REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 290 OF 2018

LANDMARK FREIGHT SERVICES LIMITED.....PETITIONER

-VERSUS-

KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

KENYA REVEUNE AUTHORITY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

MINISTRY OF TRADE.....4TH RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS..5TH RESPONDENT

RULING

1. By a Notice of Motion application dated 26th June, 2019, the 1st Respondent, Kenya Bureau of Standards, is seeking to set aside an order made by this court on 24th June, 2019 requiring Mr. Clarkson Ogembo Nyambok to appear in court in person and present a report to court. The 1st Respondent contend that this court is *functus officio* and *res judicata* as to conducting proceedings, recalling of witnesses, undertaking, indulging in and advancing a rehearing of the petition after rendering its judgment on 20th June, 2019. It is further the 1st Respondent's contention that the orders of this court to reopen this petition for further hearing on the guise of giving directions for the disposal of the sugar is without jurisdiction and is an attempt to hold a second trial.

2. The 1st Respondent also aver that the court is required to make a decision based on the evidence before it and recalling a witness after delivery of judgement will lead to a miscarriage of justice. It was further their contention that in the event that new issues are raised, the court will have to decide on these issues and parties will not have an opportunity to respond neither is it proper for the court to make a decision on new issues raised. It is therefore urged that by recalling Mr. Ogembo, this court is going against Section 146 of the Evidence Act and Article 50 of the Constitution. Counsel cited the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR** for the proposition that a judgment has the effect of terminating the jurisdiction of the court that delivered the judgment.

3. Counsel also cited the case of **Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR** for the proposition that the principle of *functus officio* prevents the re-opening of a matter before a court that rendered the final decision thereon. She further contended that in seeking to recall the witness, the court is shifting the burden of proof to the 1st Respondent. She therefore concluded that this court has no jurisdiction to exercise judicial power over its judgment of 20th June, 2019 as that will be tantamount to sitting on appeal over its own judgment and urged the court not to recall Mr. Clarkson Ogembo Nyambok. She nevertheless appreciated that the court has to issue disposal orders in respect of the seized sugar.

4. Prof. Ojienda appearing for the Petitioner, Landmark Freight Services Limited, while opposing the application submitted that the 1st Respondent's concession that the court needs to appreciate the status of the sugar is the very reason why it is necessary to recall Mr. Ogembo to testify. It was counsel's submission that the court needed a simplified version of Mr. Ogembo's report that is clear for purposes of giving disposal or final orders that gives meaning to the judgement. It was therefore his contention that the present application is misdirected since a judgment cannot be a judgement without final orders.

5. Secondly, it is the contention of the Petitioner's counsel that the 1st Respondent's application violates Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides that nothing shall limit or otherwise affect the inherent powers of this court to make such orders as may be necessary to meet the ends of justice. Counsel posits that the application seeks to abort these proceedings yet the court has to give orders as to how the sugar will be dealt with.

6. The position of counsel for the Petitioner is that this court has jurisdiction to make post-judgement orders. He cited the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** where the Supreme Court after delivering its judgment directed certain steps to be taken by the Communications Commission of Kenya. Counsel further urged that the judgment herein will not be complete without further orders from the court. In any event, he submitted, the evidence to be clarified was already adduced in court. Counsel further submitted that the **Mitu-Bell** case does not apply where final orders have not been made by a court. It was further his submission that the court has inherent powers to conclude the matter before the court and urged the court to dismiss the application.

7. In her rebuttal, counsel for the 1st Respondent submitted that their application is not seeking to abort the proceedings but is simply challenging introduction of new evidence and it is her contention that any issue that needed to be clarified ought to have been done before the judgment.

8. I have carefully considered the arguments before the court and the only issue for determination before this court is whether by making the orders of 20th June, 2019 and 24th June, 2019, this court acted without jurisdiction. This court on 20th June, 2019 rendered itself on the instant petition and made the following orders:-

> a) Clarkson Ogembo Nyambok shall provide to the court the full test results in respect of the report dated 20th November, 2018 for purposes of clarifying his evidence as to whether the Petitioner's sugar meets the set standards. The written report should be clear and unambiguous as to whether the sugar is fit or not fit for human consumption; and
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> b) The report to be shared with the Petitioner and filed in court within three (3) days from the date of this judgement in order to enable the court to issue appropriate orders in regard to the disposal of the sugar.

9. However, when parties appeared before me on 24th June, 2019 the 1st Respondent had not filed the simplified report neither was Mr. Ogembo present in court as I had directed on 20th June, 2019 so I further directed that the matter be mentioned on 27th June, 2019 for Mr. Ogembo to appear in court and present the report, prompting the instant application.

10. To fully address the issue herein I think it is prudent to reproduce paragraphs 59-67 of my judgment of 20th June, 2019 that informed the orders made thereto:-

> **"The Petitioner made an application before this court for resampling and testing of the sugar. The application was allowed. Samples taken in the presence of the Petitioner's representatives were tested and a report dated 20th November, 2018 was prepared and shared with the parties.**
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> **At the request of the Petitioner's counsel, DW1 Clarkson Ogembo Nyambok came to court and interpreted the report. The witness told the court that the two samples were tested for yeast and molds and they returned 70 and 60 CFU per 10 grams respectively against the requirement of a maximum of 50 CFU per 10 grams. According to him, the sugar did not therefore meet the Standard being EAS 749:2010.**
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> **When the witness was put under intense cross-examination by counsel for the Petitioner he stated that for one of the samples, two chemical parameters were tested. His testimony in the typed Court record is captured thus:-**
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> > **"1. Water insoluble matter which crushed with the requirement of the standard.**
> >
> > **2. Polarization the sample BS201839493 complied."**
>
> **The witness went ahead and testified that:-**
>
> > **"The second BS2011839497 – only one chemical parameter was requested – water insoluble matter – the sample complied with the EA standard."**
>
> **When the witness was questioned about the margin of errors (uncertainty of measurements) he stated that the same vary from one test method to another. He stated that he received 7 samples from Chemutai Sawe's team and he tested all of them. His conclusion was that the sugar did not meet the East African Standard which allowed a maximum of 50 CFU per 10 grams. The witness, however, contradicted himself by stating that the laboratory test method has a margin of error which can be provided upon the request of the client namely the department that carried out the sampling and submitted the same for testing.**
>
> **It is important to let Mr Nyambok speak for himself:-**
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> > **"For the first report BS201839497 the laboratory found 70 CFU per 10 grammes. For us to obtain uncertainty of measurement, the true count has between 46 CFU to 106 CFU per 10 grammes. The actual count is somewhere between 46 and 106.**
>
> **For the second BS201839493 with a counting 60 CFU – if we include the uncertainty of measures the true count would be between 39 CFU per 10 grammes and 91 CFU per 10 grammes.**

The information is given to the client for purposes of decision making and it is up to the client to make a decision. Our work is to carry out analysis but we do not influence the decision to be made."

Although the expert witness made a conclusion that the sugar did not meet the standards, the truth of the matter is that the reports he produced, and which he appeared to admit during cross-examination not to be the maker of the same, showed that there was no clarity as to whether the sugar was good or bad. He admitted that his work was to just test the sugar and pass over the report for somebody else to make a decision. The decision maker was not availed in court and the court cannot tell how the decision that the sugar was unfit for human consumption was arrived at considering the evidence of the expert witness. Ordinarily, the contradictory evidence of the expert witness should be reconciled in favour of the Petitioner and the petition allowed as prayed. However, the court is alive to the fact that the commodity the Petitioner is asking the court to release is human food.

It is also noted that the evidence of Mr Nyambok was to the effect that although the sugar had indeed met the required standards when it was imported into the country, its quality may have deteriorated by the time it was seized. He explained that because yeasts and molds are living organisms the place where the sugar is stored will determine the growth of those organisms. Unfortunately, his evidence was not useful in that the question whether the sugar was fit or was not fit for human consumption was never answered. When a public organization, like the Bureau, determines that a certain course of action has to be taken, this must be done based on irrefutable evidence. Where there is no proper evidence to support the decision, the court must step in and steady the ship. Whereas the Bureau has a duty to ensure that only food that meets the standards reach the dinner table, the duty does not include the destruction of imports based on insufficient evidence.

Curiously, there is a letter dated 2nd July, 2018 from the 4th Respondent to the Petitioner indicating that the sugar had been cleared by the Bureau and KRA. It is important to reproduce that letter. It states:-

"Mr. Samuel Mburu Kamau

Director

Landmark Freight Services

P. O. Box 8685-00200

NAIROBI

REQUEST TO LIFT SEIZURE NOTE ON 91033 BAGS OF SUGAR OF 50KG

Following the clearance by KRA and KEBS I hereby lift the seizure note on your sugar on condition that you attach the name and address of your company to the bags of sugar.

R. Gichora

For: DIRECTOR WEIGHTS AND MEASURES"

I say the letter is curious because it was written after the samples taken from the Petitioner's seized sugar were analyzed on 14th June, 2018 and a report on the tests released on 21st June, 2018. It cannot therefore be said that the 4th Respondent was not aware of the report by the Bureau. In such circumstances reliance on the report dated 21st June, 2018 as evidencing the fact that the Petitioner's sugar was bad becomes untenable. When one considers the letter of the 4th Respondent together with the contradictory testimony of the expert witness, the picture painted is that the Petitioner's sugar may not be bad after all."

11. It is evident from the above excerpt of my judgement that I could not give an appropriate relief pursuant to Article 23 (3) of the Constitution on the disposal of the sugar. The key issue in the petition was whether the sugar was fit for human consumption.

12. Counsel for the 1st Respondent relied on the cases of **Mitu-Bell** and **John Ochanda** in support of her assertion that once a judgement has been delivered, the court becomes *functus officio.* Those two cases correctly express the law as relates to the circumstances of those cases. In the circumstances of this case, I am inclined to agree with the Petitioner's submission that the above cases are distinct from the instant one. In the instant case, no decision was made by the court in its judgement as to whether the sugar was bad or good hence the need to recall the expert.

13. I was surprised that the 1st Respondent was petrified by the fact that its own witness was being recalled to produce a simplified version of a report already placed on record. In the instant case, the court was recalling the evidence of DW1 to merely clarify the status of the sugar based on the report dated 20th November, 2018 which is already before court because without it, the court could not issue disposal orders in respect of the sugar. However, in the **Mitu-Bell** and **John Ochanda** cases, the Court of Appeal held that the trial courts in those cases, by allowing parties to file affidavits and reports after judgment had been delivered, erred in law as the procedure had the potential of introducing secondary litigation and raising new issues that were not in the original pleadings before the court.

14. I also note that courts have in certain instances issued final orders after delivering judgements. For instance, in **Satrose Ayuma & 11 others v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 3 others, Nairobi HC Petition No. 65 of**

2010, Lenaola, J (as he then was) issued orders and directions, *inter alia*, that the 3rd respondent does file within 90 days of the judgment an affidavit in court detailing out existing or planned State policies and legal framework on forced evictions and demolitions in Kenya and that within 21 days of the judgment a meeting be convened by the Managing Trustee of Kenya Railways Staff Retirement Benefit Scheme together with the petitioners where a programme of eviction of the petitioners shall be designed.

15. Similarly, in **Kepha Omondi Onjuro & others v Attorney General & 5 others [2015] eKLR**, Odunga, J in his judgement ordered the respondents to file quarterly reports in court on the progress of a project until further orders of the court. He also directed that each party was at liberty to apply.

16. In **Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others Ex Parte Francis N. Kiboro & 198 Others [2015] eKLR**, Odunga, J, while appreciating that the court was unable to grant the orders in the manner sought by the petitioners held that their eviction was to be undertaken in the presence of representatives from the Kenya National Commission on Human Rights.

17. Lastly, the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** (supra) also issued proposals/directives after judgement before issuing final orders.

18. It is therefore my view and I so hold that this court acted within its jurisdiction by recalling Mr. Clarkson Ogembo Ogembo to clarify the status of the sugar. I therefore find the 1st Respondent's notice of motion dated 26th June, 2019 without merit and dismiss the same. Having established so, I now proceed to examine the evidence of Mr. Ogembo.

19. When DW1 Clarkson Ogembo Nyambok came to court on 3rd July, 2019, he produced a report dated 26th June, 2019. His testimony was not different from what he had told the court when he initially testified on 10th December, 2018. He indicated that out of the seven samples forwarded to him for testing, three did not meet the East African Standard 749:2010 for brown sugar as they had higher than recommended yeast and molds. Four of the samples passed the test as they were found to have less than 50 colony forming units (cfu) per 10 grammes of sugar.

20. The witness told the court that when measurement uncertainty was incorporated in the three failed samples, the range within which the true value lies for two samples with 70 cfu per 10 grammes was between 46 and 106 cfu. For the sample with 60 cfu per 10 grammes, the true value lies between 39 and 91 cfu per 10 grammes of sugar. The witness concluded that when one incorporates the measurement uncertainty, the lower limit of the failed samples conformed to the standard.

21. In light of the clarification by DW1 Clarkson Ogembo Nyambok, it follows that even the three samples that failed the test still complied with the standard when uncertainty of measurement is taken into account. This evidence is the same evidence the witness gave on 10th December, 2018. With that clarity it therefore goes without saying that the sugar seized by the respondents should be released to the Petitioner.

22. Even without the evidence of Mr. Ogembo, the simplified report clearly leads this court to the conclusion that the sugar is fit for human consumption. The test results for the seven samples were as follows:-

a) BS 201839491 - 70cfu/10g - Fail

b) BS201839492 - 40cfu/10g - Pass

c) BS201839493 - 60cfu/10g - Fail

d) BS201839494 - 30cfu/10g - Pass

e) BS201839496 - <10cfu/10g - Pass

f) BS201839497 - 70cfu/10g - Fail

g) BS201839498 - 10cfu/10g - Pass

The recommended cfu per 10 grammes is 50. The average cfu per 10g for the seven samples is 38.6 meaning that if the samples had been tested as a single sample the sugar as a whole would have met the standard. When the seven samples are considered in their totality they give a cfu of 38.6 per 10g of sugar which clearly meets the East African standard for brown sugar which allows a maximum of 50cfu per 10g of sugar.

23. Before I conclude I need to comment on the statement from the bar by counsel for the 1st Respondent that the sugar has already expired. This statement was neither in the pleadings or submissions of the parties prior to the delivery of the judgement and making a decision on the same amounts to reopening litigation. This will indeed breach the principles enunciated by the Court of Appeal in the **Mitu-Bell** and **John Ochanda** cases which were cited by counsel for the 1st Respondent.

24. In conclusion, I direct the respondents to forthwith lift the seizure orders on the Petitioner's sugar and release the sugar to the Petitioner for disposal of the same as it thinks fit. All the other issues were decided in the judgement of 20th June, 2019. Those are the orders of the court.

Dated, signed and delivered at Nairobi this 29th day of July, 2019.

W. Korir,

Judge of the High Court