



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 196 OF 2019

NEW ITALYCOR LIMITEDPETITIONER

VERSUS

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

BIRGEN RONO.....2ND RESPONDENT

JUDGMENT

1. In this petition, New Italcors Limited is the Petitioner. At the time of the initiation of the petition, Kenya Bureau of Standards (the Bureau) was named as the 1st Respondent and Birgen Ronoh was the 2nd Respondent. By a consent recorded by the parties on 29th May, 2019 Birgen Ronoh was removed from the proceedings as a party therefore leaving the Bureau as the sole respondent.
2. The facts forming the foundation of this petition are not in dispute. In November 2018 the Petitioner imported a consignment of Italian food products to wit tomato puree, spaghetti and macaroni from Italy. Prior to the said importation, the Petitioner was issued with a Certificate of Conformity by the Bureau's recognised and authorised agent in the country of origin, Messrs Societe Generale' de' Surveillance S.A., confirming that the food products had complied with the required standards. However, upon arrival in Kenya the consignment was rejected by the Bureau on the ground that it did not meet the standards.
3. As provided by the Standards Act, Cap. 496 (the Act), the Petitioner appealed to the Standards Tribunal (the Tribunal) vide Standards Tribunal Appeal No. 1 of 2019. In the course of the appeal an order for retesting of the product was issued by the Tribunal.
4. On 5th April, 2019 the proceedings of the Tribunal were captured as follows:-

“Coming up for mention on 5th day of April 2019.

CORAM

Muthoni Mburu Chairperson

Hillary Sigei Member

Peter Mungai Member

In Attendance

William Langat Secretary

Charles Mwangi Court Clerk

Advocates/Parties Present

Mr Mogire for the Appellant

Ms Mokeira for the respondent holding brief for Mr M'bwanga.

Miss Mokeira

The tests were conducted and the applicant has complied with the required standards. The instructions are the matter to be marked as settled. The parties to file a written consent.

Miss Mokeira

We received the reports of compliance.

Court

Parties to file a written consent on 8th day of April, 2019.

SECRETARY

THE STANDARDS TRIBUNAL”

5. There is a written consent dated 8th April, 2019 and an order by the Chairperson of the Tribunal dated 15th April, 2019 through which the appeal is marked as settled with costs to the appellant. The consignment was however not released to the Petitioner despite written demands.
6. On 3rd May, 2019 the Bureau wrote to the Petitioner indicating that following the retesting ordered by the Tribunal, the Passata Rustica (Tomato Puree) had complied with the Kenya Standard Specification for Tomato Products. The Petitioner was informed that this product could be released. The letter also indicated that the Spaghetti Ristorante and Macaroni Products had failed to comply with the Kenya Standard for Specification for Pasta Products.
7. The Petitioner was advised to reship the rejected products back to the county of origin within 30 days. The Petitioner responded by filing the instant petition dated 24th May, 2019 seeking orders as follows:-

“(a) A declaration be and is hereby issued that the Respondents decision as contained in the 2nd Respondent’s letter Ref. No. KEBS/OP/01/10/115/(22) dated 3rd May 2019 is unfair, oppressive, and unreasonable and is a violation of the Petitioner’s legitimate expectation.

(b) A declaration be and is hereby issued that the Respondent’s decision as contained [in] its letter of 3rd May, 2019 after the Petitioner had obtained a Certificate of Conformity from the 1st Respondent’s authorized agents, and after the Respondents’ confirmation before the Standards Tribunal on 5th April, 2019 that the Petitioner’s food products had complied with the required standards is *mala fide*, irrational and abuse of powers and is in violation of the Petitioner’s right to an administration action that is efficient, expeditious, reasonable and procedurally fair as guaranteed under Article 47 of the Constitution.

(c) A declaration be and is hereby issued that the 2nd respondent impugned decision of 3rd May 2019 was made arbitrarily and in contravention of Article 232(1)(a), (e) and Article 10 of the Constitution of Kenya, 2010 on the national values and principles of governance which includes good governance, integrity, transparency, adherence to the rule of law and accountability.

(d) An order of prohibition directed against the 1st and 2nd Respondent whether by themselves and/ or their servants, agents or any person acting on their instructions from interfering and/ or destroying the Petitioner’s consignment of Italian food products in container Number CAIU373449 at the Inland Container Depot in Embakasi.

(e) An order of certiorari does issue to quash and set aside the 1st Respondent’s decision contained in letter Ref. No. KEBS/OP/01/10/115(22) dated 3rd May, 2019 issued by the 2nd Respondent and addressed to the Petitioner.

(f) An order of mandamus directed to the 1st and the 2nd Respondent to immediately and unconditionally clear and/ or release the Petitioner’s consignment of Italian food products in Container Number CAIU373449 at the Inland Container Depot (ICD) in Embakasi.

(g) The accrued Demurrage charges, customs warehouse storage charges and penalties for the Petitioner’s consignment be met by the Respondents jointly and severally.

(f) Costs of pre-verification inspection, pre-verification re-sampling, KEBS penalty, KEBS tribunal appeal and KEBS re-sampling amounting to Kshs.277,543.37 be reimbursed by the Respondents to the Petitioner.

(i) That the honourable court be pleased to award the Petitioner general and exemplary damages against the 1st and 2nd respondent to be assessed by the court for violation of its rights.

(j) The Petitioner also prays for the costs of this petition and interest.

(k) Any other further relief that this honourable court may deem fit and just to grant.”

8. It is the Petitioner’s case that the Bureau violated Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015 by failure to give adequate notice and reasons for the action it took.

9. Further that the Bureau contravened Articles 10 and 232 (1) (a) and (e) of the Constitution which provides the national values and principles of governance as including good governance, integrity, transparency, adherence to the rule of law and accountability.

10. It is the Petitioner’s case that this court has jurisdiction by dint of Articles 19, 20, 21, 22, 23 and 24 of the Constitution to grant the prayers sought in the petition.

11. In opposition to both the notice of motion for conservatory orders and the petition, the Bureau filed a replying affidavit. The same was sworn on 17th June, 2019 by Birgen Ronoh, the Acting Head of the Inspection Department of the Bureau. The Bureau also filed a replying affidavit to the petition sworn on 3rd July, 2019 by Ashiemi Seruya, a Laboratory Analyst with the Bureau; a notice of dated 4th July, 2019 objecting to the production of the Petitioner’s report dated 2nd April, 2019; a replying affidavit to the petition sworn on 3rd July, 2019 by Birgen Ronoh; and a notice of Preliminary Objection dated 17th June, 2019.

12. The Preliminary Objection challenges the jurisdiction of this court and I need to address it before taking any other step. Through the said Preliminary Objection, the Bureau seeks the dismissal of the petition on the grounds that:-

“(a) The Petition herein is fatally defective, incompetent, bad in law and an abuse of this Honourable Court’s process.

(b) The 2nd Respondent is wrongly enjoined in the present Petition.

(c) There is a clear procedure for resolution of the dispute in this matter.

(d) The present suit should have been filed before the Standards Tribunal.

(e) The Petitioner has not filed any suit before the Standards Tribunal.

(f) The Honourable Court lacks jurisdiction to entertain the matter herein.

(g) The present Petition has been filed in violation of Sections 11 and 16C of the Standards Act.”

13. Urging this court to dismiss the petition for want of jurisdiction, counsel for the Bureau submitted that as per Section 11 of the Act, the Petitioner ought to have filed an appeal against its decision dated 3rd May, 2019 before the Tribunal within 14 days.

14. It is counsel’s position that this petition is an abuse of the court process. According to the Bureau, where there is a clear procedure for resolution of disputes the availed procedure should be strictly followed. Reliance was placed on the decision of the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1KLR 425** in support of the said proposition.

15. Counsel referred to the decision in the case of **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A. 84 of 2004** as cited by Odunga, J in **Gordon Sewe Okello v Jackton Nyanungo Ranguma & 4 others [2017] eKLR** in support of the principle that where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. Counsel urged that there is no special feature in the present petition that would entitle the Petitioner to opt not to file his case before the Tribunal.

16. According to counsel, the Petitioner had previously filed an appeal before the Tribunal and should go back to the Tribunal for enforcement or interpretation of the consent allegedly recorded before the Tribunal. Counsel for the Bureau cited the case of **International Centre for Policy and Conflict & 5 others v The Hon Attorney General & 4 others [2013] eKLR** for the pronouncement that courts should give an opportunity to relevant constitutional bodies or state organs to deal with disputes under the relevant parent statutes. Urging this Court to cede jurisdiction to the Tribunal, counsel relied on the above-cited case in support of the statement that where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.

17. It is the Bureau’s case therefore that this court’s jurisdiction can only be invoked where the mechanism of the Tribunal has been exhausted.

18. Still urging this court to down its tools, counsel posited that the matter is not yet ripe for the determination of this court. According to him, the Tribunal has power to determine all the issues raised by the Petitioner and grant whatever orders the Petitioner seeks.

19. Counsel for the Bureau’s final shot on this issue was reference to the case of **Kenya National Chamber of Commerce and Industry & 2 others v Kenya Bureau of Standards & another [2019] eKLR** where the matter was dismissed on the ground that it ought to have been filed before the Tribunal.

20. Responding to the issue of jurisdiction, counsel for the Petitioner submitted that this court derives its jurisdiction to entertain this petition from Articles 22(1) and 23 of the Constitution.
21. Article 22(1) is relied on for the proposition that every person, which Article 260 defines to include a company or association or body of persons, has a right to institute court proceedings claiming that a right or freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
22. Counsel cited Article 23 in support of the assertion that this court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Counsel referred to Article 20(3) of the Constitution and urged the court to adopt the interpretation or enforcement that most favours the enforcement of a right or fundamental freedom as dictated by that provision.
23. Counsel relied on the decision of the Court of Appeal in **Godfrey Ngotho Mutiso v Republic [2010] eKLR** in urging the court to apply a generous and purposive interpretation of the Constitution.
24. According to the Petitioner's counsel, this petition alleges constitutional violations that are well set out. Counsel for the Petitioner submitted that the Bureau's submission that the Petitioner should have approached the Tribunal is disingenuous for the reason that the decision of 3rd May, 2019 was made after the Bureau represented to the Tribunal on 5th April, 2019 that the Petitioner's products had been tested and found to comply with the required standards. Counsel submitted that the Bureau's letter of 3rd May, 2019 was in total disregard of its earlier representation to the Tribunal that the Petitioner's products were compliant hence the settlement of the appeal by consent.
25. According to the Petitioner, the decision of 3rd May, 2019 was made after the Bureau had represented to the Tribunal on 5th April, 2019 that the products had been tested and found to comply with the required standards. Counsel for the Petitioner submitted that the impugned decision of 3rd May, 2019 was unreasonable, unfair and made in bad faith as the same was made after the Petitioner had marked its appeal as settled following the Bureau's representation of 5th April, 2019.
26. It is the position of counsel for the Petitioner that the impugned decision of 3rd May, 2019 is what forms the substratum of the Petitioner's case and it would therefore be disingenuous for the Bureau to argue that the Petitioner should once again challenge the impugned decision before the Tribunal.
27. Counsel asserted that such recourse if allowed would inevitably make the jurisdiction of the Tribunal illusory and a mockery of justice. Further, that such a course of action would grant a licence to the Bureau to abuse its statutory powers by misleading the appellants before the Tribunal to settle appeals only for the Bureau to later renege and argue that its arbitrary decisions should yet again be challenged before the Tribunal.
28. The Petitioner urged that the Bureau must be held accountable for its administrative actions and or decisions if adherence to the rule of law and the principle of transparency and accountability enshrined under Article 10 of the Constitution is to be protected and promoted.
29. Counsel further submits that the Petitioner is not challenging the Bureau's statutory mandate under the Act but is simply challenging the unfair and unaccountable manner in which the Bureau has dealt with the Petitioner in discharge of its statutory mandate including but not limited to disregarding the certificate of conformity issued by its authorised and recognized agent in the country of origin and misleading the Petitioner and the Tribunal to mark the appeal as settled only for it to backtrack later and reject the Petitioner's goods on the same allegation of non-compliance.
30. It is the Petitioner's position that Article 47 of the Constitution guarantees it the right to administrative action that is expeditious, efficient, reasonable, lawful and procedurally fair.
31. The Petitioner accordingly asserted that as a result of the Bureau's unfair and inconsistent administrative acts and or decisions its right to fair administrative action has been violated and going back to the Tribunal would be less convenient and inappropriate.
32. Further, that the alternative remedy has been made illusory by the Bureau thus prompting the Petitioner to invoke the jurisdiction of this court. Counsel for the Petitioner urged this court to disregard the decisions cited by the Bureau's counsel stating that the Petitioner, unlike the petitioners in the cited cases, had resorted to the Tribunal in the first instance.
33. In support of the Petitioner's position, counsel relied on the decisions in the cases of **Okiya Omtatah v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR; Keroche Breweries Limited & 6 others v Attorney General & 10 others [2016] eKLR; Republic v Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008; and Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR.**
34. The Petitioner concluded its submissions on the issue of jurisdiction by reiterating that its first port of call was the Tribunal where the Bureau indicated that its products had be tested and found compliant prompting the settlement of the appeal. It is the Petitioner's position that the Bureau could not make another decision and was indeed estopped from making the decision of 3rd May, 2019 which was at variance with the information it gave the Tribunal on 5th April, 2019.
35. It is the Petitioner's parting shot that this court has jurisdiction to hear and determine this matter and the Bureau's preliminary objection is without merit and should be dismissed.
36. Jurisdiction is everything without which a court has no power to adjudicate any dispute – see **Owners of the Motor Vessel "Lillian S"**

v Caltex Oil (Kenya) Ltd [1989] KLR 1. As was stated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, a court's jurisdiction flows from either the Constitution or legislation or both. Jurisdiction, the court held, goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.

37. The Bureau's objection to the entertainment of the dispute by this court is based on the principle which states that where an alternative dispute resolution mechanism is provided by statute, the court should be hesitant to handle the dispute unless it is clearly demonstrated that the alternative mechanism is inadequate for the resolution of the matter. This principle was clearly explained by the Court of Appeal in **Republic v National Environmental Management Authority [2011] eKLR; Civil Appeal No. 84 of 2010** when it held that:-

“We agree with Mr. Ngatia that the issue raised in the Appellant's notice of motion were in the domain of public law. But we do not accept that once a matter falls within the public law domain, judicial review is the only way to litigate upon it or it must be through the judicial review process. As we pointed out earlier, Mr. Ngatia did not contend that the matter fell outside the jurisdiction of the Tribunal specifically created to deal with disputes concerning the environment. The Tribunal itself is a public body created by statute to administer the appeal process under the Act; it cannot deal with matters concerning private law for instance. The learned Judge was merely weighing the issue of whether the High Court was in a better position to deal with the matter than the Tribunal. She dealt with the speed or pace at which the Tribunal would be able to resolve the matter and compared that with the speed or pace which would be adopted by the busier courts. She dealt with the expertise available in the Tribunal as against the High Court and such like matters and having taken all those considerations into account, she concluded that the matter ought to have been dealt with by way of an appeal rather than by way of judicial review. The Judge backed up her decision with authorities such R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD [1993] 1 ALL E.R 530. HORSHAM DISTRICT COMMISSION, ex parte WENHAM [1955] 1 WLR 680; HARLEY DEVT INC V. COMMISSION OF INLAND REVENUE [1996] 1 WLR 727; R V. WANDSWORTH COUNTY COURT [2003] 1 WLR 475 and the local case of JAMES NJENGA KARUME V. CR, 192/1992.

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.”

38. The Petitioner is indeed correct that the court should take jurisdiction if it should. This proposition is backed by the words of Chief Justice Marshall of USA in **Cohens v Virginia 19 U.S. 264 (1821)**, as cited by Mativo, J in **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR**, that:-

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

39. A court of law should not abandon a party in need of a remedy to his own devices. Equally, a court of law should not engage its adjudicative powers where the Constitution or statute has clearly denied it jurisdiction. Avoidance of jurisdiction or usurpation of the same are sins that a court of justice should not commit.

40. The Bureau is indeed correct in its submission that where there is a clear procedure prescribed by the Constitution or an Act of Parliament for the redress of any particular grievance, that procedure should be strictly followed. This principle was enunciated by the Court of Appeal in the case of **Speaker of National Assembly v Njenga Karume [2008] 1KLR 425**.

41. The said principle has an exception which was stated in **Okiya Omtatah v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR** as follows:-

“We agree with the decision in Misc. Application No. 637 of 2016 – Republic v Independent Electoral and Boundaries Commission and Others ex parte Coalition for Reform and Democracy that where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved.”

42. Where the remedy available in the alternative forum is inadequate, the court must step in so as to ensure that a full and adequate remedy is availed to the aggrieved party. This statement finds support in the case of **Republic v Returning Officer of Kamukunji Constituency and the Electoral Commission of Kenya HCMCA No. 13 of 2008** where it was stated that:-

“We cannot exercise our inherent powers to oust the constitutional or clear statutory provisions. The Court of Appeal in KIPKALYA KONES V REP CA 94/03 said that issues arising from an election process can only be challenged in an election court by way of a petition pursuant to S. 44 of the constitution and S. 19 of the Cap 7. The Interested Party wants this court

to consider an issue reserved for the election court which it has no jurisdiction to deal; we would adopt the Court of Appeal holding in the case of **SPEAKER OF NATIONAL ASSEMBLY V JAMES NJENGA KARUME CA 92/1992** where the court said;

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Order LIII cannot oust clear constitutional and statutory provisions.”

The inherent powers of the court are only invoked where there is a vacuum in the law in order for the court to do justice. There is no vacuum in the law relating to Election Petitions and we hold that we have no jurisdiction to engage this court in cross examination of the 1st Respondent and inspection of Form 16 A as that duty is reserved for the Election Court.”

43. In view of the stated legal principle and the applicable exceptions I now turn to the facts of the case in order to determine whether this court has jurisdiction to determine the petition herein. I have already outlined the undisputed facts of this case.

44. The Petitioner adopts the position that the letter by the Bureau dated 3rd May, 2019 contains a different decision which is not related to the one it challenged through the appeal it filed before the Tribunal. This, I must state with great respect to the Petitioner’s counsel, is an erroneous opinion.

45. A perusal of the letter dated 3rd May, 2019 clearly shows that the results referred to in that letter were obtained after the re-sampling **“carried out following a ruling given for a case which had been filed before the Standards Tribunal as Appeal No. 1 of 2019 between New Italcop Limited versus Kenya Bureau of Standards.”** In my understanding, these are the results referred to on 5th April, 2019 when the Bureau’s counsel indicated to the Tribunal that the Petitioner’s products had met the standards. In other words, the Bureau through the letter dated 3rd May, 2019 is going against the consent it recorded before the Tribunal on 5th April, 2019. The Bureau by writing the said letter was acting in disobedience of the order of the Tribunal. There is therefore nothing constitutional about the Bureau’s action. The proper body to deal with the Petitioner’s complaint is the Tribunal.

46. Looking at Section 16C of the Act, it is clear that the Tribunal is given sufficient jurisdiction which includes the power to make **“such other order as the tribunal considers appropriate.”** It cannot therefore be said that the Tribunal is incapable of dealing with the disobedience of its orders by the Bureau. The moment the Tribunal is appropriately moved, it will be in a position to give an adequate remedy to the Petitioner who is aggrieved by the Bureau’s actions.

47. In summary therefore, I find that the Tribunal is capable of addressing the issues raised by the Petitioner through this petition. In the circumstances I find merit in the Bureau’s notice of preliminary objection dated 17th June, 2019 and uphold the same. This petition is therefore struck out for want of jurisdiction in that it violates the principle that requires alternative remedies to be exhausted before judicial review can be invoked.

48. As regards costs, I find that the parties still have some litigation to do, as such, I direct each party to meet own costs of these proceedings.

Dated, Signed and Delivered at Nairobi this 26th day of September, 2019.

W. Korir,

Judge of The High Court