



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 306 OF 2018

MASTER FREIGHTERS LIMITED.....PETITIONER

VERSUS

KENYA BUREAU OF STANDARDS1ST RESPONDENT

HON ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. Through a letter dated 28th August, 2018, one Musa Saleri writing on behalf of the 1st Respondent, Kenya Bureau of Standards' Coast Regional Manager addressed the Petitioner, Master Freighters Limited's Managing Director as follows:-

“ The Managing Director Master Freighters Limited

P. O. Box 2685 – 80100

MOMBASA.

Dear Sir,

RE: RESULTS OF ANALYSIS

Enclosed please find Laboratory Test Report No.BS201819391 for a sample of Cooking Oil which was drawn by KEBS Officer Cliff Nyangena from your consignment imported vide Entry No. 6918130 and accompanied by Diamond Mark Permit No. 945.

It was tested against EAS 74969:2012: East African Standard Specification for Fortified Edible Oils & Fats and failed to comply with the requirements of the standard in vitamin A.

In view of the above failures, you are hereby required to Reship the consignment to the Country of origin within thirty days (30). Please make sure you involve KEBS to witness the exercise.

Yours faithfully

Musa Saleri

FOR: REGIONAL MANAGER – COAST”

2. The letter triggered the petition filed on 4th September, 2018 in which the Petitioner seeks the following reliefs:-

“a) A declaration that the petitioner’s constitutional rights to equal protection and equal benefit of the law, non-discrimination, protection of right to property, fair hearing, fair administrative action and to be subjected to equal and fair hearing and consultations before implementation of the Import Standardization Mark with regard to old pre-existing stock have been violated and infringed.

b) A declaration be and is hereby issued that the actions of the Respondent of failing to process and/or release the Petitioner’s consignment of cooking oil, at the same time detaining the cooking oil that was accompanied by Certificate of

Completion (sic) and other clearance documents violated the Petitioners' constitutional rights and fundamental freedoms.

c) An order of compensation for the Petitioner to be decided by the Court be and is hereby issued for the violation of the Petitioner's constitutional rights.

d) An order in the nature of mandamus be and his hereby issued compelling the Respondent to immediately release the detained goods that have qualified for the pre-approval stages to the Petitioner and the Respondent bears all the incidental costs.

e) An order in the nature of Certiorari be and is hereby issued for purposes of quashing the decision of the 1st Respondent to disallow the Petitioner's oil that had already arrived at the Kenyan port or were already shipped prior to the impugned order.

f) Costs of this Petition be provided for."

3. At the initiation of the petition, the Petitioner had named the Attorney General as the 2nd Respondent, however, counsel for the Petitioner indicated to the court on 4th July, 2019 that the 2nd Respondent had been discharged from the petition.

4. The facts in brief disclose that the Petitioner which is a company incorporated and registered in Kenya regularly imports palm oil products from a Malaysian company. In the usual course of business, the Petitioner imported a consignment of palm oil having obtained a certificate of compliance and an affixation of a Diamond Mark of Quality from an agent of Kenya Bureau of Standards (the Bureau) from the country of origin. Upon arrival in Kenya, the consignment was subjected to tests by the Bureau and found to have failed the standards as per the letter dated 28th August, 2018 which is already reproduced in this judgment.

5. According to the Petitioner, the Bureau's decision breaches its constitutional rights in various ways. The Bureau has however raised a jurisdiction card both in the replying affidavit dated 23rd October, 2018 sworn by its Acting Head of Inspection, Ronoh Birgen and the Notice of Preliminary Objection dated 22nd October, 2018. As is the norm I must dispense with this issue first.

6. The Bureau's Notice of Preliminary Objection is couched as follows:-

"TAKE NOTICE that at the hearing of the Petition dated 04/09/2019 Counsel for the 1st Respondent will contend as a Preliminary Point of Law, to be determined *in limine*, that the Petition is misconceived, frivolous, totally devoid of merit and *mala fides* on *inter alia*, the following grounds:-

"1. THAT the Petition filed herein discloses a purely civil dispute which is disguised as a Constitutional issue contrary to clear statutory procedures laid down in the Standards Act, Cap 496 Laws of Kenya.

2. THAT in light of the provisions of Section 16A(1) of the Standards Act, Chapter 496 Laws of Kenya the Honourable Court lacks original jurisdiction to hear and determine disputes as to decisions and/or actions of the Kenya Bureau of Standards or any of its officers, such disputes being required under Section 11 of the Act to in the first instance be referred to the Standards Tribunal.

3. THAT the Petitioner has not contended that the Tribunal in exercising its jurisdiction is unable to award them any remedy should they be successful or that the remedies known in law are either inadequate or non-existent or unconstitutional.

4. THAT proceeding with the matter which is a preserve of the Standards Tribunal in first instance goes against the tenets of Article 169(2)(d) of the Constitution of Kenya 2010."

7. The same objection is highlighted in paragraph 26 of the replying affidavit when Ronoh Birgen avers:-

" THAT I am advised by the 1st Respondent's Advocates on record which advise I believe to be true that the jurisdiction of this Court to adjudicate this matter has been invoked prematurely and contrary to well laid out statutory mechanism."

8. When the matter came up for highlighting of submissions on 4th July, 2019, the advocates for the parties indicated to the court that they were relying on their written submissions.

9. Urging the court to find that it is divested of jurisdiction on the ground that the petition offends the doctrine that requires exhaustion of dispute resolution mechanisms provided by statute before one can resort to the courts, counsel for the Bureau submitted that Section 11 of the Standards Act, Cap 496 requires any person aggrieved by a decision of the Bureau or the Standards Council to appeal to the Standards Tribunal (the Tribunal) established pursuant to Section 16A of the Act within fourteen days of the notification of the decision.

10. It is the Bureau's position that only after the Tribunal has made its decision can an aggrieved party approach this court on appeal as provided by Section 16G of the Act. It is therefore submitted that the import of the said law is that the jurisdiction of the High Court is that of an appellate court and in that regard parties are not expected to approach it in the first instance when a dispute arises under the Standards Act.

11. Counsel for the Bureau did indeed appreciate this court's unlimited original and appellate jurisdiction in criminal and civil matters as well as jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. He nevertheless pointed to Article 159(2)(c) of the Constitution which requires that in exercising judicial authority, the courts and tribunals are to uphold and promote alternative forms of resolution of disputes.

12. Counsel also pointed to Article 169(1)(d) of the Constitution which provides for the establishment of subordinate courts which include any other court or local tribunal as created by an Act of Parliament. On the strength of that provision he submitted that the Constitution is alive to the fact that tribunals must be accorded powers to handle some matters arising out of the statutes that establish them.

13. It is the Bureau's submission that the Petitioner did not exhaust the statutory remedies available to it and as has been held time and again, whenever an Act of Parliament provides a mechanism for dispute resolution, the procedure has to be followed strictly and exhaustively. It is submitted that the court can only intervene when all the available remedies fail to produce a satisfactory solution.

14. In support of its submissions, the Bureau cited the decisions in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR (E.P.) 425**; **Joseph C. Kiptoo & another v Kericho Water and Sewerage Company [2016] eKLR**; and **Geoffrey Muthinja Kabiru & another v Samuel Munga Henry & 1756 others [2015] eKLR**.

15. Counsel for the Bureau urged the court to find that the facts in **Keroche Breweries Limited & 6 others v Attorney General & 10 others [2016] eKLR** in which Odunga, J warned against splitting of litigation, are different from the facts in this case in that in the **Keroche case** resorting to the tribunal would not have provided an efficacious and satisfactory answer to the grievances of the petitioner in that case.

16. The Bureau's parting shot on the issue of jurisdiction is that this court should shy away from encouraging parties from rushing to court instead of approaching tribunals, more so when those tribunals are possessed with powers to provide adequate remedies. Further, that the court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as constitutional petitions. The court is therefore urged to dismiss the petition.

17. In opposition to the Bureau's challenge to the court's jurisdiction, the Petitioner started by urging the court to find that the preliminary objection does not meet the legal threshold set down in **Mukisa Biscuits Co. Ltd. v West End Distributors Ltd [1969] EA 696**. Counsel submitted that the Bureau's notice of preliminary objection is so widely and loosely couched that it transcends the concept of preliminary objection as recognised in judicial practice,

18. Reference was made to the decision of D.O. Ohungu, J in **Muhu Holdings Limited v James Muhu Kangari [2017] eKLR** as highlighting the ingredients of a proper preliminary objection. In that case, the learned Judge held that:-

“For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

19. Counsel for the Petitioner proceeded to submit that the stated tests are informed by the realisation that a preliminary objection should not be taken lightly since it invokes the jurisdiction of the court to determine a case *in limine* and in a summary manner. Counsel submitted that F. Gikonyo, J appreciated this fact in **Litein Tea Factory Company Limited & another v Davis Kiplangat Mutai & 5 others [2015] eKLR** when he held that:-

“Invariably, the effect of a successful preliminary objection is that the parties' rights in the suit are determined completely. And, therefore, because of the said importance of a preliminary objection in adjudication of cases, courts of law have emphasized on clarity of thought and conciseness of expression in formulating a preliminary objection before any objection could qualify as a preliminary objection in the sense of the law.”

20. Accordingly, counsel for the Petitioner submitted that the jurisdiction to summarily dismiss a petition or suit must be exercised in the clearest of cases which satisfy all the tests.

21. Turning to its arguments as to why the preliminary objection should not succeed, counsel submitted that the Bureau purports to misclassify the issues raised in the petition as a mere civil dispute disguised as a constitutional issue. According to the Petitioner, the misconception is what the Bureau uses as a springboard to impeach the court's jurisdiction by misapplying the provisions of the Standards Act.

22. Counsel for the Petitioner asserted that the nature of the dispute herein raises weighty issues of violation of constitutional rights and this court's jurisdiction under Articles 23, 47 and 165 cannot be dislodged through the Bureau's legal and factual presuppositions. Reliance is placed on the decisions in **Beekey Supplies Limited & another v Attorney General & another [2017] eKLR** and **Isaac Ngugi v Nairobi Hospital & another, Petition No. 461 of 2012** in support of the proposition that where constitutional issues are raised, this court has a duty to hear and determine the petition.

23. Counsel for the Petitioner also submitted that even if this court finds that there are issues that could perhaps fall within the jurisdiction of the Tribunal, proper administration of justice frowns against litigating in instalments.

24. Accordingly, counsel submitted that this court is the forum with jurisdiction to deal with all the issues wholesomely without deferring some issues and this tie well with the spirit of efficient and expedient administration of justice. The decisions in **Beekey Supplies Limited (supra)** and **Gibb Africa Limited v Kenya Revenue Authority [2017] eKLR** are cited in support of the position that issues should not be split between two tribunals with jurisdiction but matters should be filed before the tribunal with the jurisdiction to hear and determine all

questions in controversy and grant all the reliefs sought.

25. Still contesting the validity of the Bureau's preliminary objection, counsel for the Petitioner submitted that the Bureau's assertion that the petition herein is misconceived, frivolous, devoid of merit and totally *mala fides* can only be established by production of evidence hence the test that **"all the facts pleaded by the other side are correct"** has not been satisfied. Reliance is placed on the decision of D. O. Ohungo, J in **Muhu Holdings Limited (supra)** in support of the submission.

26. It is the Petitioner's case that even if the Bureau's preliminary objection is indeed a preliminary objection in the legal sense, the Standards Act does not in any way deprive this court of the jurisdiction to hear and determine the matter. In support of this argument, the Petitioner submitted that it primarily challenges the constitutionality and/or legality of the application of KS EA S 759:2012 (Fortified Edible Oils and Fats – Specification) standard both in substance and the manner of application and not merely the decision of the Bureau to inspect and detain its goods.

27. According to the Petitioner, the said standard was not only applied retrospectively and discriminatively but also in clear breach of the Petitioner's legitimate expectation. The Petitioner's position is that the jurisdiction granted to the Tribunal by Section 16(A) of the Standards Act is limited to determining issues relating to compliance with the relevant law and does not extend to issues that seek to challenge the law or the basis of its application.

28. Still stressing that this court has jurisdiction to deal with the matter, the Petitioner submitted that it has invoked this court's jurisdiction under Articles 22, 23, 47 and 165(3) of the Constitution since its rights to protection from discrimination, fair administrative action and property have been violated by the Bureau. The Petitioner posited that this court has the monopoly of original jurisdiction in constitutional application and interpretation.

29. The Petitioner finally submitted that this court has variously held that in exercising its jurisdiction under Articles 22 and 23 of the Constitution, the existence of an alternative dispute resolution mechanism does not take away the jurisdiction of the court to deal with the issues in its original jurisdiction. The Petitioner asserted that once constitutional issues are raised, the matter falls into the jurisdiction of this court and not the Tribunal. The court was therefore urged to dismiss the preliminary objection.

30. In regard to the pleadings and submissions made in respect of the issue of jurisdiction, the question that arises is whether there is a proper preliminary objection before the court and if so whether the same should be allowed.

31. The law on what a preliminary objection should contain was laid down in the case **Mukisa Biscuit Manufacturing Co. Ltd (supra)** as follows:-

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

32. It was also stated in the same case that:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

33. A perusal of the Bureau's preliminary objection shows that the same raises a pure point of law namely whether this court has jurisdiction to hear and determine the petition. It is also noted that this is an issue that can be determined on the pleadings filed by the parties and does not require evidence to be adduced by any of the parties. Further, by determining the issue of jurisdiction, the matter can be finalised without the need to determine the petition. In the circumstances I find the Bureau's notice of preliminary objection to be proper.

34. The next question is whether this court has jurisdiction to hear and determine the matter. I did not hear any of the parties say that this court does not possess the jurisdiction to hear and determine the Petitioner's grievances. What the Bureau is saying is that the petition should be dismissed for the reason that the Petitioner failed to exhaust the dispute resolution mechanism provided by the Standards Act. The Petitioner's answer to this submission is that its case falls into the exceptions applicable to the rule.

35. The case that is often cited as stating the rule that requires exhaustion of statutory dispute mechanisms before the court can be resorted to is the decision of the Court of Appeal in the **Karume case**. In that case the Court stated that:-

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

36. In the **Geoffrey Muthinja Kabiru case**, the court of appeal again stressed the importance of exhausting alternative remedies by stating that:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring

that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed.”

37. Like every other doctrine, the exhaustion doctrine has exemptions. In **Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** this Court (J. Ngugi, G. V. Odunga and J. M. Mativo, JJ) highlighted the exemptions as follows:-

“What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case (supra)*, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.

In our view, to bar a person from carrying out his constitutional obligation and mandate of upholding and defending the Constitution would amount to abdication by this Court of one of its core mandate under Article 165(2)(d) of the Constitution.....

The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit.”

38. Where a party fails to demonstrate that any of the exceptions is available in respect of their case, the court is allowed to deny such a party a remedy for failure to exhaust the alternative process. This was stated by the Court of Appeal in **Republic v National Environmental Management Authority [2011] eKLR** when it held that:-

“We agree with Mr. Ngatia that the issues 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.”

39. The question therefore is whether the Petitioner has given satisfactory reasons why it bypassed the Tribunal and came directly to this court. The Petitioner claims that its petition raises constitutional issues and the Tribunal has no capacity and authority to address the issues. A perusal of the Petitioner’s pleadings reveals otherwise. What the Petitioner simply seeks through this petition is to challenge the detention, inspection and testing of its goods and the decision by the Bureau directing it to re-ship the goods back to the port of origin. This is a matter that squarely falls within the jurisdiction of the Tribunal. Any constitutional issues that may arise are peripheral in nature. Such issues normally arise in almost all litigations and the tribunal hearing the matter is expected to address them. The dominant issue which I have identified falls within the jurisdiction of the Tribunal and that is the body the Petitioner should have first approached.

40. It is not disputed that the Petitioner is indeed aggrieved by the actions of the Bureau. That however should not be a good reason for it to flout the well-known exhaustion of alternative remedies doctrine. This court cannot fail to implement this doctrine since such failure will result in two categories of litigants: those required to first approach the Tribunal and those who can avoid the Tribunal.

41. In the circumstances of this case I agree with G. V. Odunga, J in **Beekey Supplies Limited & another v Attorney General & another [2017] eKLR** when he states that:-

“33. This court must respect the law and restrict its jurisdiction to its supervisory powers over tribunals under Article 165. The court must not encourage parties to ignore the Tribunal and rush to court where the Tribunal is possessed of the powers to give a remedy. This court has the duty to promote other methods of dispute resolution provided for by Acts of Parliament....

40. The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.”

42. This court must be at the forefront in ensuring that parties comply with the laws of the land. One such law requires that any person aggrieved by the decision of the Standards Council or the Bureau should appeal to the Tribunal. From there, this court can be engaged in its appellate jurisdiction.

43. In the circumstances of this case, I find the Bureau’s preliminary objection merited and find that the Petitioner engaged the jurisdiction of this court prematurely. I therefore dismiss the Petitioner’s petition *in limine* and award costs to the Bureau.

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

W. Korir,

Judge of the High Court