REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 8 OF 2018

IN THE MATTER OF: AN APPLICATION BY ROYAL GROUP INDUSTRIES KENYA

LIMITED FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONACT

AND

IN THE MATTER OF THE STANDARDS ACT

BETWEEN

ROYAL GROUP INDUSTRIES KENYA LIMITED.....APPLICANT

VERSUS

THE KENYA BUREAU OF STANDARDS.....RESPONDENT

JUDGMENT

1. The Applicant is a Limited Liability Company licenced by the relevant licencing authorities to manufacture and distribute pipes in Kenya.

2. The Respondent is a statutory body established under the Standards Act, Chapter 496 of the Laws of Kenya. Its functions include the promotion of the standardization in industry and commerce.

3. Section 14 of the Standards Act is entitled “Powers of Inspectors”. The Inspectors in question are those appointed under section 13 of that Act. Section 14(1) of the Act provides as follows.

> *An inspector may for the purposes of this Act, at all reasonable times—*
>
> *(a) enter upon any premises at which there is, or is suspected to be a commodity in relation to which any standard specification or standardization mark exists;*
>
> *(b) inspect and take samples of any commodity or any material or substance used, or likely to be, or capable of being used in the manufacture, production, processing or treatment thereof, and cause any container within which there is or is suspected to be any quantity of any such commodity, material or substance, to be opened;*
>
> *(c) inspect any process or other operation which is or appears likely to be carried out in those premises in connexion with the manufacture, production, processing or treatment of any commodity in relation to which a standard specification or a standardization mark exists;*
>
> *(d) require from any person the production of any book, notice, record, list or other document which is in the possession or custody or under the control of that person or of any other person on his behalf;*
>
> *(e) examine and copy any or any part of such book, notice, record, list or other document which appears to him to have relevance to his inspection or inquiry, and require any person to give an explanation of any entry therein, and take possession of any such book, notice, record, list or other document as he believes may afford evidence of an offence under this Act;*

(f) require information relevant to his inquiry from any person whom he has reasonable grounds to believe is or has been employed at any such premises or to have in his possession or custody or under his control any article referred to in this subsection;

(g) (g) seize and detain, for the purpose of testing, any goods in respect of which he has reasonable cause to believe that an offence has been committed;

(h) (h) seize and detain any goods or documents which he has reasonable cause to believe may be required as evidence in any proceedings for any offence under this Act.

4. Utilizing the powers donated to them under this section, Inspectors of the Respondent apparently raided the premises belonging to Mache Hardware on 19/03/2018 and, after inspection, impounded plastic piping products belonging to the *Ex Parte* Applicant. Mache Hardware is one of the *Ex Parte* Applicant's dealers.

5. The Respondent insists that the inspection revealed non-compliance to the set standards set by the Respondent, specifically in relation to marking and labelling and wall thickness requirements.

6. The *Ex Parte* Applicant is persuaded that the raid, impoundment and seizure of pipes manufactured by it is "whimsical, oppressive, vexatious and a nullity in law." Consequently, the *Ex Parte* Applicant approached this Court under Certificate of Urgency the following day, 20/03/2018. The Chamber Summons it filed principally asked for leave to file a substantive Judicial Review Application against the Respondent and certain interlocutory reliefs.

7. The matter came up before the Learned Honourable R. Korir who certified the matter urgent and granted the leave to file substantive Judicial Review Application. She directed the *Ex Parte* Applicant to file the substantive Judicial Review Application within twenty-one days. Meanwhile, the Learned Judge directed that the prayer for interlocutory relief be heard *inter partes* at a later date though she gave interim relief until the planned *inter partes* hearing of that prayer.

8. When the *Ex Parte* Applicant served the Respondent with the Suit Papers for purposes of the Intended *inter partes* hearing, the Respondent responded by filing a Notice of Preliminary Objection. The essence of the Preliminary Objection was that the Court did not have the jurisdiction to determine this matter since, the Respondent argued, the proper forum should be the Standards Tribunal established under section 16A(1) of the Standards Act.

9. In a ruling dated 24/05/2018, I dismissed the Preliminary Objection and ruled that the Court had jurisdiction to hear the suit. Subsequently, with the concurrence of the parties, I directed them to subject the impounded pipes for re-testing with both parties present and for a report to be filed in Court. Pursuant to this order, the parties went for re-testing on 18/06/2018. While the two parties agreed on the parameters of what was to be tested namely the markings; dimension test; impact test; longitudinal/heat reversion test and pressure test, the two parties diametrically differed on the outcome of the tests done. Indeed, according to the Report dated 24/06/2018 filed in Court by the Respondent, the Applicant's team walked away through the tests. Their contention was that the machines used for testing did not meet the standards required. The Applicant subsequently filed its own Report dated 16/07/2018 confirming its misgivings about the re-test undertaken. I will return to this shortly.

10. This is a Judicial Review matter. The substantive prayers sought are three:

a. That an order of prohibition do issue, prohibiting the Respondent from entering into the Applicant's premises, searching, impounding and/or seizing pipes and/or other products manufactured, supplied and/or distributed by the *Ex Parte* Applicant.

b. That an order of prohibition do issue, prohibiting the Respondent from entering into the premises of the *Ex Parte* Applicant's dealers, suppliers, distributors and/or agent and searching, impounding and/or seizing pipes and/or products manufactured, supplied and/or distributed by the *Ex Parte* Applicant.

c. That an order of mandamus do issue compelling the Respondent to return the *Ex Parte* Applicant's pipes impounded from its distributor's Mache Hardware and/or any other distributor, dealer, supplier and/or agent of the *Ex Parte* Applicant.

11. As I understand it, the *Ex Parte* Applicant is of the view that the Respondent acted illegally and in a manner inviting the exercise of Judicial Review of this Court for two reasons. First, the *Ex Parte* Applicant argues that the raid of Mache Hardware on 19/03/2018 was "whimsical, oppressive, vexatious and a nullity in law." It argues that while section 14 of the Standards Act gives the Respondents' inspectors certain powers, at section 14(1)(g) and (h) only permits them to seize and detain any goods only on one of two situations:

a. Either the inspector in question has "reasonable cause to believe that an offence has been committed"; or

b. The inspector has "reasonable cause to believe that [the goods or documents] may be required as evidence in any proceedings for any offence" under the Standards Act.

12. The *Ex Parte* Applicant argues that the Respondent's inspectors acted illegally because they entered the premises of Mache Hardware seeking to be allowed to collect samples of products for testing for compliance against relevant Kenya Standards specifications. Yet, the *Ex Parte* Applicant argues that this was only a pre-text because the Respondent claimed later that "samples could not be retrieved due to interference from Royal Group Industries (court order.)" The basic point, as I understand it is that the *Ex Parte* Applicant is of the opinion that the Respondent did not have any reasonable cause to seize and detain the goods.

13. The *Ex Parte* Applicant relied on relied on ***Kenya Bureau of Standards v Powerex Lubricants Limited [2018] eKLR***, a Court of Appeal

decision involving the Respondent where the Court addressed section 14 of the Standards Act expressed itself thus:

The inspectors cannot just descend on the premises and cart away products without any tangible reason, or without disclosing any and seek to hide behind section 14 of the Standards Act. They must act without malice, caprice, unreasonableness and within four corners of the law…the reasonable belief must therefore be founded in the law. It denotes good faith, rationality and cannot be based on mere pretence or surmise…..…In our view, without indicating the basis of the belief that an offence has been committed, and why that belief existed, there is no 'reason' that could be attributed to that action. In our view no basis was laid to support the belief let alone showing that it was 'reasonable'. A decision that was going to paralyze the Respondent's operations ought to have been explained to the Respondents.

14. The *Ex Parte* Applicant thinks that the decision to seize and detain the goods was illegal for a second reason: that the Respondent's Officer in charge of surveillance, a Mr. Raymond Michuki, had a conflict of interest because he is a director of Modplast Kenya Ltd which also manufactures products similar to those manufactured by the Applicant and is therefore a competitor to the Applicant. The *Ex Parte* Applicant is persuaded that this conflict of interest is the true driver of the actions of the Respondent and that the actions are an attempt to use public office and authority to eliminate competition and take over the Applicant's market share or space.

15. Third, the *Ex Parte* Applicant argues that it is licenced by all relevant authorities and it has been forwarding samples of its products to the Respondent for testing and further that "having a permit is an indication that its products are of high quality and the same are safe for consumption by the general public." As I understand it, the argument here is that since the *Ex Parte* Applicant has the relevant licences, they provide prima facie evidence of the quality and standards of the goods it manufactures.

16. Fourth, the *Ex Parte* Applicant argues the decision by the Respondent was illegal for yet another reason: that knowing the decision was going to paralyze the *Ex Parte* Applicant's operations, the Respondent was duty bound to explain to the *Ex Parte* Applicant the reasons for its actions which, the *Ex Parte* Applicant insists, it never did. The *Ex Parte* Applicant believes that this offended Article 47 of the Constitution.

17. The *Ex Parte* Applicant relies on the decision in ***Republic v Kenya Bureau of Standards Ex Parte Powerex Lubricants Limited [2018] eKLR***. There, the High Court (Korir J.) stated:

The Applicant was entitled to know why a seizure and detention order whose effect was to close its business had been issued. That is not to say that the Respondent's inspectors should not have taken samples. They were allowed to do so by law but the drastic step of seizing and detaining all the goods in the factory amounted to withdrawing the licences without informing the Applicant of the accusations against it and without giving it an opportunity to respond to the allegations.

18. In the first place, at a general level, the Respondent resisted the Application for the reasons that it feels that the *Ex Parte* Applicant is "in effect seeking to suspend the powers and mandate of the Respondent as against itself (the *Ex Parte* Applicant)". The Respondent faults the *Ex Parte* Applicant for seeking overly blanket prohibitory orders against the Respondent from entering its premises to search, impound and seize products manufactured, supplied or distributed by it or from doing the same regarding the premises of the dealers, suppliers or distributors of the *Ex Parte* Applicant's goods.

19. The Respondent argues that granting such orders would virtually paralyze the Respondent's statutory powers vis-à-vis the *Ex Parte* Applicant. What is more, the Respondent argues, the practical effect of the orders wold be to undermine the citizens' fundamental consumer rights as guaranteed under Article 46 of the Constitution and the Consumer Protection Act. Hence, the Respondent argues that the Application misapprehends the scope of Judicial Review.

20. In the second place, the Respondent argues that the seizure and detention of the goods on 19/03/2018 was legal and procedural. It argues that under section 14 of the Standards Act, the Respondent's inspectors can knock at the premises at any time for inspection on compliance with the law. If during such exercise it comes to their attention that there has been non-compliance with the standard specifications, that, alone, constitutes "reasonable cause" to act. In this case, the Respondent argues that the Respondents' inspectors carried out the test in the presence of the shop manager and the result of the test showed non-compliance. The inspectors supplied a copy of the Seizure Notification Form as well as Market Surveillance Report Form to the *Ex Parte* Applicant.

21. The Respondent insists that what happened on 19/03/2018 was a well-structured process and was not whimsical at all. It also argues that it gave reasons from seizing and detaining the pipes in the Seizure Notification Form in the following words: "*The products do not meet the marking and dimensional requirements of their respective Kenya Standards*." The Respondent argues that a more detailed written explanation would have been unrealistic because the market survey was neither in respect of the *Ex Parte* Applicant's products only nor conducted in its premises. The Respondent points out that many other manufacturers' pipes were seized during the exercise for non-conformity.

22. Further, the Respondent argues that the fact that a manufacturer sends samples to the Respondent does not exempt the manufacturer from regular market surveillance as permitted by the Standards Act. Neither does holding a permit or a licence constitute such an exemption.

23. Both parties are correct on the nature of Judicial Review. The holding in ***North Wales Police v Evans [1982] 1 WLR*** is famous for stating the correct standard of review and deference poise of the Court in Judicial Review Applications. The Court held that:

> *The Court will not, however, on Judicial Review application act as a Court of Appeal from the body concerned, now will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by law, the Court would under the guise of preventing abuse of power be guilty itself of usurping power.*

24. The holding in that case is the main theme in the treatise, ***The Supreme Court Practice, 1997 Vol. 53/1-14/6*** which is in the following words:

> *The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question*.

25. I think this is a good place to begin an analysis of the present case. The Court of Appeal put it quite felicitously in ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd***:-

Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters… The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

26. Hence, as our Courts have said before, "*where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations:- (i) where there is an abuse of discretion; (ii) where the decision-maker exercises discretion for an improper purpose; (iii) where the decision-maker is in breach of the duty to act fairly; (iv) where the decision-maker has failed to exercise statutory discretion reasonably; (v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (vi) where the decision-maker fetters the discretion given; (vii) where the decision-maker fails to exercise discretion; (viii) where the decision-maker is irrational and unreasonable*." See ***Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze.***

27. So, was the seizure and detention of goods belonging to the *Ex Parte* Applicant by the Respondent on 19/03/2018 "whimsical, oppressive, vexatious and a nullity in law"? I have come to the considered conclusion that the actions of the Respondent was not unlawful, unfair or oppressive so as to attract the far-going reliefs sought by the *Ex Parte* Applicant. I have come to this conclusion for the following four reasons:

a. First, on the facts of the case, it is not possible to say that the Respondent's inspectors had no reasonable cause to believe that an offence had been committed. The inspectors carried out a market survey and tested the goods which they subsequently found to be non-conforming. While I agree with the *Ex Parte* Applicant that the procedural scheme anticipated in the Standards Act when a market survey is the basis for "reasonable cause" is that the inspectors take samples of products for testing only returning to seize and detain the goods once armed with the results of the test done, it would appear that, here, there was a basis for suspicion based on previous interactions and market surveys including communication between the Respondent and the *Ex Parte* Applicant. This is substantiated in the Complaints Report by the Respondent dated 27/09/2017; the Market Surveillance Report dated 10/09/2017; a letter dated 10/08/2016 by the Regional Manager, South Rift Region; as well as Seizure Notifications dated 21/08/2017; 13/09/2017; 02/10/2017 and 19/12/2017. All these available documents tended to show that the *Ex Parte* Applicant was manufacturing sub-standard pipes and laid a proper basis for the actions taken on 19/03/2018

What is more is the fact that while this Court insists on scrupulous adherence to the law and procedures, the truth of the matter is that the Respondent carried out its testing of the products seized and formed the conclusion that they were sub-standard. If the duly mandated technical agency has formed that opinion and there is no basis for its substantive review for either irrationality or Wednesbury unreasonableness, it would seem to me to be inimical to public interest to order the return of the products to the market due to the Respondent's failure to follow proper procedure. I will return to the "substantive review" shortly.

b. The orders sought are, also, not warranted by the alleged conflict of interest by Mr. Raymond Michuki for three reasons. First, as an evidential matter, the conflict of interest was not sufficiently established beyond allegations that Mr. Michuki is a director of ModPlast Limited. There was a need to provide proof of such directorship or association with the company and not the mere say-so of the *Ex Parte* Applicant. Second, it is noted that on 19/03/2018, the Respondent's inspectors seized and detained piping products of other manufacturers and not just the *Ex Parte* Applicant. Third, if the serious allegations are actually true, the remedy would not be to immunize the *Ex Parte* Applicants from enforcement proceedings where its goods are sub-standard; the remedy would be to pursue the said Raymond Michuki using the correct legal avenues including an appropriate complaint to the Ethics and Anti-Corruption Commission (EACC).

c. As the Respondent correctly points out, the fact that a manufacturer periodically sends samples of its products to the Respondent for testing does not exempt the manufacturer from market surveillance under section 14 of the Standards Act and neither does it establish any kind of presumption that its products meet the standards specifications. It is, therefore, not evidence of bad faith or ulterior motive to be subjected to a market surveillance even after submitting samples for testing.

d. I found the argument that no reasons were given for the action taken by the Respondent on 19/03/2018 to be unavailing. The *Ex Parte* Applicant does not deny that the Manager of Mache Hardware was given a copy of Seizure Notification Form which clearly stated that the goods taken away were non-confirming. That manager was present during the testing. Thereafter, a detailed report was prepared showing the results of the tests done. To demand for a "formal" written explanation beyond this would, in my opinion turn the functional requirement for justification for administrative decisions to a fetish.

28. What, then, should we make of the rival reports by the two parties respecting the seized goods? As described above, in a bid to resolve this matter during its pendency before me, I directed the Respondent to re-test the goods seized in the presence of representatives of the *Ex Parte* Applicant. The Respondent filed a Report dated 24/06/2019. According to the Report of the re-test, the goods were tested for the following parameters: marking; dimension test; longitudinal/heat reversion test; impact test; and pressure test. The Report contains details of the tests done under each parameter; the standards used; the source of the standard; and the results reached. According to the report, the

products seized failed under all parameters except the Marking Test. The Report, therefore, concludes that the seized pipes were non-conforming with the requirements of the applicable KS ISO 1452-2:2009.

29. The *Ex Parte* Applicant hotly contests the Report. They raised three substantive complaints. First, it argues that the goods seized were mishandled because they were "strewn all over the yard" and, therefore, exposed to the elements. Second, the *Ex Parte* Applicant insisted that the instruments used by the Respondent were not the most accurate as per the ISO Certification standards. Third, the *Ex Parte* Applicant protested that the persons involved in the testing were not "engineers" registered with the relevant body in Kenya.

30. I have considered these complaints lobbed at the Re-test Report by the Respondent. I have considered the complaints in light of two important but related issues. First, as aforesaid, the nature of this suit is Judicial Review not an appeal from the decision of the Respondent as the technical agency with the statutory mandate to carry out the duty of enforcing standards. Second, while on the outer limits the Court is permitted to carry out a substantive review of the decisions of the Respondent and other technical agencies, it does so only utilizing the standards of irrationality and *Wednesbury* unreasonableness – not merit review. Differently put, the Court must defer to the finding of the technical agency (in this case, the Respondent) unless it is clearly irrational or meets the threshold of Wednesbury unreasonableness. Using this standard of review, the *Ex Parte* Applicant's complaints do not meet the threshold. There is simply no forbidding evidence of irrationality or unreasonableness to warrant a review of the substantive merit-based decision of the statutorily mandated technical agency in the area.

31. The upshot is that the Application dated 09/04/2018 is without merit. It is hereby dismissed in its entirety with costs.

32. Orders accordingly.

Dated and delivered at Nakuru this 19th day of December, 2019.

.....

JOEL NGUGI

JUDGE