



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW NO. 2 OF 2018

**IN THE MATTER OF AN APPLICATION BY NJERU INDUSTRIES LTD TO APPLY FOR ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS**

-AND-

IN THE MATTER OF THE CROPS ACT, No. 16 OF 2013

-AND-

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT 2015

-AND-

IN THE MATTER OF THE AGRICULTURE AND FOOD AUTHORITY ACT No. 13 OF 2013

-AND-

IN THE MATTER OF THE COMPETITION ACT No. 12 OF 2010

-AND-

**IN THE MATTER OF ALLEGED VIOLATION OF CONSTITUTIONAL RIGHTS, PROTECTION AND GUARANTEES
UNDER ARTICLE 10(2), ARTICLE 19, 20, 21, 22, 23, 24, 27, 31, 36, 47, 48, 50 AND 73 OF THE CONSTITUTION OF KENYA**

-AND-

IN THE MATTER OF REQUEST FOR UPGRADING OF TEA PROCESSING CAPACITY OF NJERU INDUSTRIES LTD

-AND-

IN THE MATTER OF TEA REGULATIONS OF 2008

-BETWEEN-

REPUBLIC.....APPLICANT

NJERU INDUSTRIES LTD.....EXPARTE APPLICANT

-VERSUS-

AGRICULTURE AND FOOD AUTHORITY

TEA DIRECTORATE.....RESPONDENT

JUDGMENT

Introduction:

1. **Njeru Industries Ltd**, the Exparte Applicant herein, was on 04/04/2018 granted leave to apply for orders of Certiorari, Prohibition and Mandamus which leave was to operate as a stay to the implementation of a decision of **Agriculture and Food Authority - Tea Directorate**, the Respondent herein, which is the tea sector regulator, contained in a letter dated 19/03/2018 which required the Exparte Applicant to *inter alia* 'disable the Black CTC line until the factory justifies the source of additional green leaf to warrant for Black tea manufacture within **fourteen days (14) days** from the date of this letter.'

2. The Exparte Applicant which is a privately owned and licensed tea manufacturer thereafter filed the substantive Notice of Motion dated 18/04/2018 on the very date. On 11/06/2018 the Respondent filed a Notice of Motion dated 08/06/2018 seeking to set aside the leave granted aforesaid and to discharge the order for stay. I will henceforth refer to the substantive Notice of Motion dated 18/04/2018 as '**the Motion**' and the Notice of Motion dated 08/06/2018 as '**the Discharge Motion**'.

3. Upon concurrence of Counsels and the approval of this Court the motion and the discharge motion were ordered to be heard together and the Discharge Motion was deemed as the response to the Motion. Parties filed written submissions and highlighted on them.

The Exparte Applicant's case:

4. The Exparte Applicant's case is contained in the Exparte Chamber Summons dated 29/03/2018, the Affidavit Verifying the Facts sworn by **Henry Paul Njeru** (who is one of Exparte Applicant's directors) on 29/03/2018, the Statements of Facts and Reliefs, the Replying Affidavit sworn by **Henry Paul Njeru** on 12/06/2018, a Further Supporting Affidavit sworn by Henry Paul Njeru on 30/05/2018 and the Motion.

5. The Exparte Applicant is a limited liability company duly incorporated in Kenya. It began its dealings in the tea business way back in the 1970's as a registered tea grower affiliated to the **Kenya Tea Development Agency** (hereinafter referred to as '**KTDA**'). With passage of time amid making losses from several challenges including rejection of its green tea leaf and delayed payments, the Exparte Applicant opted to start a privately-owned tea processing factory and sometimes in 2012 or thereabout applied for a manufacture license to the then industry regulator, the **Tea Board of Kenya** (hereinafter referred to as '**Board**').

6. The Board considered the Exparte Applicant's application for a manufacture license and invited objections, if any, from the then industry players. Several objections were made more so by the neighboring factories affiliated to KTDA. Resulting from a protracted process, the Exparte Applicant lodged a complaint with the **Competition Authority of Kenya** (hereinafter referred to as '**the Authority**') in October 2012 against the factories which were opposed to the Exparte Applicant's approval of the manufacture license. The complaint was duly heard by the Authority.

7. By a letter dated 16/07/2013 the Authority advised the Board to issue the Exparte Applicant with the manufacturing license to spur competition and growth in the sector as envisaged in the Kenya Vision 2030. On 03/02/2014 the Board issued two Tea Manufacturing Licenses hereinafter referred to as '**the Licenses**') to the Exparte Applicant subject to the conditions therein including renewal. Both licenses were valid from 01/01/2014 to 31/12/2014 and permitted the Exparte Applicant to manufacture **CTC Orthodox, Purple and Oolong teas**. The difference in the two licenses was the approved manufacturing capacity. In one of the licenses (**No. TBK 0802440** being part of annexure '**HPN2**' in the Exparte Applicant's **Verifying Affidavit** sworn by Henry Paul Njeru on 29/03/2018) the maximum capacity was 2,000,000 kilograms of green tea leaf per year. The other license was **No. TBK 0802431** which was also annexed by Henry Paul Njeru as annexure '**HPN4**' in a **Replying Affidavit** he swore on 12/06/2018 which had the maximum capacity of 5,000,000 kilograms of green tea leaf per year.

8. At the time of the renewal of the licenses in 2015 the Respondent herein, which had taken over the regulatory functions from the Board on the enactment of the **Crops Act No. 16 of 2013** issued one **Renewal License No. TBK 0900143** for the period 01/01/2015 to 30/06/2015 with a manufacturing capacity of 2,000,000 kilograms of green tea leaf per year. It was dated 17/03/2015. A subsequent renewal was vide **Renewal License No. TD/0907421** dated 29/08/2016 for the period 01/07/2016 to 30/06/2017. This renewal license did not indicate any manufacturing capacity. On 26/09/2017 the Respondent issued a License for the period 01/07/2017 to 30/06/2018 for a manufacturing capacity of 20,000,000 kilograms of green tea leaf per year.

9. The Exparte Applicant contended that upon issuance of the licenses it installed machinery for purposes of producing the Orthodox Teas (Black and Green), Purple and Oolong High Value Teas. That, with a view to improve the quality of its product the Exparte Applicant installed a CTC Line for purposes of manufacturing and processing of the Purple CTC Teas and Orthodox Teas which the Exparte Applicant had long been licensed to manufacture and which are Special High Value Teas in the Kenyan market.

10. The Exparte Applicant stated that in order to spur growth and innovation in the tea sector the Respondent vide its circular dated 20/09/2017 informed factories which intended to upgrade its leaf processing capacity to apply to the Respondent for the requisite changes justifying its source of additional leaf to warrant the application for variation. In response to the circular the Exparte Applicant applied for the variation of its license vide its letter dated 15/11/2017 and proposed processing a further product known as the Black CTC Tea further to its other products. For clarity, the Exparte Applicant contended that the CTC Line it installed is currently used for processing the other special high value teas including the Black CTC Orthodox Tea (which it was duly licensed to process) and which product is different from the Black CTC Tea for which the Exparte Applicant is intending to process once its application to the Respondent is successful.

11. However, the Exparte Applicant decried the way the Respondent has since handled its said application which ought to have been determined within 90 days from when it was lodged in November 2017. To the Exparte Applicant, it has sufficiently complied with all the requirements and reports have been generated by the Respondent's Committees in its favour, but the Respondent is unfairly delaying the determination of the application in a manner to restrict the Exparte Applicant from engaging in competitive business with the factories allied to KTDA thereby aiding the creation of an unlawful dominant undertaking by KTDA which conduct remain contrary to the advisory opinion by the Authority and the law. The Exparte Applicant further wonders why the Respondent has licensed other factories allied to KTDA which indeed did not even meet most of the conditions unlike the Exparte Applicant.

12. It is the Exparte Applicant's position that the Respondent and its predecessors have continuously imposed very stringent and restrictive

conditions on its license and business in general including unilaterally varying the conditions of its license thereby forcing the Exparte Applicant to operate within an uncertain and hostile environment unlike the other factories which are allied to KTDA. With such a background and the currency of these proceedings the Exparte Applicant is highly apprehensive that its application for variation of the license as well as its application for renewal of the license dated 23/03/2018 may not be fairly dealt with by the Respondent.

13. The Exparte Applicant further contended that it secured credit facilities from financial institutions to boost its business and with the uncertainty created by the Respondent it is highly likely to default on satisfying the facilities a situation which dangerously exposes it to a possible recall of the facilities and a forfeiture of its securities. It is on those basis that the Exparte Applicant prays for the following orders: -

‘1. THAT the Honourable Court be pleased to grant the applicant for orders of certiorari, Mandamus and probation to remove into this Court and quash the decision of the respondents against the exparte applicant as contemplated in their letter dated 19th March 2018 to disable the black CTC line within 14 days and or other decision emanating therefrom, by the Tea Directorate to close the exparte applicants Tea processing factory.

2. THAT the Honourable Court be pleased to grant the applicant for orders of mandamus to compel the respondents to issue them with a variation by the manufacturing license as per the exparte applicant’s application to the Respondent dated 23rd March 2018 as they have sufficiently met the requirements as per the Tea Regulations of 2008.

3. THAT the Honourable Court be pleased to grant the applicant for order of prohibition against the respondent, their agents, proxies, representatives or any other persons claiming through them from s shutting down the exparte applicants factory either entirely or the CTC line, barring them from selling tea products at the East African Tea Traders Association, independent tea buyers, tea brokers, tea exporters, tea packers and international tea buyers, harassing, intimidating, arresting, seizing, detaining applicants personnel and motor vehicles, conducting operations on the applicants motor vehicles and tea picking stations, or in any other way interfering with tea operations of the exparte applicants, their servants, agents, drivers, clerks, supervisors and farm hands or any other representatives.

4. THAT the costs be provided for.

The Respondent’s case:

14. The Respondent is strenuously opposed to the prayers sought by the Exparte Applicant. The Respondent filed the Discharge Motion which was supported by the affidavit of **Antony Muriithi**, its Interim Head Director, sworn on 08/06/2018. It contended that its legal mandate includes regulation, control, cultivation of tea, registration of tea growers and managements of agents, licensing of manufacturers, factories, regulation of and control of the method of manufacture and that it has all along dealt with all the players in the tea sector fairly and in accordance to the law.

15. The Respondent took the position that since the Exparte Applicant was issued with the license it has been in breach of its terms and conditions. That, in particular the Exparte Applicant changed its factory location without the approval of the Respondent, that it has been involved in leaf poaching and that the Respondent was forced to appear before the Murang’a County Assembly to respond to such complaints and that the Respondent unilaterally installed an additional line to manufacture Black CTC Tea without its authorization and application.

16. The Respondent averred that it has all along acted in compliance with the **Constitution, the Crops Act, the Fair Administrative Action Act, 2015** and has observed the rules of natural justice in its fair administrative procedures as captured in its letter dated 18/03/2018. That, its administrative action was *inter alia* lawful, reasonable and procedurally fair. That, the Exparte Applicant failed to demonstrate when it applied for leave, a *prima-facie* case, on reasonable grounds for believing a failure of public duty on the part of the Respondent and as such the Exparte Applicant is abusing due Court process. That, the Exparte Applicant remains guilty of material non-disclosure in omitting to state its various breaches of its license conditions prior to application after the fact which casts doubts as to its *bona fides*. The Respondent further contended that grant of the leave which operates as a stay offends public policy and tends to reward law breakers like the Exparte Applicant.

The Parties Submissions:

17. The Exparte Applicant after going through the parties’ respective cases dealt with the discretionary nature of the judicial review reliefs as espoused in the **Halsbury’s Laws of England**, 4th Edition Vol 1(1) para 12 page 270, the decision’s in **Kenya National Examinations Council vs. Republic exparte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996, Republic vs. Cabinet Secretary for Ministry of Interior & Co-ordination of National Government & 2 Others exparte Patricia Olga Howson, Republic vs. Judicial Commission of Inquiry into The Golden Affair, Hon. Mr. Justice of Appeal Bosire and Another exparte Honourable Prof. Saitoti (2007) 2 EA 392; (2006) 2 KLR 400 and Kinyanjui vs. Kinyanjui (1995-98) 1 EA 146.**

18. The Exparte Applicant submitted against the allegations that it was in breach of the license conditions. It demonstrated that it had adequate green leaf supply even from its own farms, denied that it installed an additional CTC Line for processing the Black CTC Tea and submitted that it disclosed all material information necessary to the matter before Court and buttressed that argument with the decision in **Republic vs. President & 7 Others exparte Wilfrida Itolondo & 4 Others (2014) eKLR.** The Exparte Applicant further denied the allegation of tea poaching.

19. The Exparte Applicant submitted that the tendency of the Respondent varying the license conditions unilaterally and without due process was highly alarming. It was further submitted that since the Respondent has all along been varying the manufacturing capacities at will, the Exparte Applicant was apprehensive of such a trend which remain a sure proof that the actions of the Respondent ought to be checked for abuse of power, biasness, unfair administrative action and procedural impropriety.

20. It was also submitted that the Exparte Applicant has a legitimate expectation that the application for variation of the license shall be dealt with and determined in a manner prescribed by law. The Exparte Applicant is however perturbed by the Respondent's conduct of not determining its said application within the law given that a determination must be made within 90 days of the application pursuant to **Regulations 9 and 10 of the Tea (Licensing, Registration & Trade) Regulations, 2008** and the Respondent has blatantly refused to oblige. Instead, the Respondent has applied double standards in its snail-speed dealing with the application and has openly favored the factories allied to KTDA. That, the Respondent has instead, and contrary to law, aided in the creation of a dominant undertaking. The Exparte Applicant submitted that the result of the foregone is that the Respondent is in breach of **Article 47 of the Constitution** among other laws of the land and that the Exparte Applicant is entitled to a remedy in law. On the uncertainty created by the Respondent the Exparte Applicant in submitting that the *status quo* cannot be legally allowed to prevail as such cited the decision in **Republic vs. Cabinet Secretary for Ministry of Interior & Co-ordination of National Government & 2 others exparte Patricia Olga Howson** (supra) and on the aspect of legitimate expectation the decision of **Akaba Investments Limited vs. Kenya Revenue Authority (2007) eKLR** was cited.

21. The Exparte Applicant in its closing submissions urged this Court to find that the Motion is merited and that the Respondent is guilty of unfair administrative action, have been procedurally unfair, that the decision to close the CTC Line was made with ulterior motives and in bad faith and that it has been biased against the Exparte Applicant.

22. The Respondent submitted that the Motion is not merited at all. That the Respondent satisfied all the elements of procedural fairness in the administrative law context and that it strictly complied with **Article 47 of the Constitution** and **Sections 1, 3(g) of the Fair Administrative Act, 2015** where the Respondent informed the Exparte Applicant of the specific violations the Exparte Applicant had committed under the **Crops Act**. That, the Respondent has since adhered to the procedure on licensing provided for in **Sections 18 to 25** inclusive of the **Crops Act** and that it has even visited the Exparte Applicant's factory a result of which the Exparte Applicant was advised to discontinue its Black CTC Line and not the Purple CTC Line which it has a license. The Respondent contended that it has never discriminated against the Exparte Applicant or at all given that there is no evidence that it has since treated any other applications differently. The Respondent urged this Court to be persuaded by the decision in **Alnasir Papat vs. Capital Markets Authority (2016) eKLR**.

23. The Respondent strongly submitted that the Court's jurisdiction of Judicial Review was only limited to the three tests of legality, rationality and procedurally propriety to the decision under review otherwise a Court may easily find itself doing that which is for the public body to undertake, a temptation which a Judge must resist. The Respondent further urged this Court to find that where personal interests and public interest are involved it is not in public interest for a Court to sanction a situation that may dent or diminish investor confidence in the Capital Markets. The case of **Vania Investments Pool vs. Capital Markets Authority (2014) eKLR** was referred to.

24. Lastly, the Respondent urged this Court to strike out the contents of paragraph 4 of the Affidavit sworn on 30/05/2018 as the paragraph contains information that cannot be verified and do not originate from the Respondent contrary to **Article 31 of the Constitution**. The decision in **Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others (2017) eKLR** was referred to in support thereof.

Analysis & Determinations:

25. I have certainly perused and understood the contents of the Motion, the Discharge Motion, the parties' submissions and the decisions referred thereto. It is therefore for this Court to determine which of the prayers sought in the Motion or the Discharge Motion ought to issue, but first the province of Judicial Review.

26. Judicial review has over time been a subject of litigation and the Court of Appeal in the case of **Municipal Council of Mombasa –vs- Republic & Umoja Construction Ltd** in **Civil Appeal No 185 Of 2001** stated its parameters as follows: -

“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 makers 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 decisions.” (emphasis added).

27. The above position was restated in the case of **Republic –vs- Kenya Revenue Authority exparte Yaya Towera Ltd (2008) eKLR** with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision-making process itself.

28. **The Halsbury's Laws of England 4th Edition Vol. (1)(1) at paragraph 60** gives a caution that it must always be remembered that in every case the purpose of Judicial Review is to ensure that an individual is given a fair treatment by the authority in which he has been subjected to and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

29. Be that as it may, the grounds on which the Court exercises its judicial review jurisdiction have also been a subject of consideration by Courts. In the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300**, the Court citing with approval the cases of **Council of Civil Unions vs Minister for the Civil Service (1985) AC 2** and **An application by Bukoba Gymkhana Club (1963) EA 478** held as follows: -

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or

contrary to the provisions of a law or its principles are instances of illegality. It is, for example , illegality, where a Chief Administrator Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the power to do so are vested by law in the District Service Commission....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision is usually in defiance of logic and acceptable moral standards..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural favour towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.” (emphasis added).

30. This Court is alive to the truism that the grounds upon which it exercises its judicial review jurisdiction are incapable of exhaustive listing due to the developing jurisprudence and as so stated by the Court of Appeal in the case of **David Mugo -vs- The Republic , Civil Appeal No. 265 of 1997(unreported)** that as long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue to extend so as to meet the changing conditions and demands affecting administrative decisions.

31. The above analysis is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) (2005) & EA 43** where the development of judicial review was equated to the Biblical mustard seed which a man took and sow in his field and despite being the smaller of all seeds, it grew to become the bigger shrub of all and became a tree so that the birds of the air came and sheltered in its branches.

32. Judicial review therefore stems from the doctrine of *ultra-vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality or impropriety of procedure (the three “I’s”) and has become the most powerful enforcement of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It is said that the grounds of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoglu vs Stephenson** in the last century.

33. The above position was also captured by **Nyamu, J** (as he then was) in **Republic vs Commissioner of Lands exparte Lake Flowers Limited Nairobi HC Misc Application No. 1235 of 1998** (unreported) when he held as follows: -

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..... The High Court has the same power as the High Court in England upto 1977 and much more because it has the exceptional heritage of another constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.. The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectation... Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigid chained to the past defined situations of standing and look at the nature of the matter before them..... Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

34. I believe I have said enough on the jurisdiction of this Court on judicial review. It is hence on the foregone that further discussions shall follow. I will now begin with a consideration as to whether the contents of the Respondent’s letter dated 19/03/2018 (hereinafter referred to as **‘the letter’**) ought to be impugned.

35. The genesis of the letter is by now well settled. The letter was issued by the Respondent at a time when the Exparte Applicant was awaiting the determination of its application to vary its license. The letter raised issues which required the Exparte Applicant to respond to. There were four issues of concern being that the Exparte Applicant had installed a Black CTC Line for the manufacture of Black CTC Tea without the requisite approval by the Respondent, that the Exparte Applicant had not provided proof of having adequate source of green leaf to support the application, that the Exparte Applicant was guilty of sourcing green leaf from other counties and from farmers who are not registered to deliver green leaf to the Exparte Applicant’s factory and that the Exparte Applicant had initiated sale of Black CTC teas at Mombasa Auction irregularly since it had not been cleared by the Respondent to participate in the auction.

36. The letter then went on to demand as follows:

‘From the above, you are therefore, required to respond to the above and disable the Black CTC line until the factory justifies the source of additional green leaf to warrantee (sic) for Black tea manufacture within fourteen days (14) days from the date of this letter.

In case the response is not received as aforesaid, AFA-TD will be at liberty to take action against you in accordance with the Tea Regulations.’

37. The letter therefore requested for the Exparte Applicant’s response to the four issues raised which would aid the Respondent in its determination of the application for variation. The letter was hence issued during the process towards the final decision on the application for variation of the license. It is on that footing that the Respondent’s Counsel submitted that the Motion ought to fail since the Respondent had not made a final decision capable of challenge. On the other hand, Counsel for the Exparte Applicant contended that despite the pendency of the final decision on its application for variation of its license the Respondent’s directive that the Exparte Applicant disables the CTC Line

was a decision capable of legal challenge.

38. The Respondent is a public body and a creation of the law. Under **Article 2(1)** of the **Constitution** the Respondent is bound by the **Constitution** and must exercise any authority bestowed upon it only in accordance with the **Constitution (Article 2(2))** and the law. In its discharge of public duty, the Respondent must always remain alive to *inter alia* the calling under **Article 10** of the **Constitution** on the national values and principles of governance.

39. **Article 47** of the **Constitution** provides one of the checks and balances on how public bodies discharge their duties. It provides for a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. A legislation was to be enacted by Parliament under **Article 47(3)** to give effect to the right to administrative actions. That gave way to the enactment of the **Fair Administrative Act, 2015** (hereinafter referred to as '**the Act**'). **Section 4** of the **Act** reiterates the right in **Article 47** of the **Constitution**. The **Act** defines an '**administrative action**' under **Section 2** thereof to include: -

“i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals: or

ii) any act, omission or decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates;”

40. In the context of this matter, I wish to appreciate the importance of fair administrative action and to associate myself with **Majanja, J.** when he expressed himself in **Moses Kiarie Kuria & 4 Others v. Attorney General & 3 others (2014) eKLR** thus:

‘The Constitutional guarantee of the right to fair administrative action is aimed at instilling discipline to administrative action so that the values and principles of the Constitution are infused in matters of public administration.’

41. But did the directive by the Respondent to disable the Black CTC Line amount to an administrative action? **Section 2(ii)** of the **Act** defines an administrative action to include any act, omission or decision. A '*decision*' is defined under the **Act** to mean '*any administrative or quasi-judicial decision made, purposed to be made, or required to be made, as the case may be.*' The **Free Legal Dictionary** defines a '*decision*' as follows: -

‘A conclusion reached after an evaluation of facts and law/

As a generic term, ‘decision’ refers to both administrative and judicial determinations. It includes final judgments, rulings, and interlocutory or provisional orders made by a court pending the outcome of the case...’

42. Afortiori, a decision can be final or interlocutory. In this case the directive by the Respondent to the Exparte Applicant to disable the Black CTC Line was an interlocutory decision pending the final decision on the application to vary the license. With respect to the submission by the Counsel for the Respondent, this Court finds and holds that the interlocutory decision in this matter amounted to an administrative action hence amenable to the **Constitution** and the **Act**. That being the case **Section 4(3), (4), (5) and (6)** of the **Act** came into play. For ease of reference I will reproduce the said provisions hereunder: -

“4. (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrative shall give the person affected by the decisions-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable; or

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to –

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

43. In this case the Respondent had raised the issue of the Black CTC Line as one of the issues which the Exparte Applicant was called upon to respond to within 14 days of the letter. That being the case and even before receipt of the response, the Respondent in the very letter directed the Exparte Applicant to disable the CTC line. In all aspects, the decision-making process did not pass both the constitutional and statutory tests. The Respondent was in clear violation of the procedure and the law. The Respondent was to first receive the response from the Exparte Applicant and then consider it and come up with a decision as to whether the explanation was holding. The Respondent would then decide on whether the Exparte Applicant ought to disable the line. The Respondent therefore condemned the Exparte Applicant without according it an opportunity to be heard. That was in contravention of **Articles 47 and 50(1)** of the **Constitution** as well as **Section 4** of the **Act**. That decision cannot hence stand in law.

44. The Exparte Applicant also sought for a mandamus to compel the Respondent to issue a variation of the manufacturing license per the Exparte Applicant's application dated 23/03/2018 having met all the requirements. I must state that whenever a Court is dealing with a scenario where a public body is accused of not undertaking its functions and duties as required in law, the Court must remain alive that it must not transcend into the arena of usurping the powers and jurisdiction of that public body and end up doing what the law clearly mandates the public body to do.

45. A like scenario was considered by the Court of Appeal at Kisumu in **Civil Appeal Nos. 89 and 90 of 2011 West Kenya Sugar Company Limited vs. Kenya Sugar Board & Butali Sugar Mills Limited (2014) eKLR** where the High Court at Kisumu had issued a mandamus directing the then Kenya Sugar Board to issue a manufacturing license to Butali Sugar Mills Limited on being satisfied that Butali Sugar Mills Limited had met all the requisite requirements for issuance of a manufacturing license but the Kenya Sugar Board, then the regulator in the sugar sector, was unreasonably not discharging its duty. The Court of Appeal in allowing an appeal by West Kenya Sugar Company Limited against the order of the High Court held that the High Court did not have the jurisdiction to order the Kenya Sugar Board to issue a manufacturing license. Instead, the Court of Appeal directed the Kenya Sugar Board to expeditiously hear and determine the application by Butali Sugar Mills Limited for the manufacturing license in accordance to law and with notice to all necessary parties including West Kenya Sugar Company Limited. This Court therefore has no jurisdiction to compel the Respondent to issue the variation license as sought.

46. On whether a prohibition ought to issue against the Respondent, this Court takes the position that such a relief would readily issue but limited to the matters, including all such incidental and consequential, raised by the Respondent in the letter pending the final determination of the Exparte Applicant's variation application. For avoidance of doubt, the contemplated acts include those on the CTC Line, the adequacy of the green leaf, sourcing of green leaf from Murang'a, Kirinyaga and Nyeri Counties and trading at the Mombasa Auction.

Conclusion:

47. From the foregone analysis, it behooves this Court to find and hold, which I hereby do, that the Motion is partly merited whereas the Discharge Motion is wholly for rejection. Consequently, the following final orders do hereby issue: -

(a) A *Certiorari* be and is hereby issued and the decision by the Respondent directing the Exparte Applicant to disable its CTC line until the factory justifies the source of additional green leaf to warrant for Black tea manufacture within fourteen days (14) days from the date of the letter is hereby removed to this Court and is hereby quashed.

(b) A Prohibition be and is hereby issued prohibiting the Respondent whether by itself, their agents, proxies, representatives or any other persons claiming through them from shutting down the Exparte Applicant's factory on account of the CTC Tea line or by removing and/or in any way interfering with the CTC Tea line, barring the Exparte Applicant from selling tea products at the East African Tea Traders Association to independent tea buyers, tea brokers, tea exporters, tea packers and international tea buyers, from harassing, intimidating, arresting, seizing, detaining the Exparte Applicant's personnel and motor vehicles or in any other way interfering with the operations of the Exparte Applicant, their servants, agents, drivers, clerks, supervisors and farm hands or any other representatives pending the determination of the Exparte Applicant's application for variation of its license.

(c) The Respondent is hereby ordered to expeditiously hear and determine the Exparte Applicant's application for variation of its license and in accordance with the law.

(d) Costs shall be borne by the Respondent.

Those are the orders of this Court.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at MERU this 30th day of July, 2018.

S. M. GIKONYO

JUDGE