



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

CONSTITUTIONAL REFERENCE NO. 08 OF 2016.

THE KENYA NATIONAL CHAMBER OF

COMMERCE AND INDURSTRY.....1ST PETITIONER

VISHAL NAVINCHANDRA.....2ND PETITIONER

HIRANI VALJI.....3RD PETITIONER

Vs

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The petitioners herein filed Constitutional Petition dated 8th April 2016 seeking that

- a) An order of declaration do issue to the effect the petitioners rights under Articles 27, 31 and 40 had been infringed by the 1st Respondent;
- b) An order of certiorari quashing the actions by the 1st Respondent hither by itself, or any government agency acting at its behest from harassing, searching, confiscating, holding, carting away and destroying the petitioners wares/goods/property in Meru County;
- c) An order of permanent injunction restraining the 1st Respondent either by itself or any government agency acting at its behest from harassing, confiscating, holding, carting away and destroying the petitioners wares/goods/property in Meru County;
- d) An order of prohibition prohibiting the 1st Respondent from searching, confiscating, holding, carting away and destroying the petitioner wares/goods/property in Meru County;
- e) Any other orders that the court may deem just and equitable in the circumstances;
- f) A declaration to the effect that it is the manufactures and/or who are solely liable to the manufacture, sale and/or distribution of goods that do not conform with the required standards;

g) The Petitioners also sought for orders of costs of the petition.

Accompanying the petition was an application vide Notice of Motion dated 8th April 2016 seeking temporary order of injunction and an order of prohibition restraining and/or prohibiting the 1st Respondent from whatsoever harassing, interfering, searching, holding, carting away or destroying the property/wares/goods of any member of the petitioner in Meru County pending the hearing and determination of the petition. It was sought in application that the County Commandant of police be served with the orders for purposes of enforcement and that costs of the application be in the cause.

The application was supported by the grounds on the face of application and affidavits of Gabriel Muingi the Finance Director of the 1st petitioner as well as the affidavit of Vishal Navichandra a business man in Meru Town and Member of Kenya National Chamber of Commerce and Industry Meru County.

When application under Certificate of urgency was placed before my senior brother **Hon Justice Gikonyo** he ordered thus:-

Application dated 8th April 2016 is certified urgent and it shall be heard on 18th April 2016. Meanwhile any inspections by 1st Respondent should be done in an orderly manner and in accordance with the Standards Act. It should be free of harassment and intimidation. Similarly, all goods subject of inspection and notification herein shall be stated in a full and accurate inventory which shall be filed in court by 18.4.2016. What I will temporarily stop is the intended destruction of the goods in question. Also those which have not been carted away but the petitioners will also not interfere with them until otherwise ordered. It is so ordered”

When Respondents were served with the petition and the order made on 11th April 2016 and the application Ms Janet Kungu Principal Litigation Counsel for the Hon. Attorney General filed Grounds of Opposition dated 15th April 2016 saying that the Hon Attorney General was wrongly sued as the 1st Respondent is a body corporate capable of suing and being sued and therefore the Attorney General has no role in the affairs of the 1st Respondent.

She urged that suit against 2nd Respondent be dismissed.

The 1st Respondents on the other hand through Ms Goretta Nyariki filed Notice of preliminary objection challenging the jurisdiction of this court in adjudicating the dispute herein as S.16 A(1) of the Standards Act Cap 486 Laws of Kenya gives jurisdiction to the Standards Tribunal to hear and determine disputes as to decisions and/or actions of KEBS or any of its officers as provided for in Section 11 of the Act;

Disputes as to decisions to seize and detain goods as provided for in Section 14A(4) of the Act;

The power to confirm, set aside or vary the decision or act in question and the Standards Tribunal may make such other order as it considers appropriate including an order with respect to the payment of costs as provided for in Section 16 C of the Standards Act; On any matter involving a point of law or of unusual importance or complexity as provided for in section 16 D of the Act.

1. Reference is made to Act 45 of African Charter on Human and Peoples Rights of 1979 which it is averred can only be interpreted by the Commission on Human and Peoples Rights;
2. It was also a point of objection that the supporting affidavit sworn by Gabriel Muingi was commissioned by a firm of advocates rather than commissioner of oaths contrary to Section 4 of Cap 15 Laws of Kenya;
3. It was also claimed that application dated 8th April 2016 didn't been the mandatory notice as provided by order 51 Rule 13(2) of the Civil procedure Rules 2010.

4. Further it was raised as a P.O. that the 3rd petitioner had not sworn an affidavit to support the application on his own behalf contrary to order 51 Rule 4 CPR (2010);

5. That there is no reference in the face of the application to the affidavit of Gabriel Muingi as per order 51 Rule 4 of CPR (2010) and finally that the application and petition are an abuse of the court process, vexatious and frivolous as it refers to constituency and ward boundaries and general elections at paragraph 22 and 29 of the petition and Articles 88,174,175,176 and 177 as well as 188, 190 and 248 which are irrelevant in the circumstances;

Further to the other ground of objection is that the petitioners and/or the firm of Advocates have not complied with current practice Directions as to physically address, email address and Telephone contacts; the reference has been made to Article 1(I) and 4(b) of the constitution which are non-existent.

The preliminary objection was argued by way of written submissions filed by counsels for petitioners and 1st Respondent.

This court has carefully considered the preliminary objections raised and responses by the counsels in their written submissions as well Case Law relied upon and the main issue is whether the preliminary objections meets the tests as spelt out by Law JA by court of Appeal of Eastern Africa in the celebrated authority of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A 696 at pg 700** thus

“A preliminary objections consists of a point of law which has been pleaded or which arises by clear implications and which if argued as preliminary objections may dispose of the suita preliminary objection raises pure points of law which is argued on assumptions that all facts placed by the other side are correct and cannot be raised if any fact has to be ascertained on what is the exercise of judicial discretions.

The Standards Tribunal is established pursuant to article 169(1) (d) of the constitution of Kenya 2010 and Legal Notice No. 7 of 2004 which introduced sections 10 to 16 D and its focus is to dispense justice through a fair and open manner and expeditiously without recourse to undue procedural technicalities and without reference. The functions of the Tribunal are spelt out among which is to hear appeals from any person aggrieved by the decision of the Kenya Bureau of Standards or the National Standards Council. The Standards Act-Cap 496 of the Laws of Kenya provides at Section 16 G that a party to proceedings before the Tribunal may appeal the decision of the Tribunal to the High Court.

The import of these provisions is that the Jurisdiction of the High Court under the Standards Act is that of an appellate court and in that regard parties are not expected to approach it directly in the first instance where a dispute arises under the Standards Act. The parties herein ought to have appealed against the decisions of Kenya Bureau of Standards 14 days from dates of seizure Notifications dated 4th ad 5th April 2016 respectively.

The jurisdiction of the High Court of Kenya is provided for under Article 165(3) subject to clause 5. It has wide/unlimited original and appellate jurisdiction in criminal and civil matters as well as jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened among other jurisdictions. In the same breath the constitution under Article 159 (2) (c) provides that in exercising judicial authority, the courts and tribunals shall be guided, uphold and promote among others the principles of alternative forms of dispute resolutions including reconciliation mediation, arbitration and traditional dispute resolutions mechanisms.

Further Article 169(1) (d) provides for subordinate courts which include any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2).

When petitioners approached the court seeking for enforcement of their rights under the constitution Hon

Justice Gikonyo didn't stop the Kenya Bureau of Standards from inspections of the 2nd and 3rd Respondents business premises but said the same should be done with decorum in an orderly manner and in accordance with the Standards Acts free from harassment and intimidation he stopped intended destruction of the goods that had been confiscated and future carting away. However, petitioners were ordered to ensure that any goods that were not carted away were not interfered with. The reason for the order made by Justice Gikonyo is that an Act of parliament was solely enacted to promote the standardization of the specification of commodities and to provide the Standardization of Commodities and Codes of practise.

The seizure by Kenya Bureau of Standards from Karaniya Enterprises Ltd on 6th April 2016 and from Shreeji Meru Ltd Hardware on 5th April 2016 was for reason the seized goods didn't meet the relevant standards. The petitioners say the seizures were contrary to Articles 40, 31, 47 and 50 of the constitution.

Articles 40(3) (b) (II) of the Constitution provides that the state shall not deprive a person of property of any description or of any interest in, or right over property of any description unless the deprivation is of a public purpose or a public interest and is carried out in accordance with the constitutions and any Act of Parliament that allows any person who has an interest in, or right over, that property a right to a court of law.

The Standards Act is an Act of Parliament that establishes the KEBS and provides for its functions which include assisting the Government or any local authority or other public body or any other person in the preparation and framing of any specification or codes of practise.

Kenya Bureau of Standards under Section 4(I)(i) provides for testing at the request of the minister, and on behalf of the government of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this petition or any other law dealing with standards of quality or description.

They protect the general public from buying sub-standard goods most of which are sold at the cost of genuine goods. In that regard the 1st petitioner should endeavour on behalf of its embers and for the good of the wider public to ensure that goods, exposed for sale in its jurisdiction by its members are goods that meet specification under the Standards Act. The petitioners don't seem to say that the goods that were seized were of good quality and met the standards required by the KEBs.

Their contention is that the manufacturers are the ones to be faulted for the substandard goods seized from their stores. But that is one of the issues that the Standard Tribunal should be able to deal with including ordering that the offending manufacturers compensate for loss of the seized sub-standard goods. As much as the petitioners have rights to protection of their properties the public and consumers of the goods that are suspected to be substandard also have rights to be protected against unscrupulous traders and that is the work of the KEBS.

Turning back to case law it has been held time and again that if an Act of parliament provides for mechanism for dispute resolution it has to be followed strictly and exhaustively. This was the holding of **Lady Justice Mumbi Ngugi** in **Joseph C, Kiptoo and Another vs Kericho Waters and Sewerage Company Ltd [2016] eKLR**

This is not because the Tribunal has jurisdiction under Article 165(2)(b) but as analysed above the remedies that the petitioners seek are taken care of in the Act and it is also in the interest of upholding and promoting provisions of Article 159(2)(c) of the constitution which will otherwise be rendered futile if the High Court has to accept all kinds of litigation. Different Tribunals established under different Acts of Parliament deal with specific issues in specific fields and therefore guarantee easy expeditious cheap and fair access to justice unlike the High Court which is clogged with all sorts of matters. The recognition of Tribunals and other quasi judicial bodies in dispute resolution was acknowledged by Odunga J in Misc. Civil Application No. 2 and 11 of 2013 as well as Mwera J (as he then was) in Saf Marine container N.V of Antwerp vs KPA –Mombasa H.C.C. No. 263 of 2010 and Majanja Jier Dickson Munkuelukeine vs Attorney General and 4 others – Nairobi High Court Petition No. 390 of 2012.

I have considered the petitioner authorities and concur with them on definition of preliminary objections.

Nairobi High Court Petition No. 295 of 2015 was a consolidation of 6 petitions and Judicial Review matters where petitioners were either manufacturers, distributors or retailers of various alcoholic drinks in various parts of the Republic of Kenya and the petitioners filed reference citing violations of Articles 27(1), 29(c), 31 (a) 40,47,48 and 50 of the constitution of Kenya 2010. I do find that the circumstances in the authority were much more grievous as it appears that goods seized had even been destroyed or alleged to have been destroyed; premises for the petitioners locked and sealed and therefore no more business could proceed and there was even a prayer for compensation for material loss and damage. The President of the Republic of Kenya had given blanket direction for destruction of illicit liquor and the manner same was conducted was akin to wanton destruction and there were therefore multiple questions of violations that were to be addressed by the High Court.

The president was alleged to have issued an even Executive order Ultra vires Article 135 of the constitution.

The petitioners in the cited authority claimed their licences had been suspended which is not the case herein.

In that authority the petitioners acknowledged that under the standards Act KEBS had a statutory duty to conduct regular checks and tests to ensure compliance with the standards of being fit for human consumption and other criteria and technical specifications. I dare to say that is what the 1st Respondent herein did. The 2 authorities are therefore distinguishable. The judge in the authority rightly say in his determination that it is clear that the appellate route is only applicable where what is being challenged is the decision of the Bureau or the council, but in the said authority the petitioners grievances are not restricted to the actions of the Bureau or the Council. The petitioners challenge the decisions of the Cabinet Secretary and the President as well. For that reason the mandate of the Standards Tribunal was inadequate. In any case it is the action of the Bureau that is being complained of by basically 2 traders and Section 11 of the Standards Act provides for the remedy to the dispute. That remedy has not been exhausted by the petitioners and therefore they cannot be given an audience in the High Court. As much as the heading of the matter herein is clothed as a constitutional reference this court finds that relief under articles of the constitution referred to should not have been sought as there is a parallel remedy in the Standards Act. That was the decision in **Damian Belfonte vs The Attorney General of Trinidad and Tobago C. A. 84 of 2004** which was cited with approval in the authority relied upon by the petitioners herein.

The reason the judge allowed the consolidated matters to proceed before the high court was:-

“In my view it would not be fair, convenient or conducive to the proper administration of justice to require a petitioner to split its case into two or more causes and file them before different tribunals when the matter can be dealt with by one Tribunal. In my view the petitioner in such circumstances ought to commence the case before the Tribunal with the Jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought. That Tribunal in the circumstances of these petitions is the High Court”.

The High court in these petitions confined/limited itself to very specific constitutional issues that did not touch on the mandate of the Kenya Bureau of Standards on the Standards Tribunal. To that extent that authority is not relevant to petitioners cause.

For the reason that this court finds that the cause has been brought to wrong forum when the instant court has only appellate jurisdiction as far as The Standards Act is concerned, it can do no more than to relinquish itself from the matter because Jurisdiction is everything and without it the court has no power to make one more step. This was the holding of **Nyarangi J in The Owners of Motor Vessel “Lillians” vs Caltex Oil Kenya Ltd [1989] KLR (Emphasis Mine)**. Issue of Jurisdiction is fundamental and has to be resolved at the preliminary stages of a suit to avoid litigants being subjected to hardship in terms of costs and time when it turns out the court didn't have jurisdiction and thus the proceedings become a

nullity ab initio.

The objection by the 1st Respondent is thus upheld in terms that the Standard Act at Section 11 provides for redress for the cause which the petitioners have brought to this court and therefore the same cannot be claimed to be breaches of Constitutional rights under Articles referred to. In regards to argument that affidavit of Gabriel Muingi had not been properly commissioned as required by Section 4 of Chapter 15 of Laws of Kenya, I would take the stance that this was a mere procedural technicality which standing alone should not be fatal to the substance of the suit as it would defeat the ends of justice. This was a decision of **Commissioner of Assize Visram** (as then was) in **James Njoroge Karagu vs Hannah Njoki** relying on the provisions of order 18 Rule 7 and **Ringera J** (as he then was) in **Tom Okello Obondo vs NSSF –Nairobi HCC No. 1759 of 1999**. Considering these decisions together with that of **Hamida K Kamal Khan vs Emad Abdul Jaleel Abdul Baker Mombasa HCCC No. 5 of 2000** (O.S) where **Waki J** (as he then was) held that an affidavit was not defective on ground that the juriat appeared separately on its own and guided by the constitutional provision at Article 159 (2)(d) that Justice shall be administered without undue regard to procedural technicalities . I would have dismissed grounds No. 2 to 6 as preliminary points of objection. This matter is therefore struck out for reason this cause should be litigated before the Standards Tribunal and in event that the parties are aggrieved by the decision of the Tribunal then they will be welcomed to file an appeal against the decision in this court.

Costs of the petition and the preliminary objection will be paid by the petitioners jointly and severally.

Ruling Signed Delivered and Dated this 23rd Day of March 2017.

A.ONG'INJO

JUDGE