REPUBLIC OF KENYA

IN THE HIGH COURT IN KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 38 OF 2015

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF MEDICAL SERVICES..... RESPONDENT

EX-PARTE

BRITISH AMERICAN TOBACCO KENYA LIMITED.

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th February, 2015, the *ex parte* applicant herein, **British American Tobacco Kenya Limited,** seeks the following orders:

> **1) An Order of Certiorari to remove into the High Court, for purposes of it being quashed, the decision and order of the Director of Medical Services dated 13th January 2015 wherein he demanded that the Applicant should stop forthwith the circulation of *Dunhill Switch* packs or any other cigarette packs containing the words "Crush the Capsule", "Switch the experience", "Refresh the taste", "Switch" and "Refreshing twist" and to cease and desist from further printing of the said words on its *Dunhill Switch* packs.**
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> **2) An Order of Prohibition to prohibit the Director of Medical Services from demanding the removal from the Kenyan market of *Dunhill Switch* packs or any other cigarette packs which have the words "Crush the Capsule", "Switch the experience", "Refresh the taste", "Switch" and "Refreshing twist" printed on the packs.**
>
> **3) THAT all necessary and consequential orders or directions be given.**
>
> **4) THAT the costs of this application be awarded to the Applicant.**

Ex Parte Applicant's Case

2. The application was based on the following grounds:

a) The Applicant has been manufacturing and distributing its *Dunhill Switch* brand in the Kenyan market since November 2012.

b) On 26th January 2015, the Applicant, without any previous warning whatsoever, received a letter dated 13th January 2015 from the Respondent demanding that the Applicant should stop forthwith the circulation of *Dunhill Switch* packs containing the words "Crush the Capsule", "Switch the experience", "Refresh the taste", "Switch" and "Refreshing twist" and should also cease and desist from further printing the said words on its *Dunhill Switch* packs.

c) The Respondent in its letter dated 13th January 2015 claims that the Applicant is currently running a promotion of its *Dunhill Switch* cigarettes in contravention of s.23 and s.25 of the Tobacco Control Act, 2007 ("the Act").

d) The Applicant is not running any such promotion of any of its cigarettes and the wording on the packs of its *Dunhill Switch* cigarettes has not changed since this product was launched in November 2012. The Applicant has therefore not contravened s.25 of the Act.

e) The wording printed on the *Dunhill Switch* pack merely gives adult consumers instructions on how to switch the taste of the product from that of a standard cigarette to that of a menthol cigarette. These words do not in any way give a false, misleading or deceptive impression to members of the public and therefore do not contravene s.23 of the Act.

f) There is a large health warning printed on the back and front panels of the Applicant's packs – including those of the *Dunhill Switch* brand - which warns the public explicitly of the dangers of smoking tobacco. The words referred to by the Respondent in its demand cannot therefore in any way create an erroneous impression about the characteristics, health effects, health hazards or social effects of the product and do not contravene s.23 of the Act.

g) The demand dated 13th January 2015 is unlawful and the Respondent has no jurisdiction to invoke the provisions of s. 23 and s.25 of the Act.

h) Alternatively and without prejudice to (g) above, even if the Respondent has jurisdiction under the Act to enforce s.23 and s.25, then he is acting in excess of that jurisdiction as the said provisions have not been contravened by the Applicant.

i) A concern was raised with regard to the pack inserts immediately after the launch of the *Dunhill Switch* product and the Applicant was given time to ensure that the pack inserts were depleted from the market. No concern was raised at that time with regard to the words printed on the pack about which the Respondent now complains. As such, the Applicant legitimately expected that there would be no further issues raised in respect of its *Dunhill Switch* packaging.

j) There has been a serious breach of the rules of natural justice as the Respondent has demanded that the Applicant stop the circulation its *Dunhill Switch* brand forthwith without being given an opportunity to be heard or to respond to the demand.

k) Unless leave is granted to quash the Respondent's decision, and the leave granted operates as a stay of the decision, the Respondent is likely to cause the removal of the Applicant's *Dunhill Switch* packs from the market. This will have a devastating effect on the Applicant's business and will also have an adverse effect on businesses of the 11,310 wholesalers and retailers who stock the product all over Kenya.

l) The Applicant's existing contracts related to the supply of packaging material for the *Dunhill Switch* product will also be in jeopardy.

3. According to the Applicant, it seeks to quash the decision of the Director of Medical Services at the Ministry of Health, the respondent herein, dated 13th January 2015 wherein the latter ordered the Applicant to stop forthwith the circulation of its *Dunhill Switch* brand of cigarettes in the Kenyan market by 12th February 2015. By the same decision, the Respondent further ordered the Applicant to cease and desist from circulation of any other tobacco brand, bearing similar information to that on the *Dunhill Switch* pack, in the Kenyan market by 12th February 2015.

4. According to the applicant, it is a manufacturer of cigarettes and tobacco products and *Dunhill Switch* is one of its cigarette brands which it has been manufacturing the same since November 2012. The said brand, it averred is an international brand sold in over 46 markets across the world including Africa, Middle East, the Americas, Asia Pacific and Europe and allows the adult consumers to switch the taste from a plain cigarette to a menthol-flavoured one as the filter of a *Dunhill Switch* cigarette contains a capsule with a menthol flavour. When the filter is twisted and clicked at a certain point, the menthol flavour is released and the cigarette switches from being a plain cigarette to a menthol-flavoured cigarette.

5. On 8th November 2012 the Kenya Revenue Authority (KRA) issued a formal approval to BAT Kenya to manufacture *Dunhill Switch* pursuant to the Customs & Excise Act. and pursuant to the ***Standards Act***, Cap 496, the Applicant submits samples of the *Dunhill Switch* pack and cigarettes for annual testing and certification by the Kenya Bureau of Standards (KEBS) under the East African Standards 11:2005 – Cigarettes Specifications.

6. It was disclosed that at the time the *Dunhill Switch* cigarette was launched in the Kenyan market, the cigarette pack had instructions printed on the face of the pack showing the adult consumer how to switch the flavour of the cigarette. However, sometime in January 2013, two months after the Applicant had launched the *Dunhill Switch* brand, the Public Health Department of the City Council of Nairobi issued a seizure notice to *Nakumatt* Supermarket, Moi Avenue Branch, pursuant to the ***Tobacco Control Act*** 2007, Cap 245A (hereinafter referred to as "the Act") seeking to seize 27 packets of *Dunhill* cigarettes that were being sold by the said branch at which point *Nakumatt* Supermarket brought the seizure notice to the Applicant's attention as it was in relation to *Dunhill* cigarettes manufactured by the Applicant. According to the Applicant, it was impossible to tell the reason for the seizure notice on the face of the notice, hence the Applicant arranged for a meeting with the Public Health officials to discuss the issue. During meetings held on 31st January 2013 and 3rd April 2013 the Public Health officials clarified that the reason for the enforcement was due to the inclusion of pack inserts in the *Dunhill* cigarette packs and argued that pack inserts were deemed to be promotional leaflets and that they were littered all over the city.

7. Although the Applicant took the view that the pack inserts were designed to inform adult consumers (who had already made the decision to consume the *Dunhill* brand and had already purchased a pack of cigarettes) on product use and that the littering of the pack inserts was an unintended consequence that was not contemplated by the Applicant, on 3rd April 2013, the Applicant and the Public Health officials reached an amicable settlement in which the Applicant agreed not to print any more pack inserts going forward and the Public Health Officials allowed the Applicant to deplete the current stock of already made products with pack inserts by 31st May 2013 and did not seize any product from *Nakumatt* Supermarket or seize any other seizure of *Dunhill* cigarettes or any other of the Applicant's brands. However, as the Public Health Officers did not raise any issue with the instructions and wording printed on the *Dunhill Switch* Pack, the Applicant assumed that the said pack complied with the provisions of the Act and legitimately expected that there would be no further issued raised in respect of the said pack under the said Act.

8. However, on 26th January 2015, more than two years since the Applicant began manufacturing and distributing its *Dunhill Switch* Cigarettes in Kenya, the Applicant received a demand from the Director of Medical Services at the Ministry of Health (the Respondent herein) claiming that it had come to his attention that the Applicant is currently doing a promotion of *Dunhill* Cigarettes in contravention of s.23 and s.25 of the Act and claimed that certain words printed on the cigarette packs and cigarette sticks amount to promotional information deliberately developed for purposes of providing false, misleading

and deceptive information to members of the public and was likely to create an erroneous impression about the characteristics, health effects, health hazards or social effects of *Dunhill* tobacco. No explanation whatsoever was given as to why the Respondent had formed the view that the words complained of were false, misleading or gave deceptive information to members of the public. The letter gave the Applicant a thirty-day deadline to ensure that there was no circulation of the Applicant's *Dunhill Switch* brand in the market. As the letter was only received by the Applicant on 26th January 2015, nearly 15 days after it was written, this effectively gave the Applicant only 15 days to comply with the letter.

9. In response the Applicant wrote to the Respondent on 28th January 2015 pointing out the fact that the demand was only received on 26th January 2015 and requesting for time to respond to the issues raised in the letter; however no response was received from the Respondent. The Applicant's further efforts to elicit a response from the Respondent were unsuccessful.

10. In the Applicant's view, the words referred to in the Respondent's demand dated 13th January 2015 do not in any way contravene the provisions of either s.23 or s.25 of the Act. Yet the demand gives an erroneous impression that the Applicant is currently carrying out a promotion when in fact there has been no change whatsoever on the wording of the *Dunhill Switch* pack since it was launched in November 2012. In its view, the wording on the pack merely gives the adult consumers instructions on how to switch the taste of the product and do not in any way give a false, misleading or deceptive impression to members of the public. The applicant contended that there is a large health warning printed on the face of the pack (both back and front panels in English and Swahili) which warns the public on the dangers of smoking tobacco. Therefore the wording referred to by the Respondent in its demand and decision cannot in any way create erroneous impression about the characteristics, health effects, health hazards or social effects of the product.

11. The Applicant averred that the *Dunhill Switch* product is also manufactured and sold in other countries in the world, some of which have tobacco control legislation which is similar to the Act, such as South Africa, Mozambique and the 6 Gulf Cooperation Council (GCC) member states of United Arab Emirates, Bahrain, Kuwait, Oman, Qatar and Saudi Arabia. It was the Applicant's view that as the words on the pack cited in the Respondent's demand dated 13th January 2015 do not contravene the provisions of either s.23 or s.25 of the Act, the Respondent's demand is unlawful and the Respondent has no jurisdiction to make the demand. Even if the Respondent has jurisdiction, he is acting in excess of that jurisdiction. To the Applicant, the Respondent has also acted in an unreasonable manner in failing to give the Applicant sufficient time to respond to its demand.

12. To the Applicant, as Parliament passed the Act to specifically govern the tobacco industry in Kenya, the World Health Organization Framework Convention on Tobacco Control (the "FCTC" or "the Convention") and the Tobacco Control Policy (the "Policy") cannot override the Act. In any case the Respondent's impugned decision does not make any reference whatsoever to the FCTC or the Policy as the same is wholly premised on the Act. It was therefore the Applicant's position that the Respondent cannot at this stage seek to rely on the FCTC or the Policy which in any event the Applicant has not contravened.

13. To the Applicant, it has at all times complied with the laws and regulations that govern the tobacco industry in Kenya in terms of the requisite warnings and denied that it is violating or continues to violate the provisions of sections 23 or 25 of the Act as alleged by the Respondent.

14. While the Respondent admitted in the Replying Affidavit that he is a Public Health Officer, the Applicant wondered why his office led the Applicant to believe for a period of two years that the wording on *Dunhill Switch* packs complied with the provisions of the Act.

15. It was contended by the Applicant that the Respondent's statement that words on *Dunhill Switch* packs are pure advertisements and promotion aimed at displaying Dunhill Switch cigarettes as "the best to switch to" is completely false and a clear indication that the Respondent has failed to understand the purpose of the words. The fact that the words "switch the experience" appear after the words "crush the

capsule in the filter" are a clear indication that the word "switch" is used to inform the adult consumers of the product that once the capsule in the filter is crushed, the taste of the cigarette can be switched from an ordinary cigarette to a menthol flavoured one. The word "switch" is not in any way used to compare the product to any other product in the market and the Respondent has completely failed to understand the context in which the word used. To it, there is no prohibition on manufacturing or selling menthol flavoured cigarettes under the Act or on describing products as being menthol flavoured. The word "switch" also enables the adult consumers of the *Dunhill Switch* cigarettes to distinguish them from plain Dunhill cigarettes. To the Applicant, the Respondent failed to specifically identify the alleged false promotion of the product being carried out by the Applicant in terms of s 23(1) of the Act or explain the manner in which it is alleged that the words complained of constitute an advertisement under the terms of s25(1) of the same Act.

16. It was the Applicant's case that the Respondent failed to understand the purpose of the reference made to the laws applicable in the Gulf Cooperation Council States, which was only to draw the comparison that *Dunhill Switch* cigarettes are lawfully sold in other countries that have ratified the Convention and which have similar laws to Kenya and that the Applicant referred to the legislation of not just the Gulf Cooperation Council states but also the legislation of South Africa and Mozambique. Of the Gulf Cooperation Council States, all the states have ratified the FCTC except Bahrain who acceded to it. South Africa and Mozambique have also ratified the FCTC. It explained that the wording on the South African *Dunhill Switch* pack is very similar to the pack sold in Kenya and South Africa has ratified the FCTC.

17. While appreciating that the Respondent is empowered to enforce the provisions of the Act, the Applicant asserted that he is a under a statutory duty to do so within the confines of the said Act. However, in its view, the Respondent demonstrated that demonstration his failure to understand the context in which the word "switch" is used on the *Dunhill Switch* pack.

18. The Applicant averred that the Respondent only agreed to meet the Applicant's representatives after the decision was issued and the Applicant was never accorded any opportunity to meet with the Respondent before the decision was issued and even then offered no explanation as to the basis upon which it is claimed that the words complained of are false or misleading.

19. In its submissions the Applicant reproduced the various provisions of the Act in particular those falling under Part V thereof with emphasis on sections 23 and 25 According to it, sections 22(1), 23 and 25 of the Act provide that:

> **22(1) No person shall promote a tobacco product or a tobacco-related brand element except in accordance with the provisions of this Act.**
>
> ***23. False promotion***
>
> ***(1) No person shall promote tobacco or a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects, health hazards or social effects of the tobacco product or its emissions and as may be prescribed by the Minister."***
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> ***25. Promotion by advertisement.***
>
> ***(1) Subject to this Part, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element or one that evokes a tobacco product or element.***
>
> ***(2) No person shall advertise any tobacco product on any medium of electronic, print or any other form of communication.***
>
> ***(3) No person shall promote tobacco or a tobacco product by means of lifestyle advertising."***

20. It is submitted that the use of the Marks on the packaging for the *Dunhill Switch* brand does not contravene any of the above sections or any other section of the Act.

21. With respect to section 23 it was the Applicant's case that the use of the Marks on the packaging for the *Dunhill Switch* brand is to communicate factual information to adult consumers regarding a lawful product and to identify and distinguish the product from other products on the market. The Marks describe the product and how it is used, namely that, when the filter capsule is twisted and clicked, the menthol flavour is released and the cigarette switches from being a plain cigarette to a menthol-flavoured cigarette. In particular Crush the Capsule" describes to the act of crushing the filter capsule; "Switch the Experience" and "Switch" describe the switching of the product from a plain cigarette to a menthol cigarette; and "Refresh the Taste" and "Refreshing Twist" describe the effect of the release of the menthol flavour when the capsule is crushed. It was contended that the use of the Marks on the packaging is not false, misleading or deceptive or likely to create an erroneous impression within section 23 of the Act. As noted above, the Respondent has not stated in what respects the use of the Marks is false, misleading and deceptive information or is likely to create an erroneous impression within section 23. Furthermore the packaging for the Dunhill Switch brand carries the same warnings as other tobacco brands and therefore there cannot be any erroneous impression about the health effects or health hazards of the product.

22. With respect to section 25, it was submitted that the use of the Marks on the packaging for the Dunhill Switch brand is not 'lifestyle advertising' within section 25(3) of the Act since the Act defines 'lifestyle advertising' as:

> ***"lifestyle advertising" means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, sensuality, recreation, excitement, vitality, risk or daring"***

23. According to the Applicant, the use of the Marks on the packaging is not 'advertising' within this definition which applies to the separate act of publicizing a product (i.e. 'advertising that associates a product with...'). Section 25(3) does not refer to packaging (in contrast to section 23 that specifically includes packaging). As noted above, the use of the Marks on the packaging for the Dunhill Switch brand is to communicate factual information to adult consumers regarding the product and how it is used hence is not 'advertising' within section 25(3). Furthermore, even if the use of the Marks on the packaging is considered to be 'advertising', it is not 'lifestyle advertising' as defined in the Act. The use of the Marks does not associate the product with, or evoke an emotion about, or image of, a way of life. The Marks only communicate factual information regarding the product and how it is used.

24. It was further submitted that this fact is further confirmed by the definitions of "brand preference advertising" and "information advertising" under the Act, namely:

> ***"brand preference advertising" means advertising that promotes a tobacco product by means of its brand characteristics"***
>
> **And**
>
> ***"information advertising" means advertising that provides factual information to the consumer about a product and its characteristics, availability, price or brands."***

25. In the Applicant's view, sections 23 and 25 of the Act must also be interpreted consistently with the Constitution, including consumers' rights to receive product information and the duty of manufacturers to provide such information, freedom of expression and the protection of property, as further detailed below. The proper recognition of these constitutional rights requires that sections 23 and 25 of the Act must permit the use of the Marks on packaging to communicate factual information to adult consumers regarding the product and how it is used. It is thus not illegal, unlawful or offensive for the ex-parte Applicant to use the Marks on its packaging as the Act does not prohibit the communication of factual information on tobacco product packaging to consumers. Therefore the Respondent cannot hold the ex-parte Applicant liable for an act which is not prohibited in law without disclosing any offence known to

law.

26. It was the Applicant's submission that the Respondent's demand violated the Constitution and was thus null and void. According to the Applicant, under Article 46 (1) of the Constitution, consumers have a right to the information necessary for them to gain full benefit from goods and services. As consumers have this right to access and receive information, there is a corresponding duty upon manufacturers to provide that information. In this respect the Applicant relied on **CFC Stanbic Bank Limited vs. Consumer Federation of Kenya (COFEK) Being sued through its officials namely Stephen Mutoro & 2 others [2014] eKLR** where the Court recognised that**:**

> **"it cannot be disputed that for a consumer to make an informed decision, he/she is entitled to full information about the goods or services he/she intends to procure."**

27. The consequences of compliance with the Respondent's directions would lead to consumers being denied the right to information necessary for them to make an informed decision regarding a lawful product.

28. It was further submitted that the same demand violated the right to freedom of expression as enshrined in Article 33 of the Constitution by prohibiting the ex-parte Applicant from communicating with adult consumers about their lawful products and denying adult consumers the right to receive such information. To the Applicant the said demand further violated Article 40 of the Constitution which protects the right to property and Article 260 of the Constitution defines "property" as including 'intellectual property' of which the Marks are part. It was therefore submitted that the said demand amounted to unlawful deprivation of the Applicant's property without compensation.

29. According to the Applicant, the Respondent's demand was disproportionate and unjustified. In its view the same demand was disproportionate in terms of Article 24 of the Constitution by limiting the rights of the ex-parte Applicant and exposing it to unnecessary costs without meeting the requirements for limitation of rights set out in Article 24 of the Constitution. According to the Applicant, the requirements are unnecessary or disproportionate on the grounds that the prohibition on the use of the Marks is unnecessary and will not contribute to the achievement of any objective because the use of the Marks on the packaging for the *Dunhill Switch* brand is to communicate factual information to adult consumers regarding a lawful product and how it is used and the packaging for the *Dunhill Switch* brand carries the same warnings as other tobacco brands and therefore there cannot be any erroneous impression about the health effects or health hazards of the products. Further, consumers would be denied the right to information necessary for them to make an informed decision regarding a lawful product and the ex-parte Applicant will be denied its rights of property and freedom of expression without any public health benefit and the ex-parte Applicant will lose its investment in the product which it only started to produce after it received the necessary approvals.

30. It was the Applicant's case that the demand violated Article 47 of the Constitution with respect to the right to Fair Administrative Action.

31. In support of its submissions the Applicant relied on **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935,** and submitted that the said decision rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. According to the Applicant, irrationality as fashioned by **Lord Diplock** in the above takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no

sensible person who had applied his mind to the question to be decided could have arrived at it. The Applicant relied on **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** where it was held that where the Board fails to consider relevant evidence and considers irrelevant ones this Court must intervene where the failure to do so renders the decision so grossly unreasonable as to render it irrational. The case of **Orion East Africa Limited vs. The Permanent Secretary Ministry of Agriculture & Another [2012] eKLR** was also cited for the position that once [products] are licensed, the licence holder has a legitimate expectation that it will distribute and market its product without unlawful interference from the State and that the right to fair administrative action is intended to protect the individual from unreasonable administrative action. Further, the taking of administrative action by the 1st Respondent by underwriting an advert which achieves the effect of a ban breached the right to fair and reasonable administrative action particularly where it has not been demonstrated that the provisions of the regulatory statute have been breached hence the Respondent's actions were held to be unreasonable. In the Applicant's view, the Respondent's demand fell squarely within the unacceptable parameters of decision makers under the above precedents because:

(1) The Respondent's demand was made without lawful authority.

(2) The ex-parte Applicant had a legitimate expectation that it could use the Marks on its packaging upon the product (including the packaging) being certified by the Kenya Bureau of Standards and approved by the Kenya Revenue Authority. This legitimate expectation was reinforced by the Respondent's failure to raise any concern regarding the Marks when it previously raised an unrelated concern in relation to pack inserts immediately after the launch of the Dunhill Switch Product. The Respondent's demand unlawfully and unreasonably denies the ex-parte Applicant of its legitimate expectation.

(3) The Respondent acted in an unreasonable and unfair manner in failing to provide the ex-parte Applicant with an opportunity to be heard or respond to the demand in violation the principals of natural justice, transparency and procedural fairness;

(4) The consequences of compliance with the Respondent's demand would lead to an irrational consequence and an unreasonable effect that consumers would be denied the right to information necessary for them to make an informed decision regarding a lawful product and the ex-parte Applicant will be denied its rights of property and freedom of expression. A court should not allow a decision to stand or be acted upon that aids the contravention of the law.

32. Based on the foregoing, the Applicant urged the Court to quash the decision as sought.

Respondent's Case

33. In response to the Application, the Respondent conceded that the applicant is a manufacturer of cigarettes and tobacco products including the subject matter herein *Dunhill switch* cigarette an international brand which includes the display of the words "crush the capsule in the filter", "switch the experience", "refresh the taste" "switch and refreshing twist" on the cigarette packs.

34. It was submitted that the tobacco industry in Kenya is principally governed by the Constitution of Kenya, ***Tobacco Control Act 2007***, ***The World Health Organization Framework Convention on Tobacco Control*** (WHO-FCTC) (hereinafter referred to as "the Convention") which is the first public health treaty negotiated under the auspices of WHO, Adopted Guidelines and policy options and recommendations for implementation of the Convention**,** The Kenya Tobacco Control Policy {2012}, ***Customs & Excise Act***, ***Food, Drugs & Chemical Substances Act*** Cap 254, ***Standards Act*** Cap 496, ***Environmental Management & Coordination Act***, ***Public Health Act*** cap 242 among others. According to the Respondent, in line with the aforementioned laws**,** the Ministry Of Health is keen on enforcement of tobacco control laws domestically within the confines of the Act and Internationally under the Convention which Kenya ratified on 24th June 2004 to ensure Kenya meets its obligations domestically as well as internationally while at the same time curbing the effects of the tobacco epidemic locally and

globally and safeguarding the greater public health concerns.

35. While recognising that tobacco business is a legitimate business with its lawful products available for purchase by adult consumers, the Respondent contended that it not an ordinary business since it is a lethal stuff which science has established is harmful and globally kills at least 50% of it's lifetime users and it was against this backdrop that there arose a global concern to address tobacco use, its effects and the need to develop some form of control for the industry through various mechanisms including laws. To that end, over the years, the Ministry of Health in the course of implementation of the act has engaged the tobacco industry stakeholders including the ex-parte applicant herein on tobacco control measures at various levels and some level of compliance has been achieved in the sense the industry stakeholders have complied with the health warning messages on tobacco products.

36. It was contended that in the course of implementing the Act the ex-parte applicant has been made aware of it's obligations as a manufacturer and key player in the tobacco industry as far as matters concerning the provisions of the Act on advertisement and promotion of tobacco products is concerned. To the Applicant, the subject of this suit largely revolves around the question of interpretation as to whether the aforementioned words found on the cigarette packs conform to the requirements of sections 23 and 25 of the Act in terms of promotion and advertisement in addition to the provisions of the other laws mentioned herein above.

37. To the Respondent, the ex-parte applicant by virtue of its Dunhill cigarette packs continues to violate the express provisions of sections 23 and 25 of the Act through the words and expressions on the said cigarette packs and therefore the respondent's action is not erroneous on the facts and the law as alleged by the ex-parte applicant. It was asserted that Article 13 of the Convention outlaws all forms of advertising and promotion through false, misleading and deceptive means aimed at creating an erroneous impression about the characteristics, health effects, hazards and emissions of a tobacco product warning and this has found its way at section 23 & 25 of the Act which the respondents have proceeded to enforce.

38. To the Respondent, the denial by the ex-parte applicant that the words on the packs are only meant to give instructions on how to switch the menthol flavour is false since the offensive words are pure advertisements and promotions aimed at displaying Dunhill cigarettes as the best to switch to in terms of experiencing and refreshing the taste from an ordinary cigarette to a menthol flavour by crushing the capsule. A plain meaning points towards the fact that the expressions are an advertisement and promotional but not instructional as alleged by the applicant with the sole intent of evoking the menthol flavour element. The sum effect is that it encourages and promotes consumption of the Dunhill switch cigarettes pegged on experiencing the menthol flavour contrary to the express provisions of section 23(1) & 25(1) of the Act.

39. It was the Respondent's contention that its decision is further informed by the definitions of what constitutes an advertisement as found in the Act as the words fall within that provision and it was on the strength of this interpretation that the ex-parte applicants were directed to stop further circulation of the Dunhill switch cigarettes containing the aforementioned offensive words on the packs as a proportionate and justified response to considerable public health harm from smoking tobacco product as a result of promotional venture in line with the objectives of the Act. In its view, the assertions by the ex-parte applicant on approvals by KRA and KEBS have no significance on these proceedings as the approvals were issued in line with the provisions of the ***Customs & Excise Act*** on condition that the applicant was to also strictly adhere to the applicable laws regarding tobacco products and is not in any way a clearance for variation or exemption from tobacco control laws.

40. To the Respondent, the application is brought in bad faith in the sense that the reference to and comparison of laws that the applicant seeks to rely on being the Gulf Cooperation Council (***Tobacco Control Act of 1993***) are not in any way applicable to Kenya because Kenya is not a member of the Gulf council neither are the said laws general rules of international law or any treaty or convention ratified by Kenya as per article 2(5)&(6) of the constitution. Even by the time the law was enacted it has been overtaken by events by the Convention.

41. The Respondent contended that he has the powers as a Medical Officer of Health under the ***Public Health Act*** as well as an authorized officer under the Act to enforce provisions thereof and as such did not act in excess of jurisdiction. Further, he averred that he neither made any improper or irrelevant considerations, nor acted unreasonably or illegally in making the said decision but clearly gave the reasons for the said decision as per the Act with the sole aim of protecting public health in line with the objectives of the Act. The Respondent averred that it accorded the ex-parte applicant a reasonable opportunity to present its case through their lawyers but the only problem was that they wanted a written undertaking by the respondent not to proceed with the enforcement of the notice which in his view was tantamount to breaching the law to protect the whims of the ex-parte applicants.

42. The Respondent averred that the advertisement and promotion of the menthol scented cigarettes by the ex-parte applicant in this case just like e-cigarette and *shisha* is a way of hoodwinking the consumers from knowing the real effects of tobacco consumption because the scent will take the form of the most valued edible products in this case the cigarette sticks containing some menthol element in it. In that regard the vested economic interests of the tobacco industry in Kenya should not be allowed to control the greater public health agenda. It was his view that the Convention guidelines on Public health policies require that in setting up and implementing their public health policies on tobacco control, governments shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with the national law. This is based on the best scientific evidence and experience of parties in addressing tobacco control interference. The application before court is one good example of such interests by the tobacco industry players. The Court was urged to take judicial notice of the fact that the Ministry of Health is determined to implement the tobacco control laws against the backdrop of a tobacco industry that is working extremely hard to compete negatively with the government. In doing so, the tobacco industry has embarked on diversifying its packaging and branding under the guise of complying with the law while inserting promotional messages on cigarette packs to advertise menthol/chocolate/sweet flavoured brands all aimed at enticing consumers and hoodwinking them that cigarettes they are selling are less harmful. It is in this respect that globally, countries like the UK, France, Ireland and Australia have moved towards standardized plain packaging to achieve important public health benefits vis-à-vis the vested interests of the tobacco industry which effectively removes the opportunity to advertise and promote tobacco products by the tobacco industry.

43. The Respondent averred that against the backdrop of a bullish and subversive tobacco industry, the respondent as a duly authorised public health enforcement officer acted in the best interests of the public through legitimate action in support of tobacco control measures in line with the Act which has domesticated the progressive provisions of the Convention. According to him he performed his duties within the law as laid down and at no time was he actuated by malice, discrimination, bad faith or extraneous considerations.

44. According to the Respondent, in the circumstances an order of certiorari ought not to issue while to issue an order of prohibition would have the effect of permanently barring the respondent from taking such action whenever necessary.

45. It was submitted on behalf of the Respondent that that the High Court's jurisdiction in judicial review is circumscribed by the provisions of the ***Law Reform Act*** which confers to the court the jurisdiction to issue any of the three prerogative orders; Section 8 of the Act provides that the High Court shall not issue any of these orders in the exercise of its civil or criminal jurisdiction. It goes further to state that the orders will be issued in any case where the High Court in England is by virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, of the United Kingdom empowered to make an order of Mandamus, Prohibition or Certiorari the High Court shall have power to make like order. This, it was submitted, based on **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43 and Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** has led to the development of fairly well settled criteria for issuance of the orders; these include illegality, impropriety of procedure and irrationality (the three "I's") thus it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to proof breach of any of the above criteria for that party to succeed in their claim.

46. To the Respondent, whereas scope of judicial review is very narrow, this matter presents a difficult situation towards making a determination within that narrow scope without looking at the merits of the impugned decision based on domestic & international obligations as well as interpretation of the provisions of the Act. To the Respondent, from a strictly judicial review perspective, a close reading of the *ex-parte* Applicant's motion turns onto one head of illegality and lack of jurisdiction. After setting out what in the Respondent's view were factual matters and the historical background guiding the regulation of the industry, as well as the statutory provisions, it was submitted that it was against the backdrop of the above laws, that the subject of this suit largely revolves around the question of interpretation and enforcement. That is interpretation as to whether the words in question "crush the capsule in the filter", "switch the experience", "refresh the taste" "switch and refreshing twist" found on the cigarette packs conform to the requirements of sections 22, 23 and 25 of the Act in terms of promotion and advertisement and the subsequent enforcement of those provisions in addition to the provisions of the other laws mentioned above. The respondent submitted that the words "crush the capsule in the filter", "switch the experience", "refresh the taste" "switch and refreshing twist" found on the cigarette packs are outrightly promotional and an advertisement well within the meaning and interpretation found at section 2(a) of the Act, the tobacco control policy 2012 as well as the Convention and therefore out rightly offend the provisions of sections 22(1),23(1) & 25(1) of the Act.

47. According to the Respondent, a plain meaning points towards the fact that the expressions are pure advertisement and promotional but not instructional as alleged by the applicant with the sole intent of evoking the menthol flavour as a brand element. The sum effect is that it encourages and promotes consumption of the Dunhill switch cigarettes pegged on experiencing the menthol flavour as opposed to ordinary cigarettes. It was submitted that the provisions of the Act must be read and interpreted collectively and not selectively together with the other related laws. In that regard the respondent disagreed that the words are only instructional and for factual information to the consumers.

48. It was submitted that those words promote and encourages the consumption of this brand of cigarettes with the sole advantage of evoking a menthol flavour as the brand element thereby switching from an ordinary cigarette to a menthol-flavoured one. It was therefore submitted that the decision is therefore not erroneous on facts and the law.

49. With respect to the question whether the decision was illegal, it was submitted that on account of the above interpretations, the law clearly prohibits any form of advertisement and promotion. Despite that the ex-parte applicants have and continue to offend the provisions of the ***Tobacco Control Act*** and ***The Tobacco Control Policy*** (2012) thereby perpetuating an illegality themselves. Therefore a directive by the respondent that they stop and desist from further printing of those words on the cigarette packs is legal and made in an enforcement capacity provided for by the Act at section 36 with good intentions of giving effect to the provisions of the law and correcting an illegality in the collective and greater public health interest bearing in mind Kenya's international and domestic obligations as well as the objectives of the Act.

50. On the question whether the decision was unreasonable and whether there were improper considerations by the respondent in making the impugned decision, it was submitted that at no time did the Respondent take improper or extraneous considerations in making the said decision. The directive was well within the confines of enforcing the provisions of the Act thereby giving effect to the objectives found therein as well as The Convention. Therefore there would be no reason to interfere with the said decision as the same is reasonable in the circumstances bearing the in mind the laws as set out hereinabove, their objectives and the greater public health interest.

51. On the issue of natural justice, it was submitted that over the years since the Act came into force the ex-parte applicant as a key industry player has always been made aware of its obligations and in which some level of voluntary compliance has been achieved in the sense the industry stakeholders have complied with the health warning messages on tobacco products amongst others. The Act has clearly established offences as per sections 22(1), 23(1),25(1) which the ex-parte applicants were expected to comply with and which they have clearly offended. However, the respondent in good faith and in enforcing the provisions of the Act accorded the ex-parte applicant an opportunity to be heard and gave

them a notification and a grace period of at least 30 days to act accordingly. Upon receipt of the letter, the ex-parte applicant met with the respondent through two of its legal officers and two other MOH officials. They also later sought a meeting with the respondent who in a letter dated 5th February 2015 expressed willingness to meet them. They later demanded a written undertaking from the respondent that the notice would not be enforced to no avail as the same would amount to an illegality. The respondent therefore submitted that the rules of natural justice were duly accorded to the ex-parte applicant.

52. With respect to jurisdiction, it was submitted that under section 36 of the Act, the respondent, as an authorised officer under section 36 of the Act has the jurisdiction to enforce the provisions of the Act in addition to other relevant laws governing the Tobacco industry. By virtue of the provisions of ***The Public Health Act***, The Director of Medical services is himself a Medical Officer of Health and therefore equivalent to a Public Health Officer as stated in Sec 36 of The Tobacco control Act. Secondly, the deponent herein is himself a Medical officer of Health within the meaning of ***The Public Health Act*** and therefore they are all authorized officers as well as the Medical officers of health otherwise known as public health officers. Therefore by operation of the law they have the jurisdiction to carry out enforcement of the provisions of the Act under ***The Public Health Act*** as well as the Act in the greater Public Health Interest.

53. The respondent therefore submitted that the decision is therefore within its enforcement jurisdiction as per the law and did not act in excess of it since the Act grants enforcement powers to Public Health Officers appointed under Section 9 of the ***Public Health Act***.

54. The Respondent appreciated that the matter no doubt touches on issues of public interest as it deals with protecting the greater public from considerable health harm arising from exposure to Tobacco consumption. Courts while exercising their Judicial Review Jurisdiction, it was submitted, have been alive to considerations of public interest in declining the issuance of judicial review orders even where a party has made out a case for issuance of orders of judicial review. In this case it is important that we appreciate the background necessitating need for control of tobacco industry which hinges on and is largely driven by public health concerns and the right to health. On this account it was submitted that the court in the interests of the public should not grant those orders. The laws have clearly demonstrated the desired objective of protecting the greater public health from harm arising from tobacco consumption and exposure. To support this the Respondent relied **Republic vs. Judicial Service Commission Ex-Parte Pareno (2004) 1 KLR 203, *Halsbury's Law of England* 4TH Volume II Page 805 Paragraph 1508, R vs. Kenya National Commission on Human Rights Ex-Parte Uhuru Kenyatta (2010) eKLR.**

55. It was submitted that from the pleadings the ex-parte applicants are not seriously challenging the jurisdiction of the Respondents but, is instead, challenging the merits of the decision to stop them from further circulating cigarette packs containing the offensive words. In any case it was submitted that the decision was merited on account and well within the confines of the provisions of the laws set out herein with a clear goal & objective.

56. With respect to the prayer for certiorari, it was submitted that the order should not be granted because the decision was arrived at in accordance with the provisions of the law. As for prohibition, it was submitted that the issuance of the order as sought would have the effect of curtailing the statutory duties and functions of the enforcement officers as provided for by law. The Respondent urged the Court to be persuaded by similar findings by the High Court in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J**. quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR**.

57. On the question of public interest, it was submitted that the Convention is the first public health treaty and one of the most widely embraced treaties in UN History. It reaffirms the right to the highest attainable standard of health. It aims at shielding the greater public from the dangerous effects of exposure to tobacco consumption and production as a public health concern with serious health, economic and social effects. According to the Respondent, the Act has recognised all this and seeks to meet the objectives set out therein. The respondent therefore submitted that its actions are purely driven by public health interest

which is the golden thread that runs through all the laws cited herein. On that account the Respondent argued that the decision should be upheld.

58. While the ex-parte applicant pleaded a violation of a number of its constitutional rights as per articles 24, 33, 40,46, it was submitted that The Kenya Tobacco Policy 2012 has a policy linkage with the Constitution of Kenya provisions and appreciates that the constitution guarantees fundamental rights which have a bearing on tobacco control which include right to life, right to highest attainable standard of health, consumer protection, right to clean and healthy environment on which second hand smoke is anchored, right of children to basic health care to be protected from harm, right of citizen participation in governance and management of public affairs, right to information which empowers the public to access the information held by government on tobacco control. To the Respondent, whereas there is no hierarchy of rights, there has to be a balance between the competing rights of the ex-parte applicants which are not absolute and the greater public health interests in a mutually respectable manner. As such there are instances where some private rights and interests have to give way to greater public rights and interests. It was submitted that the ex-parte applicant has not mentioned anything about the right to health vis-à-vis it's rights. The right to health, according to the Respondent is one of the most fundamental human rights which was a primary concern in developing the Convention. Cumulatively the ex-parte applicant by its actions based on the offensive words, violates and undermines this universally acclaimed right by encouraging, promoting and advertising the use of tobacco contrary to the laws which seek to strike a balance between the competing interests and rights by a way of reasonable and permissible limitation.

59. In support of this position, the Respondent relied on the decision of **Nyamu & Emukule, JJ** in **Martha Karua vs. Radio Africa Ltd T/A Kiss F.M. Station) & 2 Others [2006] eKLR** where the learned judges held:

> **"Perhaps we should also add that the fundamental rights and freedoms have over the years acquired an international dimension which can no longer be ignored by the municipal courts. Courts should therefore recognize that there is international public law dimension to the Chapter 5 rights and freedoms and also that the interpretation should also be guided by the underlying purpose of the right or freedom"**

60. Further reliance was placed on **Kenya Bus Service Ltd & 2 Others vs. Attorney General & Others Misc Civil Application No. 413 of 2005** where it was held that:

> **"the fundamental rights and freedoms in Kenya although dearly cherished are not absolute. They are subject to the right and freedoms of others. The freedoms and rights of others are equally protected by the Constitution and guaranteed to every person. In addition the rights and freedom are subject to the public interest. It is therefore quite evident from the relevant provisions that as far as the other persons are concerned the fundamental rights and freedoms are on an equal footing and that there is no hierarchy of rights and that all must enjoy the same rights and freedoms. It is therefore a serious contradiction for a litigant to want to muzzle, stifle or extinguish other persons rights and freedoms in the name of enforcing theirs. Nothing could be more unconstitutional. The reason why the fundamental rights and freedoms are subject to the rights of others and the public interest as per the Constitution of Kenya is that they create mutuality in terms of their enjoyment and responsibility. They are subjected to the public interest because it is absolutely necessary to achieve the common good for all."**

61. To the Respondent, the Constitution gives equal protection in relation to the enjoyment of fundamental rights and freedoms. It is only where a right or freedom has permissible limitations when the court is called upon to consider competing values and interests such as necessity of limitation, reasonableness, whether reasonably justifiable in a democratic society, proportionality (whether the means justify the end). The vested economic interests of the ex-parte applicant should not be allowed to override and drive the greater public health interest agenda in Kenya. Kenya as a state party has an obligation as per article 5.3 of the Convention to protect its policies from commercial and other vested interests of the tobacco industry with national law.

62. In support of its submissions the Respondent cited persuasive authorities from other jurisdictions such as **British American Tobacco South Africa (Pty) Limited vs. Minister of Health, et al.,** Case No: 60230/2009, in The High Court of South Africa (North Gauteng, Pretoria) 2011**, In the case British American Tobacco UK Ltd & Ors, R (on the application of) vs. Secretary of State for Health [2004] EWHC 2493 (Admin) (05 November 2004), Imperial Tobacco Ltd., Re Judicial Review 2010 SLT 1203, 2010 GWD 32-655, [2010] ScotCS CSOH 134, [2010] CSOH 134,** Outer House, Court of Session (2010).United Kingdom**, Caceres Corrales vs. Colombia, Judgment C-830/10, Corte Constitucional de Colombia [Constitutional Court] (2010)** Colombia October 20, 2010 Constitutional Court**, 5000 Citizens v. Article 3 of Law No 28705, EXP. No 00032-2010-PI/TC, Tribunal Constitucional del Perú [Constitutional Court](2011)** Peru July 19, 2011 and **British American Tobacco of Peru S.A.C. vs. Congress of the Republic** (British American Tobacco Del Perú S.A.C. vs. Congreso De La República, 22881-2010-0-1801-JR-CI-10, Corte Superior De Justicia De Lima, Décimo Juzgado Especializado En Lo Constitucional De Lima Peru July 24, 2014.

63. It was submitted that taking into account all the persuasive decisions from the other jurisdictions as well as domestic and international obligations, we humbly submit that the said orders should not be granted in the interests of the public. To the Respondent, the applicants failed to seriously prove illegality, impropriety of procedure and irrationality as far as the decision and its implementation is concerned and prayed that the substantive Motion herein be dismissed in its entirety with costs to the Respondent.

Determination

64. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

65. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the**

performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

66. The parties ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

67. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

68. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

69. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

70. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR,** that:

"**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs.**

Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."

71. To do otherwise would amount to this Court sitting on appeal on the decision made by the Respondent. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

"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."

72. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision 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 the individual judges for that of the authority constituted by law to decide the matter in question. Unless that 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. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

73. This Court adopts the position in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J**. quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows:

"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

74. In this case, the parties and their counsel with respect seems to have directed a lot of their energies in addressing the issues relating to the merits of the decision taken by the Respondent and whether in the circumstances the same was right or wrong taking into account the prevailing legal and factual climate. This Court however will not allow itself to be drawn in the determination of the merits of the Respondent's decision.

75. Of crucial importance is however whether the Applicant was treated fairly before the Respondent

arrived at the impugned decision. In making its decision the Respondent was purportedly implementing public policy. Therefore the Respondent was constitutionally obliged pursuant to Article 10(1)(c) of the Constitution to comply with the national values and principles governance one of which is the rule of law. One of the tenets of the rule of law is compliance with the rules of natural justice as enshrined in Article 47 of the Constitution which provides as hereunder:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

76. In this case, it is the Applicant's case that sometime in January 2013, two months after the Applicant had launched the *Dunhill Switch* brand, the Public Health Department of the City Council of Nairobi issued a seizure notice to *Nakumatt Supermarket*, Moi Avenue Branch, pursuant to the ***Tobacco Control Act*** 2007, seeking to seize 27 packets of *Dunhill* cigarettes that were being sold by the said branch at which point *Nakumatt* Supermarket brought the seizure notice to the Applicant's attention as it was in relation to *Dunhill* cigarettes manufactured by the Applicant. According to the Applicant, it was impossible to tell the reason for the seizure notice on the face of the notice, hence the Applicant arranged for a meeting with the Public Health officials to discuss the issue. During meetings held on 31st January 2013 and 3rd April 2013 the Public Health officials clarified that the reason for the enforcement was due to the inclusion of pack inserts in the *Dunhill* cigarette packs and argued that pack inserts were deemed to be promotional leaflets and that they were littered all over the city.

77. Although the Applicant took the view that the pack inserts were designed to inform adult consumers (who had already made the decision to consume the *Dunhill* brand and had already purchased a pack of cigarettes) on product use and that the littering of the pack inserts was an unintended consequence that was not contemplated by the Applicant, on 3rd April 2013, the Applicant and the Public Health officials reached an amicable settlement in which the Applicant agreed not to print any more pack inserts going forward and the Public Health Officials allowed the Applicant to deplete the current stock of already made products with pack inserts by 31st May 2013 and did not seize any product from *Nakumatt* Supermarket or undertake any other seizure of *Dunhill* cigarettes or any other of the Applicant's brands. However, as the Public Health Officers did not raise any issue with the instructions and wording printed on the *Dunhill Switch* Pack, the Applicant assumed that the said pack complied with the provisions of the ***Tobacco Control Act***, 2007 and legitimately expected that there would be no further issue raised in respect of the said pack under the said Act.

78. However, on 26th January 2015, more than two years since the Applicant began manufacturing and distributing its *Dunhill Switch* Cigarettes in Kenya, the Applicant received a demand from the Director of Medical Services at the Ministry of Health (the Respondent herein) claiming that it had come to his attention that the Applicant is currently doing a promotion of *Dunhill* Cigarettes in contravention of s.23 and s.25 of the ***Tobacco Control Act***, 2007 and claimed that certain words printed on the cigarette packs and cigarette sticks amount to promotional information deliberately developed for purposes of providing false, misleading and deceptive information to members of the public and was likely to create an erroneous impression about the characteristics, health effects, health hazards or social effects of *Dunhill* tobacco. No explanation whatsoever was given as to why the Respondent had formed the view that the words complained of were false, misleading or gave deceptive information to members of the public. The letter gave the Applicant a thirty-day deadline to ensure that there was no circulation of the Applicant's *Dunhill Switch* brand in the market. As the letter was only received by the Applicant on 26th January 2015, nearly 15 days after it was written, this effectively gave the Applicant only 15 days to comply with the letter.

79. In response the Applicant wrote to the Respondent on 28th January 2015 pointing out the fact that the demand was only received on 26th January 2015 and requesting for time to respond to the issues raised in the letter; however no response was received from the Respondent. The Applicant's further efforts to

elicit a response from the Respondent were unsuccessful.

80. In other words, the Applicant contended that the Respondent had already arrived at a decision which decision they notified the Applicant to implement without the Applicant being afforded a hearing.

81. The Respondent on the other hand retorted that over the years since the Act came into force the ex-parte applicant as a key industry player has always been made aware of its obligations and in which some level of voluntary compliance has been achieved in the sense that the industry stakeholders have complied with the health warning messages on tobacco products amongst others. Although the Act clearly established offences as per sections 22(1), 23(1),25(1) which the ex-parte applicants were expected to comply with and which they offended, the respondent in good faith and in enforcing the provisions of the Act accorded the ex-parte applicant an opportunity to be heard and gave them a notification and a grace period of at least 30 days to act accordingly. Upon receipt of the letter, the ex-parte applicant met with the respondent through two of it's legal officers and two other MOH officials. They also later sought a meeting with the respondent who in a letter dated 5th February 2015 expressed willingness to meet them. They later demanded a written undertaking from the respondent that the notice would not be enforced to no avail as the same would amount to an illegality. The respondent therefore submitted that the rules of natural justice were duly accorded to the ex-parte applicant.

82. In other words the Respondent contends that its action subsequent to the impugned decision amounted to compliance with the rules of natural justice. This position, the applicant contested arguing that the Respondent only agreed to meet the Applicant's representatives after the decision was issued and the Applicant was never accorded any opportunity to meet with the Respondent before the decision was issued and even then offered no explanation as to the basis upon which it is claimed that the words complained of are false or misleading.

83. It is admitted that the Applicant's products were already in the market. Whether the licensing was by KRA and KEBS in line with the provisions of the ***Customs & Excise Act*** is not the issue. The issue is that the Applicant was entitled to fair administrative action. I therefore associate myself with the position in **Orion East Africa Limited vs. The Permanent Secretary Ministry of Agriculture & Another [2012] eKLR** that once [products] are licensed, the licence holder has a legitimate expectation that it will distribute and market its product without unlawful interference from the State and that the right to fair administrative action is intended to protect the individual from unreasonable administrative action.

84. This discourse brings me to what constitutes compliance with the rules of natural justice. In **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, **Lord Mustill** held:

> **"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."**

85. Similarly, in **Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E** it was held that the commissioners:

> **"…must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."**

86. It is true that where a person is offered an opportunity of being heard and fails to utilise the same he cannot be heard to complain that he was never heard. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

> **"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point**

that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

87. However, it is clear that by the time the Respondent had a meeting with the Applicant, a decision had already been made and the time for compliance was running. From the contents of the letter it is clear that by the time the said meeting was held, the Respondent had to all intents and purposes not only made findings but even arrived at its recommendations which were to be implemented by the Applicant. In my view a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."

88. Dealing specifically with Article 47 of the Constitution it was held in **Geothermal Development Company Limited vs. Attorney General & 3 Others (2013) eKLR** that:

"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board***[2005] 4 IR 217).** Hilary Delany **in his book,** *Judicial Review of Administrative Action***, *Thomson Reuters 2nd edition, at page 272,* notes that, '*Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision*'…Article47 enshrines the right of every person to fair administrative action. Article 232enunciates various values and principles of public service including '*(c) responsive, prompt, effective, impartial and equitable provision of services' and '(f) transparency and provision to the public of timely, accurate information*'…Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable**

consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* **[1994] 2 IR 439)…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See**Charkaoui v Canada***[2007] SCC 9,** *Alberta Workers' Compensation Board v Alberta Appeals Commission (***2005) 258 DLR (4th), 29, 55and***Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).***"**

89. The importance of fair administrative action as a Constitutional right appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

90. The Respondent seems to suggest that since the Applicant knew what it was supposed to do there was no need for further notification. This notion has been disabused several times by this Court with the *locus classicus* in this jurisdiction being the case of **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a

loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*." [Emphasis mine].

91. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

92. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

93. It follows that the mere fact that the Respondent was of the view that the Applicant knew or ought to have known the legal position did not relieve it from the constitutional obligation to act fairly. It is therefore clear that even if the *ex parte* applicant was duly notified of the findings by the Respondent such notification was unprocedural and did not lend itself to a fair hearing. It follows that the decision made by the Respondent was null and void and cannot be permitted to stand.

Order

94. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

(1) An Order of Certiorari removing into this Court, for purposes of it being quashed, the decision and order of the Director of Medical Services dated 13th January 2015 wherein he demanded that the Applicant should stop forthwith the circulation of *Dunhill Switch* packs or any other cigarette packs containing the words "Crush the Capsule", "Switch the experience", "Refresh the taste", "Switch" and "Refreshing twist" and to cease and desist from further printing of the said words on its *Dunhill Switch* packs which decision is hereby quashed.

(2) An Order of Prohibition prohibiting the Director of Medical Services from demanding the removal from the Kenyan market of *Dunhill Switch* packs or any other cigarette packs which have the words "Crush the Capsule", "Switch the experience", "Refresh the taste", "Switch" and "Refreshing twist" printed on the packs unless and until the Respondent affords a hearing on the issue to the Applicant.

(3) The costs of this application are awarded to the Applicant.

95. Orders accordingly.

Dated at Nairobi this 17th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odhiambo for the Respondent

Cc Mutisya