



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JR MISC. APPLICATION NO. 39 OF 2013

**IN THE MATTER OF: THE FOOD, DRUGS AND CHEMICAL SUBSTANCES ACT
CAP 254 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF: THE STANDARDS ACT CAP 496 (MISCELLANEOUS
AMENDMENTS 2002 NO. 2) ACT OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF: THE SEIZURE NOTICE DATED 14TH MAY, 2013 AGAINST
M/V KYW 846 OWNER MUYA MAILU KAMENE AT GICHEHA FARMS LIMITED
ZIWANI ESTATE TAVETA**

AND

MUYA MAILU KAMENE.....APPLICANT

VERSUS

1. THE KENYA BUREAU OF STANDARDS

2. DISTRICT PUBLIC HEALTH OFFICER

TAVETA.....RESPONDENTS

GICHEHA FARMS LIMITED.....INTERESTED PARTY

RULING

1. In a Notice of Motion dated 12th July, 2013 and filed on 13th July, 2013, the ex parte Applicant Muya Mailu Kamene sought –

(1) an order of certiorari to issue and remove to this court

for purpose being quashed the Respondents' decisions contained in the seizure notices issued on 7th May, 2013, and on 14th May, 2013 by the Respondent herein against the Applicant's motor vehicle KYW 840, now stationary at Gicheha Farms premises at Ziواني Estate Taita Taveta;

(2) an order of mandamus to issue to compel the Respondents to release and or hand over possession of motor vehicle KYW 840 to the owner Muya Mailu Kamene the Applicant herein;

(3) an order of prohibition prohibiting the impounding, seizure, detention or continued withholding of the Applicant's motor vehicle KYW 840 by the Respondents and the Interested Party.

2. The application was supported by the Statutory Statement dated 2nd July, 2013 and the Affidavit Verifying the Facts of Muya Mailu Kamene sworn on 2nd July, 2013 attached to the Chamber Summons for leave to commence these proceedings and dated 2nd July, 2013.

3. The facts are not in dispute. The Applicant bought three hundred bags of maize from the Interested Party Gicheha Farms Limited on 20th March, 2013 packed in 90kg bags and paid a sum of Kshs. 750,000/= and was issued with a receipt No. 9847 on that date. The Applicant says in his Affidavit Verifying the Facts that the maize purchase was for re-sale to Mombasa Maize Millers Limited who upon delivery of the consignment tested it, and found it unfit for human consumption being infected with Aflatoxin disease. The Applicant says that he returned the maize to the Interested Party where the First and Second Respondents took samples for testing at their laboratories, and established that the maize was indeed infected with Aflatoxin disease and proceeded to issue a Notice of Seizure in terms of Section 14(h) of the Standards Act (Cap 496, Laws of Kenya). The Notice refers to seizure of 300 bags of 90 kgs each. The Notice is dated 7th May, 2013.

4. A Further Notice entitled "**Seizure Form "B"**" was issued on 14th May, 2013 under Section 30(10) (a) (which does not exist), but rather 30(1)(e) of the Food, Drugs and Chemical Substances Act, (Cap 254, Laws of Kenya), which refers to seizure of motor vehicle KYW 840, but below under "Details of articles seized with quantity and/or membership **"DRY MAIZE grains 300 bags x 90KGS"**". This is in conformity with definition of "articles" under the above Act.

"Article" includes –

(a) any food, drug, cosmetic, device or chemical substance and any labelling or advertising material in respect thereof;

(b) anything used for the preparation, preservation, packing or storing of any food, drug, cosmetic device or chemical substance.

5. When the two seizure notices are read together, they refer to one article, the 300 bags of dry maize of 90 kg each, and not motor vehicle KYW 840.

6. The above facts are consistent with the Affidavit of Musa Saleri the officer in charge of Taveta office of the **Kenya Bureau of Standards** the First Respondent, herein. This deponent avers that he is the person who sampled 25 bags of maize randomly and had them submitted to the **Kenya Bureau of Standards** for analysis, and that when the results came back, the Standard Bureau found that the maize failed to meet the parameters of **(i) Aflatoxin (ii) Rotten and diseased and (iii) totally defective.**

7. This deponent also avers that both the Applicant and the Interested Party were informed of the results of laboratory tests following which seizure notices were issued against the sale of rotten maize. This deponent denies seizure of the Applicant's lorry KYW 840. He terms the application herein as misconceived, incompetent, bad in law and an abuse of the court process and that the same should be dismissed with costs.

8. The Replying Affidavit of Robert Mburu, the Interested Party's Operations Manager was in the same vein. He denied that the Interested Party ever sold the ex parte applicant any rotten maize. He confirmed that the Interested Party had sold to the purchaser 300 bags of maize of 90 kg each, that the ex parte Applicant returned 21 days later with maize packed in bags different from the branded bags used by the Interested Party, and blamed the ex parte Applicant for spreading false information that the Interested

Party was selling rotten maize to the millers and the public.

9. The Interested Party had therefore caused tests to be carried out on the stocks of maize from which it had sold the maize to the ex parte Applicant, and found that its stocks were clean. It had therefore rejected the ex parte Applicant's claim to return the maize after 21 days following the sale. The Interested Party therefore urged the court to dismiss the application with costs, and award the Interested Party damages at the rate of Kshs. 1000/= per day for watching over the ex parte Applicant's motor vehicle.

10. In addition to the basic pleadings aforesaid counsel for the Applicant and the First Respondent each filed written submissions. The Applicant's counsel's submissions dated 31st August, 2016 were filed on 1st September, 2016. The submissions of counsel for the First Respondent dated 19th September, 2016 were filed on 21st September, 2016 together with the authorities referred to therein.

Analysis and Determination

11. The issue is whether there are grounds for issuing the three orders of certiorari, mandamus and prohibition.

12. It has been said that judicial review is not about merit, but process. This has been said in many cases. **“There is no doubt that the remedy of judicial review is different from an appeal because what judicial review deals with is the process by which the decision was arrived at but not the merits of the Board's decision. ‘BEJA MNYIKA BEJA vs. ELECTORAL COMMISSION OF KENYA (Nairobi High Court Misc. Application No. 1249 of 2007.’**

13. The ex parte Applicant seeks all the reliefs in judicial review. An order of **certiorari** will issue for lack or excess of jurisdiction, an order of **mandamus** will issue for failure to carry out a statutory duty, and an order of **prohibition** will issue for purporting to carry out an act in an illegal way or contrary to law.

14. None of these reliefs lie in this case. The Applicant bought maize from the Interested Party. The maize was allegedly rejected by the miller or millers to which it was to be ultimately sold. It was purportedly returned to the seller, the Interested Party after 21 days, and it was rejected. The matter was reported to the Respondents who inspected the maize, took out samples and had them tested. The tests showed that the maize was indeed affected with aflatoxin disease, and was rotten. Both Respondents issued seizure notices of the maize, to ensure that it did not get back into the market. It is upon these notices that the ex parte Applicant has based his claim to the three judicial review remedies or reliefs.

15. With respect, the ex parte Applicant has not demonstrated that either the Respondent had no legal authority to issue the seizure notices for the maize and ensure that tainted maize did not get into the market. The first Seizure Notice dated 7th May, 2013 was issued under the provisions of Section 4(1)(b) of the Standards Act, (Cap 496, Laws of Kenya) which says –

“S14. An Inspector may for the purposes of

this Act at all reasonable times –

(a) – (f)

(g) seize and detain for purposes of

testing any goods in respect of which he has reasonable cause to believe that an offence has been committed.”

16. And Section 30(1)(e) and (10) of the Food, Drugs and Chemical Substance Act, (Cap 254, Laws of

Kenya) says –

“30(1)an authorized officer may, at any hour reasonable for the proper performance of his duties –

(a) – (d)

(e) seize and detain for such time as may

be necessary any article by means of or in relation to which he believes any provision of this Act or any regulations made thereunder has been contravened;

(10) any article seized under this Act may at the option of an authorized officer be kept or stored in the premises where it was seized or may at the direction of an authorized officer be removed to any other premises where it was seized or may at the direction of an authorized officer be removed to any other proper place; and any person who removes, alters or interferes in any way with articles seized under this Act without the authority of an authorized officer shall be guilty of an offence; and

(7) where an authorized officer has seized an article under this Act and the owner thereof or the person in whose possession the article was at the time of seizure consents to the destruction thereof, the article may be destroyed or otherwise disposed of as the authorized officer may direct.”

Determination

17. The power of seizure is vested in both Respondents. It was duly exercised in accordance with the respective mandates under the **Standards Act** and the **Food, Drugs and Chemical Substances Act**, as cited above. There was no material as to what has happened to the articles (the maize) since seizure on 7th May, 2013. There is no material to show how it has been or was disposed of. Notwithstanding the absence of material on how the article (300 bags x 90kg bags of maize) has been disposed, the onus was upon the ex parte Applicant, to approach both the Respondents and the Interested Party on the disposal of the seized article – the 300 bags of 90kg each.

18. I have a deep suspicion that as a result of these proceedings, the First Respondent was not involved in terms of Section 14A(2) & (3) to have the goods destroyed by giving the ex parte Applicant fourteen day’s notice to give his views or consent to the destruction of the goods. The cost of such destruction may be borne by the ex parte Applicant.

19. In any event, and being aggrieved the ex parte Applicant ought to have proceeded to the Tribunal to challenge the findings of the Respondents. The Standards Tribunal is established under Section 16A of the Standards Act. The principle is that where a statute has established a procedure for settlement of disputes, that procedure ought to be followed. The Judicial Review application is not only premature but does not lie.

Conclusion

20. In my opinion, the Respondents acted within the parameters of their mandates under the **Standards Act**, and the **Food, Drugs and Chemical Substances Act** and there is no basis for the grant of any of the reliefs of certiorari, mandamus or prohibition. They are declined.

21. As for the claim of Kshs. 1,000/= per day for looking after the ex parte Applicant’s lorry, that is a matter for the civil court and evidence to support such a claim and not a judicial review court.

22. For all those reasons the ex parte Applicant’s Notice of Motion dated 12th July, 2013 and filed on 15th July, 2013 is dismissed with a direction that each party bears its own costs.

Dated, Signed and Delivered at Mombasa this 17th day of November, 2016.

M. J. ANYARA EMUKULE. MBS

JUDGE

In the presence of:

No Appearance for Applicant

No Appearance for Respondents

Mr. Kaunda Court Assistant