REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 265 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF MANDAMUS AGAINST THE KENYA BUREAU OF STANDARDS

AND

IN THE MATTER OF STANDARDS ACT (CAP 496)

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, OF 2015

AND

IN THE MATTER OF THE STANDARDIZATION MARKS (PERMITS AND FEES) REGULATIONS

AND

IN THE MATTER OF RENEWAL OF KENYA BUREAU OF STANDARDS PERMIT FOR THE YEAR 2016

BETWEEN

REPUBLIC…….....…….APPLICANT

AND

KENYA BUREAU OF STANDARDS.....RESPONDENT

EXPARTE: MOUNTAIN SLOPES COMMERCIAL SERVICES LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion filed herein on 21st June, 2016, the *ex parte* applicant herein, **Mountain Slopes Commercial Services Limited,** seeks the following orders:

1. That an order of Certiorari be granted to call up to this honourable court and quash the decision of the letter dated 23rd May, 2016 from the Respondents, Kenya Bureau of Standards (KEBS) on the Laboratory Test Report done on the Opaque Beers from the Ex parte Applicant's factory.

2. That an Order of Mandamus be granted to compel the Respondent, itself and/or its agents and/or servants to renew the Ex parte Applicant's permit for the year 2016 to manufacture excisable goods in the nature of opaque beer.

3. That costs of this Application be provided for.

4. Such further and other relief that the Honourable Court may deem just and expedient to grant.

Ex Parte Applicant's Case

2. According to the applicant, it has been carrying out its licensed business in the nature of manufacturing opaque beer by name King Master since the year 2009 during which period it has fully complied with the licensing requirements such as taking out business permits, Alcoholic Drink Licence and licence under the ***Food, Drugs and Chemicals Substance Act, (Food Hygiene) Regulations***, to sell, prepare, pack, store and display the Alcoholic beverage. It was averred that the company's factory premises was inspected by a Public Health Officer, and the premises found to meet the minimum requirements outlined under the ***Food, Drugs and Chemical substance Act***, and accordingly cleared for licencing, 2016 by the Ministry of Public Health and Sanitation. In addition, the applicant has filed the relevant tax returns, and holds a valid tax compliance certificate from the Kenya Revenue Authority and its products were tested and a certificate of analysis issued by the Ministry of Health indicating that the samples complied with the Kenyan standards on the tested parameters.

3. It was also averred that the applicant complied with the Environmental Impact Assessment & Audit Regulations and was issued with an Impact Assessment License for the objective of construction of a development of a Small-Scale Brewery by National Environment Management Authority (NEMA).

4. According to the applicant, on 6th February 2016, it made an application for renewal of the liquor licence to the Embu County Government which application was responded to vide a letter dated 10th February 2016. The said response was to the effect that the County Government of Embu was not in a position to issue the company with the liquor licence owing to the fact that there was an ongoing case in court challenging the implementation of ***Embu County Alcoholic Control Act***. In the said letter the director of Trade and Industrialization noted that the applicant had been licenced to manufacture and sell liquor by NACADA in the year 2013 and that the applicant was legally mandated to continue operating its business per section 16(4) of the ***Embu County Alcoholic Drinks Control Act 2014*** until such a time that its Application for renewal of the licence shall be granted.

5. It was averred by the applicant that on 27th February, 2015, it paid for the renewal of the License for Manufacture of Excisable Goods for the year 2015 though the same was never issued. However it averred that the Respondent by statute has the powers to issue, suspend and/or cancel any permit issued by itself and there is no provision in law allowing it to delegate such powers to strangers or other bodies as to do so, amounts to acting ultra-vires. According to it, whereas section 10A of the ***Standards Act*** provides for reasons for non-issuance or cancellation of a permit, the approval by Alcohol Inter Agency Committee is not a statutory requirement for renewal of the ex parte Applicant's Permit. It was therefore contended that the Respondent's decision to delegate its powers to the Alcohol Inter Agency Committee is in itself *ultra vires*, null and void, unlawful, in bad faith, discriminative, unprocedurally improper and an abuse of office.

6. The applicant reiterated that its goods in the nature of opaque beer have always complied with the required standards and it has all through met other operational requirements and that its permit has never before been cancelled, suspended or refused to be renewed except for the year 2016. It re-asserted that

there is no provision in the Act or in law which requires it to seek the approval of the purported Alcohol Inter-Agency Committee and other regulatory institutions as directed by the Respondent and that in exercising its discretion, the Respondent must take into account the said provision to enhance procedural fairness and ensure that an opportunity of a hearing is afforded to the persons who are likely to be affected by the administrative decision. However as the procedure as provided for in the ***Standards Act*** was not adhered to, this offends the clear element of fair hearing as envisaged under Article 50 of the Constitution of Kenya.

7. The applicant's case was that it is unreasonable for the Respondent to decline to renew its permit at the behest of strangers and much worse without inviting the Applicant to give its position on the same. In its view, since the Respondent's decision was clearly an administrative action as contemplated in section 4(1)(2) and (3) of the ***Fair Administrative Act***, the Respondent was therefore under a constitutional and statutory duty to ensure that its actions were expeditious, efficient, lawful, reasonable and procedurally fair. It averred that since procedural fairness requires that a person who is likely to be affected by a decision be afforded an opportunity of being heard before decisions adversely affecting their interest is taken, it is thus a constitutional and statutory requirement that the Respondent ought to have given reasons as envisaged by statute. It was averred that as the Applicant had complied with all standard obligations including making an application to renew its permit for the year 2016, it had and still has a legitimate expectation that the said Permit ought to be renewed to enable it resume its normal operations. Further, the employees of the ex parte Applicant have now been deprived of their only source of livelihood by the closure of its operations.

8. The applicant asserted that based on the documents in its possession, it had reasonable grounds to believe, and believed that it had fully complied with all operational and licensing requirements except the Kenya Bureau of Standards Permit whose renewal it applied for renewal on behalf the Company in February, 2016 though its spirited attempts to have the said Permit from the Respondent failed.

9. It was disclosed that the applicant, as required by the law submitted samples of opaque beer drawn from its factory to the Respondent's officers which samples were tested in accordance with the requirements of EAS 61 East African Standard specification for opaque beer and having examined the said samples the beer was found fit for human consumption.

10. To the applicant, the said non-issuance of the said Permit paralysed the company's operations as police officers closed down the business for lack of current Permit as a result of which the applicant was caused to incur huge financial losses and loss of employment to the staff. Since the applicant had always complied with its Standards' obligations, the Respondent had no justification in declining to renew its Permit for the year 2016 yet the Respondent had not tendered any rational or satisfactory reason for failing to renew the same and failed to communicate in writing the reasons for refusal or termination and therefore the ex parte Applicant is unable to move to the appeals Tribunal as required under section 11 of the ***Standards Act***.

11. It was the applicant's case that the legality of the Respondent's action of declining and or refusing to renew the ex-parte Applicant's Permit has to be looked at in terms of the provisions of the ***Standard Act, Cap 496*** and the ***Standardization Marks (Permits and Fees) Regulations*** and yet the procedure as provided for in the ***Standards Act*** was not adhered to and therefore this offends the clear element of fair hearing as envisaged under Article 50 of the Constitution of Kenya.

12. In a rejoinder the applicant averred it had fully complied with all the licensing requirements and the company's product, King Master opaque beer is certified as strictly conforming with the Kenya Bureau of Standards opaque beers specification-**KS 05- 1041: Kenya Standard Specification for Opaque Beer**. It was averred that the Respondent vide a letter dated 23rd May, 2016, refused to renew the ex parte Applicant's permit to manufacture excisable goods in the nature of opaque beer without giving any reasons but instead, the was advised to seek approval from the Alcohol Inter- Agency Committee and other regulatory institutions. In its view, it is misconceived for the Respondent vide its Replying Affidavit to base its decision for non-renewal of the said permit on a new issue being that the samples failed to meet the parameters of gravity of 0.9929 instead of falling within the range of 1.005 to 1.045. According

to the applicant, the record for the previous years shows that the respondent had been renewing the ex parte Applicant's permit within the same range of about 0.9929 and below and never at any time declined to do so except in the year 2016.

13. To the applicant, the company's product, Kingmaster opaque beer is certified as strictly conforming with the Kenya Bureau of Standards opaque beers specification KS 05- 1041: Kenya Standard Specification for Opaque Beer and that the respondent proceeded to issue the ex parte applicant with the said permit for the year 2010 based on a parameter of 0.9836 as to specific gravity test conducted. The requirements as indicated ranging between 1.015-1.02 and the test method number reference KS 05-610.It was averred that a further test and analysis of the ex parte applicant's samples of opaque beer was conducted previously and the respondent proceeded to issue the Applicant with the said permit for the year 2010. To the applicant therefore, the respondent cannot refuse to issue the permit based on the current parameters of gravity yet the said respondent issued permits to the ex parte applicant in the years 2009, 2010, 2011, 2012, 2013, 2014 and 2015 without considering gravity at any specific parameter. In its view, the respondent has been issuing the ex parte applicant with the said permit based on a parameter as to gravity ranging between 0.9331 to 0.992I in the previous years and copies of the relevant laboratory test reports issued by the respondent which is the statutory body empowered to promulgate and publish Standards submitted to the ex parte applicant.

14. The applicant contended that in the absence of any precise standard indicating that parameter level as to gravity ought to range between 1.005-1.045 to support the parameters as deposed in their letter dated 23rd May, 2016, the respondent cannot at this instance rely on the current parameter yet it has been issuing the ex parte applicant with the said permit where the parameter as to gravity was less than the one of 0.9929 which is their point of contention.

15. It was the applicant's view that this the Court can adopt the previous parameters that the respondent has been using to issue the ex parte applicant with the said permit and which the ex parte applicant has always been relying on, based on this reliance the respondent can be estopped from relying on the current parameter of 0.9929 as the reason for non-renewal of the said permit.

16. The applicant took the position that if a party is made to believe in a certain state of facts and that party acts on those facts to his detriment and the other party stands by and does not stop him from so acting that other person is stopped from changing his stand. Further, if a man, either in express terms or by conduct makes a representation to another of the existence of a certain state of facts to the damage of him who so believe and acts the first is estopped from denying the existence of such state of facts. In this case it was contended that if a party has acted where fair inference can be drawn from his conduct that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction against the person who, on the face of his conduct, has acted on the view that the transaction was legal and that the principle applies even if the party whose conduct is in question was himself acting without the full knowledge or in error.

17. The applicant added that an equitable estoppel arises where one party makes to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it, and therefore the respondent can be estopped from asserting the parameter as to gravity as the ground for non-renewal of the ex parte applicant's permit. It was therefore averred that the respondent violated the ex parte applicant's legitimate expectation since a legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. Further it is a basic principle of fairness that legitimate expectations ought not to be thwarted, and that the protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in an administrative body dealing with the public.

18. The applicant averred that it wrote to the Government Chemist Department to seek an expert opinion on the suitability of the test results conducted by the respondent and undertook to submit samples of the opaque beer drawn from the ex parte applicant's factory to the Government Chemist for testing and

analysis and the Government Chemist Department through a letter dated 9th August, 2016 responded that gravity at 20% cannot be a requirement for fitness of human consumption as far as alcoholic drinks are concerned. According to the applicant, an analysis on the samples of opaque beer drawn from the ex parte applicant's factory and submitted to the Government Chemists Department was conducted and a Certificate of analysis issued to that effect, where various tests as to the parameters required to be in compliance with the Kenyan Standard were conducted and the parameters for specific gravity at 20% was found to have complied in the range of 1.022. Further, the certificate of analysis indicated that the opaque beer (king master brand) complied with the Kenyan specifications for opaque beers and was also fit for human consumption. It was contended that the respondent failed to adhere to the standard tool- Kenya Standard Specification for opaque beers KS 05-1041 which is the required tool used to test alcoholic beverages manufactured and sold within Kenya but instead used the EAS 61 East African Standard specification for opaque beer a tool meant to test alcoholic beverages for export. It was averred that a certificate of analysis purporting to be signed by a public analyst shall be accepted as *prima facie* evidence of the facts stated therein provided that the party against whom it is produced may require the attendance of the public analyst for the purposes of cross-examination, and that no such certificate of a public analyst shall be received in evidence unless the party intending to produce it has, before the trial given to the party against whom it is intended to be produced, reasonable notice of such intention together with a copy of the certificate.

19. It was submitted on behalf of the applicant that the Respondent, Kenya Bureau of Standards, (KEBS) is a statutory body established under the provisions of the ***Standards Act***, Cap 496, Laws of Kenya. It is charged with the responsibility of *inter alia*, promoting standardization in industry and commerce and to provide facilities for the examination and testing of commodities and the manner in which they may be manufactured, produced, processed or treated and that its functions include setting standards in the manufacture and trade of consumable commodities within the republic and enforcing compliance to the said standards.

20. It was submitted that the Respondent having issued the ex parte Applicant with the permit for all the previous years regardless of the parameters, its actions were unprecedented and unlawful and the same amounted to unfair administrative action which was and is in blatant contravention of Article 47 of the Constitution and a breach of the Applicant's legitimate expectations that its permit would be renewed after full inspection and therefore failure to renew the same, the Respondent would furnish satisfactory reasons thereof and only after hearing the Ex parte Applicant.

21. To the applicant, the manner in which the Respondent declined to renew the ex parte Applicant's permit is clandestine and in utter breach of rules of natural justice, being the right to be heard. The Respondent acted unreasonably, unfairly and in breach of Article 47 of the Constitution in failing to renew the permit without taking into account the licensing and certification of the Applicant's goods given by the various government agencies including the Respondent and also approval by the Kenya Revenue Authority. This has posed a threat and uncertainty of the licenses and certifications already issued to the Applicant.

22. It was submitted that as required by statute the Respondent has not tendered any justifiable reasons for refusing to renew the ex parte Applicant's permit and as such the action is arbitrarily, unfair and it is in contravention of Article 27 of the Constitution in particular Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The actions by the Respondents to unilaterally issue an unlawful decision goes against the very fabric of a society governed by the rule of law and it has denied the ex parte Applicant the benefit and protection of the law.

23. According to the applicant, the ***Standards Act*** empowers the Respondent to issue, renew, refuse to renew, cancel, or suspend a permit and there is no provision in statute that the ex parte Applicant must seek the Approval of Alcohol Inter Agency Committee before its permit is renewed. Therefore the actions of the Respondent violated the Applicant's legitimate expectations that it would continue enjoying the benefits of its permit. In support of this position the applicant relied on paragraph 79 of **Keroche Breweries Limited & 6 others vs. Attorney General & 10 others [2016] eKLR** for the holding that:

"On the issue of discretion Prof Sir William Wade in his Book Administrative Law has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism."

24. It was submitted that the Respondent's statutory mandate under the ***Standards Act*** is to ensure standardization in industry and commerce within Kenya and its functions are provided for under section 4.

25. It was submitted that the action by the Respondent to refuse to renew the ex parte Applicant's permit for the year 2016 is discriminative and capriciously arbitrarily and the court should intervene in the interest of justice for the purposes of quashing the said decision and also compel the Respondent to renew that the Applicant's permit as the Respondent had no basis whatsoever in declining to renew the Applicant's permit for the year 2016 and the reason that was tendered is not envisaged under Section 10A of the ***Standards Act***. To the applicant, the Respondent's failure to renew the Applicant's permit is a clear breach of the statutory provisions as well as the rules of natural justice and the procedural rules laid down in the statute (***Standards Act***).

26. It was submitted that from the letter from the Respondent dated 23rd May, 2016 on Laboratory Test Report done on the Applicant's samples of Opaque Beer drawn from its plant, the decision to suspend or failure to renew the Permit to manufacture excisable goods in the nature of Opaque Beer came from the Alcohol Inter-Agency Committee and the Respondent was simply implementing the same and this view is supported by the fact that the non-renewal of the Permit was to await the report of the Alcohol Inter-agency Committee rather than the evaluation by the Respondent itself. In the applicant's view, the letter was not written in the course of Respondent's normal exercise of its statutory mandate but the action was provoked by decisions of other parties.

27. According to the applicant, the Respondent's actions were unconstitutional and illegal and offended the provisions of the ***Fair Administrative Action Act, 2015*** which has elaborate provisions on the procedure to be followed by public bodies prior to taking administrative action that is likely to adversely affect the rights and fundamental freedoms of any person. Based on **Keroche Breweries Limited & 6**

Others vs. Attorney General & 10 Others (supra) it was submitted that the actions of the Respondent are unlawful as it did not comply with the provisions of the law or requirements of natural justice. In this respect the applicant relied on **R vs. Public Procurement And Administrative Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Ltd [2010] eKLR** and in **Anisminic vs. Foreign Comp. Comm. (H.L.) [1969] 147,** where it was held that:

> "**that an unreasonable decision is a nullity and the instances in which a tribunal's decision may be a nullity include failing to comply with requirements of natural justice, deciding on matters not remitted to a tribunal, taking into account irrelevant matters as well as failing to take into account relevant matters, all of which exist in this case."**

28. According to the applicant, failure to renew the permit is subject to section 10A of the ***Standards Act*** which requires that for the powers under section 10A to be exercised Kenya Bureau of Standards must be "satisfied" of the circumstances enumerated in subsections (a), (b) and (c) of the said section exist.

29. In this respect the applicant relied on **David Oloo Onyango v Attorney-General [1987] eKLR** and **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, and submitted that the decision by the Respondent itself is perverse and irrational, it is marred with legal deficiency. The Respondent's failure to consider its administrative mandate and rather opting to delegate its legal mandate to the Alcohol Inter Agency Committee is in itself in bad faith. It also relied on paragraphs 129 and 130 of **Keroche Breweries Limited & 6 others vs. Attorney General & 10 others [2016] eKLR** where this Court expressed itself as hereunder:

> **"In my view a proper consideration of a matter requires that the Tribunal considers all aspects of the case and all aspects of the case cannot be said to have been considered when the person against whom the complaint is preferred has not been called upon to give his or her version of the issues in question. As was held by Emukule, J in Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478:**
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> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."**
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> **"In my view, an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. Further an administrative action cannot be said to be procedurally fair where a decision is arrived at based on an opinion formed as a result of the consideration of the version of only one side since by a consideration of one side one cannot be said to have felt certain about the truth of the matter in dispute. Where one's right or fundamental freedom is likely to be affected by an administrative action, that person has a right to be given written reason for the action. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 where it was held:**
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> **"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of**

the decisions."

30. At paragraph 131 of the said decision, the Court held:

> **"In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable. It was in appreciation of this that judicial review was recognised in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 as the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness."**

31. To the applicant, where a public body fails in this mandate then judicial review is the best enforcer in ensuring that the law is observed. It is for this reason that the applicant seeks an order of Mandamus against the Respondent since their actions are contrary to what is expected of their statutory duty. It was submitted that the said actions amounted to a gross violation of their legitimated expectations that the Permit was not supposed to be withdrawn without first affording the Applicant an opportunity to be heard.

32. The applicant also appreciated the provisions of section 11 of the ***Standards Act*** which provides that:

> ***Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being him, appeal in writing to the Tribunal.***

33. It was however its view that it was unable to move to the Appeals Tribunal as required thereunder because, although the Appellate route is one which is provided for by statute and which should in fact guide the Applicant, in the present case the Applicant not only challenges the decision of the Respondent in failing to renew its permit but also the directive of the Alcohol Inter Agency Committee upon which the Respondent bases its decision for non-renewal of the Applicant's Permit. To the applicant, section 11 aforesaid provides the remedy which is supposed to be sought by the Applicant, but the Applicant feels that the remedy is less convenient, beneficial and effectual due to the conduct of the Respondent in arriving at their decision for non-renewal of the ex parte Applicant's Permit. It was therefore its view that the only relief which can best address its plight is a Constitutional relief and Judicial Review sought is the most powerful enforcer of constitutionalism. In this respect reliance was sought from **Keroche Breweries Limited & 6 others vs Attorney General & 10 others [2016] eKLR** at paragraph 76 where the Court cited with approval the ***Court of Appeal of Trinidad and Tobago*** in the case ***Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004*** and held that:

> **"I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. Therefore confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In other words the Court ought to consider whether the alternative remedy is less convenient, beneficial and effectual. It must be appreciated that judicial review has become the most**

powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43."

34. It was submitted that it is clear that the Respondent herein in the exercise of its discretion breached the duty to act fairly whereas the rule of law required it to act fairly and the applicant relied on **Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531** where it was held that:

"**The rule of law in its wider sense has procedural and substantive effect...Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law enforces minimum standards of fairness, both substantive and procedural."**

35. The Respondent, it was submitted in failing to act fairly and disregarding statutory provisions as clearly set out is enough to enable this Court grant the judicial review order of Mandamus to compel the Respondent to renew its permit. The applicant relied on the holding in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543.**

36. It further relied on **Haji Yusuf Mutenda & 2 Others vs. Haji Zakaliya Muguyiasoka & Others [1957] E.A. 391** that**:**

"In cases where there is a duty of a public or quasi-public or nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest, the court has jurisdiction to grant a mandamus to compel the fulfilment."

37. It was the applicant's position that the Respondent had a duty to fulfil its mandate as required by law. It is also in the interest of justice and the duty of this Court to safeguard the rule of law by promoting public interest, guiding public bodies and ensure that they act lawful, ensuring that they are accountable to the law and not above it. Further, the Court also has to ensure that the rights and interests of those affected by the exercise of a public authority or power are protected and upheld.

38. The applicant asserted that it has no other remedy open to it other than proceeding by way of an order of Mandamus to compel the Respondent to renew the ex parte Applicant's permit to manufacture goods in the nature of opaque beer for the year 2016.

39. As to whether the Respondent can be estopped from their action of failing to renew the ex parte applicant's permit for the year 2016 based on the parameters as to gravity, the applicant relied on **Maritime Electric Company Ltd vs. General Dairies QB 27** in which it was held that:

"The underlying principle is that the crown cannot be estopped from exercising its powers, whether given in a statute or common law when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to the private individual...it can however be estopped when it is not properly exercising its powers but is misusing them and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without countervailing benefit to the public."

40. The applicant's case was based on the Respondent's refusal to renew the ex parte applicant's permit for the year 2016 yet prior to 2016 they had been renewing the ex parte applicant's permit to manufacture excisable goods in the nature of opaque beer as a result of which the respondent lulled the ex parte applicant into a sense of security that the parameter as to gravity now in question would neither be demanded nor be a ground for non-renewal of the said permit. Whereas in 2016, the said permit was suspended, no parameter as to specific gravity was claimed by the respondent in their letter dated 23rd May, 2016 which stated that the ex parte applicant had to seek approval from the Alcohol Inter Agency Committee before the said permit was renewed. No specific range as to gravity was claimed from the ex parte applicant whether deliberately or inadvertently. It was averred that by the time the Respondent sent its letter denying the ex parte applicant's permit on 23rd November, 2016, the ex parte applicant had been carrying on its business of manufacturing excisable goods in the nature of opaque beer as usual and in

compliance with every requirement set by the respondent with regards to alcoholic beverages. The failure by the respondent not regularly monitoring its said parameters as to gravity with a view to determining the range at which it should be maintained, the Respondent placed the ex parte applicant in an unenviable position where the ex parte applicant is being exposed to shouldering the burden which legally ought not to have been shouldered by it. On legitimate expectation the applicant relied on **Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 2 Others, Constitutional Petition No. 359 of 2013**, **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237, Council of Civil Service Unions and Others vs. Minister for the Civil Service (1985) AC 374 (408-409)**. It also relied on **Muti vs. Kenya Finance Corporation & Another [2004] 2 EALR 182,** in which **Ochieng, J** held thus:

> **"If a man, either in express terms or by conduct makes a representation to another of the existence of a certain state of facts to the damage of him who so believe and acts the first is estopped from denying the existence of such state of facts."**

41.On costs, it was submitted that the continued closure of the ex parte Applicant's factory has deprived the Applicant of its' source of livelihood as well as its' employees and continues to accrue huge financial losses and unless costs are awarded the ex parte Applicant stands to lose a great deal.

Respondent's Case

42. In response to the application, the Respondent averred that the respondent is a statutory body established under the provisions of ***Standard Act*** Cap 496 Laws of Kenya with the mandate, *inter alia,* to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated.

43. The Respondent affirmed that the ex parte applicant herein applied to the respondent for a permit to produce alcoholic beverages in the nature of Opaque beer. It however averred that licensing of manufacturers of alcoholic beverages is a multi-agency function that does not begin and end at the respondent, but involves meeting other requirements regulated and supervised by other bodies such as the National Environmental Management Authority (NEMA), Public Health Departments and National Authority for the Campaign Against Alcoholic and Drug Abuse (NACADA) among others which bodies are in turn regulated by different laws, rules and regulations which set out their mandates and specify different requirements to be met by a party before it is licensed to manufacture alcoholic beverages. It was explained that the requirements for alcoholic drinks manufacturers are detailed in the Kenya Standards known as Ksh. 1499:2012 which is the basis for certification of all alcoholic drink manufacturers.

44. To the Respondent, following the ex parte applicant's application for permit to manufacturer alcoholic beverages in the nature of opaque beer, the officers from the respondent visited the premises of the ex parte applicant and drew samples for testing. By way of a letter dated 23rd May, 2016, the respondent advised the ex parte applicant that it had carried outs tests on the various samples that were drawn from the applicant's premises and attached to that letter test certificates. It averred that for certification to be done, a sample must comply with the requirements of regulations KEEAS 61:2013, the East African Standard Specification for Opaque Beers. However, as per the report referenced KEBS/TES/5795/f/16 dated 3/3/2016, sample BS201605795 failed with respect to specific gravity at 20ºC where the requirement is a range of 1.005 to 1.45 yet the ex parte applicant's sample scored 0.9929 and having failed on the technical requirements, the respondent was under no obligation to issue any permits to the ex parte applicant.

45. To the Respondent, in a judicial review application the court can only compel performance of a statutory obligation but cannot force a particular result where the statutory obligation has been performed. In any case, it was contended, this Court is not technically endowed to overturn the laboratory tests conducted by the respondent on the *ex parte* applicant's sample and hold that they meet the requirement for certification.

46. It was disclosed that the respondent took liberty in its letter dated 23rd May, 2016 advised the *ex parte* applicant that besides the technical test, there were other regulatory requirements to be complied with and which the *ex parte* Applicant had not complied. According to the Respondent, even if the tests turned in the applicants' favour, the respondent would not be in a position to certify the *ex parte* applicant to manufacture opaque beer unless it complied with other regulatory and statutory requirements.

47. It was therefore the Respondent's case that the ex parte applicant had not proved compliance with the other statutory and regulatory requirements as the certificates annexed to the supporting affidavit either refer to entities different from the *ex parte* applicant or are way out-dated and stale.

48. It was submitted on behalf of the Respondent that under the ***Alcoholic Drinks Control Act***, No 4 of 2010, and the District Committee is tasked with the responsibility of Licensing or renewal of License to manufacture Alcoholic drinks. However, the Cabinet Secretary for Interior and Co-ordination of National Government vide Gazette Notice. 5069 appointed an Inter-Agency Taskforce for control of potable spirit and Combat of Illicit Brews tasked, among others, with the responsibility of undertaking a full audit of all alcoholic drinks, potable spirit and illicit brew in Kenya and the manufactures thereof and to inspect all the premises manufacturing alcoholic drinks and recommend measures of control. Through a public notice issued by the Kenya Revenue Authority, the Ex-parte Applicant were issued with a temporary license for the year 2015 to manufacture or import Alcoholic drinks of the nature of Opaque beer on an interim basis pending the conclusion of audit by Inter- Agency Taskforce for control of potable spirit and Combat of Illicit Brews. It was disclosed that the Inter- Agency Taskforce for control of potable spirit and Combat of Illicit Brews upon conclusion of its audit vide a report on Inspection of premises Manufacturing Alcoholic Drinks in Kenya produced in October, 2015 ordered 115 Alcohol manufacturing firms, with the Ex-Parte Applicants being one of them, to cease the manufacturing of alcoholic drinks with immediate effect.

49. According to the Respondent, before a License is issued by the District Alcoholic Drinks Regulation Committee the Applicant must submit their Application to the other regulatory bodies and upon satisfaction be issue with Certificates of compliance, such as Public Health Certificate, Certificate of compliance from National Environment Management Authority (NEMA), Kenya Bureau of Standards (KEBS) certificate of compliance with standards for manufacturing alcoholic drink, Certificate of compliance from National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA) and a license from the Inter-Agency Taskforce for control of potable spirit and Combat of Illicit Brews upon meeting the brewing standards set.

50. It was averred that the Respondent as mandated visited the Ex-parte Applicant's premises and took samples for testing which were tested in accordance with the requirements of KS EAS-61 East African Standard specification for opaque beer and a report dated 3rd March, 2016 compiled. The Ex-parte Applicants Application failed the parameter for specific gravity at 20?C as it was below the set range of 1.005-1.045 at 0.9929 which was communicated to the Ex-parte Applicant.

51. To the Respondent, it has no power or authority to issue licenses as the same is under the mandate of the Inter- Agency Taskforce for control of potable spirit and Combat of Illicit Brews which was clearly communicate to the Ex-parte Applicant vide the letter dated 23rd May, 2016. Accordingly, the Respondent has not made a decision on whether or not to License the ex-parte Applicant rather its role in the licensing process is on issuance of a certificate of compliance with standards for manufacturing alcoholic drinks set out. It was contended that the certificate of compliance with standards for manufacturing alcoholic drinks issued by the Respondent is upon testing of samples extracted from the manufacture's premises which test is a technical one and as such the prayers sought by the Ex-parte applicant cannot apply against the Respondent as the court cannot compel the Respondent to give a different result in the test as the same would amount to manipulation of results.

52. It was submitted that the Respondent followed the due procedure required of them under ***Standards Act*** (CAP 496) of the Laws of Kenya **with regards to testing**

53. According to the Respondent, the purpose of judicial review is to check that public bodies do not

exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large and in this case the Respondent carried out its task within the ambit of the law.

54. It was therefore submitted that since the licensing of manufacturers of alcoholic beverages is a multi-agency function and not solely based on the Respondent herein, under section 90 and section 116B of the ***Customs and Exercise Act***, Cap 472 of the Laws of Kenya, Kenya Revenue Authority mandates the commissioner to issue Licenses for manufacturing of exercisable goods. The ***National Authority for Campaign Against Alcohol and Drug Abuse Act***, 2012 on the other hand mandates NACADA to in collaboration with other lead agencies, facilitate and promote the monitoring and surveillance of national and international emerging trends and patterns in the production, manufacture, sale, consumption, trafficking, promotion of alcohol and drugs of abuse which involves issuing a certificate of compliance upon been certified that compliance with the set out rule of manufacturing of alcoholic beverages. The Respondent relied on Regulation 4 of The ***Alcoholic Drinks Control (Licensing) Regulations***, 2010.

55. It was submitted that alcohol and drug abuse is a real pandemic in Kenya destroying the lives of young Kenyans. In the recent past there has been a high number of death and hospitalization from consumption of illicit brew. The rampant manufacture, distribution, sale and consumption of illicit brew and the resultant deaths arising from such activities prompted the Cabinet Secretary for Interior and Co-ordination of National Government **Joseph Nkaissery** to form a task force to audit alcoholic drinks in the country as part of government's effort to eradicate dangerous liquor. The said Task Force draws its members from 12 agencies including NACADA, Anti-counterfeit Agency, Kenya Bureau of Standards, Kenya Revenue Authority, Public Health and Government Chemist, National Youth Service and National Police Service, Council of Governors, Office of the Attorney General, Interior ministry and National Intelligence Service. Its terms of reference are to:

a. undertake a full audit of all alcoholic drinks, potable spirits and illicit brews in the Kenyan market and the manufacturers thereof;

b. recommend the suspension and recalling of harmful potable spirits and alcoholic drinks in the Kenyan market;

c. recommend the suspension and recalling of counterfeit potable spirits and alcoholic drinks in the Kenyan market;

d. inspect all the premises manufacturing alcoholic drinks and recommend measures of control including the closure of production premises.

56. It was submitted that since the responsibility of licensing manufactures of Alcohol and Alcoholic Beverages is tasked on the established taskforce and as such any concerns on the same should be raised with them. According to the Respondent, the Ex-parte Applicant is being less than candid to this Court as it has failed to disclose that the Inter-agency Taskforce visited its premises and conducted inspection and vide a report published in October 2015 recommended the immediate cessation of manufacturing of Alcoholic drinks and revoked the Temporary license issued to it. Further the ex-parte Applicant has not established that the Respondent decision was *ultra vires*, illegal, unreasonable or in contravention of the rules of natural justice. To the contrary, the Respondent acted as mandated by the law and has not made any decision rejecting or approving the renewal of the Ex-parte Applicant and only advised them to seek approval from the Inter-agency Taskforce.

57. The Respondent relied on **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, and Volume 1(1), 4th Edition of *Halsburys Laws of England*** at page 116, Paragraph 59 and submitted that *it has not made any decision warranting the exercise of Judicial Review remedies. Whereas t*he ***Standards Act*** allows the Respondent to suspend a licence where it has reasonable belief that there is a violation of the Act or any other law, it was submitted that the Respondent has not communicated to the Ex-parte Applicants their desire to suspend the License and only communicated the results of the test on the samples collected at the Ex-Parte premises. Therefore the Ex-parte Applicant have not establish any breach, on the part of KEBS in conducting the test as required under EAS 61 East

African Standard Specification for opaque beer.

58. It was the Respondent's case that the orders sought cannot be granted against the Respondent since samples failed a technical requirement which test the Respondent has no control of. It relied on **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** and **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** and submitted that an order of *mandamus* is not an order of specific performance, like in a contract situation. A party in a judicial review seeking an order of *mandamus* must show the existence of a statutory duty conferred or invested by statute upon some person, body of persons or tribunal which such person, body of persons or tribunal has failed to perform. The Respondent are under no statutory obligation to produce results that are in favour of the Ex-parte Applicant rather their duty is to conduct test that are free and fair to ensure that the alcoholic drink manufactured meets the set standard. To them, the fact that the Government Chemist Department issued the Ex-parte applicant with a certificate of analysis is not sufficient reason to compel the Respondent to issue a certificate since the Government Chemist uses different parameters from those of the Respondent in conducting their duties and manufacturing involves mixing of various element under different conditions to produce the product intended. Failure to put the required amount of a substance can lead to different results. It contended that the mere fact that licenses were issued the previous years on their products does not guarantee that it would be issued the following year and that is the reason they are subjected to an application for renewal and periodic test. The Respondent had never expressly or impliedly assured the ex-parte applicant that there license would continue to be renewed regardless of complying with the set out requirements and in this respect relied on **Joel Nyabuto Omwenga & 2 Others vs. Independent Electoral & Boundaries Commission & Another [2013] eKLR** where the court stated that:

> **"…for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."**

59. According to the Respondent, the expectation given must be legitimate and relied on **HWR Wade C.F. Forsyth in *Administrative Law***, that:

> **"[i]t is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law."**

60. It was the Respondent's submissions that the Ex-parte Applicant expectation that they would always be issued with a license by the Respondent was not legitimate as the issuance of the license was subject to compliance with the statutory requirements and the tests set out. Further, the final decision of issuance of a License lies with the inter-agency taskforce which the Respondent advised the Ex-parte to consult and the prayers sought by the Applicant should be directed to the taskforce To the Respondent it acted within its mandate set out in the ***Standards Act*** in testing the ex-parte samples and premises to ensure that they met the standard specification required and in doing so, did not guarantee a result that would be favourable to the ex-parte applicant.

61. It was the Respondent's view, the prayers sought herein are not efficacious since it would amount to the court compelling the Respondent to produce a specific result to the test conducted as this Honourable court is not technically endowed to overturn laboratory test.

62. The Respondent therefore urged the Court to dismiss the application with costs to the Respondent.

Determinations

63. In my view, the matter before me revolves around the role of the Respondent in the licensing process with regard to the applicant's suit products and the question for determination is whether the Respondent has undertaken its said obligations as provided for under the law.

64. Section 10A of the ***Standards Act*** provides as follows:

> ***(1) The Bureau may where it is satisfied that the holder of a permit—***
>
> ***(a) has not complied with any condition specified therein; or***
>
> ***(b) has not manufactured any commodity to which the permit relates to the relevant Kenya Standard of approved specification, as the case may be; or***
>
> ***(c) has ceased to manufacture the commodity to which the permit relates, cancel, or suspend the operation of, a permit; and suspension under this subsection may be for such period, not exceeding one year, as the Bureau deems fit.***

65. The Respondent's functions are prescribed under section 4 of the ***Standards Act*** as hereunder:

> ***(a) to promote standardization in industry and commerce;***
>
> ***(b) to make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus, for the determination of their degree of accuracy by comparison with standards approved by the Minister on the recommendation of the Council, and for the issue of certificates in regard thereto;***
>
> ***(c) to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated;***
>
> ***(d) to control, in accordance with the provisions of this Act, the use of standardization marks and distinctive marks;***
>
> ***(e) to prepare, frame, modify or amend specifications and Codes of practice;***
>
> ***(f) to encourage or undertake educational work in connexion with standardization;***
>
> ***(g) to assist the Government or any local authority or other public body or any other person in the preparation and framing of any specifications or codes of practice;***
>
> ***(h) to provide for co-operation with the Government or the representatives of any industry or with any local authority or other public body or any other person, with a view to securing the adoption and practical application of standards;***
>
> ***(i) to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description.***

66. In this application the applicant seeks *inter alia* an order of *mandamus* compelling the Respondent to renew the ex parte Applicant's permit for the year 2016 to manufacture excisable goods in the nature of opaque beer.

67. In **Republic vs. Kenya National Examinations Council *ex parte* Gathengi & 8 Others Civil**

Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89* thus:

> ***"The order of mandamus is of 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 and 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."***

68. In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J.** said-

69. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** the Court itself, *inter alia*, as follows:

> **"*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature…In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…"**

70. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. In other words where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass.

71. Whereas the Court may compel the performance of the general duty where such duty exists, it will however not compel its performance in a particular manner This position was appreciated by the Court of Appeal in the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"*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..." [Emphasis added].

72. In this case a reading of the functions conferred upon the Respondent under section 4 of the Act does not confer upon it the power to renew the ex parte Applicant's permit. Accordingly, this Court cannot compel it to perform a duty not imposed on it. To do so would mount to the Court compelling the Respondent to act unlawfully yet an order of *mandamus* only compels the performance of a lawful obligation. In any case where the authority is exercising a discretion the Court cannot compel it to do so in a particular manner. Even if the Respondent had the power to issue the said permit, this Court could only compel it to exercise its discretion and consider the application for the renewal of the permit. Of course where such an order is issued and not complied with it may be concluded that the Respondent has no reason to decline the application in which event an order of *mandamus* my issue because where no reasons exist for not exercising discretion favourably or the reasons given are irrelevant, nothing stops the Court from issuing appropriate orders.

73. In this case Regulation 4 of The ***Alcoholic Drinks Control (Licensing) Regulations***, 2010 provides that:

(1) A person who wishes to manufacture or otherwise produce; sell, dispose of, or deal with; import or cause to be imported; or export or cause to be exported any alcoholic drink under the Act, shall apply to the <u>District Committee</u> for a licence.

(3) An application for a grant or renewal of a licence to manufacture or otherwise produce; sell, dispose of, or deal with an alcoholic drink shall be in Form 2 specified in the Second Schedule.

74. It is therefore clear that it is the power of the District Committee to consider the application for the renewal of the licence. That the said Committee may take into account the relevant certificates issued by the various agencies such as the Respondent herein, the National Environmental Management Authority (NEMA), Public Health Departments and National Authority for the Campaign Against Alcoholic and Drug Abuse (NACADA), is not in doubt . However the role of the said agencies is limited to the issuance of certificates relevant to their fields of operation and where an agency fails in its role an aggrieved person can only seek an order compelling it to issue the certificate and not the permit.

75. I accordingly cannot issue an order compelling the Respondent to issue the applicant with the permit as sought herein.

76. It was however contended that the Respondent herein, in its decision of 23rd May, 2016 adverted to a decision made by the Alcohol Inter Agency Committee. In its letter dated 23rd June, 2016, addressed to the Applicant, the Respondent stated as follows:

Enclosed are copies of test certificates for private sample of opaque beer drawn from your firm by KEBS officers.

The samples were tested in accordance with the requirements of EAS 61 East African Standard specification for opaque beer and performed as indicated in the test reports.

Please note that, for renewal of your permit you are advised to seek approval from Alcohol Inter-Agency committee and other regulatory institutions.

77. That the Respondent referred the ex parte applicant inter alia to the said Alcohol Inter-Agency Committee for approval is clear. The Respondent however cited no legal provision in the ***Standards Act***, the instrument from which it derives its authority and powers, that provides that for a permit to be issued, the approval of the said Alcohol Inter-Agency Committee is a pre-requisite. In my view practices and norms are not constitutional grounds for the restriction or limitation of fundamental rights and freedoms under the Bill of Rights. In order to satisfy this requirement a law must be clear and without ambiguity or vagueness in order that citizens may know what their obligations are. I accordingly associate myself with

the decision of the Hong Kong Court of Final Appeal case of **Leung Kwok Hung vs. HK Special Administrative Region** where it was held at para 27 that:

> **"To satisfy this principle, certain requirements must be met. It must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. As pointed out by Sir Anthony Mason NPJ (at para.63), the explanation of these requirements in the often quoted passage in the majority judgment of the European Court of Human Rights in Sunday Times v. United Kingdom (No.1) (1979 – 80) 2 EHRR 245 (at para.49, p.271), the "thalidomide" case, is of assistance:**
>
> **"First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."**

78. As was held by **Lord Somervel** in **Vine vs. National Doc Labour Board [1956] 3 All ER 939**, at page 951:

> **"The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duly and the character of the person. Judicial authority normally cannot, of course, be delegated…There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated."**

79. Therefore whereas the Respondent can take advice from the other agencies, the ultimate decision on whether or not to issue the certificate must rest with it and no other body. If it makes a decision solely based on the views of other bodies, then it would have failed to carry out its statutory obligation in which event the Court would be entitled to quash such a decision and to compel it to undertake its mandate in accordance with the law.

80. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** it was held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. *It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission*...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when**

there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision." [Emphasis mine.]

81. Similarly in **Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271,** the Court expressed itself as follows:

"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred."

82. This position is restated in section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation. It is therefore my view that the decision by the Respondent to refer the applicant's application to the said Alcohol Inter Agency Committee amounted to unlawful abdication of its statutory mandate. As was held in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323,** even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) *where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion*; (8) where the decision-maker is irrational and unreasonable.

83. The Applicant has further accused the Respondent of violating the applicant's legitimate expectations. In **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** where **Lord Diplock** states, at page 949:-

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do *until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment* or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (emphasis supplied)

84. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by

law". See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. This was the view adopted in **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR** where it was held that:

> **"...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."**

85. In other words since the doctrine of legitimate expectation is based on considerations of fairness, even where benefit claimed not procedural, it should not be invoked to confer an unmerited or improper benefit. **See R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241.**

86. Similarly in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** it was held that:

> **"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."**
>
> See also **Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67]**.

87. However as was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012**:

> **"…the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."**

88. The three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** as follows:

> **"In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."**

89. In **De Smith, Woolf &Jowell,"*Judicial Review of Administrative Action*"** 6th Edn. Sweet & Maxwell page 609 it is stated that:

> **"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."**

90. In this respect the Applicant relied on **Fordham Michael, *Judicial Review Handbook*** (supra) at page 502 to the effect that:

> **"Consistency is a principle of good administration. Judicial Review may lie because treatment is unjustifiably unfavourable with action in relevantly likely cases (or prior treatment in the**

same case), or because it unjustifiably fails to distinguish other unlike cases. Consistency links with freedom from arbitrariness, each of which also links with (and is promoted by) adequate certainty of approach."

91. Similarly, in **Rank vs. East Cambridgeshire District Council EWHC 2081 Admin**, it was held:

"One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process...But it is also important for the purpose of securing public confidence in the operation of the development control system....The potential relevance arises because consistency is desirable and inconsistency may occur if the authority fails to have regard to a previous decision."

92. Therefore if a public authority is to depart from previous decisions in similar cases, it must demonstrate good reason for that departure. Hence in **R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607**, it was held:

"Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires."

93. In **Republic vs. Attorney General & Another Ex Parte Waswa& 2 Others [2005] 1 KLR 280**it was held:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

94. The rationale for this doctrine was restated in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

95. In this case, it as the applicant's case that it was misconceived for the Respondent vide its Replying Affidavit to base its decision for non-renewal of the said permit on a new issue being that the samples failed to meet the parameters of gravity of 0.9929 instead of falling within the range of 1.005 to 1.045. According to the applicant, the record for the previous years showed that the respondent had been renewing the ex parte Applicant's permit within the same range of about 0.9929 and below and never at any time declined to do so except in the year 2016. Accordingly, the applicant contended that the

respondent by its conduct lulled the ex parte applicant into a sense of security that the parameter as to gravity now in question would neither be demanded nor be a ground for non-renewal of the said permit. Whereas in 2016, the said permit was suspended, no parameter as to specific gravity was claimed by the respondent in their letter dated 23rd May, 2016 which stated that the ex parte applicant had to seek approval from the Alcohol Inter Agency Committee before the said permit was renewed. No specific range as to gravity was claimed from the ex parte applicant whether deliberately or inadvertently. It was averred that by the time the Respondent sent its letter denying the ex parte applicant's permit on 23rd November, 2016, the ex parte applicant had been carrying on its business of manufacturing excisable goods in the nature of opaque beer as usual and in compliance with every requirement set by the respondent with regards to alcoholic beverages.

96. In the applicant's view, the failure by the respondent in not regularly monitoring its said parameters as to gravity with a view to determining the range at which it should be maintained, the Respondent placed the ex parte applicant in an unenviable position where the ex parte applicant is being exposed to shouldering the burden which legally ought not to have been shouldered by it.

97. The Respondent on the other hand was of the view that the mere fact that the applicant had previously been licensed based on the former parameters cannot be a basis for seeking that the same parameters be applied.

98. In the 8th Edition of **Garner's Administrative Law**, B. L. Jones and K. Thompson observed at page 259 that:

> **"We may turn next to the operation of *audi alteram partem* in relation to decisions as to privileges, or 'licences'. It is first necessary to note various different kinds of decisions that may be taken in relation to privileges. For example, the decision may be to revoke an existing 'licence', to refuse to review an existing 'licence', or to refuse the initial grant of a 'licence'. In relation to each of these types of decision the expectations of the person affected is of much significance. Did the citizen have legitimate expectation of success, or was he simply 'hoping against hope' of obtaining, retaining, or being granted renewal of, a 'licence'? How do these factors influence the manner of operation of the audi alteram partem rule?**
>
> **The revocation of a privilege may generally be regarded as comparable to the act of taking away 'property'. It will usually defeat the privilege-holder's legitimate expectation that it will continue for its initially granted time-span, and accordingly the *audi alteram partem* rule will normally apply with some vigour. Such has, for example, been shown in cases where members have been expelled from clubs without the substantial procedural rights which the courts have been prepared to imply into their contracts of membership.**
>
> **Conversely, one who had no more than a mere hope of favour and failed to obtain it has lost nothing, save an advantage to which he had no legitimate expectation. The demands of procedural justice will in such a case be significantly less great."**

99. From the foregoing, it is clear that legitimate expectation may apply to the grant or renewal of a licence or permit.

100. It is true that under section 4(e) of the ***Standards Act***, the Respondent has the power to prepare, frame, modify or amend specifications and Codes of practice. However as held the decision of the High Court of Australia in **Haoucher vs. Minister for Immigration and Ethnic Affairs Reference [1990] 169 CLR 648**:

> **"…. in all the circumstances, the promise to follow a certain procedure having been made, or the practice of consultation having been established, fairness may require that the public authority should be held to its promise or previous practice. It adds nothing to say that there was a legitimate expectation, engendered by the promise or practice, that a certain procedure would be followed".**

101. In the same vein it was held in **Attorney General of Hong Kong vs. Ng Yuen Shiu [1983] 2 All ER 346** that:

> **"the expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.' and 'The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty".**

102. Back home in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that:

> **"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way…..Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. …..In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power."**

103. It is therefore my view that where there is a change in policy or practice which the applicant had previously been subjected to, that change ought not to be implemented adversely against the applicant *until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment.*

104. There is no evidence that this was done in this case.

105. Having considered the foregoing it is my view and I so find that in its decision of 23rd May, 2016, the Respondent acted unlawfully in that it failed to exercise a discretion and delegated the same or abdicated its authority unlawfully to the Alcohol Inter Agency Committee and further that its decisions violated the applicant's legitimate expectation.

106. As regards the alternative remedy of appeal, section 11 of the ***Standards Act*** provides:

> ***Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal.***

107. It is my view that since it is alleged that the Respondent abdicated its duty to make a decision, the said provision is inapplicable.

Dispositions and Remedies

108. Article 23(3) of the Constitution gives this Court the power to grant appropriate relief while section 11(1) of the ***Fair Administrative Action Act*** provides that in proceedings for judicial review under section 8(1), the court may grant any order that is just and equitable, including an order setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions; or compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right.

109. In the premises an order of certiorari is hereby issued removing into this Court for the purposes of being quashed and quashing the letter dated 23rd May, 2016 from the Respondents, Kenya Bureau of Standards (KEBS) on the Laboratory Test Report done on the Opaque Beers from the Ex parte Applicant's factory to the extent that the Respondent directed the applicant to seek the approval of the Alcohol Inter-Agency committee. However the Respondent was within its right to advise the applicant to seek the approval or certificates from the other regulatory institutions. I therefore direct the Respondent to independently consider the applicant's application and make a decision thereon taking into account the applicant's said legitimate expectation with respect to compliance within 30 days from the date of service on it of this decision and furnish the applicant with the decision and the reasons therefor.

110. As the applicant has not wholly succeeded it its application there will be no order as to costs.

Dated at Nairobi this 19th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Otieno for the applicants

CA Mwangi