



IN THE MATTER OF: AN APPLICATION BY MABRUI LIMITED FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE SUGAR ACT (No.10 of 2001) AND THE SUGAR (IMPORTS, EXPORTS AND BY-PRODUCTS) REGULATIONS, 2008

AND

IN THE MATTER OF: THE KENYA SUGAR BOARD

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE KENYA SUGAR BOARD.....RESPONDENT

EXPARTE.....MABRUI LIMITED

J U D G M E N T

Pursuant to leave granted on 27th October 2009 to commence Judicial Review proceedings, the Exparte Applicant herein Mabru Ltd (*hereinafter simply referred to as the company*) filed a Notice of Motion on 28th October 2009 seeking the following orders:

1. An Order of CERTIORARI to issue to remove to the High Court and quash the decision of the Kenya Sugar Board (“the Board”) to award rights to import 260,000 metric tonnes of sugar (“Comesa Sugar”) in accordance with the tonnage lots allocated to bidders in the public auction “conducted” under the auspices and/or authority of the Board on 22nd September 2009;
2. An Order of PROHIBITION to issue to prevent/prohibit the Board from issuing giving and/or granting import permits to the said bidders in the said auction and/or otherwise from acting on the aforesaid decision;
3. An Order of MANDAMUS to issue directed at the Board to compel it to refund to the Applicant the sum of Kshs.9,039,757/- being the amount paid to the Board in the month of September 2009 for the rights to import Comesa Sugar stipulated as Lot Numbers 23, 28, 145, 146, 147, 150, 382, 424, 425, 428 and 469 (11 Nos) at the auction held on 12th August 2009;
4. An Order for costs of this application.

The application was supported by the statutory statement accompanying the application for leave dated 26th October, 2009 and the verifying affidavit sworn by Kenneth F.M. Gakuru, the import manager of the Exparte Applicant.

It is also supported by a supplementary affidavit sworn by Susan Njeri Mungai, a director of the company in response to the Replying affidavit sworn in opposition to the Notice of Motion by Erick Ng'eno, a legal officer employed by the Respondent.

Before directions were issued by the court on the hearing of the Notice of Motion, the Respondent through their advocate on record Mwangambo and Okonjo advocates filed a notice of preliminary objection on 11th November 2009 urging the court to strike out the Exparte Applicant's Notice of Motion with costs on grounds that the court lacked jurisdiction to entertain the suit. It was the Respondents view that no action could be maintained in court against the Respondent by virtue of the operations of:

- (a) The provisions of the Auctioneers Act, Act No.5 of 1966.
- (b) The provisions of the Sugar Act No.10 of 2001 read together with the Sugar **(Imports, Exports and By-products)** Regulations 2003.
- (c) The provisions of the Public Procurement and Disposal Act 2005 as read together with the Sugar **(Imports, Exports and By-Products)** Regulations 2008, Legal Notice No.114 of 5th September, 2008 as amended by Legal Notice No.122 of 31st July 2009.
- (d) The provisions of Order 53 of the Civil Procedure Rules.

The preliminary objection was argued before my sister Gacheche, J on 28th October 2010 and in her ruling delivered on 8th December 2010, J. Gacheche dismissed with costs the preliminary objection and found that this court had jurisdiction to hear and determine the Notice of Motion filed by the Exparte Applicant herein. She in particular directed that trial be conducted in respect of Prayer 3 thereof in which the applicant had sought orders of mandamus to compel the Kenya Sugar Board **(the Respondent)** to refund to it a sum of Kshs.9,039,757/- being the amount paid to the Respondent in September 2009 for rights to import Comesa sugar stipulated as Lot Numbers 23, 28, 145, 146, 147, 150, 382, 424, 425, 428 and 469 (11 lots) at the auction held on 12th August 2009.

This order was informed by the fact that on 28th October 2010 when the parties were making their submissions on the preliminary objection, Mr. Gikera then Counsel on record for the Applicant had abandoned Prayers 1 and 2 in the Notice of Motion in which the applicant had sought for orders of certiorari and prohibition on grounds that the said prayers had been overtaken by events.

In this judgment therefore, I will only address the issues raised by the parties that relate to the prayer for mandamus as sought in Prayer 3 and restrict my findings to that prayer only.

Before delving into an analysis of the different positions taken by the parties in this case, I think it is important to note that both parties filed written submissions which their respective advocates highlighted before me on 16th November, 2011.

The case for the applicant as can be discerned from the pleadings and the submissions made by Mr. Muriuki on its behalf is that on 12th August 2009, the applicant together with other bidders participated in an auction held by the respondent for the purpose of buying rights to import Comesa sugar. In the auction, bids were allocated to the highest bidder on a quota system. The applicant successfully bid for various Lots in the 1st and 2nd quota and was allocated bid No.62. Following the auction, the applicant paid the respondent a total sum of Kshs.9,039,757/- for rights to import Comesa sugar in 11 lots allocated to it namely Numbers 23, 28, 145, 146, 147, 150, 382, 424, 425, 428 and 469. Of the 86 bidders who had participated in the auction, only 7 of them including the Applicant paid fully for the bids they had placed

on the various Lots allocated to them and this forced the Respondent to conduct a 2nd auction on 22nd September 2009 (*hereinafter referred to as the 2nd auction*) to sell the balance of the initial quota of 260,000/- metric tonnes not taken up by the licensed sugar importers in the first auction conducted on 12th August 2009.

According to the applicant, in the second auction, the respondent changed the rules without giving the participants prior notice and fixed a uniform bid price of Kshs.33,500/- and supervised the allocation of the remaining quantities on a prorata basis of 30%.

It is the applicant's case that the decision of the respondent to change the rules in the 2nd auction without prior notice to allow for such low bids as Kshs.33,500/- with the knowledge that the Applicant and other participants in the first auction had been allocated Lots at bids ranging from Kshs.900,000/- - 1,000,000/- was oppressive, unjust and unreasonable as it put the Applicant at a disadvantaged position when compared to successful bidders in the 2nd auction. The Applicant contended that given the high bid prices for the lots allocated to it in the first auction, it could not utilize its importation rights to import Comesa sugar into the country as it could not compete with the successful bidders in the second auction given the low bids set by the Respondents in the second auction. This is despite the fact that the Applicant had also fully participated in the second auction.

Aggrieved by the outcome of the 2nd Auction, the Applicant demanded from the Respondent in a letter dated 9th October 2009 a refund of the amount paid for Lots allocated to the Applicant in the first auction which the Respondent rejected in letter dated 14th October 2009. This is what triggered the filing of the Judicial Review proceedings in this case.

The respondent on its part opposed the applicant's Notice of Motion claiming that both the 1st and 2nd auctions conducted on its behalf by Regent auctioneers were conducted properly, fairly, justly and following the same rules. It is the Respondents contention that the two auctions were conducted under the Sugar (*Imports, Exports and By-products*) Regulations 2008, Legal Notice No.114 of 5th September 2008 as amended by Legal Notice No.122 of 31st July 2009 which provided as follows:

- (a) An Advertisement was to be run twice in the local dailies inviting sugar importers to participate at the said Auction;
- (b) The sale would be subject to a Reserve Price, which was set at Kshs.30,000/- per Lot of 500 metric tones in both the First and Second Auctions;
- (c) Participation would be by catalogue issued by the Respondent upon the payment of Kshs.200,000/- by a bidder;
- (d) The date, place and time of the Auctions were made known; and
- (e) A copy of these Rules were issued by the Respondent free of charge to all bidders, including the Exparte Applicant herein, and the Auctioneer took members through the same and even invited questions on the same.

Though the Respondent denied having changed the rules in the 2nd auction or having interfered with the same, it conceded having influenced the bidders to settle at a uniform bid price of Kshs.35,500. In paragraph 11 of the Replying affidavit the deponent avers as follows:

- (11) THAT the Respondent at all times acted within the law, and did not act ultra-vires or dictate a uniform price of Kshs.33,500/- because:
 - a. The Respondent did NOT dictate any price, but rather encouraged the present bidders to consult and agree amongst themselves on a uniform bid price, which they willingly and unanimously did.

- b. The Respondent's action was in the public interest and in fulfillment of its statutory mandate to facilitate equitable access to the benefits and resources of the industry by all interested parties.
- c. The intervention by the Respondent was geared at protecting the wider public against the shortage of sugar, or inflation in sugar prices caused by exorbitant sale of importation rights at the auction, or shortage of sugar in the country.
- d. This action by the Respondent was prompted after it emerged that the parties who, at the 1st Auction, had bid very high prices, some in the millions, locked out capable importers, yet did not have the capacity to utilize their quotas.
- e. The Respondent did not act fraudulently, or collude with others, as the proposal was made openly by the Respondent during the auction, and all the bidders were at liberty to accept or reject the proposal, for which they chose to accept a uniform bid.

Lastly, it was the Respondent's contention that the applicant was not entitled to a refund of the bid monies it willingly and voluntarily paid after the 1st auction since it was not challenging the legality of the 1st auction or seeking its annulment. It is further the Respondent's case that the Applicant is not entitled to a refund of the monies sought having willingly participated in the two auctions and having benefitted from the same by using the importation rights acquired in the two auctions to import Comesa sugar.

According to the Respondent, as of the date of filing this suit, the Applicant had not returned the importation licences or letters of allocation of rights to import Comesa sugar issued to it under the two auctions. These were some of the averments in the replying affidavit sworn by Eric Ng'eno on behalf of the Respondent which were not contraverted in the supplementary affidavit sworn by Susan Njeri Mungai on 3rd March, 2011.

Having considered the two cases presented by the exparte Applicant and the Respondent as summarized hereinabove, I find that the only issue for determination by this court is whether the order of mandamus being one of the remedies in judicial review is available to the Applicant given the facts and evidence presented before the court in this case. I say that this is the only issue pending determination by this Court since it is not disputed that the respondent is a statutory body established under the Sugar Act, Act No.10 of 2001 which is amenable to the supervisory jurisdiction of this court through judicial review.

In order to determine whether or not the Applicant is deserving of orders of mandamus as sought in Prayer 3, it is important to understand what constitutes the order of mandamus and when it should issue as a matter of law.

In Halsbury's Laws of England, 4th Edition at paragraph 128, the learned author had the following to say about the order of mandamus

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty".

At paragraph 129 headed the 'mandate' it is stated:

"The order must command no more than to do that which the party against whom the application is made 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".

The Court of Appeal in Kenya National Examination Council Vs R exparte Geoffrey Gathenji Njoroge &

9 Others, C/A No.266 of 1996 after quoting with approval the above passage in Halsbury's Laws of England concerning the nature and scope of the remedy of mandamus proceeded to explain that an order of mandamus can only be issued against public officers or public bodies who have failed to perform a public duty. The Court of Appeal expressed itself in the following terms:

“What do these principles mean?”

They mean that an order of mandamus will compel 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.....”

As stated earlier, the Applicant in this case seeks an order of mandamus to compel the Respondent to refund monies paid to it in September 2009 (Kshs.9,039,757/-) for rights to import Comesa sugar in 11 Lots allocated to it in the first auction held on 12th August 2009.

Given the law as expounded above on when orders of mandamus can issue, the question that now falls for determination by this court is whether the Respondent had a public duty to make such a refund which it had failed to do to the detriment of the Applicant. I have gone through all the pleadings filed by the parties herein particularly those filed by the applicant including the written and oral submissions made by Mr. Muriuki on its behalf and I have not come across any claim by the Applicant that the Respondent had a statutory or public duty to refund monies paid to it following bids in an auction where after the auction, a bidder feels aggrieved by the way subsequent auctions were conducted or for any other reason.

I find that the Applicant has not placed before the court any evidence to prove that in failing to make the refund as demanded in letter dated 9th October 2009 (***annexture KG – 6***, the Respondent was failing to perform a public duty imposed on it by any statute or in any other way to the detriment of the Applicant who had a legal right to expect the duty to be performed.

In the absence of evidence to show that the Respondent had a public duty imposed by the Sugar Act or any other law to refund monies paid to it as a result of allocation of rights in public auctions to import sugar which it had deliberately failed to perform, I find that the Applicant has failed to demonstrate that it is deserving of the orders of mandamus as sought in this case.

I wholly concur with the submissions made by the Respondent that since the applicant willingly and voluntarily participated in the two auctions and this is not disputed by the Applicant, each auction constituted a separate contract of sale. I am fortified in this finding by Section 21(2) of the Auctioneers Act Cap.529 Laws of Kenya which states as follows:

Section 21 (2)

“where any movable or immovable property is put up for sale by auction in lots, each lot shall *prima facie* be deemed to be the subject of a separate contract of sale”.

It is important to note that the applicant is not challenging the legality or validity of the 1st auction pursuant to which the money for which it is now claiming a refund was paid.

In view of the provisions of Section 21(2) of the Auctioneers Act and given that it is not disputed that the Applicant participated in the two auctions conducted by the Respondent to the end whether or not the Respondent changed the rules in the 2nd Auction, the two auctions constituted a contract between the Applicant and the respondent. This was infact admitted by Mr. Muriuki in his submissions in reply when he was inviting the court to make a finding that the two auctions constituted one contract with different phases. To quote him verbatim, Mr. Muriuki told the Court the following:

“I fail to see how those two contracts can be separated. It is one contract with several phases”.

Since it is contended that the two auctions amounted to two contracts between the parties, any disputes arising therefrom would be disputes in the realm of private law which should be adjudicated upon in a civil suit before the ordinary civil courts. Judicial Review is a public law remedy which is only available to litigants who demonstrate that a public officer, a public or statutory body or inferior tribunal has abused its powers by either acting illegally, without or in excess of its jurisdiction, is guilty of procedural impropriety or has failed to perform a public duty.

In this case, I find that the applicant has failed to bring himself within the perimeters that would entitle it to the remedy of Judicial Review. It is my considered view that judicial review remedies including the order of mandamus cannot be issued by this court to resolve disputes arising from what is essentially private contracts of sale between two parties.

Let me at this point observe that judicial review remedies are issued at the discretion of the court. The court has to consider several factors including the conduct of the applicant before deciding whether or not to issue judicial review remedies. Needless to say such discretion should be exercised judiciously.

In this case though I have already made a finding that the Applicant's case falls outside the ambit of judicial review, in case I am wrong in that finding and the remedy of judicial review was available to the Applicant, I would not have been inclined to exercise my discretion in favour of the applicant by granting it the orders sought for the following reasons.

To start with, as mentioned earlier, it was disclosed by the respondent in its pleadings that before instituting this suit, the applicant had already benefitted from the importation rights acquired in both the 1st and 2nd auctions by importing sugar into the country despite the high bid prices paid in the first auction which formed the basis of the Applicant's complaints in this case.

This claim by the Respondent was not contravened by the applicant. In law what is not denied is deemed to be admitted. If the court were to accept the claim by the respondent, since it is not disputed by the applicant, I find that the action by the Applicant of seeking a refund of the monies in question after benefitting from the facility for which the money was paid is purely wrong and unconscionable. The Applicant would in such circumstances be asking the court to allow it to have its cake and eat it at the same time which is obviously not possible. This would also be very unfair to the Respondent.

In the circumstances, I would refuse to exercise the court's discretion in the Applicant's favour and find that this suit is actually an abuse of the court process.

Lastly, it was urged on behalf of the Applicant that this court should follow the judgment of J. Gacheche in **R –Vs- The Kenya Sugar Board Exparte Commodity House Ltd and Stuntwave Ltd JR 249/10** in which the Hon. Judge issued orders of mandamus in facts similar to those in this case. The *exparte* Applicants in that case had also participated in the first auction conducted by the Respondents as in this case, paid a total of Kshs.87,837,000/- pursuant thereto and after learning of the 2nd auction conducted on 22nd September 2009 in which the Respondent accepted a low uniform bid of Kshs.33,500/- per lot, they instituted judicial review proceedings for orders of mandamus to compel the Respondent to refund the monies paid.

In that case, the Respondent had in its pleadings admitted that the huge difference in bid prices between the first and 2nd auctions exposed the Applicants to unfair competition and that for that reason it had resolved to refund the bidders in the first auction the monies paid in bid prices subject to concurrence by the Treasury. As in this case, the Applicants had in that case relied on grounds *inter alia*, that they were entitled to a refund of the said monies because the Respondent had violated their legitimate expectation that should it change procurement rules in subsequent auctions like it did in the 2nd auction, they would get a full refund paid for the importation rights.

J. Gacheche in issuing the orders of mandamus as prayed found that the Respondent had acted irrationally by allowing itself to be shackled by the Treasury's refusal to authorize it to refund the money when the

money had not been paid to the Treasury but to the Respondent and the Treasury was not a party to the suit. She also held that the Respondent had acted contrary to the Applicants expectation that should it change procurement rules, it would refund monies already paid in previous auctions.

At the outset, as correctly observed by Mr. Muriuki, this decision by J. Gacheche is only of persuasive authority as being a decision by a court of concurrent jurisdiction, it is not binding on this court. Having said that, I wish to distinguish the two cases by observing that though it is true the Applicants were bidders in the first auction conducted by the Respondent herein, they did not participate in the 2nd auction and there was no claim that they ever utilized the importation rights acquired by them in the first auction to their benefit before seeking a refund as is the scenario in the present case.

Secondly, in this case, the applicant did not demonstrate that the Respondent had made any representation whether express or implied from which it would have acquired some legitimate expectation that if the Respondent changed rules of conducting the 2nd auction or subsequent auctions, it would refund monies paid in the first auction.

What then gives rise to legitimate expectations?

In Halsbury's Laws of England, 4th Edition, Vol.I Paragraph 81 at page 151, the learned author in discussing the concept of legitimate expectation had this to say

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice”

In Keroche Industries Ltd –Vs- Kenya Revenue Authority & 5 Others [2007] eKLR J. Nyamu applied the decision in R (BIBI) V Newham London Borough Council in which Schieman LJ gave a set of three practical questions which the Court must ask itself in order to ascertain whether a claim based on legitimate expectation is properly grounded. These are

- (1) What has the public authority, whether by practice or by promise committed itself;**
- (2) Whether the authority has acted or proposes to act unlawfully in relation to its commitment;**
- (3) What should the court do?**

With due respect for Mr. Muriuki, I have not come across any evidence in this case that the Respondent had whether by practice or promise, expressly or impliedly indicated to the Applicant that it would refund monies paid in the first auction should rules of conducting subsequent auctions change. The letter dated 8th September 2010 written by the Applicant to the Respondent in which it was stated:

“In case of any changes in your current rule, we will demand 100% refund of our bid money”

which the applicant heavily relied on for its claim that it had legitimate expectation that the bid monies would be refunded if auction rules changed, in my view does not help the Applicant's case in any way.

This is because this was a letter addressed to the Respondent in which the Applicant was specifying circumstances under which it will demand a refund of its bid monies. It was not a letter by the Respondent to the Applicant promising it to refund bid monies paid to it if rules changed in subsequent auctions. If this letter had been written by the Respondent giving representations that it would refund bid monies if rules changed in subsequent auctions, different considerations would have applied and this court may have reached different conclusions.

Though this court is alive to the fact that there is need to have uniformity in decisions emanating from the

High Court where issues for determination are more or less the same, I am also a firm believer in the principle that each case should be decided on its own merits. In this case, for the reasons I have expounded in this judgement, I have come to the conclusion that the applicant has failed to demonstrate that it is deserving of the orders of mandamus as sought in Prayer 3 of the Notice of Motion dated 28th October 2009.

Consequently, I find no merit in the Notice of Motion dated 28th October 2009 and it is hereby dismissed with costs to the Respondent.

Dated, Signed and Delivered by me at Nairobi this 28th day of February 2012.

C. W. GITHUA
JUDGE

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In the presence of:

Florence – Court Clerk

Mr. Muriuki for Applicant

M/s. Kitoto for Respondent