



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 281 of 2011

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, PROIBITION AND MANDAMUS**

AND

**IN THE MATTER OF: THE NATIONAL CEREALS AND PRODUCE BOARD ACT CAP.338,
LAWS OF KENYA**

AND

IN THE MATTER OF: THE NATIONAL CEREALS AND PRODUCE BOARD

AND

**IN THE MATTER OF: THE DECISION OF THE NATIONAL CEREALS AND PRODUCE
BOARD TO PROCURE AND SUPPLY FERTILIZERS**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL CEREALS &PRODUCE BOARD.....RESPONDENT

**EX PARTE:
ALFRED KIBET TOO**

JUDGEMENT

The ex-parte Applicant Alfred Kibet Too (the Applicant) with leave of the court commenced judicial review proceedings against the Respondent, the National Cereals and Produce Board through a Notice of Motion dated 14th November 2011 in which he sought the following orders ;

- a) An order of certiorari removing to this Honourable Court for purposes of being quashed the decision of the Respondent to procure and supply fertilizer;**
- b) An order of prohibition directed at the Respondent prohibiting it forthwith from procuring and supplying fertiliser;**
- c) An order of mandamus directed at the Respondent compelling it to withdraw any orders for fertilizer and further remove all stocks of fertilizer stored within the Respondents premises/depots;**

d) Costs of the application.

The Application is supported by the Statutory Statement and Verifying Affidavit sworn by the Applicant both dated 11th November 2011. It is also supported by the Applicant's further affidavit sworn on 16th February 2012.

The application is premised on several grounds which can be summarised as follows;

- a) That the Applicant is a producer within the meaning of Section 2 of the National Cereals and Produce Act (The Act)**
- b) The Respondent is engaged in procuring and supplying fertiliser to farmers within Kenya.**
- c) The actions of the Respondents are patently illegal since the Act does not mandate the Respondent to procure and supply fertiliser;**
- d) The decision by the Respondent to procure and supply fertiliser is ultra vires the provisions of S4 and 5(2) of the Act and is therefore illegal.**
- e) The said decision is unlawful on account of its irrationality and breach of the Applicant's legitimate expectations.**

The Application is opposed by the Respondent through the affidavit of Professor Gideon K. Misoi, the Managing Director of the Respondent (the Board).

This case is centred on the Applicant's contention that as a farmer and producer who relies on maize farming for his livelihood, he was aggrieved by the Respondent's decision to procure and supply fertilizer to farmers as this was not part of the duties and functions of the Board given its mandate under the Act. According to the Applicant, the duties and functions of the Board are provided for under Section 4 (1) and 5 of the Act and they do not include the procurement and supply of fertilizers.

It is the Applicant's case that the Board was diverting its funds and energies towards the alleged illegal activities and neglecting its core mandate of purchasing grains and agricultural produce offered to it for storage to the detriment of farmers and the public at large. The agricultural products the Board is authorised to exercise its mandate over are specified in the schedule to the Act. They are beans dried, bixa annatto cashew-nuts millet, rice paddy and sorghum.

The Respondent in support of its case relied on the Replying Affidavit sworn by Professor Gideon Misoi and the annexures thereto.

The Respondent denied the Applicant's claim that it had abandoned its primary duties as outlined in the Act as a result of diverting its funds to buy and supply fertilizer. On behalf of the Board, Prof Gideon Misoi also denied the Applicant's claim that the Respondent had made a decision to buy and supply fertilizer to farmers. He contended that the Board was only implementing an executive decision made by the cabinet, and further that the funds for the acquisition of fertiliser were being provided by the Government from grants received from donor countries and the African Development Bank. The funds were separate from the funds allocated to the Board by the Ministry of Agriculture for the purpose of carrying out its mandate under the Act. He disputed the Applicant's allegation that the Board had abdicated its responsibilities and concentrated on activities outside its mandate with the result that the country had experienced food shortages and an increase in food prices.

It is the Respondent's case that it continues to buy and store grains and scheduled agricultural produce from farmers and has appropriately paid the farmers depending on the availability of funds allocated to it for that purpose by its parent Ministry. Prof Misoi averred that the cabinet decision to buy bulk fertilizer and distribute it through the Board was informed by the need to avail cheap and affordable fertilizer to farmers in order to reduce food production costs, increase yield of agricultural produce and thereby

reduce the high food prices experienced at the time. He pointed out that since the Respondent began this intervention, there has been a positive effect in that food production had increased and food prices had stabilised. In response to the Applicant's claim that the procurement and supply of fertilizers had not alleviated food shortages, the Respondent asserted that food shortages when and if they occurred were caused by severe drought and adverse weather conditions which not only affected Kenya but the entire horn of Africa. This was a natural phenomenon which neither the Board nor anyone else could control. The Respondent invited the court to find that the application was not merited and dismiss it with costs.

Mr Lutta, Learned Counsel for the Respondent in support of the Respondent's case raised two preliminary points of law. The first one was that this court does not have jurisdiction to entertain the Applicant's application since it was statute barred. The second objection was in respect of the Applicant's *locus standi*.

On the issue of *locus standi*, Mr Lutta submitted that the Applicant had not tendered any evidence to prove that he is a farmer or that he had any dealings with the respondent by way of selling any produce to it. He further alleged that the Applicant was a busy body who was being used by fertiliser barons who were attempting through the instant proceedings to prevent the Government from supplying cheap and affordable fertiliser to farmers in order to continue reaping abnormal profits from the trade at the expense of the farmers.

On the claim that the Applicant's suit was statute barred, Mr Lutta submitted that the Applicant had not pointed to any decision the Respondent had made with regard to the importation and distribution of fertilizers. He further submitted that the Board started supplying fertilizers to farmers way back in Year 2008 and that since the application was filed on 14th November 2011, it was time barred given the six months limitation period prescribed under Order 53 Rule (2) of the Civil Procedure Rules. Mr Lutta argued that the Applicant had not explained why he did not come to court within six months of noticing that the Respondent was engaged in the business of fertiliser. In the circumstances, the court had no jurisdiction to issue an order of certiorari as prayed and if an order of certiorari does not lie, the prayers for orders of prohibition and Mandamus would have to fall by the wayside.

Turning to the merits of the Application, Mr Lutta argued that in procuring and supplying fertilizers to farmers, the Respondent was acting within its powers and mandate under S 4 and 5(2) (a) of the Act. He invited the court to adopt a wide and liberal interpretation of Section 4 of the Act and find that the importation and distribution of fertilizer to farmers was an activity which was connected and incidental to the objectives and functions of the Board.

He further submitted that the Applicant has not shown in what way the Respondent had abandoned its duties or how the supply of fertiliser had affected its core business. He urged this court not to issue the orders sought in the public interest as doing so would hamper the availability of cheap fertilizer to all farmers in the country and this would negatively affect the quality and quantity of agricultural produce. The result of this would be that the Respondent's objective of maintaining adequate strategic grain reserves to enhance food security for the benefit of the Kenyan population would be compromised. It was also the Respondent's submission that if the procurement of fertilisers was left solely to the open market, food prices would escalate to impossible levels.

To counter those submissions by the Respondent, Mr Mburugu Learned Counsel for the Applicant submitted that the Applicant had demonstrated that he had sufficient interest in this matter. He argued that the Applicant by virtue of being a farmer and producer as defined under the Act had a right to question the validity of the activities of the Board in the public interest.

On the claim that the prayer for an order of certiorari was statute barred, Mr Mburugu submitted that the decision under challenge does not fall within Order 53 Rule 2 of the Civil Procedure Rules (CPR) and that the Applicant's prayer for an order of certiorari was not time-barred. He referred the court to the decision of Justice Nyamu (as he then was) in **Republic Vs Judicial Commission of Inquiry into the Goldenberg Affair ex parte Mwalulu & 8 Others [2004] eKLR (Miscellaneous Civil Application No 1279 of 2004)** where he held that the six months statutory limitation period for instituting proceedings for

certiorari only related to judgements, formal orders or proceedings. Counsel was of the view that the activity being challenged herein was not covered under Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules as it was not a judgement, order or proceedings and was not therefore statute barred.

In response to the Respondent's submissions that the activities complained about by the Applicant were within its statutory mandate, Mr Mburugu strongly argued that the Respondent had no mandate to procure and distribute fertiliser to farmers under the Act. Counsel referred to the preamble and Section 4 (1) of the Act which outlines the mandate of the Respondent. He submitted that these parts of the Act set the tone of what was expected of the Board. The procurement and distribution of fertiliser was not one of the things the Respondent was mandated to do. He further opined that Section 4(d) which authorises the Board "**to do any other act which is connected or incidental to the foregoing**" must be read in reference to the other sub-sections in accordance with the *ejusdem generis* rule. The other paragraphs talk about foodstuffs, and fertiliser was not food stuff. He urged the court to find that the procurement and supply of fertilisers was ultra vires the mandate of the Board and the court should put an end to the Board's illegal activities by granting the orders sought.

After carefully considering the pleadings herein, the rival submissions by the advocates on record and all authorities cited, I find that four main issues emerge for determination by this court namely;

- 1) Whether the Applicant has *locus standi* to institute judicial review proceedings against the Respondent.
- 2) Whether this court has jurisdiction to grant the remedy of certiorari in this case in view of the statutory limitation period.
- 3) Whether the procurement and supply of fertilizer to farmers was ultra vires Section 4(1) of the Act.
- 4) Whether the Applicant is entitled to the reliefs sought.

Starting with the first issue, **Locus Standi** can be defined as the legal capacity of a person to institute and maintain legal proceedings in court. It includes the right to be heard before the court. The Respondent contends that the Applicant is a busy body and he has no locus standi to institute these proceedings because he has not demonstrated any past dealings with the Respondent and neither had he demonstrated that the Respondent had on previous occasions refused to purchase his produce. The Applicant, in the Verifying Affidavit states that he hails from Kapsabet, a maize growing region. He has further stated that he is a producer within the meaning of the Act which defines a producer to mean any person who by himself or his agent has grown maize, wheat or any scheduled agricultural produce. In judicial review proceedings, all an applicant needs to do to establish locus standi is to show that he/she has sufficient interest in the matter. I do not think that it was necessary for the Applicant in this case to prove that he was actually a farmer in order to demonstrate sufficient interest in this matter. The Respondent is a public body whose activities are funded from public coffers. The Applicant being a Kenyan citizen and a tax payer had a right to approach the court for appropriate relief either on his own behalf or in the public interest if he felt that the Respondent was engaging in activities that were outside its legal mandate. This is so because it is in the public interest to ensure that public bodies obey the law of the land. I am therefore satisfied that the Applicant has demonstrated that he has sufficient interest in this matter. I find that he had locus standi to commence the instant proceedings against the Respondent.

On the preliminary point of law raised by the Respondent to the effect that this court does not have jurisdiction to grant an order of certiorari, I find that though this objection was based on grounds that the prayer was statute barred, there are other aspects of this case touching on the prayer for certiorari that cannot go unnoticed and must be addressed by the court even before considering whether or not the prayer is statute barred.

I wish to begin by making an observation that the Applicant has not identified the decision allegedly made by the Respondent which this court is being invited to quash by an order of certiorari. An order of

certiorari is a remedy in judicial review which targets decisions or orders made by inferior tribunals or public bodies to quash them if it is established, inter alia, that they were made in excess of or without jurisdiction. It is therefore the duty of an Applicant to identify and specify the decision or order being challenged against which an order of certiorari can be directed. It should not be left to the court to speculate or infer from the circumstances of a case which decision was being challenged by the Applicant. To succeed in a prayer for an order of certiorari, an Applicant must satisfy the court that there is a decision or formal order against which the order can be directed.

This must be the rationale behind the provisions of Order 53 Rule 7 of the Civil Procedure Rules which require that the record of the decision being challenged must be availed to the court before the hearing of the notice of motion or an explanation be given to the satisfaction of the court for failure to do so. This provision read together with Order 53 Rule 7(2) shows clearly that for an order of certiorari to issue, the court must be satisfied that there is a decision capable of being quashed. In this case, the Applicant has annexed to his pleadings newspaper cuttings. The newspaper cuttings only show that the Board was engaged in the business of procuring and supplying fertilizer to farmers at a subsidized cost. They do not show that a decision had been made by the Respondent to that effect.

The Respondent has denied having made a decision to buy and sell fertilizer to farmers. It maintains that the decision was made by the Cabinet and the Board was chosen to be the Government's Agent for that purpose due to its wide distribution network country wide. This position was not controverted by the Applicant. The Applicant's complaint relates to the Board's activities of procuring and supplying fertilizer. It is not directed to any decision made by the Board in that regard.

In view of the foregoing, I am satisfied that the Applicant has not demonstrated that the Respondent had made any decision lawfully or otherwise which was capable of being quashed by this court through an order of certiorari. Without a decision, there would be nothing for the court to quash. If the court were to issue an order of certiorari in such circumstances, it would be engaging in an exercise in futility and this is something that courts of law should never do. The law is that courts should never issue orders in vain or orders which are unenforceable.

Given the foregoing, I find that it is not necessary for me to consider whether or not the Applicant's prayer for the remedy of certiorari was statute barred since there being no decision which the Applicant could have challenged either within or outside the statutory limitation period of six months imposed by Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, the remedy of certiorari is not available to the Applicant in any event.

Taking the facts of this case into account, I have no doubt in my mind that Prayer 1 of the Applicant's notice of motion is not merited and it must fail.

Having made that finding, I now wish to turn to a consideration of whether the Respondent acted *ultra vires* the Act in engaging in the supply of fertiliser. The Applicant has maintained that the Respondent was acting illegally when procuring and supplying fertilizer to farmers since it was acting beyond the mandate given to it by the Act of Parliament which created it. This argument was based on the fact that the procurement and supply of fertilizers was not expressly stated to be among the functions of the Board under Section 4 (1) of the National Cereals and Produce Board Act (the Act)

Section 4 (1) of the Act outlines the functions of the Respondent. The section is in the following terms;

4. (1) the functions of the Board shall be -

(a) To regulate or to control the collection, movement, storage, sale, purchase, transportation, marketing, processing, distribution, importation, exportation, disposal and supply of maize, wheat and scheduled agricultural produce;

(b) to buy, store, sell, import, export or otherwise acquire and dispose of maize, wheat and scheduled agricultural produce in such manner, such quantities and on such terms as it may, from time to time,

deem necessary to fulfil the requirements of producers and consumers in Kenya;

(c) to advise the Minister on the proper production of maize, wheat and scheduled agricultural produce in relation to the needs of Kenya, and the extent to which control over the exportation and importation of maize, wheat or scheduled agricultural produce is desirable or necessary;

(d) To do any other act which is connected or incidental to the foregoing”.

The Respondent's position is that the procurement and supply of fertilizer to farmers was lawful since it was not prohibited by any law and it was connected or incidental to its core functions as outlined above.

My reading of Section 4(1) is that the core functions of the Respondent relate to the purchase, storage, sale, importation, disposal and supply of maize, wheat and scheduled agricultural produce in such quantities and manner that would fulfil the requirements of producers and consumers in Kenya.

The Act defines ***"scheduled agricultural produce as any of the produce specified in the Schedule and any part or product of that produce."***

Though it is true as submitted by counsel for the Applicant that fertilizer cannot be described as foodstuff, the question we must answer at this juncture is - Is the procurement and supply of fertilizer to farmers connected to or incidental to the Board's mandate?

Fertiliser is a ***"chemical or natural substance added to soil to increase its fertility."*** (*Concise Oxford English Dictionary 12th ed.*). It is common knowledge that fertiliser is one of the important inputs into the production of high yield quality grain and it would obviously be in the interest of the Respondent to purchase high quality grain from its producers who are farmers.

From Section 4 (1) (b) of the Act, the Respondent has power ***"to buy, store, sell, import, export or otherwise acquire and dispose of maize, wheat and scheduled agricultural produce in such manner, such quantities and on such terms as it may, from time to time, deem necessary to fulfil the requirements of producers and consumers in Kenya"*** (*emphasis mine*)

This section clearly gives the Respondent broad powers in the acquisition, sale, storage, importation, exportation and disposal of agricultural produce. In the performance of these broad functions, the Respondent is supposed to fulfil the requirements of its producers (of cereals) and consumers of agricultural produce in Kenya. It is in the interest of producers to produce agricultural produce of high quality sufficient for their domestic use and a surplus for sale in order to make farming as a business economically viable. I concur with the Respondent that if fertilizer is not made easily available to farmers and at affordable prices, the level of food production leave alone the quality of grain produced would go down. With low production levels, the Board's function of purchasing, selling and storing grain would obviously be compromised. There may not be grain for the Respondent to buy or store. Low production levels would after a time lead to food shortages and an escalation of food prices which will not serve the interests of consumers of agricultural produce. The Respondent's consumers who are members of the public would be interested in having adequate food supply which would in turn secure low food prices.

I find merit in the Respondent's submission that the acquisition and supply of fertiliser to farmers was being done to ensure that the production of the agricultural produce e.g. maize was of high quality and to ensure high yield of the crop. This would in turn ensure that the Board was able to buy and store sufficient produce. In my view, this was an important function of the Board considering that it was charged with the responsibility of maintaining adequate strategic grain reserves for purposes of ensuring food security for our country.

From the foregoing, it is clear to me that the importation and distribution of fertiliser to farmers positively affected the level and quality of production of agricultural produce and it was for that reason directly connected and incidental to the Boards core functions. It is important to note that the procurement and supply of fertilizer is not prohibited under the Act whether directly or indirectly. Consequently, it is

my finding and decision that the Board's actions were not ultra vires the provisions of the Act. I am fortified in this finding by the statements of the court ***In Re Matter of an Application by Ali Sele, Benson Wairagu & Joseph Ng'ethe Gitau [2008] eKLR***. In this case, the learned judge accepted as good law the citation ***in De Smith's Judicial Review of Administrative Action (3rd Edition)*** in which the author states:

“The House of Lords has laid down the principle that “whatever may fairly be regarded as incidental to, or contingent upon those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires.”

Besides, Section 4 (2) of the Act shows that the Respondent is authorised to take any action in compliance with any general or special direction given by the Minister in furtherance of its objects. The Respondent in its Replying affidavit stated that it got authority to import and supply fertiliser through a Cabinet directive way back in 2008, and that it was only implementing a cabinet directive. The Respondent has annexed various letters from the Office of the Permanent Secretary which show that the Ministry of Agriculture, its parent ministry had directed it to distribute fertiliser to farmers in the country. Compliance with such directions cannot be said to be unlawful or ultra vires the Act since it was provided for under Section 4 (2) of the Act. Section 4 (2) states: ‘

“In fulfilling its functions, the Board shall comply with any general or special directions which the Minister may give”

Though it is clear in this case that the Respondent's action of procuring and distributing fertilizer to farmers was an activity undertaken in the public interest and was an important function for the Board if this country was to achieve its goal of attaining food security for its people, it is unfortunate that parliament in its wisdom did not consider it necessary to expressly include this function in the Board's mandate under the Act. Perhaps it is now time for Parliament to consider amending the Act to expressly include the procurement and supply of fertilizer as part of the Board's mandate for the sake of clarity in order to avoid unnecessary litigation in future.

I now wish to turn to a consideration of whether the Applicant is deserving of the reliefs sought in this case. The Applicant had sought the remedies of certiorari, prohibition and Mandamus.

I have already made a finding that an order of certiorari is not available to the Applicant. Similarly, an order of prohibition cannot issue in this case since prohibition like certiorari issues only where it has been proved that a decision or action of a public body has been taken in excess of or without jurisdiction. Prohibition looks to the future. It will be issued by the court to ensure that an illegal decision or action is not implemented to the detriment of the aggrieved party or members of the public.

In this case however, having found that the activities of the Respondent are authorised by the enabling Statute, an order of prohibition cannot issue.

The court cannot issue orders to prohibit the performance of a statutory duty.

Regarding the prayer for an order of mandamus, it is my finding that the same is also not available to the Applicant. Mandamus only issues to compel the performance of a public duty. There is no evidence to show that the Respondent has failed to undertake any of its public duties that this court would be called upon to compel it to perform. The Respondent is not under any obligation to withdraw orders issued for the supply of fertilizer or to remove the stocks of fertilizer held in its depots.

In the end, it is my finding that the Application dated 14th November 2011 lacks merit and it consequently fails in its entirety. On the issue of costs, this being a matter which raised issues of public interest, it is fair and just that each party bears its own costs. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of November 2012.

**C. W. GITHUA
JUDGE**

IN THE PRESENCE OF:

Florence - court clerk

N/A for the Applicant

Mr Lutta for the Respondent