REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

J.R. MISCELLANEOUS NO. 375 OF 2010

IN THE MATTER OF: AN APPLICATION BY ORION EAST AFRICA LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF: THE PEST CONTROL PRODUCTS (LICENSING OF PREMISES) (AMENDMENT) REGULATIONS, 2006

BETWEEN

REPUBLIC …….....……. APPLICANT

AND

PEST CONTROL PRODUCTS BOARD .....…… 1ST RESPONDENT
PYRETHRUM BOARD OF KENYA …….....….. 2ND RESPONDENT
EX PARTE …….....……. ORION EAST AFRICA LIMITED

JUDGMENT

The application dated 6th January, 2011 by Orion East Africa Limited, the ex parte applicant, hereinafter referred to as **"the applicant"**, seeks the following orders:

"1. An order of certiorari do issue to bring to this honourable court for the purpose of being quashed, the 1st respondent's Notification for Revocation of Certificates of Registration of the Applicant's products namely Pesthrin 60 EC, Pesthrin Public Health EC and Vet Dust 0.4% dated 15th November 2010.

2. An order of prohibition do issue to prohibit the 1st respondent, its servants, and/or agents from executing and/or enforcing the Notification for Revocation of Certificates of Registration of the applicant's products namely Pesthrin 60 EC, Pesthrin Public Health EC and Vet Dust 0.4% dated 15th November 2010 or in any other way interfering with the applicant's business.

3. Costs of this application be provided for."

The application was supported by a statutory statement and an affidavit sworn by **Peter Thuo**

Maina, the applicant's Managing Director. Mr. Maina stated that the applicant is a company duly licensed by the 1st respondent to manufacture, formulate, package, warehouse and distribute or offer for sale pest control products in Kenya and abroad. It has been in the market for over 20 years and has obtained good standing and leadership in pest control products. The applicant is also a stake holder in the pyrethrum industry and was granted a Pyrethrum Growers Licence by the 2nd respondent on 27th September, 2006.

On 15th November, 2010 the 1st respondent purported to revoke the certificate of registration of its products namely **Pesthrin 60 EC, Pesthrin Public Health EC** and **Vet Dust 0.4%** ostensibly because the applicant no longer sources technical grade pyrethrum for formulation purposes from the 2nd respondent and as a consequence was in breach of the conditions on which the registration was given by the 1st respondent. A copy of the notification of revocation was annexed to the applicant's affidavit. The alleged notification of withdrawal of support was not copied to the applicant and neither did the 1st respondent bother to request the applicant to respond to the allegations before the purported decision to revoke the certificates of registration of its products was made.

The applicant contended that **Section 6** of the **Pest Control Products Act, Cap 346,** does not grant power to the 1st respondent to revoke or deregister a registered pest control product. The applicant further stated that the three products whose registration the 1st respondent sought to revoke were registered on diverse dates between July 2004 and April 2008.

The certificate of registration of Pesthrin 60 EC was issued on 16th July, 2004 whilst the Letter of Access was issued after the product registration on 25th April, 2005. The Letter of Access could not therefore have possibly founded the basis for registration of the three products whose registration is sought to be revoked since Pesthrin 60 EC was registered prior to the issuance of the letter of access while Pesthrin Public Health and Vet Dust 0.4% are not mentioned in the Letter of Access, the applicant stated.

The applicant further contended that the certificate of registration of Pesthrin 60 EC refers to non-existent conditions for registration. The registration certificate of Pesthrin Public Health and Vet Dust 0.4% is also not subject to any conditions. There was also no obligation on the part of the applicant to source technical grade pyrethrum from the 2nd respondent and the purported reason for revocation is therefore fanciful and arbitrary, Mr. Maina deposed.

The applicant added that a Letter of Access to technical grade information is at any rate superfluous as there is no requirement either in the **Pest Control Products Act** or the Regulations thereto that the same must be produced before registration of a product.

Upon receipt of the revocation letter aforesaid, the applicant protested strongly vide a letter dated 7th December, 2010. The applicant alleged that the 2nd respondent has shown demonstrable hostility towards its market presence and has previously written correspondences whose import is to bind it to buy pyrethrum extracts from the 2nd respondent yet the Kenyan market is fully liberalized and business is driven by free market forces. Over the last 20 years the applicant has bought pyrethrum and other grades of pyrethrum extracts from the market and from the 2nd respondent on non-agency basis and at competitive commercial terms. Further, there exists no contract between the applicant and the 2nd respondent obligating the former to source pyrethrum extracts from the latter, Mr. Maina added. The applicant alleged that the 2nd respondent has in the past failed to produce reliable and quality technical grade pyrethrum extracts hence adversely affecting the applicant's business.

The applicant further stated that the technical grade information that the 1st respondent cited as a basis for revocation of registration of her products is not patented or protected in any way as a registered intellectual property with the Kenya Industrial Property Institute. The applicant read bad faith in the 1st respondent's action of revoking the certificates of registration of its products for allegedly failing to source technical grade pyrethrum from the 2nd respondent since as far back as 2007 the 2nd respondent

had confirmed that the applicant was extracting pyrethrins with its approval and licensing. In a letter dated 15th June, 2007 addressed to the applicant, the 2nd respondent stated, *inter alia*:

> **"We are aware that you are already extracting pyrethrins following our approval and licensing last year. We would also appreciate if you can bring a 50 ml sample of each of your extract materials for our evaluation."**

The applicant's contention is that the revocation of registration of its products is actuated by ill will, malice and sheer business rivalry and has nothing to do with breach of any known law or regulation governing registration of her products. The applicant has invested heavily in her business and has recently invested in modern state of the art equipment for extraction of pyrethrin and other plant extracts and is bound to suffer a projected loss of over Kshs.200 million should the unlawful revocation be left to stand, Mr. Maina stated.

The applicant added that the 1st applicant has previously subjected her to harassment and at one point raided her factory and wrongfully seized and carted away lorry loads of her products. The applicant challenged that move by filing judicial review proceedings **in Miscellaneous Application No. 161 of 2003.**

For the aforesaid reasons the applicant urged the court to grant the orders sought.

The 1st respondent filed a replying affidavit sworn by **Gladys Njeri Maina**, its Secretary/Chief Executive Officer.

Ms Maina stated that the 1st respondent is a statutory body established under **Section 5** of the **Pest Control Products Act** to undertake the functions set out at **Section 6** of the said **Act**. The 1st respondent is also a designated National Authority for the implementation of International Conventions which Kenya has ratified including, Rotterdam Convention, seeking to regulate the use of certain hazardous chemicals and pesticides. The essence of the duties of the 1st respondent is to safeguard human health and the environment through the regulation of pest control products.

The 1st respondent further stated that pest control products must be registered so that the 1st respondent is given opportunity to assess the risk level and see how that risk can be managed. Pest control products are required to be labelled with full indication of their risk level and a safeguard mechanism to manage that risk. The certificate of registration of pest control products includes the name of the manufacturer of that product and its local agent or distributor in the market. An application for registration of a pest control also includes a confidential disclosure to the 1st respondent of the manufacturing process and formula of the product. Where the process includes the use of a raw material or formulation from another party, a Letter of Access to the technical data on that material ingredient by that party has to be submitted in support of that application, the 1st respondent stated.

Regarding the three pest control products in issue, the 1st respondent stated that they were registered based on Letters of Access from the 2nd respondent to the applicant. The 2nd respondent has since withdrawn that access and the applicant is now sourcing material from elsewhere.

In response to various issues raised by Mr. Peter Maina in his supporting affidavit, the 1st respondent stated, *inter alia*:

- **The applicant was issued with a licence to trade in pest control products and not a certificate of registration of any pest control product.**
- **The applicant was licenced to grow pyrethrum on the terms of the licence dated 27th September, 2006 but the applicant was not authorized to extract or process pyrethrum or deal in pyrethrum products.**
- **The notification for revocation of certificate was issued at the request of the registered**

owner of the technical data in respect of the applicant's three pest control products.

- **That upon receipt of the letter of withdrawal the applicant sought to know why the said action was taken and appropriate response was given.**
- **Before the letter of withdrawal was done the applicant had admitted that it had changed the source of the pyrethrum technical grade active ingredient for their products and the applicant and the 2nd respondent had ceased supply and business relations under which the said certificates were issued since the applicant had been sourcing active ingredients from elsewhere.**
- **That on 29th December, 2010 the 1st respondent had written to the applicant seeking to know the source of Pesthrin and how it was registered. The 1st respondent had also requested the applicant to register its new pest control product.**
- **That since 2007 the applicant had been using unlicenced materials to make its products but passing them off as those of the 2nd respondent.**
- **That the applicant has no registered or licenced active ingredient that would entitle it to formulate the three pest control products in issue and the three products are illegal and may endanger human health and environment.**
- **That the 1st respondent granted to the applicant only a temporary registration of Pesthrin 6% EC for a period of one year vide a letter dated 19th July, 2004. The product was to be considered for full registration upon fulfillment of conditions set out in the said letter.**
- **Upon the said temporary registration a certificate of registration was issued in the joint names of the applicant and the 2nd respondent but it expired on 15th July, 2005. Before expiry of that certificate the applicant in fulfillment of the conditions set out in the letter of temporary registration availed a letter of access dated 25th April, 2005 from the 2nd respondent. The letter of access is very specific to Pesthrin 6% EC. Thereafter the applicant was granted full registration of the said product.**
- **It is not true that the applicant does not require the particular certified active ingredient from the 2nd respondent to formulate that pest control product.**
- **That once the applicant stops sourcing the active ingredient manufactured by the 2nd respondent she cannot be a formulator or agent of the 2nd respondent in respect of that known pest control product.**
- **That pyrethrum and transactions in pyrethrum products are fully controlled by the 2nd respondent under the Pyrethrum Act Cap 340.**
- **That the applicant has admitted that she is processing her own pyrethrum into raw material which is in contravention of the Pyrethrum Act.**

The 2nd respondent filed a replying affidavit that was sworn by **Dr. Isaac J.W. Mulagoli**, its Managing Director. He stated that the Pyrethrum Board of Kenya is a statutory body established under **Section 4** of the **Pyrethrum Act** with a view to promoting the pyrethrum industry. Under the Act the 2nd respondent enjoys exclusive mandate within the Republic of Kenya to grow, process, market pyrethrum and control all transactions of pyrethrum and its products.

The 2nd respondent further stated that the applicant was on 27th September, 2006 granted a pyrethrum grower's licence, however, the applicant last delivered pyrethrum to the 2nd respondent in 2007.

The applicant has never had any authority to extract or process pyrethrum or deal in pyrethrum products, the 2nd respondent stated. It added that the applicant's pest control products in issue contained pyrethrin as the active ingredient and the 2nd respondent is the proprietor of pyrethrin and supplier of technical data grade material in respect of the three products. The 2nd respondent had given conditional authority and access to its technical data to the applicant in respect of the said three products in support of an application for registration with the 1st respondent. There was an understanding that the applicant would buy pyrethrins for the 2nd respondent. But thereafter the applicant changed the source of the pyrethrum technical grade active ingredient for its products in breach of the conditions of the authority and access granted to her and in contravention of the law. Consequently, the 2nd respondent withdrew the

authority and access which it had granted to the applicant and subsequently requested the 1st respondent to deregister the three products.

The 2nd respondent further stated that it is within the powers and mandate of the 1st respondent to revoke the applicant's certificate of registration of the said three products. The 2nd respondent had severally raised its concern about the applicant's breach of the conditions of the authority to access its technical data and notified the applicant of its intention to withdraw its authority of access due to its breach of the terms and conditions aforesaid. Dr. Mulagoli cited a letter dated 20th April, 2009 wherein 2nd respondent stated:

"The technical grade product (pyrethrum Pale Extract 50%) for which the letters of access were issued for registration of the above products was last ordered by your company (Orion East Africa Limited) in February 2007. Over two years have since elapsed without generation of further business to PBK. In this regard, PBK is contemplating withdrawing the technical data supporting the registration of these products in line with its business strategy.

However, prior to undertaking this move we wish to obtain Orion's understanding in so far as these products' status is concerned. Kindly revert on this matter."

The applicant failed to respond to the 2nd respondent's concern. Consequently the 2nd respondent withdrew the authority to access granted to the applicant.

The 2nd respondent denied that it has shown hostility towards the applicant's market presence and further denied that the Kenya pyrethrum industry or market is fully liberalized. It also denied that it had at any time failed to produce reliable or quality technical grade pyrethrum extracts as alleged by the applicant.

The 2nd respondent further stated that it is the only legal entity that is by law authorized to do pyrethrum processing in Kenya and it is unlawful for the applicant to undertake pyrethrum extraction and processing.

In response to the respondents' replying affidavit the applicant filed further affidavits which in turn attracted supplementary replying affidavits by the respondents. I need not highlight the contents of these further affidavits.

The parties also filed their respective submissions and highlighted the same. I have carefully considered the affidavits as well as the written submissions.

The first issue for consideration is whether the 1st respondent's act of revoking the certificates of registration was lawful.

The applicant contended that under the provisions of **Section 6** of the **Pest Control Products Act** the 1st respondent has no power to consider applications for revocation of pest control products and there cannot be any subsidiary legislation or regulation by the Minister that would purport to confer upon the 1st respondent power to consider such revocation. That section provides as hereunder:

"The functions of the Board shall be –

(a) to assess and evaluate pest control products in accordance with the provisions of the regulations made under this Act;

(b) to consider applications for registration of pest control products and to make recommendations thereon to the Minister;

(c) to advise the Minister on all matters relating to the enforcement of the provisions of this Act and regulations made thereunder."

The applicant further submitted that under **Section 15** of the **Act,** revocation of registration of pest control products is not one of the matters for which the Minister is empowered to formulate regulations on.

However, the 1st respondent's advocate sought to rely on the provisions of **Regulation 11(2) (d)** of the **Pest Control Products (Registration) 2006** which it says grants it power to deal with applications for revocation of pest control products. Under **Section 15** of the **Pest Control Products Act**, the Minister may make regulations respecting the registration of pest control products. The Pest Control Products (Registration) Regulations were formulated pursuant to that power. **Regulation 11** relates to suspension and revocation and registration of certificates of registration. The regulation provides as hereunder:

"11 (1) The Board may suspend or revoke a certificate of registration issued under these Regulations for such time as the Board may determine.

(2) The powers conferred by paragraph (1) shall not be exercised by the Board except on one or more of the following grounds –

(a) That the matter stated in the application on which the certificate of registration was granted were false or incomplete in a material particular;

(b) That new information has become available to the Board which renders the pest control products unsafe or dangerous;

(c) That the premises on which, or on part of which, the pest control product is manufactured, assembled or stored by or on behalf of the holder of the certificate of registration are unsuitable for the manufacturing, assembly or storage of pest control products;

(d) That the holder of a certificate of registration has given a notice to the Board in writing of any intentions to suspend product registration for a period not exceeding 5 years."

From the foregoing, it is crystal clear that the Board is given power to suspend or revoke a certificate of registration under **Regulation 11(1)**. However, that power can only be exercised on one or more of the grounds stated in **Regulation 11(2) (a), (b), (c)** and **(d).** The notice of revocation of certificate of registration dated 15th November, 2010 did not cite the provision of the law under which the notice had been issued. The 1st respondent's advocate referred to **Regulation 11(2) (d)** of the Regulations in his submissions. That notwithstanding, I do not agree that the reason that was given by the 1st respondent is one of the accepted grounds for revocation of a certificate of registration. The 1st respondent's decision was based on the 2nd respondent's contention that the applicant was no longer sourcing technical grade pyrethrum from itself. That reason is not in conformity with the provisions of **Regulation 11(2)** aforesaid.

Regulation 11(2) (d) cannot suffice because there is no indication that the holder of the certificate of registration had given a notice to the Board of any intention to suspend any of their products' registration. The registration certificates in question belong to the applicant and that is why the 1st respondent addressed the notification for the revocation to the applicant. The certificate of registration in respect of Pesthrin Public Health had been issued in the names; **"Manufacturer; Pyrethrum Board of Kenya/Registrant, Agent; Orion EA Limited"** of P.O. Box 10171 Nairobi. The certificate of registration for Pesthrin 60 EC was also issued in a similar manner although the applicant was recognized as the Formulator of the product. In respect of Vet Dust 0.4% the certificate of registration is also in the name of Pyrethrum Board of Kenya/Orion EA Limited. On 15th April, 2008 the 1st respondent wrote to the applicant stating that Pesthrin 60 EC had been given full registration. The applicant was asked to pay Kshs.30,000/= as registration fees, which sum was promptly paid. It is therefore only the applicant as the

holder of the certificate who could give a notice of intention to suspend the registration of the product. If none of the conditions stipulated under **Regulation 11(2)** had been met the revocation of the certificates of registration was illegal.

Writing about "**illegality**" as a ground for judicial review, Lord Diplock in **COUNCIL OF CIVIL SERVICE UNIONS vs. MINISTER FOR THE CIVIL SERVICE, [1985] AC 3 374** stated:

"By "illegality" as a ground of judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

Whether he has or not is per excellence a justificable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of state is exercisable."

The reason given by the 2nd respondent for requesting revocation of the certificates of registration does not seem to have been one of the conditions upon which the certificates of registration for the aforesaid three products were issued to the applicant. The condition under which Pesthrin Public Health was registered is stated in the certificate as **"Insecticide for the impregnation of long lasting treated bed net"**. The condition under which the certificate of registration in respect of Pesthrin 60 EC was issued is stated in the certificate as **"Insecticide for the control of caterpillars, aphids and thrips on brassicas & French beans".** For Vet Dust 0.4% the condition under which the pest control product was issued is stated in the certificate as **"A contact insecticide for the control of beetles & larvae in hides & skin, under storage".** Surely the quoted words herein cannot amount to obligatory pre-requisite conditions for issuance of the certificates of registration as alleged by the respondents.

Although the 2nd respondent had stated in its letter dated 14th September, 2010 addressed to the 1st respondent the reasons for its purported withdrawal of Letters of Access issued to the applicant, the reasons stated therein on their own are not sufficient to warrant revocation of the applicant's certificates of registration as stated under **Regulation 11(2)** aforesaid. The certificate of registration in respect of Pesthrin 60 EC is dated 16th July, 2004. The letter of access by the 2nd respondent is dated 25th April, 2005 and it is illogical that the said letter of access could have founded the revocation of a certificate that had already been issued much earlier. The purported reason for revocation of the applicant's certificate of registration is therefore unreasonable and irrational.

In **COUNCIL OF CIVIL SERVICE UNIONS vs. MINISTER FOR THE CIVIL SERVICE (supra**), Lord Diplock delivered himself thus:

"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness." (ASSOCIATED PROVINCIAL PICTURE HOUSES LTD vs. WENDESBURY CORPORATION [1948] 1 KB 223). **It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."**

It also appears to me that there was procedural impropriety on the part of the 2nd respondent in failing to notify the applicant of its withdrawal of the Letters of Access. The 2nd respondent's letter to the 1st respondent dated 14th September, 2010 was not copied to the applicant yet the applicant was the one who was going to suffer the consequences of revocation of the certificates of registration. Equally, the 1st respondent did not invite the applicant to make any comments or response to the 2nd respondent's letter before proceeding to revoke the certificates of registration. Rules of natural justice require that before such a drastic action is taken the applicant be given an opportunity to be heard. The respondents were well aware that the applicant was going to suffer considerable loss as a result of their decision and it was only fair that before any adverse action is taken the applicant be afforded an opportunity to comment on the matter.

In "**Judicial Review Handbook"** by F. Fordham at page 100, the learned author states that:

"The general duty to act fairly will depend on the consideration of three factors (i) the nature of the decision (ii) the relationship existing between that body and the individual and (iii) the effect of that decision on individual right".

I do not agree with Mr. Ojiambo, learned counsel for the 1st respondent, that his client was not obliged to hear the applicant before it proceeded to revoke the certificates of registration since that the **Pest Control Products Act** and the Regulations thereto do not so state. The **"audi alteram partem"** saying, that is, **"hear the other side"**, is a well known principle of natural justice which embraces almost every administrative action, whether or not it is stipulated in an Act of Parliament.

In **COOPER v WANDSWORTH BOARD OF WORKS (1863) 14 CB (NS)**, Byles, J. held that even where there are no positive words in a statute requiring a party to be heard, as long as any decision made against that party is likely to subject him to financial loss, the justice of the common law must supply the omission of the legislature.

Article 47 of the **Constitution of Kenya, 2010** grants every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Constitution is the Supreme law of the land and all Acts of Parliament, Rules and Regulations made thereunder must espouse the spirit of the Constitution. Whenever a public officer or any person interprets any law or makes or implements public policy decisions he must be guided by the National values and principles of governance stipulated under **Article 10** of the **Constitution of Kenya, 2010** which include transparency, accountability, integrity and rule of law, just to name a few of the principles.

The 1st respondent's decision which was occasioned by the 2nd respondent's unprocedural decision violated the applicant's legitimate expectation that the registration of her pest control products will not be interfered with without due process of the law, considering the express provisions of the **Pest Control Products Act** and the relevant Regulations. The applicant's products have been in the market for a number of years and the applicant, having lawfully procured registration of the pest control products, has invested heavily in the business including production and marketing of the said products. In **R vs DEVON COUNTY COUNCIL, ex parte BAKER & ANOTHER [1995] 1 All ER 73 at page 88,** it was held that:

"….the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain) here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the 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 recognizes that the interests 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."

Before I conclude this judgment, I must restate that the remedy of judicial review is concerned with reviewing not the merits of a decision in respect of which an application for judicial review is made, but the decision-making process itself. See **REPUBLIC v JUDICIAL SERVICE COMMISSION, ex parte PARENO [2004] 1 KLR 203.**

This court is not deciding whether the applicant has violated any of the provisions of the **Pyrethrum Act** or not, and if so, the consequences that ought to follow. That is the function of the Pyrethrum Board of Kenya, the 2nd respondent. But in the exercise of its statutory mandate, the Board must act in accordance with the law including rules of natural justice. That also applies to the 1st respondent. If the applicant has breached any of the provisions of the Pyrethrum Act or any covenant between her and the 2nd respondent there are consequences that ought to follow, as long as the appropriate action is taken in accordance with the law. Two wrongs never make a right.

Having taken into consideration all the relevant issues, an order of certiorari is hereby issued to bring

to this court and quash the 1st respondent's notification for revocation of the certificates of registration of the applicant's products namely; Pesthrin 60 EC, Pesthrin Public Health EC and Vet Dust 0.4%. An order of prohibition is also issued to prohibit the 1st respondent, its servants and/or agents from executing and/or enforcing the notification for revocation of the certificates of registration in respect of the aforesaid pest control products as stated in the 1st respondent's letter dated 15th November, 2010 or in any other way interfering with the applicant's business. The respondents shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER1, 2011.

D. MUSINGA
JUDGE
In the presence of:
Muriithi – Court Clerk
Miss Kamau for Mr. Ojiambo for the 1st Respondent
Mr. Ng'ang'a for the Ex Parte Applicant