REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 601 of 2008

REPUBLIC…….APPLICANT

VERSUS

THE MINISTER FOR AGRICULTURE…….....1ST RESPONDENT

THE KENYA SUGAR BOARD…….…….… 2ND RESPONDENT

EXPARTE: MAT INTERNATIONAL LIMITED

JUDGMENT

On 6th October 2008, Issa & Co Advocates filed this Notice of Motion dated the same date on behalf of Mat International Ltd. against the Minister for Agriculture and the Kenya Sugar Board. The Applicant seeks the following orders:

1. An order of certiorari to bring to this Hon. Court for the purpose of being quashed the Sugar (Imports, Exports and By-products) Regulations 2008, promulgated under Legal Notice 114 of 2008, published on 5th September 2008;

2. An order of prohibition to prohibit any implementation of the sugar (Imports Exports & By Products) Regulations 2008, promulgated under Legal Notice 114 of 2008, published on 5th September 2008;

3. An order of prohibition to prohibit the Kenya Sugar Board from implementing the Sugar (Imports, Exports and By Products) Regulations 2008, promulgated under Legal Notice No. 114 published on 5th September 2008;

4. An order of mandamus to compel the 2nd Respondent to issue the Applicant with an import licence for the period 2008-9;

5. Costs of this suit.

The Notice of Motion is premised on the statutory statement and verifying affidavit sworn by David Patrick Killoran, dated 29th September 2008 and 24th September 2008 respectively, a further affidavit by

David Killoran dated 17th November 2005 and filed in court on 19th November 2008, another further affidavit filed on 20th November 2008 and; List of Authorities dated 28th November 2008. After the Notice of Motion was filed, the following Interested Parties came into the matter, Nairobi Bottlers Ltd., the Wriggley Company E.A Ltd., Patco Industries Ltd., E.A. Breweries Ltd and Stillbone Ltd.,1st – 5th Interested Parties.

The Notice of Motion was opposed and the Respondents filed the following documents:

1) Replying Affidavit sworn by Hon. William Ruto, Minister for Agriculture dated 24th October 2008;

2) Three replying Affidavits sworn by Rosemary Mkok, the Chief Executive Officer of the 2nd Respondent, dated 24th October 2008 and two affidavits dated 2nd February 2009;

3) 1st Respondent's submissions filed in court on 25th May 2009;

4) 2nd Respondents submissions dated 23rd February 2009 with Lists of Authorities.

The Interested Parties also filed two affidavits by James Musyoka Managing Director Kenya Breweries Ltd., sworn on 18th December 2008 for 1st Interested Party and another by Andrew Otieno, Finance Director, of the 2nd Interested Party, sworn on 26th November 2008. They filed submissions on 27th May 2009. Other IPs who had come on record did not take part in the hearing. The Applicant was represented by Mr. Okwach and Issa Advocate, the 1st Respondent by Mr. Onyancha, 2nd Respondent by Mr. Kemboy

The facts in support of the application are found in the verifying affidavit of David Patrick Killoran dated 29th September 2008, that the Applicant is the largest importer of COMESA Sugar in Kenya and she applied for renewal of her licence on 1st July 2008 for the period 2008-09 (DPK 1). That the 2nd Respondent had sent a notification to the Applicant on 4th July 2008 on the requirements to be met before Registration as an importer and upon payment of the requisite fees, the licence and permit would be issued.

The 2nd Respondent informed the Applicant that the licence was ready but upon collection it was withheld. On 4th July 2008, the 1st Respondent announced through the newspapers that all import licences had been scrapped. The Applicant wrote to the 1st Respondent seeking clarification but to date there has been no response. It is the Applicants contention that the 1st Respondent has no power under S 27 of the Sugar Act, to purport to cancel the Import licences and the unilateral act of canceling licences was ultra vires the powers vested in the 1st Respondent. That the Secretary General COMESA had warned the 1st Respondent that cancellation of import licences would constitute a non-tariff barrier which is prohibited under Article 49 of the COMESA TREATY (DPK 5). That he is aware that at the 26th COMESA meeting held in Lusaka on 24th November 2007, the Council extended the safeguard measures granted to Kenya for a further 4 years and pursuant to that extension, the Minister of Trade vide Gazettee Notice 8146 of 5th September 2008, published a legislative supplement No. 63 establishing the Sugar Safeguard Committee and notified the general public of it. The Gazette notice sets out the composition of the Committee and its mandate (see paragraph 11-13 of Affidavit). That, in total disregard of the Committee, the 1st Respondent published the impugned Regulations as Legal Notice 114 gazetted on 5th September 2008. (DPK 8). He deponed that the said Regulations are ultra vires S 27 of the Sugar Act 2001 which provides that all sugar imports will be subject to such Regional and International Trade Agreements to which Kenya is a party. That the Regulations are in conflict with the mandate of the Sugar Safeguard Committee, S 27 and the COMESA Treaty – Articles 49, 55 and 61. (DPK 9) That the Regulations have been made in total disregard of the advice given by the office of the Attorney General prior to publication of the Regulations (DPK 10). The Applicant contends that they are prejudiced by the

enforcement of the Regulations in that;

i) She had been assured that upon payment of Kshs.50,000/= she would be issued with a licence;

ii) That the Applicant had entered into contracts of commitments prior to publication of the Rules with full knowledge that the COMESA quota for 2008-09 was available;

iii) The implementation of the Regulations is unreasonable as the Applicant risks having his sugar which is already shipped put in jeopardy. The Applicant exhibited a schedule of their commitments;

iv) The system of auctioning is open to manipulation;

v) Introduction of permits in consignments of 500 tons parcels and verification of each consignment is an administrative burden and acts as a non-tariff barrier.

That the Applicant has been subjected to unfair treatment. That the Applicant having acted on the representation made by the Government and having duly paid for the import licence it has a legitimate expectation that its business would not be frustrated.

The Applicants contention therefore is that apart from the Regulations being ultra vires the Sugar Act, the 1st and 2nd Respondents publication of the Regulations and seeking to enforce them is an abuse of power, irrational and unreasonable. Counsel also urged that the impugned Regulations have not been placed before the National Assembly as required by S.34 (1) of the Interpretation and General Provision Act Cap 2 Laws of Kenya. Reliance was made on the case of **R V SHEER METAL CRAFT LTD (1954) 1 QB 586** for the above proposition.

The Applicant made reliance on the following cases:

1) **TRANSOUTH CONVEYORS LTD V KRA CA 89/07** where the court held that S 27 of the Sugar Act donates power to the Kenya Sugar Board to control imports of Sugar subject not only to International Trade Agreements but also subject to prevailing import duties, taxes and other tariffs; That in this case, the current Regulations have made a fundamental departure from existing Regulations. That as regards Regulations 4 (4), 4(5) it was alleged that they introduce non-tariff barriers and are discriminatory in nature and Regulation 4(3) subjects the decision of the Board to conditions as the Minister may impose, yet the court has held that the Minister has no power to do that. That Regulation 10(2) vests the right to overrule the decision of 2nd Respondent in the Minister contrary to the sugar Act.

2) **NJUGUNA V MINISTER FOR AGRICULTURE (2000) EA 184**, the court held that the court has power to quash subsidiary legislation that is ultra vires; This court is invited to do likewise.

3) NEDEMER TECHNOLOGY BV LTD V KACC PETITION 390/06 where the court held that the Respondents could not wriggle out of the Attorney General's opinion as legal adviser of the Government;

4) PIONEER ASSURANCE V ZIWA (1974) EA 161, COCKER V DIRECTOR OF PENSIONS (2000) IEA 38, where the Respondent was ordered to comply with the law subsisting before the new Regulations.

That the Applicants had a legitimate expectation that having been issued with certificates and having entered into contracts they would be allowed to continue.

Mr. Onyancha, Counsel for the 1st Respondent in opposing the Notice of Motion relied on an affidavit sworn by Hon. Ruto, Minister for Agriculture; He urged that the Minister acted within his powers because the said Regulations were made to curb abuse of existing Regulations. That having been made under an Act of Parliament they, cannot be reversed. That if the Applicants have been aggrieved by the Regulations they should appeal. That the Regulations are made as an exercise of discretion and the

Applicant has failed to demonstrate the basis of the challenge. That S. 27 has to be read with S 33 (2) which gives the Government the power to curb malpractices and there is no evidence of use of excessive powers. That the policy was that no cheap sugar was to be imported. He urged the court to disregard the opinion of the Attorney General on the issue as it was placed before a subcommittee for consideration. Hon. Ruto deponed that in respect of the letter from the Secretary General COMESA, the said letter was written well before the Regulations were promulgated but that thereafter there was an exchange of letters between the Ministry and the Council and the Council's decision was taken into account when the Regulations were drafted.

Rosemary Mkok, the Ag Chief Executive Officer of the 2nd Respondent swore three affidavits in reply to the Applicant's case. She deponed that the Applicant has deliberately suppressed and concealed material facts and distorted the factual position. She deponed that with the ascension of the Free Trade Area under the COMESA Treaty, the Government was concerned that the sugar Industry which was operating under uncertain structural constraints would not survive in a regime in which sugar could be imported duty free into the country from the COMESA countries. That there were several adverse effects on the sugar industry, that is, poor rainfall, high costs of farming, declining land units etc (para 11-12 of the Replying Affidavit dated 24th October 2008). The Government applied for protection of the Sugar Sector by way of safeguards under Article 61 of the COMESA Treaty as read with Article 10(1) of the same treaty. The purpose of the safeguards was to cushion the sugar industry from potential negative effects of cheap duty free sugar imports from the COMESA Free Trade Area while at the same time striving to restructure to make the sugar sector competitive. The safeguard measures were last extended by the Decision Council on 24th November 2007 for a period of 4 years at Lusaka in Zambia.

There were terms and conditions imposed that there had to be research done on high sucrose and early maturing varieties, the sugar industry changes into pricing formular from one based on weight to one based on sucrose content, and lastly that Kenya submits periodic performance reports on all measures taken to improve the competitiveness (RM 2).

That the regulations governing importation of sugar was the Sugar (Imports, Exports and By Products) Regulations 2003, and amended by Legal Notice 2/06 and that the said Regulations were found to be inadequate as many unscrupulous traders took advantage of the system so that the 2nd Respondent was not able to monitor the use of annual licences. It was discovered that some traders used the said licences to import sugar under the guise of other low value or duty free goods, as evidenced by RM 3A & B. That the importers also used the licences to bring in sugar that did not meet the minimum statutory standards required by the Kenya Bureau of Standards. That the old Regulations also enabled some importers to monopolize the import of COMESA duty free sugar. She exhibited as RM 5 the companies that engaged in the sugar imports that the process was thus lacking the basic ingredients of fair trade and competition. Another weakness of the old system was that some traders diverted sugar meant for export into the domestic market which gave unfair competition to those who had taxed sugar. Due to these shortcomings, the Respondents found it necessary to come up with new Regulations to effect the necessary changes which included-

1) Issuance of specific licences for consignments rather than the annual blanket registration;

2) Effective monitoring of the importation process which comprised 3 stages

(i) pre-arrival notification to the Board for purposes of planning;

(ii) Customs documentation for purposes of clearance supported by import permits issued by the Board;

(iii) Cargo release supported by physical verification to ensure that it tallies with the consignment.

3) That the right to import sugar under the COMESA Tariff, safeguard would be publicly auctioned off by lots to the highest bidder, so as to make the process open, transparent, competitive and non discriminative.

That the said Regulations have been prepared to fully conform with the Act and COMESA Treaty and conditions upon which the safeguards were extended, and are promulgated in such a way as to curb the earlier prevalent abuse of the system and equip the 2nd Respondent to monitor it. She further deponed that the said 2008 Regulations processes licences expeditiously, have introduced competitiveness, and made the process more simpler.

In reply to the Applicants allegation that they applied for renewal of their licence on 1st July 2008 and the 2nd Respondent declined to renew it without notice, MKOK deponed that all licenses which had been granted under the old regime lapsed on 30th June 2008 and that the payments made by the Applicant on 1st July 2008 had not been demanded by the 2nd Respondent and that no notification was ever sent to the Applicant the requirements for registering as an importer, and the 2nd Respondent denied knowledge of the source of the notification.

In response to the averments at paragraphs 11-14 of the verifying affidavit on the role and mandate of the safeguard Committee, MKOK deponed that the Committee's role is merely administrative and coordinating body which cannot usurp the powers of the 1st and 2nd Respondents. It is the Respondent's contention that the powers and mandate of the 2nd Respondent are set out under S 4, 27 and 33 of the Sugar Act, and the promulgation of the 2008 Regulations was for purposes of the Respondent carrying out those functions. That it is only the 1st and 2nd Respondents who had the legal mandate to promulgate the rules. It is the view of the deponent that these proceedings are an ill-disguised appeal against the policy decision made by the 1st and 2nd Respondents in exercise of their statutory powers and this court has no jurisdiction to sit on appeal. It was denied that the sugar safeguard committee was set up to supplement the functions and role of the 2nd Respondent.

The allegations of discrimination against the Applicant are denied and it was deponed that the Applicant has brought in many tones of sugar between March and September 2008 (RM 1 4A & B). It was also deponed that most importers have responded positively to the 2008 Regulations and it would be absurd for the Applicant, a single player in the industry to be allowed to determine which laws to regulate the industry and that these proceedings are being used for ulterior motives. That the Applicant has on various occasions filed cases against the Respondent (RM 18) questioning the role of the 2nd Respondent yet the courts have vindicated the 2nd Respondent.

In addition to the above Mr. Kemboy, Counsel for the 2nd Respondent submitted that nowhere in the statement did the Applicant raise the question of the failure by the Respondents to table the Regulations before the National Assembly for approval. That even if the court were to find that it was one of the grounds upon which this application is predicated, the Applicants needed to demonstrate by way of sworn evidence that that should have been done and the Respondents would then reply. He termed that submission as an afterthought.

As to whether any of the orders should issue, Counsel submitted that the Applicant had to come under the grounds recognized in Judicial Review i.e. of illegality, procedural impropriety or irrationality. That so far, it has not been shown that the 1st and 2nd Respondents exceeded their powers under Ss. 27 and 33 of the Sugar Act and the orders cannot issue.

It is also the 2nd Respondent's contention that once the 2nd Respondent is satisfied with the Rules made, the Applicant has no right to complain. That if the tariffs and taxes were not in conformity with the COMESA Treaty, then the complaint would have been valid but there is no evidence that they do not conform. That the only complaint by the Applicants arises from the letter from the Secretary General COMESA (DPK 5) dated 24th July 2008 titled "**ban on importation of sugar to Kenya**". That the report on extension of safeguards exhibited by the 2nd Respondent spells out the conditions upon which the safeguards were extended but that the letter of secretary General and Attorney General were speculative and made before the Rules.

On whether an order of mandamus can issue, it was submitted that the 2nd Respondent has discretion to regulate importation of sugar and their hands cannot be fettered to issue licences to certain parties.

On the Attorney General's opinion Mr. Kemboy urged that the letter is dated 1st September 2008 whereas the Regulations were made on 3rd September 2008 and the Applicant has not specifically said what is in the letter that did not comply with the Regulations.

Counsel urged the court to look into the Applicants conduct on how they obtained the confidential opinions of the Attorney General and deny them the orders. Counsel was also concerned about the Applicants conduct in drawing the court's order wrongly and that it amounted to subversion of justice and orders should be denied on that ground too.

The 1st and 5th Interested Parties were represented by Mr. Kamau. They swore two affidavits and filed submissions. The Interested Parties are Manufacturers of Sugar based products and import industrial sugar from outside COMESA region which is not subject to COMESA Mutual tariffs and concessions and not subject to regulations sought to be quashed. The Interested Parties come to court to ensure that the court clarifies that Industrial sugar is not included in the Regulations sought to be quashed and the court should direct the regulatory regime of Industrial sugar.

I have now considered the application, the pleadings on record, the submissions by all Counsel and some of the authorities that this court was referred to. In Judicial Review applications, the grounds upon which an application is brought are three, broadly known as illegality, procedural impropriety and irrationality. Order 53 Rule 4 provides that no other grounds shall be relied upon in support of the Notice of Motion save those contained in the statement of facts. The Applicant cannot therefore purport to introduce any new grounds in his submissions or arguments save those pleaded in the statement. The grounds that have been pleaded in the statement are as follows:

1) that the Regulations are ultra vires the sugar Act 2001 sections 27 and 33 thereof;

2) That the Regulations flouted the terms agreed between the Kenya Government and COMESA Treaty;

3) That the promulgation of rules is an abuse and misuse of power and in total disregard of Sections 27 and 33 of the Sugar Act and the advice given by the office of the Attorney General;

4) The Regulations breached the legitimate expectation of the Applicant who expected his licence to be renewed and expected the court to comply with the Government's representations at the 24th COMESA meeting.

The above are the only grounds upon which the Applicant can urge their Notice of Motion and no other. At the hearing of the Motion however, the Applicant raised a new ground to the effect that the 2008 Regulations are ultra vires in that they had not been placed before the National Assembly as required by S 34 (1) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya. That failure to comply with the said mandatory provision renders the whole exercise of the powers donated under S. 33 as the Sugar Act ultra vires the intent of the Act.

Secction 34 (1) of Cap 2 provides as follows:

"**All rules and Regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder , or to the making of any new rule or regulation.**

2) subsection (1) shall not apply to rules or regulations a draft of such is laid before the National Assembly and is questioned by resolution before the making thereof, nor to rules of court.

3) ……..”

Nowhere in the pleadings did the Applicant allege that the failure to place the Regulations before the National Assembly was fatal to the Regulations and it cannot be considered in this motion a ground the basis upon which to interfere with the Regulations. If it had been pleaded, the onus would have been on the Respondents to show that there had been unreasonable delay in the Respondent's failure to place the Regulations before the National Assembly for approval. The Regulations were gazetted on 5th September 2008. That is when they came into force. This Application challenging the same was made on 3rd October 2008 when leave was granted to commence Judicial Review proceedings and the Notice of Motion was filed on 6th October 2008. This application was therefore made a month after the Gazettement. Was a period of one month unreasonable? Anyway, since that is not a ground for consideration, it is a moot question that cannot be considered at this stage.

The 1st Respondent is the Minister in charge of the Ministry of Agriculture under which the sugar industry docket falls. S 33 of the Sugar Act confers on the 1st Respondents a mandate in consultation with the 2nd Respondent, to make Regulations for the better carrying out of the provisions of the Act. The Regulations are supposed to provide for regulation and control of, production, manufacturing, marketing and importation of exportation of sugar and its by products all to provide the form of licences to be issued under the Act and the manner and form of the Application. Section 33 reads-

“**The Minister may in consultation with the Board, make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing, such Regulations shall provide for**

a) The regulations and control of production, manufacturing, marketing importation or exportation of sugar and its by products;

b) The forms of licences to be issued under this Act, and the term and manner of application therefor;

c) The fees which may be charged for any actually relating and incidental to the development, products marketing and distribution of sugar and its by-products.”

The 2nd Respondent is a statutory body established pursuant to the provisions of Section 3 of the Sugar Act No. 10 of 2001 (hereinafter referred to as the Act) as a body corporate and Successor to Kenya Sugar Authority . By virtue of S 4(1) of the Act, the functions of the 2nd Respondent are spelt out as regulating, developing and promoting the sugar Industry, co-coordinating the activities of individuals and organizations within the industry and facilitating equitable access to the benefits and resources of the industry by all interested parties.

S 4 (2) imposes on the 2nd Respondent the duty inter alia, to

(a) participate in the formulation and implementation of overall policies plans and programs of work the development of the industry;

(b) Monitor the domestic market with a view to identify and advising the Government and Interested Parties of any distortions in the sugar market;

(c) Promote the efficiency and development of the industry through the establishment of appropriate institutional linkages.

Section 27 gives the 2nd Respondent the mandate to control all sugar imports. It states as follows:

“**27 (1) subject to such regional and international trade agreements to which Kenya is a party, all**

sugar imports into the country shall be subject to the prevailing import duties, taxes and other tariffs and such imports shall be controlled by the Board;

(2) The Government shall introduce other safeguard measures as may be necessary to protect the industry from unfair trade practices."

Kenya is a party to the treaty that establishes the Common Market for Eastern and Southern Africa (the COMESA Treaty). With the advent of COMESA Free Trade Area, Kenya applied for safeguard measures to cushion the sugar industry from the threats posed by duty free sugar imports from COMESA and the safeguards are meant to restructure the Industry to make it more competitive. The last safeguards were granted by the COMESA Council of Ministers in the meeting of 24th November 2007. The report was exhibited by the Rosemary MKOK as RM 2. The safeguards were granted on terms and conditions. The 2008 Regulations were required to take into account these safeguard measures as well as the COMESA Treaty generally. These are the safeguards envisaged under S 27 (2) of the Sugar Act.

The 24th COMESA meeting held in Lusaka where the safeguard measures were extended for 4 years were granted on the following terms:

i) The extended safeguard measures would not be more restrictive than it was at the end of the initial period;

ii) The safeguard measures would be applied on a non discriminatory basis;

iii) New administrative measures which may act as non tariff barrier such as licensing which did not exist before the granting of the initial period of safeguards should not be introduced;

iv) The quota under the safeguard would be enlarged in each successive year of application; and the tariff applied on import quotations above quotes should be reduced in each successive year of application of the safeguard;

v) A redress for admitting and ministering the implementation of the mandatory on which the extension is premised, the term and conditions attached thereto and liaison with COMESA policy organs would be established as proposed by the secretariat and approved by Council;

vi) Kenya must submit periodic performance reports to council through the Secretary General on all measures activities and improvements on the sugar sectors competitiveness at least twice each year"

The Applicant has cited specific Regulations which they allege do not conform to the COMESA Treaty and the safeguards granted under the COMESA Treaty. I will now consider each of the impugned Regulations which is alleged to be ultra vires the Sugar Act and COMESA Treaty.

The Applicant alleges that the 2008 Regulations are more restrictive and discriminative in nature in that they seek to punish large importers of sugar and make the process more laborious. An example was given of Regulations 4(4) and 4 (5). They provide as follows:

"**Reg 4 (1) where the Board approves an application for an import or export permit under these Regulations, it shall be on payment of a registration fee of one hundred thousand shillings, register the Applicant by entering the name and such other particulars as it may determine in the register maintained under Regulation 5;**

(3) ……

(4) ……

(5) The permit shall be issued only for the specific consignment being imported or exported;

(6) A permit issued under these regulations shall last for one year and shall be renewable on payment of the fee prescribed in paragraph I"

According to the Applicants the permit cannot last a year when it has been issued for one consignment and that if an importer were to bring in ten consignments in a year, it would mean paying Kshs 100,000/= ten times. The Applicant contents that the rules as promulgated are more restrictive than that the 2003 Regulations, are discriminatory in nature and have introduced new administrative measures which act as non tariff barriers to trade.

In my view the onus was on the Applicants to demonstrate how these particular Regulations are restrictive or discriminative in nature. It is not sufficient to merely allege as they purported to. It is not for this court to take the 2003 Regulations and scrutinize them one by one in comparison to the 2008 Regulations.

The Applicants should have specifically pointed out the restrictions now introduced or those that were made more strigent than the 2003 Regulations. The applicant also failed to demonstrate how the Regulations did not take into account the safeguard measures extended to Kenya in 2007. Rosemary Mkok in her affidavit at paragraphs 16 – 24 has attempted to show the shortcomings of the 2008 Regulations which they have tried to address in the 2008 Regulations e.g. Abuse of annual licences, importation of low cost sugar, monopoly of the market by some traders etc. The Applicant did not address the specific shortcomings under these new Regulations.

It is the Applicants contention that Regulation 4(3) of the 2008 Regulations is ultra vires S 27 of the Act. It reads:

"**4(3) A permit issued under these Regulations shall be subject to such conditions as the Board may, with the written approval of the Minister, impose."**

I have already set out above the provisions of S 27 of the Sugar Act. S 27(1) clearly vests the importation of sugar under the control of the Sugar Board.

In **TRANSOUTH CONVEYORS LTD V KRA CA 89/07** consolidated with other appeals, the Court of Appeal considered the powers of the 2nd Respondent under S. 27 (1) of the Sugar Act. The court held that the power to licence importers and determine the need for sugar imports lies with the Sugar Board. It follows that issuance of permits to importers is the duty of the Board and the Minister has no role to play in that duty. In my view Regulation, 4 (3) takes away the power of the Board and hands it over to the Minister. By the Minister approving issuance of a permit, it means that he would have the last say on whether or not a party can be issued with a permit. Nowhere under S 27 is it provided that the Minister of Agriculture has a role to play. He can only consult with the Board as provided under S.33 of the Act, that is, when making Regulations which deal with control of, production of, manufacturing, marketing, importation and licensing of sugar, and Regulations which determine fees charged for any activity relating and incidental to development of Sugar and the by products. Once the Regulations are promulgated, the Minister has no role to play in the issuance of permits but that is left to the Board. Regulation 4 (3) usurps the powers of the Board and is ultra vires the sugar Act.

By promulgations Regulation 4 (3), the Board actually hands over its mandate to issue permits to the Minister. That is not the intention of the legislature envisaged under S 27 and 33 of the Sugar Act .

It is also the submission of the Applicant that Regulation 10(2) purports to vest the 1st Respondent with the right to overrule the decision of the 2nd Respondent in cancellation of permits in the event of a party contravening the 2008 Regulations.

Regulation 10 reads as follows:

"**10 (1) The Board may cancel an import, or export permit of a person who contravenes these Regulations;**

(2) A person whose permit has been cancelled may appeal the decision to the Minister."

I do agree with the Applicants view that giving the Minister the last say on whether or not the permit can be cancelled takes away or interferes with the mandate of the 2nd Respondent under S 27 of the Sugar Act. It

is the Board which has total control over Sugar Imports – the issuance or cancellation of licences but not the Minister.

The in conclusion of such a provision in the Regulations is ultra vires S 27 of the Act and hence the Sugar Act 2001. I would reiterate the Court of Appeal's decision in **TRANSOUTH CONVEYORS CASE (supra)**.

Under Section 27 of the Sugar Act, the 2nd Respondents shall control importation of sugar subject to such Regulations and international Trade Agreements to which Kenya is a party. One of those Trade Agreements is the COMESA TREATY. The 2008 Regulations promulgated by the 1st and 2nd Respondents have to take into consideration the provisions of this treaty S.27 (2) allows the Government to introduce other safeguard measures as may be necessary to protect the industry from unfair trade practices. It is not disputed that safeguard measures have been extended to Kenya by the COMESA COUNCIL, the last one being at the meeting held in Lusaka, Zambia on 24th November 2007. The Applicant alleges that the Rules contravene both the COMESA Treaty and the safeguard Measures and the mandate of the Safeguard Committee that was established vide Gazette Notice 8146 on 5th September 2008. Article 49 of the COMESA Treaty deals with elimination of non-tariff barriers on Common market goods; Article 50 bars the introduction of security or other restrictions to sugar Trade. Article 55 Provides that member states practice free, liberalized and competitive trade; while Articule 61 allows a member state to take safeguard measures in the event of serious disturbances in the economy, as did Kenya when it sought extensive of safeguard measures in November 2007 in Lusaka, Zambia.

It has not been denied by the Respondents that on 1st September 2005, the Principal Parliamentary Counsel, on behalf of the Hon the Attorney General, wrote to the Permanent Secretary, Ministry of Agriculture. The Counsel acknowledged having received a copy of the draft regulations on 27th August 2008 which had already "**been signed by the Minister even before it had been subjected to statutory redrafting and or clearance by our office as required."**

The Counsel went on to draw the Respondent's attention to certain issues in the Regulations, that did not conform to the COMESA Treaty and the safeguard measures granted to Kenya on 24th November 2007. It said in part,

" **Having carefully examined the provisions of the COMESA Treaty, to which Kenya is a party, the proposed Regulations contravene the wording and spirit of the Treaty aforesaid and more particularly Article 49 thereof, in that they are bound to lengthen import procedures, thus constituting non tariff barriers which are prohibited thereunder, hence an unnecessary administrative imposition. Of great concern is the fact that while this country continues to enjoy the benefits of intra-Comesa trade exports by having its produce duty free to COMESA states, over the years, it has continued to create non-conducive and non-tariff barriers for imports into the country…."**

Counsel observed that the Regulations contravene the conditions given for the extension of the safeguards measures to Kenya and that paragraphs 4-6 of the Regulations are,

(a) non-tariff barriers to liberalized trade

(b) discriminatory against importers

(c) Restrictive in nature

That the Regulations are unlawful and risk the country having the extended safeguard measures cancelled. Some of the observations (concerns) by the Attorney General's office had been raised by the office of the COMESA Secretary General in its letter of 24th July 2008. The topic was '**ban on importation of sugar into Kenya'**. The attention of the Minister for Agriculture was drawn to the safeguard measures granted to Kenya in November 2007 and that any unilateral action by Kenya would lead to a review of the safeguards.

The Applicants contend that the Respondents ignored the advice by the COMESA Council and Attorney General in promulgating the said Rules which resulted in the Respondents acting ultravires the Act and the COMESA Treaty. In response, the 1st Respondent dismissed the Attorney General's opinion as having been given before the Regulations were gazetted and that in any case it was just a memo. The Minister also deponed that the issue raised by the COMESA Secretary General had been addressed and that the issues raised in the Attorney General's advice were considered by a committee and incorporated in the Regulations. Mr. Kemboy also urged the court to disregard the Attorney General's letter having been written on 1st September 2008 while the Rules were gazetted on 3rd September 2008. He also urged the court not to grant orders to a party like the Applicant who obtained such confidential information irregularly.

Firstly I wish to observe that the manner in which a party gets evidence to support their case has really never been an issue to be punished by the court in the Kenyan context, unless the evidence ends up being untrue. In any event, by the time the Applicant moved this court under certificate of urgency on 29th September 2008, the Attorney General's opinion was in the public domain. The Applicant exhibited DPK 10 of 9th September 2008, which is an extract from the Daily Nation Newspaper whose title was "**AG Declares new rules on Comesa Sugar illegal."** It seems the said Attorney General's letter was with the press by that time and the Applicant cannot be blamed for having obtained it unprocedurally.

The next question is whether the said opinion was binding on the Respondents. It is noteworthy from the Attorney General's letter that the Respondents had consulted the Attorney General's Office as the legal advisor of the Government on the 2008 Regulations. The Attorney General however noted an irregularity that even before the Rules had been scrutinized and before the Attorney General gave their input, the 1st Respondent had already gone ahead and signed. Secondly, the letter is dated 1st September 2008 and it spelt out some shortcomings on the Rules. But by 3rd September 2008 the Rules were already signed by the Minister and gazetted. What is challenged are Regulations that will affect the public at large and it is the duty of the Attorney General, being defender of public rights to demonstrate good faith. Such advice of the Attorney General would not be ignored or wished away by a public body. Indeed the courts have held that such advice cannot be ignored.

Justice Kanyaihamba, of supreme court of Uganda – in **BANK OF UGANDA V BANCO ARABE ESPANOL (2002) 2 EA 333** said as follows:

"**In my view the opinion of the Attorney General is authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature or any agreement, contract or other illegal transaction should be accorded the highest respect by Government and Public Institutions and their agents, unless there are other agreed conditions, 3rd parties are entitled to believe and act on that opinion without further inquiries or verifications. It is improper and untenable for the government, the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interests of 3rd parties."**

The above view really sums up the seriousness and respect with which the Attorney General's opinion on such matters as this should be accended.

In the case of **REP V JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR ex parte PROF SAITOTI HMISC 102/06** the court found that an opinion given by the Attorney General on whether or not to prosecute the Applicant for the Goldenberg Affair was binding on

the Government and they could not ignore it. Similarly in the **NEDEMER TECHNOLOGY B.V. LTD V KACC PET 390/06** Justice Nyamu considered the effect of the Attorney General's opinion in the matter and said as follows:

"**I find that it is improper and untenable for the Hon the Attorney General to have found the exclusion clause legal and effective as of 19th November 2002 when the contract was signed and the other representations made and now six (6) years later, he has the courage and nerve to openly disown the clause and the other representations in a court of law. Surely what has changed now, to warrant such a drastic acrobatic change of mind by the foremost legal advisor to the Government. The office of the Hon. The Attorney General is an institution with institutional memory and the rules of common decency demands that the office maintains consistency in its opinion and representations based on the law.**

The change of mind smacks of total lack of public morality and even on this ground alone, the court finds that it would be difficult to conclude that what is driving the new position, by the Attorney General…."

I do endorse the above proposition that when the Attorney General gives a legal opinion on a matter, the same has to be respected and taken as the correct position in law by public institutions. The Respondent have maintained that the advice of the Attorney General was taken into account. Unfortunately this court did not have a copy of the draft Regulations that were sent to the Attorney General for approval to ascertain whether or not what the Attorney General suggested was incorporated or taken into account. The Applicant should have endevoured to table both the draft and the Regulations before this court to enable the court appreciate whether or not the draft regulations are similar to whatever was ultimately promulgated. What I have noted from the Attorney General's opinion is that at page 3 of the letter, the Attorney General criticized the fact that the Respondents had included a regulation aimed at punishing importers or exporters who failed to make returns by imposing a fine of Ksh.500,000/=. The Attorney General, noted that it was contrary to the law as there was no enabling provision under the Sugar Act. I do note that in the promulgated Regulations there is no such provision providing for punishment of would be defaulters as suggested in that letter. It means that that particular provision was removed from the 2008 Regulations and that leads me to conclude that indeed there were amendments to the draft Regulations before they were promulgated. The Applicants have not satisfied this court that after the Attorney General's advice was given, the same was not taken into consideration. The Attorney General's advice was on the same reasons as the General Secretary of the COMESA. The ground that the Attorney General's advice was not considered, rendering the Regulations an abuse of power by the Respondents is not tenable.

The Applicant contended that by the 2nd Respondent denying them a certificate of Registration, that decision was unreasonable and irrational. The excuse for refusal to issue the Applicant with the certificate was that the Respondents were in the process of overhauling 2003 Regulations and that all the certificates had expired in June 2008. The 2nd Respondent does not deny the fact that the Applicant paid for and was issued with a receipt for importation of sugar under order the 2003 Regulations. The payment was made on 1st July 2008. The new regime i.e 2008 regulations had not come into force. There would have been no basis for the 2nd Respondent to receive money from the Applicant when they well Knew that they could not issue a certificate. The acceptance of the money raised the Applicant's expectation that they would be issued with a licence for 2008-2009. Failure to issue the said certificate when 2nd Respondent had willfully received the money breached the Applicants legitimate expectation that the usual practice would follow and I would find the 2nd Respondent's decision to withhold the certificate to have been unfair and unreasonable in the circumstances. The Principle of Ligitimate expectation is all about a person in public office acting fairly and consistently. In **CCSU V MINISTER FOR CIVIL SERVICE 1985 AC 374** the House of Lords considered the ways in which a legitimate expectation may arise. The Court said, it may arise"**from an express promise given on behalf of a public authority or for the existence of a regular practice which the claimant can reasonably expect to continue."**

In this regard, the acceptance of payment after the old licence had lapsed and no other regime for issuance of sugar import licences being in existence breached the Applicants expectation that the usual practice would follow, once the Applicant prequalified for importer's licence. The decision of the 2nd Respondent to act to the contrary is unfair and amenable to Judicial Review orders.

The Applicant also contends that the Regulations as promulgated are in conflict with the mandate and purview of the Sugar Safeguard Committee. The Safeguard Committee was gazetted, under Gazette Notice 8146 under legislative supplement 63 of 5th September 2008 by the Minister for Trade. It was made pursuant to the safeguard measures granted to Kenya on 24th November 2007. Safeguard clauses are provided for under Article 61 of the COMESA Treaty. The Article provides that if a member experiences serious disturbances in the economy the state shall after informing the Secretary General of COMESA, take necessary safeguard measures. The safeguard Committee was established by the office of the Deputy Prime Minister and the Minister for Trade and its functions are to "**..to facilitate and monitor the implementation of the sugar safeguard arrangements following the decision made by COMESA Council of Ministers to extend the same…."**

The specific functions of the Committee are listed under Regulation 3 of the said Gazette Notice: It reads as follows;

"**3. The Key deliveries associated with the Sugar Safeguard Committee will include but not necessarily limited to:**

(a) building stakeholder consensus on the various aspects of the Sugar imports within the COMESA safeguard arrangements thus alleviating possibilities of stakeholder discord;

(b) administering and monitoring the implementation of the sugar safeguard and all the undertakings on which the extension of the safeguard is premised;

(c) ensuring implementation of appropriate government policies and legislation relating to the sugar industry;

(d) monitoring the implementation of the Industry Strategic Plan, and in this respect ensuring harmonization or the alignment of the individual factory strategic plans to the overall industry strategic plan;

(e) facilitating submission of quarterly reports to the COMESA Secretariat on progress achieved in the implementation of the sugar safeguards; and

(f) facilitating interventions as appropriate, in respect to policy reforms and evaluation missions of the sugar industry. The specific purposes of these missions will be to:

(i) assess the progress achieved in the sugar industry restructuring process as reflected in the quarterly in the quarterly reports.

(ii) Review the prevailing challenges with a view to developing responsive strategies in liaison with the sugar safeguard committee.

Having considered the functions of the Committee, I do agree with the 2nd Respondents contention that the Committee is an administrative body and its mandate is to help formulate policy, monitor, review, prepare regular progress reports on the sugar industry and assess the developments in the sugar industry. It was council, in extending safeguard measures one of the conditions given by COMESA that Kenya must submit periodic progress reports to the COMESA Council an all measures activities and improvements (see R M 10 A). The Applicant did not demonstrate how the 2008 Regulations as promulgated, are in conflict or contradictory with the mandate of the Safeguard Committee. Whereas the 2nd Respondents mandate under S 27 is limited to control of all sugar imports the safeguard committee

looks at all aspects of the Sugar Industry, assesses, monitors, facilitates policy making and files reports on the progress to the COMESA Secretariat. The committees role compliments the Respondents' roles. This court finds no conflict between the committee's mandate with the Regulations and that ground must fail.

Having made the various findings in this judgment, the question is then whether the orders sought can issue.

In the case of **NJUGUNA V MINISTER FOR AGRICULTURE (2000) 1 EA 184** the Court of Appeal held that the authority delegated power to make subsidiary legislation is amenable to censure by way of Judicial Review at all times to ensure that the Rules accord with the policy, objectives and aspirations of the Act. This court has jurisdiction to intervene and quash the Regulations made under the Sugar Act if found to have contravened the Act or if made in excess of the powers given by the Act. The 1st prayer sought is the quashing of the Regulations promulgated under Legal Notice 114 408.

After considering the Regulations, I found that Legal Notice 4 (3) is ultra vires the Sugar Act as the 1st Respondent has no power to approve permits. Issuance of permits is the preserve of the 2nd Respondent under S. 27 of the Sugar Act. To the extend that the 2nd Respondent seeks to abrogate its mandate to the 1st Respondent by allowing the 1st Respondent to have the last say in the issuance of permits, that Regulation is ultra vires the Act and must be quashed by an order of certiorari. This court also finds that Regulation 10 (2) is ultra vires the Act to the extent that the Board surrendering its mandate in respect of appeals arising from cancelled permits, to the 1st Respondent. S 27 vests that duty to control imports in the 2nd Respondent but not 1st Respondent. The powers of the 1st and 2nd Respondent to consult under S 33 is limited to the making of Regulations but not control of the sugar imports. To the extent that it seek to involve the 1st Respondent in control of sugar imports. The said Regulation is ultra vires the Act. The 1st and 2nd Respondents should come up with a proper mechanism of appeal other than involving the 1st Respondent in the control of sugar import. The court wonders why appeals cannot lie in the tribunal set up in the Act under S. 31 The two Regulations 4(3) and 10(2) are hereby called up and quashed by an order of certiorari. I find no good reason to quash the rest of the Regulations since the Applicants have not demonstrated that they are ultra vires the sugar Act or the COMESA Treaty nor are they illegal. The court will only intervene to the extent shown. The 2nd prayer is that the court prohibit the implementation of the 2008 Regulations.

Only two of the Regulations are ultra vires the sugar Act and in my view, I would not give a blanket order of prohibition to stop the implementation of the 2008 Regulations as a whole. I will suspend the order for prohibition for a period of only 60 days to allow the Respondents to rectify the Regulations failing which the order of prohibition will take effect.

The Applicant also sought an order of mandamus to compel the 2nd Respondent to issue the Applicant with an import licence for the period 2008/09. I did observe that the Respondents did not act fairly by denying the Applicant a licence having received money from it. However, time has gone by. The new Regulations are now in place. I do appreciate that Judicial Review remedies are discretionary and may not be granted even when deserved. There are other importers who may find themselves in the same position and I find that it would be unfair to undo the situation and allow one importer a licence under the old rules which stand revoked while the others operate within the new Regulations. Under the circumstances, I find already that a licence banned under the 2003 Regulations when the 2008 are in force will not augur well even for that other interested parties.

Lastly, an order of mandamus does not lie to direct a public body to perform its duty or exercise its discretioin in a particular manner. (**See KENYA NATIONAL EXAMINATION COUNCIL V R CA 266/96)** The Applicant specifically wants to be issued with a 2008-2009 licence. The rules under which that licence could issue are no more. Even if the licence was paid for, the Respondent still had a discretion to refuse to issue the licence and refund the money. This court cannot force the Respondents to act in a particular manner and this court declines to grant an order of mandamus.

For all the reasons given in this judgment, an order of certiorari is granted in terms of prayer I as indicated above. An order of prohibition is granted but suspended for 60 days to enable the Respondents rectify the Regulations that have been quashed in default, the order of prohibition will take effect.

The Interested Parties are importers of sugar based products and import industrial sugar from outside COMESA region and are not subject to COMESA mutual tariffs concessions. They came to court to protect their interests as the Kenya Revenue Authority refused to clear their sugar following the stay order issued by this court on 26th November 2008 as it had been interpreted as affecting all sugar imports and there was no regulatory system in place. They seek the court to clarify that Industrial Sugar is not subject of the Regulations sought to be quashed. I have looked at the 2008 Regulations. Reg 6(3) provides that imports of raw or mill white and refined sugar outside the COMESA mutual tariff concession shall not be subjected to the auction in paragraph 2. Paragraph 2 provides that the 2nd Respondent shall offer for auction such quantities to be imported by registered importers under the COMESA mutual tariff concession as per the schedule to be Regulations. It means the auction system is not applicable to Industrial Sugar imported outside COMESA region by the Interested Parties. The Interested Parties' Counsel asked the court to clarify under which regime the Industrial sugar is imported. There is only one regime in existence, that is, the 2008 Regulations, the 2003 Regulations having been revoked with the coming into force of the 2008 Regulations. I believe the same 2008 Regulations apply to importation of industrial sugar, with the necessary modifications to suit the Interested Parties and that should be clearly set out in the 2008 regulations. This being a Judicial Review application the only available remedies to a party would be an order of certiorari, prohibition and mandamus but no other. This court will not therefore attempt to give any other orders outside its jurisdiction. In sum, this Notice of Motion is only partially successful. I will therefore order each party to bear its own costs.

It is so ordered.

Dated and delivered this 17th day of July 2009.

R.P.V. WENDOH

JUDGE

Present

Mr Okwach & Issa - Applicant

Mr. Onyancha - 1st Respondent

Mr. Kemboy - 2nd Respondent

Mr. Gachuhi - 1st Interested party &

H.R Mr. Kamau - 2nd – 4th Interested parties

Muturi: Court clerk