



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

JUDICIAL REVIEW APPLICATION NO. 1 OF 2020

IN THE MATTER OF:

**IN THE MATTER OF AN APPLICATION BY STAR BRILLIANT LIMITED FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
MANDAMUS, PROHIBITION AND DECLARATION**

and

IN THE MATTER OF

IN THE MATTER OF THE MEAT CONTROL ACT, CAP 356

AND

IN THE MATTER OF:

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF:

IN THE MATTER OF STATUTORY INSTRUMENTS ACT, 2013

AND

IN THE MATTER OF:

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 53

BETWEEN

STAR BRILLINAT LIMITED.....APPLICANT

AND

THE CABINET SECRETARY - MINISTRY OF AGRICULTURE,

LIVESTOCK, FISHERIES AND CO-OPERATIVES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The applicant first came to court under urgency seeking to stay the 1st Respondent's orders on **Legal Notice No. 63 of 2020**, revoking the declaration of the applicant's slaughter house in Naivasha as a slaughter house.
2. Urgency was initially certified. Subsequently, stay was granted against implementation of the impugned Legal Notice due to the 1st Respondent's inability to file a response in the agreed time. Urgency was thereafter revoked when it transpired through the application by the Interested Party that there were similar proceedings ongoing in the Constitutional and Human Rights Division of the High Court in Nairobi. The said proceedings were eventually discontinued.
3. The Applicant in these proceedings seeks the following reliefs:
 - a) An **Order of Certiorari** removing to this Honourable Court to be quashed the Legal Notice Number 63 of 2020 issued by the 1st Respondent.
 - b) An **Order of Prohibition** prohibiting the 1st Respondent, his officers and agent from issuing and implementing Legal Notice Number 63 of 2020 pending hearing and final determination of this Application.
 - c) An **Order of Declaration** that the Legal Notice 63 of 2020 violates the rights of the Applicant under Article 47 of the Constitution, Sections 5 and 6 of the Fair Administrative Action Act, No. 4 of 2015 and provisions of Statutory Instruments Act, 2013.
4. The **Legal Notice No. 63 of 2020** subject of the proceedings is made under The **Meat Control Act Cap 356** pursuant to the **Meat Control (Export Slaughterhouse Regulations)**. It reads as follows:

“Revocation of Declaration

In exercise of the powers conferred by Regulation 3 (1) of the Meat Control Act (Export Slaughter house) Regulations, the Cabinet Secretary for Agriculture Livestock and Fisheries and Co-operatives revokes the declaration of the following slaughter houses as export houses for the purpose of these regulations with effect from March 2020.

Star Brilliant (EPZ) Limited

Goldox (K) Limited

Silzha Limited

Fuhai Machakos Trading Company Limited

Dated the 31st March, 2020.”

The Legal Notice was published in the Kenya Gazette of 20th April, 2020 (Supplement No. 50).

5. The Interested Party was enjoined pursuant to a Ruling on 26th January, 2021, and was allowed to file submissions on the substantive Judicial Review application. It is apt to note, at the outset, the scope of the role of an Interested Party. The Supreme Court in the case of **Francis Karioko Muruatetu & Another v Republic & 5 others [2016] eKLR** stated that an Interested Party's role is limited and he cannot introduce issues to the suit which have not already been raised by the Judicial Review applicant. The relevant holding is as follows:

“[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

The Applicant's Representations

6. The Applicant is a limited liability company, initially incorporated as Star Brilliant EPZ Limited. It later changed its name to Star Brilliant Limited in 2017 (hereinafter the company). It is also a registered Donkey Slaughterhouse. Its operations started in September 2016. It invested in excess of Kshs 200,000,000/= towards the slaughter house operations. It directly employed two hundred employees in its Naivasha based enterprise. It displayed as **SB5**, a list of its employees.
7. According to the Affidavit of Justus Maranga, the Company obtained a special permit to enable it purchase, transport and slaughter donkeys and sell donkey meat. Permits are issued by Veterinary Officers from the donkeys' point of origin under supervision of officials from Ministry of Interior and Co-ordination of National Government. Purchased donkeys are inspected and approved by health officials. They are purchased locally and from Ethiopia and Tanzania.

8. The company annexed to its affidavit a bundle of its authorizations and permits as SB3, SB6 and SB9 which include: Slaughterhouse Licence under the **Meat Control Act**; Registration of Premises under the **Hide Skin and Leather Trade Act**; Nakuru County Government Trade Licence; and Veterinary Department permits to move donkeys. SB9 is a letter dated 2nd January, 2016 by the Principal Secretary Ministry of Agriculture to the company granting it approval to construct an “*Export Slaughterhouse for Donkeys*” in accordance with the **Meat Control Act, Cap 356**.

9. The company was, therefore, surprised to receive a letter from the Director of Veterinary Services in the Ministry of Agriculture Livestock and Fisheries dated 22nd April 2020 revoking the Applicant as an export slaughter house pursuant to a Legal Notice No. 63 of 20th April 2020. As such, veterinary inspection services were thereby withdrawn with immediate effect.

10. The Legal Notice No. 63 of 2020 despite being published on 20th April, 2020, revokes the declaration of the company as an export slaughter house with effect from 31st March, 2020.

11. The Applicant’s case is that the Minister’s decision was arbitrary, harsh and ill-advised; that the company was not notified that its licence was under scrutiny or consideration for revocation, nor afforded the right to a fair hearing prior to issuance of the revocation; and that no reasons were afforded it for the impugned decision.

12. It is asserted that the Legal Notice offends the provision of **Article 47** of the **Constitution** and **section 7 a, c, d, e, f, h, k, m** and **n** of the **Fair Administrative Actions Act**. Further, that it breaches **Sections 5, 6, 10** and **11** of the **Statutory Instruments Act** as read with Article 10 of the Constitution that obligate consultation with an affected person. In addition, the applicant asserts that **Regulation 3** of the **Meat Control Act (Export Slaughterhouse)** Regulations does not confer the Cabinet Secretary powers to issue the impugned declaration.

The Respondent’s Representations

13. The Cabinet Secretary for Agriculture was sued through the Attorney General, as the Government’s chief legal advisor. The Respondent’s case is set out in the Replying Affidavit of Obadiah Njagi, the Director of Veterinary Services.

14. The Respondent asserted that the decision to halt slaughter of donkeys in Kenya was not an arbitrary, ill-advised or harsh one, but was informed by the need to prevent and protect the donkey population in Kenya from an alarming rate of decline and threatened extinction; that a report by the Kenya Agricultural Livestock Research Organisation (KARLO) on the status of Donkey Slaughter in Kenya — annexed as ONN1 — had availed data showing donkeys slaughtered daily in export slaughterhouses and its implications on community livelihoods; that traditionally donkeys have not been reared for the food industry in Kenya; that an increase in commercialization of donkey and donkey products without structured interventions to upgrade the value chain would disrupt livelihoods of communities that depend on donkeys.

15. Further, that in light of bush slaughter, donkeys (asses) were gazetted as food animals in 1999 alongside quails, ostriches, rabbits, horses and mules in order to promote food security; that under the Meat Control Export Slaughterhouses Regulations, the slaughter-houses, including the Applicants’, were licensed and established in the regions which had the leading donkey populations; that the rationale for their establishment was the high donkey population; that the Meat Control Regulations permit establishment of slaughterhouses on fulfillment of conditions focusing on facility, sanitation, inspection, disposal of condemned carcasses and parts, food additives and records maintenance under the Act.

16. They urge that the Director of Veterinary Services has the mandate under the Act to order closure of a slaughterhouse upon failure to comply with any conditions; and that the KALRO Report made certain findings, which informed their decisions including:

- that donkey slaughter in export slaughter-houses as well as donkey theft resulted in reduction of the donkey population in Kenya.
- that the problem is exacerbated by the slow rate of reproduction in Donkeys due to their long gestation period.
- that the indiscriminate slaughter of donkeys in slaughter houses resulted in slaughter of pregnant donkeys and foals.
- that a ban on slaughter of pregnant donkeys was recommended.
- that it was paramount to regulate donkey slaughter and skin trade, and urgently develop and operationalize an effective donkey reproduction programme.

17. The Respondent also alleged that a letter to the Applicant dated 1st November, 2019 on sustainable consumptive utilization of donkeys, indicates that the applicant had been given certain conditions prior to the making of Minister’s decision. The said letter was, however, not annexed to their affidavit.

18. Finally, the Respondent argued that in any event the Applicant had not been given a licence to practice in year 2020 as their licence expired in December, 2019.

The Interested Party’s Case

19. The Interested Party’s case is set out in the Replying Affidavit of Robert Maitethya, Chairman of Meru County Donkey Welfare Community Based Organisation and also representing the views of over 25,000 donkey farmers owing over 100,000 donkeys. He also filed submissions in the matter. He stated that he is an advocate of donkey welfare in Kenya; that he had noticed a steep decline in donkey population; that his view had been informed by the KALRO Report showing that the donkey population may be effectively extinct in Kenya

by 2023; that due to the increased investment in donkey slaughter and export business, there was increased pressure on the donkey population in Kenya.

20. Further, he stated that he had not seen any gazette notice that declares the donkey species as liable for slaughter for skin and meat in terms of Section 2 of the Meat Control Act. Thus, according to him, donkey meat cannot be regulated for purposes of slaughter and meat export; that the donkey protection stakeholders have sent multitude representations to the Ministry of Agriculture against continued slaughter of donkeys; and that the Government agreed with community members and announced plans to implement a nationwide ban on donkey trade and slaughter; and that the Legal Notice No. 63 of 2020 was thus a legitimate government directive in its aim to protect the donkey population.

21. He conceded that the correct process in law is yet to be followed; that donkey owners are yet to be consulted; that donkeys are yet to be declared under **Section 2** of the **Meat Control Act**, that the applicant is yet to be gazetted as an export slaughter house; and that under the Meat Control Act there is no power vested in Cabinet Secretary to issue permits for slaughter and export of donkey meat and hides.

22. The Interested Party did not attach any exhibits to their Replying Affidavit,

Issues for Determination

23. The issues that arise for determination are as follows

1. *Whether the Cabinet Minister had power under **Regulation 3** of the **Meat Control Act** to issue a declaration revoking the Applicant as a slaughterhouse given the provisions of **Section 70** of the **Interpretation and General Provisions Act Cap 2**.*

2. *Whether in making the revocation declaration the Cabinet Minister:*

a) *Complied with **Article 47** of the **Constitution** and the provisions of the **Fair Administrative Actions Act**.*

b) *Consulted with stakeholders including the applicant.*

3. *Whether the Legal Notice No. 63 of 2020 issued by the Cabinet Minister revoking the Applicant's slaughter house complied with the provisions of **Section 5, 6, 10 and 11** of the **Statutory Instruments Act**.*

4. *Whether the Applicant is entitled to any or all of the orders sought in their application.*

24. The Applicant's submission is that **Regulation 3 (1)** of the **Meat Control Act** does not empower the Minister to issue the impugned notice. To answer this issue, it is apt to consider what the Act does in respect of donkeys.

25. The Respondent at Paragraph 9 to 10 of the Replying Affidavit of Obadiah Njagi, Director of Veterinary Services, confirms that: the export slaughterhouse of the Applicant was "*licenced and established*" under the **Meat Control (Export Slaughterhouse) Regulations 1973** in regions with a donkey-dense population. Further, that donkeys (asses) were gazetted in 1999 as food animals.

26. The Applicant exhibited SB8 being **Legal Notice No. 146** of **1999** under which the Minister for Agriculture declared Mules and Asses, amongst other animals, as animals under **Section 2** of the **Meat Control Act** to which the Act applies. An ass is the simile of a donkey. Thus, under **Legal Notice No. 146** of **1999** donkeys are brought under the Meat Control Act as "*animals*", and "*meat*" and "*slaughter house*" means a place kept for the purpose of slaughter of animals for human consumption.

27. Under the **Meat Control (Local Slaughterhouse) Regulations 2010** a "lairage" means

"holding pens for livestock at a slaughterhouse prior to slaughtering"

and "donkey" is defined in terms of red meat under the definition of "unit" for purposes of throughput in a slaughterhouse.

28. Under those same Regulations the Minister may declare a place a slaughterhouse under **Regulation 3(1)** of the **Meat Control (Local Slaughterhouse) Regulations**. The Regulation provides:

"(1) The Minister may, by a notice in the Gazette, declare any abattoir, slaughterhouse or any other place where animals are slaughtered and meat is prepared or meat products are manufactured for human consumption to be a slaughterhouse for the purpose of these Regulations."

29. More pointedly, under the Regulations, the Applicant's slaughterhouse licence and operations could lawfully be interfered with statutorily by the Director of Veterinary Services under the wide powers conferred on him in **Regulation 5** of the of the **Meat Control (Local Slaughterhouse) Regulations Act**. Regulation provides:

"5. The Director may—

(a) issue instructions and directives as may be necessary for the enforcement of these Regulations;

(b) order the closure of any slaughterhouse in the event of noncompliance with these Regulations; or

(c) issue a prohibition order to any local slaughterhouse in Form 1 set out in the Third Schedule.”

The Director did not exercise any of these statutory powers as an option or alternative to the impugned Legal Notice. In his Replying Affidavit, he did not even comment on these powers or his non-invocation of them.

30. The provision regarding declaration of slaughterhouses is supplemented by **Legal Notice No. 123 of 2007, The Meat Control (Export Slaughterhouses Amendments) Regulations, 2007**, which provides:

“3. The principal Regulations are amended in regulation 2 by-

(a);

(b) inserting the following definition in the proper alphabetical order - "slaughterhouse" means any place declared to be an export slaughterhouse under regulation 3 of these Regulations. (Emphasis added)

31. Thus, the Minister has power under the amendment Regulations to declare a place as an export slaughterhouse. Does that mean that once he ‘declares’ a slaughterhouse he cannot undo or revoke the declaration? The Regulations are silent on that question. Similarly, the mother statute, the **Meat Control Act at Section 3 (1)** enables the Minister to make regulations for:

“Licensing, control and regulation of slaughter houses.”

but is silent on whether the Minister may expressly make regulations to revoke a declaration of a slaughter house.

32. Thus, the Applicant argues, the issuance of the revocation of declaration vide **L.N. 63 of 2020** was illegal as it is not authorized by any provisions of law.

33. The Applicant has further argued that even in terms of the **Interpretation and General Provisions, Act Section 70**, the Minister has no power to alter the slaughterhouse licence unless in so doing he conforms to the conditions necessary for the issuance of the said licence. I understand the applicant to mean that whatever processes were put in place to enable issuance of a licence, revocation of a licence should similarly be subjected to the converse processes.

34. **Section 70** of the **Interpretation and General Provisions Act** provides:

“Where a written law confers a power to issue a licence, permit or authorization, then, unless a contrary motion appears, the licence, permit or authorisation may be issued subject to conditions, not inconsistent with that Law, which the authority issuing it deems expedient. (Emphasis added)

35. I have carefully perused the Meat Control Act and the Regulations thereunder. It is clear that under **Section 3**, the Minister has express power to make regulations for all sorts of purposes, which are applicable in multiple ways. The Minister’s broad power to make regulations would, ideally, presumably entitle him to make regulations specifically to revoke any decisions, discretions or actions taken by him. There is however, no express power under the Act or the Regulations which he has made, to revoke a declaration he has made.

36. In the absence of any express power — either in the statute or in the regulations he, at his discretion, has made — to revoke his declarations, it must be deemed that in order for him to undo his declaration, there must be notice and due process to be followed. In other words a revocatory action, if it affects any person who has legitimately relied upon the order or declaration, must be done or effected justly and in accordance with principles of reasonableness, fairness and procedural propriety. This falls in line with the principles of legitimate expectation whereby if a person has been led or treated in a certain way by an administrative authority by dint of some consistent practice in the past, he is entitled to the reasonable expectation of such continued treatment.

37. In the case of **Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR**, Odunga J observed as follows on legitimate expectation:

“55. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”. See R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D. This was the view adopted in Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR where it was held that:

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

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

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

Similarly in this case, the applicant would be justified to expect a measure of consistency of action from the Respondent. This leads us directly to the next issue.

Whether in making the revocation declaration there was compliance with Article 47 of the Constitution and the Fair Administrative Actions Act

38. Article 47 (1) and (2) of the Constitution provides:

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

39. The provisions of Article 47 (1) and (2) of the Constitution are operationalized through Fair Administrative Action Act No. 4 of 2015; and Section 4 of that Act is a replica of Article 47 (1) of the Constitution. Under Section 3 (1) a), the Act applies to any person exercising administrative authority. In invoking the Act, the Section 4 (2) of the Act obliges the person exercising administrative action to give written reasons for any action taken against the person affected.

40. The applicant argued that Article 47 of the Constitution was violated by the Minister’s action, and that the rules of natural justice were ignored. Reliance was placed on two authorities of the Court of Appeal, namely, the cases of *Judicial Service Commission v Mbalu Mutava & another [2015] eKLR* and *Pashito Holdings Limited & Another v. Paul Nderitu Ndungu & 2 Others [1997] eKLR*.

In the JSC case, the court held:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

41. In the *Pashito Holdings* case, which had something to do with fairness but had nothing to do with Article 47 of the Constitution, the Court of Appeal stated:

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to ‘act judicially’.”

42. The Applicant submitted that the Respondent did not demonstrate any impropriety on the Applicant’s part to warrant the revocation; and that revocation falls afoul of Section 7 (2) a, c, d, e, f, h, k, m and n, (5) and (b) of the Fair Administrative Actions Act, No. 4 of 2015.

43. The Applicant relies on *Republic v Nairobi City County Ex Parte B Concept Limited T/A B Club [2017] eKLR* which dealt with a complaint about the revocation of a permit and licence. The court there held:

“That the revocation of the Permit and the Licence by the Respondent were administrative actions is not in dispute since section 2 of the Fair Administrative Action Act, 2015 defines “administrative action” to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.” (Emphasis added)

44. In *O’Reilly v. Mackman [1982] ALL ER 1129* cited with approval in *Peter Akech Kadamas v. Municipality of Kisumu [1986 - 1989] EA 194* the exercise of legislative authority was explained as follows:

***“Wherever any person or body of persons has legal authority conferred by Legislation to make decisions in public law, which affects the common law or statutory rights of other persons as individuals, it is amenable to the remedy of Judicial Review of its decision either for error of law in so acting or for failure to act fairly towards the person who will be adversely affected, VIZ; by not affording him a reasonable opportunity of learning what is alleged against him of putting forward his own case in answer to it on the part of the person by whom the decision fails to be made”.* (Emphasis added)**

45. In the present case it is clear that the Respondent was seeking to exercise a legislative authority. He was therefore under a duty to ensure that his action was not only expeditious and efficient, but also lawful, reasonable and procedurally fair in terms of **Section 4 (1)** of the **Fair Administrative Action Act**. In addition, he was bound to appreciate that the exercise of his authority is an administrative statutory authority and that his actions or decisions would affect the legal rights or interest of the person to whom it relates under **Section 3 (1) (c)** of the **Fair Administrative Action Act**. In this case, that person was the Applicant.

46. Even if it may be said that the Minister could undo by revocation what he had done by declaration, the procedural issues raised under the Fair Administrative Action Act would still arise. In this case, the Respondent has not tabled any evidence that clearly demonstrates any interaction between the Ministry and or the Applicant or any inquiry or investigation concerning the slaughterhouse or its operations. Had the Minister done so, the procedural aspect of his actions would have demonstrated his effort and attempt to act within the rule of law.

47. In **Republic v Kombo & 3 others ex parte Waweru (2008) 3 KLR (EP) 478**, Emukule J aptly stated as follows in respect of the rule of law:

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorized by law - and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard.”

48. The Respondent denied in Paragraph 27 of their Replying Affidavit that “*affected parties were not consulted*” and that a letter of 1st November, 2019 addressed to the Applicant indicated “that the Applicant had been given certain conditions and obligations on the matter prior to the decision.” The alleged letter was, however, not annexed by the Respondent. There is therefore no evidence to demonstrate that there was any engagement with the Applicant prior to the decision to revoke its declaration as an export slaughterhouse.

49. The Respondents have sought to rely for their decision on the KALRO Report which they annexed. I have perused that Report carefully, and note as follows:

- The report was a study.
- The purpose of the report was to present the status of donkey slaughter in Kenya and its implication on donkey population and community livelihood. (See Executive summary)
- Several slaughter house companies, including the Applicant were involved as participants in the study and the findings were disseminated to stakeholder. (See Acknowledgments, Conclusions). None of the bodies represented by the Interested Party are mentioned in the Report.

50. The conclusions and recommendations of the Report were inter alia, as follows:

- 1) “An audit of actors along the donkey value chain to ascertain compliance to set rules and regulations including reporting is recommended.”
- 2) “Considering that the demand for donkeys for outweighs the supply, hence the reported theft, regulation of donkey slaughter is required while also considering the plight of investors who were licenced by the government to recoup their return on investment.”
- 3) “Enforcement of laws on importation of animals is recommended and a study to ascertain the cross border smuggling of donkeys into Kenya for hide trade is recommended to minimize risks of trans boundary diseases.”
- 4) “An audit of slaughter houses to ascertain compliance to animal welfare standards is recommended.”
- 5) “Taking cognizance of numerous actors along the donkey value chain, a comprehensive study to assess the social and economic impact assessment of donkey slaughter and trade for all actors is recommended to guide policy review.”
- 6) “A ban on slaughter of pregnant donkeys is recommended and development and/or adoption of penside pregnancy diagnostic kits for use prior to purchase or admission of donkeys into the slaughterhouses made a mandatory procedure.”
- 7) “Community sensitization on impacts of donkey slaughter on their livelihoods (should sic) is recommended. In addition laws on animal movement should be enforced and mechanisms to ascertain ownership and sale at the local level enhanced to curb donkey theft.”

51. Even assuming that stakeholders had been fully apprised of the recommendations and were given the said Report, I see nothing in the recommendations that even faintly suggests the imminent action taken by the Minister through the impugned Legal Notice. It appears to me that the Report constitutes a first attempt to appreciate the status of the donkey value chain. The only proposal in the Report that could have led to a strong ministerial action like a ban, is Recommendation No. 6 above, viz the proposal to ban slaughter of pregnant donkeys.

52. Ultimately, and based on the foregoing, I find that the Respondents flouted the Applicant's rights under **Article 47** of the **Constitution** and the provisions for procedural due process of the Fair Administrative Actions Act. To that extent, the Minister's Legal Notice was unlawful, unreasonable and procedurally unfair to the Applicant.

Whether Legal Notice 63 of 2020 complied with the provisions of Section 5, 6, 10 and 11 of the Statutory Instruments Act.

53. The applicant argues that the **Statutory Instruments Act No. 23 of 2013** outlines the procedures to be followed by every regulation making authority; and that **Section 5** of that Act read together with **Article 10** of the **Constitution** requires every regulation making authority to make appropriate consultations with persons who are likely to be affected. These steps include, according to the applicant, preparing a regulatory impact assessment report under **Section 6**, submitting the impugned Gazette Notice to Parliament for scrutiny under **Section 10**, and transmitting the statutory instrument to the responsible Clerk for tabling before Parliament within 7 days after its publication.

54. The Act defines "**Statutory Instrument**" as follows:

" 'statutory instrument' means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."

55. Under the **Interpretation and General Provision Act Section 2** "*subsidiary legislation*":

"means, any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument." (Emphasis added)

I would opine that a Legal Notice such as LN No. 63 both constitutes Subsidiary Legislation and is also expressly authorized to be issued pursuant to subsidiary legislation.

56. In the absence of any response from, or documentation by, the Respondents to the Applicant's claims under this head that the Legal Notice did not comply with the Statutory Instruments Acts, the assertions of the applicants are uncontested.

57. The consequences of failure by one party to controvert allegations of the other party were expressed in **Mohammed & Another v Haidara [1972] EA 166 at 167** where Spry VP stated:

"The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied."

Accordingly, the applicant's assertions stand.

Disposition and Orders

58. Having found that the 1st Respondent has not been able to defend itself on all the issues raised by the applicant, the application succeeds in its entirety.

59. Accordingly, the applicant is entitled to the reliefs sought in this suit. The following orders are therefore hereby issued:

1. An **Order of Certiorari** removing to this Honourable Court to be quashed the Legal Notice Number 63 of 2020 issued by the 1st Respondent.
2. An **Order of Prohibition** prohibiting the 1st Respondent, his officers and agent from issuing and implementing Legal Notice Number 63 of 2020.
3. An **Order of Declaration** that the Legal Notice 63 of 2020 violates the rights of the Applicant under Article 47 of the Constitution, Sections 5 and 6 of the Fair Administrative Actions Act, No. 4 of 2015 and the provisions of the Statutory Instruments Act, 2013.

60. The Appellant shall have the costs of this suit.

Administrative directions

61. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

62. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

63. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 5TH DAY OF MAY, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Wairegi for the Applicant
2. Ms Cheruiyot for the Respondents
3. Mr. Karani for the Interested Party
4. Court Assistant - Quinter Ogutu