REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS JUDICIAL REVIEW NO. 1 OF 2019

IN THE MATTER OF: AN APPLICATION BY LUNA FOOD STUFF

LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST THE DECISION KENYA BUREAU OF STANDARDS

AND

IN THE MATTER OF: SECTIONS 10 & 11 OF THE FAIR

ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, LAWS OF KENYA

AND

IN THE MATTER OF: THE STANDARDS ACT, CAP 496 OF THE LAWS

OF KENYA BETWEEN

REPUBLIC...APPLICANT

-VERSUS-

KENYA BUREAU OSTANDARDS..RESPONDENT

AND

LUNA FOOD STUFF LIMITED..EX PARTE APPLICANT

Mr. Muturi Mwangi for the Ex-parte Applicant

Mr. Ogetto, Otachi for the Respondent

JUDGMENT

Introduction

1. The Ex-parte Applicant, by a chamber summons application dated 19th February 2019 and filed in court on 25th February 2019 sought for leave to begin judicial review proceedings against the Respondent for substantive orders for:

a. Spent

i. An Order of Mandamus to compel the Respondent herein to release the Ex-parte Applicant's imported goods (PASTA-SPHAGHETTI) which are held at the Kenya Ports Authority in Mombasa, vide customs entry no. 7048052.

ii. An Order of Certiorari quashing the Administrative decision made by the Respondent and communicated through its letter addressed to the Ex-parte Applicant dated 23rd January 2019 with respect to its imported goods (PASTA-SPHAGHETTI) which are held at the Kenya Ports Authority in Mombasa, vide customs entry no. 70480523.

iii. An Order of Mandamus to compel the Respondent to confirm the Certificate of Conformity issued by SGS on 19th

September, 2018 under the authority of Pre-Export Verification of Conformity (PVoC)

b. Spent

c. Costs of the Application be provided for.

2. By an Order dated 25th February 2019, this Court granted the leave sought and directed that the Ex-Parte Applicant do file and serve a substantive notice of motion. By a further Order dated 5th March 2019, the Applicant was directed to filed and serve the substantive notice of motion upon the Respondent and leave granted to amend the initial chamber summons to lay any further details touching on the entire Application and any facts necessary for the comprehensive appreciation of the issues to be determined by this court.

3. The Applicant went on to file the Notice of Motion Application dated 8th March on the 11th March 2019 seeking for:

i. An Order of Mandamus to compel the Respondent herein to release the Ex-parte Applicant's imported goods (PASTA-SPHAGHETTI) which are held at the Kenya Ports Authority in Mombasa, vide customs entry no. 7048052.

ii. An Order of Certiorari quashing the Administrative decision made by the Respondent and communicated through its letter addressed to the Ex-parte Applicant dated 23rd January 2019 with respect to its imported goods (PASTA-SPHAGHETTI) which are held at the Kenya Ports Authority in Mombasa, vide customs entry no. 70480523.

iii. An Order of Mandamus to compel the Respondent to confirm the Certificate of Conformity issued by SGS on 19th September, 2018 under the authority of Pre-Export Verification of Conformity (PVoC)

iv. Special Damages of USD 6,733 and USD 10242.20 being port charges and shipping line charges respectively and Ksh. 112,988 being custom warehouse rent, incurred up to date by the Ex-Parte Applicant due to maladministration by the Respondent and which continue to incur on daily basis till the release of goods from the port

v. General damages

vi. Costs of the Application be provided for.

4. The Applicant's Application was supported by the grounds contained therein and by a Statement and an affidavit of Mohdhar Abubakar both dated 19th and filed on 25th February 2019 as well as a further affidavit by the same Mohdhar sworn on 8th March 2019.

5. In response, on 20th March 2019, the Respondent filed an affidavit sworn by Birgen Rono on 18th March 2019.

6. The matter proceeded by written submissions. The Applicant filed submissions dated 8th and filed on 11th March 2019 and further submissions dated 20th May 2019 and filed on 14th June 2019. The Respondent on the other hand filed submissions dated 18th March on the 20th March 2019.

Ex-Parte Applicant's Case

7. The Ex-parte Applicant, through its Chief Executive Officer Mohdhar Abubakar, averred that it imported 2,550 cartons of pasta from Italy for a value of 10,965.00 EUR.

8. It was averred that as per the Standards **Act Cap 496** Laws of Kenya and the Regulations put in place by the Respondent, Kenya Bureau of Standards; the goods were subjected to verification and/or testing through the Pre-Export Verification of Conformity (PVoC). According to the Applicant, as per the Kenya Standard 524:2010 Pasta Product, the its consignment of PASTA-SPAGHETTI was verified to have conformed to the required parameters and standards set forth therein and the Ex-parte Applicant herein was issued with a Certificate of Conformity dated 19th September, 2018 by SGS; upon payment of the requisite charges, the Ex-parte Applicant imported the food Product into the country, through the Port of Mombasa.

9. It was deponed that upon arrival at the Port of Mombasa, the goods were subjected to another test by the Respondent using the EAS 173:2004: East African Standard Specification for Pasta Products and the Respondent thereafter issued a report on the test results stating that the consignment had been rejected based on the parameters of Crude Protein Content and the Protein Content on Dry Weight Basis.

10. The case was made that the Respondent herein has predicated and based its decision to deny the Ex-parte Applicant's consignment a Certificate of Conformity on its arbitrary application and use of EAS 173:2004 being the East African Standard Specification for Pasta Products as opposed to the relevant Kenyan Standard 524: 2010 used by SGS in the Pre-Export Verification of Conformity (PVoC). The Respondent has appointed SGS as its Agent for pre-shipment verification of conformity and inspection, to conduct and execute its statutory and administrative mandate thus subjecting the Ex-parte Applicant to loss and damage.

11. It was also the Ex-parte Applicant's case that the Respondent had acted ultra vires the express and unambiguous provision of **Section 21 of the Standards Act Cap 496 of the Laws of Kenya** which provides that where there is a conflict between the provisions of a specification declared to be a Kenya Standard under **Section 9(1)** of the Act and a specification made or declared under any other written law, the Kenya Standard shall prevail.

12. According to the Ex-Parte Applicant, after receiving the Respondent's Test Results pursuant to its application and use of EAS 173:2004 being the East African Standard Specification for Pasta Products, the Ex-parte Applicant wrote a letter dated 13th November, 2018 to the Respondent appealing its decision and requesting for a re-test of the food product (PASTA-SPAGHETTI), and informed the Respondent that it were ready and willing to cater for all the costs of the re-test.

13. It was averred that by a response contained in a letter dated 20th December, 2018, the Respondent acknowledged receipt of the Applicant's letter and further communicated the Respondent's decision to decline the request for resampling and re-testing the imported PASTA-SPAGHETTI. The Ex-parte Applicant further admitted to receiving a letter dated 23rd January, 2019 from the Respondent indicating that at the port of destination, samples were drawn for analysis from the consignment and the results issued indicated non-conformity with the requirements of KS 524:2010 Pasta Products Specification in respect to Crude Protein Content and Protein Content on Dry Weight Basis. This letter also purported to withdraw and invalidate their earlier letter dated 20th December, 2018.

14. It was averred that the Respondent maliciously declined the Ex parte Applicant's request for appeal, resampling and re-testing by withdrawing their letter dated 20th December, 2018, which they had clearly stated that at the port of destination samples were drawn for analysis from the consignment and the results issued vide sample reference number BS201838393 indicated non-conformity with the requirements of EAS 173:2004: East African Standard Specification for Pasta Products in respect to Crude Protein Content and Protein Content on Dry Weight Basis.

15. The Ex-parte Applicant averred that before it imported the food product in question from Italy, a Certificate of Conformity was issued by SGS under the authority of the Pre-Export Verification of Conformity programme, for and on behalf of the Respondent. SGS confirmed to the Applicant that it was acting on behalf of the Respondent, and that the correct standard to use was and still is KS 524: 2010 for pasta products and that there is no requirement of percentage crude protein under the KS 524: 2010 standard. SGS had also informed the Ex-parte Applicant that they had not received any communication and/or complaint from the Respondent in relation to the same.

16. Per the Applicant, before its importation, the Pasta product had been subject of a test conducted by SGS as per the Kenyan Standard 524: 2010 which test found the food product was of the required standard. On arrival however, the Respondent maliciously indicated non-conformity with the requirements of EAS 173:2004: East African Standard Specification for Pasta Products and subsequently alleged that the consignment did not conform to the parameters and requirements of the Kenya Standard 524: 2010.

17. The Ex-Parte Applicant’s case therefore was that the Respondent herein used a different standard from the Kenya Standard 524: 2010 used by SGS and thus had acted capriciously in the circumstances and ultra vires the express and unambiguous provision of Section 21 of the Standards Act Cap 496 of the Laws of Kenya which provides that where there is a conflict between the provisions of a specification declared to be a Kenya Standard under Section 9 of the Act and a specification made or declared under any other written law, the Kenya Standard shall prevail.

18. By a further affidavit dated 8th March and filed on 11th March 2019, the Applicant through its Chief Executive Officer averred that it had incurred financial loss due to the decision by the Respondent contained in the letter dated 23rd January, 2019. The Applicant went on to particularize the costs incurred and stated that the charges continued to incur on a daily basis until when the goods are cleared from the Port. The charges alluded to were: Port Charges: $6,733 from 26th October, 2018 to 6th March, 2019; Shipping Line Charges: $10242.20 and Custom warehouse rent: Ksh. 112,988.

19. It was further deponed that the applicant has been carrying out business for a long time in Kenya, importing goods and carrying out the same business with the approval of the Respondent

20. The Applicant expressed apprehension that if the Application was not allowed, it stood to suffer irreparable damage as the quality of goods was depreciating, taking into account they are food products.

21. In the circumstances, it was averred that it was only fair and just that this application be heard, and orders prayed granted to obviate imminent injustice to the Ex-parte Applicant and remedy maladministration by the Respondent.

Respondent’s Case

22. The Respondent advanced its case through the affidavit sworn by its acting Chief Manager of Inspection Birgen Rono who from the outset advanced the position that pursuant to **Sections 11 and 14A(4) of the Standards Act, CAP 496 of the Laws of Kenya**, this Honourable Court lacked the jurisdiction to hear and determine the suit herein. This, according to the Respondent, lay with the Standards Tribunal. An argument was also put forth that the Notice of Motion filed by the Applicant was substantively defective to the extent that the Applicant had set out prayers not contained in the original Chamber Summons filed before this Honourable Court at the leave stage.

23. Citing Sections 3, 4 and 14 of the Standards Act, it was averred that the Respondent had the mandate to inspect goods to ascertain they conformed to set standards and that in exercise of its statutory power, the Respondent through its officers proceeded on 29th October 2018 and collected samples of pasta-spaghetti from the Ex-Parte Applicant's consignment for purposes of establishing the quality and safety of the pasta-spaghetti. It was averred that in the above regard, the Respondent had developed the Kenya Standard- Pasta Products Specification, KS 524:2010, which prescribe the requirements and methods of test for pasta products. The samples from the Applicant’s consignment were tested against the prescribed standards at the Respondent's accredited laboratory and failed to comply with the set standards in relation to parameters of Crude Fibre Content and Protein Content on dry weight basis.

24. To the Respondent, it was a shocking revelation that the Applicant had attached an email allegedly from SGS Kenya implying that crude fibre content and protein were not parameters of consideration as relates to testing of pasta products. Further, it was averred that were the said email to be taken as authentic on its face value, it would be a clear concession by the Applicant that its products were not tested

according to the required standards at the alleged point of export.

25. The Respondent further averred that by its letter dated 23rd January 2019, it had advised the Applicant of the applicable standards, (Kenyan standards) upon which the tests had been done and withdrew its earlier letter which wrongly referenced the East African Standards. Further that when the Kenya Standards and the East Africa Standards are placed side by side, it was clear that their provisions were identical. Additionally, the procedures for the testing for the percentage in content of the crude fibre content and total protein on dry basis applied in the East African Standards 173:2004 Specification and the Kenyan Standards 524:2010 standard were one and the same. Specifically that under both standards, the Ex Parte Applicant's Pasta-Spaghetti had a crude fibre content of 0.79%m/m against the legal maximum requirement of 0.45 %m/m and a Protein Content on Dry Weight Basis of 9.96 % m/m against the legal minimum requirement of 10.6% m/m and was therefore not in compliance with the standards specification.

26. As a consequence of the foregoing averments, it was the Respondent's contention that by a communication to the Ex Parte Applicant, it duly notified it of the results thereto and advised that the consignment of imported pasta-spaghetti should be reshipped back to the country of origin.

27. The Respondent went on to aver that at all material times due regard of the law was exercised as per the Respondent's mandate enumerated under the Standards **Act CAP 496** and the Constitution of Kenya. It was averred that the Ex Parte Applicant's consignment of pasta-spaghetti was tested by the Respondent, the statutory body and the body with an international accredited laboratory facility to this effect and found to be substandard.

28. The Respondent refuted the argument made by the Applicant that the Respondent cannot at the port of entry, undertake testing to ensure compliance with the required standards. It made the case that the existence of a testing agency at the point of origin did not take away the statutory mandate of the Respondent. Pursuant to this mandate, the Respondent averred that it undertakes random sampling of products at the point of entry to ensure that they conform to the required standards and that such products were properly and lawfully cleared for importation into the country.

29. It was argued that this Honourable Court should take into account that the decision of the Respondent was arrived at by experts in the relevant field and is meant to protect the general public from consumption of hazardous and substandard products.

30. It was also deponded that the Applicant had not stated under what legal basis they intended the consignment of Pasta-Spaghetti which has already been found to be substandard to be released for public consumption.

31. Regarding the claim for general and special damages, it was the Respondent's position that in view the arguments it had advanced, that prayer was misguided and ought not to be granted as no material had been placed before this Honourable Court in support of the alleged prayer.

32. It was on the basis of the foregoing that the Respondent urged the Honourable Court to strike out the Application herein as it lacks merits and places at risk, the being of the Kenyan consumers.

The Ex-Parte Applicant's Submissions

33. Mr. Muturi Mwangi advanced the Ex-Parte Applicant's case and in his submissions came up with the following issues for determination:

a. ***Whether or not this Honourable Court has jurisdiction to hear and determine the present judicial review application.***

b. ***Whether or not Prayers 4 and 5 in the Notice of Motion dated 8th March, 2018 are justified.***

c. ***Who should bear the costs of the preliminary objection***

d. ***Whether the respondent acted ultra vires and maliciously in making its decision***

34. Submitting on whether this Court was properly seized of jurisdiction to hear and determine the present matter, Mr. Muturi Mwangi begun by extensively analysing the supervisory jurisdiction of the Court. To this end, it was submitted that judicial review is the law concerning control by the courts of the powers, functions and procedures of administrative authorities and bodies discharging public functions. It is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies that perform public functions. It is the branch of administrative law which deals with control, through court process, of the executive organ of the state. Thus, in order to surmount the paucities of legislative control, the High Court of Kenya is vested with supervisory jurisdiction to scrutinise administrative actions to ensure power is exercised fairly and in conformity with the law. This is the court's judicial review jurisdiction conferred by statutes and the Constitution.

35. It was further submitted that this Court's jurisdiction under **Article 165(6)** of the Constitution to intervene and protect the rights of an affected party becomes necessary particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged. In the present proceedings, this Court is being asked in exercise of its supervisory jurisdiction, to review the lawfulness of the Respondent's decision to deny the Ex-parte Applicant's consignment a Certificate of Conformity on its arbitrary application and use of EAS 173:2004 being the East African Standard Specification for Pasta Products as opposed to the relevant Kenyan Standard 524: 2010 used by SGS in the Pre-Export Verification of Conformity (PVOC). It was further submitted that for such a decision to be amenable to judicial review, it must affect an individual's interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions. It thus goes without saying that where a public officer has been granted statutory powers, the exercise of such powers is subject to the supervisory jurisdiction of the Court In the present case, the Respondent's decision clearly affects the Applicant's

rights to property as stipulated under Article 40 of the Constitution, and it was therefore the duty of this Honourable Court to ensure that the exercise of the Respondent's powers is legal, rational and compliant with the principles of natural justice. Reliance was placed on **Republic vs Secretary of the Firearms Licensing Board & 2 others Ex-parte Senator Johnson Muthama [2018] KLR.**

36. It was further submitted that the substance of judicial review was the prerogative superintendence of jurisdiction. In this regard, Counsel cited **Lang vs British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244 and Re Allen and Superintendent of Motor Vehicles and Attorney General of British Columbia (1986), 2 B.C.L.R. (2d) 255.**

37. According to Counsel, based on the foregoing trite principles of public law, the Ex-parte Applicant had approached this Honourable Court which granted him leave to commence judicial review proceedings against arbitrary/unlawful exercise of statutory power by the Respondent.

38. Mr. Muturi Mwangi then proceeded to put forth the argument that **Sections 11 and 14A (4)** of the Standards Act do not operate as an ouster to the Court's jurisdiction. He argued that it was a well-established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts in the absence of clear and unambiguous language to that effect. That statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. That if such a provision is reasonably capable of having two meanings, the meaning that shall be taken is one which preserves the ordinary jurisdiction of the Court. Reliance was placed on **The East African Railways Corp. vs Anthony Sefu [1973] EA 327** and **Republic vs Public Procurement Administrative Review Board Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728.**

39. Per Counsel, by the strict reading of Sections 11 and 14A (4) of the Standards Act, there is no restriction to this Court's jurisdiction as in both Sections, the word 'may' had been used hence the said provisions were not couched in mandatory terms. It was therefore argued that Sections 11 and 14A (4) of the Act, were not ouster clauses; and if any Court would interpret it as such, then that would not only be unconstitutional, but also unreasonable given that such an interpretation will leave the Ex-parte Applicant without an effective remedy.

40. Citing **Republic vs Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others (2017) eKLR**, Mr. Mwangi submitted that any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. That the tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and interests of justice and the rule of law demand this.

41. The Ex-parte Applicant submitted that this Honourable Court must in this case, and at all times, embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. To fail to do so would be to engender and abet an injustice and as had been held before, a court of justice has no jurisdiction to do injustice.

42. Counsel went on to submit that the Standards Tribunal offers no suitable remedy to the Ex-parte applicant and while the Applicant had the option of pursuing an appeal before the Standard Tribunal, the alternative remedies within the present judicial review provide efficacious and satisfactory answer to the Ex-parte Applicant's grievances. Reliance was again placed on **Republic vs Independent Electoral and Boundaries Commission another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR**

43. It was also submitted that the present dispute did not fall squarely within the jurisdiction of the Standards Tribunal and that the availability of other remedies is no bar to the granting of judicial review reliefs. This was buttressed by **Republic vs Ministry of Planning & Another Ex-parte Mwangi S. Kimenyi (2008) KLR** and **Republic vs Commissioner of Lands ex parte Lake Flowers Ltd Nairobi HCMISC Application No 1235 of 1998.**

44. Mr. Mwangi submitted that as the Respondent herein used a different standard from the Kenya Standard 524: 2010 used by SGS Kenya, it had acted capriciously in the circumstances and ultra vires the express provisions of **Section 21** of the Standards Act Cap 496 Laws of Kenya which provides that where there is a conflict between the provisions of a specification declared to be a Kenya Standard under **Section 9(1)** of the Act and a specification made or declared under any other written law, the Kenya Standard shall prevail.

45. According to the Counsel for the Ex-Parte Applicant, before the Ex-parte Applicant imported the pasta from Italy, a Certificate of Conformity was issued by SGS under the authority of the Pre-Export Verification of Conformity programme, for and on behalf of the Respondent. SGS confirmed to the Ex-Parte Applicant through one of its officials that it was acting on behalf in behalf of the Respondent; and that the correct standard to use was and still is Kenya Standard 524: 2010 for pasta products and that there was no requirement on percentage crude protein under the KS 524: 2010 standard.

46. It was the Applicant’s further submission that the power vested in a public authority must be exercised in accordance with the intention of Parliament as may be inferred from the Mother Act. In this respect the decision to harass the Ex-parte Applicant by the respondent on malicious and irrelevant considerations was unlawful. The exercise of such process by the Respondent for improper purposes was invalid. The Respondent herein maliciously failed to use the correct and required standards, which are KS 524: 2010 for pasta products while carrying out its mandate of resampling and/or retesting the pasta from Italy. The Respondent failed to consider the provisions of the Standard Act, thus acting in breach of the law. Further, the Kenya accreditation services vet all applications to the bodies issuing PVOC's for the Ex-parte Applicant consignments. These bodies continue to remain registered and no evidence had been produced to suggest that their accreditations or licenses have been withdrawn. Due to the above reasons, it was the Ex-Parte Applicant’s submission that the Respondent acted ultra vires thus subjecting the Applicant to loss and damages.

47. Supporting its prayer for an order of Certiorari, the Applicant submitted that the impugned decisions were informally made by the Respondent in bad faith and to prevent its food stuffs from entering the country. The decision made by the Respondent herein contradicts that of its Agent and the decision was made with no explanation whatsoever. However, in a deserving case as herein, the Honourable Court may

quash whatever decision is said to be unlawful or which constitutes an error of law. While doing so, the court only needs to satisfy itself that such a decision was made. It was urged therefore that the decision of the Respondent herein should be quashed since it failed to comply with the requirements of the law that is the Standards Act cap 496 Laws of Kenya.

48. Regarding the order of Mandamus sought, Mr. Muturi Mwangi for the Ex Parte Applicant appreciated the general rule that the reviewing court has no mandate to substitute its own decision for that of the administrator since the court can only remit the matter to the administrator. He further outlined the circumstances under which the Court would be entitled to intervene even in the exercise of discretion including: where there is an abuse of discretion; where the decision maker exercises discretion for an improper purpose; where the decision-maker is in breach of the duty to act fairly; where the decision-maker has failed to exercise statutory discretion reasonably; where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; where the decision-maker fetters the discretion given; where the decision-maker fails to exercise discretion and where the decision-maker is irrational and unreasonable.it was submitted that the Respondents' decisions were unlawful, disproportionate malicious and unreasonable. The impugned decision had unfairly hindered the Ex Parte Applicant's business operations and interests. **The case of New Milimani Sacco Limited versus- Sacco Societies Regulatory Authority** was cited.

49. The Ex-Parte Applicant submitted that the real objective behind the impugned decision/conducts was to harass, frustrate and force the Ex Parte Applicant to exit the Kenyan market in favour of its competitors. The decision impugned herein was unlawful, based on irrelevant considerations, manifestly oppressive and violated the Ex Parte Applicant's rights to fair administrative action.

50. It was further submitted that the Ex Parte Applicant was highly prejudiced by the Respondents' actions/decision, and had suffered financial loss and loss of business as a result. Further, the Ex Parte Applicant was faced with imminent loss of business and threats of closure or total collapse due to failing operations; which will lead to loss of employment/livelihoods by the Ex Parte Applicant's employees/dependants, unless the orders herein are urgently granted as sought.

51. On declarations and compensation, Reliance was placed on **Sections 11(a) to (j)** of the **Fair Administrative Actions Act**, which provide that the court may declare the rights of the parties and award costs or other pecuniary compensation in appropriate cases, as herein. The Court was referred to **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others**.

52. Turning to the issue of whether or not Prayers 4 and 5 in the Notice of Motion dated 8th March, 2018 were justified, it was submitted that on 25th February, 2019, the Ex-parte Applicant filed its Chamber Summons application dated 19th February 2019 seeking leave to commence judicial review proceedings. This application was allowed and Orders issued on 5th March, 2019 allowing the Applicant to file and serve Substantive Motion within 8 days. By the aforesaid Orders it was also ordered that the ex-parte Applicant counsel have leave to amend the initial chamber summons to lay any further details touching on the entire petition and any facts necessary for the comprehensive appreciation of the issues to be determined by this Court.

53. In closing it was the Applicant's prayer that the instant application be allowed as prayed and the court dismiss the Respondent's preliminary objection dated 18th March, 2019 with costs being borne by the Respondent.

<u>Respondent's Submissions</u>

54. Urging on behalf of the Respondent, Mr. Ogeto formulated four issues for determination:

a) ***Whether this Honourable Court has the jurisdiction to hear and determine the Applicant's application;***

b) ***Whether the Notice of Motion as presently filed reflected the Leave granted;***

c) ***Whether the Respondent lawfully exercised its statutory duty to make the impugned decision(s);***

d) ***Whether the application meets the threshold for this Honourable Court to grant the orders sought against the Respondent.***

55. On the first issue Mr. Ogeto submitted that there was ample judicial authority emanating from the Courts emphasizing that the question of jurisdiction was paramount in any adjudication and whenever raised, the Court or Tribunal seized of the matter must, as a matter of prudence, inquire into it in limine and resolve it before doing anything concerning the matter in respect of which it is raised. This argument was buttressed by excerpts from the cases of **The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd [1989] KLR; Consolidated Bank of Kenya Limited vs Arch Kamau Njendu t/a Gitutho Associates [2015] eKLR** and **Kenya Revenue Authority& 2 others v Darasa Investments Limited [2018] eKLR.**

56. Turning specifically to the matter herein, the Respondent through learned counsel submitted that pursuant to **Sections 11 and 14A (4)** of the Standards Act, CAP 496 of the Laws of Kenya, this Honourable Court lacked Jurisdiction to hear and determine the instant suit. According to Counsel, it was only after the Standards Tribunal had pronounced itself that a party may thereafter under **section 16G** of the Act appeal to the High Court. As such the instant suit was fatally defective for failure to exhaust the statutory remedies under the constitutive act and did not qualify as an appeal as contemplated by the Act. The Court was therefore urged to therefore dismiss the suit at the preliminary stage for lack of jurisdiction and failure to exercise the available statutory remedies. On this line of argument, Mr. Ogeto called to his aid a plethora of judicial precedents including: **Kenya National Chamber of Commerce and Industry & 2 Others v Kenya Bureau of Standards & another [2017] eKLR; Republic v Kenya Revenue express Authority ex parte Interactive Gaming & Lotteries Limited (2016) eKLR; Republic v Principal Magistrate Lamu Magistrate's Court & another ex parte Kenya Forest Service (2016) KLR; Republic v Architectural Association of Kenya & 3 others Ex Parte Paragon Ltd [2017] eKLR; Republic v Non-Governmental Organisations Co-Ordinations Board & 4 others Ex Parte International NGO Safety Organisation (INSO) [2016] eKLR and Fredrick Mworia v District Land Adjudication Officer Tigania West/East & 3 Others (2016) KLR.**

57. Regarding the circumstances where an exception to the exhaustion of statutory remedies was permissible, it was submitted that the Applicant had neither demonstrated in the application how the available statutory remedy was ineffective and insufficient to warrant the Court to consider entertaining this matter nor did the relevant statutes in this matter provide an exception to the doctrine of exhaustion of statutory remedies. Per Counsel, the Applicant was in fact treating our statutes with contempt when indeed they complement the Constitution. It was argued that the Ex- parte Applicant had not pleaded or argued any virgin constitutional question, nor demonstrated how its matter fell under the purview of exceptional circumstances. On this line of Defence, Counsel placed reliance on **Republic vs Director of Immigration Services & 2 others Exparte Olamilekan Gbenga Fasuyi & 2 others (2018] eKLR; Resolution Insurance Ltd vs HIV & AIDS Tribunal & 3 Others [2018] eKLR and Leonard Otieno vs Airtel Kenya Limited [2018] eKLR.**

58. The Respondent invited the Court to make a finding that the Standards Act had an elaborate, efficient and effective statutory mechanism to resolve disputes made pursuant to the Act, and further an appeal mechanism for the same under **Section 16A, 16C and 16G.**

59. Closing on this issue, a submission was made that under **Section 7** of the Fair Administrative Action Act, the jurisdiction of tribunals was expressly acknowledged.

60. The next issue counsel tackled was whether the notice of motion as presently filed reflected the leave granted. It was the Respondent's submission that prayers 4 and 5 of the Notice of Motion exceeded the leave granted on 25th February 2019 which was limited to orders of mandamus and certiorari and ought therefore to be struck off in limine. Reliance was placed on **In The Matter ff CMC Holdings Limited [2012] eKLR.**

61. According to Counsel, whereas on 4th March 2019 there were further orders issued by this Court order 6 provided as follows:

> ***"That exparte Applicant Counsel has leave of this Court to amend the initial Chamber Summons to lay any further details touching on the entire Petition (sic) and any facts necessary for the comprehensive appreciation of the issues to be determined by this Court."***

62. It was Counsel's submission that the Applicant did not amend the initial chamber summons and no leave was granted to the Applicant to amend its Notice of Motion, to which directions had already been given under order 1 therein. As such, Mr. Ogeto submitted that the Applicant could only amend its claim, so as to lay any further details to facilitate determination of the prayers for which leave had been granted, which were according to him the "issues to be determined by the Court"

63. Regarding whether the respondent lawfully exercised its statutory duty and powers to make the impugned decisions, Mr. Ogeto submitted that while on or around 10th October 2018 the Respondent by way of random sampling at the port, through its officers, collected samples of Pasta from the Applicant's proposed import consignment, this was in line with the Respondent's statutory mandate so as to ensure imports into the country complied with the statutory and safety standards. The samples of the pasta were tested against the Kenya Standard Pasta Product Specification, KS 524:2010 at the Respondent's accredited laboratory and failed to comply with the set standards in relation to parameters of Crude Fibre Content and Protein Content on dry weight basis.

64. It was the Respondent's submission that for the Ex-parte Applicant to establish a case to be granted the orders sought, it ought to establish that the Respondent carried out an action (decision) that was beyond its statutory duty, or the process was marred with illegalities, irrationalities, unfairness and un-reasonability.

65. **Article 46(1) (a), (b)** and **(c)** of the Constitution of Kenya, 2010 was cited in reference to its provision protecting consumers' rights to access goods of reasonable quality, to the protection of their health, safety, and economic interest. Next, Counsel directed the Court to consider the Respondent's functions under **Section 4** of the Standards Act, specifically:

> **"…**
>
> ***(c) to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated;***
>
> **…**
>
> ***to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description."***

66. It was submitted that on the basis of the above provision, every commodity imported to, manufactured or processed for consumption had to undergo testing for ascertaining that the goods conform to the set standards. It was further submitted that in the performance of its statutory mandate, the Respondent carries out the following activities routinely:

> ***"(a) Developing standards which provide for common and repeated use of rules, guidelines or characteristics for products and services to make sure that products and services are fit for their purpose and are comparable and compatible***
>
> ***(b) Testing and inspecting products at port of entry into Kenya to provide assurance as to quality and prevent harmful products from entering Kenyan market***

(c) Monitoring of products in the Kenyan market to ensure that they conform to relevant technical regulations in a process called market Surveillance;

(d) Taking samples from products in the market and carrying out laboratory tests to ascertain if the products conform to the set standards."

67. Counsel thereafter submitted that it was in the exercise of the statutory powers alluded to above that the Respondent's officers collected samples of the pasta for purposes of establishing the quality and safety of the same. The samples of the pasta-spaghetti were tested against the prescribed standard, the Kenya Standard Pasta Products Specification; KS 524:2010, at the Respondent's accredited laboratory and failed to comply with the set standards in relation to parameters of Crude Fibre Content and Protein Content on dry weight basis. The Applicant's product had a crude fibre content of 0.79%m/m against the legal maximum compositional requirements for pasta products and Applicant's imported goods requirement of 0.45 %m/m and a Protein Content on Dry Weight Basis of 9.96 % m/m against the legal minimum requirement of 10.5% m/m and was therefore not in compliance with the standards specification.

68. According to Mr. Ogeto, the Applicant had sought to challenge reference to the East African Standards, Pasta Products-Specification (EAS 173:2004), notwithstanding the fact that by its letter dated 23rd January 2019, the Respondent advised the Applicant of the applicable standards, (Kenyan standards) upon which the tests had been done and withdrew its earlier letter which wrongly referenced the East African Standards. Further, it was submitted that when the Kenya Standards and the East Africa Standards are placed side by side, the parameters in both were word by word similar.

69. It was the Respondent's submission that compliance with importation procedures did not take away its duty to carry out the sample testing to ascertain fitness for consumption. That a look at the Certificate of Conformity attached to the Application on page 16 of the Applicant's originating pleadings confirmed this. At the end of the Certificate it is categorically stated *"KEBS may reject the consignment covered by this CoC if found to be nonconforming on verification at the port of entry."* Further that under Order 5 of the Verification of Conformity to Kenya Standards of Imports Order 2005, the Respondent may properly re-inspect goods at the port of entry. It was therefore submitted that the Respondent having the powers to perform the actions complained of, this Honourable Court could not be called upon in judicial review, to sit on appeal over the said decision, to determine fitness of consumption as related to the condemned goods. Reliance was placed on the case of **David Kimani Karogo v Thika Land Disputes Tribunal & 2 others (2017] eKLR.**

70. It was further submitted that the Respondent exercised its statutory duties lawfully and that the Applicant sought orders whose effect would mean that the standardisation prescribed by law would be of no value as every party would be approaching the Courts on flimsy allegations in an attempt to stifle the Respondent in its role. This would not have been the intention of Parliament and by extension, the People of Kenya under the Constitution. The advocate for the Ex-Parte Applicant submitted that the Court in its capacity as a judicial review court could not be tasked to choose between the Certificate of Conformity and laboratory test results at the point of entry, a matter that will require substantial and expert review of the contents of the wheat pasta; a role at best is suited for the Tribunal. It was submitted that the Applicant had failed to prove that the manner in which the Respondent carried its statutory mandate as vested by the Standards Act was marred by improprieties. It had failed on this and instead attempts to invite the Court to delve into the arena of merit and take on the role of a standardisation expert.

71. The Court was urged by the advocate for the Respondent to consider the Public Interest by making a judicial decision that puts the health and wellbeing of the people of Kenya first, as this should never be sacrificed at the altar of commercial interests. The Court was asked to take into account that the decision of the Respondent was arrived at by experts in the field and was meant to protect the general public from consumption of hazardous and substandard products. In support of this proposition, counsel referred to **Kenya National Chamber of Commerce and Industry & 2 Others v Kenya Bureau of Standards & another [2017] eKLR** and **Isaac Gathungu Wanjohi & another v Director of City Planning, City Council of Nairobi & another (2014) KLR.**

72. Addressing whether the application meet the threshold for grant of Judicial Review orders, Mr. Ogeto submitted that it did not. On the prayer for an order of certiorari, it was submitted that this could not be issued as the Respondent acted within its statutory mandate, under the Standards Act. Secondly, the Applicant could not invite the Court to compel the Respondent to certify its pasta fit for human consumption which was the effect of the orders sought, as such certification was the preserve of the Respondent. That the Court could not be asked to prohibit the Respondent from performing its statutory duty. Counsel cited **Kenya National Examination Council vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others (1997 eKLR**

73. According to the advocate for the Respondent, it was a fundamental misconception by the Applicant in this matter is that the Respondent applied a standard which is not provided for under the Kenyan Standards and in this respect, breached **Section 21** of the Standards Act. The reality according to Mr. Ogeto was that what was applied was the Kenyan Standard and the erroneous reference to the East Africa Standard was corrected by the letter dated 23rd January 2019, which was the letter being challenged before this Court.

74. On the Ex-Parte Applicants claim for compensation, it was the Respondent's submission that the case herein was not one for which the Court may grant damages. Reliance was placed on **Republic v Law Society of Kenya Ex parte Stephen Mogaka t/a Musyoki Mogaka & Co Advocates & another (2018] eKLR.** It was further submitted that as justifiable cause existed for the Respondent's actions, damages would not be an appropriate or just and fair remedy.

75. Regarding the prayer for special damages, it was submitted that there was no breakdown given of the alleged port, shipping line and custom warehouse charges, relevant dates, specific supporting documentation and how it had any relation to the Respondent's impugned actions and as such the prayer was misplaced and could not stand. Reliance was placed upon **Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR**. As for the claim for general damages, the Respondent reiterated that it acted as per the law and should not be penalised for that.

76. On the basis of these submissions, the Respondent asked the Court to dismiss the Applicant's application with costs on the grounds that the court lacks jurisdiction and/or that the application had not established a case for the judicial review orders sought.

Analysis and Determinations

77. After a scrupulous probe of the contenting parties respective positions and having taken into account Learned Counsels' submissions and the authorities cited therein, I am in no doubt that the instant Application raises four substantive issues for determination to wit:

a. ***Whether this court is properly seized of the jurisdiction to entertain the instant application dated 8th March 2019***

b. ***Whether the Notice of Motion as presently filed reflected the Leave granted on the 26th February 2019***

c. ***Whether the Ex-Parte Applicant is entitled to the judicial review orders sought***

d. ***Who should bear the costs***

78. The Respondent raised a preliminary objection challenging the jurisdiction of this court to handle the matter and it therefore behoves this court to consider its jurisdiction as the point of departure.

79. The law on jurisdiction is trite and I shall not seek to reinvent the wheel. It has been held time without number that where a Court of law adjudges itself to be bereft of the jurisdiction to tackle a dispute before it, the Court ought to forthwith divest itself as jurisdiction is everything. In the timeless words of Nyarangi JA in **Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Limited [1989] KLR 1:**

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***
>
> **(See also Safe Rider Vehicle Technologies (PTY) and 2 Others v National Police Service Commission NRB JR No. 10 of 2017 [2017] eKLR and Republic v National Environment Management Authority NRB CA Civil Appeal No. 84 of 2010 [2011] eKLR.)**

80. In the instant case the Respondent argued that the Ex-Parte Applicant, having been aggrieved by its decision contained in the letter dated 23rd January 2019, ought to have followed the proper statutory procedure and laid out its grievances before the Standards Tribunal as it was mandated to do under the Standards Act, Cap 496, Laws of Kenya.

81. Under **Section 11 of the Standards Act CAP 496, Laws of Kenya**, any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Standards Tribunal established under **Section 16A** of the same Act.

82. As relates to whether the Applicant's claim fell within the ambit of the Standards Tribunal, **Section 14A (1)** provides:

> ***An inspector may order the destruction of goods detained under section 14(1) if the following conditions are satisfied—***
>
> ***(a) testing indicates that the goods do not meet the relevant Kenya Standard; and***
>
> ***(b) it is reasonably necessary to destroy the goods because the goods are in a dangerous state or injurious to the health of human beings, animals or plants.***

83. **Section 14A (4)** on its part provides:

> ***(4) Any person who is aggrieved by an order under subsection (1) may, within fourteen days of the notice of the order under subsection (3), appeal in writing to the Tribunal.***

84. My analysis of the above provisions read together with the crux of the Applicant's claim leaves me in no doubt that the decision complained off fell squarely within the ambit of disputes that ought to have gone through the Standards Tribunal appellate process.

85. Mr. Ogeto for the Respondent reasoned, I believe rightly so, that where there has been provided a statutory mechanism for the resolution of disputes, such mechanism ought to be considered and fully exhausted before alternative channels for resolution are sought. Judicial precedent is replete with decisions that echo this position as I shall endeavour to illustrate shortly.

86. Before doing so however, I find it prudent to dispel the Ex-Parte Applicant's misplaced notion and argument that its predicament was an exceptional circumstance and so out of the norm to the extent that the Court ought to consider allowing its claim as the Standards Tribunal held no remedy that would adequately resolve its dispute with the Respondent. From where I stand, the Applicant ought to have first taken its grievance before the Standards Tribunal instead of jumping the gun and filing the instant application. Under **Section 9(2)** of the ***Fair Administrative Action Act***, **No. 4 of 2015** it is provided that:

> ***"The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted"***

Subsection (3) thereof provides that:

> ***The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

87. I fully associate myself with the positon espoused in **Kenya National Chamber of Commerce and Industry & 2 others v Kenya Bureau of Standards & another [supra]** which I hereby reproduce below:

> ***"The Standards Tribunal is established pursuant to article 169(1) (d) of the constitution of Kenya 2010 and Legal Notice No. 7 of 2004 which introduced sections 10 to 16 D and its focus is to dispense justice through a fair and open manner and expeditiously without recourse to undue procedural technicalities and without reference. The functions of the Tribunal are spelt out among which is to hear appeals from any person aggrieved by the decision of the Kenya Bureau of Standards or the National Standards Council."***

88. The Court in that instance went on to state:

> ***"The import of these provisions is that the Jurisdiction of the High Court under the Standards Act is that of an appellate court and in that regard parties are not expected to approach it directly in the first instance where a dispute arises under the Standards Act. The parties herein ought to have appealed against the decisions of Kenya Bureau of Standards 14 days from dates of seizure Notifications dated 4th and 5th April 2016 respectively."***

89. Quoting **Lady Justice Mumbi Ngugi** in **Joseph C, Kiptoo and Another vs Kericho Waters and Sewerage Company Ltd (2016) KLR**, the Court in the **Kenya National Chamber of Commerce and Industry Case [supra]** stated:

> ***"Turning back to case law it has been held time and again that if an Act of parliament provides for mechanism for dispute resolution it has to be followed strictly and exhaustively.***
>
> ***This is not because the Tribunal has jurisdiction under Article 165(2)(b) but as analysed above the remedies that the petitioners seek are taken care of in the Act and it is also in the interest of upholding and promoting the provisions of Article 159(2)(c) of the constitution which will otherwise be rendered futile if the High Court has to accept all kinds of litigation . Different Tribunals established under different Acts of Parliament deal with specific issues in specific fields and therefore guarantee easy expeditious cheap and fair access to justice unlike the High Court which is clogged with all sorts of matters."***

90. The Court in **Kenya National Chamber of Commerce and Industry & 2 others v Kenya Bureau of Standards & another [supra]** went on to conclude that:

> ***For the reason that this court finds that the cause has been brought to wrong forum when the instant court has only appellate jurisdiction as far as The Standards Act is concerned, it can do no more than to relinquish itself from the matter because Jurisdiction is everything and without it the court has no power to make one more step.***

91. The Court of Appeal in **Republic vs. National Environment Management Authority [2011] eKLR**, held that:

> ***"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute."***

92. In **Judicial Review No. 678 of 2017 Republic v Energy Regulatory Commission & 2 others [2018] eKLR** the court stated that:

> ***"13. From the provisions I have cited, it is clear that a party whose licence is revoked by the ERC has a statutory right of appeal to the Tribunal established under the Act. Does the fact that this procedure exists exclude the jurisdiction of this court to entertain the application for judicial review" The existence of a statutory remedy vis-à-vis the right to apply for judicial review has been the subject of judicial pronouncement. It has been held that where a statute provides for a mode of resolving a dispute that procedure must be followed. For example in Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017]eKLR, the Court of Appeal reiterated this principle that, "[It] is abundantly clear to us that where there is a specific procedure as to redress of grievances, the same ought to be strictly followed."***

93. Finally, in **Civil Application No. Nai. 92 of 1992 Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** the Court of Appeal held that;

> ***"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

94. The judicial decisions elaborated above are on all fours with the predicament this Court has been tasked with resolving in the instant application. I can do no better than fully align myself with the ratiocination of my esteemed colleagues. Consequently, it is the Courts finding that the Application dated 8th March 2019 is not meritorious for want of jurisdiction of this court.

95. Having downed my tools, it follows therefore that the remaining substantive issues can only be addressed at a forum properly seized of jurisdiction, which in this case is the Standards Tribunal contemplated under **Part IVA of the Standards Act, Cap. 496 Laws Of Kenya**.

96. In the upshot, the Application dated 8th March 2019 is hereby dismissed, the Respondent's preliminary objection is upheld and the Respondents shall have the costs.

97. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 12TH DAY OF JULY 2019

……………………..

R NYAKUNDI

JUDGE.