



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 226 OF 2018**

IN THE MATTER OF: ARTICLE 2(1) & (2), 3(1), 10, 19, 20, 22, 23(1) & (3), 27(1), 35, 40, 46, 47(1), & (2), 48, (50), 159, AND 258 (1)  
OF THE CONSTITUTION OF KENYA 2010;

AND

IN THE MATTER OF: THE STANDARDS ACT CAP 496 OF THE LAWS OF KENYA;

AND

IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT, NO. 2 OF 1995 LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 3, 4(1) (2) (3) (A) (B) (D) & (G), 4, 6, 7(1) (A) & (2) OF THE FAIR ADMINISTRATIVE ACTION  
ACT, 2015

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 2(1) &  
(2), 3(1), 27(1), 35, 40, 46, 47, 48 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010;

**BETWEEN**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....PETITIONER**

**AND**

**KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**MINISTRY OF TRADE.....4<sup>TH</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATION.....5<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL.....6<sup>TH</sup> RESPONDENT**

**RULING**

**The Genesis of the Preliminary Objection**

1. On 7.3.18 this Court was scheduled to deliver a full Judgment in this petition but fell short of doing the same upon realizing that material information necessary for the just, fair and conclusive determination of the petition was not before the court, or were not adequately clarified

in the submissions. Consequently, at paragraphs 49 and 50 of the Judgment, the Court observed and directed as follows:

**“(49) I have carefully considered the petition and the prayers it seeks. I have also very carefully considered the submissions of the parties to this petition. The submissions made by the parties will only make sense once the court establishes the factual realities before the court, that is, in relation to the quality of the sugar, and the operational state of the Petitioner as a sugar manufacturing entity. From the pleadings herein, and from the submissions of the parties, the following state of affairs are determinable:**

- (i) The process of sugar testing for quality is still underway, and parties are still awaiting the final results of the tests, whose samples were drawn on 18<sup>th</sup> September, 2018.**
- (ii) The Petitioner protests the integrity of the samples which were taken for testing leading to the results dated 2<sup>nd</sup> August, 2018.**
- (iii) The issue before the court is purely about allegations that the Petitioner’s sugar is substandard and unfit for human consumption and should be destroyed. This is an issue which can be resolved by doing tests whose sampling meets integrity.**
- (iv) Sugar is a perishable commodity. This means that even if testing had been previously done, the same can be re-done at the time of releasing the same for public consumption. This re-testing would however not prejudice the right of a party who would be vindicated by an earlier testing if the later testing is performed under conditions which may have deteriorated.**
- (v) Because the court is dealing with a perishable food product, the court has the authority to order re-testing at any time before the release of the products to the public. This can be done notwithstanding that the goods had earlier passed the test. This re-testing is necessary because the goods which may have earlier passed the test are still locked in a warehouse, and may have changed in state during that period.**

**(50) Due to the foregoing reasons, it is the finding of this court that it cannot make a Judgment in this matter until all the facts are in. And in order for this court to adjudge on this matter the court directs as follows:**

- (a) The court hereby directs and orders a fresh testing of the sugar the subject matter of this suit.**
- (b) The said testing shall be carried out by the 1<sup>st</sup> Respondent (KEBS) and one or two other independent testing agencies chosen by the Petitioner.**
- (c) The sampling for testing must strictly comply with the law and utmost integrity must be observed in the process by all the parties.**
- (d) The sampling process shall be supervised by the Deputy Registrar of this court.**
- (e) The sampling will be done on 11<sup>th</sup> March, 2019.**
- (f) It has been alleged by the Petitioner that the Respondent closed down the Petitioner’s factory which has not been operational since June, 2018. This court reserves the right to visit the Petitioner’s factory to verify those allegations. The said visit will be undertaken today the 7<sup>th</sup> of March, 2019 at 4.00 p.m. so that no party is able to interfere with the situation on the ground.**
- (g) Upon full compliance with these directions, this court will then review the petition and render a Judgment on the petition.”**

2. Pursuant to the foregoing the Court allowed further proceedings in the matter after all parties complied with above directions, and all the parties herein fully participated until the matter was concluded and a Judgment reserved for 11.6.19 which was extended to 7.11.19. The 1<sup>st</sup> Respondent however, despite participating fully in the proceedings leading to the final Judgment herein, nevertheless raised a Preliminary Objection the subject matter of this Ruling.

### **The Preliminary Objection**

3. The Notice of Preliminary Objection herein raised by the 1<sup>st</sup> Respondent is dated 26.3.19. It is premised on the grounds set out therein. The 1<sup>st</sup> Respondent states that this Court lacks jurisdiction to entertain further proceedings in the Petition having delivered its Judgment on the 7.3.19 which effectively brought to an end its jurisdiction. Consequently, it is now *functus officio* and the jurisdiction has since shifted to the Appellate Court.

4. Ms. Ovesi learned counsel for the 1<sup>st</sup> Respondent submitted that in directing parties to file further submissions the Court seems to be assisting the Petitioner to frame new issues post Judgment. Counsel submitted that this is illegal and amounts to this Court sitting on its own appeal.

5. In support of its submission, Ms. Owesi relied on the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** where it was held that in the adversarial system of litigation there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.

6. Ms. Owesi further submitted that after delivery of Judgment this Court can only deal with an Application for review or an Application for stay of execution and there is no jurisdiction to grant interim Judgement as the same is not recognized under the Kenyan laws. Reliance was placed in **Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others [2016] eKLR** where it was held that:

**“Whereas a court has jurisdictional competence to issue interim orders, the trial court failed to appreciate that the concept of partial or interim judgment is not part of the Kenyan legal system. Whereas a trial court has the jurisdictional competence to make interim orders, the trial court erred in delivering a judgment that was not a final judgment that determined the rights and liability of parties.”**

7. Mr. Awuor, learned Counsel for the Petitioner’s in response to the 1<sup>st</sup> Respondents submissions on its Preliminary Objection relied on its supplementary submissions filed on the 3.4.19. In a nutshell Counsel submitted that the preliminary objection is materially misinformed as there is no Judgment that has been delivered by this Court on the substantive questions raised in the Petition to date as this Court stated that it cannot make a Judgment in this matter until all facts are considered and nothing stopped this Court from ascertaining the factual realities before rendering a just Judgment.

8. Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents relied on the submission by the 1<sup>st</sup> Respondent in terms of the preliminary objection.

### **The Determination**

9. The issue of jurisdiction is now settled by the authorities of the Court. In the landmark case of: - **The Owners of Motor Vessel Lilian S vs. Caltex Kenya Ltd. (1989) KLR** the Court held that: -

**“it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

10. The main issue therefore is jurisdiction of the Court to entertain this matter after delivering a Judgment on the 7<sup>th</sup> March 2019.

### **Whether this Court is functus officio**

11. The doctrine of functus officio is one of the expressions in law on the principle of finality. **The Black's Law Dictionary, Ninth Edition** defines *functus officio* as: -

**“[having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”**

12. The Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** cited with approval an excerpt from an article by **Daniel Malan Pretorius** entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated:

**...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”**

**The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;**

**“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”** (emphasis mine)

13. This Court is in consonance with the finding in **Jersey Evening Post Ltd vs. Ai Thani (supra)** that a Court is functus official when it has performed all its duties in a particular case. The question then is: has this Court performed all its duties in this petition?

14. In order to determine whether this Court has performed all its duties by addressing all the substantive issues raised in the Petition, I

reproduce verbatim its findings pursuant to orders of 7.3.19 which are as follows:

“i) The process of sugar testing for quality is still underway, and parties are still awaiting the final results of the tests, whose samples were drawn on 18<sup>th</sup> September, 2018.

(ii) The Petitioner protests the integrity of the samples which were taken for testing leading to the results dated 2<sup>nd</sup> August, 2018.

(iii) The issue before the court is purely about allegations that the Petitioner’s sugar is substandard and unfit for human consumption and should be destroyed. This is an issue which can be resolved by doing tests whose sampling meets integrity.

(iv) Sugar is a perishable commodity. This means that even if testing had been previously done, the same can be re-done at the time of releasing the same for public consumption. This re-testing would however not prejudice the right of a party who would be vindicated by an earlier testing if the later testing is performed under conditions which may have deteriorated.

(v) Because the court is dealing with a perishable food product, the court has the authority to order re-testing at any time before the release of the products to the public. This can be done notwithstanding that the goods had earlier passed the test. This re-testing is necessary because the goods which may have earlier passed the test are still locked in a warehouse, and may have changed in state during that period.

**50. Due to the foregoing reasons, it is the finding of this court that it cannot make a Judgment in this matter until all the facts are in. And in order for this court to adjudge on this matter the court directs as follows:**

(a) The court hereby directs and orders a fresh testing of the sugar the subject matter of this suit.

(b) The said testing shall be carried out by the 1<sup>st</sup> Respondent (KEBS) and one or two other independent testing agencies chosen by the Petitioner.

(c) The sampling for testing must strictly comply with the law and utmost integrity must be observed in the process by all the parties.

(d) The sampling process shall be supervised by the Deputy Registrar of this court.

(e) The sampling will be done on 11<sup>th</sup> March, 2019.

(f) It has been alleged by the Petitioner that the Respondent closed down the Petitioner’s factory which has not been operational since June, 2018. This court reserves the right to visit the Petitioner’s factory to verify those allegations. The said visit will be undertaken today the 7<sup>th</sup> of March, 2019 at 4.00 p.m. so that no party is able to interfere with the situation on the ground.”

(g) Upon full compliance with these directions, this court will then review the petition and render a Judgment on the petition.”

15. The Court of Appeal in *Kenya Deposit Insurance Corporation (as Liquidator of Dubai Bank Kenya Limited) vs. Rapid Communications Limited & 2 others; Bank of Africa Kenya Limited & 2 others (Interested Party)* [2019] eKLR stated as follows... *But the question still remains; when is a court of law rendered functus officio? ...*

*“So that, finality, which is at the core of the doctrine of functus officio, is achieved when the judgment or order has been 'perfected' or 'drawn up, issued and entered'.”*

16. From the foregoing can it be argued that the decision by this Court issued on the 7.3.19 achieved finality? This Court notes that finality of a Court is achieved when a Judgment or order has been perfected or drawn up, or issued and entered as stated in *Kenya Deposit Insurance Corporation (as Liquidator of Dubai Bank Kenya Limited) v Rapid Communications Limited(supra)*.

17. Had the Judgment issued on the 7.3.19 been perfected?

The word “**Perfect**” is defined by Black’s Law Dictionary, 10<sup>th</sup> Edn. At page 13974 *as to take all legal steps needed to complete, secure or record (a claim right or interes) to provide necessary public notice in final conformity with the law.*

18. Accordingly, this Court finds and holds that the decision delivered on the 7.3.19 had not been perfected and indeed, there was an indication that a determination in the Petition could not be made until the Court had all the facts. Consequently, this Court gave directions as follows:

*that a re-testing of the subject sugar was be conducted by the 1<sup>st</sup> Respondent and two independent testing agencies; this Court directed that it reserves the right to visit the Petitioner factory to verify the allegations and the visit was fixed on the same day of the decision at 4:00 pm so that no party is able interfere with the situation on the ground; Lastly, this Court ordered that upon full*

compliance with its directions the Court would then review the Petition and render a Judgment on the Petition.

19. In the upshot, it is the finding of this Court, and I so hold, that the Judgment issued on the 7.3.19 was not final, and only provided directions to parties. The fulfilment of those orders or directions was to lead to the final Judgment as noted in the said directions. For avoidance of doubt the Court of Appeal in **Kenya Deposit Insurance Corporation (as Liquidator of Dubai Bank Kenya Limited) v Rapid Communications Limited (supra)** affirmed this position as follows...

**“So that, finality, which is at the core of the doctrine of functus officio, is achieved when the judgment or order has been 'perfected' or 'drawn up, issued and entered'. In the matter before us, the impugned order had not been perfected, and indeed, there was a further order made at the time of delivery of the ruling, that it would be revisited. All parties were present when the further order was made and they participated in the deliberations that followed before the order of 20<sup>th</sup> April, 2018 was made. It is noteworthy that it was made "further to the orders issued on 22<sup>nd</sup> December, 2017". In those circumstances, it is our view that the doctrine of functus officio did not apply. We so find.”**

20. This Court is bound by the above decisions of the Court of Appeal. In the circumstances of this case, this Court is not *functus officio* since it was yet to perfect its decision because it was waiting for full compliance with its directions issued on 7.3.19.

#### 21. **Orders**

a) The preliminary objection raised herein by the 1<sup>st</sup> Respondent is dismissed for lack of merit.

b) There shall be no order as to costs.

**Dated, Signed and Delivered at Mombasa this 7<sup>th</sup> day of November, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Ms. Arika holding brief Professor Ojienda for Petitioner

Mr. Wachira Nguyo for Hon. Attorney General

Ms. Mwencha holding brief Ms. Kariuki for 1<sup>st</sup> Respondent

Mr. Ochieng for 2<sup>nd</sup> Respondent

Mr. Kaunda Court Assistant