REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 13 OF 2019

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR ORDERS OF MANDAMUS

AND

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

AND IN THE MATTER OF THE FAIR ADMINISTRATIVE

ACT, 2015

BETWEEN

REPUBLIC..APPLICANT

VERSUS

KENYA BEREAU OF STANDARDS..RESPONDENT

MAY BROS KENYA LIMITED..EX-PARTE

RULING

1. This is a Ruling on the Notice of Motion application dated 7.3.19 brought by the ex-parte Applicant under **Order 53 Rule 3 (1) & (2) of the Civil Procedure Rules, 2010** and all other enabling provisions of the law.

2. The Respondent is the Kenya Bureau of Standards, a statutory body created, under the **Standards Act, Cap. 496**.

3. The application prays for the following orders:

(a) An order of mandamus ordering and compelling the Respondent to immediately and unconditionally conduct resampling and retesting of the Applicant's entire consignment of vegetable cooking oil under customs entry numbers 2018MSA6911663 and 2018MSA6911704 respectively.

(b) In the alternative, an order of Mandamus ordering and compelling the Respondent to immediately and unconditionally release the Applicant's entire consignment of cooking oil under customs number 2018MSA6911663 and 2018MSA6911704 and meet all cost for reshipping of the consignment back to Singapore.

(c) An order of pecuniary compensation for loss of business and all demurrage costs incurred from 27th November 2018 to date.

(d) Costs and other incidentals be borne by the Respondent.

(e) Any such order or relief as the Honourable Court may deem just, fit and appropriate in the circumstances of this matter.

4. The application is supported by the verifying affidavit of Yusuf Hassan Ahmed, sworn on 1.3.19 and supplementary affidavit of the same deponent sworn on 18.7.19 and a statutory statement filed on 4.3.19.

5. The Applicant's case is that it purchased 119.70 MTS of Moi brand red palm vegetable oil packed in 6,650 20 litter jerrycans from M/s Moi foods Malaysia. The consignment was laden on board of MV EVER DAINTY 130W vide bill of lading No. COSU6180647800 and COSU6180647810. Upon arrival to the port of Mombasa, Kenya the Respondent seized the entire consignment stating that samples must be collected from the consignment and tested to determine its quality conditions. The Respondent later informed the Applicant vide a letter dated 12th October 2018 that the consignment had failed to comply with the Respondent's requirements in regard to iodine value, Vitamin A and Iron content and therefore should be reshipped back to Singapore.

6. However, the Applicant appealed and was allowed a review of the sample results but on the condition that the Applicant meets the cost for resampling and retesting. The Applicant avers that it paid the requisite fees for retesting as demanded by the Respondent but faults the Respondent for failing to conduct the resampling and the retesting from 28.11.2018 to the date of filing this suit.

7. The Applicant submits that the Respondent's omission to conduct the resampling and retesting violates the Applicant's reasonable and legitimate expectation that upon its appeal being successful and after paying the resampling fees, the Respondent would indeed conduct the resampling. As such, it is the Applicant's case that the Respondent's acts amounts to unreasonable delay and has occasioned the Applicant loss and damage in demurrage costs and loss of business considering further that the Applicant's consignment is of highly perishable nature.

The Response

8. The Respondents opposed the application through the replying affidavit sworn on 14.6.19 by Mr. Saleri Musa, its Principal quality assurance officer, department of surveillance Coast Region-Taita Taveta. Firstly, the Respondent contests the jurisdiction of this court to hear and determine this matter by virtue of Sections 11 and 14A (4) of the Standards Act. The Respondent's case is that the Standards Tribunal is vested with the original jurisdiction of dealing with the Applicant's alleged grievances and therefore the suit is fatally defective and cannot be sustained.

9. 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, and on that regard through its officers it seized the Applicant's consignment and collected samples for purpose of establishing the quality and safety of the vegetable oil. The samples of the oil were tested against the Kenya standard at the Respondent's accredited laboratory and found to have failed the set standards in relation to parameters of iodine value, copper (refined fats and oils) and vitamin A. Therefore, according to the Respondent, the Applicant's oil in both the two consignments failed to meet all the set requirements as to standards and quality. Consequently, it was not in compliance with the standards specification.

10. The Respondent avers that it communicated the results to the Applicant and notified the relevant authorities in the interest of health and wellbeing of the People of Kenya. It was further deponed that upon request for re-sampling and re-testing of the vegetable oil by the Applicant, the same failed in iron content and therefore not fit for human consumption. The Respondent therefore prays that this Court orders that the goods be re-shipped to country of origin as earlier directed by the Respondent, and the suit herein be struck.

11. The Applicant in Response to Respondent's Replying Affidavit, filed a supplementary affidavit sworn by Yussuf Hassan Ahmed on the 18th July 2019. The Applicant states that the Standards tribunal's Jurisdiction as provided for under Section 11 and 14A(4) of the Standards Act, has not crystalized due to the fact that the Respondent even to date has not delivered nor communicated to the Applicant its decision as to the re-testing of the consignment, and that there is therefore no valid decision that would be subject of an appeal under Section 11 of the Standards Act. The Applicant avers that it has not been communicated when the alleged re-sampling and re-testing was done, and if it was indeed done, then the Respondent did not comply with the statutory requirement under Section 14 A(3) of the Standards Act by publishing the results in the Gazette and therefore the Respondent cannot seek refuge under the umbrella of jurisdiction of the Standards Tribunal.

12. On 30.4.2019 parties consented to dispose the application by way of written submissions. The Applicant filed its submissions on the 29.4.2019, and supplementary submissions on 22.7.19. The Respondent filed its submissions on 17.6.2019. The matter came up for highlighting of submissions on 24.7.2019. **Mr. Ahmed** learned Counsel, appeared for the Ex-parte Applicant, while **Mr. Gathu**, learned Counsel, appeared for the Respondent.

Ex-parte Applicant's Submissions

13. It was submitted on behalf of the Applicant that in a claim for judicial review the court is asked to review the lawfulness of an enactment, or decision, action, or failure to act in the exercise of a public function. The Applicant cited a number of authorities in support of the argument above. These include ***Pastoli v Kabale District Local Government Council and Others [2008]2 EA 300, Republic –v- The Commisioner of Lands Ex-parte lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998, Council of Civil Service Unions –vs- Minister for the Civil Service [1984] 3 All ER 935, HL.***

14. The Applicant submits that it had legitimate expectation that after payment of the requested fees, the Respondent would conduct the re-sampling and re-testing exercise. However, the Respondent in disregard thereof failed to conduct the re-sampling. By dint of Article 47 of the Constitution and Section 4(1) of the Fair Administrative Action Act, it was submitted that the Applicant is entitled to expeditious, efficient and fair procedural action which has been violated by the Respondent in unreasonably delaying the re-sampling and re-testing exercise without any reasons beings communicated. It was further submitted that the Applicant is entitled to pecuniary compensation in accordance with provisions of Section 11(1) j of the Fair Administrative Action Act. The Applicant therefore seeks to be compensated in costs in the sum of Kshs. Kshs.44,700,549/=.

15. Submitting on whether this Court was properly seized of jurisdiction to hear and determine the present matter, Mr. Ahmed, counsel for the Applicant referred to Section 9(2) of the Fair Administrative Action Act and the Constitution. Counsel submitted that though a party should strictly follow the procedure laid by either the Constitution or an Act of parliament the Respondent herein abrogated Section 14A(3) of the Standards Act by failing to give the Applicant a written notice of its decision or publishing the same in the gazette notice, hence there was no substantive decision to appeal to the tribunal.

Respondent's Submissions.

16. Mr. Olando, learned Counsel for the Respondent raised five issues for determination:

> ***a) Whether this Honourable Court has the jurisdiction to hear and determine the Applicant's application;***
>
> ***b) Whether the Respondent carried out the re-sampling and re-testing of the Applicant's consignment of vegetable cooking oil as requested or not?***
>
> ***c) Whether the Applicant's consignments of Vegetable cooking oil met the required standards and if not then whether the same should be destroyed or reshipped?***
>
> ***d) Whether the Respondent lawfully exercised its statutory duty to make the impugned decision(s);***
>
> ***e) Whether the application meets the threshold for this Honourable Court to grant the orders sought against the Respondent.***

17. On the first issue Mr. Olando submitted that the question of jurisdiction is paramount and must be dispensed with first. Mr. Olando cited **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, for that position.**

18. Turning specifically to the matter herein, Counsel submitted that pursuant to **Sections 11 and 14A (4)** of the Standards Act, CAP 496 of the Laws of Kenya, this Court lacked Jurisdiction to hear and determine the instant suit. According to Counsel, it was only after the Standards Tribunal had pronounced itself on an issue 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 available under the constitutive Act. 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.**

19. Secondly, the Respondent submitted that they lawfully exercised their statutory duty and powers to make the impugned decisions. It was the Respondent's submission that on or around 6.6.2018 the Respondent through its officers collected samples of vegetable cooking oil from the Applicant's consignment for purpose of establishing its quality and safety. The sample were tested against the Kenya Standard KS EAS 769.2012 at the Respondent's accredited laboratory, and failed to comply with the set standards in relation to parameters of Iodine value, copper (refined fats and oils) and vitamin A. The Respondent then directed the re-shipment of the vegetable oil as provided under Section 14A (6) of the Standard Act. It was conceded that the Respondent allowed the request for re-sampling and re-testing as requested by the Applicant and issued inspection fee demand of Kshs.31,552/=.

20. 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 that the process was marred with illegalities, irrationalities, unfairness and un-reasonability.

21. The Respondent referred the court to Article 46(1) (a), (b) and **(c)** of the Constitution, which protect consumers' rights to access goods of reasonable quality, protection of their health, safety, and economic interest. In order to effectively protect the public, the Respondent operates under **Section 4** of the Standards Act, which gives it powers to:

> **"…**
>
> ***(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."***

22. On the basis of the above provision, every commodity imported, manufactured or processed for consumption had to undergo testing for ascertaining that the goods conform to the set standards.

23. Mr. Olando submitted that it was in the exercise of the statutory powers alluded to above that the Respondent's officers collected samples of the vegetable cooking oil from the Applicant's consignments for purposes of establishing the quality and safety of the same. The samples of the vegetable oil were tested against the prescribed standard, KS 769:2012, fortified edible oils and fats specification and found not in compliance with the standards specification. It was submitted that the Respondent having the powers to perform the actions complained of, this Court had no jurisdiction to interfere with the said decision. Reliance was placed on the case of ***David Kimani Karogo v Thika Land Disputes Tribunal & 2 others [2017] eKLR.***

24. It was further submitted that the Respondent exercised its statutory duties lawfully and that the Applicant sought orders whose effect would be to subordinate the standardization prescribed by law to an interpretation by the court when every party dissatisfied with the prescribed standards would be rushing to court for variation of the same.

25. The Respondent urged the court to consider Public Interest by making a 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 Respondent submitted 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.

26. As to whether the application meet the threshold for grant of Judicial Review orders, it was submitted that it did not. On the prayer for an order of Mandamus, 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. It was submitted that the Respondent's decisions are reasonable, rational, lawful, fair and in compliance with the constitutional and statutory framework.

Analysis and Determinations

27. I have carefully considered the application and submissions, and the authorities cited therein. I am of the considered view that the issues for determination in the instant application are as follows:

> ***a. Whether this court is properly seized of the jurisdiction to entertain the instant application dated 8th March 2019***
>
> ***b. Whether the Ex-Parte Applicant is entitled to the judicial review orders sought***
>
> ***c. Who should bear the costs***

28. The Respondent challenges the jurisdiction of this court to hear the application herein, and cited **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."***

29. The Respondent's case is that the Ex-Parte Applicant, having been aggrieved by its decision, 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. However, the Applicant contented that after the request for re-sampling and re-tasting no further communication was passed to it by the Applicant hence there was no decision to appeal from.

30. **Section 11 of the Standards Act CAP 496, Laws of Kenya**, provides that 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.

31. As 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."***

32. 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."***

33. Although it is the Applicant's case that it was not issued with the results after resampling, the basis on which it could exercise its right of appeal to the Tribunal, I believe that the above provisions and the crux of the Applicant's claim falls squarely within the ambit of disputes that ought to have gone through the Standards Tribunal. In this instance, the Tribunal established under the Standards Act was meant to be the resort of first instance for either actions (decisions) or inaction to the Respondent. Indeed, it is now trite that where there is 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. There is no evidence that the Applicant at any time sought to first approach the Standards Tribunal. I am not persuaded that the Applicant's predicament was an exceptional circumstance to allow it to overlook the said Tribunal and to come directly to this court for Judicial review remedies. 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)."

34. The position which this court takes was addressed in **Kenya National Chamber of Commerce and Industry & 2 others v Kenya Bureau of Standards & another [supra]** as follows:

> ***"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."***

35. 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."***

36. Also 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."***

37. Again, 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."***

38. From the foregoing it is clear that this court lacks the jurisdiction to hear or determine the present application, and so it is not necessary to address the other issues raised herein, except to casually observe that even if this court had the necessary jurisdiction, the Judicial review remedies are discretionary and would not, in this case, issue to compel the release of substandard goods into the public market for consumption. As for claim of damages, assessment of the same would require proof by way of evidence. The Judicial Review proceedings ordinarily do not give provision for *viva voce* evidence. It is unlikely therefore that had this court found that it had the jurisdiction to hear this matter the application before the court would have succeeded.

39. In the upshot, the Application dated 7.3.19 is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 19th day of November 2019

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ahmed for Ex parte Applicant

Mr. Gathu holding brief Olando for Respondent

Mr. Kaunda Court Assistant