REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISIN

JR MISCELLANEOUS CIVIL APPL. NO. 458 OF 2016

BETWEEN

REPUBLIC…………………………………..........................…..APPLICANT

AND

THE AGRICULTURE FISHERIES AND FOOD AUTHORITY…...RESPONDENT

EX PARTE: MSHALE COMMODITIES LIMITED

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 25th October, 2016, the *ex parte* applicant herein, **Mshale Commodities Limited,** seeks the following orders:

> **1. An order of certiorari to remove into the High Court and quash forthwith the decision of the Respondent contained in the letter dated 12th August, 2016 suspending the registration of the Applicant as a sugar importer.**
>
> **2. An order of Prohibition to be issued against the Respondent prohibiting the Respondent from enforcing, implementing or in any other manner whatsoever from effecting its decision contained in the letter dated 12th August, 2016.**
>
> **3. An order of mandamus to compel the Respondent to consider the Applicant's application for a new sugar import licence for the year 2016/2017 in accordance with the law.**
>
> **4. The costs of this application be borne by the Respondent in any event.**

Ex Parte Applicant's Case

2. According to the applicant, a duly incorporated company in Kenya, it was registered as a sugar importer on 21st May, 2008 and has continuously carried on that business. The applicant averred that its registration as a brown sugar importer was las renewed from 1st July, 2015 to 30th June, 2016 in a communication dated 11th September, 2015. However when on 26th August, 2016, the applicant lodged an application for renewal of registration for among others, importation of sugar, it did not receive any response thereto though it was aware that other companies which lodged similar application shad their

licenses renewed.

3. While aware that there are conditions attached to the licence the applicant contended that it had nor contravened any of the governing regulations and asserted that it had duly submitted its quarterly returns as provided by the regulations. The applicant revealed that the annual turnover of the Applicant in respect of sugar sales for the financial year 2014-2015 stands at Kshs 1,302,334,499.67 and the applicant has in its employment eight (8) number of employees.

4. It was averred that on 12th August, 2016, the Respondent suspended the applicant's registration as a sugar importer without any prior notice, warning and or hearing, in flagrant violation of section 4 of the ***Fair Administrative Action Act, 2015*** ("the FAA Act") thereby rendering the suspension decision illegal and unlawful hence the applicant's fundamental right to a fair administrative action has been violated by the Respondent.

5. According to the applicant, the imported sugar volumes for the period between December 2014-September 2016 stood at 299,988 bags of 50kg with a total value of Kshs 1,025,708,455.48 hence the suspension of the applicant's registration will occasion the company irreparable loss and damage which may force the company to wind up.

6. According to the applicant, the Respondent acted without or in excess of jurisdiction for the following reasons:

a. The ***Sugar Act*** was repealed on 1st August 2014 and all statutory instruments issued under the ***Sugar Act*** were deemed to have been repealed by virtue of section 42(2)(b) of the ***Crops Act***.

b. More significantly, section 42(2)(e) of the ***Crops Act*** expressly provided that "*subsidiary legislation issued under the repealed law shall continue to apply up to thirtieth June 2013*." It was therefore contended that Legal Notice No. 114/08, under which the ***Sugar (Imports, Exports and By-products) (Amendment) Regulations, 2008*** were gazetted automatically expired on 30th June, 2013 by operation of law.

c. In any event, the ***Sugar (Imports, Exports and By-products) (Amendment) Regulations, 2008*** as amended by Legal Notice No. 23/2010 did not vest power on the Respondent to suspend registration of a sugar importer.

d. The Cabinet Secretary drafted the ***Sugar (Imports, Exports and By-products) (Amendment) Regulations, 2013 ("the 2013 Regulations")*** which appear not to have been gazetted hence pursuant to section 22(1) and 23 of the ***Statutory Instruments Act***, are not in force.

e. The 2013 Regulations are in any event, void for failure to comply with section 11 of the ***Statutory Instruments Act,*** in that they were not tabled before Parliament.

f. Additionally, the 201 Regulations were made without public participation and appropriate consultations undertaken as required by sections 4(a) and 5 of the ***Statutory Instruments Act.***

7. According to the applicant, whereas the Respondent's letter suspending the registration of the Applicant as a sugar importer stated that, the applicant through one of its Directors had been formally charged in Court with engaging in sugar smuggling and transport of narcotic through the port of Mombasa, Kenya, the applicant as a corporate body was not charged with the offence of sugar smuggling and or transportation of narcotics. The applicant however clarified that on or about 4th August, 2016, **Jack Alexander Wolf Marrian**, the Managing Director of the applicant, was in his personal capacity charged with the offence of trafficking narcotics and in the said charge sheet there was no reference to the applicant which is distinct and separate entity from its directors and shareholders. Yet the basis for the suspension of the applicant's registration as a sugar importer was sugar smuggling and transportation of narcotics. It was however the applicant's case that since Article 50(2)(a) of the Constitution presumes that

every accused person is innocent until proved guilty, the fact that the said Director was charged with the said offence ought not to have been taken into account in arriving at the impugned decision as that ran counter to the said constitutional presumption and was hence unreasonable, irrational and ultra vires.

8. It was therefore contended that the said decision was reached by the Respondent in abuse of discretion and power contrary to section 7(2)(j) and (o) of the ***FAA Act***. The applicant averred that it expected to be given prior notice and to be accorded the right to be heard before an adverse decision could be taken against it. Therefore in failing to do so, the applicant was denied a right to be heard under section 7(2)(m) of the said Act.

9. It was further contended that the reasons for the suspension of the applicant's registration was tainted with bad faith, malice and ulterior motive and was against public interests since the applicant as a tax payer contributes to the running of the country apart from employing staff who risk being rendered jobless. These factors, it was contended were not taken into account by the Respondent before making the said decision.

Respondent's Case

10. According to the Respondent, following the repeal of the *Sugar Act*, section 5 of the ***Agriculture Fisheries and Food Authority Act, 2013*** ("AFFA Act") vested in the Respondent all the funds, liabilities, rights, functions and duties which were vested in the defunct Kenya Sugar Board and section 20 of the ***Crops Act*** gives the Directorate and/or the Respondent power to issue licences to qualified applicants under the terms and conditions prescribed therein. On the other hand section 32 of the ***Crops Act*** gives the Respondent as the licensing authority the power to revoke, alter or suspend a licence under the Act if in its opinion an offence under the Act, or in respect of the licensed activity under any other written law, has been committed by the licence holder or any employee of the licence holder or a condition of the licence has been contravened or not complied with.

11. It was the Respondent's view that even though the applicant and its Directors and Shareholder are distinct and separate, a company is an artificial person that exists only in the contemplation of the law and acts through human persons for its day-to-day running hence the Directors represent the company and whatever they do within the scope or authority conferred upon them, in the name of and on behalf of the company, they bind the company and not themselves.

12. They applicant therefore was of the view that it acted within the law and the application ought to be dismissed with costs.

Determinations

13. I have considered the application, the respective affidavits and submissions filed herein.

14. The Applicant in this application contends that its right to be heard was violated as it was not notified of the action the Respondent intended to take against it before the said action was taken. ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 539 at para 639 states:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or**

obligations or any criminal charge.”

15. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The said Article 47 provides:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

16. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **“The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.”**

17. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** it was held that:

> **“20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *“(c) responsive, prompt, effective, impartial and equitable provision of services”* and *“(f) transparency and provision to the public of timely, accurate information.”***
>
> **28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *“Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.”***
>
> **29. Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the**

same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439).

30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."*

18. Section 4(3) of the ***Fair Administrative Action Act, 2015*** provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

19. In this case the applicant's contention that it was never heard before the decision suspending its registration was made has not been controverted. Instead the Respondent has contented itself by stating that it had the powers to act in the manner it did. However the Respondent is obliged in exercising its powers to do so in accordance with the law. In my view, power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade** in his book ***Administrative Law*:**

"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a

responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

20. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC**:

> **"A power which is abused should be treated as a power which has not been lawfully exercised…Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc* (*supra*) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237,* that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."**

21. That power must be exercised lawfully is not a choice. Therefore in the exercise of public authority, the authority entrusted with that exercise must act lawfully, reasonably, fairly and in good faith. It must consider all the relevant factors and avoid irrelevant ones. It must exercise the power in a proportionate manner and avoid the use of excessive power.

22. In this case, the Respondent seems to be of the view that the law empowers it to have absolute discretion when it comes to the suspension of registration of licences. That view, with due respect is clearly erroneous. To hold therefore that a member of the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary, it has been held, is the first victim. See **Masalu and Others vs. Attorney General [2005] 2 EA 165.**

23. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, that:

> **"When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."**

24. The phrase "in his opinion" in administrative action means the same thing as "if satisfied". The term "satisfied" was dealt with in **Republic vs. Kenya Forest Service Ex-parte Clement Kariuki & 2 Others [2013] eKLR,** where the Court held that:

> **"the catchword in the above section is that the Board must be "*satisfied*". For the Board to be said to have been satisfied, it is my view that it must consider all the relevant factors."**

25. The word "consider" or "in his consideration" also means in substance the same thing and this was dealt with in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

> **"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."**

26. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**

27. In my view a person entrusted with the exercise of public authority, cannot be said to have considered an issue before him when those who stand to be adversely affected by the decision are denied a hearing on the issue. It is only upon taking into account the divergent views on the matter that it can be properly said that the authority has "considered" the matter before him and was therefore "satisfied" that a particular action ought to be taken. Otherwise such a decision amounts to an arbitrary abuse of power. This was the position adopted in **Fernandes vs. Kericho Liquor Licensing Court [1968] EA 640** where the Court held that:

> **"Section 16 of the Liquor Licensing Act (Cap 121) provides the conditions under which a licensing court, may refuse to renew licence and enacts that a licensing court may refuse to renew an existing licence only when it is satisfied that one or more of six specified circumstances exist. Under section 16 the licensing court is not entitled to refuse the renewal of an existing license on the ground that there is nolonger a need for the licence in the particular locality. The licensing court has no jurisdiction or power to refuse to grant the renewal of the licence on the ground stated in section 16(a) without first informing the**

applicant of its objection and giving him an opportunity to answer it as provided in section 12(2). See *Re Mulchand Punja Shah* _[1958] EA 587…_In the instant case the appellant was never informed by the licensing court as required by section 12(2) that the court did not regard him fit and proper person to hold licence. A demand for production of a Kenya citizenship certificate would not amount to an objection on the ground that the appellant was "not a fit and proper person". If the court does seriously believe that an applicant is not a fit and proper person, then it is only right that he should be told so in specific terms. Secondly, the expression "fit and proper" refers to the personal qualities of an applicant and not to his national status…It is quite clear that the renewal of the licence in this case was refused on the ground that the appellant was not a Kenya citizen. That, however, is no disqualification for the purposes of the liquor licensing law. No other disqualification is imputed to the appellant and therefore the application was illegally refused."

28. As to the issue whether the Regulations were in compliance with the provisions of the ***Statutory Instruments Act***, in these proceedings, no challenge has been taken with regard to the said Regulations and without an express relief sought in that direction this Court cannot impugn the said regulations.

29. Having considered the issues raised before me, it is my view and I hold that the decision suspending the applicant's registration as an importer of sugar was clearly tainted with procedural irregularity and cannot be allowed to stand.

<u>Order</u>

30. In the result I find merit in the Notice of Motion dated 25th October, 2016, and I grant the following orders:

1. An order of certiorari removing into this Court and quashing forthwith the decision of the Respondent contained in the letter dated 12th August, 2016 suspending the registration of the Applicant as a sugar importer.

2. An order of prohibition against the Respondent prohibiting it from enforcing, implementing or in any other manner whatsoever from effecting its decision contained in the letter dated 12th August, 2016.

3. An order of mandamus compelling the Respondent to consider the Applicant's application for a new sugar import licence for the year 2016/2017 in accordance with the law.

4. The costs of this application are awarded to the applicant and will be borne by the Respondent

31. It is so ordered.

Dated at Nairobi this 10th day of January, 2017

G V ODUNGA

<u>JUDGE</u>

<u>Delivered in the presence of:</u>

Mr Kilukumi for the Applicant

Mr Mugoye for the Respondent

CA Mwangi