



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 11 OF 2016

IN THE MATTER OF:

***VIOLATION, INFRINGEMENT, DENIAL AND THREAT TO CONSTITUTIONAL RIGHTS IN
ARTICLE 19, 20,21,22,23,24,27,40, 47, 258,259,260 & ENFORCEMENT THERETO***

AND

RULE 19 OF SIXTH SCHEDULE OF TRANSITION AND CONSEQUENTIAL PROVISIONS

AND

SECTION 17 OF THE STANDARDS ACT CAP 496

AND

APPLICATION FOR GRANT/RENEWAL OF PERMIT TO USE STANDARDIZATION MARK

BETWEEN

MUCHENA MBAYA T/A AMERU TRADITIONAL BEER....PETITIONER

-VS-

KENYA BUREAU OF STANDARDS.....RESPONDENT

JUDGMENT

[1] In the Petition before me, the Petitioner has sought for the following orders:

- 1. A Declaration of rights that the Petitioner is entitled to be issued with the permit to operate business by the Respondent.**
- 2. That the Respondent be compelled to issue the Petitioner with a permit to use the standardization mark under the Standard Act CAP 496 of the Laws of Kenya.**
- 3. That the honourable court do grant an order of compensation to the Petitioner for the pure economic loss and earning from the business.**
- 4. That the honourable court do grant any other relief that it deem fit in the circumstances and in the interests of justice.**

5. That the costs of this Petition be provided for.

Preliminary objection

[2] But, the Respondent took out a preliminary objection to the effect that this court does not have jurisdiction to try the issues in controversy. The points taken are contained in an undated Notice of Preliminary Objection filed on 21st July 2016, to wit:-

1. THAT this honourable court lacks jurisdiction to preside over this suit in that the Standards Tribunal established under Section 16A (1) of the Standards Act Chapter 486 of the Laws of Kenya has the jurisdiction to hear and determine disputes of any nature as follows:

i. On any dispute as to the decisions of the Kenya Bureau of Standards as provided for in section 11 of the Standards Act.

ii. The power to confirm, set aside or vary the decision or act in question and the Standards Tribunal may make such other order as the Standards Tribunal considers appropriate, including an order with respect to the payment of costs as provided for in Section 16C of the Standards Act;

2. THAT without prejudice to preliminary objection 1 above, the Petition and the Application seeks the orders of Certiorari, mandamus and prohibition in violation of the procedure and substantive law set out in Sections 8 and 9 of the Law Reform Act, Chapter 26 of the Laws of Kenya as read with Order 53 of the Civil Procedure Rules, 2010.

3. THAT the present petition lacks the mandatory specificity required of a Constitutional Petitions and References.

4. THAT the application dated 13th May 2016, does not bear the mandatory notice “if any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedient” contrary to Order 51 Rule 13 (2) of the Civil Procedure Rules, 2010.

5. THAT there is no reference on the face of the Application dated 13th May, 2016 to the Supporting Affidavit of Muchena Mbaya, the Petitioner contrary to Order 51 Rule 4 of the Civil Procedure Rules, 2010.

[3] Parties filed submissions on the preliminary objection. Petitioner submitted that appeal to the tribunal vide Section 11 of the Act can only be on the following questions:

i. Orders on cancellation and suspension of the permits under section 10A of the Act.

ii. Standard levy orders made by the minister under Section 10B and 10 of the Act.

iii. Decision and or directive of the counsel/respondent pursuant to thus powers conferred to it by the Act.

iv. Decisions and or orders of destruction of goods under the Act.

Thus, it was contended that no decision by the Respondent was issued or notified to the Petitioner, so that the Petitioner would seek the remedy from the tribunal.

[4] On the other it was submitted for the Respondent that the Standards Tribunal acts as an independent quasi judicial body whose main objective is to dispense justice through a fair, open and expeditious

manner without recourse to undue technicalities. Under section 11, the Tribunal's function is to hear appeals from any person aggrieved by a decision of the Kenya Bureau of Standards or the National Standards Council. Finally it was submitted that the case at hand relates to a decision or orders on cancellation and suspension of permits under Section 10A which power has been conferred to it by the Standards Act CAP 496 and that the dispute should therefore be referred to the tribunal for hearing and determination thereof and if any party is dissatisfied he/she will be at liberty to seek recourse to the High Court.

DETERMINATION

Preliminary objection must be straight-forward

[5] A preliminary objection should be plainly straight-forward. It should not require probing of evidence in order to prove. It should also be capable of disposing the suit completely. See opinions by Law, JA and Sir Charles Newbold P. in **MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS (1969) EA 696**. At page 700, Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

See also Ojwang J (as he then was); he stated in a simple and clear manner in the case of Oraro v Mbajja [2005] e KLR that:

I think the principle is abundantly clear. A ? preliminary objection?, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle , a true preliminary objection which the Court should allow to proceed. I am in agreement...that „where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

[6] The objection herein is on the jurisdiction of the court to determine this petition. I will, therefore, say just enough to determine the objection. The Respondent has argued that matters in controversy relate to cancellation or suspension of permit under section 10A of the Standards Act. And that such matter ought to be litigated before the Standards Tribunal established under Section 16A of the Standards Act CAP 496 of the laws of Kenya. Section 11 of the Standards Act provides as follows:

Appeals

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 Tribunal.

Section 16 thereof further provides for matters which may be referred to the tribunal. But, of importance is the argument by the Petitioner that there is no decision or act which was been taken or done by the

Respondent for which a referral to the Tribunal could be made under the Standards Act. However, the averments in the Petition and the Supporting Affidavit to the effect that the Respondent has refused and or ignored to issue a permit despite having given the Respondent a clean laboratory report and certificate thereto causes some confusion. I note that this is a case for renewal of permit to use a standardization mark. See annexure MM 7. The question would therefore be: is this a matter which ought to be referred to the Standards Tribunal for determination. On the basis of the facts that have been disclosed by the parties, I should state that counsels herein may have greatly restricted the scope of the terms "cancellation or suspension of a permit". The terms draw from the Act especially the powers of the Bureau which include **issuing, cancelling or suspending** a permit for use of a Standardization Mark. Therefore, refusal to issue or renew a permit is also appealable to the Tribunal. Except, however, I note that the law requires the Bureau to convey notification of its decision or act in relation to a permit in question to the Applicant. This is a duty that flows from the law. Again, fair administrative action as well as natural justice would require that such notification is given so that the Applicant will decide whether to invoke other remedial processes if he is aggrieved by the decision or act complained of. That is why section 11 of the Standards Act 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 Tribunal.

It has been argued that there was no decision to cancel or suspend the permit that has been issued herein by the Bureau and therefore there is nothing to appeal to the Tribunal. It bears repeating that, as a matter of law, a public organ with a statutory duty bears a public duty. Thus, it exercises public power and must notify the person to be affected by, of its decision. I have not been shown any formal communication refusing to issue or renew, or cancelling or suspending the permit herein. This omission is responsible for the kind of a squirm I am seeing in this matter. Nonetheless, the Standards Tribunal still has power to address the kind of failure or omission by the Bureau and may compel the Bureau to make a determination in accordance with the Standards Act. It may also make such other order or orders that may be appropriate in accordance with section 16C of the Standards Act. The Preliminary objection, therefore, succeeds. But, I do not want to fall into error or cause ambiguity. Accordingly, I refer this dispute to the Standards Tribunal to determine the following matters:

- a. Whether the Bureau made a decision on the application for grant or renewal of permit by the Petitioner herein
- b. Depending on the finding in (a) above, whether notification of the decision was given to the Applicant; and
- c. May make such or other orders as may be appropriate in the circumstances of the case.

The petitioner will thereafter take the course cut out in law. In light of the decision above, I order each party to bear own costs of the Petition. It is so ordered.

Dated, signed and delivered in open court at Meru this 13th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

M/s. Kiome advocate for Petitioner

M/s. Nyaga advocate for M/s. Goretti advocate for respondent

F. GIKONYO

JUDGE