REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. MISC. APPLICATION NO. 610 OF 2016

IN THE MATTER OF: AN APPLICATION BY HEALTH U 2000 LTD FOR ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF THE LAWS OF KENYA

AND

IN THE MATTER OF DRUGS AND CHEMICAL SUBSTANCES ACT CAP 254 LAWS OF KENYA

AND

IN THE MATTER OF FOOD DRUGS AND CHEMICAL SUBSTANCES (FOOD HYGIENE) REGULATIONS 1978

IN THE MATTER OF NOTICE NOT TO USE THE FOOD PLANT SERIAL NO. 825 ISSUED TO THE APPLICANT ON 29/10/2016

IN THE MATTER OF ARTICLES 40, 43 AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF REPUBLIC…….…….APPLICANT

VERSUS

NAIROBI CITY COUNTY..……..…1ST RESPONDENT

CHIEF PUBLIC HEALTH OFFICER

NAIROBI CITY COUNTY..…..…….……2NDRESPONDENT

EX-PARTE

HEALTH U 2000 LIMITED

JUDGEMENT

Introduction

1. The ex parte applicant herein, **Health U 2000 Limited**, moved this Court by a Notice of Motion dated 20th December, 2016, seeks the following orders:

> **1. THAT an order for certiorari do issue to remove into this Honourable Court and quash the decision made on 29th November 2016 by the 1st & 2nd Respondents stopping the operations at applicant's warehouse No. A5 situated at Plot No.11880/11 Abacus Lane, Off Baba Dogo Road vide Notice Not to Use the Food Plant bearing serial number 825 together with the seizure Form date 29/11/2016.**
>
> **2. THAT an Order of Prohibition do issue against the 1st and 2nd Respondents prohibiting them from undertaking any further steps or actions or issuing orders and commands to officers working under them and prohibiting any further proceedings in furtherance to the decision of the Respondents made on 29th November 2016 requiring the Applicant not to use its warehouse No. A5 situated at Plot No.11880/11 Abacus Lane, Off Baba Dogo Road vide Notice Not to Use the Food Plant bearing serial number 825.**
>
> **3. THAT costs of this application be awarded to the Applicant.**

Applicant's Case

2. According to the Applicant, it is duly licenced by the 1st Respondent to carry on business of offering healthy Foods by importing and also locally sourcing, packaging and selling several health items all of which are certified by Kenya Bureau of Standards within the area of jurisdiction.

3. According to the applicant it applied for and was granted a licence to sell, prepare, pack, store or display food at plot NO.11880/11 at Abacus Lane off Baba Dogo Road. Pursuant thereto, on about 22nd February 2016, the Respondents issued the Ex Parte Applicant herein with a health Certificate for Plot No.11880/11 certifying that the premises has been inspected and found suitable as store for the year 2016. In addition, on 29/1/2016 the Respondents issued the Ex parte Applicant herein a clearance certificate from the fire prevention department with comments that the premises were satisfactory for the year 2016 operation.

4. It was further averred that the Respondents herein issued the employees of the Ex Parte application with certificates of medical Examination certifying that they are fit under the Foods, drugs and Chemical Substances (Food Hygiene Regulations) to work at the Ex parte applicant's premises. According to the applicant, before it imports its goods, the same are subjected to a rigorous and thorough vetting process by the SGS (***Societe geneale de Surveillance***) on behalf of the Kenya Bureau of Stands (KEBS) before they can be allowed to enter the Kenyan market. It was therefore contended that that the Ex parte Applicant at all material times relevant to this dispute had complied with all the legal requirements and was legally operating its business.

5. However, on or about 29/11/2016, the Respondents herein went to the Ex Parte Applicant's said warehouse and issued the Plaintiff with a Notice Not to Use the Food Plant which Notice had the following conditions:

> ***(a) "stop repackaging of goods within this godown until the court gives you authority to continue changing the expiry dates;***
>
> ***(b) Stop using the cosmetic/supplement storage mezzanine until we approve its workability as***

public health supportive; and

(c) Ensure your sanitary facilities are in good state"

6. It was averred that further to the foregoing, the Respondents seized some articles which they alleged had contravened the provisions of section 30(1) of the ***Food Drugs and Chemical Substances Act*** including:

(1) Potato flakes 11.34 Kgs

(2) Mixed herbs & Spice 7 Kgs

(3) Black eyed beans 25 Kgs

7. It was disclosed that the items that were seized by the Respondents herein had been set aside by the Ex parte Applicant herein and were scheduled for disposal and despite the Respondent having been explained to, they refused, ignored and neglected to heed the explanation given by the Ex Pare Applicant. It was however averred that the Respondents inspected neither the premises and nor all the goods inside the applicant's premises.

8. According to the ex parte applicant, it pays to the lessor approximately Ksh.2,195,358/= for a quarter while its loss per five day week caused by the closure order is in the region of Kshs 2.4 million. It was further averred that the Ex Parte Applicant imports thousands of products and that the seized articles are just but a minute fraction of its products and that it is not therefore just and fair to condemn the entire warehouse and order that operations be suspended on account of a few items which are alleged to be in contravention of ***Food, Drugs and Chemical Substances Act***.

9. It was revealed that the Respondents' decision was communicated after it was made and not before it was made and therefore, the Ex Parte Applicant was denied the Constitutional Right to fair administrative action guaranteed under Article 47 of the Constitution of Kenya. To the applicant, the Respondents' decision was made without basis or foundation and therefore the same was in excess of the Respondents' jurisdiction, ultra vires the statue, null and void. Further, the decision was in conflict with the Constitution and therefore it is null and void. The applicant's case was that its constitutional and legal rights were violated without following any due process.

Respondent's Case

10. The Respondents on their part filed the following grounds of opposition:

1. THAT at the outset, the said application is premature, misconceived and bad in law and the Respondent will raise a point of law, to be determined *in limine,* that the Ex Applicant has not complied with Section 16(2) of the Food, Drugs and Chemical substances (Food Hygiene) Regulations 1978 which requires that any person, on whom a notice is served under paragraph (1) of this Regulation may, within fourteen days form the date he receives such notice, appeal to the Minister who shall make such order thereon as he thinks fit and whose decision shall be final.

2. THAT the Respondent will contend as a preliminary point of law, to be determined *in limine,* that the Applicant's suit is hopelessly misconceived, frivolous, totally devoid of merit and *mala fides* for the reason *inter alia,* that the Applicant followed the wrong procedure in that is should have instituted an appeal with the Minister fourteen days form the date he receives such notice.

3. THAT this court has no jurisdiction to grant the orders herein as section 16(3) of the Food, Drugs and Chemical substances (Food Hygiene) Regulations 1978 maintains that a notice served under this Regulation shall remain effective until such a time as the person on whom it

is served receives a copy of the Minister's decision and complies with any direction which may be given by the Minister.

4. THAT the Ex parte Applicant has not complied with the requirements provide under the Food, Drugs And Chemical Substances Act, Cap 254 Laws of Kenya.

5. THAT the 2nd Respondent pursuant to Section 30(1) (a) of the Food, Drugs And Chemical Substances Act, sent its officers to the Ex Parte's premises on the 29th November, 2016 to conduct a health inspection on the Ex Parte's warehouse at Abacus Lane off Baba Dogo Road,

6. THAT the officers of the 2nd Respondent inspected the premises and goods therein and found the following items:-

a) Potato Flaks of 11.34 kg whose expiry date was 27th April, 2016,

b) Mixe herbs and Spices of 7 Kg with no expiry date

c) Stevia 20 KG whose expiry date was 13th June, 2014, and

d) Black Eye Beans 25 Kg which was best before November, 2016

7. THAT the officers of the 2nd Respondent also found that most supplements had no storage instructions contrary to the Law.

8. THAT the aforesaid items were found in the premises of the Ex Parte ready to be used for packaging and sale. The aforesaid items were not set aside in any container or in a manner indicating that they were due for disposal as alleged by the Ex Parte Applicant.

9. THAT the offices of the 2nd Respondent seized the said items and issued a notice under Sction16 (1)(b) of the Food, Drugs and Chemical substances (Food Hygiene) Regulations 1978.

10. THAT the Respondents are authorized by Section 30(1) (a) of the Food, Drugs and Chemical substances Act, to conduct health inspections within its jurisdiction hence the actions of the Respondents are within the confines of the law.

11. THAT the grant of Orders sought in the said Application would greatly prejudice the Respondents who are mandated by law to enter any premises and examine any such articles to which the Food, Drugs And Chemical Substances Act or its regulations apply is prepared, preserve, packaged, stored or conveyed.

12. THAT the Applicant is not above the law and ought to follow the prescribed legal processes required of a business dealing with food, drugs and chemical substances.

13. THAT the Applicant has not shown that it has an arguable Application or *prima facie* case worth meritorious consideration and determination by this Honourable Court on perusal of the materials presented to it by the application.

14. THAT the grounds relied upon in the Application are not for Judicial review but for a civil claim.

15. THAT the Applicant is not entitled to any of the reliefs prayed in the Application or at all.

16. THAT the Honourable Court sets aside the Orders granted, and makes an Order to have

the Applicant comply with the notice dated 29th November, 2016.

Determination

11. I have considered the application, the affidavit in support thereof, the grounds of opposition filed and the submissions made on behalf of the respective parties herein.

12. Since the Respondents have not filed any affidavit in reply the factual averments on behalf of the applicant are not in dispute. In arriving at this position I rely on **Mohammed & Another vs. Haidara [1972] E.A 166** *at page 167* paragraph F-H, where **Spry V.P** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

> **"The respondent made no attempt to reply to these allegations and they therefore remain unrebutted… Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied…"**

13. This position was restated in **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012] eKLR** in which the court stated as follows:

> **"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."**

14. It was however contended by the Respondents that pursuant to Regulation 16(2) of the ***Food, Drugs and Chemical Substances (Food Hygiene) Regulations, 1978*** the applicant ought to have appealed to the Minister instead of commencing these proceedings. The said Regulation 8 provides as follows:

> ***Any person, on whom a notice is served under paragraph (1) of this Regulation may, within fourteen days from the date he receives such notice, appeal to the Minister who shall make such order thereon as he thinks fit and whose decision shall be final.***

15. In my view the appellate remedy provided under the aforesaid provision contemplates that there was a hearing before the decision appealed from was made. In this case, it is the applicant's case that despite having been licensed to carry out its business, the Respondents in violation of Article 47 of the Constitution, made an about-turn and purported to stop the applicant's operations.

16. Section 4(3) of the ***Fair Administrative Action Act, 2015,*** (hereinafter referred to as "the Act"), a statute enacted pursuant to Article 47 of the Constitution, 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.

17. Section 4(4) on the other hand provides as follows:

The administrator shall accord the person against whom administrative action is taken an opportunity to

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.;

18. Section 2 of the Act defines "administrative action" to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

19. The same section defines "administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

20. The general position on the right to a hearing was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate

substitute for a prior hearing is available."

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

> **"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'*…Article47 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'*…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)…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).***"**

22. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies *ex parte* Githungo [2001] KLR 299,** where he held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

23. In my view, an administrator must in its notice be clear as to the action it intends to take so that the person against whom the action is intended can properly direct his mind to the proposed action and properly answer the allegations made against him. This clarity in my view is both in respect of the grounds upon which the intended action is based as well as the intended administrative action. In this case the impugned notice did not purport to give the applicant an opportunity of being heard on the allegations made against it. It in fact was a final decision. In my view, such a notice ought to call upon the party against whom the allegations are made to answer to the same. It is therefore not sufficient merely to notify the person that an administrative action is in the offing or has been arrived at as the Respondents did in this case.

24. One of the grounds for impugning a decision is where the decision is tainted with procedural improprieties and as was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300:**

> **"Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

25. In this case, it is my view and I find the applicant's application merited.

Order

26. Consequently an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the decision made on 29th November 2016 by the 1st & 2nd Respondents stopping the operations at applicant's warehouse No. A5 situated at Plot No.11880/11 Abacus Lane, Off Baba Dogo Road vide *Notice Not to Use the Food Plant* bearing serial number 825 together with the seizure Form date 29/11/2016.

27. Having issued an order of certiorari it is my view that it is nolonger necessary to issue an order of prohibition prohibiting implementation of a decision that has been quashed.

28. The applicant will have the costs of these proceedings to be borne by the Respondents.

29. It is so ordered.

Dated at Nairobi this 13th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makori for the applicant

NA for the Respondent

CA Mwangi