REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 160 of 2011

REPUBLIC .....APPLICANT

VERSUS

KENYA SUGAR BOARD.....RESPONDENT

EX-PARTE

MUMIAS SUGAR COMPANY LIMITED

JUDGMENT

This application was triggered by a letter dated 14th June, 2011 addressed to the Managing Director of the ex-parte applicant, Mumias Sugar Company by the Acting Chief Executive Officer of Kenya Sugar Board, the respondent herein. The said letter spoke to the ex-parte applicant as follows:-

"RE: EXPORT OF SUGAR

Your letter Ref. GM/MD/3.7 dated 15th March, 2011 on the subject above refers.

We regret to advise that your request to export 15,000 metric tonnes of sugar to the European Union market has been declined.

This has been occasioned by failure to obtain the necessary concurrences by certain arms of Government."

Unhappy with the denial of an export permit, the applicant moved to court and obtained leave to commence judicial review proceedings. Through the notice of motion dated 18th July, 2011 the applicant seeks orders as follows:-

(a) An Order of *certiorari* issues removing to the High Court to quash the decision of the Respondent by letter dated 14th June, 2011 declining to grant the applicant export permit to export 15,000 metric tonnes of sugar to Czarnikow Group Limited, 24 Chiswell Street, London ECIY 4SG under the EPA-EBA Government to Government Agreement;

(b) An order of *Mandamus* to compel the Respondent to strictly comply with the provisions of

sections 4(2) (f),6,7 and 8 of the Sugar Act (Cap 342) Laws of Kenya as read together with Regulations 3(3), 4 of the *Sugar (Imports, Exports and By-Products) Regulations*, 2008 and the *First Schedule* of the Sugar Act, paragraph 7 thereof in determining the application by the Applicant for an export permit to export 15,000 metric tonnes of sugar to Czarnikow Group Limited, 24 Chiswell Street, London ECIY 4SG under the EPA-EBA Government to Government Agreement;

(c) An Order of *Mandamus* to compel the Respondent to strictly comply with the provisions of Sections 4(2)(f),6,7 and 8 of the Sugar Act (Cap 342) Laws of Kenya as read together with Regulations 3(3),4 of the *Sugar (Imports, Exports and By-Products) Regulations*, 2008 and the *First Schedule* of the Sugar Act, paragraph 7 thereof and grant the Applicant an export permit to export 15,000 metric tonnes of sugar to Czarnikow Group Limited, 24 Chiswell Street, London ECIY 4SG under the EPA-EBA Government to Government Agreement;

(d) Costs and further incidentals to this application be provided for.

The said application is supported by the application for leave, the statutory statement, a verifying affidavit sworn by Dr. Evans Kidero and annextures thereto all dated 8th July, 2011. It is also supported by a supplementary affidavit sworn by the said Dr. Evans Kidero on 15th December, 2011 and written submissions dated 10th February, 2012.

The application was opposed by the respondent through a replying affidavit dated 9th November, 2011 and a further affidavit dated 16th December, 2011 all sworn by Solomon Odera, the Acting Chief Executive Officer of the respondent. The respondent further supported its case through submissions dated 10th February, 2012.

A brief background is essential in this matter. The applicant is a leading producer and exporter of sugar and its by-products. The respondent on the other hand is a state corporation/parastatal whose principal mandate is to regulate, develop and promote the sugar sector in Kenya. There exists an Economic Partnership Agreement known as EPA-EBA entered between the European Union and the East African Community. Under the said trade agreement, partner states of the East African Community are allowed to export duty free certain goods including sugar to member states of the European Union. Each member state of the East African Community is allocated a certain quota of sugar to export to the European Union. The applicant has over time been exporting sugar to the European market in order to satisfy the Kenyan Government's quota.

On 10th March, 2011 the applicant entered into an agreement to sell 15, 000 (fifteen thousand) metric tonnes of raw sugar to a company called Czarnikow Group Limited. The purchaser was acting as an agent for a company called Azucarera Ebro based in Spain. Upon the signing of the agreement Evans Kidero, the Managing Director of the applicant wrote to the Chief Executive Officer of the respondent on 15th March, 2011 seeking approval and the necessary export license/permit to enable the applicant ship the sugar consignment to the buyer's warehouse at Mombasa. The applicant wanted the consignment to reach the warehouse on or before 20th April, 2011. The respondent did not respond until 14th June, 2011 when it replied to the applicant through the letter reproduced at the beginning of this judgment.

The applicant's application is premised on two broad grounds namely that:-

(a) The respondent took into account irrelevant considerations in rejecting the application for an export licence; and

(b) The respondent breached the applicant's legitimate expectations in making its decision.

The applicant's arguments in support of the application were clearly brought out by paragraphs 9 and 10 of the verifying affidavit sworn by Dr. Evans Kidero on 8th July,2011 when he averred that:-

(9) I am advised by the Applicant's Advocate on record, Prof Githu Muigai, which advise I verily believe to be correct that sections 4(2)(f),6,7 and 8 of the Sugar Act (Cap 342) Laws of Kenya as read together with Regulations 3(3) and 4 of the *Sugar (Imports, Exports and By-Products) Regulations,* 2008 and the *First Schedule*, the Sugar Act, paragraph 7 thereof, confer the authority to licence exporters of sugar exclusively on the Respondent and sets parameters to be considered by the Respondent in deciding on whether or not to grant the licence. When the Respondent declined to grant the Applicant export permit to export 15,000 metric tonnes of sugar to Czarnikow Group London under the EPA-EBA Government to Government Agreement due to *"failure to obtain the necessary concurrences by certain arms of Government,"* the Respondent took into account irrelevant considerations.

(10) I am further advised by the Applicant's Advocate on record, Prof. Githu Muigai which advise I verily believe to be correct that there would be a *legitimate expectation* on the part of the Applicant that the Respondent would approve the Applicant's application to export 15,000 metric tonnes of sugar to Czarnikow Group London under the EPA-EBA Government to Government Agreement for the reasons that:

(a) The Applicant is the accredited exporter of sugar on behalf of the Government of Kenya under the EPA-EBA Government to Government Agreement;

(b) The Government of Kenya had committed herself to supply its quota allocation under the EPA-EBA Government to Government Agreement where the European Union has already allocated a duty free quota for Kenya.

The reasons which the respondent gives for opposing the application are:-

(a.) That the EPA-EBA agreement is a Government to Government agreement which envisages the participation of the Government of Kenya through the Ministry of Agriculture. The respondent therefore argues that the applicant was exporting sugar as an agent of the Government and the grant of an export licence was therefore not automatic.

The respondent further argues that an export licence could not be granted because the applicant was exporting the sugar through an agent and the Government had also exhausted its quota for export to the European Union for that particular year. The respondent referred to the letter dated 17th May, 2011 from the Permanent Secretary, Ministry of Agriculture to its Acting Chief Executive Officer to buttress this argument. The said letter stated that:-

"SUGAR EXPORT TO EUROPEAN UNION

Reference is made to your letter KSB/PD/SR/Vol. 1X/167 dated 18th April, 2011.

I have noted that M/s Mumias Sugar Company Limited intends to sell 15,000 metric tonnes to any European Union destination through M/s Czarnikow Group Limited.

Although I appreciate M/s Mumias Sugar Company Limited desire to export sugar, the agreement to export same to European Union should not be through a broker.

Furthermore, Kenya's quota for export to European Union this year has been exhausted. It is in light of this that the Ministry's concurrence to the request is declined."

I will revert back to this letter in the course of this judgement.

(b.) That the respondent was unable to perform its duties at the time the applicant applied for an export licence. The respondent submits that the grant of an export licence is a preserve of the respondent's Board and at that time the Board had not been constituted owing to an order issued by Abida Aroni, J on 26th July, 2011 in **Kisumu High Court Petition No. 33 of 2011, Milka Adhiambo Otieno**

and Another Vs. The Attorney General and 2 others.

(c.) That the applicant failed to join a material and relevant party namely the Minister of Agriculture and by extension the Attorney General.

In reply to the respondent's submissions, the applicant argues that the decision of Abida Aroni, J in the Milka Adhiambo Otieno case is not relevant since the order staying the composition of Board was made on 26th July, 2011 and the decision of the respondent in this matter was made on 14th June, 2011. The applicant therefore submits that there must have been a Board in place prior to 26th July, 2011. The applicant also submits that the claim by the respondent that there was no Board in place only works to confirm the applicant's case that no decision was made on its application for an export licence.

At the close of the hearing the advocates on record, agreed that the issues for determination by this court are:-

(1) Who is the proper person to grant an export permit under the Sugar Act?

(2) Whether the respondent had an obligation to consult with the parent Ministry.

(3) Whether the decision communicated by the letter dated 14th June, 2011 is a proper decision of the respondent.

(4) Whether the orders sought to be issued against the respondent can be granted.

(5) Whether the respondent properly exercised the power given to it for granting permits under the Sugar Act.

(6) Who should bear the costs?

As can be seen, the issues are intertwined and I propose to address them together in reaching my decision.

The respondent argued that the Minister of Agriculture ought to have been made a party to these proceedings. According to the respondent, making the Minister a party would have roped in the Attorney General thereby making whatever decision issued by this court implementable. The respondent submitted that there is no Board in place and if any orders are issued the same may not be enforced.

The answer of the applicant to this argument was very brief: The fact that there is no Board in place does not mean that orders cannot issue. The applicant also argued that there was no need to join the Minister of Agriculture since the orders sought are sought against the respondent.

I have considered the rival arguments on this issue. It is clear that the argument by the respondent that there was no Board in place at the time the decision was made is misleading. The order issued by Abida Aroni, J was issued on 26th July, 2011 and the challenged decision was made on 14th June, 2011. It follows therefore that there must have been a Board in place at the time the decision was communicated to the applicant. Any other argument would lead to the conclusion that since there was no Board in place then the decision allegedly contained in the letter dated 14th June, 2011 was a sham decision made by somebody who had usurped the powers of the Board. In my view the respondent is only trying to use the order made in Kisumu as a shield from these proceedings. The respondent's action cannot be accepted.

Another argument by the respondent related to the same issue is that if the orders sought are granted then the same may not be enforced because there is no Board in place and a substantive Chief Executive Officer has not been appointed. The applicant submits that one of the prayers is for the quashing of a decision already made and the existence of a Board is irrelevant. Another order seeks to compel the respondent to fulfill its statutory mandate. I agree with the applicant's arguments. Unless the respondent is pleading total incapacity to deliver upon its mandate then the issue of the existence of a Board does not

come into play. If the orders sought by the applicant are deserved, then the same ought to be granted. I do not want to imagine or believe that the respondent is pleading inability to deliver on its statutory mandate.

As to whether the applicant ought to have enjoined the Minister and the Attorney General, I find that the respondent is a legal entity which can sue and be sued. The applicant is challenging the respondent because of alleged failure to carry out its statutory functions. There was therefore no need to enjoin the Minister and the Attorney General in these proceedings.

The main question in this matter is: Who has the power to grant an export licence? If it is found that the respondent is the body to issue export licences, then the next question would be whether it made a decision to deny the applicant a licence. In the same vein another issue would be whether the respondent properly exercised its discretion in denying the applicant a licence.

Who has the power of granting an export licence? Under the Sugar Act No. 10 of 2001 (hereinafter simply referred to as the Act) one of the purposes for which the respondent is established is to **"facilitate the export of local sugar" (See Section 4 (2) (f) of the Act).** This mandate is clarified by **the Sugar (Imports, Exports and By-Products) Regulations, 2008.** The relevant part of the regulations provide that:-

"3. (1) Every person who imports or exports sugar or its by-products shall apply for an import or export permit from the Board.

(2) An application for an import permit shall be in Form A as set out in the Schedule.

(3) An application for an export permit shall be in Form C as set out in the Schedule.

4.(1) Where the Board approves an application for an import or export permit under these Regulations, it shall on payment of a registration fee of one hundred thousand shillings, register the applicant by entering the name and such other particulars as it may determine in the register maintained under regulation 5.

(2) The Board shall, upon registering an applicant under paragraph (1) issue an import or export permit in Form B or D as the case requires, in the Schedule to these Regulations.

(3) A permit issued under these Regulations shall be subject to such conditions as the Board may impose. [L.N.122/2009].

A reading of the Act and the Regulations clearly shows that the respondent is the body mandated by the law to issue sugar import and export licences. The forms referred to in the Regulations also confirm this fact in that applications for import or export licences are addressed to the Board. The Minister of Agriculture or the officers under him have not been given any role to play when it comes to an application for the issuance of a licence.

In conducting its affairs, the Board shall proceed in accordance with the First Schedule or delegate its powers as provided by Section 8 of the Act which states that:-

"Subject to this Act, the Board may, either generally or in any particular case, delegate to any committee of the Board or to any member, officer or employee or agent of the Board, the exercise of any of the powers or the performance of any of the functions or duties of the Board under this Act."

In the replying affidavit, the respondent indicated that the granting of export licences was done by the Board. Since there is no evidence that this particular function has been delegated, there is no reason to doubt the contents of the replying affidavit. The issuance of an export licence was therefore the sole responsibility of the Board. Although the Permanent Secretary in the Ministry of Agriculture is a member

of the Board, it cannot be assumed that the function of issuing import and export licences had been delegated to him since there is no evidence of such delegation.

The letter dated 14th June, 2011 indicated that the application for an export licence had been declined due to **"failure to obtain the necessary concurrences by certain arms of Government."** Apparently the concurrence not obtained was that of the Permanent Secretary, Ministry of Agriculture as can be seen from the letter dated 17th May, 2011.

The question therefore is whether the decision to deny the applicant a lincence was made by the respondent. From the look of things it appears that the respondent did not make any decision. It simply communicated the decision of the Permanent Secretary to the applicant. Even if it made a decision, then that decision was tainted because it was influenced by external forces. It is therefore clear that the respondent took extraneous factors into consideration when making its decision. I do not mean to say that the respondent should not consult the parent Ministry before making decisions on certain matters. Consultations are proper and a pointer to good governance. What is important is how the respondent handles the fruits of such consultations. The respondent should use the information received from the parent Ministry to reach its own independent decisions. In the case at hand the decision reached by the respondent if any was solely guided by the advice of the Permanent Secretary. That means the respondent did not consider the applicant's case but only acted as a conduit of the decision of the Permanent Secretary.

As already indicated, I am of the view that the Board did not make any decision on the applicant's application for an export permit. Assuming that the respondent made a decision, and that decision was reached for the reasons stated in the letter of the Permanent Secretary dated 15th May, 2011, then I would still find such a decision to be an improper decision. The Permanent Secretary faulted the applicant for trying to export the sugar through an agent. He however did not point to any law or policy which made the export of sugar through an agent illegal or improper. The second reason is that Kenya had exhausted its export quota for the year. The respondent is the body which should have information on the quantity of sugar that Kenya is supposed to export to the European Union every year. This mandate is captured by Section 6(f) of the Act which provides one of the functions of the respondent as access to "**all such relevant information as may be necessary for the efficient administration of the industry."** If the Permanent Secretary was aware that Kenya had exhausted its export quota, he ought to have passed this information to the Board when it was considering the application. After all, he is a member of the Board by virtue of Section 5(1)(d) of the Act. The fact that the Permanent Secretary had to write to the Acting Chief Executive Officer of the respondent clearly supports the fact that the respondent never made a decision on the application. Had it made such a decision then the views of the Permanent Secretary would have been found in the minutes of the meeting which discussed the application and not in the said letter.

The respondent has clearly displayed a lethargic and lukewarm attitude towards its mandate. The replying affidavit and further affidavit sworn by the Acting Chief Executive Officer, points to a corporation trying to evade its responsibilities. The fact that the respondent took three months to respond to the applicant's application for an export permit only points to a corporation which makes trading with Kenya an unpalatable and nightmarish experience. An application for an import or export licence should be dealt with promptly in order to enable free flow of sugar between Kenya and its trading partners.

The respondent submitted that the grant of an export licence is not automatic and the fact that the applicant had been granted licences in the past did not mean that this particular application should have turned out in favour of the applicant. The applicant responded to this issue by citing the doctrine of legitimate expectation. I do not find it necessary to address the issue of legitimate expectation in this matter. According to the Regulations, the export licence is granted for the export of a given consignment. Once the consignment is exported the licence cannot be used to export another consignment. There is also evidence on record that Kenya has been allocated a quota of sugar to export annually to the European Union. Once the quota is exhausted, the respondent cannot grant an export licence. It is therefore difficult to bring in the doctrine of legitimate expectation in such circumstances. Maybe an applicant can rely on legitimate expectation where a licence has been denied and the applicant can prove that the quota for a given year has not been exhausted. I however believe that

the applicant cannot rely on legitimate expectation in this matter.

I think I have said enough to clearly show the direction I am heading to. The respondent has a duty of issuing export licences. In this particular case it did not make any decision on the applicant's application. It abdicated and abandoned its responsibilities to a stranger. Even though it pretended to have made a decision through the letter dated 14th June, 2011, it is quite clear that the purported decision did not originate from it. For avoidance of doubt however and whatever its worth, I call into this court the decision communicated by the said letter and quash it. That means prayer (a) of the application is allowed. The applicant has also proved that the respondent refused or neglected to execute its statutory mandate. As such I issue an order of mandamus in terms of prayer (b) directing the respondent to consider the applicant's application in accordance with the Act and make a decision on the same. Considering the evidenced slowness of the respondent, I direct it to make the said decision within 45 days from today's date. In prayer (c) of the application the applicant is asking for an order compelling the respondent to issue an export licence to it. To me this prayer appears to be asking the court to take over the mandate of the applicant. I decline to play ball and refuse to grant this order. The applicant is awarded costs against the respondent.

Dated and signed at Nairobi this 11th day of July, 2012

W. K. KORIR, J