Kenya Bureau of Standards v Kwale International Sugar Company Limited & 4 others (Civil Appeal 2 of 2020) [2022] KECA 937 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KECA 937 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 2 OF 2020

P NYAMWEYA, SG KAIRU & JW LESSIT, JJA

JULY 29, 2022

BETWEEN

KENYA BUREAU OF STANDARDS ..... APPELLANT

AND

KWALE INTERNATIONAL SUGAR COMPANY LIMITED .. 1ST RESPONDENT

MINISTRY OF TRADE ..... 2ND RESPONDENT

KENYA REVENUE AUTHORITY ..... 3RD RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

(An appeal from the Judgment of the High Court at Mombasa (E. K. Ogola J.) dated 7th November 2019 delivered in Mombasa High Court Constitutional Petition No 226 of 2018)

JUDGMENT

1. The Kenya Bureau of Standards (KEBS), the Appellant herein, seeks to overturn the decision made by the High Court at Mombasa (E.K. Ogola J.) on a petition filed by Kwale International Sugar Company Limited, the 1st Respondent herein. To appreciate the grounds of this appeal, it is necessary to give a procedural history of the matter in the High Court. The 1st Respondent's claim in the subject petition, being Mombasa Constitutional Petition No. 226 of 2018 dated 18th September 2018, was that on 25th June 2018, a multi-agency team made up of the Appellant and 3rd and 4th Respondents raided and sealed off its factory and warehouse at Ramisi in Kwale County without any notice; impounded and sealed its lorries that had been loaded with sugar; and proceeded to sample the sugar in the warehouse. Further, that these actions were undertaken despite random sampling of the sugar undertaken on November 2018 (sic) and March 2018 having found the same sugar to be compliant with KEBS standards, and KEBS issuing the 1st Respondent with a standardization permit to deal in "unifresh"

sugar. Following various letters by the 1st Respondent and a meeting with the multi-agency team, the Appellant availed a letter and report dated 2nd August 2018 with the sampling results, which indicated that the sampled sugar had higher levels of total viable count than allowed, which the 1st Respondent disputed.

2. Being aggrieved by the seizure of its sugar and results of the sampling, the 1st Respondent filed the Petition in the High Court alleging violation of various Constitutional rights, namely the rights to property under Article 40; consumer and economic rights under Article 46, fair administrative action under Article 47, and right to information under Article 35. The 1st Respondent prayed that for declaratory orders that the actions of the Appellant and the 2nd to 5th Respondents were in violation of various Articles of *the Constitution*, illegal and unconstitutional; a mandatory order compelling the Appellant and 2nd to 5th Respondents to immediately lift the seizure and renew the 1st Respondent's standardization permit; a permanent injunction restraining the Appellant from seizing the 1st Respondent's sugar; an order of certiorari to quash the Appellant's report dated 2nd August 2018 and for compensation for losses suffered and costs.

3. The Appellant's response to the petition was in a replying affidavit sworn on 15th October 2018 through Bernard M Nguyo, its Acting Managing Director, who deposed that the Appellant is established under the *Standards Act* and with a statutory mandate of provision of standardization and conformity assessment with relevant Kenyan standards, and is part of a multi-agency team compromising of the Directorate of Criminal Investigations, Kenya Revenue Authority, Anti-Counterfeit Agency and National Police Service tasked with investigating cases involving illicit trade following the influx of contraband, counterfeit and/ or substandard good in the country, which posed a health, safety and environmental risk to the members of the public.

4. The Appellant's case was that it tested a sample of the 1st Respondent's sugar of "Kwale" brand on 14th March 2018 which did not comply with the KS EAS 749:2010 standard, and that although the 1st Respondent was awarded a permit for its "Unifresh" brand of brown sugar on 12th February 2018 valid until 11th February 2019, the permit for the "Kwale" brand expired on 21st March 2018 and was not renewed due to the failure of the sample tested on 14th March 2018. Further, that another sample of the said brand was tested on 26th June 2018 and did not comply with the standard KS EAS 749:2010 with respect to the Total Viable Count. In addition, that another resampling was undertaken on 11th September 2018 at the 1st Respondent's request, and that the samples taken in November 2017, March 2018 and June 2018 were from different production batches and not of the same sugar.

5. The 1st Respondent filed a Notice of Motion application dated 18th September 2018 contemporaneously with its petition, seeking various conservatory orders. The High Court consequently granted interim orders on 25th September 2018 restraining the Appellant and 3rd Respondent from destroying the sugar in the 1st Respondent's warehouse, from implementing the report dated 2nd August 2018. In the course of the hearing of the Petition on 16th October 2018, the 1st Respondent's counsel informed the High Court that there were new developments in the matter, "as 4 out of 9 batches of sugar (about 70% of the warehouse) have been confirmed compliant pursuant to the requirements of KEBS" and prayed that the compliant batches be released to the 1st Respondent once the results were relayed to all the parties. The High Court then directed that the said test results be formally disseminated to the parties within 2 days thereof.

6. After conclusion of the hearing on 25th October 2018, the 1st Respondent's counsel again prayed for release of the compliant goods, and while reserving the matter for judgment, the High Court ordered the release forthwith of the sugar which had complied with the Appellant's standards and pursuant to the Appellant's letter dated 20th October 2018. In a 'judgment' dated 7th March 2019, the High

Court noted that the submissions by the parties would "only make sense once the Court establishes the factual realities before the Court that is in relation to the quality of the sugar and the operational state of the Petitioner as a sugar manufacturing entity", and proceeded to identify the state of affairs that were determinable before reaching a decision that it could not make a judgment until all the facts were in. The High Court then made various directions to enable it adjudge the matter, principally on the fresh testing of the sugar that was the subject matter of the petition; the manner the testing was to be undertaken; and a site visit by the Court to the 1st Respondent's factory. Lastly, that upon compliance, the Court would then review the petition and render judgment thereon.

7. The Appellant thereupon filed a notice of motion application dated 11th March 2019 where they sought to stay execution of the directions given on 7th March 2019 and all consequential orders, and the setting aside and review of the said directions. From the record, it appears that the High Court gave directions on 14th March 2019 suspending the orders given on 7th March 2019 for the retesting and re-sampling of the sugar, and granted leave to the parties to file and serve further submissions. The Appellant thereupon filed a Notice of Preliminary Objection dated 26th March 2019, on the ground that the Court was functus officio therefore, did not have jurisdiction to entertain further proceedings, having delivered judgment on 7th March 2019. Directions were given on the same date that the preliminary objection would be heard together with the submissions, and hearings were held on 9th April 2019 and 30th April 2019 to highlight the submissions, whereupon judgment was reserved.

8. On 7th November 2019, the High Court delivered both the ruling on the preliminary objection and the judgment on the petition. The High Court dismissed the preliminary objection, after finding that it was not functus officio as it had not perfected its judgment. On the petition, the High Court identified the two issues for determination to be firstly, whether the Appellant and 2nd to 5th Respondents acted procedurally and on reasonable grounds, and on which it was satisfied that the 1st Respondent had demonstrated that its factory was closed without the due process of the law and without disclosure of the written reasons for the decision, and was also not given an opportunity to be heard. Therefore, that the Appellant violated the 1st Respondent's rights guaranteed under Article 47 of *the Constitution*, and neither acted independently nor within the law. Secondly, on whether damages were payable, and the High Court found that while the 1st Respondent did not quantify the amount payable to it in damages for the violation of his constitutional rights in its petition, it did so in its submissions, and awarded of the sum of Kshs. 8 million as compensation for the violations that resulted to its premises being closed down arbitrarily from the 25.6.18 to 13.11.18, and for the loss suffered during the detention of the 93,359 bags of sugar which was later found to be compliant by the Appellant.

9. The High Court consequently made the following orders:

    a. A declaration that the Respondents herein have violated Articles 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 35, 27, 40, 48 & 50, of *the Constitution* of Kenya, 2010;

    b. An order declaring the seizures of the Petitioner's factory, warehouses and stores on 25th June 2018 by Respondents herein illegal and unconstitutional.

    c. A mandatory injunction compelling the respondents to immediately from the date of the judgment to lift the seizures and allow the Petitioner to access its Factory, warehouse and stores.

    d. Mandatory orders compelling the 1st Respondent to renew the Standardization permit with respect to Kwale Sugar.

e. An order of permanent injunction restraining the Respondents and any other agent or servant of the Kenya Bureau of Statistics acting under the authority of the Bureau from purporting to seize the Petitioner's sugar consignment stored in its warehouse.

g. Kshs. 10,000,000/= compensation for losses suffered as a result of the seizures of the Petitioner's sugar consignment and closure of its factory by the Respondents between 25.6.18 to 13.11.18.

h. Compensation to the Petitioner for the 8995 bags of sugar which the 1st Respondent refused to re-test in violation of this Court order. The compensation shall be based on the market value of each bag.

i. Costs of the petition shall be for the Petitioner to be paid by the 1st Respondent

10. The Appellant is aggrieved by the said judgment delivered on 7th November 2019, and raised 24 grounds of appeal in its memorandum of appeal dated 9th January 2020, which they condensed to five during the hearing of the appeal namely, whether the High Court erred; in rendering a second judgment in the petition; in descending into the arena of conflict; in awarding unpleaded and unproven damages; in failing to appreciate the statutory mandates of the Appellant; in determining the preliminary objection together with the main petition and whether the High Court considered public interest in arriving at its decision.

11. We heard the appeal on 12th April 2022, and learned counsel Mr. Masafu holding brief for Mr. Wekesa appearing for the Appellant and highlighted their written submissions; as did learned counsel Prof. Tom Ojienda SC assisted by Ms. Awuor , appearing for the 1st Respondent. Ms. Waswa appeared for the 2nd, 4th and 5th Respondents, and did not make any submissions or take a position on the appeal, while and Mr. Ochieng appeared for the 3rd Respondent and stated that while he did file any submissions, he supported the appeal and would rely on the Appellant's submissions.

12. Our duty as the first appellate Court as set out in Selle and Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusions of facts and law, and we will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane vs Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah (1968) E.A*. Three issues arise for determination in this appeal, namely, whether the procedure adopted by the High Court was irregular and unfair; whether the High Court was functus officio as at the date of the delivery of judgment of 7th November 2019; and whether the reliefs granted by the High Court were appropriate and merited.

13. On the first issue on the procedure adopted by the High Court, the Appellant faulted the trial Judge for descending into the arena of dispute and exhibiting partisanship by aiding the 1st Respondent to reframe the case after the 1st judgment, in violation of his oath of office and constitutional dictates of a fair hearing, thereby rendering a blatant miscarriage of justice. The Appellant argued that in the 7th March 2019 judgment, the High Court made a finding that the submissions by the parties would make sense once the Court established factual realities after the 1st Respondent failed to prove its petition. Further, that it was not open to Court to reopen the petition to further hearing. Additionally, that during the site visit the High Court directed the Appellant to undertake resampling and retesting of the sugar which was the subject of the petition, yet the said prayers had not been sought in the petition and none of the parties had been heard on the same.

14. That the Court while at the site, and on its own motion, proceeded to interview the 1st Respondent's representatives at the factory on 7th March 2019 without preparing the parties and according to them a chance to have their experts present and prepared to participate in the exercise, which was a clear indication of the Court descending into the arena of the conflict, as it turned itself into an investigator for the 1st Respondent while denying the Appellant an opportunity to be heard. Reliance was in this regard placed on the case of *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others* [2014] eKLR on the importance of parties and the Court being bound by the pleadings.

15. The Appellant also urged that a preliminary objection and more so on jurisdiction, should be first and independently considered, and reliance was placed on the decision in *Owners of the Motor Vessel 'Lillian S' v Caltex Kenya Ltd* (1989) KLR 1 that jurisdiction was paramount and without it a court should take no further steps. Therefore, that when confronted with the Appellant's Notice of Preliminary Objection that the High Court was functus officio upon rendering the judgment of 7th March 2019, the said Court should have first considered the issue of jurisdiction at the earliest opportunity upon the question being raised and failure to do so caused the Appellant injustice.

16. The 1st Respondent on its part submitted that the High Court had inherent powers to issue directions to ensure that the ends of justice were met under section 3A of the *Civil Procedure Act* and Rule 3 (8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and nothing stopped the Court from ascertaining factual realities before rendering its judgment. Additionally, that the 1st Respondent had from the outset, called for retesting of the sugar, that the Appellant was heard and all parties agreed to file supplementary submissions and the Court scheduled hearing for the substantive petition on 26th March 2019, and that there was no law that barred the Court from conducting site visits. Lastly, that the Court directed that the Notice of Preliminary Objection be heard on the same day as the Petition. and the Court directed that the judgement on both would be delivered at once. They submitted that the Constitutional Court had a duty to ensure expeditious disposal of cases.

17. We are guided in this respect by the procedure for hearing of constitutional petitions is provided in Rule 20 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, as follows:

    1. The hearing of the petition shall, unless the Court otherwise directs, be by way of—

        a. affidavits;

        b. written submissions; or

        c. oral evidence.

    2. The Court may limit the time for oral submissions by the parties.

    3. The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.

    4. The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.

    5. A person summoned as a witness by the court may be cross examined by the parties to the petition. Evaluating petition for directions and allocating hearing dates.

18. In addition, Rule 21 provides that in giving directions on the hearing of the case, a Judge may require that parties file and serve written submissions or further information at any stage of the proceedings, and the Court may frame the issues for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case. It is evident that wide latitude and discretion is granted to the High Court when hearing constitutional petitions, which must like any other discretion be exercised judiciously, and with the objective provided in Article 159 of *the Constitution* and Rule 3 of the said Rules of providing substantive justice expeditiously. It is also notable that the Rules are made pursuant to the provisions of Article 22(3) of *the Constitution* which provides as follows:

> 3. The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—
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> a. the rights of standing provided for in clause (2) are fully facilitated;
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> b. formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
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> c. no fee may be charged for commencing the proceedings;
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> d. the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
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> e. an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

19. In the present appeal, it is notable that after taking the parties' evidence and submissions, the trial came to a close, and the High Court gave a judgment date. A first judgment was then delivered on 7th March 2019. This judgment had the effect of opening up the trial for further evidence to be collected, and the judge proceeded to give directions for retesting of the sugar samples and a site visit to the 1st Respondent's factory. A site visit was undertaken on the same date on 7th March 2019, and it appears from the record that the parties were not given an opportunity to make any representations on the site visit. The Appellant then filed an application seeking a stay of the directions, and the parties appear to have agreed to suspend the application and directions as regards the retesting of the 1st Respondent's sugar. The Appellant thereafter filed a preliminary objection arising from the directions, which the parties canvassed and a ruling delivered thereon by the Court. The parties were also directed to file supplementary submissions after the directions and site visit.

20. While the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 do not preclude the holding of site visits and giving of directions by a Court to address any emerging facts or issues, such interventions should provide an opportunity for all the parties to participate and make representations. It is also preferable in this regard that procedural directions are given at the pre-trial stage, for the orderly and efficient proceedings by the Court, and at the very least before close of trial. It is evident that the risk in adopting the approach taken by the High Court after the close of trial, is the appearance or actuality that the Court may be collecting additional evidence to fill gaps in a party's case.

21. We find that in the circumstances of the present appeal, there was an element of unfairness and prejudice that was caused to the parties as a result of the procedure adopted by the High Court, as no opportunity was given to express their opinions, adduce evidence or comment on the evidence introduced by the Court during the site visit. The effect was that the subsequent procedures adopted by the High Court were also irregular.

22. We are also of the view that this finding is dispositive of this appeal, as we cannot in the circumstances address the remaining issues which touch on the merit of the decisions consequently made by the High Court. The net result is that the proceedings of the High Court, having been vitiated, cannot stand, while the issues raised by the parties in their respective cases still remain unsolved.

23. We accordingly allow the Appellant's appeal and set aside the entire proceedings of the High Court and judgment delivered on 7th November 2019 in Mombasa Constitutional Petition No. 226 of 2018. Pursuant to the provisions of Rule 33(c) of the Court of Appeal Rules of 2022, we hereby remit Mombasa Constitutional Petition No. 226 of 2018 back to the High Court at Mombasa for a new trial by a Judge other than E.K. Ogola J.

24. The appellant shall have the costs of the appeal. Each party will bear their own costs of the vitiated proceedings of the High Court.

25. Orders accordingly.

DELIVERED AND DATED AT MOMBASA THIS 29TH DAY OF JULY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR