IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 207 OF 2016

BETWEEN

CAROGA PHARMA (K) LIMITED.....APPELLANT

AND

THE SECRETARY PEST CONTROL

PRODUCTS BOARD.....RESPONDENT

(Appeal from the judgment of the of the High Court of Kenya at Nairobi (Judicial Review Division) (W. Korir, J.) delivered on 4th November 2015

in

Judicial Review Case No. 128 of 2015)

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JUDGMENT OF THE COURT

The appellant, ***Caroga Pharma (K) Limited*** in this appeal is aggrieved by the decision of the High Court (W. Korir, J.) which dismissed its application that had sought, i) an order of mandamus to compel ***the respondent, the Secretary, Pest Control Products Board*** to restore its registration Number 0819 *(the registration)* of a product by the name of Duranet LLIN *(Duranet)* which registration was issued under the Pest Control Products Act, Cap 346, and ii) a declaration to the effect that the transfer of the appellant's registration was contrary to the Act, the regulations and the guidelines.

The appellant was the local agent for Clarke Mosquito Control Inc, USA, *(Clarke Mosquito),* the registered owner of Duranet. On 10th August 2006, the appellant applied to the respondent for, and obtained registration of Duranet. On 7th March 2014 it received a notification that an India based company known as Shobikaa Impex Private Limited, the 2nd Interested Party had purchased Duranet from Clarke Mosquito.

Later, in January 2015, the appellant learnt that Duranet had been sold to the 2nd Interested Party and that registration of the transfer was effected on 12th March 2015. The certificate of registration also specified that Chrystal Kenya Limited, the 1st Interested Party had been appointed as the local agent. The appellant was aggrieved by the registration of the transfer and the appointment of another agent without its consent.

Both Interested Parties were parties to the suit in the High Court.

According to the appellant, the Pest Control Products Act and the Pest Control Products (Registration) Regulations, 2006 provided that an applicant who is not resident in Kenya shall appoint an agent who is permanently resident in Kenya to whom any notice or correspondence may be sent, and that before a change of agent can take place, an original letter of no objection should be obtained from the existing local agent; that the requirement to obtain an original letter of no objection from a former agent was to ensure that it was not rendered impecunious or exposed to incur the losses of setting up permanent offices, and other necessary infrastructure for representation and distribution of the principal's product; that a letter of 19th August 2013 from Clarke Mosquito was annexed to the 2nd Interested Party's letter of 12th March, 2015 by which Clarke Mosquito notified the respondent that Duranet had been sold and transferred did not constitute an original letter of no objection from the former agent as Clarke Mosquito was not the registered local agent for Duranet in Kenya. The appellant claimed that it stood to suffer irreparable loss and damage having established the product in Kenya.

It was further asserted that, ***Article 47*** of the ***Constitution*** guarantees every person a right to fair administrative action and by failing to follow the prescribed procedure for effecting a change of agent, the respondent had infringed on the appellant's constitutional rights to its detriment. The appellant's motion seeking the orders was supported by the affidavit of ***Nicholas Karani Gichohi***, the appellant's managing director.

Peter Opiyo, the Chief Executive Officer of the respondent swore an affidavit in reply on 3rd July 2015 where he deponed, that the application for the initial registration of Duranet was submitted on 10th August, 2006 through, the appellant as the former local agent appointed by the principal, Clarke Mosquito. The appellant was informed of the registration through notification ref PCPB /111/Reg/Vol.1/08/147 dated 14th April 2008. On 19th August 2013, Clarke Mosquito notified the respondent that Duranet had been sold and transferred to the 2nd Interested Party inclusive of all related assets and intellectual property, and that Tagros Chemicals, India the manufacturers of Duranet had issued a letter of no objection for its registration to be transferred from Clarke Mosquito to the 2nd Interested Party.

In its replying affidavit, the 2nd Interested Party averred that it applied to the respondent to be registered as owner of Duranet, and at the same time appointed the 1st Interested Party as local agent. And in its affidavit in reply, the 1st Interested Party confirmed having been appointed as agent by the 2nd Interested Party and that it had undertaken registration of the transfer of the product on the 2nd Interested Party's behalf.

Upon considering the motion and hearing the parties' submissions, the learned judge dismissed the application for reasons that the orders seeking to compel the respondent to restore the registration of Duranet back into the appellant's name, and for a declaration that the respondent had acted contrary to the requirements of the Act and the regulations, were incapable of being granted. The court further found that the Certificate of Registration of Pest Control Product Number 0819 clearly showed that the product was registered in Kenya in the names of Tagros Chemical Limited, India and Clarke Mosquito, with the appellant indicated as its agent; that thereafter, Tagros Chemical Limited, India and Clarke Mosquito had sold the product to the 2nd Interested Party. The court concluded that an order restoring the registration to the appellant would deprive the lawful owner of its product.

The appellant was aggrieved by the High Court's decision and filed this appeal on the grounds that the learned judge was wrong in finding that the appellant's written consent was not required prior to registration of a change in agent, and in disregarding the requirement; in finding that Form A7 was only applicable when a registrant is changing agents, and not when the registrant has sold the product to a third party as the new registrant; in failing to hold that the respondent actions were ultra vires and void *ab initio*, and for finding that the appellant was not the registrant of Duranet.

The appellant filed its written submissions, but though served, did not attend the hearing. On its part, ***Ms. J. Chimau*** appeared for the respondent while ***Mr. Modi*** appeared for the Interested Parties. Counsel informed us that they too had both filed their respective written submissions which they would rely on in their entirety, without highlighting them.

The appellant submitted that the learned judge misapprehended the law in that he failed to appreciate that Form A7 specifically stipulated that an application for change of agency must be accompanied by an original letter of no objection from the former agent and that the regulation did not exempt a new owner from adhering to this requirement; that the learned judge misconstrued the requirement to mean that a new owner can issue a letter of no objection in place of a former validly registered agent; that the court was wrong to find that the respondent's action of transferring the registration was not ultra vires and *void ab initio;* that the respondent was in breach of the regulations when it transferred Duranet without seeking the written approval of the appellant, and it was unfair and unjust to have denied the appellant a hearing before such transfer was effected. In support of this contention the case of ***Diana Kethi Kilonzo & Another vs IEBC & 2 Others, Petition NO. 359 of*** 2013 was cited.

The respondent begun by submitting that the appeal is not merited as there are no points of law for determination; that the respondent was well within its powers to register Duranet in the 2nd Interested Party's name since no binding contract existed between the appellant and the 2nd Interested Party; that any contractual agreement between Tagros Chemicals Limited, India, Clarke Mosquito was with the appellant as an agent and not as the owner or registrant of Duranet; that the appellant's tenure as local agent ended when the product was acquired by the 2nd Interested Party, that the registrant of Duranet had the absolute discretion and exclusive right to appoint an agent. It was therefore not mandatory under the regulations for a new owner to continue with a former agent.

The Interested Parties submitted that, ***Form A7 (Application for change of Agency)*** under the ***Pest Control Products [Licence Fees & other charges] Regulation 2006*** is concerned with the change of agent by the registrant and does not relate to instances where an agent is appointed following transfer to a new registrant; that therefore ***Form A7 (4c)*** was not applicable to the appointment of the 1st Interested Party by the 2nd Interested Party. It was further argued that the transfer of registration did not require the registered agent's consent and the respondent was not required to obtain such consent in order to effect the change of ownership.

We have considered the grounds of appeal and the parties' submissions, and are of the view that the underlying issue to be addressed is whether the learned judge rightly exercised his discretion to decline to grant the orders sought. The principles that guide the exercise of such discretionary jurisdiction are set out in ***United India Insurance Company Limited vs East African Underwriters Kenya Ltd [1985] KLR 898,*** where Madan, JA (as he then

was) stated;

> ***"The Court of appeal will interfere with discretionary decision of a judge appealed from where it is established that the Judge:***
>
> ***(a) misdirected himself in law,***
>
> ***(b) misapprehended the facts,***
>
> ***(c) took account of consideration which he should not have taken into account,***
>
> ***(d) failed to take into account a consideration of which he should have taken into account,***
>
> ***(e) his decision, albeit a discretionary one, is plainly wrong."***

With these guidelines in mind, we will determine whether the learned

judge rightly interpreted ***regulation 7 (3)*** of the ***Pest Control Products [Registration] Regulation*** and Form A7 concerning the "Application for Change of Agency"; whether the failure to submit a letter of no objection rendered the transfer a nullity, and, whether the learned judge rightly declined to grant the orders sought for restoration of the registration back into the appellant's name.

In considering the relevant provisions, ***regulations 4(1)*** and ***(2)*** of the ***Pest Control Products [Registration] Regulation*** specify that;

> ***"(1) Every person desiring to register a Pest Control Product shall make application to the Board in Form A set out in the second schedule and shall on request, supply any, further information which may be required by the Board.***
>
> ***"(2) An applicant who is not resident in Kenya shall appoint an agent permanently resident in Kenya to whom any notice or correspondence may be sent".***

Regulation 7 (3) also specifies that;

> ***"No person to who the certificate of registration has been issued under this regulation shall lend, hire, sell, or transfer or otherwise dispose of the certificate to any other person without the approval of the Board".***

In addition, ***Form A7 (4c) (Application for Change of Agency)*** issued under the of the ***Pest Control Products (Licence Fees and other charges) Regulations 2006*** then stipulates that;

> ***"Every application must be accompanied by;-***
>
> ***(a) An original letter from the registrant,***
>
> ***(b) A binding agreement entered between the registrant and the agent,***
>
> ***(c) <u>an original letter of no objection from the former agent</u>,***
>
> ***(d)***...(emphasis ours)***"***

The above provisions are clear that an application for registration of a pest control product must be made in the prescribed Form A, which form includes a requirement that the application be accompanied by a letter of no objection from the former agent. The appellant has denied issuing such a letter, and contends that as a consequence the respondent ought not to have registered the transfer of the registration until such time as it had received the appellant's letter of no objection.

The appellant was the local agent for Duranet. It is not disputed that the Clarke Mosquito sold and transferred Duranet to the 2nd Interested Party. The respondent stated that upon receipt of a notification of the intention to transfer the registration to the 2nd respondent, it was well within its powers to approve the transfer, particularly as no binding contract existed between the appellant and the new owner. But the appellant's grievance is that a letter of no objection was mandatory, and that since no such letter was obtained from it, its rights to fair administrative action were violated.

Upon considering this complaint, the learned judge concluded that such letter was not required where a new owner was *"…appointing its agent for the local market',* and that Form A7 was *"…only applicable where a registrant is changing agent. It does not apply to a situation where a product is changing hands. The form is not applicable where the registrant has sold the product to another person or company and the buyer then becomes a new registrant."* In other words, the learned judge limited the necessity of the accompanying no objection letter to instances where an existing registrant was changing its agent, and excluded cases where the product was being transferred to a new registrant.

In construing the above provisions, there is no distinction made between appointment of a new agent or

where a registrant is changing agents. What is specified in Form A7 is for the appointment of an agent to be specified, and where a former agent exists, that such agent provide a letter of no objection. It is uncontroverted that the appellant was an agent for Duranet, and that it did not provide a letter of no objection to accompany the 2nd Interested Party's application to transfer of the registration from Clarke Mosquito to the 2nd Interested Party, or in respect of the appointment of the 1st Interested Party in place of the appellant.

Pursuant to the concerned regulations, we do not agree with the learned judge that the letter of no objection was limited to instances where an existing registrant was changing agents, and we find that the judge misdirected himself when he concluded that no change of the local agent for Duranet had occurred. The record shows that, Duranet was registered with the respondent since 2006, and that the appellant was at the time appointed as its agent. Being a former agent of Duranet he was required to provide the respondent with a letter of no objection.

As no letter was submitted together with the application, we find and hold that whilst registering the transfer of Duranet from Clarke Mosquito to the 2nd Interested Party and the local agency from the appellant to the 1st Interested party, the respondent did not comply with the requirements of the law for it omitted to obtain a letter of no objection from the appellant prior to transfer.

Having so found, we next turn to consider, whether as a consequence of the omission to submit the letter, the transfer was rendered void *ab initio*. To determine this issue will require us to interrogate the nature and effect of the no objection letter. ***Jonathan Manning's Judicial Review Proceedings***, ***second edition, para 7.32*** enumerates the position thus;

> ***"Failure to comply with the procedures laid down by Parliament will not always have as its corollary that the resulting decision or act will be void and of no effect. Where Parliament does not specify the result of such a failure, it will be for the courts to determine what that result should be. The mechanism the courts have evolved for doing this is to decide whether or not compliance with the provision in question is mandatory. If it is mandatory the failure will result in the decision being rendered void if it is simply directory, then it will not be rendered void…"***

Furthermore, that;

> ***"…In deciding whether a particular duty is mandatory or directory, the courts have held that the following matters should be considered:***
>
> ***(a)the nature and purpose of the legislation; (b)the importance of the provisions breached;***
>
> ***(c)the relationship of between the provision and the purpose of the legislation; and***
>
> ***(d)the prejudice suffered by the applicant."***

See also ***Secretary of State for Trade and Industry vs Langridge [1991] 3 all ER 591.***

In the Uganda case of ***Pastoli vs Kabale District Local Government Council and Others* [*2008] 2 EA 300*** it was held;

> ***"When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose***

of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory."

In other words, whether or not the letter of no objection was mandatory or directory in nature requires that it be viewed within the context or purpose for which an agent is engaged and the main purport of the Pest Control Products Act.

We begin by observing that the preamble provides that, the Pest Control Products Act was established to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests and of the organic function of plants and animals. Of significance is that, nowhere in the Act is reference made to appointment of an agent. Instead, this is to be found in the ***Pest Control Products (Licence Fees and other charges) Regulations 2006. Regulation 4 (2)*** on the appointment of agents stipulates that an applicant or registrant who is not resident in Kenya shall appoint an agent permanently resident in Kenya to whom any notice or correspondence may be sent. Evidently, the agent's primary duty, as set out in the regulations, is to receive correspondence and facilitate communications between the respondent and the principal.

As concerns the impugned provision, which stipulates that an application for change of agency should be accompanied by "*…an original letter of no objection from the former agent…*", it is instructive that it is relegated to Form A7, tucked away in an annexure to the regulations, as opposed to being included in the substantive legislation. All of the above would suggest to us that the provision is merely directory and not mandatory. We say this because, to begin with, the provision bears no relationship to the agent's role of coordinating communications between the principal and the respondent specified in ***regulation 4(2)***.

Secondly, when viewed against the objectives of the Act, which is to ensure the proper management and regulation of pest control products in Kenya, the appointment of agents, for purposes of the Act, is essentially to facilitate communication of information. With this in mind, it could not have been the intention of Parliament to create a provision that would be an impediment to the mandatory regulatory processes prescribed by the Act. In reality, any number of reasons could lead to failure to obtain a letter of no objection from a former agent, and by inference, the effect of such absence would be to frustrate the concerned regulatory processes. Thirdly, there is no expression of what mischief the provision sought to address, and neither is any sanction imposed for failure to comply.

On whether the appellant was prejudiced by failure to submit the letter thereby violating its rights to fair administrative action, the provision is specific. What is required is a letter of no objection, not a letter of objection or of consent. Further, nothing in the provision infers that the agent can seek redress from the regulatory body in the event it objects to such change. This is more particularly because, at all times, the agent was answerable to its principal and not to the regulatory body given that their appointment under ***regulation 4 (2)*** was always the responsibility of a registrant not resident in Kenya.

Simply put, the stature of the no objection requirement in relation to the purport of the Act strongly points

to it being directory and not mandatory in nature. The effect of this is that, a registration that omitted inclusion of the letter will not be rendered void. Accordingly, having regard to the circumstances of the instant case, we are satisfied that the registration of the transfer of Duranet by the respondent on 12th March 2015 was not rendered void *ab initio*.

Having so found, the final issue at this juncture is whether the appellant was entitled to the order of mandamus sought to compel the respondent to restore the brand registration to its name.

Addressing this issue, the learned judge had this to say;

> ***"The certificate of registration of the product is clear that the registrant is Tagros Chemicals Ltd, India/Clarke Mosquito Control Inc., USA. The registrant has sold the product to the 2nd Interested Party. An order restoring the registration to the Applicant will amount to taking away the product from the current lawful owner (the 2nd Interested Party) and giving it to the Applicant."***

In considering the efficacy and scope of the orders of mandamus, this Court addressed the nature of the remedy of mandamus the case of ***Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR,*** as follows:

> ***"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-***
>
> ***"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."***
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> ***At paragraph 90 headed "the mandate" it is stated:***
>
> ***"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."***

In this case, what the lower Court was being asked to do was to compel the respondent to restore the registration certificate back to the status that it was before the transfer of Duranet from Clarke Mosquito to the 2nd Interested Party so that the appellant's name is returned as local agent for Duranet. But, what would be the effect of such reversal?

It goes without saying that, any reversal of the registration would reinstate Clarke Mosquito as the owner of the brand, and the appellant as the agent, leading to a wrongful and misleading representation of the actual ownership and agency of Duranet. Essentially, reversing ownership to the former registrant and reinstating the appellant, as agent would be tantamount to depriving the 2nd Interested Party of proprietorship and control of its product. And this is what led the learned judge to observe that;

> ***"Granting the orders as prayed for by the Applicant would amount to assisting the Applicant steal the 2nd Interested Party's product. Courts do not participate in illegalities. They do not cheer unlawful acts and neither do they support business coups."***

We agree. The appellant was an agent for the former owner of Duranet. Following registration of the transfer, ownership was conveyed to the 2nd Interested Party and the agency to the 1st Interested Party. Given the irregularities likely to result from a reversal of the transfer, we consider that an order of mandamus is not the most efficacious remedy applicable to the instant case, and in the circumstances, as did the learned judge, we decline to grant it.

For the reasons set out above, we find no sufficient reason to disturb the decision of the trial court, and we order that this appeal be and is hereby dismissed. As the appellant has been partially successful, we order that each party bears its own costs of the appeal, and in the court below.

It is so ordered.

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR