IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 103 OF 2010

BETWEEN

REPUBLIC…….....APPELLANT

AND

THE HON ATTORNEY GENERAL…….....1ST RESPONDENT

BUREAU OF STANDARDS

COMMERCIAL MANAGER……..... 2ND RESPONDENT

KENYA PORTS AUTHORITY….....…3RD RESPONDENT

KENYA REVENUE AUTHORITY.....4TH RESPONDENT

EX PARTE: JAMES MUCHEMI T/A JAMPUR AGENCIES

(*Appeal from the Ruling of the High Court of Kenya at Nairobi (Wendoh, J.) dated 12th February, 2010 in Misc. Application No. 321 of 2009)*

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JUDGMENT OF THE COURT

It is now established beyond debate that for an application for judicial review of an administrative action to succeed, it must be shown that in arriving at the impugned decision the administrative body or tribunal exceeded its powers, committed an error of law, violated the rules of natural justice, and reached a decision which no reasonable tribunal would have reached in the circumstances. See **R V. Secretary of State for Education and Science *ex parte* Avon County Council** (1991) 1 All ER 282**.** Until recently in a judicial review application, the courts were concerned more with the decision-making process and not the merits of the decision. See **Municipal Council of Mombasa V. Republic and Umoja Consultants Ltd,** Civil Appeal No.185 of 2001 where the Court stated:

> **"…The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

But in recent decisions such as **Suchan Investment Limited V Ministry of National Heritage & Culture & 3 Others**, Civil Appeal No. 46 of 2012, and **Rentco East Africa Limited, Lantech Africa Limited,Toshiba Corporation Consortium V. The Public Procurement Administrative Review Board & Another**, Civil Appeal No. 24 of 2017, the courts have extended the consideration

of merit of the decision in limited instances, for example, in **Rentco East Africa Limited** (supra) this Court, citing with approval, the case of **Suchan Investment** (supra) said:

> **"We alluded earlier to the permitted limit for consideration in a judicial review application of the merit of a decision of a public body. While the traditional parameters that we have considered in the previous paragraphs still apply, with the promulgation of the Constitution of Kenya, 2010 and enactment of Fair Administrative Action Act, 2015 there has been a shift in those considerations."**

The appellant, James Muchemi T/A Jampur Agencies, an importer of cosmetic hair products from the USA, UK and South Africa, moved the High Court (Wendoh, J) with a judicial review application to quash by an order of *certiorari* the decision of the 2nd respondent made on 27th May, 2009 rejecting the assorted imported hair products and directing him to re-ship them to their country of origin within 30 days on the basis that the products failed to comply with the relevant Kenya standards. He also applied for an order of prohibition to stop the respondents from destroying the goods; and an order of *mandamus* to compel the respondents to release to him the container in which the goods were.

The High Court (Wendo, J) in her determination of the application expressed herself as follows:

> **"All in all, I find that there was material non-disclosure of facts by the Applicant but finds that the Respondents acted within their powers and their decision cannot be faulted. Judicial Review remedies are discretionary in nature and can be denied even though deserved. They are not deserved in this case. An order of *certiorari* lies to quash a decision made without or in excess of jurisdiction or in breach of rules of natural justice. Prohibition also lies that prohibit proceedings continued in breach of the rules of natural justice or without or in excess of jurisdiction. The Applicant has not demonstrated that the said orders are deserved. An order of mandamus lies to compel the performance of a statutory duty. The Respondents have not refused or neglected to perform any disclosed duty and the order would not lie. In sum, I find no merit in the notice of motion dated 29/7/09 and it is hereby dismissed with costs to the Respondents."**

That determination has given rise to this appeal. The 17 grounds upon which it is premised are to the effect that the learned Judge erred in: not appreciating the evidence supplied by the applicant; finding that the Inspection Report Form releasing the consignment in question related to a different consignment; failing to appreciate the salient entries of the importation of goods; accusing the appellant of material non-disclosure yet all the documentation was done by the respondent; ruling that the appellant did not address the issues of disparities in the Entry Form and that of the Certificate which according to her indicated that the goods were from USA yet nowhere in the certificate is this fact stated; shifting the onus of clarifying entries from the maker of the document to the appellant; failing to appreciate **sections 6** and **7** of the Standards Act that make the issuance of either a Conformity Certificate or Non- Conformity Report mandatory and that destination inspection cannot be a verbal communication over the counter; failing to find obvious contradictions in the respondent's affidavits; finding that the appellant supplied the wrong certificate of compliance from Beauty Enterprises yet the appellant was only giving history of his business; failing to consider business cards, newspaper cut-outs contained in the appellant's verifying affidavit vindicating his claim of third party involvement in rejection of his goods; finding that the disputed Inspection Report relates to another consignment which had no basis; and failing to subject the respondent's documents to judicial scrutiny.

At the hearing of the appeal, all parties except the 1st and 2nd respondent, who, despite having been duly served with the hearing notices, did not attend Court. They also did not file their written submissions as ordered.

The appellant's case summarized in the submissions and orally highlighted was that on 29th February, 2009, he imported assorted hair products from Labchem Ltd in London. When the consignment arrived, the procedural entry form was filled accompanied by a packing list. Subsequently, the inspection report form was completed. The inspector, who was the 2nd respondent's representative, remarked on the form that the goods be released. Following this, the appellant's clearing agent sought to have the goods released when it was allegedly informed that a third party (Haco Industries Ltd) required a re-verification of the appellant's container by the 3rd respondent to which the appellant conceded to. Within a day, the 2nd respondent issued a notice of rejection of the goods. Labchem Limited issued a letter reiterating flawlessness of the goods. The appellant wondered why the Inspection Report Form releasing the goods was curiously dated 26th February, 2009 instead of 26th May, being the date it was initially released to the appellant. The appellant maintained that it was only after the rejection of the goods that he noticed the confusion in the release document.

On the issue of conformity, it was submitted that Legal Notice No.78 of 2005 of the Standards Act, requires the respondent to mandatorily issue either a Conformity or Non-Conformity certificate. Neither was issued and the learned Judge failed to address this. According to the appellant, the events leading to the rejection of the consignment was the business rivalry with Haco Industries Ltd yet the learned Judge did not make a finding on this.

The 3rd respondent opposed the appeal and submitted that the appellant failed to prove that he was deserving of the three reliefs sought; that the 3rd respondent was not the maker of the decisions and did not breach any law; and that the remedy of *mandamus* was not available because there was no allegation that the 3rd respondent had failed to do any act; that the only document that linked the 3rd respondent to the transaction was the request to re-verify the appellant's container, which request was addressed to an entity that was not party to those proceedings.

For the 4th respondent, it was submitted that the learned Judge properly exercised her discretion; that the 4th respondent acted on the basis of a letter from the 2nd respondent dated 27th May, 2009, which ordered a re-shipment of the appellant's goods within 30 days or their destruction at the appellant's expense. On this basis, the 4th respondent detained the appellant's consignment within the law and within its mandate; that Legal Notice No. 66 of 1999 mandated the 4th respondent to stop the importation of any prohibited goods. Such goods, under **Regulation 2(a)** of the aforesaid legal notice, are defined to include imported goods condemned by the 2nd respondent; and that by **Regulation 3** any goods declared prohibited are to be re-exported or destroyed at the expense of the owner. Further, that **section 18(1)** of the East African Community Management Act (EACMA) read together with Part A of the Second Schedule to the Act defines the appellant's goods as prohibited goods. The 4th respondent therefore acted within the confines of lawful exercise of power governed by statute when it advised the re-exportation or destruction of the appellant's goods. This had nothing to do with business rivalry.

In the discharge of our duty on first appeal, we are required to re-evaluate the evidence in order to come to our own conclusion by way of retrial, **Selle V Associated Motor Boat Co. [1968] EA 123**.

Judicial review orders are discretionary. Therefore, for this Court to interfere with the court's exercise of that discretion, it must be shown that the trial court was clearly wrong, misdirected itself or acted on matters it ought not to have acted upon or failed to take into account matters, which it should have taken into account and as a result, arrived at a wrong conclusion. See: **Mbogo & Another V Shah** (1968) EA 93. The broad question is, whether the learned Judge properly exercised her discretion in refusing to grant the reliefs sought by the appellant.

We reiterate that the appellant applied for *certiorari*, *mandamus* and prohibition, called "*prerogative writs"* in the old days in England. The often-cited decision of this Court in **Kenya National Examination Council V. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others**, CA No. 266 of 1996, laid down in great detail the efficacy and scope of these prerogative orders. The appellant's grievance was anchored on paragraphs 11 and 13 of his affidavit verifying the motion, where he deposed as follows;

> **"11. THAT it is shocking that after approving and clearing the consignment on the previous day, on 27th May 2009, the Kenya Bureau of Standards wrote a letter to me rejecting the Assorted Hair Products allegedly for failing to comply with relevant Kenya Standards.**
>
> **THAT I found the decision to reject the goods excessive and illegal as my products have never been found wanting and the Kenya Bureau of Standards were through with verification and the release of the consignment had been approved."**

On the authority of **Kenya National Examination Council V. Republic *ex parte* Geoffrey Gathenji Njoroge & 9 Others**, (supra) and many others, it is now established that an order of *certiorari* is efficacious in quashing a decision already made and will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice have not been complied with. An order of *mandamus*, on the other hand, is in the form of a command directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing, which the law imposes on him or them and which he has or they have failed to do by virtue of his or their office and is in the nature of a public duty. For one to qualify to seek this order, it must be shown that there is a specific legal right. Finally, prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body from continuing with proceedings in excess of its jurisdiction or in contravention of the law, including acts done in violation of the rules of natural justice. By its very nature, it is said that prohibition looks to the future. It is therefore not efficacious where a decision has already been made, whether in excess or for lack of jurisdiction or whether in violation of the rules of natural justice.

From the arguments presented before the court below and before us, the focus appears to have been on the merit of the appellant's case rather than the procedure for the decision to reject the appellant's consignment. Of course, in determining the latter, the background information is critical.

The contention in this dispute was that the goods imported by the appellant did not meet the standard requirements for Kenya; and that they were not inspected before shipment. According to the respondents, because the consignment was not accompanied by a Certificate of Conformity, it was inspected locally by the 2nd respondent; that upon inspection, it was found that the products did not bear an Expiry/Best Before Date contrary to the requirements of the standard declared in Gazette Notice No. 3613 of 30th May, 2003.

The appellant's position was that the key document relied on by the respondents, Custom Entry Form had discrepancies on the date on which the consignment arrived and the country of origin; that the form indicated that the consignment originated from the United States of America when it in fact came from Great Britain. It followed, in the appellant's opinion, that the certificate used to reject the goods was not the correct form.

The duty of the learned judge, in view of the rival arguments, was to consider the process in which the decision to reject the consignment was arrived at; to determine whether the decision was made without or in excess of jurisdiction, or whether the rules of natural justice were not complied with; whether the respondents failed to perform public duty which the law required them to perform.

The learned Judge first considered the alleged discrepancies on the entry form and expressed the following view on the matter;

> **"I have observed that these details on the description of the goods and the container are similar save that the date of the inspection of the goods is 26th February 2009 and the Inspector indicated in his findings that the goods originated from the United States of America. It is however evident that the goods imported by entry form JM4, the subject of these proceedings were imported from Great Britain, see entry No.7. The applicants did not address the issue of the disparity in the Form of entry and that on the certificate, which indicated that the goods were from the United States of America. It would therefore mean that the certificate does not apply to the goods in issue and the question is have the goods been inspected and passed the inspection?"**

The allegation was that the inspection report had been doctored to appear as if the goods met the standards requirements. The appellant on the one hand, contending that the goods met the required standards and had been released vide the inspection report dated 26th February, 2009 but was erroneously dated as if it related to the consignment of May 2009; and the 2nd respondent on the other hand, argued that in February 2009, the applicant had imported goods from the USA which were inspected and verified by the 2nd respondent and allowed for release into the Kenyan market vide the inspection report dated 26th February 2009; that there was another consignment in May, 2009 whose origin was Great Britain, which was not accompanied by a certificate of conformity and upon inspection, was found to be non-compliant as they did not bear an expiry date in accordance with the requirements of Kenya Standard KS 1707:2002.

The 2nd respondent is a Government entity established under the Standards Act with the mandate to, *inter alia* carry out inspection, testing, analysis and verification of goods imported into the country to confirm their compliance with the standards set out in the Act pursuant to

Legal Notice No. 78 of 2005. In addition, **section 14A** of the Standards Act gives an inspector the power to order for the destruction of goods that do not conform to the relevant standards after giving the owner of the goods 14 days' notice of their intention either by written notice or by publishing the said notice in the gazette. The section proceeds to illustrate the procedure by which an aggrieved party can lodge an appeal. This jurisdiction is the basis for determination of whether the 2nd respondent acted in excess of its mandate.

We think, however, in the circumstances of this appeal that the burden was on the appellant to demonstrate that the goods met the requirements for import.

Without going into the merits, once the 2nd respondent was satisfied that the products did not bear an Expiry/Best Before Date, a matter that did not require any expertise to determine, the 2nd respondent was entitled to call into aid the provisions of **section 3, 4, 5 and 6 of the** Verification of Conformity to Kenya Standards of Imports Order, **Legal Notice No.78** of 15th July 2005. Specifically, **section 6** which reads:

> **"6. (1) The Kenya Bureau of Standards shall issue a certificate of conformity in respect of goods that conform with Kenya Standards or nonconformity approved specifications and a nonconformity report in respect of goods which do not.**
>
> **(2) No Goods that do not conform to the Kenya Standards or approved specifications shall be permitted into Kenya, and shall be re-shipped, returned or destroyed at the expense of the importer."**

Upon re-inspection, the 2nd respondent found that the goods did not meet the Kenya Standards by failing to have an expiry date. While by **section 6(1),** this finding ought to have been communicated to the appellant by a **non-conformity report,** we note that there is no format to present that report. We are satisfied that the respondent's letter of 27th May, 2009, served the purpose the report was intended to serve, namely, to inform the appellant that the goods have been rejected as they did not meet the required standard, hence the appellant was required to re-ship them to their country of origin or have them destroyed by the 2nd respondent at his expense. The letter, addressed to the appellant stated in pertinent part that;

> **"Following the inspection it was determined that the said products failed to comply with the requirements of the relevant Kenya Standards.**
>
> **The non-compliance contravenes the Standards Act Cap 496, Laws of Kenya, and therefore the goods have been rejected. By notice of this letter, you are required to reship the goods back to the country of origin within the next 30 calendar days from the date of receipt of this letter, failure to which the goods will be destroyed at your expense".**

The learned Judge, in the passage we have reproduced in the previous paragraph, applied the correct test for the grant of *certiorari, mandamus* and prohibition. *Certiorari*, as the learned Judge held, was not available to the appellant since what the 2nd respondent did was within its mandate in law. The appellant was given the reason or reasons for the action challenged.

The 2nd respondent could not be compelled to release the impounded goods without breaking the law.

We find no merit in this appeal. Accordingly, it is dismissed with no orders as to costs in view of the circumstances of the case.

Dated and delivered at Nairobi this 28th day of September, 2018.

W. OUKO, (P)

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

ASIKE – MAKHANDIA

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR