



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), GITHINJI & VISRAM, JJ.A.)

CIVIL APPEAL NO. 38 OF 2013

BETWEEN

MABRUI LIMITED.....APPELLANT

AND

KENYA SUGAR BOARD.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Githua, J.) dated 28th February, 2012

in

H.C Misc. Applic No. 628 of 2009)

JUDGMENT OF THE COURT

1) Following the shortage of sugar in the country, the respondent held an auction on the 12th August, 2009, for the allotment of rights to import 260,000 metric tons of sugar under the COMESA mutual tariff concession. This was pursuant to **Regulation 6** of the **Sugar (Import and By products) Regulations** (herein after referred to as the **Regulations**) which stipulates: -

“6.

(1) The Board shall determine annually the amount of refined sugar required by manufacturers and other sugar intended for local consumption taking into account the shortfall in the domestic production.

(2) Pursuant to paragraph (1), the Board shall issue permits for such quantities to be imported by registered importers under the COMESA mutual tariff concession as provided in the schedule to these Regulations.”

The appellant was amongst the licensed sugar importers who participated in the said auction. At the end of the auction, the appellant successfully bid and was allotted 11 lots for which he paid a total amount of Kshs. 9,408,257/=.

2) Apparently, the entire quota of 260,000 metric tons was not taken up hence, the respondent held a second auction on the 22nd September, 2009. The appellant also participated in this auction. According to the appellant, the second auction was riddled with irregularities and unfairness in that, the respondent intervened and changed the rules by dictating a uniform bid price of Kshs. 33,500/= per lot as opposed to allowing competitive bidding contrary to the **Regulations**. It is instructive to note that in the first auction the average bid per lot was between Kshs. 900,000/= and Kshs. 1,000,000/=. The appellant felt that the respondent's conduct placed it at a disadvantage with respect to the price it had paid in the first auction which was quite high and incomparable to the price dictated in the second auction. There was no way it could compete with bidders who purchased the rights to import in the second auction.

3) Subsequently, the appellant vide a letter dated the 9th October, 2009 demanded a refund of the difference between what it had paid in the first auction and the uniform bid price which translated to Kshs. 9,039,757/=. However, the respondent declined to make such a refund in its letter dated the 14th October, 2009.

4) Those were the circumstances which instigated the appellant to file judicial review proceedings in the High Court. By a notice of motion

dated the 28th October, 2009, it sought an order of *mandamus* to compel the respondent to refund the sum of Kshs.9,039,757/=.

5) The respondent on its part, maintained that the auctions were conducted in accordance with the **Regulations** and denied dictating the price in the second auction. Nonetheless, the respondent did admit to encouraging consultation between the bidders with the aim of coming up with a uniform bid price. In the end, all the bidders including the appellant unanimously and willingly agreed to settle for the uniform bid of Kshs. 33,500/= which was above the reserve price. Justifying its intervention, the respondent alluded that it was necessitated by the realization that bidders in the first auction bid at very high prices which resulted in locking out capable importers. Yet some of the successful bidders lacked the capacity to utilize the quotas they had bid for. It was crucial to protect the public from inflation of sugar prices. The respondent further contended that its conduct was not only in public interest but was also geared towards the fulfilment of its statutory mandate, *to wit*, to facilitate equitable access to the benefits and resources of the industry by all interested parties. As far as the respondent was concerned, the appellant had no basis for questioning or attacking any of the auctions since he had benefited from both.

6) Upon considering the evidence before her, the learned Judge (Githua, J.), in a judgment dated the 28th February, 2012, dismissed the appellant's application with costs. In doing so, she found that the appellant had not brought itself within the parameters that would entitle it to the remedy of *mandamus*. In particular, that the issue in dispute revolved around the two auctions which in her view, were contractual in nature and thus fell within the realm of private law. She also stated that: -

“To start with, as mentioned earlier, it was disclosed by the respondent in its pleadings that before instituting this suit, the applicant had already benefitted from the importation rights acquired in both the 1st and 2nd auctions by importing sugar into the country despite the high bid prices paid in the first auction which formed the basis of the Applicant's complaints in this case. This claim by the Respondent was not contravened (sic) by the applicant. In law what is not denied is deemed to be admitted. If the court were to accept the claim by the respondent, since it is not disputed by the applicant, I find that the action by the Applicant of seeking a refund of the monies in question after benefitting from the facility for which the money was paid is purely wrong and unconscionable. The Applicant would in such circumstances be asking the court to allow it to have its cake and eat it at the same time which is obviously not possible. This would also be very unfair to the Respondent.”

7) Aggrieved with the aforementioned decision, the appellant has filed the appeal before us which is predicated on the grounds that the learned Judge erred in law and fact by-

- ***Applying a restrictive and erroneous interpretation of the law relating to the order of mandamus.***
- ***Applying restrictive interpretation of the applicability of the doctrine of legitimate expectation.***
- ***Holding that there was no public duty on the respondent to refund the amount paid in respect of the first auction.***
- ***Holding that the appellant had imported sugar using rights purchased from the first auction whereas there was no evidence to that effect.***
- ***Disregarding the evidence of the respondent's resolution to refund.***
- ***Holding that the availability of other remedies ousted the jurisdiction of judicial review.***

8) Mr. Juma, learned counsel for the appellant, submitted that the respondent being a public body is expected to be fair, reasonable and rational whenever exercising its powers under the **Sugar Act**. Pursuant to the **Regulations**, rights to import sugar were to be acquired through competitive bidding. Therefore, the respondent in intervening as it did changed the rules in the second auction. Accordingly, its actions were amenable to judicial review.

9) He took issue with the finding by the trial Judge that the dispute was in the realm of private law. In his view, the issue in dispute was the manner in which the respondent discharged its public obligation as donated under **Section 4** of the **Sugar Act**. As such, the issue rightly fell within the realm of public law. Citing this Court's decision in **Kenya National Examination Council vs. Republic ex parte Gathenji & Others [1997] eKLR**, Mr. Juma argued that the availability of other forms of remedy does not bar a party's right to seek judicial review remedies.

10) On legitimate expectation, it was urged that the trial Judge ignored and failed to appreciate the import of a letter dated the 24th May, 2010. It was clear in the said letter that the respondent had on its own volition reached a resolution to refund successful bidders in the first auction, what had been paid over and above the uniform bid price. Moreover, the appellant had attached conditions in respect of payment for the lots allocated to it in the first auction. Of essence, is that in every letter forwarding payment, the appellant inserted the following condition: -

“In case of any changes in your current rules we will demand 100% refund of our bid money.”

The same gave rise to a legitimate expectation on the appellant's part to a refund in the event the respondent changed its rules. Mr. Juma emphasised that the appellant, in seeking the refund, did not in any way denounce the rights he had purchased in the first auction. He asked us to allow the appeal on the aforementioned grounds.

11) Mr. E. Otongo, learned counsel for the respondent, agreed with the findings of the learned Judge. Towards that end, he contended that the

learned Judge properly exercised her discretion in dismissing the appellant's application.

12) Disputing the applicability of legitimate expectation in this case, he emphasised that legitimate expectation arose where a public authority has in one way or another made a promise or representation to another. He relied on the High Court's decision in ***Keroche Industries Ltd. vs. Kenya Revenue Authority & 5 Others* [2007] eKLR**. Elaborating further, he stated that the statements contained in the letters forwarding payments by the appellant did not amount to a promise or representation by the respondent to the appellant. They were merely declarations by the appellant. In any event, there was nothing precluding the respondent from altering the rules in subsequent auctions.

13) We have considered the record, submissions by counsel for the respective parties as well as the law. In our view, the appeal turns on the single issue of whether the trial Judge erred in declining to grant the judicial review remedy of mandamus.

14) The nature of judicial review was aptly articulated by this Court in ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd.* [2002] eKLR** as follows:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which 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..."

See also ***Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR**.

15) It is also concerned with the reasonableness of a decision or conduct in question. Lord Green M.R. in the often cited case of ***Associated Provincial Picture House vs. Wednesbury Corporation* [1914] 1 KB 222** remarked as follows: -

"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision."

16) The common law principles of administrative law have now been incorporated in the Constitution in the form of "***Fair Administrative Action***". **Article 47 (1)** of the **Constitution** provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 43 (7)** confers power upon the Parliament to enact legislation to give effect to the rights of fair administrative action. Pursuant to that power, the Parliament enacted the ***Fair Administrative Action Act, 2015 (Act)***. The principles of judicial review are now statutory. They are set out in **Section 7 (2)** of the **Act**. However, as **Section 12** of the **Act** provides, those principles are in addition to, and not in derogation from the general principles of common law and rules of natural justice.

17) In this case, the appellants sought an order of mandamus to compel the respondent to refund a sum of Kshs. 9,039,757 being the amount paid to the respondent for rights to import Comesa Sugar at the auction held on 12th August, 2009. The remedy of the order of mandamus is intended for enforcing the performance of public duties by administrative bodies and tribunals. The learned Judge quoted, *inter alia*, paragraph 129 of the Halsbury's Laws of England, Fourth Edition which provides in part:

"The order must command no more than to do that which the party against which the application is made is legally bound to perform".

18) The learned Judge also quoted an excerpt from the judgment of the Court of Appeal in ***Kenya National Examination Council vs R - exparte; Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal No. 266 of 1996*** where the Court said that:

"An order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..."

The learned Judge considered the ambit of the order of mandamus in relation to the facts of the case and said:

"I have not come across any claim by the applicant that the respondent had a statutory or public duty to refund monies paid to it following bids in an auction where after the auction a bidder feels aggrieved by the way subsequent auctions were concluded or for any other reason".

The learned Judge ultimately held thus:

"In the absence of evidence to show that the respondent had a public duty imposed by the Sugar Act or any other law to refund monies paid to it as a result of allocation of rights in public auctions to import sugar which it had deliberately failed to perform, I find that the Applicant has failed to demonstrate that it is deserving of the orders of mandamus as sought in this case".

In addition, the learned Judge held that, had the court found that the respondent had a statutory duty to refund, nevertheless, the applicant was not deserving of the exercise of discretion in its favour for the reasons that the court gave.

19) The main ground of appeal is that the learned Judge gave a restrictive and erroneous interpretation of the law relating to his order of

mandamus by finding that there was no public duty to refund the money paid for the right to import sugar. The applicant's counsel submitted, in essence, that, because the second auction was held in breach of the Sugar (imports and by-products) Regulations, 2008, which required competitive bidding, the respondent's action was irrational an abuse of discretion and which prejudiced the appellant thereby giving rise to a duty to refund the money.

20) We have considered the grounds of appeal and the respective submissions. We recognise that the respondent is a statutory body and that its decisions particularly relating to rights to import sugar and the granting of permits are amenable to judicial review. However, before the court could grant an order of mandamus as sought, the appellant was required to satisfy the court that the Sugar Act or the Regulations had imposed a legal duty on the respondent which it had failed or neglected to perform.

21) The money that the appellant was claiming was paid for grant of 11 lots each of 500 metric tonnes to import sugar. The appellant bid for the rights to import the sugar in the first auction held on 12th August, 2009. The appellant stated in the application for judicial review that in the first auction, the auction rules set in the law were duly followed. In addition, Eric Ng'eno, the Legal Officer of the respondent stated in the replying affidavit filed in the High Court, amongst other things, that the appellant did not return the importation licences or letter of allocation of rights to import sugar issued to it under the two auctions and also benefited from the two auctions by importing sugar.

In the impugned judgment, the High Court said:

"It is important to note that the applicant is not challenging the legality or validity of the first auction pursuant to which the money for which it is now claiming a refund was paid".

22) It is indisputable that neither the **Sugar Act** nor the regulations provided for refund of money paid to acquire rights to import sugar at all or under any conditions. The validity of the auction or contract entered into pursuant to the exercise of statutory duty was not questioned and was indeed admitted. That contract was not rescinded. It was, in fact, executed and the rights to import sugar accrued to the appellant and it retained the rights and permits. In the circumstances, the remedy of an order of mandamus does not lie.

23) The appellant was aggrieved by the second auction held on 22nd September, 2009. The appellant successfully bid in the second auction and was allotted importation rights under reduced consideration of Kshs. 33,500 per lot. Like the first auction, the second auction or contract has not been rescinded and it was indeed executed.

We agree with the finding of the learned Judge that the second auction was a separate contract. Furthermore, the appellant's case was inconsistent and contradictory. By the application for judicial review, it sought the quashing of the second auction and in the same vein, sought the refund of the money paid in the first auction over and above the money paid in the second auction. The mere fact that the price for the acquisition of sugar importation rights was reduced in the second auction does give rise to a legal duty to refund the difference in prices in the two auctions or to a legitimate expectation that the price paid in the first auction would be refunded.

24) The appellant states in the ground of appeal that the Judge erred in law in holding that the availability of other remedies ousted the judicial review jurisdiction. It was submitted by the appellant's counsel that even if it were to be argued that the relationship between the appellant and the respondent was of a commercial nature, judicial review remedies are available provided an applicant satisfies the tenets for exercise of judicial review jurisdiction. We would agree that nowadays judicial review orders are granted under the common law more freely even where other effective remedies exist. However, the discretion of the court is now circumscribed by statutory provisions. **Section 9** of the Fair Administrative Action provides:

"9 (2) The High Court or subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

9 (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to under sub-section (2) have been exhausted direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

9 (4) Notwithstanding sub-section 3, the High Court or a subordinate court may in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemptions to be in the interest of justice".

The principle in those provisions is that the court should decline jurisdiction to review an administrative action before an applicant has exhausted all available remedies except in exceptional circumstances and with the permission of the court on application.

25) In the instant case, the court in essence held that the remedy order of mandamus to refund the money did not lie but went on to say that any disputes arising from the two contracts would be disputes in the realm of private law which should be adjudicated upon in a civil suit before ordinary civil courts and further that judicial review remedies including an order mandamus cannot be issued to resolve disputes arising from what is essentially private contracts of sale between two parties. Thus, the remedy was principally declined because it did not lie and not because there were other available remedies which had not been exhausted.

26) Lastly, the remedy for judicial review is a discretionary remedy. The court considered the circumstances of the case and arrived at the conclusion that had the appellants established a right to the remedy, nevertheless, it could not have been a proper exercise of discretion to grant it. The factors that the court considered included the fact that the appellant had already benefited from importation rights acquired in both auctions, the fact that the claim unconscionable and an abuse of the process of the court. Those findings are derived from the facts of the case. The principles for interfering with the exercise of judicial discretion by the appellate court are well established. There are no grounds for interfering with the discretionary jurisdiction of the court particularly in view of our finding that the decision of the court that mandamus did not lie was in accordance with the law.

27) For the foregoing reasons, the appeal is dismissed with costs to the respondent.

We so order.

Dated and delivered at Nairobi this 14th day of July, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR