



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MWERA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 50 OF 2012

BETWEEN

KENYA SUGAR BOARD .....APPELLANT

AND

REPUBLIC..... 1<sup>ST</sup> RESPONDENT

THE COMMODITY HOUSE LTD..... 2<sup>ND</sup> RESPONDENT

STUNTWAVE LIMITED..... 3<sup>RD</sup> RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Gacheche, J) dated 4<sup>th</sup> April, 2011*

*in*

*H.C.MISC. C. NO. 249 OF 2010)*

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**JUDGMENT OF THE COURT**

**Introduction**

1. For a long time in this country, what had been dubbed as "the Sugar Wars" pertaining to the rights to import sugar from the COMESA region under the COMESA mutual tariff concessions, or simply duty free sugar, was an annual bruising orgy which seemingly defied regulation as it was riddled with corruption and opaque trade practices. In an effort to bring sanity, order and fairness to the industry, **The Sugar (Imports and By-products) Regulations (L.N No.114 of 2008)** were published under the **Sugar Act (No.10 of 2001)** and were further amended by **L.N No. 122 of 2009** (hereinafter "*the Regulations*"). We may perhaps quote the Chief Executive Officer(CEO) of the Kenya Sugar Board on the rationale for the regulatory changes:

*"In an effort to improve the sugar import procedures that provided an avenue for abuse by some unscrupulous, traders, they introduced an auction system within the import regulations that was intended to transfer some of the "super profits" made by the traders to the industry. Through this process the Board also hoped to create a fair trading environment that encourages competition and transparency."*

2. **Regulation 6** of the Regulations provides as follows:

**“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.”**

After determination of the quantities of duty free sugar to be imported, the Board would offer the right to import the said quantities to registered importers through an auction. The rules governing auctions are spelt out in the schedule to the Regulations, thus:-

*“(a) The auction of rights to import the sugar is open to all pre-qualified importers for expression of interest.*

*(b) The rights shall be sold in lots of 500 metric tons each.*

*(c) The bid price of the right shall be determined by the difference between average ex-factory price of domestic sugar and the CIF landed Mombasa prices plus IDF fees of imported sugar.*

*(d) The highest bidder shall be the person offering the largest margin.*

*(e) Only the importers who qualify at the auction will be authorized to import as per the auction.*

*(f) The qualified importers shall make returns in prescribed format to Kenya Sugar Board for monitoring purposes to ensure that only the allowed quantity of sugar enters the country duty free.*

*(g) Participation at the auction shall be by catalogue only.*

*(h) To be issued a catalogue, a Banker’s Cheque deposit of Ksh.200,000 (Shillings two hundred thousand) clearly marked “Kenya Sugar Board” must be paid at the KSB Cash office and receipt given for the amount before the date of the auction.*

*(i) A successful bidder shall be required to pay full amount for the bid balance within 30 days failure to which the deposit shall be forfeited.*

*(j) The right to import shall be issued only after full bids amount have been paid.*

*(k) The right to import is not transferable.”*

3. The **Kenya Sugar Board** (KSB) is a statutory corporation constituted under the **Sugar Act, Cap 342**, Laws of Kenya, as a body corporate with perpetual succession, common seal, capable of suing and being sued, owning moveable and immovable property, capable of borrowing or lending and doing or performing all such other acts necessary for the proper performance of its functions under the Act which may lawfully be done or performed by a body corporate - see **Section 3** of the Act. **Section 4** of the Act spells out the objects and functions of the Board while **Section 12** protects individual members of the Board from personal liability for acts done in good faith in the course of execution of the functions, powers or duties of the Board. **Section 13**, however, does not exempt the Board from liability and states, as follows:

**“Section 12 shall not relieve the Board of the liability to pay compensation to any person for any injury to him, his property or to any of his interests caused by the exercise of any power conferred by this Act or by the failure, whether wholly or partially, of any works.”**

4. All those provisions of the law are relevant to the appeal before us which relates to an order of mandamus granted by the High Court, Gacheche J. on 4<sup>th</sup> April 2011, compelling KSB to refund a sum of Kshs.87,837,000/= to **M/S Commodity House Ltd** (CHL) and **Stuntwave Ltd** (SL), two of the sugar importers who lawfully participated in an auction organized by KSB under the Regulations. KSB was dissatisfied with that decision and is now before us in this first, and possibly last, appeal. It is represented before us by learned counsel Mr. Kaumba Samuel Odiwuor who was instructed by the Attorney General, while the two respondents were represented by Senior Counsel Pheroze Nowrojee, assisted by learned counsel Mr. Asige.

### **Background.**

5. In August 2009 KSB determined, under **Regulation 6(1)**, that the sugar quota for importation under the COMESA mutual tariff concessions for that year was 260,000 metric tons. In accordance with **Regulation 6(2)** and the schedule thereto, it published a public Notice in the local media inviting interested bidders to a Public Auction for the right to import the sugar quota, to be held in its premises in Nairobi on 10<sup>th</sup> August 2009. The attention of the interested bidders was drawn to the Regulations and particularly **Regulation 6(2)** and the schedule containing the auction rules, as reproduced above, which it cautioned every interested bidder to familiarize themselves with. The auction was held as scheduled and all the 260,000 MT quota was auctioned out to some 20 highest bidders. On average, the right to import each lot of 500MT was sold for 1million shillings.

6. CHL and SL were among the successful bidders and they promptly paid for their lots the sums of Kshs.46,210,000/= and Kshs.41,627,000/= respectively, making a total of Kshs.87,837,000/= on 9<sup>th</sup> September 2009. There is no dispute about those payments over and above the Kshs.200,000/= each of them paid before attending the auction. About two weeks after that payment, CHL and SL learned that KSB was intending to hold another auction for the rights to import the same duty free sugar and they expressed their objection to that intention. They did not participate in the purported auction held on 22<sup>nd</sup> September, 2009 but sent an observer who advised them that lots were simply awarded to those present who were ready to pay an average of Kshs. 33,000/= per lot of 500MT without any competitive bidding.

7. CHL and SL wrote to KSB the following day, 23<sup>rd</sup> September, 2009, expressing their shock at the illegal, irregular and strange methodology used, which in their view, was compounded with corruption and favouritism and which rendered the earlier auction otiose as the successful bidders in the first auction could not compete with the latter who paid peanuts for their bids. They threatened to quit from the whole process and demand refund of the entire amount paid to KSB if the latter process was not nullified. There was no response from KSB.

### **The Judicial Review Application.**

8. By their notice of motion dated 29 July 2010, CHL and SL sought two Orders for which they had obtained leave of the court on 15th July 2010:

*“b) An order for judicial Review orders by way of Certiorari to remove to this Court for purposes of being quashed the decision of The Kenya Sugar Board refusing to refund the Applicants a total sum of Kshs.87,837,000/= being the bid monies paid by the Applicants for Auction Rights to Import COMESA Sugar on 8<sup>th</sup> September, 2009.*

*c) An Orders for Judicial Review Orders of Mandamus directed to The Kenya Sugar Board to compel them to refund the applicants a total sum of Kshs.87,837,000/= being the bid monies paid by the Applicants for Auction rights to Import COMESA Sugar on 8<sup>th</sup> September, 2009.”*

They pleaded that KSB was unreasonable in purporting to hold a second auction without following the law and procedure; irrational and biased in allocating importation rights on pro rata basis in the purported second auction; and also abused its powers. KSB thus trampled on the legitimate expectation of the two applicants to be treated fairly in the distribution of auction rights and further committed

breaches of its own Statute and regulations.

9. The prayer for an order of *certiorari* was abandoned at the hearing of the motion when it transpired that KSB did not in fact make any decision refusing to refund the money as sought by the applicants. Instead, KSB confirmed that it had passed a resolution to make the refund but could not do so because the money had been committed to the Sugar Development Fund and, as such, the concurrence of the Treasury and the Ministry of Agriculture (hereinafter "*the Ministry*") was necessary before the funds could be released. KSB further displayed correspondence with the Treasury, which offered the opinion that the money should not be refunded, and the Ministry, which initially had no objection to the resolution made by KSB for refund, turned round to say it supported the opinion of the Treasury. KSB further raised objections to the Judicial Review application stating that it was not only time-barred, but also fatally defective as the facts in support of the motion were contained in the "Statement" rather than in the "Affidavit" where in law they should appear. It also contended that there was misjoinder in the pleadings since the Treasury was a necessary party to the proceedings but was not joined therein.

9. Four issues therefore arose for consideration by the High Court:

- a) Whether the application was time-barred;
- b) Whether the application was fatally defective;
- c) Whether there was misjoinder in leaving out the Treasury as a party to the proceedings;
- d) Whether the order of mandamus should issue as sought.

In granting the order of *mandamus*, the High Court held that after withdrawal of the prayer for *certiorari* which had a time limit of six months, there was no time-bar for *mandamus*; that the application was not defective because all the facts in support of the application were in the Affidavit; that there was no law requiring the Treasury to grant authority before reimbursement of funds paid to KSB for a specific purpose and therefore there was no misjoinder; and that KSB acted illegally, irrationally and contrary to the applicants' legitimate expectation that should KSB change the procurement procedure, they would get a full refund of their monies. The court stated on the last issue as follows:

**“There is no doubt that the board is a public body, which can be directed by way of judicial review by this court in the performance of its public duties. Needless to say, it has a duty to act fairly and within the law.**

**It is on the record that the Treasury noted that there ‘was collusion among the bidders during the second auction to defeat the auction process’ and that consequently, the second auction was not very competitive.**

**The fact that the Board deliberated on the ex parte applicants’ request for a refund and that it approved of the on 2/4/2010 is not in doubt, nor is the fact that these ex parte applicants declined to bid as the second auction. Given the circumstances, it cannot be said that there was fair competition in the bidding process.**

**I find that the decision by the Board to invite bidders for the second auction was illegal and irrational as it would prejudice as it actually did, the successful bidders in the first auction.”**

#### **The Appeal and submissions of counsel**

10. The appeal before us is premised on seven grounds which we reproduce hereunder:

“1. *The learned trial judge erred in law and in fact in finding that the ex-parte applicants had made a case for grant of orders of mandamus.*

2. *The learned trial judge erred in law and in fact in failing to appreciate that the ex-parte applicants application was fatally defective.*
3. *The learned trial judge erred in law and in fact in failing to find that the respondents needed concurrence of Treasury to make any payments in line with the State Corporations Act.*
4. *The learned trial judge erred in law and in fact in failing to appreciate that the Orders of Mandamus was not obtainable as the acts complained about had already taken place.*
5. *The learned trial judge erred in law and in fact in finding that the respondents acted irrationally and contrary to legitimate expectations of the ex parte applicants owing to the change in procurement procedures.*
6. *The learned trial judge erred in law and in fact in finding that the ex parte applicants were entitled to a refund of the monies already paid for the importation.*
7. *The learned Judge erred in law and in fact by failing to consider the provisions of the State Corporations Act and the Sugar Act 2001.”*

Those grounds were argued in two tranches by learned counsel for the appellant Mr. Odiwuor who summarized them thus:

- 1) Procedural competence of the Judicial review application.
- 2) Scope and amenability of the subject matter to Judicial review proceedings.

11. On the first ground, Mr. Odiwuor submitted that the rules of natural justice were flouted by the High Court since KSB had, in its response to the motion, clearly stated that it had resolved to refund the money but there were other independent bodies, the Treasury and the Ministry, whose concurrence was necessary before that could be done. Those two bodies, or the Attorney General who generally advises Government Ministries were not given a chance of being heard. In his view, the two appellants, as well as the court, had a duty to summon representatives of the two Ministries under **Order 53 rule 4(3)** of the Civil Procedure Rules to shed some light on the matter. Furthermore, the suit was filed after the promulgation of the new Constitution which is very strong on protection of fair hearing rights under **Article 10**, as well as **Article 159 (2)(a)** and **(e)** which protect and promote the principles of the Constitution, especially justice to ALL irrespective of status. There was no reason, in his submission, why the two Ministries or the Attorney General were not served.

12. On the second broad ground, Mr. Odiwuor submitted that the subject matter was contractual in nature considering that the public advert for the auction was an invitation to treat which matured into a contract once the two applicants accepted the terms. As such, there were other efficacious ways of addressing the alleged breach of contract. The pertinent question would therefore be: what part of the contract was breached and which party demanded a refund? Furthermore, he submitted, there were two separate contracts offered in two different auctions which gave rise to different consequences requiring different responses. As it is, Mr. Odiwuor concluded, there was no cancellation of the contract before the two appellants demanded the refund.

13. In response to those submissions, learned senior counsel Mr. Nowrojee submitted that they were an afterthought tailored to justify an unlawful step taken by KSB. In his view, the judicial review proceedings were not about the two auctions but about the refund which KSB acknowledged and resolved was justifiable. They were not about a contract either, since KSB was not procuring anything. It was exercising statutory powers and the Legal Notices under which it published Public Auction Notices did not forbid the refund of any monies paid in the course of the bidding. The question is whether the refusal to refund was based on legality or was capricious and unreasonable. He observed that the only reason given by KSB for refusal to refund was the purported caveat placed by the Treasury, but he submitted that the Treasury itself had expressly advised KSB that this was not a matter for the Treasury and the Treasury was only expressing an opinion. There was therefore, either in pleadings, grounds of appeal or submissions of counsel, no law shown to establish that KSB must have the mandatory concurrence of the Treasury before discharging its responsibility under the law. The same applies to the Ministry which was not opposed to the refund at first but subsequently made an about-turn. Such dithering by public bodies, he submitted, was amenable to the most efficacious remedy, judicial review

proceedings, which looked at the process of refund arising from circumstances in which neither the Treasury nor the Ministry was involved and which the law squarely laid on the hands of KSB. To underscore that responsibility, Mr. Nowrojee informed us, and Mr. Odiwuor did not dispute it, that a consent order was recorded in the High court during execution proceedings in which KSB was to deposit the decretal amount in an interest earning account in the names of the Advocates on record and KSB complied without seeking any approvals from or concurrence of the Treasury or the Ministry.

11. As for the submission under **Order 53**, Civil Procedure Rules, that the Treasury and the Ministry should have been joined in the proceedings, Mr. Nowrojee submitted that the rules thereunder did not cast any duty on the court but only a discretion to consider applications for joinder. Neither the Treasury, the Ministry nor the Attorney General made any application to be joined and the court cannot therefore be blamed for failure to exercise a discretion which was not sought. It was indeed KSB, which had all the facts, which should have brought in other parties or the Attorney General, if it was persuaded that they were necessary. It was not therefore a candid submission.

12. Turning to the New Constitution and the argument about fairness, Mr. Nowrojee submitted that the submission was misplaced since there was no application or notice of appeal from the Treasury, the Ministry or the Attorney General to say that they were adversely affected by the proceedings. It was instead KSB which, in the pleadings and the letters exhibited in evidence, acknowledged that the two applicants were unfairly treated when observations were made by COMESA secretariat that the open-ended bids in the first auction were unjustifiable and escalated consumer prices of duty free sugar amounting to non-tariff barriers, hence KSB's abandonment of the system in the second auction. That unfairness, in his view, manifests itself in a huge sum of Kshs.87.8 Million being withheld unjustifiably since 2009 up to date which alone was sufficient to destroy the businesses of CHL and SL.

13. Finally, Mr. Nowrojee, at the tail end, made a surprise submission that there was no valid appeal before the court. That is because a single judge of this court issued an order extending the time for the appellant to file the record of appeal, but the order was not complied with and the record of appeal was filed out of time. The Appeal was therefore invalid and should be struck out.

14. In his brief rejoinder, Mr. Odiwuor conceded that the appeal record was filed out of the time extended by the court. He submitted, however, that there was no challenge to the record of appeal until the belated submission which seeks to have an important appeal involving Kshs.87 million of public funds, dismissed on a technicality. As to the joinder issue, Mr. Odiwuor submitted that the three Government institutions were at cross purposes. KSB, however, believed that the other two were necessary parties to the proceedings and therefore, it was incumbent on the court, even on its own motion, to summon the other two, to participate in the proceedings.

### **Analysis and Disposition.**

15. We must first deal with the technical objection *in limine* since a decision to strike out the appeal would obviate further analysis of the appeal. There is no dispute that an order was issued extending time for filing the appeal and that there was no strict compliance with that order as the record of appeal which was filed on 21st March 2012, attests. There was thus an immediate invitation under **Rule 84** of the **Court of Appeal Rules, 2010**, for any affected party to apply to the court to strike out the appeal. The caveat under the rule, which is couched in mandatory tone, is that such application must be filed within thirty days. In this case the time ran up to 20<sup>th</sup> April 2012. There is no consequence spelt out under the rule for failure to exercise that right, but it must be in our view, that the affected party is deemed to have waived such right. We are fortified in this view by the provisions of **Rule 104(b)** which provides, in relevant part, as follows:

**“At the hearing of an appeal—**

**b) A respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 84.”**

No leave was sought or granted by the court before the submission was belatedly made orally on 17th December, 2012.

16. At all events, we would be slow to resort to striking out procedures unless they were properly invoked, in view of the provisions of Article 159 of the Constitution and **Sections 3A** and **3B** of the Appellate Jurisdiction Act. The combined effect of those provisions is in favour of proceeding to determine the dispute between the parties herein on the merits. Striking out the appeal on a technicality after hearing all the submissions of counsel on the merits of it, would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal and the dispute between the parties. For those reasons, we reject the objection made on the competence of the appeal.

17. It now remains for us to consider, as argued by the appellant under two broad grounds: whether, firstly, there were procedural defects which vitiated the judicial review proceedings, and secondly, whether the scope of the subject-matter was amenable to Judicial Review. In doing so, we must recall some of the principles which would guide the court in determining the issues.

18. Firstly, this is a first appeal and we are duty bound to reconsider the whole matter and re-evaluate the same to reach our own conclusions. Secondly, as regards the remedy of judicial review generally, it only applies to the decision-making process and not the merits of the decision. We may quote from the Supreme Court Practice 1997 Vol. 53/1-14/6:

**“It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”**

In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 the Court of Appeal expressed itself 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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”**

19. Thirdly, for a long time, the remedy concerned itself with decisions or acts which were tainted with illegality, irrationality and procedural impropriety. We take those grounds from the case of Council of Civil Service Unions vs. Minister for Civil Service [1984] 3 ALL ER 935 at p.950 para. j, where Lord Diplock identified them and stated:-

**“By “illegality” as a ground for Judicial Review, I mean that the decision-maker must understand correctly the law that regulated his decision-making power and must give effect to it. By “irrationality” I mean what can now be succinctly referred to as *Wednesbury unreasonableness* (see *Associated Provincial Picture House Ltd V Wednesbury Corp.* [1947] 2 ALL ER 680; [1948] 1K.B 223).”It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.**

**“.....I have described the third head as “procedural impropriety” rather than failure to**

*observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by the administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failing does not involve any denial of natural justice."*

20. There is, however, a large body of persuasive judicial pronouncements to show that the boundaries of the remedy of Judicial review have expanded and will keep doing so in tandem with societal values. As Nyamu J. (as he then was) stated in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:

*"Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.*

*This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century."*

We appreciate the persuasive force of those pronouncements, and we adopt them.

21 Fourthly, the remedy is discretionary and will be granted regardless of the existence of other remedies available to the applicant. And, finally, as regards the judicial review order of Mandamus which is invoked in the matter before us, this court has set the parameters or scope in many decisions including Kenya National Examinations Council vs. Republic ex-parte Gathenji and Others, Civil Appeal No.266 of 1996 [1997] eKLR, where the court summarized the exposition from *HALSBURY'S LAWS OF ENGLAND*, thus:

*"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.....The order must command no more than the party against whom the application is made is legally bound to perform".*

22. With those principles in mind, we now revert to the first ground of appeal. The long and short of it is that the failure by the applicants in the court below, or by the court itself, to join the Treasury, the Ministry or the Attorney General in the proceedings was not only grossly unfair, but vitiated the

proceedings. The basis for this submission was **Order 53 rule 4** of the Civil Procedure Rules which provides in relevant part as follows:

**“If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct”.**

That provision is in terms discretionary and could only have been acted upon on reason, not capriciously. The factual basis upon which the appellant relies, however, is that the Treasury and the Ministry had informed KSB that the money paid by CHL and SL in the auction should not be refunded. This was a fact known to KSB, the Treasury and the Ministry as they had exchanged letters between themselves which neither CHL nor SL were party to or aware of until after KSB's response to the Judicial review application. It is therefore strange that KSB should require CHL and SL to have joined other parties to the proceedings when they filed their application.

23. Even after the response was made by KSB, the court had no obligation to join persons who did not seek to be joined and who the applicants had no wish or reason to proceed against since it was clear to them that the matter was purely between them and KSB. Indeed, the High Court agreed with them when it dismissed that line of submission, stating:

**“It also maintains that the Treasury should have been made a party to this suit. It has however not indicated under what law the Treasury would be required to grant an authority for reimbursement of funds which were paid to the Board at the first instance or for a specific purpose, and on that ground alone I find that its reasons for non-compliance is not convincing. The issue of non-joinder cannot lie either for the Treasury was never a party to the agreement between these ex parte applicants and the Board. That ground is also bound to fail.”**

We agree with that finding. *Afortiori*, the statute that created and constituted KSB gave it corporate independence as summarised in paragraph 3 above and, in our view, it had the sole responsibility to address and resolve the claim by CHL and SL. It is instructive that KSB did not seek the approval or consent of the Treasury or the Ministry when it eventually deposited the decretal amount in court.

24. Finally on this issue, we must recall that Judicial Review proceedings are *sui generis*. They are neither civil nor criminal. As has been said before, “*a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment*”. -See **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005.** Orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue.

We find no merit in the first broad ground of appeal and dismiss it accordingly.

25. On the second ground, the appellant basically says that the subject matter of the dispute was a contract and therefore the remedy of judicial review was not available to the respondents herein. We have set out above and re-evaluated the factual background to the dispute, the pleadings on record, the findings of the High court, the submissions of counsel, and the relevant law. In the end we have come to the conclusion that this ground too must fail.

26. As stated earlier, the remedy of judicial review is not subject to the absence of any other remedy. As we shall see shortly, the respondents' claim was not based on contract, but even if it was, they were at liberty to resort to judicial review so long as all parameters of their claim satisfied the legal requirements of that remedy. We are satisfied that KSB is a public body and, as such, its actions are amenable to

judicial review. The actions complained of in this matter relate to KSB's actions in the course of execution of its mandate which is spelt out in legal instruments; that is to say, the fair, competitive, transparent and accountable allocation of duty- free sugar importation rights. The legal and procedural requirements for that process are set out above. KSB readily conceded that the process was ultimately grossly unfair to the respondents, hence the resolution to make refund of their money. We hold, as the High Court did, that the actions of KSB were tainted with irrationality and illegality. The respondents were therefore entitled to legitimately expect that KSB would immediately refund the undisputed amounts paid to KSB but KSB took refuge behind the Treasury. As stated earlier, the Treasury had nothing to do with the lawful execution of the duties of KSB under the Act, and expressly stated so. It merely gave an opinion to KSB which was not binding. We think the actions of KSB were lacking in good faith and proper exercise of power. The further delay in releasing the funds lay at the door of KSB and it was proper, therefore, that an order of mandamus be issued to compel release of the funds. We so find.

27. The upshot is that this appeal is lacking in merit and we order that it be and is hereby dismissed in its entirety. The costs of the appeal shall be borne by the appellant.

*Dated and delivered at Nairobi this 21<sup>st</sup> day of February, 2014.*

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. MWERA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**REGISTRAR**