



**Roy Transmotors Limited & another v Kenya Bureau of Standards (Commercial Case E301 of 2023) [2024] KEHC 2952 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E301 OF 2023**

**PM MULWA, J**

**MARCH 21, 2024**

**BETWEEN**

**ROY TRANSMOTORS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**EZEE LIFE PRODUCTS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA BUREAU OF STANDARDS ..... DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Preliminary Objection dated 10<sup>th</sup> August, 2023 brought by the Defendant on the grounds that:
  - i. The Honourable Court lacks jurisdiction to entertain or adjudicate over the suit herein by reason of Section 11 of the *Standards Act*, Chapter 496 of the laws of Kenya which provides that any person aggrieved by the decision of the Defendant will appeal to the Standards Tribunal within 14 days of the decision.
  - ii. The Plaintiff having failed to exhaust the remedies under the *Standards Act*, Chapter 496 of the laws of Kenya is fatally defective and an abuse of legal process hence should be dismissed in limine with costs.
2. The parties were directed to dispense with the preliminary objection by written submissions.
3. A brief background of the matter is that the Plaintiff lodged a suit against the Defendant by way of a plaint dated 5<sup>th</sup> December 2022 and sought for reliefs in the nature of special damages for the sum of Kshs. 26,552,745.20 being the worth of 5094 bales of Ezee baby diapers seized and destroyed by the defendant, loss of profits for the 5094 bales, general damages, interest as well as the costs of the suit.



4. The preliminary objection challenges the jurisdiction of this court to entertain the matter in view of Section 11 of the [Standards Act](#) and failure to exhaust the remedies under the Act.
5. According to the defendant the original jurisdiction vests in the Standards Tribunal by virtue of section 11 of the Standard Act Cap 496 which provides:
 

“Any person who is aggrieved by a decision of the Bureau or the council may within 14 days of the notification of the act complained of being received by him appeal in writing to the Tribunal”
6. Counsel submits that the subject of this suit is a seizure notification dated 12<sup>th</sup> October 2018 and the subsequent destruction of 4880 bales of diapers by the defendant. That if the plaintiff was aggrieved by the decision of the defendant he was entitled to appeal at the tribunal as per sections 11 and 14A (4) of the [Standards Act](#).
7. The defendant argued that the plaintiff’s claim ought to be dismissed for failure to exhaust the available statutory mechanism.
8. It was submitted for the plaintiff that there are two instances relevant to this case under which an appeal can be lodged before the Standard Tribunal. Firstly, there has to be a decision of the Bureau or the Council, and secondly, there has to be a written notice or published gazette notice issued to the owner of goods. Such a notice ought to be issued at least 14 days before destruction of the goods.
9. The plaintiff submitted that the cited case of United Millers Limited v Kenya Bureau of Standards & 5 others [2021] eKLR is distinguishable from the instant one as there is no decision, at least not one that was notified to the owner of the goods as envisioned under section 11 of the [Standards Act](#).
10. The plaintiff maintains that the Court has the requisite jurisdiction to hear and determine the present matter, and the preliminary objection ought to be dismissed.

### **Analysis and determination**

11. I frame the following issues for determination:
  - i. whether the preliminary objection meets the requisite threshold
  - ii. whether this court has jurisdiction over the subject matter
12. on the first issue, the preliminary objection seeks to oust the court’s jurisdiction for the reason that there was failure to exhaust the remedies provided under section 11 of the [Standards Act](#) (quoted hereinabove).
13. It is now trite that a preliminary objection can be brought at any time at least before the conclusion of the case. However, the good practice is that it ought to be brought at the earliest opportunity. It ought to be raised primarily on pure points of law capable of disposing the suit (see Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696). And for it to succeed the facts of the case should not be contested.
14. In the circumstances I find the preliminary objection meets the threshold.
15. Turning to the second issue, jurisdiction is key in judicial proceedings and a court acting without it acts in vain. In Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 the court held that: - “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”



16. The High Court derives its jurisdiction from Article 165 (3) and (6) of *the Constitution* of Kenya. The article confers the court with unlimited original jurisdiction in criminal and civil matters.
17. The plaintiff argued as much and submitted that there exist contested facts which require evidence to be submitted and that alone justifies the dismissal of the preliminary objection.
18. The preliminary objection though appearing to raise pure issues of law on the issue of jurisdiction, I find that the issues raised cannot be adequately determined without venturing into the facts and establishing whether the defendant rendered a decision capable to be appealed at the Standards Tribunal.
19. The plaintiff submitted that there was no decision of the Bureau or the Council or even written notice issued in accordance with section 11 of the *Standards Act*, and further there was no adherence to the procedure provided by section 14A (3) of the Act which then would have given rise to the filing of an appeal before the Standards Tribunal. The plaintiff only became aware of the seizure notification during the proceedings in Criminal Case No. 2178 of 2018 – Republic v Mukhtar Rehemtulla Omar & Another where its directors had been charged.
20. The defendant while citing the case of Martin Kabubi Mwangi vs County Government of Laikipia (2019) eKLR invited the court to make a finding that there is no cause of action in the instant suit for the failure to exhaust the available remedies before approaching this court.
21. The Court of Appeal in Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, stated:
 

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...”
22. Appreciating the above position, I am also alive to the exceptions of the doctrine of exhaustion as laid down in R. Vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) Kenya and 6 others [2017] eKLR thus:
 

“What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)
23. The rationale behind the above exceptions is that statutory provisions ousting jurisdiction must be construed restively. In the instant case, the record shows that the nature of the plaintiff’s claim against



the defendant is for payment of special and general damages for loss of business arising from the seized and destroyed goods without following the proper procedure. The actions of the defendant in acting contrary to the laid down procedure leaves no doubt that indeed there is need for this Court to assume the jurisdiction.

24. Further, it is clear from the orders sought in the instant suit, this Court ought to exercise its discretion, evaluate the facts and evidence on record and render a just determination of the issues.

**Disposition**

25. The preliminary objection is without merit. As a consequence, the notice of preliminary objection dated 10<sup>th</sup> August 2023 is hereby dismissed with costs to the plaintiff.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH 2024.**

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**P. MULWA**

**JUDGE**

**In the presence of:**

Ms. Sabina Khabore h/b for Mr. Njuguna for plaintiff

Ms. Maina h/b for Mr. Gachagua for defendant

Court Assistant: Carlos

