



Blantyre Steel Limited v Kenya Bureau of Standards (Tribunal Appeal E007 of 2023) [2023] KEST 1248 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEST 1248 (KLR)

**REPUBLIC OF KENYA
IN THE STANDARDS TRIBUNAL
TRIBUNAL APPEAL E007 OF 2023
GM MBURU, CHAIR, MS MAKHANDIA, P MUNGAI & A ONG'INJO, MEMBERS
SEPTEMBER 22, 2023**

BETWEEN

BLANTYRE STEEL LIMITED APPELLANT

AND

KENYA BUREAU OF STANDARDS RESPONDENT

JUDGMENT

Introduction

1. The Appellant is a limited liability Company licensed to carry on Business within the Republic of Kenya. The Appellant principle business activity is importation and sale of various hardware products.
2. The Respondent is a body corporate established under Section 3 of the *Standards Act*, Cap 496 of the Laws of Kenya (*Standards Act*) whose functions among others include promoting standardization industry in Kenya.
3. The Appellant filed this Appeal on 5th July 2023 seeking the following reliefs;
 - a. That the Respondent's decision of 3rd May 2023 rejecting the Galvanized Wires (2.5mm) be set aside.
 - b. That the decision of the Respondent of 21st June 2023 further rejecting the Galvanized wires (2.5mm) be set aside.
 - c. That the Galvanized Wires (2.5mm) imported by the Appellant be deemed as fit for purpose and be declared as such.
 - d. That the Appellant be allowed to sell the Galvanized Wires (2.5mm) to it's customers without interference by the Respondent forthwith.
 - e. Costs of this Appeal be provided for.



- f. Any other relief as this honourable Tribunal may deem fit and just to grant.
4. The Respondent filed its response on 3rd August 2023 in which it opposed the Appellant's Appeal.

Appellant's Case

5. The Appellant states that sometime in January 2023, it imported from China among other things Zinc Galvanized wires whose diameter was 2.5 mm whose value was Khs. 5,500, 000 (Five Million Five Hundred Thousand) from China. That the Galvanized Wires were subjected to conformity test in China and the Appellant issued with Certificate of Conformity (CoC) before they were exported to Kenya.
6. The Galvanized Wire (2.5mm) after inspection in China was zinc coated to rate at 72min and declared eligible for Kenya market. That upon docking in Kenya, the Respondent conducted tests on the Galvanized Wires and issued a report stating that the Zinc coating on the wires was rating at 24.9min against the required standard of 72min. The Respondent therefore by a letter dated 3rd May 2023 rejected the said goods and ordered the Appellant to re-ship them back to the country of origin within 30 days of the said letter failure to which the same would be destroyed at the Appellant's cost.
7. Dissatisfied with the Respondent's decision, the Appellant sought the second opinion and hence referred the goods to the Ministry of Roads and Transport to conduct an independent test on the Galvanised wires. The ministry of roads indeed conducted the test and the galvanised wires passed the test having rated at 79.4 in mass zinc coating.
8. That upon receipt of this results, the Appellant wrote to the Respondent on 22nd May 2023 requesting the Respondent to reconsider its decision and certify the Galvanized wires as fit for the market in which the Respondent vide a letter dated 21st June 2023 declined.
9. The Appellant attached the following documents to support its case;
- i. Certificate of Conformity.
 - ii. Test report from China.
 - iii. A letter from the Respondent dated 3rd May 2023 giving results for the tests.
 - iv. A letter dated 15th May 2023 from Ministry of Roads giving results for the tests.
 - v. Letters dated 22nd May 2023 and 21st June 2023.
10. The Appellant relied on the decision of this Tribunal in the case of Sinotruck Machinery And Equipment Company Limited V Kenya Bureau of Standards [2018] eKLR

Respondent's Case.

11. The Respondent's case is that under Section 4 of the [Standards Act](#) Chapter 496 of Laws of Kenya, it is mandated to conduct tests on imported commodities to determine if they comply with the set Standards. Further the Respondent executes this mandate by inspecting imports both at the port of origin through its Agents or by itself at the point of destination. The inspection procedures as governed by The Standards (Verification of Conformity to Standards and other Applicable Regulations) Order, 2020 gazetted in Legal Notice 78 of 2020 (hereinafter referred to as LN 78 of 2020) Clause 7 of the LN 78 of 2020 on verification of conformity provides that

7.



- (1) Any product which is the subject of this order may be subjected to verification of conformity to Kenyan Standards, approved specifications and other applicable regulations in the exporting country or transshipment port by the inspection body appointed under Paragraph 6.
 - (2) Notwithstanding the provisions of subparagraph (1), the Bureau may re-inspect the imported products at a port of entry if, in the Bureau's opinion, it is necessary to do so.
12. Further the Respondent avers that by way of disclaimer on KEBS Certificate of Conformity documents, it clearly states;

“KEBS may reject the consignment covered by this CoC if found to be non conforming on verification at the port of entry.”
13. The Respondent further argued that it has absolute discretion in deciding which product ought to be sampled for testing regardless of the existence of Certificate of Conformity. Therefore, the decision to sample and test the consignment was well within the provisions of **LN 78 of 2020** and not actuated by any malice as implied by the Appellant.
14. The Respondent further argued that at the port of entry and based on the intelligence reports, a sample was drawn from the Appellant's consignment and tested against the requirements of the Applicable standards (**KS EAS 135-2021**) and failed in Zinc coating which led to the rejection of the consignment.
15. The Respondent rejected the test results from a different laboratory because it could not verify the test piece sample tested by the different laboratory as well as the test methodology used. Further the Respondent argued that it is the only body under the law mandated to conduct tests for purposes of conformity assessment and that the Appellant did not avail any material to fault the Respondent's test report.
16. The Respondent relied on two precedents namely;

Republic vs Kenya Revenue Authority ex parte Proto Energy limited E 023 OF 2021

and

Republic Versus Public Procurement Administrative Review Board and 2 others Exparte Rongo University 2018 eKLR.
17. Both Parties herein agreed to dispense of this matter by way of written submissions. We have considered the said submissions and authorities filed.

Issues for Determination

18. This Honourable Tribunal identified the following three issues for determination;
 1. Whether the Respondent has mandate to test imported goods for compliance notwithstanding the Certificate of Conformity issued to the Appellant at the port of origin.
 2. Whether the Respondent's findings at the point of entry overrides the CoC at the point of origin.
 3. What is the implication of a conflicting result from another body in this case Ministry of Works vis- a- vis KEBS results.



4. Who should bear the cost of this Appeal.

1. Whether the Respondent has mandate to test imported goods for compliance notwithstanding the Certificate of Conformity issued to the Appellant at the port of Origin.

19. The Respondent is mandated under Section 4 (1) (a) of the Standards Act (hereinafter the Act) to promote standardization in industry and commerce.
20. It also has the function pursuant to Section 4 (1) (i) of the Standards Act, to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of the Standards Act or any other law dealing with standards of quality or description.
21. Section 14 (1) (g) of the Standards Act provides that the powers of the Respondent inspectors include among others to seize and detain, for the purpose of testing, any goods in respect of which the Respondent has reasonable cause to believe that an offence has been committed. Section 9 (4) of the Standards Act provides that any person who contravenes the provisions of an order under subsection (2) shall be guilty of an offence. Subsection 2 provides that no person shall manufacture or sell any commodity, method or procedure to which the relevant specification or code of practice relates unless it complies with that specification or code of practice. The import of Section 14 (1) (g) read together with Section 9 (2) and (4) is that the Respondent has a legal duty to ensure that products being sold in Kenya are compliant with applicable standards. In our considered view, the Respondent has been empowered to seize goods on suspicion that such goods are not compliant with applicable standards regardless of whether such goods had been subjected to pre-import verification.
22. Based on the Standard declared, under Section 9 of the Act for Kenya Standard for steel wire and steel wire products for fencing, **Standard KSEAS135:2021**, the Respondent took a sample of the Appellants galvanized wire and subjected it to a test. The returned results showed that the consignment failed to comply with the requirements of the standard with respect to weight of Zinc coating (galvanizing) and tensile.
23. The Respondent in their Submissions dated 24th August 2023 relied on the Standards (Verification of Conformity to Standards and Other Applicable Regulations) Order, hereinafter referred to as Legal Notice 78 of 2005, on Verification of Conformity to Kenyan Standards of Imports. We have perused the said regulations and state that the current regulations on the said subject are the Standards (Verification of Conformity to Standards and Other Applicable Regulations) Order 2020, gazetted on 28th April 2020 hereinafter referred to as Legal Notice Number 78.
24. Legal Notice Number 78 under clause 4 states that the Order shall apply to all products imported into Kenya. The products exempt are those under Schedule 4.
25. The Appellant did not plead that the products, being the subject matter of this suit were exempt from the application of the Legal Notice 78 of 2020. Neither did we, upon perusal of the schedule, find it so.
26. Clause 5 of the said regulations place the onus of ensuring that products imported into the country meet the Kenyan Standards, approved specifications and other applicable regulations. They are further required to inform the Bureau in the prescribed form that the imported products meet Kenyan Standards, approved specifications and other applicable regulations. Further, Clause 7 states that any product which is subject of this order may be subjected to verification of conformity to Kenyan Standards, approved specifications and other applicable regulations in the exporting country or trans-shipment port by the inspection body appointed under clause 6.



27. Clause 6 which is a crucial to this case, lays down the basis for appointment of inspection bodies. They are appointed to carry out inspection on behalf of the Respondent in the country of exportation of products or in a trans-shipment port or in a port of entry, to undertake verification of conformity to Kenya standards approved specifications and other applicable regulations. Upon inspection, they are required to issue a Certificate of Conformity or Non-conformity under Paragraph 8.
28. The Respondent did not deny that it appointed the Inspection body that carried out the inspection of the products before they were shipped from China. We therefore find that the CCIC Hebei, the issuing office, was duly appointed as an Inspection Body by the Respondent.
29. Clause 7 (2) provides that notwithstanding the provision of subparagraph (1), the Bureau may re-inspect the imported product at a port of entry, if in the Bureau's opinion it is necessary to do so.
30. The powers given by the Act and Regulations give the Respondent unfettered powers to re-inspect products imported into the country despite the products being verified in the exporting country.
31. The Appellant relied on a report issued by the Ministry of Roads and implored upon the Respondent to re-consider its earlier decision.
32. We do not find any legal provision mandating any other government body to do what the Respondent does and no direction was given by the Appellant in this vein. We therefore find that it was within the Respondent's mandate to test imported goods for compliance notwithstanding that the importer has a valid Certificate of Conformity

2. Whether the Respondent's findings at the point of entry overrides the CoC at the port of origin .

33. Under Section 4 of the *Standards Act* Chapter 496 Laws of Kenya, it is only the Respondent who is mandated to conduct tests on imported commodities to determine if they are in conformity with the set Standards. The Respondent therefore has authority to re-inspect and or re-test any imported goods either at the point of origin or destination. To do this, the Respondent has appointed agents in China who conducts Tests on its behalf after which they issue Certificate of Conformity.
34. Under Standards Order 2020 gazetted in Legal Notice 78 of 2020, clause 7 (2) provides that " Notwithstanding the provisions of subparagraph (1), the Bureau may re-inspect the imported products at the point of entry if in the Bureau's opinion, it is necessary to do so". With this provision, we hold that the findings of the Respondent at the port of entry overrides the CoC issued at the port of origin and that they have authority to do so.

3. What is the implication of a conflicting result from another body in this case Ministry of Works vis- a- vis KEBS results.

36. As stated elsewhere in this Judgement, the Respondent is the only government body mandated under the *Standards Act* to test and sample imported goods in the country. It follows that any other tests done outside the provisions of the *Standards Act* cannot override the test results by the Respondent. We therefore find for the Respondent on this issue.

3. Who should bear the cost of this Appeal.

37. In view of the foregoing we dismiss this Appeal with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023

Gladys Muthoni Mburu - Chairperson



Moses Sande Makhandia - Member

Peter Mungai - Member

Andrian Ong'injo - Member

Delivered in the presence of:

