Getranke Afrique Limited v Kenya Bureau of Standards (Tribunal Appeal E004 of 2023) [2023] KEST 1346 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEST 1346 (KLR)

REPUBLIC OF KENYA

IN THE STANDARDS TRIBUNAL

TRIBUNAL APPEAL E004 OF 2023

GM MBURU, CHAIR, MS MAKHANDIA & P MUNGAI, MEMBERS

JUNE 30, 2023

BETWEEN

GETRANKE AFRIQUE LIMITED .... APPELLANT

AND

KENYA BUREAU OF STANDARDS .... RESPONDENT

JUDGMENT

1. The Appellant is limited liability Company licensed to carry on Business within the Republic of Kenya.
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 in industry.
3. The Appellant filed this Appeal on 13th February 2023 being dissatisfied by the Respondent's decision to suspend its Standardization Mark Permits numbers 55384 and 55385.
4. The decision to suspend the Appellant's Standardization Mark Permit was contained in the letter dated 31st January 2023 and addressed to the Appellant indicating that the Appellant's Standardization Mark Permits had been suspended on account of the Appellant's
    a. Failure to properly label the product as a composite flour as required under KS EAS 782:2019-Composite Flour Specification.
    b. The inclusion of amylase enzyme as an ingredient in the product.

Summary of Facts

5. That on 8th June 2022, the Appellant applied for and was issued with Standardization Mark numbers 55384 and 55385 which were to expire on 7th June 2024. Before expiry of the permits, the Respondent

in a letter dated 31st January 2023 suspended the said permits for reasons stated earlier in this judgment. Aggrieved by this decision the Appellant moved this Tribunal stating that the Respondent;

a. Erred in both law and fact by suspending the Appellant's permits number 55384 and 55385 without any justifiable reason

b. Erred in both law and fact by suspending the permits without affording the Appellant an opportunity to be heard before adverse decision was taken.

c. Erred in both law and fact by considering irrelevant considerations in suspending the Appellant's permits.

d. The suspension was unprocedural.

e. The suspension was unreasonable and violated the Appellant's right to legitimate expectation.

f. Violated Article 47 of the *Constitution* by suspending the permits.

6. The Respondent in it's response filed on 14th March 2023 denied the Appellant's allegations stating;

A. That it did not error in both law and fact in suspending the permit

B. That it is mandated by statute to regulate standardization marks.

C. That the suspension was lawful.

D. That the Appellant failed to comply with mandatory requirement standard KS EAS 782:2019:2019

E. That the suspension was procedural.

F. That the Respondent did not breach article 47 of the *Constitution*.

7. Parties agreed to have the matter dispensed with by way of written submissions. Both parties filed their written submissions together with Authorities. We have considered both the submissions and Authorities filed herein.

Appellant's Case

8. The Appellant states that it applied for two standardization marks and the same were issued on 8th June 2022 being standardization marks number 55384 and 55385. The standardization marks were to expire on 7th June 2024. However, on 2nd February 2023, the Appellant was served with a letter dated 31st January 2023 from the Respondent suspending its standardization marks for the reasons that first, the Appellant failed to comply with requirements of KS EAS 782:2019- composite flour specification, secondly that the Appellant included Amylase Enzyme as an ingredient in the product and thirdly that there was widespread mishandling of the Appellant's product which was contrary to the requirements of KS EAS 39:2000 (Code of hygiene practices).

9. The Appellant responded to the accusations on 3rd February 2023 stating that it had complied with the issues raised in the letter dated 31st January 2023. The Appellant contented that in the letter dated 15th November 2022, it had informed the Respondent about change in labelling of its products as required under KS EAS 782:2019 Composite flour specification.

10. On the second issue of Amylase Enzyme, the Appellant explained the importance of the enzyme and that the same is used to break down starch and also change the taste of its product from bland to sweet

and to counter too much gelatinization of starch during porridge preparation. The Appellant further offered to stop the same if it was a big issue.

11. The Appellant denied knowledge of the third issue that dealt with hygiene and averred that the picture attached to the suspension letter was not taken at its warehouse. Further the Appellant indicated it has engaged the public in vigorous campaign on how to handle its products. Further that the Appellant products are compliant as per the standards issued by the Respondent and therefore suspension of its marks was in bad faith.

12. It is the Appellant's contention that the Respondent did not grant the Appellants an opportunity to be heard before taking the action of suspending their Marks. The Appellants seek to rely on Article 47 of the *Constitution* and the *Fair Administrative Actions Act*, no. 4 of 2015 which stipulates the guidelines and requirements for fairness on any administrative action including being subjected to a reasonable and procedurally fair process including being given notice, information and rationale for a decision and being offered an opportunity to be heard. The Appellant also sought to rely on the case of The Republic v The Honourable Chief Justice of Kenya & Others & others Exparte HCMCA No. 1298 of 2004.

Respondent's Case

13. The Respondent's case is anchored on the fact that on 8th June 2022, it issued two standardization Marks Number 55385 and 55384 which allowed the Appellant to manufacture composite flour KS EAS 782:2019 under brand names Nguzo and Pweza.

14. That upon issuing the permits, the Appellant's products were not labelled according to requirement 10 of the mandatory standard KS EAS 782:2019 as it failed to label the words Composite flour.

15. That upon establishing non adherence to the mandatory standard against which the permits were issued and failure to undertake corrective action, the Respondent suspended the two permits.

16. The Respondent also sought to rely on Section 10A of the *Standards Act* which empowers the Respondent to cancel or suspend a license where the Respondent is satisfied that some conditions have not been complied with. The Respondent also sought to rely on Article 46 (1) of the *Constitution* on consumer protection.

17. The Respondent invoked several precedents including *Republic vs Kenya Revenue Authority ex parte shake Distributors Limited* HCMISC. Application No. 359 of 2012.

Issues for Determination

18. This Honourable Tribunal identified the following three issues for determination;

    1. Whether the Respondent was justified in suspending the Appellant's standardization marks 55384 and 55385.

    2. Whether the Respondent violated the Appellant's right to fair administrative action.

    3. Whether the respondent violated the Appellant's right to legitimate expectation.

Whether the Respondent was justified in suspending the Appellant's standardization marks 55384 and 55385.

19. On the first issue this Tribunal is guided by the Law in place which should provide guidance on which circumstances a mark or license can be suspended.

    The *Standards Act* Cap 496 Section 10A provides that:

    1. The Bureau may where it is satisfied that the holder of a permit;-

        a. has not complied with any condition specified therein; or

        b. has not manufactured any commodity to which the permit relates to the relevant Kenya Standards of approved specification, as the case may be or

        c. has ceased to manufacture the commodity to which the permit relates cancel, suspend the operation of, a permit; and suspension under this subsection may be for such period, not exceeding one year, as the Bureau deems fit.

20. The main reason for suspension of the Mark was that the Appellant failed to properly label the product as a composite flour as required under KS EAS 782:2019 which action could easily lead to unintended use of the product. The main issue therefore is lack of labelling which the Respondent has addressed throughout in its Response to the Appeal in exclusion of the other two issues. We therefore take it that the other two issues were not worth addressing by the Respondent. We shall therefore not dwell so much on the said last two issues.

21. The Appellant in response to this allegation states that on 24th November 2022, they sent an email together with a letter dated 15th November 2022 to one Peris Ayugi, the quality Assurance and Inspection officer of the Respondent on her email ayugip@kebs.org notifying her of the change in labelling of the product. The change showed the words Composite Flour prominently in green colour. The same is marked as annexure 6, 7 and 8 of the Statement of Appeal. The said officer was part of the team that visited the Appellant factory in Thika. The Appellant's position is therefore that because they had already changed the label way back in November 2022, the Respondent's letter suspending its marks ought not to have been written given that they had already complied.

22. The Respondent avers that the letter dated 15th November 2022 was not officially received and therefore hold that at the time of suspending the standardization marks, the Appellant had not complied.

23. We note that M/S Peris Ayugi has not sworn an affidavit or made a statement to deny receiving the email together with the letter dated 15th November 2022 from the Appellant. The Respondent has not denied receiving the letter but only that it was not officially received. If the letter was attached to the email, and the email is received, then it follows that service was properly effected. We also observe that there is no dispute as to authenticity of the email used by the Appellant in forwarding the letter dated 15th November 2022. We also note that the letter suspending the marks was done by a different person other than M/S. Peris Ayugi.

24. In view of the above, we find that the Appellant's letter dated 15th November 2022 was properly sent to the Respondent. We also find that new labelling attached in the letter dated 15th November 2022 was correctly brought to the attention of the Respondent.

2. Whether the Respondent violated the Appellant's right to fair administrative action.

25. Fair Administrative Action is provided for in the Bill of Rights of the *Constitution* of Kenya under Article 47 as follows;

    1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

    Section2 (2) of the *Fair Administrative Act* defines administrative action as "any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates."

25. The Respondent is therefore obligated by the *Constitution* and the *Fair Administrative Action Act*, 2015 under Section 4(2) to give written reasons for any administrative action that is taken against the Appellants or any other party for that matter. The *Act* provides under Section 4(1) that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

26. What the *Constitution* requires is the notification of the intention to take action against a person likely to be adversely affected thereby and the reasons for the intended action. It entails an opportunity to the applicant to be heard on the circumstances alleged to constitute satisfactory reasons for taking of adverse action like the action in this case where the standardization Mark is being suspended.

27 Reliance was made in the case of *Republic v. County Director of Education, Nairobi& 4 others Ex parte Abdukadir Elmi Robleh* [2018] where it was stated that

> "...whereas the authority concerned may well have proper reasons to act in the manner it intends to act, where its decision is tainted by procedural impropriety, the same cannot stand..." In the circumstances of the present case, the Respondent did not notify the Appellants of intended action.

28. The decision to temporarily suspend the Appellant's license was done without a notice to show cause which is contrary to the of rules of natural justice. As a State Agent, the Respondent is enjoined to apply the Constitutional and statutory provision as established.

29. Even where refuge would be sought on the public interest constituent, the refuge is unavailable in the circumstances of this Appeal since the Appellant comprised the same public to be protected in law. There was exhibition of outright bad faith in the failure or neglect on the part of the Respondent to notify the Appellant of the intended action and even after the impugned action was taken and upon receipt of a letter dated 3rd February 2023 from the Appellant explaining that they had complied, the Respondent did not withdraw the letter dated 31st January 2023.

30. In the case of *Onyango Oloo vs. Attorney General* [1986-1989] EA 456 it was held that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. Since the principle of natural justice is violated, it matters not that the same decision would have been arrived at.

31. In our view the Respondent did not abide by the provisions of section 4(3) of the *Fair Administrative Actions Act*. The Respondent in its list of documents did not attach any document or Notice served upon the Appellant requiring them to comply or their standardization marks would be suspended.

3. Whether the Respondent violated the Appellant's right to legitimate expectation.

32. For one to benefit from this doctrine of legitimate expectation, he must not act in contravention of the statutory provisions set out in the instrument. As stated elsewhere, where a public body makes a promise to a party that it will act or not act in a particular way it follows that both parties must follow the law in dealing with each other. We have stated earlier that the Respondent did not accord the Appellant an opportunity to be heard and or was not served with a Notice of intention to suspend its standardization marks.

33. In view of the foregoing we uphold the Appeal and order as follows:

    1. The Respondent's decision to suspend the Appellant's Standardization Marks Number 55384 and 55385 vide their letter dated 31st January 2023 is hereby quashed.

    2. The Respondent is hereby ordered to reinstate the said standardization marks to the Appellant immediately.

    3. Each party to bear its costs to this appeal.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.

GLADYS MUTHONI MBURU - CHAIRPERSON

MOSES SANDE MAKHANDIA - MEMBER

PETER MUNGAI - MEMBER

Delivered in the presence of:

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