



**Ideal Ceramics Limited v Kenya Bureau of Standards (Tribunal Appeal
4 of 2020) [2023] KEST 1347 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEST 1347 (KLR)

**REPUBLIC OF KENYA
IN THE STANDARDS TRIBUNAL
TRIBUNAL APPEAL 4 OF 2020
GM MBURU, CHAIR, MS MAKHANDIA, P MUNGAI & A ONG'INJO, MEMBERS
AUGUST 4, 2023**

BETWEEN

IDEAL CERAMICS LIMITED APPELLANT

AND

KENYA BUREAU OF STANDARDS RESPONDENT

JUDGMENT

1. The Appellant, Ideal Ceramics Limited is a limited liability company incorporated and domiciled in Kenya whose business include among others importation and selling of ceramic tiles. The Appellant was represented by Oluga & Company Advocates for purposes of this appeal.
2. The Respondent is a statutory body established under Section 3 of the *Standards Act* Cap. 496 Laws of Kenya (*Standards Act*) tasked with inter alia to promote and maintain standardization, metrology and conformity assessment in the provision of products and services. The Respondent was represented by Luise N. Rasanga Advocates for purposes of this appeal.
3. The genesis of the dispute and cause of action is a letter dated 5th October 2020 issued by the Respondent to the Appellant vide an email dated 11th November 2020. In the said letter, the Respondent directed that the Appellant transports two hundred and sixteen (216) boxes of tiles and hands over the same to the Respondent because tests carried by the Respondent indicated that the breaking strength of the tiles remained below the minimum requirements under KS ISO 13006: Kenya Standard for Ceramic Tiles.
4. In previous correspondence submitted as evidence, the Appellant had requested the Respondent to re-sample and re-test the samples but the Respondent declined to accede to the request arguing that the subject tiles are not under the control of the Respondent as they were seized in-situ on 6th July 2020.
5. The appeal was filed on 23rd November 2020 but took long to proceed because for some time the Tribunal was not fully constituted. The grounds of appeal include, first, that the Respondent's



decision to decline re-sampling and re-testing was in bad faith and motivated by ill-will, irregular, illegal and unprocedural process. The Appellant further averred that the tiles had been inspected at the point of origin by the Respondent's own appointed agent and a Certificate of Conformity number S-2019/06/549605 issued. The Appellant further argued that the goods were preserved by the Appellant upon being seized and that the Respondent had not adduced evidence to demonstrate interference. They also questioned who had the mandate to re-sample and re-test as they argued that re-sampling and re-testing is within the purview of the Council and not Market Surveillance Appeals Committee.

6. The second ground of appeal was premised on the sampling process where the Appellant argued that test results were dated 6th March 2020 while samples were received on 10th March 2020 which was four (4) days before the samples were received and ten (10) days before the testing date. There were also alleged inconsistencies between the test results by the Respondent and the communication by the Respondent, according to the Appellant the laboratory results indicated compliance with KS ISO 13006: Kenya Standard for Ceramic Tiles while the Communication by the Respondent indicated non-compliance. The Appellant also took issue with the fact that the results were communicated on 30th June 2020 and received on 1st July 2020 while the results were dated 6th March 2020.
7. The Appellant sought a re-sampling and re-testing and also went ahead to do their own independent sampling and testing done by Gemma Quality Lab which confirmed that the tiles passed the "breaking strength" test. The Appellant request for re-sampling and re-testing was done on 30th June 2020 and received by the Respondent on 1st July 2020 but only for the Respondent to communicate the results on 11th November 2020.
8. The Appellant was also challenging the fact that they were issued with a Seizure Notification and Notice of Destruction in one legal instrument which in their view was unprocedural as the two are provided for under different sections of the *Standards Act*.
9. The Appellant therefore contends that the whole process by the Respondent was irregular, unfair, colored in bad faith, ill motive and predetermined and prayed that the decision by the Respondent condemning the tiles for non-compliance with KS ISO 13006: Kenya Standard for Ceramic Tiles be declared as null and void and the said tiles be released. In the alternative, the Appellant prayed to be allowed to carry out an independent analysis in presence of the Respondent's appointed agent Societe Generale de Surveillance S.A (SGS).
10. In their Statement of Response dated 13th January 2021 and filed on 14th January 2021, the Respondent avers that while conducting market surveillance, the Respondent drew random samples of the Appellant's ceramic tiles and submitted the same for testing and the goods failed to comply with KS ISO 23006 : Kenya Standards for Ceramic Tiles a decision which was communicated on 6th March 2020. The Respondent admitted there to have been an error on the dating of the letter received by the Appellant on 30th June 2020. The Respondent argued that the appeal was time barred as it ought to have been done within 14 days from receipt of Seizure Notification dated 6th July 2020 or earlier.
11. The Respondent further averred that they have a statutory mandate to inspect, seize for confirmatory testing and subsequent destruction in order to ensure that goods and services consumed in Kenya comply with set standards. They declined re-sampling and re-testing of the tiles due to the fact that the tiles were in the custody and control of the Appellant and as such the Respondent could not guarantee the integrity of the tiles that were to be re-tested. The Respondent adduced various case laws which the Tribunal duly studied and noted.



12. The Respondent further argued that the Market Surveillance Appeals Committee is a body within the Respondent with legitimate mandate to look into market surveillance enforcement activities and that the Respondent is not limited in its mandate by virtue of the fact that goods could have been inspected by their agents at the country of origin.
13. The matter was dispensed by way of written submissions from which the Tribunal framed the issues for determination as follows:
 - i. Whether the appeal is time barred.
 - ii. Whether the sampling and testing process was unprocedural and thus questionable.
 - iii. Whether the goods comply with the KS ISO 13006: Kenya Standard for Ceramic Tiles.
 - iv. Who should bear the cost of this appeal.

Whether the appeal is time barred

14. The Tribunal considered the chronology of events and noted that according to the Respondent the cause of action arose on 6th July 2020 pursuant to Seizure Notification while according to the Appellant the cause of action arose on 11th November 2020 pursuant to receipt of Respondent's letter dated 5th October 2020. The letter reiterated the Respondents position on non-compliance and directed that the goods, comprising of two hundred and sixteen (216) boxes be transported to the Respondent at the Appellant's cost.
15. The Tribunal noted that in the intervening period there were numerous correspondence and requests including a request for re-sampling and re-testing by the Appellant which was declined.
16. It is our considered view that the decision of 5th October 2020 communicated to the Appellant on 11th November 2020 in itself established a cause of action notwithstanding the fact that there could have been other instances where a cause of action was established.
17. Consequently, we find that the appeal is not time barred because it was filed on 23rd November 2020 within 14 days from the date of the latest cause of action which was 11th November 2020.

Whether the sampling and testing process was unprocedural and thus questionable

18. The Appellant cast aspersions on the sampling and testing process arguing that it was flawed, delayed and colored with ill motive. They indicated that the letter of 6th March 2020 communicating the outcome was issued prior to receipt of samples and analysis of the sample. The evidence adduced confirmed this and the Respondent conceded to there having been an error on the dating of the letter.
19. The Tribunal noted that there was a delay between sample collection, testing and communication of results and decision amounting to approximately five (5) months. This did not appear to be good practice especially in matters standards where time is most certainly of essence.
20. The Tribunal took note of the Appellants efforts to seek independent sampling and testing and the fact that they adduced evidence for a Certificate of Conformity from the Respondent's Agents. While we agree the Respondent has a statutory power to continuously inspect and test goods in the market we note that the error in dates and delays in the process did cast reasonable doubt on the credibility of the sampling and testing outcome and in our view the balance of convenience tilts in favor of the Appellant that indeed the process was inefficient, unprocedural and questionable.



Whether the goods comply with the KS ISO 13006: Kenya Standard for Ceramic Tiles

- 21. The Appellant adduced evidence to the effect that the goods comply with KS ISO 13006: Kenya Standard for Ceramic Tiles as per the Certificate of Conformity by the Respondent’s Agent and as per an independent testing agent hired by the Respondent.
- 22. The Appellant also adduced evidence demonstrating that the sampling and testing procedure by the Respondent was marred by delays and inconsistencies some of which the Respondent conceded to, the Appellant requested for a joint re-sampling and re-testing between the Respondent and an independent person which request the Respondent declined maintaining that the tiles did not meet the requisite standards.
- 23. Having found that the sampling and testing process was unprocedural and questionable, the foregoing further tells this Tribunal that the balance tilts in favor of the Appellant as it is not possible for the Tribunal to determine with certainty the compliance or non-compliance thereof. In the circumstances, the fair thing for the Respondent to have done is accede to the request of the re-sampling and re-tasting.

Who should bear the costs of this appeal

- 24. We are of the view that each party should bear its own costs.

Conclusion

- 25. In view of the above, this Tribunal finds for the Appellant and orders as follows: The Respondent’s decision contained in the letter dated 5th October 2020 is hereby quashed and declared null and void. The Respondent is directed to conduct a re-sampling and re-testing in presence of Appellant’s duly appointed independent representative. Each party to bear its own costs. The Standards Act does not give this Tribunal powers to award cost.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023

GLADYS MUTHONI MBURU (CHAIRPERSON)

MOSES SANDE MAKHANDIA - (MEMBER)

PETER MUNGAI - (MEMBER)

ADRIAN ONG’INJO - (MEMBER)

Delivered in the presence of:

.....for Appellant.

.....for Respondent.

