REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 4 OF 2021

BETWEEN

UNITED MILLERS LIMITED..... APPELLANT/ APPLICANT

AND

THE KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

THE DIRECTOR, DIRECTORATE OF

CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

THE DIRECTOR, PUBLIC HEALTH.....4TH RESPONDENT

THE EXECUTIVE DIRECTOR,

ANTI COUNTERFEIT AUTHORITY .....5TH RESPONDENT

THE DEPARTMENT OF HEALTH SERVICES

NAKURU COUNTY.....6TH RESPONDENT

(Being an application for conservatory orders against the judgment of the Court of Appeal at Nairobi (Makhandia, Kiage & Kantai, JJA), delivered in Civil Appeal No. 273 of 2019 on 29th January 2021.)

RULING

A. *INTRODUCTION*

[1] Before Court is an application dated 4th March 2021 filed under Rules 31 and 32 of the Supreme Court Rules, 2020. It seeks

conservatory orders or in the alternative stay of the the Court of Appeal Judgment and orders issued in *Civil Appeal No. 273 of 2019* on 29th January 2021, pending the hearing and determination of the substantive appeal before this Court.

B. *BACKGROUND*

[2] The genesis of this matter is a letter dated 7th September 2018 by the 1st respondent communicating that the applicant's 29,716 bags of 50kgs Marked Mauritius sugar and 46 bags of 5okgs Marked Thailand sugar had failed the yeast and mold test when tested against the *KS EAS 749:2010 Brown Sugar - Specification*, and could therefore not be released for sale and was condemned for destruction.

[3] Aggrieved by that decision and following grant of leave, the applicant filed *Judicial Review Application No. 396 of 2018* seeking to quash the impugned decision. On 13th May 2019, the High Court (*Mativo J*) dismissed the application on grounds that: it offended the doctrine of exhaustion of available statutory remedies set out in Section **9 (2)** of the Fair Administrative Action Act No. 4 of 2015 (*the FAA Act*); it failed to apply for or satisfy the exceptional circumstances within which a party can directly move the High Court under section **9 (4)** of the FAA Act; and in the alternative, failed to demonstrate that the 1st respondent's impugned decision was tainted with illegality, or on any judicial review grounds.

[4] Further aggrieved, the applicant filed *Civil Appeal No. 273 of 2019* challenging the entire High Court decision before the Court of Appeal. In a judgment delivered on 29th January 2021, the Court of Appeal *(Makhandia, Kiage & Kantai, JJA.),* upheld the High Court determination and reasoning. Aggrieved further, the applicant moved to this Court and filed ***Petition No. 4 of 2021*** invoking the Court's jurisdiction under Article 163(4)(a) of the Constitution. It also filed the application, subject of this ruling.

C. *THE APPLICATION*

[5] The application is supported by the Supporting Affidavit sworn by the applicant's Director, ***Kamal Narshi Shah*** on 5th March 2021. It is averred that the appeal is arguable. That the Court of Appeal erred in its interpretation and application of the Constitution and the FAA Act. That the appeal raises fundamental constitutional issues in relation to the effectiveness or relevance of the protection afforded by Article 47 of the Constitution and the FAA Act, the exhaustion of alternative remedies, and the supervision by amorphous Executive multi-agency bodies operating on the basis of undisclosed legally unfounded protocols. The applicant also contends that the 1st respondent's impugned decision is unreasonable, arbitrary, irrational and an infringement of its right to administrative action protected under Article 47 of the Constitution. It is urged that unless the Court of Appeal's Judgment is stayed and appropriate conservatory orders granted, the appeal will be rendered nugatory.

[6] The 1st respondent opposed the application through the Replying Affidavit sworn by its Managing Director, ***Bernard Njiraini*** on 23rd March 2021. The Court is cautioned against granting orders in vain. It is urged that the orders sought are premised on a presumption that the subject matter of appeal can be released for consumption by the general public, while disregarding the fact that during the protracted period, its standard and quality has irreversibly deteriorated making it incapable of use or consumption in accordance with the provisions of Articles 46 (a) & (c) of the Constitution. It is also averred that the application must fail as the petition upon which it is premised is incompetent and improperly before the Court by reason that the applicant has neither demonstrated that the appeal involves matters of constitutional interpretation and/or application nor has it sought leave or certification to appeal to this Court.

(i) Applicant's case

[7] In its submissions filed on 16th March 2021 the applicant calls upon the Court to preserve the subject matter of appeal and not to determine the substantive issues pending in the appeal. The applicant submits that this Court has jurisdiction to grant conservatory orders under Article 23(3)(c) of the Constitution, which donates authority to the courts to uphold and enforce the Bill of Rights by granting appropriate reliefs, including conservatory Orders. It adds that conservatory orders should be granted on the

inherent merit of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to each cause.

[8] The applicant contends that is has met the threshold for grant of stay or conservatory orders settled by this Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others***; SC Application No. 5 of 2014, [2014] eKLR ***(Munya 1 Case)***. To buttress this submission, it urges that the appeal is arguable for reasons that, it challenges the legal propriety of the Multi-Agency Team Protocol, and that the 1st respondent failed to disclose the rationality behind the impugned decision, making it impossible to assess whether the same was within the limits of lawful authority. Relying on the Court of Appeal's decision in **Krish Commodities Limited vs Kenya Revenue Authority**; Civil Appeal No. 67 of 2017, [2018] eKLR, the applicant submits that the impugned decision is illegal, irritational, lacked procedural propriety, infringes the applicant's right to fair administrative action enshrined in Article 47 of the Constitution and is in breach of the provisions of Article 10(2)(c) of the Constitution.

[9] It is also urged that the appeal raise matters of public interest because the Multi-Agency Team's continued operations under arbitrary protocols adversely affects the class of public engaging in commodity importation to Kenya. That unless the orders sought are granted, the appeal will be rendered nugatory and no subsequent damages will be reasonable compensation. It relies on the Court of Appeal decisions in ***Stanley Kangethe Kinyanjui v Tony Ketter & 5 others***; CA Application No. 31 of 2012, [2013] eKLR and ***Alfred Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others***; CA Application No. 31 of 2016, [2016] eKLR to reinforce this argument.

(ii) 1st Respondent's Case

[10] In its submissions dated 23rd March 2021, the 1st respondent submits on two issues, that is, whether an incompetent petition can form the legal basis of an application for stay and the purpose and nature of conservatory orders sought.

[11] On the first issue, it contends that ***Petition No. 4 of 2021***, upon which the instant application is premised, fails to satisfy the principles set in ***Lawrence Nduttu & 6000 others vs Kenya Breweries Ltd & another***; SC Petition no. 3 of 2012, [2012] eKLR (***Lawrence Nduttu Case***) as it does not raise any issue challenging the interpretation or application of the Constitution by the two courts below. That the issues before the High Court involved the interpretation and application of Section 14 A (4) of the Standard Act which provides that, any party aggrieved by the 1st respondent's decision ought to appeal to the Standards Tribunal within 14 days of the said decision. It urges further that the grounds of appeal at the Appellate Court queried the interpretation and application of provisions of the FAA Act and the Standard Act. In the alternative, the respondent asserts that the applicant has failed to seek certification to appeal to this Court as is the requirement in ***Sum Model Industries Ltd vs Industrial & Commercial Development Corporation;*** SC Application No.1 of 2011, [2011] eKLR.

[12] Consequently, it is the 1st respondent's case that ***Petition No. 4 of 2021*** is incompetent, and as a result the instant application offends the provisions of Section 31 (2) of the Supreme Court Rules, 2020 which requires that an interlocutory application shall not be originated before a petition of appeal is filed in Court. It relies on this Court decision in ***James Mbatia & Ephantus Mwangi vs Kenya Railways Corporation & the Attorney General***; SC Application No. 10 of 2017, [2018] eKLR, to urge the Court to dismiss the application as there is no proper appeal before it.

[13] On the second issue, the 1st respondent restates its grounds in reply and submits that grant of stay or conservatory orders would be futile. It submits that in the circumstances, there are no compelling grounds to demonstrate the nugatory nature of the appeal. In conclusion, it relies on this Court's decision in ***Malindi Law Society v Law society of Kenya, Nairobi Branch & 5 others***; SC Application No. 20 of 2017, [2018] eKLR, to urge the Court to dismiss the application before it.

(iii) 2nd to 6th Respondents' Case

[14] We note that the 2nd to 6th respondents have not filed any response to the application despite having been properly served with the same and the Court's compliance Mention Notices. We further note that the 2nd and 5th respondents did not participate in the High Court proceedings while the 3rd respondent only adopted the 1st respondent's submissions. Lastly, we note that the 4th to 6th respondents did not participate in the Court of Appeal proceedings.

D. *ISSUES FOR DETERMINATION*

[15] On the basis of the pleadings and submissions by the Parties herein, we consider that only two issues merit our determination:

i. Whether this Court has jurisdiction under Article 163(4)(a) of the Constitution to hear and determine Petition No. 4 of 2021 and consequently the instant application; and

ii. Whether the orders sought in the application can issue.

E. ANALYSIS

[15] The Court's jurisdiction to hear and determine this application and the main appeal has been challenged by the 1st respondent. Citing the ***Lawrence Nduttu Case***, it urges that there is nothing of constitutional interpretation and/or application in the main appeal to warrant invocation of this Court's jurisdiction under Article 163(4)(a) of the Constitution. It also urges that the applicant has failed to seek certification to warrant exercise of jurisdiction under Article 163(4)(b) of the Constitution. Consequently, the 1st respondent urges the Court to dismiss the instant application on grounds that it is incompetent, lacks legal basis and offends the provisions of Section 31 (2) of the Supreme Court Rules, 2020 which requires that an interlocutory application shall not be originated before a petition of appeal is properly filed with the Court.

[16] It is the applicant's contrary contention that the petition raises fundamental constitutional issues, specifically the effectiveness and relevance of the protection afforded by Article 47 of the Constitution and the FAA Act, the exhaustion of alternative remedies under Article 159 (2) (c) of the Constitution, and the legality of an amorphous Executive multi-agency body operating on the basis of undisclosed legally unfounded protocols. It contends that the Court of Appeal erred in law in its interpretation and application of the Constitution and the FAA Act. It also argues that the 1st respondent's impugned administrative decision is unreasonable, arbitrary, irrational, an infringement of the applicant's right to administrative action protected under Article 47 of the Constitution, and a breach of the principle of transparency and accountability set out in Article 10 (20 (c) of the Constitution.

[17] On the issue of jurisdiction, we stated in ***Aviation & Allied Workers Union Kenya v. Kenya Airways & Others***; SC Application No. 50 of 2014, [2015] eKLR that where a court's jurisdiction, is objected to by any party to the proceedings, such an objection must be dealt with as a preliminary issue, before the meritorious determination of any cause. We must therefore evaluate whether *Petition No. 4 of 2021* and consequently the instant application has met the set jurisdiction principles under Article 163(4)(a) of the Constitution.

[18] This Court's appellate jurisdiction is set out in Article 163 (4) of the Constitution, in the following terms:

"Appeals shall lie from the Court of Appeal to the Supreme Court;

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)" [Emphasis Added]

[19] This Court is replete with jurisprudence on what amounts to a matter warranting appeal to this Court under Article 163(4)(a) of the Constitution. In the ***Lawrence Nduttu Case***, we delineated this Court's jurisdiction under Article 163 (4) (a) of the Constitution as follows:

"...This Article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under Article 163 (4) (b) of the Constitution. Towards, this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.

(28) The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163

(4) (a)."

[20] In ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others***; SC Petition No. 10 of 2013, [2014] eKLR, we were emphatic that a matter that directly involves an interpretation and/or application of a particular provision of the Constitution will constitute an appeal as of right under Article 163(4)(a) of the Constitution. Subsequently, in the ***Munya 1 Case,*** the Court in determining whether it had jurisdiction under Article 163(4)(a) of the Constitution stated that:

"The import of the Court's statement in the Ngoge case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

[21] So then, does ***Petition No. 4 of 2021,*** raise issues of Constitutional interpretation and application and have the same been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this Court by way of an appeal" We have extensively examined the record and it is apparent that *Judicial Review Application No. 396 of 2018* was brought under the provisions of Sections 4, 7, 8 and 11 of the FAA Act and Order 53 Rule 3 of the Civil Procedure Rules, 2010. It was also anchored on the provisions of Article 47 of the Constitution and section 4(1) of the FAA Act, which guarantees every person the right to an administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair. Also, among the orders sought was a declaratory order that the 1st Respondent's administrative decision, infringed the applicant's rights under Article 47 of the Constitution and section 4 (1) of the FAA Act.

[22] In response, the 1st respondent, filed a preliminary objection challenging the High Court's jurisdiction to entertain the judicial review proceedings pursuant to Sections 11 and 14A (4) of the Standards Act and Section 9 of the FAA Act. The Court *(Mativo J*) delineated two issues for determination in considering the preliminary objection: *whether it was divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism; and whether the ex-parte applicant had demonstrated any grounds to warrant grant of judicial review orders.*

[23] On the first issue, the trial court found that the *ex-parte* applicant ought to have exhausted available dispute resolution mechanism before approaching it. The learned Judge therefore found that the judicial review application offended the doctrine of exhaustion of statutorily available remedies set out under Sections 11 and 14A (4) of the Standards Act and Section **9 (2)** of the FAA Act, and further failed to satisfy the exceptional circumstances under section **9(4)** of the FAA Act. It thus held that the application must fail. The court however did not down its tools upon making the determination that it lacked jurisdiction. It

determined the second issue and found that the *ex-parte* applicant had failed to establish a case to warrant grant of judicial review orders.

[24] On appeal, the Court of Appeal delimited three issues for determination, namely: *whether the High Court properly exercised its jurisdiction, whether it was right in invoking the principle of exhaustion, and whether it was right in finding that the substantive motion failed the threshold for grant of the judicial review*. The Appellate Court upheld the trial court's determination and entirely endorsed its reasoning. It found that the trial court in reaching its determination was guided by the need to serve substantive justice to the parties and exercised it discretion soundly and on reasonable judicial principles. The Court of Appeal opined that having failed to revert to the internal dispute resolution mechanisms provided for under Section 14A (4) of the Standards Act and Section 9 (2) of the FAA Act and having also failed to apply for exemption from this requirement as is provided for under Section 9 (4) of the FAA Act, the High Court was divested of jurisdiction to entertain the judicial review proceedings. The Court of appeal also found that having reached this conclusion on jurisdiction, the High Court ought to have downed its tools. Nonetheless, it considered the third issue and agreed with the trial court that the substantive motion failed to satisfy the grounds for grant of judicial review.

[25] Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in ***Peter Odour Ngoge v Francis Ole Kaparo & others***; SC Petition No. 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of the Constitution. From the foregoing, we find no difficulty in concluding that the issues before the High Court as well as the Court of Appeal did not either involve the interpretation and application of the Constitution or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.

[26] We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in ***Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others***; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other *quasi-judicial* authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

[27] In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine ***Petition No. 4 of 2021*** or the instant application for conservatory or stay orders.

F. ORDERS

[28] Consequently, we make the following orders:

i. The Petition of Appeal No. 4 of 2021 dated 23rd February 2021 and filed on 25th February 2021, is hereby struck out for want of jurisdiction;

ii. The Notice of Motion dated 4th March 2021 and filed on 16th March 2021, is hereby dismissed; and

iii. The Petitioner/applicant shall bear the 1st respondent's costs.

[29] It is accordingly ordered.

DATED and **DELIVERED** at **NAIROBI** this **16th Day** of **July, 2021.**

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE &

VICE-PRESIDENT

OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

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