



REPUBLIC OF KENYA

IN THE STANDARDS TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NUMBER 1 OF 2017

BETWEEN

JUBILEE JUMBO HARDWARE LIMITED.....APPELLANT

VERSUS

KENYA BUREAU OF STANDARDS.....RESPONDENT

RULING

Introduction

The Appellant is a limited liability company incorporated and domiciled in Kenya. The Appellant operates a hardware business in Kisumu and has a branch in Meru where they offer for sale various iron and steel products, plastic pipes and barbed wires among others.

The Respondent is a body corporate established under Section 3 of the Standards Act, Cap 496 of the Laws of Kenya (Standards Act) whose mandate include among others promoting standardization in industry and commerce and controlling use of Standardization Marks and Distinctive Marks.

This appeal was filed at this Tribunal on 26th September 2017 by the Appellant being dissatisfied with the Respondent's decision of condemning the Appellant's products as substandard and ordering destruction of seized products and placing an embargo against removal, sale, use, disposal, re-exportation, damaging, destroying or any dealing whatsoever with quantities of products left in the custody of the Appellant without express authority from the Respondent.

The relief sought by the Appellant was an order to set aside/discharge the order by the Respondent to destroy the goods/items seized and to set aside and/discharge the order by the Respondent stopping the Appellant from selling and/or distributing into the market the goods already released to them. The Appellant also prayed for costs of the suit.

Summary of facts

On diverse dates (13th, 14th and 19th) in the month of September 2017 the Respondent visited the Appellant premises in Kisumu and Meru and inspected the goods in question at the premises of the Appellant and according to the Respondent the field inspection results revealed non-compliance with the requirements of: KS 445:1984 covering zed sections, KS 572:2017 covering angle sections, KS 261:2013 covering barbed wire, KS ISO 3633 covering waste pipes, KS ISO 1452 covering pressure

pipes, KS ISO 15874 covering polypropylene pipes, KS EAS 11:2014 covering galvanized corrugated steel sheets and KS 2199:2009 for rain water pipes.

The Respondent issued Seizure Notification to the Appellant dated 13th September 2017, Samples Collection Form dated 14th September 2017 and another Seizure Notification dated 19th September 2017. The Seizure Notification instructed the Appellant that the products seized shall be up for destruction within 14 days from the date of the Seizure Notification and placed an embargo against removal, sale, use, disposal, re-exportation, damaging, destroying or any dealing whatsoever with quantities of products left in the custody of the Appellant without express authority from the Respondent.

The Respondents issued Laboratory Test Reports on 13th and 23rd October 2017, 23rd, 24th and 27th November 2017 and 15th January 2018 and according to the Laboratory Test Reports by the Respondents the products in question did not comply with the requirements of the applicable Standards.

Being dissatisfied with the actions of the Respondent and apprehensive of the goods seized being destroyed the Appellant filed this appeal on 26th September 2017. The Respondent filed a Replying Affidavit on 4th December 2017. The Appellant filed a Replying Affidavit on 21st March 2018 and the Respondent filed a Further Replying Affidavit on 6th April 2018.

The parties were given an opportunity for hearing but agreed by mutual consent to dispense with the matter by way of written submissions. The Appellant filed their written submissions on 30th April 2018 and the respondent filed their written submissions on 17th May 2018. The Appellant filed supplementary submissions on 26th June 2018.

Appellant's case

The Appellant contends that the goods subject of this appeal were not tested as required under Section 14 (1) (A) of the Standards Act, Cap 496 (Standards Act) prior to the Order by the Respondent condemning the Appellant's goods for destruction being issued.

The Appellant also argued that the Respondent did not give notice or reasons why it is necessary to destroy the goods as required under Section 14 (1) of the Standards Act.

It was also the Respondent's case that the Seizure Notification dated 13th September 2017, 19th September 2017 and Sample Collection Form dated 14th September 2017 contained items that were imported from Uganda with Certificate of Compliance and that the Respondent had verified and released the items to the Appellant on 9th June 2016 because the said goods were compliant with the Kenyan Standards. The Appellant averred that they had a legitimate expectation that the Respondent cannot seize and further order the scrutiny and or destruction of the goods after the entire consignment had already been released to the Appellant unconditionally.

The Appellant also contended that the Seizure Notifications dated 13th September 2017 and 19th September 2017 and Samples Collection Form Dated 14th September 2017 did not specify which law and/or negotiation that the items seized flouted and the items in question were condemned even before testing was done by the Respondent.

It was also the Appellant's case that the Respondent had not articulated the danger the goods posed to the public and that the goods were largely in compliance with the relevant standards with the products being within acceptable tolerance as required under standard specifications.

Respondent's case

On their part, the Respondent argued that they have a public duty to protect the health, safety and economic interest of consumers as envisaged under Article 46 (1) (a) (b) and (c) of the Constitution of Kenya, 2010.

On diverse dates (13th, 14th and 19th) in the month of September 2017 the Respondent visited the Appellant premises in Kisumu and Meru and inspected the goods in question at the premises of the Appellant and according to the Respondent the field inspection results revealed non-compliance with the requirements of: KS 445:1984 covering zed sections, KS 572:2017 covering angle sections, KS 261:2013 covering barbed wire, KS ISO 3633 covering waste pipes, KS ISO 1452 covering pressure pipes, KS ISO 15874 covering polypropylene pipes, KS EAS 11:2014 covering galvanized corrugated steel sheets and KS 2199:2009 for rain water pipes.

The respondents issued Laboratory Test Reports on 13th and 23rd October 2017, 23rd, 24th and 27th November 2017 and 15th January 2018 and according to the Laboratory Test Reports by the Respondents the products in question did not comply with the requirements of the applicable Standards.

The Respondent averred that the field inspection revealed that the products were not only in a dangerous state for consumers but were also substandard contrary to the requirements of Subsection 9 (2) as read together with Subsection 9 (4) of the Standards Act and Article 46 (1) (a) (b) and (c) of the Constitution of Kenya, 2010. In addition, the Respondent averred that the goods in the current state did not offer value for money to consumers and therefore go against the spirit of fair trade practices envisaged under Article 46 (1) (a) (b) and (c) of the Constitution of Kenya, 2010.

It is the Respondent's case that the goods in question were subjected to Laboratory Tests which confirmed that the said goods did not meet the requirements of the relevant Standards hence corroborating the field tests conducted by the inspectors in the presence of the outlets representatives.

The Respondent averred that the hot-rolled steel sections imported from Uganda were certified under US ISO 657:1989 a Uganda National Standard, which is not equivalent to KS 572:2017 and KS 445:1984 and in the absence of harmonized East Africa Standards, this invalidates the accessibility of the said goods into, and presence in, the Kenya market.

It is the Respondent's case that Section 14 of the Standards Act gives its inspectors powers to enter upon any premises, conduct inspections, seize for confirmatory testing and subsequent destruction of substandard goods irrespective of whether the goods were previously inspected and issued with a standardization mark or goods have been cleared to enter the country by its inspectors at entry points.

The Respondent also argued that Regulation 3 of Legal Notice No. 78 of 2005 places a burden on the Appellant as an importer to ensure that the products they import conform to Kenya Standards and that liability arising from non-compliance observed downstream by the regulator is the sole responsibility of the importer, not the Respondent. Regulation 3 of Legal Notice No. 78 of 2005 reads as follows:

"A person who imports goods must ensure that the goods meet Kenya Standards or approve specifications".

The Respondent also averred that the Appellant contravened subsection 9 (2) of the Standards Act by offering for sale substandard goods to consumers and thus committed an offence under the Standards Act.

Issues for determination

The issues for determination are as follows;

1. Were the goods tested by the Respondent"
2. Did the Respondent give notice and reasons for destructions as required under Section 14 of the Standards Act"
3. Had the goods been tested in Uganda and found compliant and if so is Border Inspection final"
4. Did the Respondent attach new conditions to goods already tested and released"

Determinations

1) Were the goods tested by the Respondent"

From the documents filed by both the Appellant and the Respondent, it is evident that the issue of whether the goods were tested is contentious.

The Appellant state in its ground of appeal 3(c) that

"...the notice vide Seizure Notifications dated 13th September, 2017, 14/9/2017 and 19/9/2017 addressed to the Managing Director of the Appellant contained items that were imported from Uganda with Certificate of Compliance and the respondent had stopped verified and released the items to the Appellant on 9/6/2016 for being compliant with Kenyan Standards..."

The import of their ground is that the goods had Certificate of Compliance which can only be issued upon testing of goods by the Respondent and finding compliant to Kenyan Standards.

The Respondent response to this via a replying affidavit filed on 4th December, 2017 is that the Respondent seized the goods already in the market and on testing them found they did not meet the required standards.

Paragraph 4 of the same affidavit reads:

"That the respondent visited the appellant premises in Meru and Kisumu and conducted inspection and field tests on the subject goods in the presence of the outlets representatives"

The Respondent then proceeds to state in paragraph 5:

"That the field tests conducted revealed that the goods did not meet the requirements of the relevant standards i.e KS445:1984 covering Zed sections, KS572:2017 covering angle sections, KS261:2013 covering barbed wire, KS ISO 3633 covering waste pipes, KS ISO 1452 covering pressure pipes, KS ISO 15874 covering polypropylene pipes, KS EAS 11: 2014 covering galvanized corrugated steel sheets and KS 2199:2009 covering rain water pipes"

Based on the arguments presented by both the Appellant and the Respondent we find that several tests were done, the Appellant argues that the goods were tested and verified at the point of entry, the Respondent avers that they conducted field tests which were witnessed by the Appellant's representatives and that confirmatory laboratory tests were also done at a later stage. Having found that several tests were carried out we now turn into the question of who adduced what evidence to support their argument.

Under the Standards Act the Respondent has the role of testing the goods entering the Kenyan market and this can be done through an agent of the respondent. The question at hand is whether the Respondent or its agent tested the goods prior to being presented to the market.

The Appellant contends in their submissions that the goods seized by the Respondent were imported by the Appellant from Uganda and subjected to tests at the point of entry and cleared as compliant with Kenyan Standards.

They only recourse that the Appellant would have in view of the Respondent contention that the goods had not been tested was to produce documentary evidence showing that the goods had been tested and found compliant by either the Respondent or its agent.

The documents produced by the Appellant were as follows;

1. Seizure Notification dated 13th September 2017 addressed to the Managing Director of the Appellants.
2. Samples Collection Form dated 14 September 2017 addressed to the Managing Director of the Appellants.
3. Seizure Notification dated 19th September 2017 addressed to the Managing Director of the Appellant.
4. East African Community Certificate of Origin.
5. Tembo Steel (U) Limited invoices.
6. Import duty payment receipt by Kenya Revenue Authority.
7. Specifications for hot rolled steel section for windows, doors and ventilators.

The Appellant however neither produced proof of testing at the point of entry nor a Certificate of Conformity which is normally issued as confirmation that the goods in question comply with Kenya Standards and requirements of goods in Kenyan market.

In view of this shortcoming by the Appellant this Tribunal is only left to make its decision relying on the below listed Respondent's Laboratory Test Reports which indicate that the goods were not compliant with Kenya Standards and requirements.

1. KS02-445: Hot rolled steel
2. KS06-261:2013 – Barbed wire
3. KS2199:2009 – Plastic piping
4. KS02-572 – Structure steel
5. KS ISO: 3633:2002 – Plastic piping for waste
6. KS 2199:2009 – Plastic rain water piping
7. KS ISO 1452.2 – Plastic piping for water supply

Under the Standards Act the Respondent is the only body mandated to monitor, set out and enforce standards of the goods in question. The upshot of this is that this Tribunal finds that goods were tested and fell short of the required standards and specifications.

That said, we observe that the Respondent did not formally provide results for the field tests which results were the basis for condemning the Appellant's goods. We also note with a lot of concern that Confirmatory Laboratory Test reports were issued after this case had been filed that is on 13th and 23rd October 2017, 23rd, 24th and 27th November 2017 and 15th January 2018. Our reliance on the Confirmatory Laboratory Test Reports was solely because the Appellant did not provide proof of testing

at the point of entry and or Certificate of Conformity.

In future, the Respondent should provide formal test results whether field tests or confirmatory laboratory test results in a timeous manner and fashion.

2) Did the Respondent give notice and reasons for seizure and destructions as required under Section 14 of the Standards Act"

The Appellant has flouted the Respondent for not giving reasons for seizure and destruction as stated in the Statement of Appeal grounds 3(b).

In its Replying Affidavit dated 27th November 2017 at Paragraph 9, the Respondent confirms service of the Seizure Notification to the Appellant. The Respondent has annexed Seizure Notification number 2827 dated 14th September 2017 for seized goods at the Appellant's premises in Kisumu. The notice was served by the Respondent and received by the Store Manager for the Appellant and witnessed by a representative of the Appellant.

The Respondent also annexed Seizure Notification number 2459 dated 19th September 2017 for seized at the Appellant's premises in Meru. The same was served by the Respondent and acknowledged and witnessed by representatives for Appellant.

All these Seizure Notifications are stamped by the Appellant Official Stamp and signed by both the Serving and receiving Persons. The Appellant by a Replying Affidavit dated 20th March 2018 at Paragraph 15, confirms receipt of the Seizure Notifications.

Section 14A 1(a) of the Standards Act provides for destruction of goods if they do not meet relevant Kenya Standard which is clearly set out in the said Seizure Notifications.

We find that proper Seizure Notification as stated in Sec. 14A (3) of the Standards Act were given and or served by the Respondent to the Appellant. We also find that a reason for seizure of the goods was given in the sense that the Seizure Notifications clearly states that the goods were seized because they do not meet the requirements of Relevant Standards as set out in Sec 14A(1) (a) of the Standards Act.

It is however important to note that the Seizure Notification was issued to the Appellant on the strength of field tests conducted on site in presence of the Appellants representatives although the Appellants disputes testing having been done and the Respondent failed to provide formal results for the field tests. As indicated previously, we have relied on Laboratory Test Results for purposes of this suit and disregarded field testing because no results were provided in support of the field testing.

3) Had the goods been tested at the point of entry and found to be complaint"

It was also the Respondent's case that the Seizure Notification dated 13th September 2017, 19th September 2017 and Sample Collection Form dated 14th September 2017 contained items that were imported from Uganda with Certificate of Compliance and that the Respondent had verified and released the items to the Appellant on 9th June 2016 because the said goods were complaint with the Kenyan Standards requirements. The Appellant averred that the Respondent cannot therefore seize and further order the scrutiny and or destruction of the goods after the entire consignment had already been released to the Appellant unconditionally.

Unfortunately the Appellant did not provide proof of the subject matter goods having been tested by the

Respondent and having been confirmed by the Respondent as compliant with applicable standards. Instead, the Appellant provided the following commercial documentations which were stamped by the Respondent:

1. East Africa Community Certificate of Origin confirming that the goods were of Uganda origin.
2. Permit to Use the Uganda Standard Certification Mark for hot rolled steel sections issued to Tembo Steels (U) Limited which supplied hot/cold rolled steel to the Appellant.
3. Single Administrative Document (SAD) – SIMBA (C.17 B Customs) which is import documentation.
4. Invoice from Tembo Steels (U) Limited.
5. Import taxes Payment slips.

The above documents had the Respondent's stamp on the face of them and hence the argument by the Appellant that the goods were duly cleared by the Respondent. Under the Standards Act, the Respondent is the only body mandated to monitor, set out and enforce standards of the goods in question. The Respondent is also mandated to carry these functions through their appointed agents. Before proceeding further, this Tribunal needs to identify the documents that are expected to be issued by the Respondent in certification of goods.

According to the Respondent, the only document that is issued to confirm validity of goods is Certificate of Conformity (CoC) which can only be issued by the Respondent or its appointed agent after duly testing the goods against parameters set out in the standards for a particular commodity. It is the contention of the respondent that in absence of CoC, any good in the market in this country are deemed not to have gone through any testing and therefore, subjected to tests by the respondent. In the current case the Appellant did not produce a Certificate of Conformity but produced several other importation documents which are not equivalent to Certificate of Conformity and thus not useful at all to the Appellant's case.

The Appellant contended that they had obtained clearance at the point of entry. It was also the Respondent's contention that clearance at point of entry does not in any way prevent the Respondent from seizing goods in the market and testing them if they have reason to believe that such goods are not compliant with applicable standards.

The burden of proving that the goods had been tested and met the standards falls squarely on the Appellant. It is noteworthy that the Appellant did not produce the necessary document namely Certificate of Conformity or even had any evidence that the products were tested and found to have met the standards by an agent of the Respondent. The commercial documents provided have no relevance whatsoever to standards in this country even if stamped by the Respondent.

Section 21 of the Standards Act provides that where there is a conflict between the provisions of a specification declared to be a Kenya Standard under Section 9(1) of the Standards Act and a specification made or declared under any other written law the Kenya Standard shall prevail.

Section 14 (1) (g) of the Standards Act empowers an inspector to seize and detain, for the purpose of testing, any goods in respect of which he has reasonable cause to believe that an offence has been committed at all reasonable times. Section 9 (2) of the Standards Act provides that where a Kenya Standard has been declared 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. Subsection 4 of Section 9 further provides that any person who contravenes the provisions of an order under subsection (2) shall be guilty of an offence.

In view of the provisions of Section 9 of the Standards Act, it is our considered view that the Respondent has powers to seize and detain for purposes of testing any goods they believe to be in contravention of standards specification in Kenya regardless of whether such goods had been tested and cleared by the Respondent at the point of entry and for this reason the Respondent is not estopped from seizing and testing goods in circulation within the Kenyan market by virtue of having cleared the goods at the point of entry. Therefore, we find that the Standards Act does not place any limitation on the number of times goods can be inspected. As such; the fact that the Appellant's goods could have been inspected at the point of entry does not prevent the Respondent from re-inspecting the goods again.

Regarding legitimate expectation, we associate ourselves with the case of **Republic v Nairobi City County & another exparte Wainaina Kigathi Mungai [2014] eKLR** where it was held that the legitimate expectation cannot override the law. In the circumstances, we find that the Respondent acted within the scope of its authority to inspect under Section 14 of the Standards Act and thus the Appellant's legitimate expectation cannot outweigh Article 46 and the provisions of the Standards Act.

Having said that, in the absence of proof of testing at the point of entry and a Certificate of Conformity establishing the conformity of the Appellant's goods to Kenya Standards, the laboratory Test Reports by the Respondent is the only evidence available to speak on the quality of the Appellant's goods.

4) Did the Respondent attach new conditions to goods already tested and released"

Having found that the Respondent has a legal duty to test goods circulating in the market regardless of whether such goods were cleared at the point of entry we now turn to the issue of whether the subject matter goods complied with applicable standards and whether the Respondent attached new conditions to the goods allegedly tested and released to the market.

The Appellant averred that the Respondent had not articulated the danger the goods posed to the public and that the goods were largely in compliance with the relevant standards with the products being within acceptable tolerance as required under standard specifications.

The Respondent on their part submitted extensively on the extent of non-compliance with the requirements of: KS 445:1984 covering zed sections, KS 572:2017 covering angle sections, KS 261:2013 covering barbed wire, KS ISO 3633 covering waste pipes, KS ISO 1452 covering pressure pipes, KS ISO 15874 covering polypropylene pipes, KS EAS 11:2014 covering galvanized corrugated steel sheets and KS 2199:2009 for rain water pipes.

We have carefully studied the requirements under the standards adduced as evidence and the Laboratory Tests Results availed by the Respondent and note that the respondent's goods failed to meet several requirements under the standards. The requirements are neither new nor additional requirements but rather the normal requirements under the standards at all material times. Notably, some of the goods in question are construction materials and we agree with the Respondent that there is a danger and a great risk to the public if such goods are sold to unsuspecting public who use the same for construction.

Conclusion

In view of the foregoing, it is our considered view that the subject matter goods did not meet standard requirements and specifications as prescribed under Kenya Standards and therefore dismiss the appeal. We at the same time wish to caution the Respondent's on the need to avail formal test results whether as a result of field tests or confirmatory tests in a timeous manner and fashion.

Each party to bear its costs for the appeal.

Dated at Nairobi this 3rd day of August 2018

Gladys Muthoni Mburu(Chairperson)

Hillary Sigei(Member)

Moses Sande Makhandia.....(Member)

Peter Mungai.....(Member)

Lul Abdiwahid(Member)



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