



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 93 OF 2020**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY, NATIONAL TREASURY**

**AND PLANNING .....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE STRATEGIC FOOD RESERVE**

**TRUST FUND.....1<sup>ST</sup> INTERESTED PARTY**

**ALPHA GRAIN LIMITED .....2<sup>ND</sup> INTERESTED PARTY**

**BELLAMY MILLING COMPANY LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**BUFFALO MILLERS .....4<sup>TH</sup> INTERESTED PARTY**

**CAPWELL INDUSTRIES LIMITED.....5<sup>TH</sup> INTERESTED PARTY**

**EASTERN FLOUR MILLS LIMITED.....6<sup>TH</sup> INTERESTED PARTY**

**ELDORET GRAINS LIMITED.....7<sup>TH</sup> INTERESTED PARTY**

**GOLDLEAF KENYA LIMITED.....8<sup>TH</sup> INTERESTED PARTY**

**GRAIN INDUSTRIES LIMITED.....9<sup>TH</sup> INTERESTED PARTY**

**JAMII MILLING LIMITED .....10<sup>TH</sup> INTERESTED PARTY**

**KABANSORA MILLERS LIMITED .....11<sup>TH</sup> INTERESTED PARTY**

**KARIBU FLOUR MILLS LIMITED.....12<sup>TH</sup> INTERESTED PARTY**

**KENBLEST LIMITED.....13<sup>TH</sup> INTERESTED PARTY**

**KENSELRISE LIMITED.....14<sup>TH</sup> INTERESTED PARTY**

**KITALE INDUSTRIES LIMITED .....15<sup>TH</sup> INTERESTED PARTY**

KITUI FLOUR MILLS LIMITED.....	16 <sup>TH</sup> INTERESTED PARTY
MALINDI MILLERS LIMITED.....	17 <sup>TH</sup> INTERESTED PARTY
MAMA MILLERS LIMITED.....	18 <sup>TH</sup> INTERESTED PARTY
MOMBASA MAIZE MILLERS, KISUMU .....	19 <sup>TH</sup> INTERESTED PARTY
MOMBASA MAIZE MILLERS, MOMBASA.....	20 <sup>TH</sup> INTERESTED PARTY
MOMBASA MAIZE MILLERS, NAIROBI.....	21 <sup>ST</sup> INTERESTED PARTY
NAIROBI FLOUR MILLS .....	22 <sup>ND</sup> INTERESTED PARTY
OSHO GRAIN MILLERS LIMITED .....	23 <sup>RD</sup> INTERESTED PARTY
PEMBE FLOUR MILLS LIMITED .....	24 <sup>TH</sup> INTERESTED PARTY
UNGA LIMITED .....	25 <sup>TH</sup> INTERESTED PARTY
UNITED MILLERS LIMITED.....	26 <sup>TH</sup> INTERESTED PARTY
JOY MILLERS.....	27 <sup>TH</sup> INTERESTED PARTY
MERU MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED.....	28 <sup>TH</sup> INTERESTED PARTY
NGUPE AGENCIES.....	29 <sup>TH</sup> INTERESTED PARTY
FAIRATE GRAIN MILLERS LIMITED.....	30 <sup>TH</sup> INTERESTED PARTY
AMAINI FLOUR MILLS LIMITED .....	31 <sup>ST</sup> INTERESTED PARTY
RONGAI FLOURS MILLS LIMITED.....	32 <sup>ND</sup> INTERESTED PARTY
SWEET MEAL COMMODITIES LIMITED.....	33 <sup>RD</sup> INTERESTED PARTY
GIANT MILLERS .....	34 <sup>TH</sup> INTERESTED PARTY
SIMBA MFALME .....	35 <sup>TH</sup> INTERESTED PARTY
NICEY NICEY MILLERS.....	36 <sup>TH</sup> INTERESTED PARTY
MWANGA MILLERS.....	37 <sup>TH</sup> INTERESTED PARTY
JIKAZE MILLERS .....	38 <sup>TH</sup> INTERESTED PARTY
NAICIA MILLERS .....	39 <sup>TH</sup> INTERESTED PARTY
UNGA FARM CARE EA LIMITED.....	40 <sup>TH</sup> INTERESTED PARTY
SIGMA FEEDS LIMITED .....	41 <sup>ST</sup> INTERESTED PARTY
ISINYA FEEDS LIMITED .....	42 <sup>ND</sup> INTERESTED PARTY
FARMERS CHOICE LIMITED .....	43 <sup>RD</sup> INTERESTED PARTY
EX PARTE APPLICANT: OKIYA OMTATAH OKOITI	

## JUDGMENT

### The Application

1. The *ex parte* Applicant, Okiya Omtatah Okoiti, is aggrieved by decisions made and published in **Gazette Notice No. 3234 of 17<sup>th</sup> April 2020** which was published on 20<sup>th</sup> April 2020 in a special issue of *Kenya Gazette Vol. CXXII -No. 72* and in **Gazette Notice No.3644 of 15<sup>th</sup> May, 2020** by the 1<sup>st</sup> Respondent, which was published on the same date in a special issue of the *Kenya Gazette Vol. CXXII-No.89* by the Cabinet Secretary, National Treasury and Planning, the 1<sup>st</sup> Respondent herein. According to the *ex parte* Applicant, the said decision authorized the importation into Kenya of substandard and poisonous maize which does not meet the East African Community Standard for dry maize.

2. The *ex parte* Applicant consequently filed an application by way of a Notice of Motion application dated 15<sup>th</sup> July 2020 in which he seeks the following orders;

a) **THAT a Judicial Review order of certiorari do issue, to bring to this Court for purposes of being quashed, and to be quashed, the Gazette Notice No. 3234 of 17<sup>th</sup> April 2020 by the Respondent, which was published on 20<sup>th</sup> April 2020, in a special issue of Gazette Vol. CXXII-No.72; and Gazette Notice No.3644 of 15<sup>th</sup> May, 2020 by the 1<sup>st</sup> Respondent, which was published on the same date in a special issue of the Kenya Gazette Vol. CXXII-No.89.**

b) **THAT a Judicial Review order of prohibition do issue, prohibiting the Respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing the Gazette Notice No.3234 of 17<sup>th</sup> April 2020 by the 1<sup>st</sup> Respondent, which was published on 20<sup>th</sup> April 2020 in a special issue of the Kenya Gazette Vol.CXXII-No.72; and Gazette Notice No.3644 of 15<sup>th</sup> May 2020 by the 1<sup>st</sup> Respondent, which was published on the same date in a special issue of the Kenya Gazette Vol.CXXII-No.89.**

c) **THAT a Judicial Review order of mandamus do issue, to compel the 1<sup>st</sup> Respondent to issue a new gazette notice on the importation of maize, wherein:**

i) **It strictly adheres to the law governing the importation of relief maize in Kenya, including but not limited to the East African Community Standard and Kenyan Standard on maize.**

ii) **The Strategic Food Reserve Trust Fund is the sole agent to import the relief maize.**

d) **THAT consequent to the grant of the prayers above the Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.**

e) **THAT costs be in the cause.**

3. The application is supported by the grounds on its face, and a Statutory Statement and Verifying Affidavit of Okiya Omtatah Okoiti all dated 12<sup>th</sup> June 2020. It is averred that through a Gazette Notice No.3234 of 17<sup>th</sup> April 2020, and Gazette Notice No.3644 of 15<sup>th</sup> May 2020 ( hereinafter “the impugned gazette notices”), the 1<sup>st</sup> Respondent irregularly and unlawfully allowed the importation of substandard maize that endangered the lives of Kenyans, granted tax waivers to the benefit of the 2<sup>nd</sup> to 43<sup>rd</sup> Interested Parties (hereinafter “the millers”),violated Section 114(2) of the East African Community Customs Management Act,2004 (hereinafter EACCM Act 2004) through partial remission of applicable duty contrary to what is provided for in the gazette notice, and violated item 20 of Part B of the Fifth Schedule to the EACCM Act 2004, by failing to put in place clear and specific mechanisms on how the full benefits of the exemptions would be passed to the ultimate consumer. Further, that the 1<sup>st</sup> Respondent also irregularly and unlawfully allowed the importation of GMO maize modified in accordance with other standards other than the standards applicable in the European Union.

4. It was averred that unless the gazette notices are quashed the lives of millions of Kenyans are in danger, and that the government will lose revenue without subsidizing the consumer of the emergency relief. Thus, that the Constitution would also be further violated and threatened. The *ex parte* Applicant contended that it is only the Strategic Food Reserve Trust Fund that has the mandate to import the relief maize, and that no authorization was granted to the private millers by the Fund to do so. Further, that the 1<sup>st</sup> Respondent’s attempts to abolish the Public Finance Management (Strategic Food Reserve Trust Fund) were set aside through **Constitutional Petition No.145 of 2020** wherein the Public Finance Management (Strategic Food Reserve Trust Fund) Revocation Regulations, 2020 (Legal Notice No. 61 of 14<sup>th</sup> April 2020) were suspended. Therefore, that the Strategic Food Reserve Fund is still in existence.

5. Therefore, that the purpose of these proceedings was to oppose the 1<sup>st</sup> Respondent’s decision to authorize importation by third parties of substandard and poisonous maize that does not meet the East African Community Standard, and also the tax waiver that will not benefit the consumers granted to the parties at 14% for white maize and 10% for yellow maize. The *ex parte* Applicant contended that the aflatoxin levels allowed in the impugned gazette notice were 10 parts per million as opposed to 10 parts per billion which is what is provide for under that East African Community Standards, and that this is one thousand times higher than the levels allowed under the law. Further, that the gazette notices were silent on the amount of fumonism levels and allowed for the importation of maize that has a moisture content not exceeding 14.5% which is higher than the maximum of 13.5% set by East African Community Standard and Kenyan Standard.

6. The *ex parte* Applicant further averred that the East African Community Standard is recognized and endorsed by the Kenya Bureau of Standards (KEBS), and that on 7<sup>th</sup> May 2020, KEBS issued a public notice to inform the importers and the general public that they should comply with the East African Standard Specification for maize (Grains). It is deposed that although Gazette N0.3644 of 15<sup>th</sup> May 2020

purports to revoke Gazette Notice No.3234 of 17<sup>th</sup> April 2020 no major changes have been made as the former does not provide a commencement date for the importation window, all it does is to provide that the maize shall be imported on or before 31<sup>st</sup> July 2020 and thus it opens ways for mischief as any maize in the Country including that imported under Gazette Notice No.3234 of 17<sup>th</sup> April 2020 could be considered imported under the concessional rates. It was thus deponed that the real import of this vagueness is that Gazette Notice No.3234 is still in force.

7. It was further contended that in accordance with Clause 20(c) in Part B of the Fifth Schedule to the EACCM Act of 2004, goods for emergency relief must be imported within a specified period. However, that the revised gazette notice does not give a specific period on when the importation will start, nor when it will end. Further, that both Gazette Notices failed to specify as required by the authorizing Act when the emergency event i.e. coronavirus disease was gazetted as a formidable epidemic disease in the country, being 27<sup>th</sup> March 2020. Therefore, that given that the Act provides that the importation must be done within 6 months or such other period not exceeding 12 months of the natural disaster leading to the need for emergency relief, this failure to specify the date means that both gazette notices are invalid as they do not comply with the conditions set out in the authorizing Act. It was the *ex parte* Applicant's contention that even if the private millers qualified as government approved agents under the clause 20 of the EACCM Act, the revised gazette notice is still unlawful and *ultra vires*. This is for the reasons that it does not guarantee that the consumer will enjoy the benefits of the taxes to the full extent of the duty concession, for as matters stand it is still the private millers who will enjoy these benefits.

8. According to the *ex parte* Applicant, Gazette Notice No. 3234 required that the imported maize be accompanied by a certificate of conformity from a company appointed by KEBS, which is not the case in the revised Gazette Notice no.3644 which provided for a certificate of conformity from KEBS. According to the *ex parte* Applicant, this requirement by the revised gazette notice is contrary to KEBS's policy as KEBS lacks capacity to inspect goods at the supply or origin, and the task is subcontracted to several appointed agents. That in light of the foregoing KEBS can only issue the certificates after the maize has entered the country, and can only conduct inspection at the ports of entry and that the certificates of conformity are required before cargo in voyage is insured. The *ex parte* Applicant therefore averred that he has reason to suspect that the requirement for KEBS certification is a ploy to facilitate entry into the country of the contaminated maize, which is already in the country or offshore at the port of Mombasa.

9. The *ex parte* Applicant also deponed that he reasonably suspects that the lowering of standards contrary to the law is deliberate and tailor-made to serve vested interests. He further averred that the very short period of 41 days that is from 20<sup>th</sup> April 2020 to 30<sup>th</sup> May 2020 given for the importation of the maize was too short as there are several processes involved. These include sourcing and buying, inspecting, sourcing and hiring a vessel, loading the maize onto the vessel and transporting it from Mexico which is the only current source and complying with the restrictive procedures for clearing vessels imposed at the port of Mombasa this period is not long enough. Therefore, that the impugned gazette notices are designed to achieve an undisclosed collateral purpose.

## **The Responses**

### ***The Respondents' Response***

10. In response, the Respondents filed a Replying Affidavit sworn on 10<sup>th</sup> July 2020 by Dr. Julius Muai the Principal Secretary, National Treasury. It was averred therein that contrary to Order 2 Rule 6(1) the *ex parte* Applicant had introduced a new cause of action by challenging Gazette Notice No.3644 dated and published on 15<sup>th</sup> May 2020. It was also averred that the *ex parte* Applicant had failed to consider that the EACCM Act 2004 primarily provides for the management and administration of customs and for related matters but not the standard of goods. It is deponed that the 1<sup>st</sup> Respondent had indicated that the concession was to apply to maize imported between 20<sup>th</sup> April, 2020 and 30<sup>th</sup> May, 2020 and that he set various conditions some of which included that the moisture content for both white and yellow maize was set at 14.5%. It was also deponed that aflatoxin levels were also set at 10 parts per million. The deponent averred that the 1<sup>st</sup> Respondent published a subsequent Gazette Notice No.3644 on 15<sup>th</sup> May, 2020 revoking the initial Gazette Notice No.3234. It was further deponed that the previous gazette notice which is the basis upon which the application has been made has since been revoked and that no one can lay a claim on a notice that is non-existent.

11. The deponent deposed that the Fifth Schedule of the EACCM Act provides for the exemption of goods imported for emergency relief purposes and it is under this that the Gazette Notice No.3644 was promulgated. It was deponed that the *ex parte* Applicant had conflated the criteria to qualify for concession with standards prescribed by KEBS on the importation of maize. Further, in regards to the issue on the certificate of conformity it was averred that the purpose for this condition was to ensure that the imported maize was of good quality. It was also deponed that the *ex parte* Applicant's allegations were based on mere suspicion as he had not placed any evidence before this Court to prove that the maize was not fit for consumption. The Principal Secretary deponed that the application was premised on alarmist statements as no academic or empirical knowledge had been demonstrated by the *Ex parte* Applicant to give opinion evidence.

12. The Respondents further averred that the Interested Parties had through their Replying Affidavit made it clear that they had not imported any maize prior to 20<sup>th</sup> April 2020 as there was a court order in place staying the implementation of Gazette Notice No. 3234. It was deponed that Gazette Notice No.3644 is fully compliant with the provisions of KEBS whose standards are similar to EAS 2, Maize Grains Specifications, published by the East African Community. The deponent further averred that the Strategic Food Reserve Trust Fund had been disbanded through Legal Notice 61 of 14<sup>th</sup> April, 2020 and that this was so as to ensure fair competition. Therefore, that it is only the millers in the schedule of Gazette Notice No.3644 who have the responsibility to import relief food.

13. The Respondents pointed out that Gazette Notice No.3644 revised the earlier conditions to 13.5% for moisture content of the maize and 10 parts per billion for aflatoxin levels. These are the same standards that the *ex parte* Applicant is advocating for. In conclusion it was deposed that all the criteria required had been met and therefore there is no further action contemplated on the part of the Respondents.

### ***The Interested Parties' Response***

14. In response, the 2<sup>nd</sup> -17<sup>th</sup>, 19<sup>th</sup> -26<sup>th</sup> and 40-43<sup>rd</sup> Interested Parties filed a Replying Affidavit sworn on 7<sup>th</sup> July 2020 by Nirmal Shah, the Chief Executive Officer of the 8<sup>th</sup> Interested Party. In regards to the issue regarding the effective date it was averred that Section 58 of the Interpretation and General Provisions Act provides that where timelines are not provided to perform a certain action then the same shall be done without undue delay and shall be done as often as is required. This according to the deponent therefore meant that the importation was deemed to commence from the date of the publication of the gazette notice dated 15<sup>th</sup> May 2020. It is deponed that pursuant to this gazette notice the Interested Parties herein made necessary contracts for the importation of the maize. The deponent averred that the imported maize underwent necessary tests at the port as per the KEBS, which is the only body that is mandated to carry out tests on imports. He further deponed that it is only after the tests have been undertaken that the goods can be said not to have met the standards.

15. It was deponed that KEBS is not a party in this suit and that *ex parte* Applicant has not filed any certificate interrogating the quality of the said imported maize. That contrary to the *ex parte* Applicant's allegations the maize imported had to meet Condition (d) of the gazette notice which stated that it had to be accompanied by a certificate of conformity issued by a Company appointed by KEBS. This said condition guarantees the safety of imported white maize by the Interested Parties herein. It was further deponed that for the Strategic Food Reserve Trust Fund to act as sole importer would be anti-competitive and in clear violation of the Competition Act No.12 of 2010. The deponent averred that the Gazette Notice No.3644 dated 15<sup>th</sup> May 2020, granted the importers approval to import up to 4 million bags of white and yellow maize. This according to the deponent can only sustain the Kenyan population up to 2 months as 40 million bags are consumed every year.

16. It was deponed that the only motivation for the millers to import the maize was the fact that the gazette notice provided for a reduced duty of 14% for white maize and 10% for yellow maize down from 50 %. It is averred that was this not the case they would not have imported the maize. It was further deponed that the *ex parte* Applicant's claim for the millers to pay the difference after the maize has already been cleared in conformity with the terms of the gazette notice is unconscionable. It was deponed that the reduction of duty by the government was so as to ensure that the prices of essential commodities was within reach for the majority and to further ensure food security in the country. The *ex parte* Applicant did not demonstrate any academic or empirical knowledge in toxicology and therefore he had no authority to give opinion evidence. In conclusion it was deponed that no orders can be issued against a revoked order and that the Applicant had not produced any evidence to show that the maize imported did not meet the standards required by KEBS.

### ***The Reply***

17. In his rebuttal, the *ex parte* Applicant filed a further Affidavit he swore on 2<sup>nd</sup> October 2020. He reiterated the contents of his verifying affidavit dated 12<sup>th</sup> June 2020 and averred that the two Gazette Notices had direct correlation and that Order 2 Rule 6(1) of the Civil Procedure Rules does not permit a party to raise a new ground if it is inconsistent with a previous pleading that he has filed in the same suit. The deponent urged the Court to be guided by the Ugandan case of **National Outdoor Advertisement Contractors Association & 7 Others vs Uganda National Roads; Kampala. [2015]** where the Court gave guidance on amendment of a Notice of Motion in judicial review proceedings. It was averred that contrary to the Respondent's assertion the application does not offend Order 2 Rule 6.

18. It was also deponed that no evidence was annexed to show that the 2<sup>nd</sup> to 43<sup>rd</sup> Interested Parties were competitively sourced and allocated the quotas in the gazette notices as required by the Public Procurement and Asset Disposal Act. It was further averred that in light of section 4(2) (c) of the Public Procurement and Asset Disposal Act, tax waivers are involved to subsidise goods and services during emergency situations, and that private players who are driven by profit cannot therefore purport to make more profit than the Government itself.

19. The *ex parte* Applicant reiterated that the 1<sup>st</sup> Respondent's attempts to illegally abolish the Strategic Food Reserve Trust Fund were put on hold on 9<sup>th</sup> June 2020 through **Constitutional Petition No. 145 of 2020**, and the orders are still in force as the matter is still pending determination. The *ex parte* Applicant further averred that the Employment and Labor Court in **Okiya Omtatah Okioti vs Ukur Yatani, Cabinet Secretary, The National Treasury and Planning, ELRC Misc. App. No.62 of 2020**, stayed Gazette Notice No.4134 of 17<sup>th</sup> June 2020, which purported to revoke the appointment of the chairperson and the Members of the Strategic Food Reserve Oversight Board.

20. Lastly, the *ex parte* Applicant contended that no legitimate expectation can accrue from the violation of the law. He further deponed that no evidence was annexed to show that the maize imports were required to stabilize the prices of maize in the local market, and that it is the statutory mandate of the Strategic Food Reserve Trust Fund to stabilize prices of essential food commodities in Kenya. In addition, that no knowledge in toxicology is required herein or a certificate to show that the maize being imported does not meet the KEBS standards, and all that is required is to demonstrate that the specifications for the dry maize given in the gazette notices contravene those given in the East African Community Standard for dry maize.

### **The Determination**

21. I have considered the arguments made by the parties, and it is not disputed as averred and submitted by the Respondents, that Gazette Notice No. 3234 of 17<sup>th</sup> April 2020 by the Respondent, which was published on 20<sup>th</sup> April 2020 in a special issue of Gazette Vol. CXXII-No.72 was revoked, and is thereby of no legal effect. The prayers in relation to the Gazette Notice No. 3234 of 17<sup>th</sup> April 2020 have therefore been overtaken by events. In addition, the *ex parte* Applicant did not dispute that Gazette Notice No.3644 of 15<sup>th</sup> May, 2020 revised and changed the earlier conditions that were in the Gazette Notice No. 3234 of 17<sup>th</sup> April 2020 to 13.5% for moisture content of the maize and 10 parts per billion for aflatoxin levels. This Court will therefore only consider the outstanding arguments made in relation to the legality of Gazette Notice No.3644 of 15<sup>th</sup> May, 2020, which are two. The first is whether the Gazette Notice No.3644 of 15<sup>th</sup> May, 2020 contravenes section 114(2) of the EACCM Act and Clause 20, Part B, Fifth Schedule of the EACCM Act 2004. Second, whether the said Gazette Notice contravenes the East African Community Standard and Kenyan Standard on maize grains.

22. The *ex parte* Applicant in this respect filed written submissions dated 24<sup>th</sup> August 2020, wherein he submitted on various issues, including those that are now overtaken by events. On the issues at hand, the *ex parte* Applicant contended that the 1<sup>st</sup> Respondent acted *ultra*

vires to his mandate under section 114(2) of the EACCM Act, Item 20 Part B of the 5<sup>th</sup> Schedule of the Act as read with Articles 10,73,75,129 and 153(4)(a) of the Constitution It was further submitted that the Court should intervene since the Respondents failed to adhere to the rule of law in supporting this ground. Counsel cited the case of **Republic vs Kenya National Examination Council, Miscellaneous Civil Application No. 328 of 2015** where it was held that the Court had jurisdiction to interfere where there is an improper exercise of discretion. The case of **Keroche Breweries Limited & 6 Others vs Attorney General & 10 others [2016] eKLR** was also cited in support of this argument.

23. The *ex parte* Applicant in this regard cited Article 129 which decrees that the 1<sup>st</sup> Respondent's executive authority must be exercised in a manner compatible with the principle of service. Further that Article 153(4) also enjoins him to act in accordance with the Constitution. To buttress this argument counsel further cited the case of **Jayne Mati & Another vs Attorney General [2011] e KLR**. On whether the duty waiver in both gazette notices is against the public interest, the *ex parte* Applicant cited Article 201(a), (d) and (e) on the principles of public finance and Article 232(1) (b) on the values and principles of public service. It was submitted that the two Articles had been violated by the provisions allowing private entities to import maize at concessional import duties that would not benefit the public, and that the 1<sup>st</sup> Respondent does not have any legal powers to impose the claimed levels of reduced duty as section 114 (2) provides that duty is either not applied or no exemption is granted. However, the section does not provide for partial remission.

24. Still on the legality of the impugned Gazette Notices, it was submitted by the *ex parte* Applicant that it is in public interest for the Strategic Food Reserve Trust Fund and not private millers to import maize, and that it would be easier for the Government to monitor and enforce its maize standards where the Government body mandated with strategic food reserve is the sole importer. It was submitted that this would benefit the general public as the government would not lose any revenue, the consumers would enjoy reduced prices owing to the reduced duties, and local farmers would also be cushioned from the impact of imports in the market. The *ex parte* Applicant submitted that the Strategic Food Reserve Trust Fund is still in existence, and that the President signed into law the Supplementary Appropriation Bill, 2020, paving way for the utilization of Kshs.107.5 billion from the Consolidated Fund, whereupon the National Assembly subsequently allocated Kshs. 10 billion to the Strategic Food Reserve Trust Fund on 21<sup>st</sup> April 2020, and could not have allocated this amount of money to a non-existent entity.

25. The *ex parte* Applicant it is irregular for the imported maize to be accompanied by a certificate of conformity issued by KEBS, as there are serious issues on whether the Bureau is able to discharge its statutory duties to protect Kenyans in relation to the planned importation. Counsel further submitted that the Bureau's aim was to either deliberately subvert the law or negligently direct importers under the claimed revoked gazette notice to comply with the Kenyan Standard that is no longer applicable. Further, that there is no reason why the impugned gazette notices are silent on fumonism levels in the maize. Importers must therefore be compelled to comply with the East African standard on maize, and it was submitted that the purpose of the gazette notices was to allow into the Kenyan market maize meeting the lowered standards.

26. Lastly, on whether the *ex parte* Applicant is entitled to judicial review reliefs sought it was submitted that he was entitled to the Order of Mandamus as the 1<sup>st</sup> Respondent had acted contrary to the rules of natural justice as was held in the case of **Kenya National Examination Council vs Republic Ex Parte Geoffery Gathenji Njoroge Civil Appeal No.226 of 1996**. It was also submitted that he was entitled to the Order of Certiorari as it was now established that the 1<sup>st</sup> Respondent's decision violated the Ex parte Applicant's and the general public's legitimate expectation. Counsel submitted that the gazette notices were null and void ab initio and therefore they cannot lie or stand. This was held in the case of **Macfoy vs United Africa Company Limited [1963]3 ALL ER 1169**. On the Order of Mandamus the 1<sup>st</sup> Respondent acted in contravention of the Constitution and therefore he or any other person must be prohibited from enforcing the impugned Gazette Notice.

27. On the issue of costs are payable, it was submitted that this suit was filed in public interest and that the *ex parte* Applicant has spent a lot of personal resources prosecuting it and therefore he is entitled to costs. Counsel relied on the principle of award of costs in constitutional litigation between a private party and the State where a successful private party is entitled to costs. This principle was discussed in the case of **Kenya Human Rights Commission vs Communications Authority of Kenya & 4 Others [2018] eKLR**. It was further submitted that the Ex parte Applicant persuades this Court not to award costs if the application is not successful.

28. The Respondents' counsel filed written submissions on 14<sup>th</sup> December 2020 wherein it was submitted that the elementary principle of the law is that "he who alleges must prove.", and counsel cited section 107 of the Evidence Act and the case of **Wareham T/A A.F. Wareham & 2 Others vs Kenya Post Office Savings Bank, [2004] 2 eKLR** where the Court held that the burden is on the plaintiff to prove that on the balance of probabilities his case is true. Counsel submitted that there was no evidence of poisonous maize save for the allegations raised by the *ex parte* Applicant which do not comply with the provisions of the Evidence Act.

29. In response to the issue of the disbandment of the Strategic Food Reserve Trust Fund, counsel also cited the case of **Thuku Kirori & 4 Others v County Government of Murang'a[2014]eKLR** where the Court held that a liberalised market envisages competition where the consumer is presented with a variety of choices from which he may pick the most suitable for his needs, subject only to his capacity to access them.. With regard to the issue on the failure to indicate the commencement date, it was submitted that it is within public knowledge when Corona Virus was declared a pandemic, and when the 1<sup>st</sup> Corona case was reported in Kenya, that is 13<sup>th</sup> March, 2020.Counsel submitted that Gazette Notice No.3644 provided that the last day for importation would be 31<sup>st</sup> July 2020. Which was clearly in accordance with Clause 20, Part B, Fifth Schedule of the EACCM Act, 2004.

30. On the order of mandamus sought to compel the 1<sup>st</sup> Respondent to issue a new gazette notice, counsel submitted that Gazette Notice No.3644 dated 15<sup>th</sup> May, 2020 already complies with orders the *ex parte* Applicant is seeking. In regard to the order of prohibition against the Respondents from giving effect, implementing or enforcing Gazette Notice 3644, counsel submitted that it is not possible to issue the order as the millers had already imported the maize.

31. The 2<sup>nd</sup> -17<sup>th</sup>, 19<sup>th</sup> -26<sup>th</sup> and 40-43<sup>rd</sup> Interested Parties' counsel filed written submissions dated 4<sup>th</sup> November 2020, and submitted that the Interested Parties had legitimate expectation on the legality of the process before importing, counsel cited the Supreme Court case of

**Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others Supreme Court Petition No.14, 14A, 14B & 14C of 2014** and the High Court decision in **Republic vs Principal Secretary, Ministry of Transport, Housing and Urban Development Ex Parte Soweto Residents Forum CBO [2019]eKLR** where the courts expounded on how legitimate expectation can arise,. Counsel submitted that upon the issuance of Gazette Notice No.3644 granting tax waivers the Interested Parties, they proceeded to import maize as they had reason to believe that the same was done lawfully. It was also submitted that the Cabinet Secretary has the powers to grant waivers within a specified period to address a specific need and therefore the Interested Parties had legitimate expectation that the gazette notice met all the requirements of the law.

32. Counsel further submitted that the gazette notice created a legitimate expectation and that it created a reasonable expectation in the minds of the millers who proceeded to import maize due to the tax waiver granted. It was submitted that the government's role is to ensure that the private sector conducts its business so as to spur economic growth and this it does through providing tax rebates, tax reliefs or other economic incentives. In conclusion to this issue counsel submitted that the reliefs sought ought not to be granted as the same was lawful and that the citizens of Kenya are already enjoying reduced flour prices.

33. On the issue of having the Strategic Food Reserve Trust Fund as a sole importer of maize, counsel for the Interested Parties cited section 4(a) of the Competition Act and submitted that Kenya being a liberal economy means that the prices of essential goods are determined by the forces of demand and supply and that the attendant benefits of importing goods at subsidized prices is enjoyed by the consumer .Counsel likewise cited the case of **Thuku Kirori & 4 Others vs County Government of Muranga [2014] eKLR** where the Court highlighted the liberalized economy in Kenya. The Court stated that a liberalized economy envisions competition where the consumer has the option of choosing from a variety of choices depending on the capacity to access them. The case of **Republic v Nairobi City County & 2 others ex parte Nuclear Investments Ltd & Another [2025] eKLR** was also cited to emphasis on the need for protection when undertaking business to prevent unfair competition.

34. On the final issue on whether the *ex parte* Applicant is entitled to reliefs sought, it was submitted that no evidence was adduced to prove that imported maize was offshore or already in the country, and no contrary evidence was adduced to prove that the maize did not meet the test. Counsel also submitted that nothing stopped the Ex parte from enjoining KEBS as an Interested Party so that it could clarify on testing of the maize and whether it partnered with its agencies in undertaking the test at the port of origin.

35. It is notable that Gazette Notice No 3644 of 15<sup>th</sup> May 2020 was published pursuant to powers granted to the Cabinet Secretary, National Treasury and Planning by section section 114 (2) of the East African Community Customs Management Act as read with Item 20 of Part B of the Fifth Schedule to the Act. The Gazette Notice provided as follows:

#### **GAZETTE NOTICE NO. 3644**

#### **THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004 IMPORTATION OF MAIZE AT CONCESSIONAL RATE\***

**IT IS notified for the general information of the public that pursuant to the powers conferred to the Cabinet Secretary under section 114 (2) of the East African Community Customs Management Act, 2004 read with provisions of Item 20 Part B of the Fifth Schedule to the Act and in consequence of the declaration of Coronavirus COVID-19 as a formidable epidemic disease in Kenya by the Cabinet Secretary for Health, a concessional Import Duty rate of 14% shall apply in respect of white maize and 10% in respect to yellow maize imported on or before 31st July, 2020 by millers as set out in the Schedule hereto: ....**

#### **ADDITIONAL INFORMATION**

**The White Maize shall meet the following conditions:**

- (a) It shall not be genetically modified (i.e. Non-GMO) in accordance with the laws of Kenya and Kenyan standards applicable under the laws of Kenya and implemented by the the Kenya Bureau of Standards and the National Biosafety Authority;**
- (b) It shall have a moisture content not exceeding 13.5% as provided for under the laws of Kenya and Kenyan standards (KS EAS2:2017) applicable under the laws of Kenya and implemented by the Kenya Bureau of Standards;**
- (c) Its aflatoxin levels shall not exceed ten (10) parts per billion (ppb) as provided for under the laws of Kenya and Kenyan standards (KS EAS2:2017) implemented by the Kenya Bureau of Standards and the Department of Public Health of the Ministry of Health;**
- (d) It shall be accompanied by a certificate of conformity issued by the Kenya Bureau of Standards; and**
- (e) It shall have been imported on or before the 31st July, 2020.**

**The Yellow Maize shall meet the following conditions:**

- (a) It shall not be genetically modified (i.e. Non-GMO) in accordance with the laws of Kenya and Kenyan standards applicable under the laws of Kenya and implemented by the the Kenya Bureau of Standards and the National Biosafety Authority;**
- (b) It shall have a moisture content not exceeding 13.5% as provided for under the laws of Kenya and Kenyan standards (KS**

EAS2:2017) applicable under the laws of Kenya and implemented by the Kenya Bureau of Standards;

(c) Its aflatoxin levels shall not exceed ten (10) parts per billion (ppb) as provided for under the laws of Kenya and Kenyan Standards (KS EAS2:2017) implemented by the Kenya Bureau of Standards and the Department of Veterinary Services under the State Department of Livestock;

(i) It shall be accompanied by a certificate of conformity issued by the Kenya Bureau of Standards; and

(ii) It shall be used for the manufacture of animal feeds only; and

(iii) It shall have been imported on or before the 31st July, 2020.

Dated the 15th May, 2020.

UKUR YATANI, Cabinet Secretary for the National Treasury and Planning.

\*G.N. 3234 of 2020 is revoked

36. The starting point for this Court's consideration of the legality of the Gazette Notice are the key principles of statutory interpretation that apply to tax laws, which are generally considered to be penal in nature. The first key principle of interpretation is that taxing legislation must be construed with strictness whether or not such construction is against the State or against the person sought to be taxed, and there should be no room for presumption or assumption. This principle was explained by the Court of Appeal in Mount Kenya Bottlers Ltd & 3 Others v Attorney General & 3 others [2019] eKLR as follows:

**"48.....However, when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated;**

***'...in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'***

(Emphasis ours)

49. Similar statements have been made in several judgments on tax cases. In Scott v. Russell (Inspector of Taxes), [1948] 2 All ER Lord Simonds expressed:

***"... there is a maxim in Income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."***

37. Likewise, in Bennion on Statutory Interpretation, 5th Edition, this position in law as far as interpretation of tax legislation is concerned was also surmised as follows:

***" It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used.'...."***

38. In this respect, Section 114 of the EACCM Act 2004 provides for exemptions from payment of duty on certain goods as follows:

**(1) Duty shall not be charged on the goods listed in Part A of the Fifth Schedule to this Act, when imported, or purchased before clearance through the Customs, for use by the person named in that Part in accordance with any condition attached thereto as set out in that Part;**

**(2) Duty shall not be charged on the goods listed in Part B of the Fifth Schedule to this Act when imported in accordance with any condition attached thereto as set out in that Part.**

**(3) The Council may by notice in the Gazette amend the Fifth Schedule.**

39. Section 114 of the EACCM Act 2004 is the basis of the exemption regime set out in the Fifth Schedule to the Act, and Part B of the Fifth Schedule provides for goods imported or purchased before clearance through customs. Clause 20 thereof provides as follows:

**Goods for emergency relief purposes of such quantities and within a specified period imported by government or its approved agent or a nongovernmental organisation or a relief agency as authorised by the Director/Commissioner responsible for disaster management in a Partner State provide that:**

- (a) the goods are household utensils, food stuffs, materials for provision of shelter, and equipment and materials for health, sanitary and education purposes,
- (b) the goods are for use in areas where a natural disaster or calamity has occurred in Partner State,
- (c) the importation shall be made within 6 months or such further period not exceeding 12 months as the Commissioner of a Partner State may permit in each case,
- (d) the quantities of imported goods shall be subject to such limitations as the Commissioner may impose, and
- (e) the Commissioner shall submit a notification of the exemption detailing the description of the goods and quantities to the Directorate for circulation to other Partner States.

40. Clause 20 of Part B of the Fifth Schedule of the EACCM Act specifically and clearly provides that the goods can be imported by government or its approved agent or authorised nongovernmental organization or relief agency. Therefore, there is no specific requirement that the importation can only be made by the Strategic Food Reserve Trust Fund, and it is my finding that the Interested Parties are not barred by the Act from importing the said maize. In addition, there is a specific requirement in Gazette Notice No 3644 of 15<sup>th</sup> May 2020 that Kenyan standards (KS EAS2:2017) shall apply and be implemented by the Kenya Bureau of Standards and the Department of Public Health of the Ministry of Health. It is notable that the *ex parte* Applicant relied on, and annexed a copy of a different standard, namely EAS 2:2013 that has additional specifications on the tolerable limits of specific requirements when testing and grading maize grains, including on filth and fumosin, which are missing from requirements specified in the said Gazette Notice.

41. This Court, as a judicial review court is however not the appropriate forum to decide as to which is the applicable standard between the two standards, as this would require evidence and arguments from the implementing agencies, who are not parties in this suit. However, this notwithstanding, it would be in the public interest for the applicable requirements to be clarified and established before any maize is imported for both human and animal consumption.

42. On the requirement that the authority to import goods for emergency relief shall indicate the quantities and specified period of importation. The reason why there can be no open-ended authority and mischief that is required to be addressed here is evident, given that these are provisions exempting the importers from paying the required duties on the said goods, and there is the possibility of the provisions being abused. Therefore, a strict and purposive interpretation of Part B of the Fifth Schedule would require a start and end date of the period of importation of relief foods to avoid this outcome. For the same reasons, the authorization cannot operate retrospectively, as is suggested by the Respondents, to the time the COVID-19 pandemic was declared, as Gazette Notice No 3644 of 15th May 2020 cannot operate retrospectively. To this extent, it is my finding that the said Gazette Notice did not comply with the provisions of section 114 and Clause 20 of Part B of the Fifth Schedule of the EACCM Act.

43. The Interested Parties in this respect urged that the doctrine of legitimate expectation applied, as they had relied on and imported maize. They however did not bring any evidence of the said importation, and the period it was done to bring themselves within the operation of the Gazette Notice No 3644 of 15th May 2020, and it was also established by the Supreme Court in **Communications Commissions of Kenya & 5 others vs Royal Media Services Ltd and 5 others, (2014) e KLR** that there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

#### **The Disposition.**

44. The *ex parte* Applicant has sought orders of certiorari, prohibition and mandamus. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the order of prohibition:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”**

45. As regards the requirements for an order of mandamus to issue, the Court proceeded to hold as follows:

**“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a**

person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”

46. Lastly, the Court of Appeal discussed the order of certiorari, and opined as follows:

“...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

47. This Court has found that the 1<sup>st</sup> Respondent acted unlawfully and in contravention of the provisions of the Clause 20 of Part B of the Fifth Schedule of the EACCM Act in failing to indicate the specific period to which the importation of maize applied in Gazette Notice No 3644 of 15<sup>th</sup> May 2020 , and that it is also in the public interest that the standards and requirements as regards the maize to be imported are clarified. The *ex parte* Applicant is therefore entitled to the orders sought of certiorari to quash the impugned decision. Consequently, an order of prohibition stopping any importation of maize pursuant to Gazette Notice No 3644 of 15<sup>th</sup> May 2020 is also merited, to ensure that this Court does not act in vain.

48. The outstanding order of mandamus cannot however be granted in the manner sought by the *ex parte* Applicant for two reasons. Firstly, the dereliction on part of the Respondents with respect to the specific circumstances of this application can be adequately remedied by way of an order of certiorari and prohibition. Secondly, an order of mandamus cannot issue to command the Respondents to act in a specific way in the future, and with respect to undefined and unknown circumstances for which no duty has been demonstrated on its part.

49. In any event, the Respondent still has power and discretion, if the need still exists or arises to issue a new Gazette Notice on importation of maize that is compliant with the provisions of section 114 and Clause 20 of Part B of the Fifth Schedule of the EACCM Act and applicable standards. Lastly, it is also notable that the status of the Strategic Food Reserve Fund is the subject of pending litigation.

50. In the premises, I find that the *ex parte* Applicant’s Notice of Motion application dated 15<sup>th</sup> July 2020 is merited only to the extent of the following orders:

**I. An order of certiorari be and is hereby issued to remove into the High Court and quash Gazette Notice No.3644 of 15th May, 2020 by the 1st Respondent, which was published on the same date in a special issue of the Kenya Gazette Vol. CXXII-No.89.**

**II. An order of prohibition be and is hereby issued directed at and prohibiting the Respondents and Interested Parties herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing Gazette Notice No.3644 of 15th May 2020 by the 1st Respondent, which was published on the same date in a special issue of the Kenya Gazette Vol.CXXII-No.89.**

**III. The 1<sup>st</sup> Respondent shall meet the costs of the *ex parte* Applicant’s Notice of Motion dated 15<sup>th</sup> July 2020 .**

51. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021**

**A. NDUNG’U**

**JUDGE**