



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 205 OF 2018

IN THE MATTER OF:

ARTICLES 20, 22, 23, 25, 27, 40, 48, 50, 159 & 258 OF THE CONSTITUTIONAL OF KENYA 2010

AND

IN THE MATTER OF:

THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004 (EACCMA 2004)

IN THE MATTER OF:

THE CONTRAVENTION OF PHOENIX GLOBAL KENYA LITED’S FUNDAMENTAL RIGHTS AND FREEDOMS BY

THE MULTI-AGENCY TASK TEAM KENYA COMPRISING KENYA REVENUE AUTHORITY, DIRECTOR CRIMINAL INVESTIGATION ANTI-MONEY LAUNDERING UNIT, ANTI-BANKING FRAUD UNIT FINANCIAL REPORTING CENTRE, CYBERCRIME UNIT, ANTI-COUNTERFEIT BODY AND THE ATTORNEY GENERAL

BETWEEN

PHEONIX GLOBAL KENYA LIMITED.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS

(on behalf of himself as well as the ANTI-MONEY LAUNDERING UNIT,

ANTI-BANKING FRAUD UNIT AND THE CYBERCRIME UNIT)...3RD RESPONDENT

ANTI-COUNTERFEIT AGENCY.....4TH RESPONDENT

FINANCIAL REPORTING CENTRE.....5TH RESPONDENT

KENYA BUREAU OF STANDARDS.....6TH RESPONDENT

MITCHELL COTTS (K) LIMITED.....7TH RESPONDENT

JUDGMENT

1. By amended petition dated 1st October 2018 and filed herein on 2nd October 2018 the Petitioner prays for the following orders:

- (a) a declaration that your Petitioners fundamental rights to the protection of its property from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached;
- (b) a declaration that the Respondent has acted inconsistently with and in a breach of its powers, duties and obligations under the provisions of Articles 10, 35, 47 and 50 of The Constitution particularly when the importation of rice as a commodity is not under investigation;
- (c) a declaration that the purported Multi-Agency team comprising of the Respondents is not anchored in law and the sealing of the Seventh Respondents' warehouses where the Petitioners' rice is stored by the First Respondent at the behest of the Third Respondent was illegal and unlawful;
- (d) consequently, an Order prohibiting the Respondents whether by themselves or through their agents, servants or employees from interfering with your Petitioners' proprietary rights or its access to their rice consignments presently stored at the Mitchell Cotts warehouses in Mombasa or accessing the said warehouses for purposes of depositing further consignments of rice therein in the normal course of its business;
- (e) general damages for unlawful and illegal detention of the Petitioners' consignments of rice.
- (f) The costs consignment upon this petition be paid and born by the Respondents;
- (g) All and other such orders or relief as this Honorable Court may deem just and fit to grant

2. The Petition is underpinned on Articles 20, 21, 22, 23, 25, 27, 40, 48, 50, 159 and 258 of the Constitution and is supported by the following affidavits:-

- i. Affidavit of Biren Jasani sworn on the **3rd August 2018** and filed herein contained at pages **11 to 636** of the Petitioner's bundle (hereinafter referred to as '**the Petitioner's First Affidavit**');
- ii. Affidavit of Biren Jasani sworn on the **15th August 2018** and filed herein on the same day in support of the Application Notice for Contempt (hereafter referred to as '**the Petitioner's Second Affidavit**');
- iii. Affidavit of Biren Jasani sworn on the **16th August 2018** and filed herein on the same day (hereinafter referred to as '**the Petitioner's Third Affidavit**');
- iv. Affidavit of Biren Jasani sworn on the **18th September 2018** and filed herein on the **19th September 2018** (hereinafter referred to as '**the Petitioner's Fourth Affidavit**');
- v. Affidavit of Biren Jasani sworn on the 25th September 2018 and filed herein on the same date – also opposing the First Respondent's application to set aside the Orders made herein (hereafter referred to '**the Petitioner's fifth Affidavit**');
- vi. Affidavit of Biren Jasani sworn on the 5th October 2018 and filed herein on the same date (hereinafter referred to as '**the Petitioner's Sixth Affidavit**');

1.3 None of the Respondents have filed any Response to the Petition. However, Replying Affidavits have been filed as follows:-

- i. Affidavit of Joseph Ng'anga's sworn on the 14th August 2018 and filed herein on the same day (hereinafter referred to as '**the DCI's First Affidavit**');
- ii. Affidavit of Khaleed Jaffar Athman sworn on the 16th August 2018 and filed herein on the same date (hereinafter referred to as '**the KRA's First Affidavit**');
- iii. Affidavit of Isaac Gachoka sworn on the 10th September 2018 and filed herein on the 11th September 2018 (hereinafter referred to as '**the KRA's Second Affidavit**');
- iv. Affidavit of Yusuf Osman sworn on the 27th August 2018 and filed herein on the same date also in support of its application of even date hereinafter referred to as '**the Anti-Counterfeit Agency First Affidavit**');
- v. Replying Affidavit of Yusuf Osman sworn on the 10th September 2018 and filed herein on the 11th **September 2018** (hereinafter referred to as '**KRA's Second Affidavit**');
- vi. Replying Affidavit of Joseph Ng'anga sworn on the **18th September 2018** and filed herein on the **19th September 2018** (hereinafter referred to as '**the DCI's Second Affidavit**');
- vii. Replying Affidavit of **Joseph Ng'anga** sworn on **the 25th September 2018** and filed herein on the same date (hereinafter

referred to as '**the DCI's Third Affidavit**');

viii. Replying Affidavit of Evenson Mairura sworn on the **26th September 2018** and filed herein on the same date (hereinafter referred to as '**the KPR's third Affidavit**'); and

ix. Replying Affidavit of Joseph Ng'ang'a sworn on the **3rd October 2018** and filed herein on the same date (hereinafter referred to as '**the DCI's Fourth Affidavit**').

3. The Petitioner is a limited liability company and carries on the business of importation and trade in, inter-alia, rice and and sugar, in huge volumes, and stores its commodities at the Mitchell Cotts (K) Limited's (7th Respondent) warehouse.

4. The Respondents are governmental Authorities responsible for collecting revenue, combating crimes and keeping standards as described in the Petition.

5. The Petitioner in recent times imported 10,327.80 Metric Tonnes of rice which is stored at the 7th Respondent's warehouses.

6. During that time a Multi-Agency Team (The Agency) was appointed by the government to establish the quality of sugar and other commodities in government's efforts to crack down on contraband commodities. That Agency visited the 7th Respondent's warehouses in which the Petitioner's rice and sugar are kept together with other third Parties' consignments. However in their effort to supervise the quality of sugar in the said premises, the Agency has also clamped down on the Petitioner's rice, holding the same in the said Warehouse on allegation that the rice is substandard. Further the Petitioner states that the Respondent have denied the Petitioner the right to carry out fumigation of the premises, thereby exposing the said rice to vagaries of bad weather and the said Warehouses have been locked. This action has allegedly grounded the Petitioner's operations and brought its business to a standstill as it is unable to trade any longer.

The Petitioner's case is that the sugar investigations ought not to negatively affect the Petitioner's rice imports and distribution business which is also vital and aids in providing food security balance for the public at large and which ought to be maintained at an affordable and sustainable level.

7. The Petitioner avers that whilst the Respondents have a duty to safeguard the wellbeing and welfare of the public at large and can do so by effectively securing the sugar consignment into a secluded area, the Petitioner believes that the exercise of any discretion to safeguard the public must, in any event, be exercised properly and judiciously and not arbitrarily on caprice, whim, like or dislikes of the Respondents, and that the respondents save the Mitchell Cotts (K) Limited are obligated to act fairly, rationally and justly as they discharge their duties; and as public officers they are bound under Article 10 of the Constitution by the national values and principles of governance which include good governance, integrity, transparency and accountability.

8. The Petitioner states that by virtue of the Article 19, 20, 21, 22, 23, 24, 27, 35, 40, 47 and 50 of the Constitution, the Respondents, by their wrongful action and unlawful conduct are infringing upon the Petitioner's rights to protect its property, fair administrative action and right to fair hearing. The Petitioner avers that any attempts to deprive and/or interfere with the Petitioner's proprietary rights arbitrarily and/or otherwise is unlawful, illegal, null and void and of no consequence whatsoever.

9. The Petitioner avers that the Respondents' refusal to permit the Petitioner access to its rice consignments for trade purposes without any lawful justification is untenable and punishable in damages

The Response

10. The Petition is opposed by all the Respondents except the 7th Respondent who supports it.

11. The 1st – 5th Respondents filed a replying affidavit sworn by Joseph G. Ng'ang'a on 16th September 2018. Mr. Ng'ang'a depones that he is the Regional Criminal Investigation Officer – Coast Region - and represents the 3rd Respondent herein, but the affidavit is sworn on behalf of the 1st – 5th Respondents. The case by the 1st – 5th Respondents is that the Directorate of Criminal Investigation (the DCI) is part of the Multi-Agency Team (the agency) comprising the Kenya Revenue Authority, Kenya Bureau of Standards, Anti-counterfeit Agency and National Police Service and the DCI.

12. The agency has been tasked to investigate cases involving contraband goods within the coast region following the influx of contraband and or substandard goods into the country which are a health risk to the public who consume these products on a daily basis. The 6th respondent has the duty to ensure that all Imports into Kenya meet the requirements of Kenya Standards or any other standards approved by the Kenya Bureau of Standards (KEBS). In particular, legal Notice No. 66 of 10th June 1999 declares all imports into Kenya which do not meet the requirements of Kenya standards or any other standards approved by KEBS as prohibited imports. The Respondents aver that this investigation is a country wide operation and is headed by Director of Criminal Investigation. On 13th July, 2018 the Agency visited premises of Mitchel Cotts (K) Limited, the 7th Respondent herein, located in Shimanzi Mombasa County. The Agency discovered a consignment of rice and sugar stored in nine go-downs suspected to be uncustomed and/or contraband goods. The said nine go-downs were sealed using Kenya Revenue Authority Seals and Police Officers placed on site to guard the go-downs. On 16th July, 2018 samples of the sugar were collected for testing at the Kenya bureau of Standards laboratory. Thereafter, the go-down was sealed and police officers remained on guard. On 20th August, 2018 the Agency visited the premises of Mitchell Cotts (K) Limited in Shimanzi and collected samples of rice for testing at the Kenya bureau of Standards Laboratory. The samples were marked, sealed and forwarded to KEBS Headquarters, Nairobi under the escort of No.216136, Mr. Washington Njiru, CP, on 24th August, 2018. The receipt of the aforementioned samples by the Kenya Bureau of Standards was acknowledged by affixing a stamp on the duplicate copies of the Exhibit Memo forms on the 24th of August, 2018. The KEBS was required to ascertain:-

- Whether the white substance meets the requirement of any grade of rice?

- The percentage of moisture in the white substance
- If the white substance has aflatoxin contamination
- The arsenic, cadmium, mercury and lead content in the white substance
- Whether the white substance is fit for human consumption.

13. The 1st – 5th Respondents state that vide a letter reference No. KEBS/HQ/MS/9/1/9, dated 17th September, 2018 the KEBS informed the DCI and the Agency that rice samples marked BS201830353, BS201830357, BS201830360, BS201830361, BS201830362, BS201830363, BS201830365, BS201830366, BS201830372 and BS201830371 had failed in grading and therefore should not be released to the owner for sale in the market and should be condemned for destruction. (A copy of the letter was attached to replying affidavit of Joseph G. Ng'ang'a and marked 'JGN – 1')

14. The Respondents further aver that vide another letter dated 17th September, 2018 referenced KEBS/HQ/MS/9/1/9/8 the KEBS informed the 3rd Respondent that rice samples marked BS201830358, BS201830364, BS201830367, BS201830368, BS201830369 and BS201830370 had complied and the rice should be released to the owner for sale in the market. (A copy of the letter was attached to the said affidavit and marked 'JGN 2'.)

15. The Respondents state and maintain that the rice samples aforesaid which have failed in grading should not be released for public consumption but ought to be destroyed. They allege that the release of the condemned rice to the public will contravene the provisions of Article 43 (1) (c) of the Constitution of Kenya which protects every person's right to adequate food of acceptable quality.

16. The 6th Respondent, the Kenya Bureau of Standards, opposed the petition vide Affidavit sworn by Caroline Outa Ogwen on 2nd November 2018. The deponent is the acting Director Market Surveillance, of the 6th Respondent. The KEBS case is that they tested the rice stored at the 7th Respondent's warehouses. The samples tested were collected from Mitchell Cotts warehouses storing the different varieties of rice belonging to the Petitioner such as Hmalaya Pearl Biryani, Shamiyana LG, Thai Biryani, S Riza Premium, T Riza Premium, U Zarah Premium, V Himalaya Pearl. (True copies of sample collection forms were attached to the said affidavit and marked 'COO-1'). The 6th Respondent's case is that the testing of the rice samples and withholding of the rice which failed to comply with the set standards is the Constitutional and Statutory mandate of the 6th Respondent among other state agencies to protect the right of consumers to health, safety and economic interests. The KEBS' case is that part of the rice tested failed in terms of grading, and that this has an impact on the grade of the rice. The grade of the rice has an impact on the price of the rice. A higher grade attracts a higher price. A lower grade deserves a lower price. The KEBS' case is that it is in the consumers' economic interest to get value for their money. It would be unjust, unconstitutional and unconscionable for the consumers to pay a higher price for rice whose grade is much lower. The KEBS' case is that it is necessary to hold onto the non-compliant rice until a decision is made with respect to its destruction or otherwise. KEBS identified the following rice belonging to the Petitioner to be good rice and should be released to the Petitioner for sale in the market. BS201830358, BS201830364, BS201830367, BS201830368, BS201830369, BS201830370, BS201831227, BS201831229, BS201831230, BS201831231, BS201831232, BS201831233, BS201831235, BS201831236, BS201831237, BS201831238, BS201831241, BS201831242, BS20183124, BS201831243, BS201831246, BS201831249

17. KEBS' case is that pursuant to the Standards Act at Section 14 B (5) any goods that fails to comply with the relevant Kenya Standard, shall be destroyed in accordance with section 14A. Accordingly, according to KEBS the following Rice, which did not conform to the set standards should be destroyed. BS201830353, BS201830357, BS201830360, BS201830361, BS201830362, BS201830363, BS20183065, BS201830366, BS201830371, BS201830372.

18. KEBS case is that it performed its functions in accordance with its statutory mandate to further the interest of the public to safe and healthy food products and that the Petitioner's commercial interests to earn income or profit cannot be subordinated to the larger public interest of safe and healthy food products.

19. The 4th Respondent oppose the petition vide a Replying Affidavit sworn by Yusuf Osman on 18th October 2018. The deponent is a senior Inspector with the Anti-Counterfeit Agency (ACA) in Mombasa office. The ACA is mandated to take action on counterfeit matters based either on formal complaint or *suo motto* pursuant to information received under Section 33 of the Anti-Counterfeit Act. The 4th Respondent states that it is part of the Anti-Illicit Trade Committee as gazetted under Gazette Notice No. 7270 of 20th July 2018 which is mandated to Co-ordinate with other ministries, departments and agencies and county governments with regard to issues of illicit trade. It is a result of the functions of the committee that the aspect of multi-agency verification came about. The 4th Respondent avers that it was not involved in the alleged seizure of the goods at the warehouse located at Mitchell Cotts in Shimanzi Mombasa town, and hence the petitioner is not entitled to general damages as against the 4th Respondent as the petitioner has failed to demonstrate that the damages incurred, as alleged, were as a result of the actions of the 4th Respondent whether by commission or omission.

Further Affidavits by Petitioner

20. In response to the Respondents' case stated above, and as regards the samples of rice taken for testing the Petitioner states that it had engaged SGS Independent of the Respondents to carry out tests on the Petitioners' rice consignments, the result of which was annexed to the Further affidavit of Biren Jasani marked '**BJ-2**'

21. The Petitioner avers that the results clearly show that the petitioner's rice has no issues from a '**fitness for human consumption**' point and does not pose any danger to the public as has been alleged by the Respondents.. The Petitioner states that its rice consignments now detained principally originated from India, Pakistan and Thailand and were imported earlier in the year 2018 before June. In Pakistan, SGS Pakistan (Private) Limited and Intertek Pakistan Pvt Limited are the Sixth Respondents' (KEBS) Pre-verification of conformity (PVOC) agent whereas in Thailand it is Intertek Testing Services (Thailand) Limited and Bureau Veritas (Thailand) Limited. (The Petitioner attached to the Supporting Affidavit of Biren Jasani dated 3rd August 2018, PVOC's for each of the shipments which are part of the consignment that

are the subject of this petition. The same PVOCs were attached to the Further affidavit as exhibit 'BJ-1' and 'BJ-2' respectively, the PVOC confirmations and the daily test reports issued by Intertek as well as SGS from the Countries of respective importation of cargo).

22. The Petitioner's case is that whilst the rice parameters are conforming to the Kenya Standards (as previously certified) prior to their departure from the point of origin, depending on the bag now sampled, there is likely to be a variance in the broken percentage based on whether the bag has been stepped on or handled harshly (by throwing) during the exercise of stacking or loading/unloading into or from trucks/containers/warehouses. The Petitioner states that the PVOC certificates are issued based on sampling at the mills at the time of packaging the goods for export and before their release from the mills for stuffing into containers for carriage to eventual destination as is evident from the daily reports produced. The rice Inspection Procedure Note from Intertek, Thailand sets out the processes and this is standard practice amongst all of KEBS' PVOC contractors. The Petitioner states that to the best of its knowledge, none of the above PVOC issuing Companies have been terminated nor any action taken against them for allegedly failing to perform and/or carry out their inspection and certification engagement properly. (In this regard, the Petitioner annexed and mark as Exhibit '**BJ-4**', a true photostat copy of PVOC Program Operations Manual available on the KEBS website).

23. The Petitioner further referred to the Standards (Kenya Accreditation Service) Regulations 2005 and The Verification of Conformity to Kenya Standards of Imports Order 2005, which it said are applicable. However, on 19th June 2018, a fresh Standards (Verification of Conformity to Kenya Standards of Imports) Order 2018 was gazetted by the Cabinet Secretary for Industry, Trade and Co-operatives pursuant to which KEBS issued a public notice and wrote to various parties on 13th September 2018, (true photostat copies of which were annexed and marked '**BJ-5**'). The Petitioner avers that there is a marked difference between the 2005 and 2018 Verification of Conformity Orders and the Respondents are clearly abusing their powers under the 2005 Order which is applicable to this matter.

24. The Petitioner referred Court to the Affidavit of JOSEPH NG'ANG'A sworn and filed herein on the 19th September 2018. The Petitioner makes the following observations thereon:-

- a) When sampling was done, two samples were drawn by the Respondents – one by the DCI and the other by KEBS as is confirmed by Imports Sampling Forms issued to the Petitioner;
- b) Of the total of 28 samples drawn, 16 results have been submitted by the DCI, and of which 3 relate to brands not belonging to the Petitioner;
- c) KEBS have, for reasons best known to them, chosen to keep the test results for the samples drawn by themselves away from this Court;
- d) Of the list of samples set out at paragraph 16 of the aforesaid Affidavit, Items 7, 9 & 10 relating to the 'SPRING' 'ELAND THAI' and 'DOUBLE HORSE' brands do not belong to the Petitioner nor are they from samples drawn from the Petitioners' goods. Their inclusion as being amongst the Petitioners' goods is clearly intended to mislead this Court.
- e) All the samples said to have failed have purportedly been failed on broken grading parameters with a 'recommendation to condemn these goods for destruction' being made – of course, KEBS is silent on the question of suitability for human consumption despite being specifically requested to make a findings on this –this compounds the malicious conduct of the Respondents;
- f) The integrity of the DCI's sampling process and submission of samples for testing is questionable as not only do the reports fail to identify which Samples Collection Form the tests conducted relate to but, also, the dates for submission of samples are inherently contradictory. Besides, the Petitioner has no person employed in the name of Alice Mithanio who is said in those results to be the customer contact name; and
- g) The result that the 'grading failed is not true for the reason that not only was a PVOC issued confirming the goods to conform to the standards prior to shipment but also based on the fact that upon their arrival, the goods were randomly sampled from the various consignments and released upon confirmation that they met the relevant standards. (In this regard see annexure marked as '**BJ-6**', a true photostat copy of KEBS' letter of the 20th September 2018).

25. The Petitioner avers that as a result of the Respondents' wrongful conduct, the Petitioner has and continues to suffer loss and damage as it is unable to continue trading. Besides, and in addition to this, the Petitioner also continues to incur heavy finance and storage charges in respect of which the Petitioner annexed and marked Exhibit '**BJ-8**', a schedule of Losses.

26. The Petitioner further faults the 1st Respondent for sealing off the Warehouses. The Petitioner states that whereas the Kenya Revenue Authority's role and mandate is collection of taxes, and in this instance, it confirms that all taxes and duties have been paid on all of the Petitioners' rice, the Kenya Revenue Authority has not only wrongfully and unlawfully sealed the subject Warehouses but has also deliberately refused, neglected and/or failed to comply with this Court's Orders made on 3rd and 16th August 2018 as well as the 28th August 2018. The Petitioner states that it was charged a substantial sum (1%) of the value of the consignment for the Pre-export Verification to be carried out for the consignments in question. If it is true that the PVOCs did a shoddy job it is most surprising that no steps have been taken to terminate the mandate of the appointed private inspection agencies despite their alleged 'unreliability'. It is the Petitioner's contention that the purported investigation into the Petitioners' rice was only commenced almost five weeks after the warehouses were sealed under the pre-text of a sugar investigation. The Petitioner's case is that the First Respondent's powers are set out in The East African Community Customs Management Act 2004 and that the First Respondent, having confirmed it has collected all duties and taxes due, is abusing its powers and acting unlawfully and with impunity,

27. The Petitioner states that it has perused the purported results attached to the KEBS Affidavit as Exhibit '**COO-2**' from which it is not only apparent that the Respondents continue to use results for rice consignments not belonging to the Petitioner to allege non-compliance with samples drawn, but the integrity of the results is in itself entirely compromised as is self-evident from the results themselves. The Petitioner accuses the Respondents of unlawful sealing of the Warehouses despite the fact that KEBS, on 20th September 2018, released the

rice as having met all standards and also having advised all its counter-parts agencies of this fact.

28. The Petitioner Further states that it has paid the amount demanded for down grading of the rice consignments as is the case with a total of 5 consignments. Despite KEBS' release, KRA and the Port Health Department have nevertheless refused to release the consignments and the Petitioner has filed separate proceedings.

Applications and Cross Petition

29. In the cause of these proceedings there were various applications, for contempt (by the Petitioner) and for lifting of temporary orders (by the 1st Respondent). Those applications were by consent suspended (to be reinstated if need be) to enable the main Petition to proceed expeditiously. During that time also, the 7th Respondent filed a cross Petition. However, by the Ruling of this court delivered on 28. 11. 18, the cross petition which is principally a petition against the 1 – 6th Respondents, was separated from the Amended Petition herein, to be determined on its own after the finalisation of this petition.

Submissions

30. With the leave of Court parties filed submission which I have considered. **Mr. Khagram**, Counsel for the Petitioner submitted that the Mitchell Cotts Warehouses were sealed initially on the **13th July 2018** on the back of a purported investigation into sugar imports then – nothing to do with rice,- and despite several requests by the Petitioner to have access to his rice cargo the Respondents failed, refused and/or neglected to permit access and continued with the wrongful and unlawful detention of the Petitioners' cargo which precipitated the current Petition. The court issued an order of release but the order was subverted and the Respondents maliciously asserted that they were purportedly also investigating rice imports and it was not until the **20th August 2018** that samples were drawn for testing. The Petitioner submitted that it is against this background that this Petition ought to be considered.

31. Mr. Khagram submitted that the purported Agency comprising the First to Sixth Respondents and apparently led by the DCI, in the course of investigating sugar imports, sealed (by the KRA) Warehouse belonging to the Seventh Respondent and which contained the Petitioner's imported rice consignments. This was done in spite of the fact that all the said consignments had been allowed entry into the Country after meeting all regulatory and statutory requirements and having paid all duties and taxes required in law. Counsel submitted that the KRA, in KRA's First Affidavit confirms that only sugar was the subject of investigations and that KRA sealed the Warehouses on instructions and at the direction of the DCI, facts confirmed in the DCI's First Affidavit. The basis for the action by the DCI was that the goods were suspected to be *'...uncustomed and/or contraband...'* Counsel submitted that, such suspicion was without foundation as the Petitioner's goods were neither uncustomed – all relevant entries having been made and passed and taxes and duties collect – nor were they uncustomed – for they were not illegal or smuggled goods nor goods prohibited for importation into Kenya. On their part the DCI and the Respondent place reliance and justification of their actions on Legal Notice No.66 of 10th June 1999 which according to him (paragraph 10) *'.....declares all imports in to Kenya which do not meet the requirements of Kenya Standards or any other Standards approved by KEBS as prohibited imports'*.

32. KEBS through its Counsel, **Ms Goretti** have also claimed that the Petitioner's rice is unfit for human consumption and shall be destroyed. Mr. Khagram submitted that no evidential proof of this has been provided to support such contention.

33. Mr. Khagram submitted that following the Respondents' alleged wrongful, and unlawful conduct, the Petitioner obtained a further re-confirmation from KEBS' relevant contracted party the veracity of the results and tests carried out – Exhibit 'BJ1' and BJ2' to the Petitioner's Sixth Affidavit. Particularly, at Pages 9 to 20 is set out the Rice Inspection Procedure for testing which is an industry wide adopted practice. Again, although daily reports are available for each one of the consignments, by way of example, Counsel drew this Court's attention to the Report at Pages 21 to 44 of the Petitioner's Sixth Affidavit and Pages 322 to 334 relating to the Thailand and Pakistan importations respectively. In addition to this, sampling was jointly carried out of the Petitioner's rice samples after these proceedings had been filed and during the pendency of the proceedings herein on the basis of the Petitioner's Advocates' letter of the 17th August 2018 - Pages 6 to 8 of the Petitioner's Fourth Affidavit.

In this regard, the Petitioner's Director, has in the petitioner's Sixth Affidavit (at Paragraph 16(c) - Page 5) queried why KEBS have chosen to keep the test results for samples drawn by themselves away from the Petitioner and the Court. The sampling Forms appear at Exhibit 'BJ2' to the Petitioner's Fourth Affidavit, with the corresponding test results by the Petitioner's Independent test contractor appearing at Pages 116 to 128 thereof. Like this, each of the tests done for samples drawn appear together with the relevant Imports Sampling Form appear from Pages 129 to 304 and the supporting documents at Pages 305 to Page 414. Mr. Khagram submitted that regretably from the DCI's Second Affidavit where he annexes results, the integrity of the results and the Samples is questionable. Further questionable are the results No. s 7, 9 and 10 in Paragraph 16 of the DCI's Second Affidavit relating to the 'SPRING' 'ELAND THAI' and 'DOUBLE HORSE' Brands, which Mr. Khagram submitted, have been mischievously included to mislead this Court.

34. Mr. Khagram submitted that a comparative look at the Petitioners' and Respondents' affidavits show that the First Result on the DCI's Second Affidavit relates to **'Himalaya Pearl Biryani Rice'** has been failed on the basis of there being 8.7% broken rice instead of the 5% maximum permissible under the Kenyan Standards. All other parameters meet the Standard. Compare this to the SGS test report done by the Petitioner's Independent Testing Agent in results appearing at **Pages 241 and 248** of the Petitioner's Fourth Affidavit where for the same **'Himalaya Pearl Biryani Rice'** Brand, the broken kernels were found to be 1, 34% and 0.63%. At **Page 255** is another test report showing 0.30% broken kernels. The testing done and Pre-verification of conformity for the same brand appears at **Pages 325 to 334** of the Petitioner's Sixth Affidavit showing the broken rice at 1.5% on the basis of which the PVOC was issued by KEBS through its contracted agent. Mr. Khagram submitted that no explanation has been given by anyone as regards the need to do further testing after the goods have entered Kenya based on a PVOC properly and validly issued for a fee. It is the Petitioner's Submission that at the time of entry of the subject rice into Kenya all the Petitioner's rice consignments conformed to the Kenya Standards and had the PVOC's issued therefor by KEBS and its sub-contractors. Counsel submitted that the fallacy of KEBS conduct can actually be discerned from a result in respect of Grade 3 rice issued by KEBS for a consignment that has long been sold and disposed off appearing as Exhibit 'BJ6' to the Petitioner's Sixth Affidavit where Grade 3 rice is said to have had only 2% broken elevating it to Grade 1 in terms of the KEBS Milled Rice Specification appearing at **Page 572** of the Petitioner's Sixth Affidavit.

35. Mr. Khagram further submitted that the DCI and KEBS as well as other Respondents' reliance on **Legal Notice No.66 of 1999** – is wholly misplaced as these regulations relate to disposal of prohibited goods under **The Customs and Excise Act (Cap.472)** and the question then arises whether the goods were 'prohibited' and could be condemned. Counsel submitted that the Multi-Agency Team referred to by all the Respondents as anchoring their actions is not anchored in law or on any statute. He relied on **KENYA REVENUE AUTHORITY –V- DOSHI IRONMONGERS & ANOR [2016]eKLR** –where the Court of Appeal upheld the Superior Court's finding that **'...the Anti – Counterfeit Secretariat was not underpinned on any law, and was therefore illegal and unconstitutional...'**.

26. Mr. Khagram submitted that this being a matter governed by **the Standards Act**, it must be governed pursuant to the provisions of that Act. Therefore the Third Respondent has no **powers** vested in him to deal with nor investigate matters or lead such investigations as are covered by the provisions of **The Standards Act**.

37. Mr. Khagram pointed out that the conditions and circumstances in which goods may be destroyed are set out in **Section 14A** of the Act and despite not being satisfied, the Respondents appear to be intent on destroying the Petitioner's goods.

38. Counsel submitted that the Respondent cannot be said to have discharged this obligation/burden to act fairly in the absence of any explanation why once the goods were verified and cleared for entry into Kenya and KEBS itself had issued Pre-Verification Certificate of Conformity (PVOC), the said goods are still locked in a Warehouse and denied entry into Kenya.

39. On their part M/S. Lavuna Counsel for the 1st respondent submitted that they had a statutory right to action. Counsel cited **Nyaga v Housing Finance Company Ltd of Kenya Civil Appeal No. 134 of 1987** where the Court of Appeal held that **"Where a party has a statutory right of action, the court will not usually prevent that right from being exercised except that the court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively.**

40. Based on the said statutory right of action, M/S Lavuna submitted that the inevitable result of the statutory functions that a statutory authority has been authorized to do and for that matter, been established for, to specifically perform, cannot result in damages when that duty is performed in accordance with the law. Counsel submitted that if the administrative bodies acted negligently or maliciously, then they could be liable to damages, but they cannot be liable for damages as a result of performing their necessary function at every occasion, because this would mean that they must be punished for doing what they have been mandated by the law to do, whereas they ought also to be punished for not doing what the law mandates them to do. So in sealing off the warehouses herein, the 1st Respondent was merely performing its statutory duty.

41. On the issue of damages, M/S Lavuna cited the principle of *Damnum sine injuria*, submitting that under this legal maxim, even where there is actual and substantial loss, there may be no actual infringement of any legal right, and therefore no action lies. Loss in money or money's worth does not always constitute a legal redress being obtainable.

There are many acts which, though harmful, are not wrongful and give no right of legal action. Counsel submitted that **"When a statute confers upon a corporation a power to be exercised for the public good, the exercise of power is not generally discretionary but imperative. No action lies"**

42. M/S Lavuna submitted that the Petitioner herein was found to have committed an unlawful act by importing substandard goods. As a result, they drew the attention of the 1st -6th Respondents to investigate them. Having been found to be culpable, the Petitioner cannot claim any damages from the Respondents. M/S Lavuno submitted that even where government inadvertently acts ultravires, the state is normally not to be held liable. The basis of this rule is that the officers should act fearlessly in the discharge of their official functions. From time to time, public interest calls for action which may later turn out to be founded on a mistake and if the official of the state is held liable for the mistake, it may act as a deterrent and prevent officials from taking any action when one is required to be taken.

43. M/S Lavuno submitted that the Court ought not to award damages as against the 1st to 6th Respondents as a remedy for the losses incurred by the Petitioner, or the 7th Respondent' if any, because the actions by government cannot in this matter be characterized as illegal, nor negligent, nor malicious.

44. In any event, M/S Lavuna submitted that damages must be proven. Counsel cited the Court of Appeal in Re: **Civil Appeal No. 120 of 2017; Kenya Tourism Development Corporation vs Sundowner Lodge Ltd**, where the court held that damages cannot be awarded where there is no quantum, justification, comparable and proof by way of evidence.

45. M/S Lavuna further submitted that the would be consumers of the said rice are entitled to consumer rights under Article 46 of the Constitution. The said Article provides:

(1) Consumers have the right-

- (a) to goods and services of reasonable quality;
- (b) to the information necessary for them to gain full benefit from goods and services
- (c) to the protection of their health, safety, and economic interest; and
- (d) to compensation for loss or injury arising from defects in goods or services

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising

(3) This Article applies to goods and services offered by public entities or **private persons**.

46. Counsel submitted that the 1st to 6th Respondents are the legally mandated Authorities that the Constitution requires to uphold the consumer rights of the Citizens of Kenya. The rice and sugar in issue was under suspicion of being unfit for human consumption. M/S Lavuna submitted that a right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is **reasonable and justifiable** in an open and democratic society based on **human dignity**, equality and freedom, taking into account all relevant factors.

47. Ms. Lavuna referred the court to various rights under the Constitution including Article 24 which limit the fundamental rights, the right life, human dignity, economic and social rights. M/S Lavuna submitted that there has been a trend where illicit goods are released to the Kenyan market that are harmful and even poisonous. If this trend is not stopped, the countries and culprits that engage in this trade will find Kenya to be the dumping ground for fake products including plastic rice that has recently been found being sold.

48. M/S Lavuna further relied on Customs laws, submitting that KRA has a mandate under Section 2 of the East African Community Customs Management Act (EACCMA) 2004 to stop the importation of restricted and prohibited goods. Counsel submitted that Section 236 of EACCMA 2004 empowers the 1st Respondent to verify the accuracy of goods entering the country, and also has the power to examine such goods. Counsel relied on **JR No. 122 of 2010; Syed Zeshan T/A Umair Enterprises vs KRA**; to assert that KRA's role is not merely to collect duty. KRA also has the role of ensuring that prohibited and restricted goods do not enter into the country.

49. On the legality of the Multi-Agency Team M/S Lavuna submitted that the team is a collaboration of different government agencies coming together to fulfill their different mandates granted to them by statute, with a common goal of eradicating the importation of sub-standard goods among other assignments. Counsel submitted that there is nothing unlawful about the team as long as they act and undertake their mandates within the confines of the constitution. Further, the Team is not in breach of Article 47 of the Constitution because they are not performing administrative functions.

50. As for claim for damages by the Petitioner M/s Lavuna submitted that **Section 227 of the East African Community Customs Management Act 2004** indemnifies any officer who acts where there are reasonable grounds to so act within the provisions of the act.

51. Mr. Makuto, Counsel for the 2nd and 3rd Respondents submitted on the following issues Counsel had raised:

- What is the quality of the rice being held?
- Is there sufficient reason for detaining the rice?
- Does the rice meet the standard set under the standards Act?
- Is the detention an infringement on the petitioner's right to property?
- Should the detained rice be released for consumption to the general population?
- Is the Petitioner entitled to compensation?

52. Mr. Makuto submitted that a Multiagency team comprising of different government departments including but not limited to the 1st, 4th, and 6th Respondent was formed to look into the importation of goods into the country following an outcry from the public that there was an influx of contraband/substandard and/or illegal goods into the country. The Agency visited the 7th Respondents warehouse on 13th July, 2018 and later on 20th August, 2018, when it collected samples of rice for testing at the Kenya Bureau of Standards Laboratory. The Results indicated that part of the rice consignment owned by the Petitioner and stored by the 7th Respondent fell short of the standard. The 6th Respondent wrote two letters to the 3rd Respondent. Vide a letter dated 17th September, 2018 referenced **KEBS/HQ/MS/9/1/9/8** the 6th Respondent informed the 3rd Respondent that rice samples marked BS201830358, BS201830364, BS201830367, BS201830368, BS201830369 and BS201830370 had complied with the standard and should be released to the owner for sale in the market. (**See annexure marked 'JGN 2'**) (The foregoing information was relayed to this court on 19th September, 2019 and the consignment described at paragraph 18 of the affidavit sworn by Joseph G. Nga'ng'a 18th September, 2018 which was certified fit for sale was released to the Petitioner).

53. Further, Counsel submitted that vide another letter reference No. **KEBS/HQ/MS/9/1/9/9**, dated 17th September, 2018 the 6th Respondent informed the 3rd Respondent that rice samples marked BS201830353, BS201830357, BS201830360, BS201830361, BS201830362, BS201830363, BS201830365, BS201830366, BS201830372 and BS201830371 had failed in grading and should not be released to the owner for sale in the market and should be condemned for destruction.

54. Mr. Makuto submitted that the Petitioner amended its Petition after being served with the Replying affidavit sworn on 18th of September, 2018. Notably the Petitioner did not deny the results contained in the letter reference **KEBS/HQ/MS/9/1/9/9** in its Amended Petition. Instead the Petitioner wrote a letter to the 6th Respondent agreeing with the KEBS Laboratory Test Results and seeking that the Rice be downgraded to Grade 2. Mr. Makuto submitted, raising the question whether rice that has been certified to have failed in grading can be released for Sale to the general population? Counsel submitted that Section 9 of the Standards Act Grants the National Standards Council Authority to set Standard and specification for commodity. Counsel submitted that Indeed a standard for milled rice was set being KS EAS 128 of 2017- Milled Rice Specification. Under Section 9(4) of the Standards Act it is made a crime to sell and/or deal with commodities that do not meet the set specification. Mr. Makuto submitted that the rice the subject matter of these proceedings which has failed in grading cannot be released for sell to the public. However in his oral submissions Mr. Makuto stated that the rice herein was good for consumption, and that the affected rice could be down graded and sold to the public since it was fit for human consumption

55. **M/S. Lorna Mima**, learned Counsel for the Forth Respondent submitted that it is a statutory body vested with the mandate, **inter alia**, to investigate complaints and information regarding abuse of intellectual property rights that is, counterfeiting. In the execution of its investigatory mandate it proceeds based on formal complaints laid and information received within the context of the provisions of Section 33 of the Anti-Counterfeit Act as read together with Regulation 13 of the Anti-Counterfeit Regulations, 2010. The 4th Respondent is part of the multi-agency team which consist of various government agencies, mandated to investigate, and conducts joint verifications in order to establish whether there are any offence committed and proceed to prosecute the same. However, the 4th defendant states that on the alleged date of inspection and seizure and sealing of the warehouse the 4th Respondent was not present as admitted by the Petitioner in the petition and subsequent pleadings by the Petitioner.

56. M/S. Mima submitted that the Petition as presented does not in any way set out with reasonable degree of precision, *inter alia*, the manner in which the Constitutional rights of the Petitioner have been breached. Further the 4th Respondent states that since the Petitioner has admitted that the warehouse was sealed by the 1st Respondent under investigation by the 3rd and 6th Respondent basically they have demonstrated that they have no Constitutional basis to bring this Petition against the 4th Respondent, and that the Petition should be dismissed with costs to the 4th Respondent.

57. **M/S. Ombat** for the 6th Respondent submitted that the Standards Act at Section 14B (4) provides that where the goods are found to comply with the relevant Kenya Standard, they shall be released to the manufacturer, importer, possessor, dealer or seller forthwith. The letter by the 6th Respondent to the Directorate of Criminal Investigations dated 2018-09-17 and letter dated 2018-09-10 forming annexure "COO3" of the 6th Respondent's Affidavit of 9th October 2018 indicates the rice sample which conformed to the standard and those samples which did not. Counsel submitted that the following rice was found to have complied with the set standard and the 6th Respondent recommended that it be released for sale in the market, BS201830358, BS201830364, BS201830367, BS201830368, BS201830369, BS201830370, BS201831227, BS201831229, BS201831230, BS201831231, BS201831232, BS201831233, BS201831235, BS201831236, BS201831237, BS201831238, BS20183124, BS201831242, BS201831243, BS201831244, BS201831245, BS201831246, BS201831249.

58. M/S. Ombat submitted that the Standards Act at Section 14 B (5) provides that where the goods fail to comply with the relevant Kenya Standard, they shall be destroyed in accordance with section 14A. Counsel submitted that the following rice did not conform to the set standards and the 6th Respondent as per its statutory Mandate, and ought not to be released to the market and should be condemned for destruction. BS201830353, BS201830357, BS201830360, BS201830361, BS201830362, BS201830363, BS201830365, BS201830366, BS201830371, BS201830372.

59. M/S. Ombat further submitted that the fact that the Rice was tested and did pass the test at the Country of Origin is not a bar to further testing once the goods are in Kenya and being traded. It is the statutory obligation of the 6th Respondent to ensure that the goods being consumed are of the required standards, failure of which the Public risks consuming harmful and/or substandard products! Further, the 6th Respondent submitted that the Petitioner in its Further Replying Affidavit dated 19th October 2018 at page 50 and 67 has expressly acknowledged the Results of the Laboratory Test for the failed samples and requested and or appealed that he be allowed to downgrade the Rice from Grade 1 to grade 2, and his appeal has been allowed by the 6th Respondent and advised to re-label the Rice, complete documentation and have the 6th Respondent inspect the consignment before the seal is lifted. M/s. Ombat submitted that Article 46(1)(a),(b) and (c) of the Constitution of Kenya, 2010 protects consumers' economic rights, rights to quality, safe and healthy products which the 6th Respondent is mandated by statute to enforce among other Agencies. The 6th Respondent in sampling and testing the Rice consignment is performing its constitutional and statutory obligation of protecting the consumers who are all persons resident in Kenya.

60. In the performance of its statutory mandate, the 6th Respondent carries out the following activities routinely:

- (a) Testing and inspecting products at port of entry into Kenya to provide assurance as to quality and prevent harmful products from entering Kenyan market;
- (b) Monitoring of products in the Kenyan market to ensure that they conform to relevant technical regulations in a process called market Surveillance;
- (c) Taking samples from products in the market and carrying out laboratory tests to ascertain if the products conform to the set standards.

61. M/S. Ombat submitted that the 6th Respondent, in accordance with its functions or mandate, has, in concert with its counterparts within the East African Community, established standards known as the East African Standard which all healthy goods and products are required to meet. With respect to the matter at hand, the 6th Respondent developed the East African Standard: Milled Rice Specification. KS EAS 128:2017 ICS 67.060 developed to provide guideline on the testing and quality of Milled Rice intended for Human consumption. The 6th Respondent submitted that it is the Petitioner's responsibility to ensure that the Rice it trades in meet the said standards.

62. In rejoinder Mr. Khagram for the Petitioner submitted that KEBS, in the Affidavit of CAROLINE OUTA OGWENO, sworn and filed herein on **9th October 2018** relies on Gazette Notice No.7270 contained in the Kenya Gazette of the **20th July 2018** as the foundation and basis for existence of the Multi-Agency Team whose conduct is now in question before this Court and that the Countrywide operation is headed by the Deputy Head of Public Service. In the same affidavit of paragraph 9 KEBS acknowledges that the Petitioners' rice consignments were unlawfully detained and the Mitchell Cotts Warehouses wrongfully sealed and locked on the **13th July 2018** to investigate cases of illicit goods being imported into the Country. Mr. Khagram submitted that firstly even if the *Gazetted Notice were* lawful, the Multi-Agency Team was not in existence on the **13th July 2018** when their unlawful conduct of sealing the Mitchell Cotts Warehouses and detaining the Petitioners' goods was perpetrated and the Respondents were clearly abusing their powers. Secondly, the mandate set out in the said Gazette Notice did not permit the Respondents to conduct themselves in the manner they did.

63. Mr. Khagram submitted that the illegal and unlawful acts of the Respondents has caused the Petitioner to suffer huge loses and damages as shown in Schedule of loss or damage annexed by Petitioner at page 576 of its Further Supplementary Affidavit sworn on 5th. October

2018. Mr. Khagram submitted that the Petitioner suffered loss amounting to a total of Shs. 53,938,446.60 as itemised in that Schedule. Counsel submitted that this loss has not been challenged by the respondents and should be awarded as damages.

64. Counsel relied on Petition NO. 248 OF 2013 – (NRB) between **Arnachery Limited –and- the Attorney General**.

The Determination

65. I have carefully considered the petition, the submissions both written and oral. In my view the following issues are relevant for determination.

- (i) The legal status of the Multi – Agency Team referred to herein
- (ii) Whether the quality of the subject rice herein was already verified pre-import and whether the inspection before entry into the country was necessary.
- (iii) Whether the deviations in the size of the subject rice should lead to its destruction, re-classification, or should be accepted as it is.
- (iv) Whether damages are payable

(i) The legal status of the Multi – Agency Team referred to herein

66. First and foremost, it is the Petitioner’s submission that the DCI and KEBS as well as other Petitioner’s reliance on **Legal Notice No.66 of 1999** – is wholly misplaced as these regulations relate to disposal of prohibited goods under **The Customs and Excise Act (Cap.472)** and the question then arises whether the goods were ‘prohibited’ and could be condemned.

67. It is the Petitioner’s Submission that the Multi-Agency Team referred to by all the Respondents as anchoring their actions is not anchored in law or on any statute.

68. Mr. Khagram submitted that this being a matter governed by **the Standards Act**, it must be governed pursuant to the provisions of that Act. As a corollary to this, it is also the Petitioner’s submission that the Third Respondent has no powers vested in him to deal with nor investigate matters or lead such investigations as are covered by the provisions of **the Standards Act**.

69. **Section 13 of the Standards Act** specifies and sets out provisions relating to appointment of **Inspectors** who, under the Act are defined in **Section 2** thereof as an **Inspector** appointed under **Section 13**. To qualify for appointment, one needs to be **Gazetted** by the Minister if the Minister is of the opinion that such person is **suitably qualified**. In the instant case apart from the Mr. Joseph

Ng’ang’a, the Coast Regional DCI who has identified himself as having led the team that sealed the Mitchell Cots Warehouses, none of the other Respondents’ employees said to be part of the team have been identified nor certificates produced evidencing their appointment pursuant to the provisions of Section 14(2) of the above Act. The provisions of Section 14 of the Act set out the powers of Inspectors, for the purposes of the Act. It is important to note here that such powers are only reserved for Inspectors appointed pursuant to the Act. In particular, **Section 14 (i) (g)** empowers an **Inspector** to seize for testing any goods he has reasonable cause to believe that an offence has been committed.

70. I have carefully considered these provisions vis-à-vis the appointment of the said Agency.

71. It is the finding of this court that the various Ministries whose functions overlap can constitute a team to coordinate their function especially in urgent critical situations where the life of a nation is concerned. The constitution of the Multi - Agency Team was not frivolous. It arose out of a grave national concern that contraband and poisonous goods were entering the country and this had multiple negative implication in the life of the nation. No responsible government would be expected to take an askance or a care free attitude when such grave issues arise.

72. The relevant government departments, in this case the KRA, DCI, KEBS, ACA and others constituting the Multi - Agency Team have the mandate to team together to investigate such a threat to the life of the nation. The various departments or Ministries are able to donate or delegate the powers they have to the Multi Agency Team. The team once constituted pursuant to the powers donated by their parental Ministries or departments remains lawfully in force. It is the action of that team which may be questioned should that team purport to act beyond the powers donated to them by their parent Ministries or departments.

73. Accordingly, this court is satisfied that the Multi-Agency Team referred to in these proceedings is lawfully anchored, and derives its powers from their parent departments, and it is the exercise of their powers that may be questioned in any proceedings such as these.

(ii) Whether the quality of the subject rice herein was already verified pre-import and whether the inspection before entry into country was necessary.

74. The DCI alleged that the Multi-Agency Task Force had been mandated to investigate cases of ‘.....**contraband and/or substandard goods ... which are a health risk.....**’.

KEBS has also claimed that the Petitioner’s rice is unfit for human consumption and should be destroyed. KRA, on the other hand, states that

the fitness of the subject rice for consumption was under suspicion for valid reasons that would put the entire Nation's public health at risk, and suggests that the Petitioner has or intends to circumvent the quality tests undertaken to protect the lives of Kenyans at large and that such rice contains 'aflotoxin' which purportedly takes a month to test. KRA states that it sealed the Warehouses to prevent contaminated or rice unfit for human consumption being released. The DCI in its Affidavit, sets out the parameters required to be addressed by KEBS – particularly that of fitness for human consumption. Yet in the test results produced by the DCI, this fundamental issue which forms the foundation of the Multi-Agency Team's actions has not been addressed. What is not in doubt, however, is that the Petitioner imported various consignments of rice on which all duties and taxes had been paid and after satisfying itself of compliance with all statutory requirements and regulations and release by other bodies, customs released the relevant goods. All the pre-import documentation required to comply with local statutory and regulatory requirements have been attached to the Petitioner's First Affidavit as Exhibits 'BJ 1 & 2'. The Petitioner drew this Court's attention to the contents of **Pages 26 to 43** and **Pages 228 to 241** of the Petitioner's First Affidavit containing the relevant Pre-verification of conformity Certificate ('PVO') issued by KEBS and its contractor as well as all other relevant documentation. In the case of each consignment, a complete replicated set of documents is annexed.

75. Following the Respondents' decision to detain the said rice, the Petitioner obtained a further re-confirmation from relevant Institutions contracted by KEBS' (see Exhibit 'BJ1' and BJ2' to the Petitioner's Sixth Affidavit. Particularly, at **Pages 9 to 20** is set out the Rice Inspection Procedure for testing which is an industry wide adopted practice). Although daily reports are available for each one of the consignments, by way of example, this Court's attention is drawn to the Report at **Pages 21 to 44** of the Petitioner's Sixth Affidavit and **Pages 322 to 334** relating to the Thailand and Pakistan importations respectively. In addition to this, sampling was jointly carried out of the Petitioner's rice samples after these proceedings had been filed and during the pendency of the proceedings herein on the basis of the Petitioner's Advocates' letter of the **17th August 2018** - **Pages 6 to 8** of the Petitioner's Fourth Affidavit. In this regard, the Petitioner's Director, has in the petitioner's Sixth Affidavit (at **Paragraph 16(c)** - **Page 5**) queried why KEBS has chosen to keep the test results for samples drawn by themselves away from the Petitioner and the Court. The sampling Forms appear at Exhibit 'BJ2' to the Petitioner's Fourth Affidavit, with the corresponding test results by the Petitioner's Independent test contractor appearing at **Pages 116 to 128** thereof. Each of the tests done for samples drawn appear together with the relevant Imports Sampling Form from **Pages 129 to 304** and the supporting documents at **Pages 305 to Page 414**. Regretably from the DCI's Second Affidavit where he annexes results, the integrity of the results and the Samples is questionable. Further questionable are the results No. s 7, 9 and 10 in **Paragraph 16** of the DCI's Second Affidavit relating to the 'Spring', 'Eland Thai' and 'Double Horse' Brands, which Mr. Khagram submitted, have been mischievously included in a bid to mislead this Court.

76. I have looked at results attached to the Petitioner's and Respondents Affidavits. Just by comparison, the First Result on the DCI's Second Affidavit relating to 'Himalaya Pearl Biryani Rice' has been failed on the basis of there being 8.7% broken rice instead of the 5% maximum permissible under the Kenyan Standards. All other parameters meet the Standard. Compare this to the SGS test report done by the Petitioner's Independent Testing Agent in results appearing at **Pages 241 and 248** of the Petitioner's Fourth Affidavit where for the same 'Himalaya Pearl Biryani Rice' Brand, the broken kernels were found to be 1, 34% and 0.63%. At **Page 255** is another test report showing 0.30% broken kernels. The testing done and Pre-verification of conformity for the same brand appears at **Pages 325 to 334** of the Petitioner's Sixth Affidavit showing the broken rice at 1.5% on the basis of which the PVO was issued by KEBS through its contracted agent.

77. What is confounding is that no explanation has been given by anyone as regards the need to do further testing after the goods entered Kenya based on a PVO properly and validly issued for a fee and which is binding on all parties. It is clear that at the time of entry of the subject rice into Kenya (being the material time), all the Petitioner's rice consignments conformed to the Kenya Standards and had the PVO's issued therefor by KEBS and its sub-contractors. This court acknowledges that verification standards at the port of import does not stop further verification when the goods arrive in Kenya. However, that verification cannot be done capriciously with noted intention to find fault and with what appears to be malice and bad faith.

78. Further, from the subsidiary legislation following—particularly **the standards (Kenya Accreditation Service) Regulations 2005** the Kenya Accreditation Service vets all applications to bodies issuing PVO's for the Petitioner's consignments. Those bodies continue to remain registered and no evidence has been placed before this Court to suggest that their accreditations or licences have been withdrawn. In so far as these particular consignments are concerned, **the verification or conformity to Kenya Standards of Import Order 2005** apply and the relevant provisions are Regulations 2, 4, 5, 6 and 7. When considered cumulatively, these effectively require KEBS to appoint inspection bodies in the Country of origin of goods and issue a Certificate of Conformity and goods that do not conform to the standards are not permitted into Kenya. This court has noted the marked difference with **the Standards (Inspection of Imports) Order 2018** which is annexed As Exhibit 'BJ5' to the Petitioner's Sixth Affidavit at **Pages 553 to 555** and which become effective on 1st October 2018. In the instant case, all the subject cargo had already been permitted entry into Kenya upon all relevant statutory bodies satisfying themselves that the requirements of law had been met and all taxes and duties paid. An Inspector is not empowered to begin testing when there is no suspicion of an offence having been committed nor any complaint lodged giving rise to such suspicion. When all these provisions under **THE STANDARDS ACT** and subsidiary legislation thereunder are considered, it is clear that the Respondents have and continue to act in breach of the law and the Petitioner's right under the provisions of **the Constitution of Kenya 2010** are threatened with violation. In **Civil Appeal no. 67 of 2017 (Krish Commodities Limited –v- Kenya Revenue Authority** the Court of Appeal held that:

'It is settled that every person has the right to fair administrative action which is expeditious, efficient, lawful and procedurally fair'.

79. The Respondents cannot be said to have discharged this obligation or burden to act fairly in the absence of any explanation why once the goods were verified and cleared for entry into Kenya and KEBS itself had issued Pre-Verification Certificate of Conformity (PVO), the said goods are still locked in a Warehouse and denied entry into Kenya.

80. From the foregoing paragraphs of this section it is the finding of this court that the subject rice was properly verified and a Pre-Verification certificate issued in conformity, and that there is no valid reason why the said rice is still in the 7th Respondent's Warehouse

(iii) Whether the deviations in the size of the subject rice should lead to its destruction, re-classification, or should be accepted as it is.

81. Section 236 of EACCMA 2004 empowers the 1st Respondent to verify the accuracy of goods entering the country. It also has the power

to examine such goods. And Section 203 of EACCMA 2004 makes it an offence to import restricted goods and makes it an offence to make false declarations. The 1st Respondents actions are therefore legal. Further as I have already observed, the fact that the Rice was tested and did pass the test at the Country of Origin is not a bar to further testing once the goods are in Kenya and being traded. It is the statutory obligation of the 6th Respondent to ensure that the goods being consumed are of the required standards, failure of which the Public risks consuming harmful and/or substandard products. Further Article 46(1)(a),(b) and (c) of the Constitution of Kenya, 2010 protects consumers' economic rights, rights to quality, safe and healthy products which the 6th Respondent is mandated by statute to enforce among other Agencies. So, the 6th Respondent in sampling and testing the Rice consignment is performing its constitutional and statutory obligation of protecting the consumers.

82. It is therefore true that it is the Petitioner's responsibility to ensure that the Rice it trades in meet the standards set under the East African Standard: Milled Rice Specification. KS EAS 128:2017 ICS 67.060 developed to provide guideline on the testing and quality of Milled Rice intended for Human consumption KS EAS 128:2017 ICS 67.0600 both at the place of origin and in Kenya.

83. While the above is the true position of the law, this Court finds that the Petitioner did not derogate from any position of the law to enable the respondents detain its goods in the said manner. The Respondents are free to carry out their legal mandate, but they have no freedom to destroy the Petitioner's business in the process. The respondents have skilled employee who are paid to work within the law. They cannot purport to maintain law and order while in the wake thereof leave a trail of destruction and disorder. Kenya is an organized Society. Those privileged to serve the public cannot afford to do it carelessly or with a care free attitude that their mistakes will never be visited upon them.

84. All along there has never been an issue of substandard, contraband or poisonous rice. The issue is alleged failure in size. This cannot be considered a life threatening issue as submitted by the respondents. I have also looked at the alleged deviation in the size, which appears negligible. As I have already observed in issue number two above, a comparative analysis of results attached to the Petitioner's and Respondents Affidavits shows margins of deviation. The First Result on the DCI's Second Affidavit relates to '**Himalaya Pearl Biryani Rice**' has been failed on the basis of there being 8.7% broken rice instead of the 5% maximum permissible under the Kenyan Standards. All other parameters meet the Standard. Compare this to the SGS test report done by the Petitioner's Independent Testing Agent in results appearing at **Pages 241 and 248** of the Petitioner's Fourth Affidavit where for the same '**Himalaya Pearl Biryani Rice**' Brand, the broken kernels were found to be 1, 34% and 0.63%. At **Page 255** is another test report showing 0.30% broken kernels. The testing done and Pre-verification of conformity for the same brand appears at **Pages 325 to 334** of the Petitioner's Sixth Affidavit showing the broken rice at 1.5% on the basis of which the PVOC was issued by KEBS through its contracted agent.

85. In my view, this margin of deviation is marginal and has been explained by the Petitioner. I have accepted that this kind of deviation can be caused simply by the way the cargo is handled both at loading and offloading and indeed dependent on the position of samples taken. This in my view is a kind of deviation that constitutes occupational hazard which should be accepted by the Respondents. To do otherwise will expose the fallacy of KEBS conduct to be discerned from a result in respect of Grade 3 rice issued by KEBS for a consignment that has long been sold and disposed of appearing as Exhibit 'BJ6' to the Petitioner's Sixth Affidavit where Grade 3 rice is said to have had only 2% broken elevating it to Grade 1 in terms of the KEBS Milled Rice Specification appearing at **Page 572** of Petitioner's 6th Affidavit.

86. The Court also referred to the Affidavit of JOSEPH NG'ANG'A sworn and filed herein on the 19th September 2018. From the said affidavit the Court observes inter-alia, that when sampling was done, two samples were drawn by the Respondents – one by the DCI and the other by KEBS as is confirmed by Imports Sampling Forms issued to the Petitioner. Of the total of 28 samples drawn, 16 results have been submitted by the DCI, and of which 3 relate to brands not belonging to the Petitioner. This issue was not disputed by the Respondents. However, KEBS has, for reasons best known to them, chosen to keep the test results for the samples drawn by themselves away from this Court. Of the list of samples set out at paragraph 16 of the aforesaid Affidavit, items 7, 9 & 10 relating to the '**Spring**', '**Eland Thai**' and '**Double Horse**' brands do not belong to the Petitioner nor are they from samples drawn from the Petitioners' goods. This fact was also not disputed. Their inclusion as being amongst the Petitioners' goods may have been intended to mislead this Court. It is notable, however, that all the samples said to have failed have purportedly been failed on broken grading parameters with a 'recommendation to condemn these goods for destruction' being unfit for human consumption made.

87. In my view, the integrity of the DCI's sampling process and submission of samples for testing is questionable as not only do the reports fail to identify which Samples Collection Form the tests conducted relate to but, also, the dates for submission of samples are inherently contradictory. Besides, as submitted by Petitioner and not disputed by the Respondents, the Petitioner has no person employed in the name of Alice Mithanio who is said in those results to be the customer contact name.

88. Finally the result that the 'grading failed is not true for the reason that not only was a PVOC issued confirming the goods to conform to the standards prior to shipment but also based on the fact that upon their arrival, the goods were randomly sampled from the various consignments and released upon confirmation that they met the relevant standards. (In this regard see annexure marked as '**BJ-6**', a true photostat copy of KEBS' letter of the 20th September 2018).

89. It is the finding hereof that whilst the rice parameters are conforming to the Kenya Standards (as previously certified) prior to their departure from the point of origin, depending on the bag now sampled, there is likely to be a variance in the broken percentage based on whether the bag has been stepped on or handled harshly (by throwing) during the exercise of stacking or loading/unloading into or from trucks/containers/warehouses. The PVOC certificates are issued based on sampling at the mills at the time of packaging the goods for export and before their release from the mills for stuffing into containers for carriage to eventual destination as is evident from the daily reports produced. The rice Inspection Procedure Note from Intertek, Thailand sets out the processes and this is standard practice amongst all of KEBS' PVOC contractors.

90. From the foregoing, it is the finding of this Court not only that the alleged size variations are negligible, but also that the method to determine the percentage of broken rice was not scientific, and at the discretion of the Agency; and sampling for the same was deliberately skewed, and in some instances deliberately wrong to achieve a particular result.

91. In the light of these discrepancies in the local Verification and Sampling method, the only dependable Sampling size result that this Court

can use is the pre-shipping Verification results from independent organizations accredited by KEBS to do that work.

92. From the foregoing it is the finding of this court that the suit subject rice has met all the import required standards as well as the quality as to size and is hereby forthwith released to the Petitioner for Sale

(iv) Whether damages are payable

93. As for claim for damages by the Petitioner **section 227 of the East African Community Customs Management Act 2004** indemnifies any officer who acts where there are reasonable grounds to so act within the provisions of the Act. Section 227 (2) and (3) provides that **“if the court before which proceedings are heard is satisfied that there were reasonable grounds for such act, the Plaintiff shall be entitled to recover any thing seized, or the value of the thing, but shall not otherwise be entitled to any damages and no costs shall be awarded to either party.”**

94. The issue here then is whether there were any reasonable grounds for the Respondents to act as they did. Section 227 offers immunity to an officer who acts in good faith. The issue is whether the officers forming the respondents’ offices have acted in good faith. The facts of this matter reveal the Respondents did not bother to exercise their expertise or skills before locking up the godowns containing the rice. The lock down would have been initially necessary for say 2 – 5 days during which proper verification could have been done. However, even when it became apparent that they were in the wrong, the Respondents still dug in, rather in a fashion to show their impunity. Subsequent orders were issued by this Court to be complied with but the same were conveniently either ignored or grudgingly partly observed.

95. Indeed the Court granted partial orders for the release of “compliant” rice but the same could not be released forcing the Petitioner to come to Court occasionally to compel compliance. Routine orders of the Court for the Respondents to allow the Petitioner access to the premises for fumigation purposes or to take stock, or to access compliant rice were always grudgingly accepted by the Respondents in a manner to show who was more authoritative. This Court hereby assets that in a democracy such as ours, the authority of the court is paramount, and every citizen has the obligation to obey a court order.

96. From the conduct of the Respondents in this matter, it is difficult to agree that their officers were acting reasonably or in good faith; and this Court finds as such. The respondents cannot therefore benefit under the said section 227 of the **East African Community Customs Management Act 2004**. This indictment on their conduct removes them from the immunity provided by that section and it is the finding of this Court that the damages are payable to the Petitioners

97. A distinction must, however be made between the Respondents for the purpose of costs and damages payable in this petition. The major Respondents with responsibility in this petition are the 1st (KRA) and 6th (KRBS). Both perform their statutory duties. However, it is the KEBS whose duty it is to ensure that the goods that enter the country are properly verified.

98. It is the report of the KEBS that makes other bodies including KRA to Act. KRA has the duty to collect taxes. But it basis its action on the belief that KEBS has done its statutory functions competently. It is for this reason that KEBS must bear the burden in this petition. The KEBS failed to recognize the results of verification from its own contacted agents. KEBS has not sacked or complained to those agents. It is also clear that KEBS has done local verification which does not indict the Petitioner. But it has refused to bring such results to this court. KEBS has not behaved like a professional body on whose shoulder lies the national health of all Kenyans. At one time it accepts verification report. When it is convenient to it, it denies the same. How will Kenyans believe this statutory body when it changes its decisions like a chameleon changing its colours? KEBS has no option but to act professionally, and its officers must do the job they are paid to do failure to which such officers must be prepared to individually answer for their misfeasance or negligence.

99. I am satisfied that the blame in this petition must fall solely on KEBS. KRA has properly done its statutory duty and cannot be blamed for the shortcomings of KEBS.

100. The Petitioner prays for general damages for unlawful and illegal detention of the Petitioner’s consignment or rice, and according to schedule of loss or damage annexed by the Petitioner at page 566 of its Further Supplementary affidavit sworn on 5. 10. 18. The Petitioner alleges to have suffered the following losses.

- a) Storage charges Shs.10,235,097.60
- b) Financial and interest costs Shs. 30,251,520
- c) Staff salary July-October 2018 – Shs.1,880,000
- d) Loss of business and damage to its brand Shs.10,000,0000
- e) Sampling and Testing Shs.1,571,829

101. Apart from the Respondents merely submitting that the damages were not payable none of them disputed these figures. This Court has no doubt that the Petitioner has suffered damages. However, all those damages may not be compensable. Nonetheless the Court cannot ignore them. On account of those losses this Court award general damages of Shs.15,000,000= in terms of prayer (e) of the petition. This shall be paid by the 6th Respondent KEBS. The Court also grants prayers (a) (b) (d) against the Respondents jointly and severally.

The costs of this Petition shall be for the Petitioner to be paid by KEBS.

102. The Amended Petition herein is allowed in the following terms:

i) Prayer (a) (b) and (d) are allowed against the Respondents jointly and severally.

ii) General damages of Kenya Shillings Fifteen Million (Shs.15,000.000=) is awarded to the Petitioner in terms of prayer (e) of the amended Petition against the 6th Respondent (KEBS).

iii) The Petitioner's entire rice quantity subject of this petition now held in the 7th Respondent's warehouse is hereby forthwith released to the Petitioner, and the 1st , 3rd and 6th Respondents are hereby ordered and directed to forthwith open the said warehouse and hand over to the Petitioner the said consignment of rice.

iv) The costs of this Petition are given to the Petitioner to be paid by the 6th Respondent KEBS.

Dated, Signed and Delivered in Mombasa this 24th day of January, 2019

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Khagram for Petitioner

Mr. Makuto for 2nd and 3rd Respondents

M/S Lorna Mima for 4th Respondent

M/S. Ombat for 6th Respondent

Kaunda Court Assistant