



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NO. 398 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF ARTICLES 21(1), 23(1) 23(3) (f), 25 (c), 27 (1),

47(1), 49(1)(d) & 50(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE STANDARDS ACT, CAP 496 LAWS OF KENYA

AND

IN THE MATTER OF THE VERIFICATION OF CONFORMITY TO KENYA

STANDARDS OF IMPORTS ORDER, 2005 (LEGAL NOTICE No. 78)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA BUREAU OF STANDARDS1ST RESPONDENT

SGS KENYA LIMITED.....2ND RESPONDENT

HELIOPOTASSE SAS.....3RD RESPONDENT

KCB BANK KENYA LIMITED.....4TH RESPONDENT

EX PARTE : UNIFRESH EXOTICS (K) LIMITED

JUDGMENT

The Application

1. The *ex parte* Applicant herein is Unifresh Exotics (K) Limited, (hereinafter “the Applicant”), which is a private company incorporated in Kenya under the provisions of the Companies Act Cap 486 of the Laws of Kenya. On 5th March 2018 the Applicant entered into a contract

with Heliopatasse SAS, (hereinafter the 3rd Respondent), which is a company registered in Belarus. The said contract was for purchase of 1000 metric tonnes of compound fertilizer for farming use from Belarus, for the sum of USD 420,000/=, and which fertilizer was to be shipped in three consignments. A Letter of Credit was consequently created/opened on 3rd April 2018 with the Kenya Commercial Bank Limited, (hereinafter the 4th Respondent) which is a registered Bank under the Banking Act in Kenya, to facilitate payments between the Applicant and the 3rd Respondent. Among the documents that were to be presented before the Letter of Credit was honoured included a Certificate of Conformity which was to be issued by SGS Kenya Limited to the Kenya Bureau of Standards.

2. The Kenya Bureau of Standards, which is sued as the 1st Respondent herein, is a statutory body established under the Standards Act and responsible for the provision of Standards, Metrology and Conformity Assessment services. In discharge of its functions, the 1st Respondent is empowered under order 4 of the Verification of Conformity to Kenya Standards of Imports Order, 2005 to appoint an inspection body or bodies in the country of origin of goods to undertake verification of conformity to Kenya Standards or approved specification. SGS Kenya Limited, is one such inspection body appointed pursuant to the provisions of provisions of order 4 of the Verification of Conformity to Kenya Standards of Imports Order, 2005, to inspect consignments at their port of origin to confirm compliance with the Kenyan standards. It has been sued as the 2nd Respondent herein.

3. On 4th May 2018 the 2nd Respondent received samples for testing in respect of the Applicant's 1st consignment of fertilizers, and after conducting its tests issued a test report on 21st May 2018 and a Certificate of Conformity on 22nd May 2018. In exercise of its powers under order 2 of the Verification of Conformity to Kenya Standards of Imports Order, 2005, the 1st Respondent subsequently issued a list on 4th June 2018, in which the Applicant's 1st consignment of fertilizer fell under the category of goods that were to be mandatory subjected to testing upon docking at the port.

4. To this end, the 1st Respondent collected samples of the Applicant's 1st consignment of fertilizer on 1st July 2018 for testing, and issued a test report on 9th August 2018 according to which the said 1st consignment was found to be non-compliant with the Kenya Standards Specification for solid Compound Fertilizers, and was required to be re-shipped, returned or destroyed at the expense of the Applicant, in terms of order 6 (2) of the Verification of Conformity to Kenya Standards of Imports Order, 2005. According to the Applicant, the 2nd Respondent further issued Certificates of Conformities dated 29th May 2018 and 6th July 2018 in respect of the 2nd and 3rd consignments respectively, which were upon testing by the 1st Respondent, likewise found to be non-compliant to the relevant Kenyan standards with the same consequences as those that applied to the 1st consignment.

5. The Applicant consequently filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 27th May 2019, in which it seeking an order of mandamus to compel the 1st and the 2nd Respondents to re-sample and re-test the subject consignments of compound fertilizer in the presence of the Applicant's Agronomist to ascertain their compliance with the Kenyan set standards; such further and other reliefs that this Court may deem just and expedient to grant; and that the costs of this Application be borne by the Respondents. It is notable at this stage to point out that the instant application was filed pursuant to partial leave granted by this Court to seek this order only, and not various other orders that were sought against the 3rd and 4th Respondents. The said prayers were denied after this Court found that they involved issues of a contractual nature as between the Applicant and the 3rd and 4th Respondents that were not amenable to judicial review. This Court has therefore in this judgment confined itself to the pleadings made with respect to the prayer of mandamus.

6. The Applicant in this respect relied on grounds set out in the Statutory Statement dated 27th September 2018, and the matters set out in the verifying affidavit, supporting affidavit and supplementary affidavits of its Legal Officer, Mathew Lomosi, sworn on 27th September 2018, 11th January, 2019, 23rd May, 2019, and 26th September 2019 respectively. In summary, it is the Applicant's case that the 1st Respondent has a statutory public duty to sample and test any import to ascertain whether it meets or conforms with the Kenya standards, and that in discharging this duty, it is obligated to observe all the tenets of fair administrative action. However, that the Applicant was never informed of the actions undertaken by the 1st Respondent, the method applied or represented during sampling and testing. Further, that there were conflicting details in the laboratory test reports.

7. The Applicant averred that it notified the 1st Respondent of the discrepancies in the testing reports by a letter dated 14th August 2018, and also requested it to facilitate a re-test and re-sampling of the fertilizer in the presence of its agronomists. However, that the 1st Respondent ignored the request, in violation of the Applicant's right to fair administrative action and contrary to Article 47 of the constitution and section 4 of the Fair Administrative Actions Act. According to the Applicant, it is also unreasonable for the 1st and 2nd Respondents to test a similar product using the same method and arrive at different conclusions, unless one of them is malicious or fraudulent.

8. The Applicant also asserted that the 2nd Respondent cannot run away from liability by hiding under the veil of its sister companies, and in issuing certificates of conformity, the SGS subsidiaries indeed acknowledge they are doing so on behalf of the 2nd Respondent. Further, that even though it is a private entity, it was retained by the 1st Respondent to perform a public duty. Therefore, that the 2nd Respondent is not sued in performance of its private duties but for its role in performance of public duties assigned to it by the 1st Respondent. Further, that the 2nd Respondent was acting as an agent of, and binds the 1st Respondent.

9. In conclusion, the Applicant stated that there would be no any prejudice that would be occasioned on any party, if re-sampling and re-testing of the subject consignment of the contract dated 5th March 2018 between the Applicant and the 3rd Respondent is conducted to establish the truth. It also averred that it had provided details as regards the ownership of the consignments, and in particular an Import Declaration Form IDF No. E1803818145 issued by Kenya Revenue Authority, which clearly indicated the Applicant as the consignee of Lot 3. This averment was made in response to the 1st Respondent's averments that the importer of this Lot was not indicated.

The Responses

10. The 1st Respondent filed a replying affidavit to the instant application sworn on 18th January 2019 by Birgen Rono, its Head of Department- Inspection. He averred that the 1st Respondent has a public duty to protect the health, safety and economic interest of the consumers, and to protect the general public from sub-standard goods imported from other jurisdictions. Further, that the 1st Respondent, in accordance with its mandate established Kenya Standards Specification for Compound Fertilizers (KS 158:2012), which tests various parameters, including moisture content, total nitrogen, total potassium content, total phosphorous, arsenic, cadmium, mercury and lead. The 1st Respondent attached a copy of the said standards.

11. The deponent explained that the 1st Respondent started a Pre-Export Verification of Conformity to Standards program on 29th September 2005 which was published in Legal Notice No. 127 of 19th June 2018, and which applied to products at the respective exporting countries, to ensure their compliance with the applicable Kenya technical regulations and mandatory standards or approved specifications. Further, that on 4th June 2018, the 1st Respondent wrote a letter to its appointed agents under the program including the 2nd Respondent, requesting cooperation from them, and that sub-standard and counterfeit products be certified under the program.

12. Additionally, that it is a requirement of the Standards (Verification of Kenya Standards of Imports Order) 2018 that all goods which are subject of the Order shall be subjected to conformity to Kenya standards or approved specifications in the country of origin by the appointed agents, and may, if the Kenya Bureau of Standards deems necessary, be re-inspected at the port of entry. Furthermore, that the 1st Respondent has the power not to permit entry into the country any goods that do not conform to Kenya standards and to reject the same and/or order that they destroyed at the expense of the importer.

13. The 1st Respondent denied authorising the 2nd Respondent to issue Certificates of Conformity in respect of goods that are sub-standard, and that any such act of was in excess of the scope and mandate of the 2nd Respondent. It averred that it is a stranger to the circumstances under which the 2nd Respondent granted the Applicant Certificates of Conformity for goods that are sub-standard. Further, that the 1st Respondent has overriding powers to reject any consignment if found to be non-conforming on verification at the port of entry, even if its appointed agent has issued a Certificate of Conformity on the said consignment, as expressly reiterated on the face of the said Certificates.

14. The 1st Respondent further explained that on 10th July 2018, its import inspection officer drew a sample from the Applicant's consignment of 189 metric tonnes NPK fertilizer imported under customs entry no. 2018CD 29224, by taking a 50-kilogram sack for testing pursuant to sample ref no. BS201824527 and Certificate of Conformity No. 5-2018/05/. Further, that the samples of the fertilizer were tested on 13th July 2018 against the Kenya Standards Specification for Compound Fertilizers (KS 158:2012) and failed to comply with the set standards in relation to nitrogen parameter, and the Applicant was notified of the results in a letter dated 16th August 2018. In addition, that the 1st Respondent also communicated to the Applicant that the said fertilizer consignment was consequently rejected and was required to be reshipped back to the country of origin, failure to which it would be destroyed. The 1st Respondent annexed copies of the customs entry form, sample collection form and submission form, test report and letter to the Applicant.

15. It is the 1st Respondent's case that it is aware of 189 metric tonnes of fertilizer imported by the Applicant under certificate of conformity number S-2018/05/482849 in Lot 1, which it tested as aforesaid. Further, that on 23rd July 2019 it also sampled and tested Lot 2 of the Applicant's fertilizer of net weight of 189 metric tonnes under sample reference number BS201826018, which consignment arrived in the country vide Certificate of Conformity No. S-2018/05/484164, and which also failed to comply with the set standards in relation to nitrogen parameter.

16. With respect to Lot 3 of the fertiliser alleged to have been imported by the Applicant, the 1st Respondent stated that the Applicant did not claim or declare the goods as required by law, when the ship carrying them docking at the port in Kilindini. Consequently, that the Respondent's did not know of its existence, and thus did not draw any samples to test. Further, that upon finding the abandoned goods at the said port, the Kenya Revenue Authority, as required by law, published a notice in the Kenya Gazette inviting owners to declare them within 30 days, failure to which they would be sold at a public auction.

17. The 1st Respondent in this respect asserted that the Import Declaration Form relied upon by the Applicant as evidence of declaration of the goods is used for pre-shipment inspection in the country of origin by the appointed agents, and does not declare the arrival of the goods in Kenya. According to the 1st Respondent, a form known as Form C. 17B -Single Administrative Document is the one utilized when making payment of duty payable against the goods, and goods are only tested after this is done. Therefore, that the Applicant did not declare the arrival of the third consignment when it arrived in Kenya.

18. In addition, that the Kenya Revenue Authority asked the 1st Respondent to test the goods for compliance with Kenyan standards prior to the intended sale by auction, and a sample was accordingly drawn from consignment on 14th May 2019, tested and found to be sub-standard. The 1st Respondent stated that it communicated this information to Kenya Revenue Authority who currently has custody of the goods, and that the Applicant has concealed material facts especially on the fate of its 3rd consignment, which was the bulk consignment of 622 metric tonnes of fertilizer. Further, that it would be unjust to condemn the 1st Respondent by compelling it to repeat an exercise in the circumstances, and the Standards Act does not provide for re-sampling and/or re-testing of goods.

19. The 2nd Respondent also filed a replying affidavit in response, sworn on 11th July 2019 by Hellen Achieng, its Liaison Office Contract Manager. The 2nd Respondent stated that the Applicant has not shown that the 2nd Respondent has a public duty to re-sample and re-test the consignment subject of these proceedings, or that the 2nd Respondent has failed to perform such public duty. The deponent denied that the 2nd Respondent was appointed by the 1st Respondent as its agent in terms of the Pre-Export Verification of Conformity Inspection Program, to inspect the consignment at its port of origin to confirm compliance with the Kenyan standards.

20. According to the 2nd Respondent, the 1st Respondent appointed SGS Societe Generale de Surveillance SA as its agent, and it annexed a

copy of a public notice issued by the 1st Respondent. Further, that the 2nd Respondent is a liaison office of SGS Societe Generale de Surveillance SA and cannot conduct inspection programs outside Kenya, and was never contracted by the Applicant to inspect the consignment. Therefore, that it could not have issued the Applicant herein with a certificate of conformity.

21. The deponent further averred that the Applicant has not availed any proof that SGS Klalpeda Limited in Lithuania contacted or communicated with SGS Kenya Limited over the impugned goods, and that the certificate of conformity is clearly indicated as having been issued by SGS Vostok Limited based in Moscow Russian Federation, which is a different and separate entity from the 2nd Respondent herein. In addition, that the Applicant merely alleges that the certificate of conformity indicates that the same is provided and authenticated by SGS Nairobi Liaison Office, and does not deny that the 2nd Respondent did not inspect the consignment. The 2nd Respondent stated that the terms “provided and authenticated by SGS Nairobi Liaison office” does not mean that it endorsed the testing conducted by SGS Vostok Limited, but only authenticated that the certificate of conformity was indeed issued by the said SGS Vostok Limited.

22. According to the 2nd Respondent, the main issue in contention is the inspection of the goods which was not done by it, and it had nothing to do with inspection of goods in Moscow which is outside its area of business, neither was it instructed to conduct testing of the Applicant’s goods, nor paid any money by the Applicant to do so. Lastly, that the 2nd Respondent, SGS Klalpeda Limited Lithuania, and SGS Vostok Limited based in Moscow Russian Federation are not one and the same entity, and a copy of the certificate of change of name of the 2nd Respondent was annexed as proof.

The Determination

23. The application was canvassed by way of written submissions. The Applicant’s Advocates on record, Prof. Tom Ojienda and Associates, filed submissions on the application dated 2nd August 2019, while the 1st Respondent’s Advocates, Lilan and Koech Associates, filed submissions dated 9th October 2019. Muriu Mungai & Company Advocates filed submissions dated 20th September 2019 for the 2nd Respondent.

24. The Applicant in its submissions detailed out the facts of this case and the parameters of grant of judicial review orders, and cited various judicial authorities in this regard, including **Republic vs Kenya Revenue Authority Ex-Parte: Cosmos Limited, [2016] eKLR** , **Council of Civil Service Unions vs Minister of State for Civil Service, (1984) 3 ALL ER 935**, **Republic vs Public Procurement Administrative Review Board & 2 Others Ex Parte- Sanitam Services (E. A) Limited, (2013) eKLR** and **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation, [1947] 2 ALL E.R 680**. The Applicant submitted that it had demonstrated the grounds for grant of a judicial review order namely illegality, procedural impropriety and unreasonableness/irrationality, as it is unreasonable for two bodies, one being an agent of the other, to test the same sample and arrive at different results unless there is malice and bad faith.

25. The 1st Respondent on its part submitted that the Applicant has not demonstrated that it has a public duty to re-test goods that it already found to be sub-standard, that there was any mischief in the manner it undertook the testing, or that the 2nd Respondent was acting within the scope and mandate given to it. The 1st Respondent further submitted that it would unjust and unfair to compel a repeat exercise only on account of unsubstantiated claims of fraud, political interference and/or incompetence.

26. It was the 1st Respondent’s further submission that the remedy for mandamus is unavailable, for the reason that the Applicant has other appropriate remedies against the entity that supplied it with Certificates of Conformity for goods that are sub-standard, and taking due account of the fact that agency is inapplicable in this instant as the 2nd Respondent exceeded its mandate. Further, that the Applicant also has a more appropriate remedy against the entity that sold/supplied to it the sub-standard goods, which fact the Applicant has acknowledged by filing the suit in **Nairobi COMM HCCC No. 346/2018 - Unifresh Exotics (K) Limited vs KCB Kenya Limited & Heliopotasse SAS** over the same subject matter.

27. The 1st Respondent also submitted that it had demonstrated that the Applicant concealed the fact that it abandoned its goods unaccustomed and failed to declare entry as required by the law, and relied on the decision as regards material non-disclosure in **Apollo Mboya & Another vs Cabinet Secretary of the National Treasury & 6 Others, [2019] eKLR**. The 2nd Respondent also cited the decisions in **Republic vs Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR** and **In the Matter of an Application by Justus Nyangaya & Others, High Court of Kenya at Nairobi, Misc. Civil Case No. 1133 of 2002** for the position that the Applicant has come to court with unclean hands and does not deserve the exercise of the judicial discretion of this Court.

28. The 2nd Respondent’s submissions were that the Applicant must demonstrate that there is a statutory duty to perform a certain action complained of for an order of mandamus to issue, and is seeking to have the court compel the 2nd Respondent to carry out a function not provided under law. That there is no law or statute that requires the 2nd Respondent to re-sample and retest the subject consignment. In addition, that the 2nd Respondent is a private company, and reliance was placed on the decision in **Republic vs Kenya Association of Music Producers (KAMP) & 3 others, ex parte Pubs, Entertainment and Restaurants Association of Kenya [2014] eKLR** where the Court declined to make an order of mandamus and prohibition against the Respondents therein, as they were private bodies.

29. Furthermore, that the basic principles on separate legal entities have been ignored by Applicant, and it is trite law that an agent cannot be sued where there is a disclosed principal as held in **City Council of Nairobi vs Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR** and **Anthony Francis Wareheim t/a Wareheim & 2 Others vs Kenya Post Office Savings Bank Civil Application Nos. Nai 5 & 48 of 2002**. Therefore that the instant proceedings as against the 2nd Respondent are bad in law.

30. I have considered the Applicant’s pleadings and submissions. The parameters within which this Court operates in judicial review were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

31. It was also emphasized by the Court of Appeal in *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*, (2016) KLR that while *Article 47 of the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, *the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.*

32. I am also guided by the Court of Appeal’s decision on the nature of the remedy of mandamus in *Republic vs Kenya National Examinations Council exparte Gathenji and Others*, (1996) e KLR 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 and 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.”

33. The main issue that therefore requires to be determined is whether the 1st and 2nd Respondents are under a public duty and obligation to retest the Applicant’s consignments of fertilizers. One of the functions of the 1st Respondent in this respect as provided in section 4(1)(i) of the Standards Act, is to provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of the Act, or any other law dealing with standards of quality or description. In this respect, the relevant Minister made the Verification of Conformity to Kenya Standards of Imports Order, 2005 which provides as follows in paragraphs 2 to 5:

“Publication of a list.

2. The Kenya Bureau of Standards shall publish a list of goods which shall be subjected to verification of conformity to Kenya Standards or approved specifications.

Compliance with standards.

3. A person who imports goods must ensure that the goods meet Kenya Standards or approved specifications.

Appointment of an inspection body.

4. The Kenya Bureau of Standards shall appoint an inspection body or bodies in the country of origin of goods to undertake verification of conformity to Kenya Standards or approved specification.

Verification of conformity.

5. All goods which are specified by the Kenya Bureau of Standards in accordance with paragraph 2 shall be subjected to verification of conformity to Kenya Standards or approved specifications in the country of origin by an inspection body authorized by the Bureau, and may be re-inspected at the port of entry by the Bureau if it is deemed necessary.”

34. The 1st Respondent is therefore clearly mandated by law to test, and verify that imported commodities conform to Kenya standards. The transformation of this power or function to a duty to retest the Applicant’s consignment of fertilisers, is determined by the context and circumstances in which the exercise of the power or function is being challenged. In the present case, it is not disputed that the Applicant’s consignments of fertiliser were tested at the ports of origin by the 1st Respondent’s appointed agents, and Certificates of Conformity issued

by the 2nd Respondent in this regard. The said Certificates of Conformity were annexed as Annexures “ML 11” and “ML 12” by the Applicant to its verifying affidavit. It is also not contested that upon retesting, the said fertiliser was found not to conform to the applicable Kenyan standards.

35. In addition, the Applicant in its letter dated 14th August 2018 to the 1st Respondent, which it annexed as ML2 to its further supporting affidavit, requested for urgent resampling and retesting of the first consignment in the presence of their agronomist, after receiving the 1st Respondent’s amended test report on 10th August 2018 in relation to the said consignment that found that it had failed the test due to the absence of nitrogen.

36. These facts and evidence are relevant for this Court’s findings in two ways. Firstly, it is evident that there were inconsistent findings as regards the same consignments in tests done by the 1st Respondent’s appointed agents, and the 1st Respondent. No reasons were given by the 1st Respondent for the inconsistency, and this Court can therefore only make an inference that the 1st Respondent and its agents either failed to take into account some relevant considerations or took into account irrelevant considerations resulting in the conflicting decisions, and in an unreasonable outcome.

37. Secondly, it is also notable that the 1st Respondent has not provided any evidence of a response to the Applicant’s request for a resampling and retesting, which was a reasonable and justifiable request, particularly given that its conflicting decision that the Applicant’s consignment did not meet the required standards would have a considerable effect on the Applicant’s economic rights and interests. Two key legal principles apply in this respect. Firstly, one of the requirements of natural justice that guide all administrative decisions are that a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker. The Court of Appeal in this regard observed as follows in the case of **David Oloo Onyango v Attorney-General [1987] eKLR**:

“There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice.”

38. Secondly, Article 47 of the Constitution, and the provisions of the Fair Administrative Act, import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of the Constitution provides as follows in this regard:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

39. The Fair Administrative Action Act defines an administrative action to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. In addition, under section 3 of the Fair Administrative Action Act, the provisions of the Act apply to all state and non-state agencies. Therefore, the provisions of the Act as regards fair action also binds the 1st Respondent in exercise of its powers under the Standards Act and the Verification of Conformity to Kenya Standards of Imports Order, 2005 to test imported goods for conformity with Kenyan standards, as its decision is likely to affect the rights and interests of the Applicant.

40. The 1st Respondent did not bring evidence of any provisions of the law that absolves it from this obligation, and on the contrary, Article 24 of the Constitution requires that any such limitation or intention to exclude the provisions of the Bill of Rights must be expressly stated in the empowering law.

41. Section 4 (3) and (4) of the Fair Administrative Action Act detail the procedure to be adopted by decision makers in implementation of Article 47 as follows:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

42. The fairness of the procedure depends on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances. In the present case, no evidence was brought by the 1st Respondent of notice to the Applicant or of its involvement in the initial testing of its consignment of fertilizer, for it to be able to participate in the process, nor of any response to its specific request to participate. The process that was employed was thus not a fair action on the part of the 1st Respondent.

43. As regards whether the 2nd Respondent had a corresponding obligation and duty, it is notable that the Applicant's grievance is that the 2nd Respondent provided the Certificates of Conformity that certified its imported fertiliser as conforming with the Kenyan standards in the country of origin. The relationship between the 2nd Respondent and the appointed agents who undertook the pre-import verification of the Applicant's consignment is one that cannot be determined, nor is amenable to determination by way of the present judicial review proceedings, as it requires evidence of this relationship to be tabled by the relevant parties and examined. This finding notwithstanding, it is my view that this relationship is not material in the present proceedings for two reasons.

44. Firstly, whatever the relationship between the 2nd Respondent and the entities that undertook the verification of the subject fertiliser in the country of origin, what is relevant and not in dispute is that Certificates of Conformity were issued thereby, that confirmed that the goods met Kenyan standards. Secondly, a perusal of the said Certificates of Conformity that were exhibited by the Applicant, show that they are Certificates of Conformity either originating from the 1st Respondent or issued in its name, that were being given by the 2nd Respondent or some other entity in their capacity as the 1st Respondent's agents. To this extent, the said Certificates of Conformity are essentially the 1st Respondent's certificates, and it bears the ultimate responsibility for their issue.

45. This position is also borne out and supported by the provisions of paragraph 6 of the Verification of Conformity to Kenya Standards of Imports Order, 2005, which is on the issue of Certificates of Conformity, and which provides as follows:

“(1) The Kenya Bureau of Standards shall issue a certificate of conformity in respect of goods that conform with Kenya Standards or nonconformity approved specifications and a non conformity report in respect of goods which do not.

(2) No Goods that do not conform to the Kenya Standards or approved specifications shall be permitted into Kenya, and shall be re-shipped, returned or destroyed at the expense of the importer. “

46. It is evident from the said provisions that the repository of the power and duty to issue the Certificates of Conformity is the 1st Respondent, and no such power or duty is given by law to its appointed agents. As shown in the foregoing, paragraph 4 and 5 of the said Order only give powers to the said agents to undertake verification of goods in the country of origin of their conformity to Kenya standards or approved specification.

47. If the 1st Respondent allowed the said appointed agents to thereupon issue the Certificates of Conformity as is evident from the annexures produced by the Applicant, it must take responsibility for any such issue. Lastly, it is also notable that in the present application, the Applicant is seeking testing and verification at the port of entry, and not the country of origin of the consignment of fertiliser. The appointed agents, whether the 2nd Respondent or any other entity, therefore have no legal function or role to play in such retesting.

48. It is therefore the finding of this Court that arising from the foregoing reasons and in the circumstances of the present application, there was a duty on the part of the 1st Respondent to resample and retest the Applicant's consignment of fertiliser in Lot 1 and 2, whose ownership is not dispute. As regards the consignment where the ownership is in dispute or not certain, and particularly Lot 3, then the issue of ownership will have to be resolved first in the appropriate fora. It is also my finding that there is no duty that arises in the present application on the part of the 2nd Respondent.

49. In the premises, I find that the Applicant's Notice of Motion dated 27th May 2019 is partially merited. I accordingly grant the following orders:

I. An order of mandamus be and is hereby issued compelling the 1st Respondent to within 60 days of the date of this judgment, re-sample and re-test Lot 1 of 189 metric tonnes of fertilizer imported by the Applicant under Certificate of Conformity number S-2018/05/482849, and Lot 2 of 189 metric tonnes of fertilizer imported by the Applicant under Certificate of Conformity No. S-2018/05/484164, and in the presence of the Applicant's Agronomist, to ascertain their compliance with the Kenyan set standards.

II. Each party shall meet its respective costs of the Notice of Motion dated 27th May 2019.

50. Orders accordingly.

DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2019

P. NYAMWEYA

JUDGE

DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI THIS 27TH DAY OF NOVEMBER 2019

J.M. MATIVO

JUDGE