Osho Chemicals Industries Limited v Attorney General & 2 others; Mitchell Cotts (K) Limited & 3 others (Interested Parties) (Petition E202 of 2022) [2025] KEHC 210 (KLR) (Constitutional and Human Rights) (22 January 2025) (Judgment)

Neutral citation: [2025] KEHC 210 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E202 OF 2022

LN MUGAMBI, J

JANUARY 22, 2025

BETWEEN

OSHO CHEMICALS INDUSTRIES LIMITED ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 2ND RESPONDENT

KENYA BUREAU OF STANDARDS ..... 3RD RESPONDENT

AND

MITCHELL COTTS (K) LIMITED ..... INTERESTED PARTY

KENYA PORTS AUTHORITY ..... INTERESTED PARTY

KENYA REVENUE AUTHORITY ..... INTERESTED PARTY

KENYA ASSOCIATION OF MANUFACTURERS ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 10th May 2022, is supported by the Petitioner's affidavit in support of even date.
2. The Petitioner alleges that the Respondents unreasonably and unlawfully obstructed timely clearance of its imported goods that resulted in massive financial loss. The Petitioner alleges that Respondents' violated its rights under Articles 40(3), 46(1) (a) and 47 of *the Constitution*.
3. Accordingly, the Petitioner seeks the following reliefs against the Respondents:

a. Declarations be issued that:

i. The decisions and actions of KEBS and the DCI in refusing to authorize the timely clearance and release of Osho's products were unlawful, capricious and in breach of Article 47 of *the Constitution* and Section 4, 5 and 6 of the *Fair Administrative Action Act* and occasioned economic loss to the Petitioner.

ii. The respondents as members of the multiagency task force are liable to pay all outstanding customs warehouse rent and any related tax payable to the 1st and 2nd Interested Party and Kenya Revenue Authority on account of the unlawful detention of the petitioners' goods.

iii. The officers of the Respondents are in breach of Articles 10(2) and 73(a) and (b) of *the Constitution* and Section 7 of the *Leadership and Integrity Act* by failing to serve the people in an equitable, inclusive, accountable and transparent manner and failing to uphold the rule of law which amounts to abuse of power and disregard for property rights and the right to a fair administrative action.

iv. It is unreasonable to detain an importer's goods for period exceeding 21 days from the date of storage in bonded warehouse and expose the importers to warehouse rent and unnecessary taxes on account of delays in carrying out testing of the products.

b) An order of prohibition directed at the Respondents and 1st to 3rd Interested Parties from in future detaining any of the Petitioner's goods beyond 21 days from the date of importation, clearance of outstanding taxes and any testing to be conducted on the goods.

c) An order of prohibition against the Interested Parties from demanding any outstanding storage charges, ware house rent or taxes from the Petitioner.

d) An order of mandamus compelling the Respondents to pay all outstanding warehouse rent and taxes due to the 1st to 3rd Interested Parties on account of the Petitioner's unlawfully detained goods.

e) An order of mandamus compelling the 1st Respondent to come up with rules, regulations or directives governing the multiagency task force and ensuring full compliance with Article 47 of *the Constitution* and the Fair Administration Actions Act to avoid unreasonable delays, inaction in clearing goods imported by manufacturers and ordinary citizens and expedited resolution of any disputes within 14 days of being raised.

f) Pending the hearing and determination of the testing the Respondents and 1st to 3rd Interested Parties, their agents or servants be restrained from selling the Petitioner's following goods:

i. NPK-12:2:44 Water soluble fertilizer-100 metric tons;

ii. Green Miracle- Foliar Fertiliser-20x250kg drums; and

iii. Karisma Organic fertilizer- 44 metric tons;

in any manner whatsoever pending further orders of the court.

g) A mandatory injunction directing the 3rd Respondent to re-test the NPK fertiliser, Green Miracle- Foliar Fertiliser and Karisma Organic Fertilizer at its own cost to confirm if all or any of the products are fit for use and file and serve under oath a report of the laboratory tests within 14 days of the court order.

h) The Respondents and 1st to 3rd Interested Parties do unconditionally and without demanding any payment from the Petitioner of costs, warehouse rent or any charges whatsoever do forthwith release the following:

(iv) NPK-12:2:44 Water soluble fertilizer-100 metric tons

(v) Green Miracle- Foliar Fertiliser-20x250kg drums

(vi) Karisma Organic fertilizer- 44 metric tons

to the Petitioner within 7 days of adoption of the laboratory tests by the 3rd Respondent in the event that all or any of the products are fit for use and in the event that the products have expired the 3rd Respondent be ordered to forthwith destroy the affected products at its own costs and release all the containers to the custody of the Petitioner.

i. Special Damages for:

No.	Costs Incurred & Paid	Kesh's	USD
1.	NPK Fertilizer Import costs, customs, shipping line, demurrage container sale, customer warehouse rent.	593639	119036.20
2.	Green Miracle – Foliar Fertilizer Import costs, customs, shipping line, demurrage container sale, customer warehouse rents, shipping costs.	546031.49	23240.28
3.	Karisma Organic fertilizer Import costs, customs, shipping line, demurrage container sale, customer warehouse rents, shipping costs.	402865.36	33548.20
	Loss of Profits		
4.	NPK Fertilizer	54,821,597	
5.	Green Miracle – Foliar Fertilizer	1,1927,600	
6.	Karisma organic fertilizer	341,440	

j) Exemplary and punitive damages for unfair, unlawful and wrongful detention of the Petitioner's goods with interest at court rates of 14% per annum from the date of judgment until payment in full.

k) Interest at court rates of 14% per annum from the date of filing the Petition until payment in full.

l) Costs of the suit on a full indemnity basis with interest at court rates of 14% per annum from the date of filing the Petition until payment in full.

m) Any other relief that the Court shall deem just.

Petitioner's Case

4. The Petitioner's Director, Manoj K. Shah stated that the Petitioner is an agrochemical manufacturing company that deals with manufacturing, formulating and packaging of agro-chemicals which are used by small-scale and large-scale farms.

5. He avers that the Petitioner has consistently adhered to the quality standards set by the 3rd Respondent and its goods tested by various inspection agencies prior to their importation for the last 25 years that it has been in operation.

6. He depones that on diverse dates in 2018, the Petitioner imported raw material being NPK-12:2:44 Water soluble fertilizer-100 metric tons which arrived on 28th August, 2018; Green Miracle- Foliar Fertiliser-20x250kg drums which arrived on 23rd September, 2018; and Karisma Organic fertilizer- 44 metric tons which arrived on 26th September, 2018. As required, the Petitioner paid the applicable taxes for the products. The shipments were released after undergoing the standard customs and 3rd Respondent's inspection procedures.

7. It is averred however that this consignment was detained on the instructions of the multi-agency task force appointed to deal with contraband commodities. The multi-agency task force comprised the three respondents among others. To date the goods have remained in the custody of the Interested Parties.

8. For context, the Petitioner depones that on 28th August 2018, the consignment, NPK-12:2:44 Water soluble fertilizer-100 metric tons, was imported under Reference number: 2018/100, Customs Entry Number 2018ICD40226, TEU's 4x20 FCLs, Product Name N-P-K 12-2-44. Initially, this product had undergone pre-shipment inspection and pre-export verification of conformity pursuant to Clause 5.3.1 of KEBS' PVoC Program Operations Manual. A Certificate of Conformity was then issued under Ref: KEN2018 202848/0001 and dated 24th July 2018.

9. On arrival at the Port of Mombasa, the 3rd Respondent drew a sample from the product with a view of testing it again. He alleges that due to the delay in getting the sample results, the Petitioner requested the 3rd Respondent to conditionally release the goods so as to avoid incurring extra storage costs by the 2nd Interested Party. This request was declined by the 3rd Respondent. He states that the tests results were released 58 days later.

10. In a letter dated 1st November 2018, the 3rd Respondent informed that the results showed that the product was non-compliant due to alleged magnesium content therein. As such, the Petitioner was informed that this product would be re-shipped to its country of origin.

11. Aggrieved by the result, the Petitioner on 6th November 2018 requested that the good be re-tested as the product had been compliant from its country of origin having passed international and local standards. Upon payment of Kshs. 59,823 for re-inspection and resampling by the Petitioner on 3/12/2018; the samples were collected on 5/12/2018 and results of reinspection and resampling by Kebs were conveyed via the 3rd Respondent letter dated 21st December 2018 which confirmed that the product was compliant with the Kebs set standards-KS 2427:2014 - Kenya Standard Compound Soluble Fertilizer Specifications.

12. The Petitioner protests that the 3rd Respondent negligently subjected the first sample to magnesium test which was not primary nutrient or micro nutrient, did not use applicable main parameter for testing Nitrogen, Phosphorous and Potassium hence erroneous testing led to the unlawful and unreasonable detention of the Petitioner's goods to date.

13. He avers that after receiving the correct results they informed the 2nd Respondent on 15th January, 2019 but the 2nd Respondent objected to release the products.

14. Afterwards the Petitioner made several follows ups with the 2nd Respondent, 3rd Respondent and made physical visits in various government offices imploring for the release of detained fertilizer which incidents are detailed in the affidavit.

15. The 2nd Respondent opened an inquiry No. 188/2019 on the circumstances surrounding the detention of the Petitioner's consignment which concluded that for the Organic Fertilizer under customs entry No. 2018ICD46343; Kebs had applied incorrect PH value of 6.5 and for the NPK fertilizer it was erroneously subjected to magnesium test which was not a primary micro-nutrient.

16. In January 2020 authorized the release of the consignment via phone call but the 3rd Respondent refused to release the product without written authorization.

17. This necessitated further follow ups by the Petitioner and beseeching various government agencies to intervene.

18. In the end, the 2nd Respondent and the 3rd Interested Party (KRA) refused to release the product notwithstanding the retesting results on the ground that the product was set to expire in May 2020 after being unlawfully detained for twenty months since September, 2018.

19. The Petitioner contends that as a result of the Respondents' actions it incurred a loss of sales amounting to Kshs. 95,814,461/- and loss of profit of Kshs.54,821,597/- and further losses as detailed in the affidavit.

20. With regard to Green Miracle- Foliar Fertiliser-20x250kg drums, which was imported on 23rd September 2018 under reference number: 2018/152 Customs Entry Number 2018ICD46590, Product Name: Green Miracle - 4000 Kgs (20 Drums of 200 Litre Pack). Intially, the product had also undergone pre-shipment inspection and pre-export verification of conformity inspection pursuant to Clause 5.3.1 of KEBS' Pre-Export Verification of Conformity (PVoC) Program Operations Manual and a Certificate of Conformity issued under Ref: KEN 2018 253219/0001 on 29th August 2018.

21. It is deponed that the 3rd Respondent on 11th October 2018 issued a seizure notice of this product on the claim that it did not meet the standard use of the Standardization Mark ('S' Mark) on imported products. The Petitioner vide a letter dated 15th October 2018 requested the 3rd Respondent to release the product to avoid incurring of storage charges as the product was lawfully registered under S-Mark but Kebs (3rd Respondent) declined the request even after it was explained that the Petitioner had made a genuine mistake on labelling which could be rectified through re-labelling. Despite countless calls and visits to 3rd Respondent's offices, no responses were received from the 2nd and 3rd Respondents. According to the Petitioner the Respondents unlawful detention of this product cost them a loss of sales of Ksh.3, 230, 000 and lost of profit of Ksh.1, 927, 600 as detailed in the affidavit.

22. In respect of Karisma Organic fertilizer- 44 metric tons imported on 26th September 2018 under reference number 2018/154 Customs Entry Number 2018ICD46343, Product Name: Karisma- Cake Organic Fertilizer - 2 X 20 FT FCL; this product had similarly undergone pre-shipment inspection and pre-export verification of conformity inspection pursuant to Clause 5.3.1 of KEBS PVOC Program

Operations Manual and was issued with a Certificate of Conformity under Ref: S-2018/09/507115 on 24th September 2018.

23. He asserts that about three weeks after the product was imported the 3rd Respondent carried out random testing on 6th November 2018. Following the test, the Petitioner was informed that this product had failed the initial standard test and was advised it would be re-shipped.

24. In protest the Petitioner in a letter dated 8th November 2018 applied for re-inspection and retesting pointing out that the 3rd Respondent's appointed Inspection agents 'SGS' had issued the Certificate of Conformity in accordance with Keb's standards after finding the product was compliant. In response, the 3rd Respondent approved the request for re-test. The 3rd Respondent in a letter dated 11th January 2019 informed the Petitioner that the re-test was done against Keb's standard KS2290:2018 and was found to be compliant.

25. The Petitioner faults the 3rd Respondent's initial test as being defective.

26. Following this, 2nd Respondent demanded the 3rd Respondent to explain the discrepancies in a letter on 5th August, 2019. The 3rd Respondent responded in a letter of 7th August, 2019 in which it admitted setting the incorrect minimum pH value of 6.5 in the Laboratory Information System instead of the correct standard pH value of 5.5-8.5 in accordance with the correct standard specification KS 2290:2018 for Organic Fertilizer. Further that the 3rd Respondent had drawn the test sample from one point instead from the 34 bags to compensate for any likely homogeneity and environmental effects that might affect the first sample.

27. This product was thus detained on account of erroneous testing by the 3rd Respondent.

28. The Petitioner avers that its request to have the product released by following the re-test results did not materialize. The Petitioner asserts that as a result of the Respondents actions with regard to this good it incurred loss of sales of Ksh.2, 244, 000 and lost of profit of Ksh.341, 440 among other losses.

29. In view of the foregoing, he asserts that the Respondents actions have caused the Petitioner loss of property and also economic loss. Similarly, their actions are said to have impacted the agricultural sector on account of the unlawful detention of the products which could have been utilized by the farmers. For this reason, the Petitioner contends that the Respondents unlawful actions were in violation of Article 40(3), 46(1) (a) and 47 of *the Constitution*.

1st Respondents' Case

30. In rejoinder, the 1st Respondent filed its grounds of opposition dated 6th June 2022 on the premise that:

    i. The Petition lacks clarity and precision in setting out the alleged violations.

    ii. The Petition discloses no cause of action against the 1st and 2nd Respondents.

    iii. The basis of attributing the alleged action upon the 1st and 2nd Respondent has not been set out.

    iv. The orders sought by the Petitioner are not tenable against the 1st and 2nd Respondents.

    v. The claim is mainly against the 1st and 2nd Respondents as per the Petition and who were acting in their private capacity and not on behalf of the government.

    vi. The Petitioner is trying to mislead the court on the law.

2nd Respondent's Case

31. The 2nd Respondent in response filed a Replying Affidavit through its officer PC Peter Ndiritu sworn on 18th July 2022. He depones that the matter was referred to the 2nd Respondent by the Ministry of Interior and Coordination in a letter dated 24th July 2019.

32. The complainant, the Petitioner herein informed that it had imported three commodities vide custom entry No. 2018ICD40226, 2018ICD46590 and 2018ICD46343. The Petitioner requested for a re - test of the consignments which was done.

33. He informs that the re-test revealed that the goods comprised in custom entry numbers 20181cd40226 and 2018ICD46343 were found compliant with the Kenyan standards but the product under custom entry 2018ICD46590 (Green Foliar Fertilizer) hence this particular product was rejected.

34. He avers that during the 3rd Respondent's investigation vide a letter dated 7th August 2019 and referenced KEBS/ CONF/ IMP/ VOL. 6(191), the 3rd Respondent admitted to having made the first test which was non-compliant.

35. In view of these results, the 2nd Respondent through its officer IP Moses Githuathi communicated via an email dated 20th February 2020, to the 3rd Respondent's Managing Director, Benard Njiraini that the two products should be released as they had complied with the set standards.

36. He asserts that the 2nd Respondent has never been a custodian of the Petitioner's consignment. He informs that the consignment is held by the 3rd Respondent at the Inland Container deport in Nairobi (ICDN). For these reasons, he stresses that the 2nd Respondent did not interfere with the Petitioner's consignment.

37. He additionally informs that vide a letter dated 5th August 2019 and referenced CID/SEC/4/4/10/ XXXIV/17, the 2nd Respondent raised concerns about the results discrepancy while seeking an explanation for the same from the 3rd Respondent.

3rd Respondent's Case

38. The 3rd Respondent filed its replying affidavit through its Chief Manager, Inspection, Inland Container Depot (ICDN), Birgen Ronoh sworn on 27th October 2022.

39. He informs that the government between 2018 and 2019 established a multi-agency team constituting inter alia the Respondents, with the aim of curbing entry of contraband goods in Kenya.

40. He depones that with regard to the Consignment Entry No. 2018 - ICD46590 Green Miracle Foliar Fertilizer 20x25kg it constituted of 20 barrels of 200 litres of green miracle imported from India. As stated, this consignment was rejected by the 2nd Respondent on 11th October 2018 on the basis that the barrels had standardization mark on their labels contrary to Section 10(6) of the *Standards Act*. He stated that the standardization mark had not been issued to the manufacturer in India and in any event, no valid standardization mark could have been issued to Indian manufacturer.

41. He stated that once the seizure notice was issued for the product, the same was to be addressed by the 3rd Interested Party (KRA). He deponed that the 3rd Interested Party can seize the goods, destroy them or re-ship them in line with *Legal Notice 66 of 1999*. He swore that once the 3rd Respondent issued the seizure notice rejecting the goods, it had no further role in the matter. He stated that 3rd Respondent cannot be held liable for stopping the release of this particular product to Petitioner as

already committed a crime under Section 10 (8) of the *Standards Act* had been committed in relation to the same.

42. As for the Consignment Entry No. 2018 ICD40226- NPK Water Soluble Fertilizer 12:2:44; he deponed that it was imported from China and arrived in the Country on 28th August 2018. A sample was drawn from the consignment and tested. He states that the test result indicated that the consignment fell short of the stipulated minimum requirements.

43. The 3rd Respondent in its letter dated 1st November 2018 to the Petitioner, communicated the result and informed that the consignment would be shipped back to the China within 30 days. The Petitioner protested the result and hence the re-test was done.

44. He depones that with the re-test results showed the product was compliant and the 3rd Respondent informed the Petitioner vide the letter dated 21st December 2018 that authorized the release of the product. The letter was copied to HOD Inspection, Manager PVoC, HOD testing and Chief Manager ICDE, Customs and Border Control, KRA.

45. He explained that the 3rd Respondent had decided on review to omit the parameters of manganese, magnesium and zinc in the re-test which micronutrients had been tested in the initial sample. The decision to omit was informed by the fact that the standard applicable KS 2427:2014 makes it optional to include micronutrients in the composition of fertilizer unless where the same are declared to form part of the fertilizer. He as such admits that this was an error that there was an error in the initial test.

46. He stated that whereas there was an error in the initial test, the Petitioner's Appeal letter of 6th November, 2018 was promptly considered and allowed by the letter of 30th November, 2018 and results released on 21/12/2018 that confirmed the goods were compliant and authorized release of the same. That afterwards, the 3rd Respondent had no role in the matter.

47. On Consignment Entry No. 2018 ICD46343- Karisma Organic Fertilizer, he depones that it arrived in the Country on 26th September 2018 from India. The 3rd Respondent drew a sample on 5th October 2018 and tested it. This sample was found to be non-compliant with the set standards. The 3rd Respondent in its communication to the Petitioner indicated that the consignment would be re-shipped back to India within 30 days as it was not compliant. The Petitioner protested the result and a further re-test was done which confirmed that the product was compliant. The 3rd Respondent in its letter dated 11th January 2019 told the Petitioner that the consignment would be released. He insisted that upon issuing the letter of release, it became functus officio.

48. He contends that to expect the 3rd Respondent's processes to be devoid of error would be unreasonable and that is why the law envisages the right of appeal. He stresses that the 3rd Respondent actioned the Petitioner's appeal as provided under Section 11 of the *Standards Act* and subjected the consignments to fresh tests. He asserts this upheld Articles 10 and 47 of *the Constitution*.

49. The 3rd Respondent further contended that Section 17 of the *Standards Act* protects it from any claims arising in relation to compliance of any commodity with specifications. That it would be against public policy to base a claim of damages against the 3rd Respondent on account of a product being found compliant upon retest for if that were the case, the 3rd Respondent would be unable to freely hear the appeal application for fear of being found liable in damages. That the implication would be akin to making subordinate courts pay damages where cases are successfully appealed in higher courts.

50. He alleges further that once the 3rd Respondent issued the release letters, the 2nd Respondent commenced its investigations. He points out that it is the 2nd Respondent that objected to the release of the consignments pending its investigations. He stated at paragraph 4 of the affidavit:

> " That I am aware that upon Kebs communicating release of the two consignments after being found compliant on retest, DCI immediately stepped in to investigate the matter and proceeded to direct that the consignments continue to be held pending investigations. DCI did in fact summon our officers at ICDN to record statements on the matter to aid investigations. Kebs was not only required to explain its actions in the matter to DCI but also Ministry officials (Exhibit 8 attached on pages 8-26 of annexure are relevant correspondence and statements)"
>
> Paragraph 5: That, in fact, the Petitioner in paragraph 26 of the Petition admits that it informed the DCI of the positive results comprised in RELEASE COMMUNICATION by Kebs but DCI OBJECTED to the release. On page 18 of the Petitioner's own annexure are records showing the status of consignments showing as at 31st January, 2019, the documents were pending release awaiting DCI VERDICT; as at 5th March, 2020, DCI was yet to issue files to KRA; as at 15th April, 2020; they were pending KEBS go ahead on account of expiry and as at 29th April, 2020, KRA and DCI refused to release because expiry was in May, 2020 (exhibit 9 attached on pages 27-28 of the annexures is a reproduction of the records as reproduced by the Petitioner).

51. Consequently, he avers that the Petitioner is dishonest in blaming the 3rd Respondent for the continued detention of the products in the circumstances yet KRA (3rd Interested Party) in its response attached records showing Kebs released the consignments from the system 22nd December, 2018.

52. Further, pursuant to Section 16(a) of the East African Community Customs Management Act and Section 12(1)(a) of the Customs Excise Act, Cap 472, imported goods remain in the custody of customs control (KRA-the 3rd Interested Party) until they are delivered for home consumption. He states that the 3rd Respondent communicating the release, it was upon the other partners of multi-agency team and eventually KRA to release the goods as the mandate of the 3rd Respondent was limited to inspection of the of the goods. That the other partners in the multi-agency were expected to equally exercise their legal mandates in respect of the same consignment and if all cleared it, KRA would eventually remove custom seals and release the goods subject to payment of any applicable taxes. That KRA was expected to act on seizure notice in respect of Consignment entry No. 2018.ICD46590 Green Manure and thus 3rd Respondent cannot be liable if no action was taken pursuant to the notice.

53. Be that as it may, he informs that the two approved goods for release on 21st December 2018 and 11th January 2019 respectively have since expired on 22nd May, 2020 and August 2021 respectively.

54. Following a court order issued on 30th June 2022, the consignments were re-tested on 8th July 2022. The test results indicated that the consignments failed the set standards.

55. Furthermore, it is asserted that Petitioner is guilty of in ordinate delay and failing to utilize the mechanism set out under the *Standards Act* by moving to the Standards Tribunal or Court within reasonable time before expiry of the consignments. For this reason, the Petition is said lack merit.

Interested Parties Case

56. The 1st and 4th Interested Parties responses and submissions are not in the Court file or Court Online Platform (CTS).

2nd Interested Party's Case

57. In opposition to the Petition, the 2nd Interested Party filed its response to the Petition dated 31st March 2023.

58. The 2nd Interested Party avers that it is unacquainted with the Petitioner, the nature of its business and the contents of the Petition. Further that the allegations in the Petition relate to entities that are distinct and independent from the 2nd Interested Party.

59. It is alleged that the Petitioner's alleged losses in this Petition should be proved. Nonetheless it is stated that any losses that could have occurred are not attributable to the 2nd Interested Party.

60. The 2nd Interested Party for this reason avers that the Petition discloses no cause of action against it hence prayers sought against are unmerited.

61. It is further asserted that the 2nd Interested Party is entitled to payment of port and statutory charges that are due to it from the consignee for the services rendered in respect of its consignment. Accordingly, the 2nd Interested Party states that these charges must be secured before the Petitioner's consignments can be released.

3rd Interested Party's case

62. The 3rd Interested Party in rejoinder filed its replying affidavit through its officer, Naphtali Kipngetich Bett sworn on 13th June 2022.

63. He depones that on diverse dates in 2018, the Petitioner imported 4 containers with serial numbers SEGU1045734, GESU3462579, CMAU1560128 and TCLU7433823. This consignment arrived at the Mombasa port on 28th August and 23rd September, 2018.The goods were then subsequently gated in at ICD Embakasi on 30th August 2018 and 1st September 2018. The consignment was processed under entry number 20181CD40226.

64. He avers that the clearing procedures were conducted as set out under the Kenyan requirements including pre-port verification of conformity to the Standards (PVOC) inspection at the ports of origin.

65. He states however that the consignment was not released to the Petitioner owing to the testing process that is customarily conducted by the Multi-Agency Task Force comprising the 2nd and 3rd Respondents and the 3rd interested Party, the Ethics and Anti-Corruption Commission, Office of the Director of Public Prosecutions, the National Intelligence Service, the Financial Reporting Centre, the Asset Recovery Agency and the Office of the President. Due to this, the consignment was stored at the Inland Container Depot (ICDN) at Embakasi to await the tests and clearance release.

66. He avers that in the process the consignment accrued warehouse rent charges of Ksh.1,590,083 at 9th March 2020 for the 18 months period in accordance with Section 42(8) of the East African Community Custom Management Act, (EACCMA) 2004.This provision allows the 4th Interested Party to extend time within which goods may be removed from the customs warehouse.

67. In view of the accrued charges, he states that the Petitioner sought a waiver from the 3rd Interested Party on the warehouse rent charges. In line with Regulation 85 of the East Africa Community Customs Management Regulations (EACCMR) 2010, the Commissioner acquiesced to the waiver of Ksh.1,500,000/- vide KRA/WAIVER/C&BC/MSA.035/03/2020 dated 8th APRIL 2020. He alleges that at that point, the 3rd Interested Party became functus officio.

68. He informs that the Petitioner's consignment is still at the ICDN yard as the 3rd Respondent is yet to clear it. In light of this, he avers that the Petitioner has not demonstrated its case against the 3rd Interested Party. This is because as averred, the 3rd Interested Party has no outstanding tax claim against the Petitioner and that it is free to collect its consignment subject to the approval of the 3rd Respondent.

Parties Submission

Petitioner's Submissions

69. The Petitioner in support of its case through Wamae & Allen Advocates filed submissions dated 29th June 2023 and rejoinder submissions dated 17th October 2023. The issues identified for discussion were:

    a. whether the Petitioner has established that its rights under Articles 40 and 47 of *the Constitution* were violated and;

    b. which reliefs would be appropriate for the Court issue.

70. On a preliminary note, Counsel stated that Prayer H in Petition had since been rendered impractical as the Petitioner's consignment has since expired and cannot be used. As such, Counsel submitted that the Petitioner was agreeable to the consignment being destroyed in accordance with Section 14A of the *Standards Act*.

71. On whether the Petitioner had established violation of its rights, Counsel answered in the affirmative.

72. Counsel reiterated the Petitioner's averments and submitted that it was evident that the Petitioner's consignment had undergone pre-shipment inspection and pre-export verification of conformity inspection in line with Clause 5.3.1 of KEBS' PVOC Program Operations Manual and Certificates of Conformity issued accordingly.

73. Counsel argued that despite this, the 3rd Respondent offered no explanation or justification as to why the consignment required further testing after the goods entered Kenya. This is notwithstanding the fact that the PVoC is validly issued at a fee and is binding on all parties as it is indicative that the consignment complied with the Kenyan standards. According to Counsel while pre-verification does not prevent further inspection, the same should not be done capriciously.

74. Reliance was placed in Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 others [2019] eKLR where it was held that:

> " 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."

75. Counsel in view of this asserted that the due to the Respondents' unlawful detention of the consignment; it has since expired and caused enormous losses in direct violation the Petitioner's right to fair administrative action as envisaged under Article 47 of *the Constitution*. Reliance was placed in

Krish Commodities Limited v Kenya Revenue Authority [2018] eKLR where the Court of Appeal noted as follows:

> " To us, the fact that the respondent was empowered to carry out the post clearance audit and demand short levied duty did not excuse the respondent from exercising such power in a reasonable, fair, efficient and effective manner. As a public authority, the respondent's obligation to act in the aforementioned manner while rendering decisions is delineated under Article 47 of *the Constitution*. Sub-Article (1) thereof reads:-
>
> > "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. "
>
> Did the respondent act fairly and reasonably? We think not. There was no explanation as to why the post clearance audit and the subsequent demand for the alleged short levied duty was made about 4 years after the initial assessment and payment of the duty so assessed. Even, Mr. Nyaga was at loss of words which could explain as to why it took such a long time. It is not in dispute that Section 135(3) of the EACCMA allows the respondent to make such a demand within 5 years. However, that is not to say that the respondent should wait until the tail end of the said period before making such a demand. There ought to be sufficient reason(s) as to why such audit and demand is made at the tail end. In our minds, the respondent cannot simply stand behind the time limit given to justify its conduct of demanding the short levied duty in question about 4 years later."

76. Moreover, Counsel submitted that the 3rd Respondent is guilty of unreasonable delay in testing the consignment as it took 58 days. It is further argued that the 3rd Respondent did not offer any explanation for the delay neither the need to re-test the consignment despite the pre-test. Considering this, it is averred that the 3rd Respondent acted in bad faith and its actions were actuated by malice.

77. Dependence was placed in Crown Chemicals v Kenya Bureau of Standards (KEBS) [2019) eKLR where it was held that:

> " For the above reasons, I find that the respondents, through their own delay, laxity or neglect of duty and the law violated the Petitioners right to under Articles 40, 47 and 50 of *the Constitution* whose particulars provisions I have already highlighted in this judgment.
>
> 28. From the facts of this case and considering that to date, the respondents have not released the Petitioners cargo so it goes without saying that the Petitioner has been denied the right to the goods that they imported at a very heavy cost... Needless to say, the loss in terms of loss in business that may be occasioned to any businessman by the delay in the release of his imported goods cannot be gainsaid. My finding is that the Petitioners rights to fair administrative action under Article 47 of *the Constitution* were violated."

78. Counsel additionally submitted that the conduct of the Respondents in general was in breach of the Petitioner's right under Article 47 of *the Constitution*. Counsel stated that this can be gleaned from the Respondents' conduct when the Petitioner was making numerous follows ups and seeking their intervention. In view of this, the Respondents were accused of being unreasonable and causing undue

delay. Reliance was placed in Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018]eKLR where it was held that:

> " Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the *Fair Administrative Action Act*. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.
>
> "The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock... as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'."

79. To expound on this point, Counsel highlighted that Section 14B of the *Standards Act* allows the inspector to conditionally release the goods to an importer pending the testing of the samples of goods to determine whether they comply with the relevant Kenyan standards. Further Section 14B (3) of the Act provides that the samples should be tested and results release within 14 days. This is in contrast to the 58 days that the 3rd Respondent took to release the results.

80. In effect, this delay is submitted to have deprived the Petitioner of its right to property as provided under Article 40 of *the Constitution*. Counsel stressed that inordinate delay that deprives a citizen of their fundamental rights is an affront to the right of a person to expeditious administrative action as held in Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government & 2 others Ex parte Patricia Olga Howson [2013] eKLR.

81. Like dependence was placed in Joint Venture of Lex Oilfield Solutions Ltd & CF AO Kenya Ltd v Public Procurement Administrative Review Board & 4 others) [2022] KECA 424 (KLR). Counsel as such stressed that it was evident that the Respondents had violated the Petitioner's rights.

82. Counsel as well submitted that the 3rd Respondent had been negligent as evidenced by the Petitioner's expert witness, Prof. Amir Okeyo Yusuf. The 3rd Respondent is said to have failed its obligation as a State organ. Reliance was placed in Peter Mwau Muinde and Another v Insurance Regulatory Authority; Claimants in the Accidents (Interested parties) Petition No. 20 of 2018, where it was held that:

> " Where it is alleged that as a result of the failure by a state organ to carry out its statutory mandate, a person's rights are threatened with violation or have been violated, the matter transcends the contractual arena and enters the constitutional arena."

83. Like dependence was placed in Commission on Administrative Justice vs. Insurance Regulatory Authority & Another [2017] eKLR.

84. Counsel in the second issue submitted that from the above discussion it was evident that the Petitioner was entitled to the reliefs sought. Counsel submitted thus the Petitioner was entitled to the prayers of declarations and the order of prohibition against the Respondents. Reliance was placed in Kenya

National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR where it was held that:

> "What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings - See Halsbury's Law of England, 4th Edition, Vol. I at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

85. Like dependence was placed in Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) [2021] KEHC 442 (KLR).

86. On general damages and compensation, Counsel relied in Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR where it was held that:

> "On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:-
>
> i. Damages should not be inordinately too high or too low.
>
> ii. Should be commensurate to the injury suffered.
>
> iii. Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.
>
> iv. Awards in past decisions are mere guides and each case depends on its own facts."

87. On aggravated and punitive damages the Petitioner relied in Peter Ndegwa Kiai t/a Perna Wines & Spirits v Attorney General & 2 others) [2021] KECA 328 (KLR) where it was held that:

> "Punitive damages are awarded in addition to compensatory or nominal damages, and proof of a highly culpable state of mind is necessary to support an award of punitive damages. Punitive damages primarily serve penal and deterrent functions in cases of gross constitutional violations, as well as vindicatory function"

88. Counsel as well relying in the evidence of loss adduced in the Petitioner's affidavit submitted that the Petitioner was entitled to special damages and the costs of this suit. Moreover, Counsel argued that the 3rd Respondent was liable to pay the accrued customs warehouse rent, as the consignment was detained owing to its erroneous testing.

89. In rejoinder, Counsel submitted that the doctrine of exhaustion is not applicable in this case as the circumstances fall within the exceptions of the doctrine as seen in the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR.

1st and 2nd Respondents' Submissions

90. On 3rd August 2023, State Counsel Edna Makori filed submissions for these Respondents. Counsel highlighted the issues for discussion as: whether the 2nd Respondent violated Articles 47 of *the Constitution* and Sections 4, 5 and 6 of the Fair Administration Actions Act; whether the 2nd Respondent was the custodian of the said consignments; whether the Petitioner has proved its case and whether the Petitioner is entitled to reliefs sought.

91. On the first issue, Counsel submitted that the 2nd Respondent observed the values and principles under Article 10 of *the Constitution* in the Petitioner's case. Counsel referring to the affidavit submitted that the 2nd Respondent in its letter to the 3rd Respondent underscored that the Petitioner's consignment, specifically the NPK fertilizer had been erroneously subjected to the magnesium test which is not a primary nutrient or micronutrient on the product label. As such the 2nd Respondent directed the 3rd Respondent to release the Petitioner's consignment.

92. Counsel further submitted that as stated by PC Nderitu, the 2nd Respondent did not interfere with the consignments and neither did it restrict release of the consignments. Counsel rehashed that as indicated in Court, the only multi-agency member who is authorized to release the consignment is the 3rd Respondent.

93. Counsel as well noted that the 3rd Respondent admitted to conducting the erroneous test. In line with this, it was stated that the 2nd Respondent has no capacity to undertake any tests on the consignments can only conduct investigations.

94. For these reasons, Counsel argued that the 2nd Respondent was not liable for the delay that was occasioned and so did not violate the Petitioner's constitutional rights as alleged.

95. Furthermore, Counsel submitted that the Petitioner had not demonstrated with precision how these rights has been violated by the 2nd Respondent as held in Anarita Karimi Njeru v. R (1979) KLR 154. Moreover, Counsel submitted that the Petitioner had not discharged the burden of proof under Section 107 of the *Evidence Act*.

96. In support Counsel relied in President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1 where it was held that:

> "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards

of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

97. Similar dependence was placed in Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board [2016] eKLR and Ridge vs. Baldwin [1964] AC 40.

98. Counsel in the second issue reiterated that the 2nd Respondent was never a custodian of the Petitioner's consignments. As deponed, the consignments have been in the custody of the 3rd Respondent at the Inland Container Deport.

99. On the reliefs sought, Counsel submitted that in the circumstances of this case, they are not merited in view of the 2nd Respondent.

3rd Respondent's Submissions

100. On 10th August 2023, the 3rd Respondent through its Counsel, Teresa Gachagua filed submissions and identified the issues for discussion as:

> " whether the 3rd Respondent is currently holding the consignments green miracle, NPK and organic karisma; whether the 3rd Respondent should be condemned to pay the Petitioner damages for holding the consignments; whether the 3rd Respondent was unreasonable in testing consignments NPK and organic karisma whereas the same had a Certificate of Conformity from the port of origin; whether the 3rd Respondent should be condemned to pay damages for errors in initial test results; whether the 3rd Respondent should be ordered to destroy the 3 consignments which have since expired; whether the 3rd Respondent was unreasonable in declining to conditionally release the consignment NPK fertilizer to the Petitioner; whether the 3rd Respondent released test results outside the stipulated statutory timeline; whether the 3rd Respondent should be ordered to compensate the Petitioner for delay in initial test results and whether the Petitioner exhausted the available mechanisms."

101. Counsel submitted in the first issue submitted that the Petitioner's consignment was released by the 3rd Respondent save for the Green Manure (Consignment Entry No. 2018 - ICD46590) as it was found to be in breach of Section 10(6) and (8) of the *Standards Act*.

102. On the second issue, Counsel submitted that being that the Petitioner's other two consignments had been released, the 3rd Respondent cannot be held liable to pay the damages. Counsel stressed that the same is not applicable for the green manure as the same was not compliant with the Kenyan standards. As such, the 3rd Respondent cannot be held liable for any damage for seizing the green manure.

103. On the third issue, Counsel submitted that the 3rd Respondent is empowered under the *Standards Act* as the body mandated to conduct standard tests. Consequently, the 3rd Respondent has the discretion to decide which products will be subjected to testing in line with rules as was the case herein. Therefore, Counsel submitted that the 3rd Respondent had indeed acted reasonably.

104. On whether the 3rd Respondent is responsible for the erroneous impugned tests, Counsel submitted that tests are normally prone to error as any other human system. Counsel relied in Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) [2017] KESC 42 (KLR) where it was held that:

> " We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and

improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television- monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice."

105. That notwithstanding Counsel submitted that the 3rd Respondent was quick to approve the Petitioner's request for a re-test. On this basis, Counsel submitted that the 3rd Respondent has executed its mandate in good faith and hence ought not be condemned to pay costs. Reliance was placed in Kenya Revenue Authority v Export Trading Company Limited [2022] KESC 31 (KLR) where it was held that:

> " Public bodies and organizations such as parastatals, which ordinarily existed to serve a country's government, by participating in proceedings, acted purely in a regulatory capacity. Such government organizations acting within their mandate needed not be condemned to pay costs where such an entity had brought or defended proceedings while acting purely in that regulatory capacity. An award of costs against such entities should only be made where such an entity had acted unreasonably or in bad faith."

106. Turning to the fifth issue, Counsel submitted that following a recent re-test of the Petitioner's consignment as ordered by this Court, it was noted that the 2 goods have since expired. Considering this, the consignment as a whole ought to be disposed in line with Section 42 and 212 of East African Community Customs Management Act.

107. Counsel submitted that the 3rd Respondent is not empowered to deal with the consignment at this stage as its mandate does not include destroying of goods. This was said to be the 3rd Interested Party's function. Counsel stated hence that issuance of orders to the 3rd Respondent in this respect would be in vain.

108. On the sixth issue, Counsel averred that the 3rd Respondent was not unreasonable in declining to release the NPK fertilizer in line with Section 14B (1) of the *Standards Act*. This is because the 3rd Respondent has the discretion to agree or decline such a request. Reliance was placed in Republic v Kenya Revenue Authority; Proto Energy Limited ([2022] KEHC 5 (KLR) where it was held that:

> " The court is generally reluctant to interfere which a functionaries' exercise of discretion "unless it is satisfied that the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a reasonable person properly directing himself to all the relevant facts and principles. For the court to intervene, there must have been a material misdirection on the part of the decision maker."

109. Like dependence was placed in Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR.

110. On the accusation of unreasonable delay in the seventh issue, Counsel submitted that the *Standards Act* does not stipulate any timeline to release a test as suggested by the Petitioner. Counsel however submitted that the impugned delay was not malicious but was due to the exigencies of work.

111. Owing to the reasons, set out above Counsel submitted in the eighth issue that the 3rd Respondent ought not to be condemned to compensate the Petitioner for the alleged losses.

112. On the final issue, Counsel submitted that the Petitioner had failed to exhaust the available dispute mechanism set out under Section 11 of the *Standards Act* which states that 'Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the

act complained of being received by him, appeal in writing to the Tribunal'. Dependence was placed in Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR where it was held that:

> " The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions."

113. Like reliance was placed in International Centre for Policy and Conflict and 5 Others v The Hon. Attorney-General & 4 others [2013] eKLR.

2nd Interested Party's Case

114. The 2nd Interested Party through its Counsel, Turasha J. Kinyanjui filed submissions dated 3rd April 2023.

115. On the onset Counsel submitted that the Petitioner had not set out with precision how the 2nd Interested Party had violated its rights as emphasized in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013] eKLR.

116. Similar reliance was placed in Buruburu Farmers Company Limited v Vincent Paul Omondi Obonyo & 4 others [2021] eKLR.

117. In like manner, Counsel submitted that the Petition discloses no cause of action against the 2nd Interested Party. Reliance was placed in Manase Guyo & 260 others v Kenya Forest Services [2016) eKLR where it was held that:

> " 51. To succeed in their Petition, the Petitioners are required to state in a clear, concise and precise manner the correlation between the alleged infringement and the action of the Respondent. It was not sufficient to merely cite provisions of *the Constitution* they belief to have been infringed but to also state the manner in which the provisions were infringed."

118. Comparable dependence was placed in Faraj & 3 others v Police & 2 others (2022] KEHC 287 (KLR).

119. Counsel further submitted that the statutory mandate of the 2nd Interested Party is only to handle and store consignments which are released once approved by the other government agencies. To emphasize this point Counsel cited the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR where it was held that:

> " We shall hereinafter refer to the appellant as "the Council". As a creature of statute, the council can only do that which its creator (the Act) and the rules made thereunder permit it to do."

120. On this premise, Counsel submitted that the Petitioner having failed to prove breach of statutory obligation on the 2nd Interested Party part was not entitled to the reliefs sought.

3rd Interested Party's Submissions

121. In support of its case, the 3rd Interested Party through it Counsel, Judith N. Kithinji filed submissions dated 3rd October 2023.Counsel identified the single issue for discussion as: whether the 3rd Interested Party is liable for damages for the detained consignment belonging to the Petitioner.

122. Counsel commenced by noting that the 3rd Interested Party had not breached the Petitioner's rights. Likewise, that the 3rd Interested Party had approved the Petitioner's request for waiver of the customs warehouse rent. As a result, the Petitioner was granted a waiver of Ksh.1, 500, 000. This fact is submitted to have also been acknowledged by the Petitioner.

123. Counsel submitted however that the 3rd Respondent had been adamant in apportioning blame for its own error on the 3rd interested party with regard to the Green Miracle Fertilizer.

124. On a preliminary note, Counsel emphasized that the 3rd interested party was not a substantive party to the suit and hence damages cannot be claimed from it by either party. Reliance was placed in Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR where it was held that:

> " an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio... What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):
>
> > "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms -with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court."

125. That notwithstanding, Counsel submitted that the 3rd Interested Party's mandate in this matter was limited to securing payment of customs warehouse rent which is still outstanding.

126. Counsel further submitted that Section 34(1) of EACCMA provides that the whole of cargo unloaded or to be unloaded shall be entered by the owner within 21 days either for home consumption, warehousing. As such, if the goods are not removed within the stipulated time they become subject of the customs warehouse rent as the case herein.

127. Speaking of the Green Miracle Fertilizer, Counsel submitted that this product was not removed from the customs warehouse due to the 3rd Respondent's seizure notice as the product did not meet the set standards. The goods were therefore detained in a customs warehouse and continue to accrue customs warehouse rent until they are removed.

128. Further, the 3rd Respondent was relying on Seizure Notice issued pursuant to the *Customs and Excise Act* Cap 472 which was no longer applicable following the amendment of *Customs and Excise Act* to remove all matters relating to customs in January, 2005 when EACCMA came into force. That the *Customs and Excise Act* remained in force until 1st December, 2015 when the *Excise Duty Act* came into force and Section 46 (1) of the Excise Duty repealed the *Customs and Excise Act*. That at the time of this

dispute, the *Customs and Excise Act* had been repealed and was inoperable and the applicable law was East African Community Customs Management Act (EACCMA). That therefore, the seizure notice was issued under repealed law.

129. The 3rd Interested party submitted that it was wrong for the 3rd Respondent to assume that because the goods are accruing customs warehouse rent, then they are under the control of the 3rd Respondent who ought to release them and referred to section 34 (1) and 34 (5) of the EACMMA Act; which merely states that if goods are not removed within first 14 days, they attract customs warehouse rent and not that they vest on the 3rd Interested Party and can released once the customs warehouse rent is cleared by whoever is responsible for making the payment. That the reason the goods were not removed was due to the 3rd Respondent's seizure notice and the finding that the other two consignments had not met the prescribed standards. That they continue to be detained and accrue customs warehouse rent.

130. On the claim that the goods were under the custody of the 3rd Interested Party who ought to have released the same; the 3rd Respondent stated the advertisement to auction the goods applies if they are not removed within 30 days and this was done but the Petitioner claimed them and were thus not considered abandoned in line with Section 42 (1) & (3) of EACCMA.

131. The 3rd Interested Party affirmed all taxes were paid and the only outstanding payment was customs warehouse rent which is due and payable unless waived by the 3rd interested party as per regulation 85 of the East African Community Customs Management Regulations.

132. On the issue of abandonment and destruction of goods, the 3rd Interested Party accused the 3rd Respondent of misapprehending the law under EACCMA on seizure which 3rd Respondent had issued based on repealed law. That the 3rd Respondent view is that with seizure, the Interested Party could suo moto re-export or destroy goods is against the law because EACCMA defines the owner of goods. The 3rd Interested Party is only allowed to detain, seize or destroy the goods under provisions of EACMMA and such re-export or destruction could only occur with the authority of the owner pursuant to Section 16 (3) of EACCMA which requires the destruction to be initiated/abandoned by the owner before the 3rd Interested Party can proceed to destroy them hence is contrary to law for the 3rd Respondent to require the 3rd Interested Party to destroy the goods without the consent of the owner. This is also supported by Section 56 of EACCMA.

133. Reliance was placed on Standard Resources Group Ltd vs AG & 3 others [2018]eKLR where it was held that:

> " Article 47(1) and (2) generally impose a duty on the state to give effect to this right by acting lawfully, reasonablly and fairly and to give written reasons where the action taken infringes or is likely to violate one's rights.... Where exercise of public power is at variance with this principle, it is inconsistent with *the constitution* and therefore invalid. This will lead to a review of that administrative action and may be nullified."

134. Counsel additionally stated that even where the owner of the goods authorizes any of the actions whether destruction of the property or re-shipping, the same is done in conjunction with the Multi-Agency Task Force so as to ensure that all the safety precautions and measures are adhered to. In light of this, Counsel submitted that the 3rd Interested Party lawfully undertook its mandate in this matter.

Analysis and Determination

135. It is my considered view that the issues that arise for determination are as follows:

i. Whether the Petition offends the doctrine of exhaustion;

ii. Whether the Petitioner's rights under Articles 40(3), 46(1) (c) 10 and 47 of *the Constitution* were violated by the Respondents; and

iii. Whether the Petitioner is entitled to the relief sought.

Whether the Petition offends the doctrine of exhaustion of remedies

136. The 3rd Respondent through Counsel submitted that the Petitioner had not exhausted the dispute settlement mechanism envisaged by Section 11 of the *Standards Act* which states that 'Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal'. The 3rd Respondent relying on the Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR where it was held that that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petition and also the case of International Centre for Policy and Conflict and 5 Others v The Hon. Attorney-General & 4 others [2013] eKLR where the same holding was upheld.

137. I agree that one of the ways in which a Constitutional Court may decline to exercise jurisdiction is when it is clear that there are other statutory or administratively defined ways of redressing a dispute but a party has blatantly skipped or ignored them and instituted court action. This is not permitted under the doctrine of exhaustion of remedies and the Court will decline to adjudicate a dispute where the statute or a regulatory regime has provided alternative means of resolving unless the primary method resolution is shown to have been utilized first. Courts have been firm in asserting this position.

138. The Court of Appeal in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (2015)eKLR reiterating this principle explained:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

139. There may however be exceptions to the doctrine as was observed in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR where a five-judge bench opined as follows:

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

140. The Court went on to outline the exceptions to the rule as follows:

> " 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
>
> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

141. Equally, the Court of Appeal in Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR stated as follows:

> " 22. For this proposition the appellant called in aid this Court's finding in the case of Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 where the Court expressed itself in relevant part as follows:-
>
> > "...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."
>
> 23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of

discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

142. In like manner, the Court in Krystaline Salt Limited vs Kenya Revenue Authority (2019)eKLR reasoned as follows:

> " What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.
>
> ...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy."

143. The question therefore becomes, did the Petitioner defy the doctrine of exhaustion of remedies in bringing the instant Petition before this Court?

144. Section 11 of the *Standards Act* Cap. 496 provides:

> Section 11-Appeals
>
> Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal.

145. The trigger of this dispute was certainly a dispute about compliance with standards but it quickly transmogrified into a series of separate facts that brought different government with discharging different roles with distinct legal mandates that taking into account the totality of the factual matrix that constitutes this dispute, it is not legally conceivable that this matter can be resolved by the Standards Tribunal in view of its scope and different players that are apparently at loggerheads amongst themselves. It is my finding that the doctrine of exhaustion of remedies does not apply hence this contention by the 3rd Respondent must flop.

Whether the Petitioner's rights under Articles 40(3), 46(1)(c 10 and 47 of *the Constitution* were violated by the Respondents

146. A Constitutional Petition should satisfy the threshold set out in Anarita Karimi Njeru v R 1979 (eKLR) which received approval of the the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR as follows:

> " (349) .... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have

been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."

147. I have examined the instant Petition. I have no doubt that it has been pleaded with reasonable degree of precision. It identifies the Articles of *the Constitution* that are alleged to have been violated, namely; Articles 40 (3); 46 (1) (a) and 47 of *the Constitution* and also gives a descriptive account of how the violation of the said articles was carried out.

148. The remaining task therefore is to find out if the Petitioner has proved the alleged violations as guided by the Supreme Court in Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) where it was held thus:

> "(49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> (50) This Court in Raila Odinga & Others *v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:
>
> > "...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

149. Likewise, in Evans Otieno Nyakwana vs Cleophas Bwana Ongaro (2015)eKLR it was held that:

> "15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...
>
> 16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
>
> 17. The Court of Appeal in Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013]eKLR considered the applicability of these provisions as follows;
>
> > We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these

forms belong to the Respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

150. Similarly, in Edward Akong'o Oyugi & 2 others v Attorney General (2019)eKLR it was observed that:

> "73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[38] :-
>
> > "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"
>
> 74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

151. The question thus becomes, has the Petitioner proved violation of the alleged fundamental freedoms and rights by any or all the Respondents and/or the interested parties?

152. To begin, important to set out the rights and fundamental freedoms that the Petitioner alleges were violated.

153. The Petitioner principally alleges violation of Articles 40 (3), 46 (1) and 47 of *the Constitution*.

> Article 40 -`Protection of Property
>
> .....
>
> .....
>
> (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
>
> (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

i. requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

154. Article 46. Consumer rights

1. Consumers have the right—

(c) to protection of their health, safety, and economic interest.

Article 47. Fair administrative action

(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

155. Article 47 has further been reinforced by enactment of the Fair Administrative Actions Act whose preamble states that it was enacted to give effect to Article 47.

156. From the affidavit evidence of the Parties herein, it is not in dispute that the Petitioner, in the year 2018 imported 3 commodities into the country after meeting the pre-inspection requirements and being issued with certificates of conformity by the agent of the 3rd Respondent in the Countries of origin. The three products that comprised the raw materials wereNPK-12:2:44 Water soluble fertilizer-100 metric tons which arrived on 28/8/2028; Green Miracle- Foliar Fertiliser-20x250kg drums which arrived on 23/9/18 and Karisma Organic fertilizer- 44 metric tons which arrived on 26/9/18 of which the respective duties were duly paid.

157. Nevertheless, upon arrival of the three consignments, the 3rd Respondent decided to conduct a test on two of these products- NPK Water Soluble Fertilizer and the Karisma Organic Fertilizer.

159. The Green Miracle Foliar Fertilizer was rejected for the specific reason that it was found afixed with standardization marks of quality “the S Mark’ on an imported product that was not licenced to use the standard mark since in any case, such a licence could not have been issued to manufacturer based in India. This was contrary Section 10 (8) as read with Section 10 (3), (6) and (7) of the *Standards Act*. The Petitioner concedes that was indeed true and that the labelling had been done by mistake. Its appeal to the 3rd Respondent to rescind this decision was declined. I would thus not consider the issue of Green Miracle Foliar Fertilizer any further in view of the admission that the use of the Standard ‘S mark’ on the Green Miracle Fertilizer was in fact contrary to the law that was pointed out by the 3rd

Respondent at the time of issuance of the seizure order. The relevant provisions of Section 10 of the *Standards Act* states:

10. Standardization marks

(1) The Council shall, by notice in the Gazette, specify a separate mark, to be known as a standardization mark, for each of the following purposes—

a. application to any commodity which is the subject of an order under Section 9(2); and

(b) application to a commodity which is not the subject of an order under Section 9(2) but concerning the manufacture or sale of which the Council has approved as specification.

(2) .....

(3) Where, after the publication of an order under section 9(2), any person intends to manufacture any commodity to which that order refers after the date specified therein he shall notify the Bureau in the prescribed form of his intention and the Bureau, if it is satisfied that he is capable of manufacturing the commodity in accordance with the relevant Kenya Standard, shall issue him with a permit to use the standardization mark referred to in paragraph (a) of subsection (1)

(4) .....

(5) .....

(6) No person shall apply a standardization mark specified under subsection (1) to any commodity except under a permit issued by the Bureau or a person acting under its authority and unless that commodity complies with the relevant Kenya Standard or approved specification.

(7) Any person who—(a)applies a standardization mark to any receptacle or covering of any commodity or to any label attached to any commodity or any receptacle or covering thereof; or(b)places or encloses any commodity in a receptacle or covering to which a standardization mark has been applied, or in a receptacle or covering to which is attached a label to which any such mark has been applied, shall, for the purposes of subsection (6), be deemed to have applied that standardization mark to that commodity.

(8) Any person who contravenes any of the provisions of subsection (3) or (6) or fails to comply with any condition in a permit, shall be guilty of an offence.

158. There was no evidence presented by the Petitioner to demonstrate that the manufacturer of the Green Miracle Foliar had been licenced or was permitted as per above requirements to allow the affixing of "the S mark' on the Green Miracle Foliar product. The 3rd Respondent cannot thus be faulted for implementing the provision of the law which in fact constituted an offence under the Section 10 (8) of the *Standards Act*.

159. I will turn to the other two products, NPK water soluble fertilizer and Karisma Organic Fertilizer. The initial test that the 3rd Respondent carried out on the NPK water soluble fertilizer was delivered on 1/11/2018, after 58 days. That was already past the 21-day period that petitioner's goods could be allowed in the customs warehouse without attracting warehouse rent.

160. The Petitioner through a letter of 6/11/2018 protested the initial results and sought reinspection and resampling which cost Kshs. 59823/-. The retest once more took much more time. It was not until 21/12/2018, almost 51 days later that retest results for the NPK Water Soluble Fertilizer came out.

161. The initial result for Karisma organic fertilizer came out around 6/11/2018 showing non-compliant result. The Petitioner did not accept the results and applied for retest. The retest results for Karisma Organic Fertilizer came out long after that; 11/1/2019. All the initial results and retest were markedly beyond the 21 days that goods were to start attracting warehouse rent.

162. That aside, the 3rd respondent confirmed it had applied the wrong standards in carrying out the initial tests and had thus made the wrong findings that cost it to erroneously declare the two products NPK Water Soluble Fertilizer and Karisma Organic Fertilizer non-compliant while they had actually met standard specifications.

163. As a result, the 3rd respondent reversed its initial results and substituted them with the compliant result in respect of the two products. It wrote the requisite release letters for the products for the NPK water soluble fertilizer via the letter dated 21/12/2018 and for Karisma Organic fertilizer, the letter dated 11/1/2019. That release never came to be as evidence further demonstrates. I will get to that shortly, but first let me now deal with how the 3rd Respondent dealt with the matter and consider whether in so doing, it violated the petitioner's rights.

164. The question is, did the conduct of the 3rd Respondent amount to violation of the any of the Petitioner's rights as pleaded given the above facts?

165. The 3rd respondent insisted that it should not be blamed for undertaking its responsibilities under the *Standards Act* of testing or even retesting the products. That there is no time limit that is provided for carrying out the tests and that it acted on the appeal made by the Petitioner seeking retesting hence complied with Article 10 and 47 of *the Constitution* by according it fair administrative action. Further that Section 17 of the *Standards Act* protects it against claims arising from decisions made in relation to compliance.

166. I will begin with Section 17 of the *Standards Act*. It states:

> Section 17- Protection of Government, Bureau, Council and members and employees
>
> The fact that any commodity complies or is alleged to comply with a Kenya Standard or approved specification or has been or is alleged to have been manufactured in accordance with any such specification, or that a standardisation mark is used in connection with any commodity, shall not give rise to any claim against the Government, the Council, or the Bureau, or any member or employee thereof.

167. To this extent, I agree that that a decision made on whether or not a product meets the standard may not found a cause of action against the 3rd Respondent. However, it would appear to me, the 3rd Respondent has misapprehended the nature of this Petition. The Petition does no question or impugn the decision of the 3rd Respondent on the product itself but it is the conduct of the 3rd Respondent in dealing with the matter under consideration that is in issue, and hence application of Article 47 of *the Constitution*.

168. As already observed, *the Constitution* under Article 47 (1) provides that the "Every Person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

169. Did the 3rd Respondent's actions towards the Petitioner in relation to the two products meet the above Constitutional threshold?

170. Firstly, I do not think that the fact that the law does not give a specific timeline for concluding and delivering the tests means that the 3rd respondent has the freedom to take as long as it desires. In discharging that responsibility, it must take into account the implications of time on those affected by its decisions especially where, as in the instant case, delay attracts direct daily costs in payment of warehouse rent and further eats into prospective profits of the entrepreneur. *The Constitution* in Article 47 uses the word 'expeditious' when it comes to making administrative decisions. I would find that in a matter such as this one time was of great essence. The reasonableness of a decision depends on the circumstances of each case and involves critical examination of a range of factors relevant to that decision including examining whether in taking the actions subject of the inquiry, the interests of those involved were considered, the impact of the decision on those affected and the reasons given for the decision. It is unreasonable in my view for the 3rd Respondent to casually take refuge in the fact that the law did not prescribe the time limit for carrying out the tests to justify an obvious injustice particularly in an instance such as this where it is clear that it is the 3rd respondent recklessness that cost it and had nothing to do with the petitioner's fault.

171. While the 3rd Respondent is by law entitled to make the tests; it should be remembered that statutory powers can only be exercised validly if they are exercised reasonably. It was unreasonable to fail to take into account the relevant factor that after 21 days, the Petitioner was bound to incur costs for no reason of its own, hence in my view taking 58 days to conduct the initial test was itself malicious. It was equally a demonstration of bad faith to take further longer periods to conduct the re-inspection and re-sampling without regard to the tribulations of the Petitioner. The 3rd Respondent must be deemed to be aware of the laws governing its area of operation and cannot thus ignore the implication of Section 34 of the East African Community Customs Management Act which provides thus:

> Section 34
>
> Entry, Examination and Delivery Entry of cargo.
>
> 34.
>
> (1) Save as otherwise provided in the Customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded shall be entered by the owner within twenty-one days after the commencement of discharge or in the case of vehicles on arrival or such further period as may be allowed by the proper officer, either for—
>
> (a) Home consumption;
>
> (b) warehousing;
>
> (c) transhipment;
>
> (d) transit; or
>
> (e) export processing zones.
>
> (2) Where any entry is delivered to the proper officer, the owner shall furnish with the entry full particulars supported by documentary evidence of the goods referred to in the entry fore the arrival of such aircraft or vessel or vehicle

(3) Entries for goods to be unloaded may be delivered to the proper officer for checking before the arrival at the port of discharge of the aircraft or vessel in which such goods are imported; and in such case the Commissioner may in his or her discretion permit any goods to be entered before the arrival of such aircraft or vessel or vehicle.

(4) Where any goods remain unentered within the period specified under subsection (1) then such goods shall, if the proper officer so requires, be removed by, or at the expense of, the agent of the aircraft or vessel in which such goods were imported to a Customs warehouse.

(5) Where entered goods are not removed from the port of discharge after the expiry of the twenty-one days prescribed under subsection (1), the goods shall be deemed to be in a customs warehouse.

172. The conduct of the 3rd Respondent was outrageous and a gross violation of Article 47 (1) of *the Constitution*. It displayed inconsiderate and irresponsible attitude towards the Petitioner. Its actions fall short being expeditious, efficient, reasonable and procedurally fair as demanded by Article 47 of *the Constitution*. I find that by its conduct, it violated the Petitioner's right to fair administrative action.

173. Turning to the 2nd Respondent, despite denial by the 2nd respondent that it did not in any way interfere with the petitioner's goods, there was ample incriminating evidence against the 2nd Respondent of having a hand in blocking the release of the products to the Petitioner as soon after the 3rd Respondent had okayed it. It is not true as claimed in the replying affidavit of the 2nd Respondent that the first time the 2nd Respondent dealt with this matter was on 5/8/19 after it received a letter from the Ministry of Interior asking it to open an inquiry in the matter. Why do I say so?

174. From the Petitioner's own affidavit evidence, as soon as it received the retest results confirming that the two products were compliant, it informed the 2nd Respondent on 15th January, 2019 but the 2nd respondent objected to the release. This is corroborated by the 3rd Respondent which stated in the affidavit sworn on its behalf that after the 3rd Respondent had authorized the release of the Petitioner's two consignment of NPK Fertilizer and Karisma Organic Fertilizer on 21/12/2018 and 11/1/2019 respectively. It is the 2nd Respondent that blocked the release. In paragraph 4 of the affidavit of Birgen Ronoh sworn on 27/10/2022, he stated:

> "That I am aware that upon Kebs communicating release of the two consignments after being found compliant on retest, DCI immediately stepped in to investigate the matter and proceeded to direct that the consignments continue to be held pending investigations. DCI did in fact summon our officers at ICDN to record statements on the matter to aid investigations. Kebs was not only required to explain its actions in the matter to DCI but also Ministry officials (Exhibit 8 attached on pages 8-26 of annexure are relevant correspondence and statements)"

175. Further, even the 2nd Respondent's act of writing the email of 20th February, 2020 stating that it was no longer objecting to the release of the consignment is confirmative of the fact it had blocked the release hence cannot be heard to say that it did not in any way interfere with the release.

176. I do not think that there is anything wrong in undertaking investigations. Even without citing the specific provisions of *the Constitution* and the *National Police Service Act*, I would not think that this is in contention. The National Police Service is mandated to carry out investigations under *the Constitution* and the *National Police Service Act* but this Court has power to intervene if it can be demonstrated that the investigative authority has been applied capriciously. What is in issue here is the conduct of the 2nd Respondent in carrying out the said investigation. Did it conform to the dictates of *the Constitution* or was it an abuse of its investigative authority?

177. The jurisdiction of the High Court under Article 165 (3) (d) (ii) extends determining whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with or in contravention of, this Constitution. Further under Article 21(1) it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."

178. The roles and functions of the police vis-a-vis the review powers of the courts was elaborated by the Court of Appeal in Dande & 4 others v Inspector General, National Police Service & 2 others (Civil Appeal 246 of 2016) [2022] KECA 170 (KLR) (18 February 2022) (Judgment) in which it cited another Court of Appeal decision of Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited & 4 others [2013] eKLR where it was held as follows:

> "Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged. By the same token and in terms of Article 157 (11) of *the Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090.It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v. R.[2002] 1 EA 205. See also Kuria & 3 Others v Attorney General [2002] 2KLR."

179. Turning to the facts of this case, the 3rd Respondent authorized the release of the Petitioner's products on 21/12/2018 and 11/1/2019 respectively. Evidence on record has already demonstrated that the 2nd Respondent blocked the release to facilitate investigations as early as 15th January, 2019. However, from

the 2nd Respondents' own affidavit, the investigation commenced on 5th August 2019 after it received a letter from the Ministry of Interior and Coordination of National Government on 24/7/19. It is then it opened an inquiry file and wrote its first letter to the 3rd Respondent on 5/8/2019 seeking an explanation on the discrepancy in the initial and the 2nd test. The 3rd Respondent replied by its letter of 7/8/2019.

180. The 2nd Respondent does not explain why there was a lull in carrying out investigations from 15/1/2019 yet it is clear from the evidence that it blocked the release of the Petitioners commodities as early as 15/1/2019. Why did the 2nd Respondent wait for the Ministry of Interior to jolt it into action by its letter of 24/7/2019 to open an inquiry yet it had stopped the release of the petitioner's goods six months earlier allegedly to facilitate the conduct of investigations?

181. Further, even after commencing the investigations after the Ministry's intervention, it was not until 20/2/2020 that the 2nd Respondent wrote a letter indicating that it no longer objected to the release of the two products. In my view, the action of stopping the release of the goods in the guise of carrying investigations which was never done until six months later and only after intervention by the Ministry was capricious exercise of authority by the 2nd Respondent done with utter disregard of the right to reasonable and procedurally fair decision by a public authority. It is also worth noting that the 2nd Respondent in its response did not even provide any justification for the prolonged inaction after blocking the release of the petitioner's goods on 15th January, 2019 and the further delay in finalizing the investigations after being prompted to open an inquiry into the matter by the Ministry of Interior via the letter of 24/7/19.

182. The implication of the 2nd Respondent's actions in relation to the Petitioner's goods had a disastrous ending. The transgression pushed the time so much to the extent that the goods expired and were no longer useful to the Petitioner. Through a report dated 8/7/22 that was compiled pursuant to an order of this Court issued on 30/6/22; it was confirmed that all the three products had expired.

183. Consequently, despite spending enormous resources and ensuring that the Petitioner had imported goods that met Kenyan standards for its business, the Petitioner had to suffer the injustice of losing the entire consignment through no fault of its own but due government agencies whose actions fell below the standards expected of them by *the Constitution* in discharge of their legal mandates.

184. In the end, not only did they violate the Petitioner's right to fair administrative action but their joint transgressions caused the Petitioner to lose those goods by effluxion of time as the combined consequence of their actions was that the goods expired and were no longer useful to the Petitioner. I consider their actions as amount to arbitrary deprivation of the property in question in violation of Article 40 (3) of *the Constitution* and hold them jointly liable for the loss.

185. I do not find any implicating evidence against the 3rd Interested Party, 2nd Interested Party or indeed any other Party for the violations meted against the Petitioner.

Whether the Petitioner is entitled to the reliefs sought

186. In determining the extent and nature of reliefs, I am guided by the judicial decisions that elaborate on what the Court should consider in granting reliefs in Constitutional litigation.

187. In Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others (SC Petition No.13 (E015) of 2022) the Supreme Court guided as follows:

> " (91) By the provisions of Articles 22 and 23 of *the Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of

infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 grant appropriate relief, including:

"(a) a declaration of rights

(b) an injunction

(c) a conservatory order

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.

(e) an order for compensation

(f) an order of judicial review."

(92) This Court in the case of Gitobu Imanyara & 2 Others v. Attorney General, SC Petition No. 15 of 2017, described Article 23 as "the launching pad of any analysis on remedies for Constitutional violations". This statement has repeatedly been made in other decisions like Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae), SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously."

188. The Superior Court then concluded:

"(94) To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

(95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing

in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims...."

189. The Court of Appeal in Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others [2021] KECA 328 (KLR) further noted as follows:

> " 15. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:.
>
> > "When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
>
> An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches."
>
> 16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss."

190. On punitive damages, the Court of Appeal in Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR guided as follows:

> " 32. The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes V Barnard [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:
>
> i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
>
> ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
>
> iii) where exemplary damages are expressly authorized by statute.
>
> Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages."

191. Similarly in Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa[2004] eKLR the Court observed as follows:

> " Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. This category is not confined to acts of government servants only but includes those of other bodies exercising functions of a governmental character. The case of Rookes supra related to the acts of a trade union. The reason why exemplary damages are awarded mainly against the government or bodies exercising functions of a governmental character is because the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service."

192. Having regard to the foregoing, the Court considers the following reliefs as commending themselves for award in this Petition are as follows:

1. A declaration is hereby issued that decisions and actions of the 2nd Respondent (the Directorate of Criminal Investigations) and the 3rd Respondent (Kenya Bureau of Standards) failure to authorize the timely clearance and release of petitioner's products namely NPK Water Soluble Fertilizer, and Karisma Organic Fertilizer were unlawful, capricious and in breach of Article 47 (1) and 40 (3) of *the Constitution*.

2. A declaration is hereby issued that it is unreasonable and therefore unlawful to detain, (without any fault on the part of an importer of goods), an importer's goods for period exceeding 21 days from the date of storage in bonded warehouse thereby unjustly exposing the importer to warehouse rent, taxes and other attendant costs and losses on account of delays in carrying out testing of the products or pending other processes by government agencies.

3. An order of prohibition is hereby issued stopping the Interested Parties from demanding any outstanding storage charges, ware house rent or taxes from the Petitioner in respect of the two products namely NPK Water Soluble Fertilizer and Karisma Organic Fertilizer.

4. Instead, an order of mandamus is issued directing the 2nd and 3rd Respondents to pay all outstanding warehouse rent and taxes due to the 1st to 3rd Interested Parties on account of the two products namely, NPK Water Soluble Fertilizer and Karisma Organic Fertilizer.

5. In view of the fact that retesting was done on 8/7/22 pursuant to the order of the Court of 30/6/2022 which confirmed the under listed products had expired namely:

   (i) NPK-12:2:44 Water Soluble Fertilizer-100 metric tons

   (ii) Green Miracle- Foliar Fertiliser-20x250kg drums

   (iii) Karisma Organic fertilizer- 44 metric tons;The 3rd Interested party shall destroy NPK Water Soluble Fertilizer and Karisma Organic Fertilizer at the cost of the 2nd and 3rd Respondent and release all the containers to the custody of the Petitioner.As for the Green Miracle Fertilizer the cost of destruction shall be borne by the petitioner.

6. Compensation for the amount incurred on the two products as particularized in paragraph 31 and 54 of the Petitioner's affidavit in respect of NPK Water Soluble Fertilizer and Karisma Organic Fertilizer as follows:

No.	Costs Incurred & Paid	Kshs.	USD
1.	NPK Fertilizer Import costs, customs, shipping line, demurrage container sale, customer warehouse rent.	593,639	119,036.20
2.	Karisma Organic fertilizer Import costs, customs, shipping line, demurrage container sale, customer warehouse rents, shipping costs.	402,865.36	33,548.20

7. Costs of this Petition.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.

.....

L N MUGAMBI

JUDGE