



**Osho Chemicals Industries Limited v Attorney General & 2 others; Mitchell  
Cotts (K) Limited & 3 others (Interested Parties) (Petition E202 of 2022)  
[2023] KEHC 2204 (KLR) (Constitutional and Human Rights) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2204 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E202 OF 2022**

**M THANDE, J**

**MARCH 3, 2023**

**BETWEEN**

**OSHO CHEMICALS INDUSTRIES LIMITED ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**KENYA BUREAU OF STANDARDS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MITCHELL COTT'S (K) LIMITED ..... INTERESTED PARTY**

**KENYA PORTS AUTHORITY ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**KENYA ASSOCIATION OF MANUFACTURERS ..... INTERESTED PARTY**

**RULING**

1. Before this Court are 2 Applications for this Court's consideration. The first Application is dated 10.05.22 in which the Petitioner seeks the following orders:
  1. Spent
  2. Pending the hearing and determination of the application the respondents and the 1<sup>st</sup> to 3<sup>rd</sup> interested parties, their agents or servants be restrained from selling the petitioner's goods:
    - i. NPK-12:2:44 Water soluble fertilizer-100 metric tons;



- ii. Green Miracle- Foliar Fertiliser- 20×250kg drums; and
  - iii. Karisma Organic fertilizer-44 metric tons.
3. A mandatory injunction directing the 3<sup>rd</sup> respondent to retest the NPK fertilizer, Green Miracle- Foliar Fertilizer 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 orders.
  4. The 3<sup>rd</sup> respondent do allow the petitioner's appointed expert Professor Amir Okeyo Yusuf to carry out independent tests from the same samples to be jointly collected and to submit a report of the laboratory tests under oath within 14 days of the court order.
  5. The respondents and interested parties do unconditionally and without demanding any payment from the petitioner of any costs, warehouse rent or charges whatsoever do forthwith release the following:
    - i. NPK-12:2:44 Water Soluble fertilizer-100 metric tonnes
    - ii. Green Miracle- Foliar Fertiliser-20×250kg drums
    - iii. Karisma Organic fertilizer -44 metric tons to the petitioner within 7 days of the order of the court upon examining both laboratory tests by the 3<sup>rd</sup> respondent and the petitioner's expert in the event all or any of the products are fit for use.
  6. In the event the report by the 3<sup>rd</sup> respondent shows that the products have expired the 3<sup>rd</sup> respondent to be ordered forthwith destroy the affected products at its own costs and release all the containers to the custody of the petitioner.
  7. The court be at liberty to make any further orders in the interest of justice.
  8. Costs be in the cause
2. The Petitioner claims that it is the leading agrochemical manufacturing company in Kenya with 25 under its belt. At the heart of the dispute herein are 3 fertilizers which were imported into the Country by the Petitioners. The Petitioner averred that the first fertilizer N-P-K 12-2-44 (NPK) was imported into the country on or about 28.8.18. The second fertilizer, Green Miracle was imported on or around 23.9.18 while the third fertilizer Karisma Organic was imported on or around 26.9.18. The Petitioner contended that the 3<sup>rd</sup> Respondent (KEBS) has on 3 occasions committed fatal mistakes in the testing of the 3 products leading to their unlawful detention. The Petitioner further asserted that the DCI has blamed KEBS for erroneous testing and unlawful detention of the Petitioner's goods. It is the Petitioner's contention that KEBS cannot therefore be trusted to issue an independent and unbiased report in the absence of independent testing by the Petitioner's expert. The Petitioner has further accused the Respondents and the Interested Parties of unlawfully detaining its goods without lawful justification and continue to expose the Petitioner to storage charges and taxes in excess of Kshs 50 million. Further that there was no justification for the detention of the goods despite scientific findings that proved that the goods should never have been detained. Because of the length of the detention of the goods, the Petitioner urged that if the goods have expired then the same should be destroyed immediately to avoid the unlawful accrual of storage charges and taxes by the tax payers as the Petitioner is blameless.
  3. Pursuant to an order of this Court of June 14, 2022, independent laboratory tests on the 3 fertilizers were carried out by the Petitioner's and KEBS's experts. Following the retests, the Petitioner filed



the Application dated October 12, 2022, seeks in the in which it renewed its prayer for release of its goods forthwith, as sought in the Application dated May 10, 2022. The Petitioner further seeks that laboratory tests by Chemical & Industrial Consultancy Unit and KEBS be admitted and considered by the Court. It is the Petitioner's case that NPK fertiliser passed in all the valid parameters tested and is in still good condition for use. As for Green Miracle and Karisma Organic, the same passed all tested parameters save for the ph Value. The Petitioner urged that it be allowed access to its goods that have been unlawfully detained since 2018 and continue to incur storage costs. Also, the release of the goods will enable the Petitioner to use the products without delay and will serve to mitigate the damages that will be suffered by the Respondents responsible for the unlawful detention of the goods. The Petitioner further averred that the 1<sup>st</sup> Interested Party has raised concerns about the risk of the continued storage of the fertilizer in its premises, due to the explosive nature of fertilizers. The Petitioner urged that if the Court deems it necessary to order the destruction of the goods, then the Respondents be made liable for all losses suffered by the Petitioner. That, no prejudice will be suffered if the goods are released

4. The Applications are opposed by the Respondents. In a replying affidavit sworn on October 27, 2022 by Birgen Ronoh (Ronoh) an officer with KEBS, stated that sometime in 2018-2019, the Government constituted a multi-agency team constituting of, among others, KEBS, Directorate of Criminal Investigation (DCI) and Kenya Revenue Authority (KRA) with the intention of curbing entry of contraband goods at all entry points.
5. On Green Miracle Manure, he averred that the consignment constituted 20 barrels of 200 litres of green miracle imported from India by the Petitioner vide customs entry no 2018ICDXXXX in container no. MRSU0206786. The 3<sup>rd</sup> Respondent rejected the consignment on October 11, 2018 via seizure notification STA/45 form no SL No 1452 on the basis that the barrels bore standardization mark on their labels contrary to Section 10(6) of the *Standards Act*, as no valid standardization mark could have issued to the Indian manufacturer. He further stated that the Petitioner admitted to labelling the imported goods with a standardization mark thereby admitting to the commission of an offence under Section 10(8) of the *Standards Act*. The effect of the seizure notice which is normally addressed to KRA was that KRA could either seize or destroy the goods or facilitate their re-export pursuant to Legal Notice 66 of 1999. Having rejected the goods, KEBS was rendered *functus officio* on the matter.
6. Regarding NPK, he stated that the same was imported from China and arrived in the country on August 28, 2018 as per entry documents. A sample was drawn on September 3, 2018 and submitted to the laboratory for analysis against the requested parameters. The test report indicated failure in several parameters that fell below the stipulated minimum values. The reports were forwarded to the Petitioner vide a letter reference KEBS/QA/I/ICDE/IMP/2/9/VOL 2(13) dated November 1, 2018. The letter communicated the decision of rejecting the consignment and it was to be shipped back to its country of origin in 30 days from the date of letter. Upon appeal, KEBS agreed to conduct a resampling and retest. A fresh sample was drawn on December 5, 2018 and submitted on December 10, 2018. The deponent further averred that there was an error in the initial test and that it was decided that the parameters of manganese, magnesium and zinc which had been tested initially, be omitted in the retest. The laboratory generated test results KEBS/TES/INO/NAR/1/18 that showed compliance against the tested parameters and the same were forwarded to the Petitioner through letter reference KEBS/QAI/ICDE/IMP/8/2/39 dated December 21, 2018 communicating decision to release the consignment. The letter was copied to acting HOD Inspection, manager PVOC, HOD testing and chief manager ICDE, Customs and border control KRA.
7. On Karisma Organic Manure, he averred that the same was imported from India and arrived in the country on or about 26.9.18 as per the entry documents. Upon testing of a sample on 5.10.18, the test report KEBS/TES/FOO-NAR/F/18 indicated failure in parameters of pH and moisture content. The



decision rejecting the consignment and that it should be shipped back to country of origin within 30 days was communicated to the Petitioner and the letter was copied to acting HOD Inspection, manager PVOC, HOD testing and chief manager KRA, ICD. Upon retesting following the Petitioner's appeal, a system error was discovered in the digital laboratory information system setting an incorrect value of 6.5 on pH whereas the right standard would be 5.5 to 8.5. Consequently, a decision to resample and retest was reached and communicated to Petitioner vide KEBS/OP/10/1 VOL 108(23) dated 30.11.18. Upon retest on 14.12.18, the moisture content was found to be 15.9% which was within the required standard. Test results KEBS/TES/FOO-NAR/F/18 showed compliance in the parameters of pH and moisture. This was communicated to Petitioner vide reference KEBS/QAI/ICDE/IMP/8/2/(48) dated January 11, 2019 and the letter copied to acting HOD; Manager PVOC; HOD Testing; Chief Manager ICDE, Customs and Border Control, KRA and DCI-(ICDE) Police station. Upon the release letter of January 11, 2019, KEBS was rendered functus officio on the matter.

8. It is KEBS case that it would be unreasonable to expect its processes, or those carried out by any other body for that matter, to be completely devoid of error and it is for this reason that the law envisages the right of review and appeal. It was averred that the law protects KEBS from being held liable for any action carried out strictly in line with its statutory mandate. Further, Section 17 of the Standards Act protects KEBS from any claims arising over compliance of any commodity with standard specifications. Thus, would be against public policy to base a claim for damages against KEBS on account of a product being found compliant upon retest. Further that upon KEBS communicating release of the 2 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 to ministry officials.
9. Ronoh further deposed that following the Court order by the Hon. Justice Mrima on June 30, 2022, fresh samples on all the 3 consignments were taken for testing on July 8, 2022 whose results are now before Court indicating failure on the parameters tested on all consignments. Consequently, the Petitioner is in fact guilty of laches as he ought to have moved the Standards Tribunal or Court within reasonable period, way before the expiry of the consignments. He urged that the Petition and application be dismissed.
10. Tom Oduor, an officer of KEBS swore a replying affidavit on November 14, 2022. He averred that KEBS is opposed to the prayer for release of the 3 consignments in question and maintains that the same have been duly tested jointly and in full view of the Petitioner's agents and found not fit for release to the Petitioner. He stated that Green Miracle failed in pH where it tested 9.3 against set requirement of 5-6. Further that the fertilizer had already expired and the same is not fit for release to the Petitioner and by extension to the Kenyan market. Similarly, NPK and Karisma Organic fertilizers were already expired at the time of submission and that there was therefore no guarantee on its quality or safety for use in its current status. Accordingly, the fertilizers are not fit for release to the Petitioner and by extension, the Kenyan market.
11. Parties filed their written submissions which were highlighted by the parties' respective counsel.
12. I have carefully considered the pleadings and the submissions of the parties through their counsel. It is quite evident that there are conflicting reports on the tests done by the parties' respective experts. There are also conflicting reports on detention and release of the goods. On the one hand the Petitioner claims that the goods arrived in the country on diverse dates in 2018 and that KEBS detained and has failed to release the same to date. On the other hand, KEBS claims that its released NPK and Organic Karisma on December 21, 2018 and January 11, 2019 respectively. KEBS further contends that the goods have expired and cannot be released but that it cannot be blamed for the expiry of the goods. The



Petitioner's position is that NPK does not expire. On liability for the storage costs, the Petitioner holds KEBS liable for the same. KEBS seeks to absolve itself, its position being that the goods have not been in its custody but have been held by the 3rd Interested Party. There is also the issue of the seizure notice against Green Miracle on account of misapplication of a standard mark contrary to Section 10(6) of the Act which must be dealt with.

13. After considering all these factors, I have come to the conclusion that the interests of justice require that this matter be conclusively dealt with at the hearing of the Petition where all parties including the multiagency authorities and the experts will have an opportunity to advance their positions. In the premises I decline to grant any of the orders sought in the Applications dated May 10, 2022 and October 12, 2022 at this stage and direct that the pending prayers therein be urged within the Petition which shall be heard expeditiously.

**DATED AND DELIVERED IN NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH 2023**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... for the Petitioner  
..... for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent  
..... for the 3<sup>rd</sup> Respondent  
..... for the 1<sup>st</sup> Interested Party  
..... for the 2<sup>nd</sup> Interested Party  
..... for the 3<sup>rd</sup> Interested Party  
..... for the 4<sup>th</sup> Interested Party  
.....Court Assistant

