REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

JUDICIAL REVIEW APPLICATION NO 11 OF 2016

IN THE MATTER OF: AN APPLICATION BY JUANCO TRADING COMPANY LIMITED (NOW PREMIASOS LTD) FOR ORDERS IN THE NATURE OF MANDAMUS AND CERTIORARI

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ENERGY REGULATORY COMMISSION.....1ST RESPONDENT

KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER KAJIADO COUNTY.....4TH RESPONDENT

AND

JUANCO TRADING COMPANY LIMITED (NOW PREMIASOS LTD)...EX-PARTE APPLICANT

JUDGEMENT

Introduction

1. By an amended application dated 27th July 2016 filed at the Judicial Review division of the High Court at Nairobi, the Ex- parte Applicant sought leave to file a judicial review application. Leave was granted by this court on the 27th of July 2016 and by an amended application for review dated 16th August 2016 and subsequently filed on the 18th August 2016, the Applicant sought for orders that:

a. An order of Mandamus directing the 3rd Respondent to remove the seized fuel from the Applicant's rented premises and allow the Applicant access and use of the premises.

b. An order of Mandamus directed at the 1st, 2nd and 3rd Respondents directing them to grant the Applicant a fair hearing

c. An order of Certiorari quashing the Laboratory Analysis Report dated 13th August 2015 declaring the fuel as adulterated together with the 3rd Respondent's seizure notice dated 17th June 2015.

d. An order of Certiorari quashing the 1st Respondent's directive contained in their letter dated 17th June 2015 addressed to the 4th Respondent cancelling the Applicant's license and directing the closure of the Applicant's business premises

e. Costs be provided

2. The application was buttressed by the grounds set out therein and in the affidavit sworn by Junghae Wainaina on 15th and filed on 18th August 2016.

3. In response to the Ex Parte Applicant's application, on 21st September 2016 the 1st Respondent filed an affidavit sworn by its Technical Officer, Ezra Kimutai Terer Milgo on 20th Septemeber 2016.

4. On 11th May 2017, the 2nd Respondent filed a response to the application through its Assistant Manager in the Quality Assurance and Inspectorate Division, Anthony Kathiri who swore an affidavit dated 8th May 2017.

5. The 3rd Respondent on its part responded by an affidavit sworn by Mutahi Wambui on 20th September 2016 and filed in court on the 21st September 2016.

6. Subsequently, a rejoinder dated 26th October 2016 was filed by Junghae Wainaina, the CEO of the Ex Parte Applicant on 27th October 2016.

7. Thereafter, the Ex-parte Applicant filed its submissions dated 22nd October 2018 on 23rd October 2018. Further submissions dated 11th December were filed on 17th December 2018.

8. The 1st Respondent filed its submissions dated 18th January on the 24th January 2019. This was followed by the 3rd Respondent which filed its submissions dated 24th January on 28th January 2019. Finally, the 2nd Respondent filed its submissions dated 21st February 2019 on even date. Throughout the length of the instant proceedings, the 4th Respondent did not participate.

The Ex-parte Applicant's Case

9. The Ex-parte Applicant averred that it had been carrying on the business of petroleum retailing at Juanco Service Station and was duly licensed by the Kajiado County Government. That in the afternoon of 17th June 2015, the 1st Respondent through its agent SGS Kenya Limited under the direction of one John Onunga visited the Applicant's service station at Juanco Centre and collected samples of the Applicant's fuel for testing to check whether it was adulterated. That the 1st Respondent collected samples of the Applicant's fuel amidst protest from the staff to be allowed to check and inspect the container used to collect and store the samples. The Applicant's representative was not given a chance to inspect the container but was only forced to sign against the sample to confirm that a sample had been collected from the Applicant's fuel.

10. It was further averred that the 1st Respondent by a letter dated 17th June 2015 wrote to the Applicant claiming that samples of the fuel collected from its Juanco service station contained domestic kerosene and directed the County Commissioner to cancel the Applicant's Petroleum Retailing license without giving the applicant the opportunity to defend itself. Consequently, on the same day, the Applicant's fuel was seized by the 3rd Respondent and a notice of seizure was issued to the Applicant requiring it to give its objections to the 3rd Respondent within 1 month failure to which the commissioner would dispose of the fuel in whatever manner. The 1st Respondent closed the station and ordered the seizure of the fuel and the withdrawal of the applicant's trading license long before the fuel was analysed by the 2nd Respondent and without granting the applicant fair hearing.

11. The Applicant then averred that by a letter dated 24th June 2015 it wrote to the 1st Respondent objecting to the alleged adulteration and requested the 1st Respondent to take fresh samples and carry out a retest to the exclusion of one Mr. Onunga.

12. According to the Applicant, there was bias on the part of the 1st Respondent's agent under the direction of John Onunga who was not in good terms with the Applicant and who had vowed to have the Applicant's service station closed following an earlier incident where he carried out a test and alleged that the Applicant's products contained adulterated petroleum products, an allegation which was proved to be false.

13. Adducing the relevant correspondences, the Applicant contended that it had written to the Respondents' severally explaining its predicament and its first experience with the Representative from the 1st Respondent's agent that culminated into several law suits and also regarding the interpretation of the results of analysis by the 2nd Respondent.

14. It was averred that 7 out of the 8 parameters tested by the 2nd Respondent on the sample of fuel collected from the Applicant's station were found to be within specification which raises reasonable doubt about the alleged adulteration of the fuel. In addition, that despite the Applicant writing to the 3rd Respondent and explaining its findings, the 3rd Respondent had unfairly failed to consider these anomalies and make a finding in favour of the applicant. Instead, the 3rd Respondent had unlawfully and without mitigating the Applicant's loss converted the Applicant's leased premises into a customs warehouse since 17th June 2015. That the Applicant had continued and was still incurring rent liability to the landlord for the past thirteen months hence incurring tremendous financial loss.

15. The contention was made that as per the law, if the Commissioner of the 3rd Respondent failed to institute proceedings against the Applicant for more than 2 months, the seized fuel or item ought to have been released to the owner who is the Applicant herein. It was argued that more than thirteen months had lapsed since the fuel was seized and the station shut down but there seemed to be no end to the issues as the 3rd Respondent was lethargic in following the clear laid down procedure under the Act.

16. It was the Applicant's case that the 3rd Respondent had failed to follow the laid down procedure under the statute. The 1st and 3rd

Respondents continued to frustrate the Applicant's business by shutting it down. All the while, it was averred that the Respondents' had failed to accord the Applicant fair administrative action. As such, it was contended that it was proper that the 3rd Respondent vacate the Applicant's leased premises and the fuel seized therein be released to the Applicant as otherwise the Applicant continued to suffer tremendous financial loss and loss of reputation to the general Public from the actions of the 1st and 3rd Respondents. On this basis, it was averred that it was only fair that the application be granted.

The 1st Respondent's Case

17. The case according to the 1st Respondent was that on 17th June , 2015 a team comprising of Kenya Revenue Authority, Kenya Bureau of Standards and SGS (Kenya) visited Juanco Service Station and as was normal procedure, samples were taken and the test results indicated the presence of kerosene adulteration in 18,600 litres of super petrol and 18,000 litres diesel. That in line with Section 6(a)of the Energy Act 2006, the 1st Respondent wrote to the Commissioner of Customs and the Kajiado Deputy County Commissioner on the same date requesting them to impose penalties on the station operator and to suspend the operating license of the station and the said letter was copied to the operator of Juanco Service Station one Mr. Junghae Wainaina.

18. It was averred that consequent to the test results, Mr. Wainaina wrote to the 1st Respondent 24th June 2015 claiming that the testing of petroleum carried out at his station on 17th June 2015 lacked objectivity and he went on to explain that one of the individuals in the testing team, a Mr. John Onunga was out to settle scores from an earlier incident that happened in the year 2000. However, according to the 1st Respondent, in the year 2000, the Energy Act 2006 was not in place and the responsibility for adulterated products was not well defined as it was today under Section 95 of the Energy Act.

19. Further, it was averred that the Applicant sought a test conducted by an independent laboratory whereupon the 1st Respondent on 3rd July 2015 responded with a no objection verdict to the retest exercise provided that the retention samples were used. It was further averred that on 8th July 2015, the Applicant through its advocates wrote to the 3rd Respondent denying that the seized products were adulterated. It was averred that by letter dated 20th July 2015, the Applicants responded to the 1st Respondent claiming that the samples collected and used in the test process on the 17th June 2015 had been doctored and that the test parties had been influenced by one Mr. Onunga. The Aplicant further requested for fresh sampling and retest by an independent laboratory on the 21st July 2015 at 11.00am.

20. According to the 1st Respondent, by letter dated 21st July 2015, it rejected the mode of sample collection and testing proposed by the Applicant due the unique nature of the test carried out by SGS (Kenya) Limited on 17th June 2015. It also explained that retesting could not be done on a sample other than that collected on the date of the incident and which was sealed in the presence of the parties concerned. That subsequently in by its letter dated 23rd July 2015 the Applicant acknowledged that previous sampling had been done and the fuel was at all times found to be wholesome but further went ahead to request that new samples be drawn.

21. In response to the letter dated 23rd July 2015, the 1st Respondent averred that it wrote to the Applicant by letter dated 27th July 2015 reemphasizing its position that a retest was possible but on the samples collected on 17th June 2015 in order to maintain consistency and transparency. A further retest date was set for 30th July 2015 where the testing would be done in the presence of the 1st 2nd and 3rd Respondents in addition to a representative of the Applicant. According to the 1st Respondent, by letter dated 29th July 2015, the Applicant responded stating that it was not in a position to attend the retest exercise as it had been unable to reach its suppliers who it wished to attend the exercise. It was contended that what followed was that by letter dated 3rd August 2015, the Applicant wrote to the 1st Respondent requesting for the results of tests on the retention samples. On 13th August 2015, the 2nd Respondent released the results of the tests indicating that both products did not meet the Kenya Standards.

22. It was then averred that the procedure provided by law was that on receipt of the test results that adulteration had occurred the Energy Regulatory Commission proceeds to write to the Deputy County Commissioner of the affected area to suspend the retail licence for the station Thereafter, the Kenya Revenue Authority compounds penalties for the station operator and once payment has occurred, the operator is adviced to seek remediation advice from the Kenya Bureau of Standards.

23. The 1st Respondent averred that on 24th August 2015 the Applicant wrote to the Energy Regulatory Commission requesting for a withdrawal of instructions to the Kenya Revenue Authority to impose stiff penalties as a result of possession of adulterated petroleum or in the alternative have the subject products removed from the station. Further, on 24th September 2015, the Applicant wrote to the 1st Respondent requesting that the seizure orders be lifted.

24. It was averred that as was normal procedure, the 1st respondent on 1st October 2015 published in some of the local dailies a list of 38 petrol stations that had been found offering adulterated fuel for sale between May and August 2015.

25. By letter dated 7th October 2015, the 1st Respondent replied to the Applicant's letter rejecting the possibility of resampling due to the fact that the commission did not have control of the Applicant's station post 17th June 2015.

26. It was averred that on 7th October 2015, the Applicant through its advocates wrote to the Commissioner of Customs services and copied to the Energy Regulatory Commission noting that it had defaulted in payment of rent for a period of four months and that they had issued instructions to an auctioneer to levy distress on the Applicant but the auctioneers indicated that the only attachable goods was the fuel which was alleged to be the property of the commissioner for customs Services property as a result of its seizure.

27. The 1st Respondent averred that it could only lift the suspension of the operator's license once it had been confirmed that payment of fines had been done, remediation advice from Kenya Bureau of standards had been complied with and that the station operator had

undertaken in writing the measures to be put in place to avoid future occurrence.

28. It was further averred that despite the Repeal of the Customs and Excise Act CAP 472, Section 46(4) of the Excise Duty Act of 2015 provides that the provisions of that Act would remain in force for the purposes of the assessment and collection of any tax and the recovery of any penalty payable under that Act and outstanding at the date of Commencement of the new Act

29. Finally, it was averred that pursuant to the provisions of section 35 of the Repealed Customs and Excise Act CAP 472, the Commissioner for Customs and Border Control could deem a premise to be a customs warehouse for the purposes of enforcing the provisions of the Act.

30. The 1st Respondent prayed that the Application dated 9th November 2015 be dismissed with costs.

The 2nd Respondent's Case

31. The 2nd Respondent made the case that its role in the matters in question was to take samples and test them against Kenya Standards for Premium Motor Spirit (PMS) and Automotive Gas Oil (AGO). The samples presented were of Automotive Gas Oil (AGO) and Premium Motor Spirit (PMS). The standards are EAS 158:2012 East African Standard for Automotive gasoline (Premium Motor Spirit)-Specification and EAS 177: 2012 for Automotive Gas Oil (Automotive Diesel)-Specification. The samples were drawn from the Applicant's outlet by a joint inspection team comprising personnel from KEBS, KRA, ERC and SGS on 17th June 2015.

32. The 2nd Respondent further averred that as aforesaid the samples failed to meet specified standards as outlined in the attached relevant reports and that it had performed its functions strictly within the confines of its mandate.

The 3rd Respondent's Case

33. The 3rd Respondent averred that it was part of an inter-agency team set up to combat the sale of adulterated petroleum products that drew membership from the Kenya Revenue Authority, Kenya Bureau of Standards and Energy Regulatory Commission.

34. It was averred that on or about 17th June 2015, the members of the inter agency committee set out conduct random inspection of petroleum products sold in Nairobi with a view to enforce the provisions of the Standards Act, Energy Act and the Customs & Excise Act. The team visited Juanco Service Station, run by the Ex-parte Applicant, and in the presence of the Manager of Juanco Service Station, a sample of the petroleum products offered for sale to the public at the service station was drawn for analysis and testing. Three sets of samples were drawn for each product. The three samples were given to the Energy Regulatory Commission, Kenya Bureau of Standards and Juanco Service Station for safekeeping of the samples. The samples issued to the Energy Regulatory Commission were subjected to tests, in the presence of all parties, to establish if the petroleum products on sale were adulterated. SGS Kenya Limited was contracted by the Energy Regulatory Commission to carry out the tests on their behalf using specific test kits which would identify the presence of Domestic Kerosene or Export Product.

35. According to the 3rd Respondent, the results of the tests indicated that there was presence of domestic kerosene in the petroleum products that Juanco Service Station was selling to the consumers. Consequently, by a letter dated 17th June 2015 the Energy Regulatory Commission directed the 3rd Respondent herein to apply the provisions of the Customs and Excise Act against Juanco Service Station. Pursuant to these provisions, the 3rd Respondent issued a notice of seizure for the 36, 600 litres of petroleum products that were being offered for sale to the consumers.

36. In response by a letter dated 24th June 2015, Juanco Trading Co. Limited contested the tests results and sought to have the petroleum products tested by an independent party after fresh samples were drawn from the service station. By a letter dated 3rd July 2015, the Energy Regulatory Commission and 1st Respondent herein welcomed the request by Juanco Trading Co. Limited to retest the petroleum products on condition that the retest would be on the samples extracted on 17th June 2015 and not on fresh samples. Following this, by a letter dated 8th July 2015, Juanco Trading Co. Limited wrote to the 3rd Respondent, through their advocates Gathenji & Company Advocates, to claim the seized petroleum products. It was averred that the seized petroleum products could not be released to the Applicant because they were the subject of the retest requested by the Applicant to authenticate the earlier results.

37. The 3rd Respondent contended that by a letter dated 20th July 2015 the Applicant sought to have the retesting carried out on 21st July 2015 at the service station. By a letter dated 21st July 2015 the 1st Respondent notified the Applicant that the retesting could only be done on the samples drawn on 17th June 2015. The Applicant wrote a letter dated 23rd July 2015 to the inter-agency committee insisting on drawing of new samples for retesting on the grounds that the containers used to draw the first sample might have had a contaminant. Responding to this letter by a letter dated 27th July 2015, the 1st Respondent reiterated its position that the retesting would be conducted on the samples that were drawn on 17th June 2015 and invited Juanco Trading Company Limited to send a representative for the retesting to be conducted on 30th July 2015 at the Commission's premises. On 29th July 2015 the Applicant wrote to the inter-agency committee notifying them of its unavailability for the retesting because it was not in a position to procure the attendance of representatives from its petroleum suppliers.

38. It was further averred that as a result of the Applicant declining to send representatives for the retesting, the petroleum products were not retested. Since no independent test or a retest was carried out on the samples, by the members of the inter-agency committee or ex-parte Applicant, to rebut the findings of the laboratory analysis dated 13th August 2015, this Honourable Court had no basis to quash the findings of the laboratory analysis dated 13th August 2015 absent a contrary finding.

39. A case was made that the Respondents' had been ready and willing to carry out a retest on the samples drawn on 17th June 2015 from the

Ex-parte Applicant's premises, as these samples were a fair representation of the contents petroleum products being offered for sale to the general public by the Ex-parte Applicant as at 17th June 2015.

40. It was then averred that in cases where a person is found selling adulterated petroleum products their licence is suspended by the Energy Regulatory Commission. The person is required to appear before the Commissioner of Customs for compounding of the offence under section 194A of the Customs and Excise Act. Thereafter, a person is sent to the Kenya Bureau of Standards for directions on how to bring the petroleum products to the requisite standards. Then the person is sent to the Energy Regulatory Commission for lifting of the suspended license. In the alternative, an aggrieved person ought to file a suit at the Tax Appeals Tribunal or the High Court at the earliest opportunity. It was further averred that the Applicant was aware of the above process as was evidenced by its letter dated 24th August 2015.

41. The 3rd Respondent contended that pursuant to the provisions of sections 34 and 35 of the repealed Customs and Excise Act, Cap 472, the Respondents' may and can deem a premise to be a customs Warehouse for the purposes of enforcing the provisions of the Act. That pursuant to the provisions of section 46 of the Excise Duty Act, 2015 that the provisions of t e Customs and Excise Act remain in force for the purposes of assessment and collection of any tax and the recovery of any penalty payable under that Act and outstanding at the date of commencement of the Excise Duty Act, 2015.

42. It was then averred that the petroleum products warehoused at the Ex-parte Applicant's leased premises could not be moved, transferred, sold, auctioned or dealt with in any other manner without obtaining prior approval from the other members of the inter agency committee, that is; the Energy Regulatory Commission and the Kenya Bureau of Standards. Furthermore, the 3rd Respondent had not been able to drain and transfer the petroleum products from the Ex-parte Applicant's leased premises to a different warehouse owing to the hazardous and highly flammable nature of the petroleum products.

43. The 3rd Respondent expressed its willingness to release the seized petroleum products to Juanco Trading Company Limited provided that it complied with the requirements of the Customs and Excise Act, the requirements laid down by the Energy Regulatory Commission and the Kenya Bureau of Standards.

44. It was averred that the 3rd Respondent had continuously engaged the Ex-parte Applicant through meetings and correspondence, with a view to resolving the matter but the engagement had failed to resolve the matter. It was further averred that the deliberations between the Ex-parte Applicant and Respondents' on the remediation of the petroleum products to bring the products to the approved Kenyan standards had prolonged the matter.

45. It was contended that where anything has been seized by the 3rd Respondent, the 3rd Respondent can direct that the thing be released and restored to the person from whom it was seized upon the person meeting the conditions imposed by the 3rd Respondent. It was further averred that the Ex-parte Applicant had been requested to remediate the petroleum products to bring them within the approved petroleum products standards stipulated by the Kenya Bureau of Standards. That contrary to assertions by the Ex-parte Applicant, the 3rd Respondent had invited the Ex-parte Applicant to appear before the Commissioner to settle the matter but the Ex-parte Applicant had declined to appear before the Commissioner.

46. The 3rd Respondent made the contention that Ex-parte Applicant was most undeserving of the prayers sought for the following reasons: The Ex-parte Applicant had not approached the Court with clean hands insofar as its conduct towards bringing this dispute to an end can be termed as unconscionable; the Ex-parte Applicant had failed to disclose that there were two tests carried out on the samples drawn from its Petroleum Service Station and both tests disclosed that the petroleum products being offered for sale to the public were adulterated; the Ex-parte Applicant had failed to disclose that there has been extensive deliberations and correspondence on the matter that have served to delay the resolution of the dispute; and the Ex-parte Applicant had failed to disclose that there was another suit pending at the Environment and Land Court in Nairobi over the same subject property and the Applicant is an Interested Party but has failed to enter appearance.

47. A case was made that the Ex-parte Applicant had wilfully neglected and failed to exercise due diligence to mitigate its losses by failing to appear before the Commissioner, despite adequate notice, to settle the matter or to file a suit within the shortest time possible. That the Ex-parte Applicant by its acts of commission and omission had frustrated the Respondents' efforts to resolve the matter expeditiously, expeditiously, efficiently and within a reasonable time period.

48. It was averred that the Respondents' were mandated by the law to protect the general public from adulterated petroleum products and the Respondents' were merely enforcing their statutory mandate.

49. The 3rd Respondent asserted that the Ex-parte Applicant had not complied with the provisions of Order 53 Rule 2 thus the prayer to quash the laboratory analysis report dated 13th August 2015 could not issue.

50. The 3rd Respondent therefore sought that the Court dismiss the Application with costs to the Respondents'.

The Ex-parte Applicant's Rejoinder

51. In the Applicant's rejoinder, it denied that the samples taken on 17th June 2015 were done in the presence of the Ex-parte Applicant's manager as no name or description of the manager has been supplied by the 3rd Respondent. It was averred that the 1st Respondent's employee/agent one John Onunga arrived unaccompanied in the station, did some sampling and then summoned other people on the phone who later joined him and as such the Applicant was not present or represented to verify the veracity of the samples allegedly collected by the 2nd Respondent's agent.

52. According to the Applicant, the tests on the alleged samples were done on the 25th June 2015, a week after sampling and closing of the Ex-parte Applicant's station which was a demonstration of the malafides of the 1st and 3rd Respondents in closing the Applicant's station.

53. The Applicant further averred that the 1st and 3rd Respondents turned a blind eye to the fact that SGS staff and agent of the 1st Respondent one John Onunga who purportedly sampled the Applicant's product had in a past incident in a rather controversial manner declared the Applicant's products as adulterated but upon retesting by the Government chemist the same were declared wholesome. That the test carried out by SGS was very sensitive and left room for the doctoring of the sampling container to obtain a pre-determined result which factor should have informed the 1st Respondent of the need for joint sampling.

54. The Applicant averred that the 1st Respondent had stubbornly insisted on carrying out a re-test on the basis of the samples which the Applicant had on numerous occasions stated were suspect and could have been doctored to produce the desired results which is vindicated by the fact that out of the 8 parameters tested by the 2nd Respondent only one parameter (flash point) was found be off spec thus raising reasonable doubts of the presence of the domestic kerosene in the sample.

55. It was further averred that it is also common knowledge that the presence of domestic kerosene is not the only item that alters the flash point of fuel and the absence of any tests carried out to establish presence of other items that could influence the flash point made the Applicant's case credible. Moreover, the 1st and 2nd Respondents were obligated to carry out a reasonable test that examined all factors that could contribute or influence the outcome of a test to wit in the Applicant's case the fact that the same tanker is used to transport various types of petroleum products which may cause cross contamination and this should not be ruled out.

56. According to the Applicant, the Respondents' act of refusal to re-sample, interpreting the results of the analysis unfairly and refusal to remove the fuel from the Applicant's premises as is the legally prescribed procedure, and the act of retention of the said product under seizure in the Applicant's business premises was meant to intimidate and arm-twist the Applicant by financial strangulation in order to force the Applicant to admit commission of a indictable offence which the Applicant verily believed it did not commit.

57. The Applicant averred that there had not been any evidence exhibited by the 3rd Respondent to support its allegation of a request having been made to the Applicant to carry out remediation on the product. It was further averred that the Applicant attended a meeting called by the inter-agency team in the 3rd Respondent's boardroom together with its lawyers on record contrary to the averments made by the Respondents' but the meeting's sole objective was to obtain an admission of guilt on the part of the Applicant.

58. The Applicant averred that its objections, requests and reasons for a re-sampling were never considered instead the 1st, 2nd and 3rd Respondents were geared into an acceleration of obtaining a guilty plea from the Applicant.

59 The Applicant denied approaching this Court with unclean hands and averred that it was the 1st , 2nd and 3rd Respondents who had been less than candid in carrying out their duties for the following reasons: refusing to accept the fact there could be existence of bias by its employees and/or agents in spite of a past incident which is well known to the Respondents; refusal to do a re-sampling despite having seized the fuel and sealed off the station; there were no two tests carried out as alleged and to the contrary the Applicant had always requested for resampling and retesting of the product which request had never been granted; refusal to give a pragmatic and prudent approach to the alleged contamination by appreciating that there could have been cross contamination as the fuel tankers are used to transport diverse products; not being practical in their interpretation of the analysis of samples considering only one parameter (flash point) out of 8 was found to be off spec; not following the laid down procedure under the Customs and Excise Act and deliberately prolonging the exercise with the sole intention of financially crippling the Applicant in order to cause it to submit to the Respondent's demands.

60. The Applicant denied having any reason to delay the resolution of the matter as it was causing it irreparable loss. It asserted that any delay had been occasioned by Respondents' belligerent attitude and approach to the possible avenues of resolving this matter.

61. The Applicant further denied failing to disclose the existence of another matter in the High Court as it was not a party to the said suit and as indicated by the annexures' 48, 49 and 50 it was a claim for rent by the landlord who was not getting his dues as a result of the Respondents' act of closing the station.

62. It was averred that the instant proceedings differed from the ELC proceedings as they had been brought to compel the Respondents' to grant the Applicant a fair hearing and also to compel them to carry out their statutory duties as prescribed by the regulating legal framework.

63. According to the Applicant, it was the Respondents that had without a justiciable cause refused to grant the Applicant a fair and expedited administrative action and had continued to cause suffering to the Applicant by their arbitrary actions and exposing the general public and the exchequer to unmitigated special damages by their conduct.

64. In closing, it was averred that the applicant had contrary to the 3rd Respondent's allegations tried to mitigate its losses by attending a meeting with the inter-agency, writing letters seeking a resolution of the matter and eventually invoking this judicial Review Proceedings.

The Ex-parte Applicant's Submissions

65. Arguing the case on behalf of the Ex-parte Applicant was the firm of Maina Njuguna and Associates. After rehashing the facts surrounding the matter, the advocates for the Applicant indicated that after several court attendances and discussions between the Ex-parte Applicant and the 1st and 3rd Respondents, a consent order was recorded in court on the following terms: An Order allowing the removal of the fuel from the Ex-parte Applicant's station. This effectively dealt with prayers (i) and (ii) in the Amended Chamber Summons. Prayer (v) had been overtaken by events. The prayers that remained for canvassing were prayers (iii) and (iv) of the Chamber Summons which were: An order of certiorari directed at the 1st Respondent's directive contained in its letter dated 17th June 2015 addressed to the 4th Respondent

directing him to cancel the Applicant's license and to close its business premises; and an order of Certiorari quashing the laboratory analysis Report dated 13th August 2015 declaring the fuel as adulterated together with the 3rd Respondent seizure notice dated17th June 2015.

66. Having rehashed the facts surrounding the case, counsel reiterated that the Ex- parte Applicant had sought to have another sampling done on the basis that: there was high likelihood of bias on the part of the SGS personnel conducting the sampling. One Mr. Onunga who had accused the ex parte applicant of a similar act in a previous incident, a matter which was disapproved in court and there was likelihood of the inter-agency team having tampered with the sampling containers as the ex-parte applicant was not afforded the opportunity to inspect the containers before sampling was carried out.

67. Counsel submitted that the 1st Respondent categorically refused to allow the request claiming that they could not vouch for the products after the first sampling a claim which is not reasonable considering that the inter-agency team had sealed off the premises and the seals were still intact. Consequently, the inter-agency conduct lacked impartiality, openness, fairness and thus jeopardized the ex- parte applicant.

68. In particular, seven issued were outlined by Applicant to wit:

a. There was abuse of power on the part of the 1st Respondent by virtue of directing the closure of the ex-parte applicant's business premises before establishing that indeed there was a case of adulteration through analysis by KEBS, the recognized authority.

b. There was open bias and an indication of premeditated harassment on the part of the 1st Respondent by virtue of claiming that the ex-parte applicant's fuel was adulterated with export products which no analysis had suggested such adulteration.

c. There was abuse of power on the part of the 3rd Respondent for issuing a seizure notice before confirmatory report of adulteration was received from the recognized authority, KEBS.

d. There was procedural impropriety on the parts of the 1st and the 3rd Respondents for using the results of a non-authorized person as a basis for ordering the closing of the ex parte applicant and issuing a seizure notice on its fuel respectively.

e. There was unreasonableness on the part of the 1st Respondent in not allowing further sampling of the fuel despite there being enough reason to warrant repeat sampling in order to dispel the possibility of biased sampling by a person who has made false claims before.

f. There was unreasonable conduct and abuse of power on the part of the 1st and 3rd Respondents for keeping the ex-parte applicants premises closed and for converting its business premises into custom warehouse for 22 months.

g. There was violation of the ex-parte applicant's constitutional and natural right ex debito justitiae to be heard (audi alteram partem) and the 1st and 3rd Respondents acting as judges in their own cause (nemo judex in causa sua).

69. Submitting under the header of bad faith, counsel for the Applicant took the view that this was a clear case of bias against the Ex-parte Applicant. The Ex-parte Applicant wrote numerous letters to the 1st Respondent indicating that there was a likelihood of there being bad blood between the 1st Respondent's agents employee, a Mr. Onunga who had previously accused the Ex-parte Applicant of a similar act as evidenced by the letter dated 24th September 2015 addressed to the 1st Respondent. The 1st Respondent failed to investigate the Ex-parte Applicant's contentions of personal animosity spite and vengeance against it by its agent. The Ex-parte Applicant named the 1st Respondent Agent by name gave a descriptive and clear incident complained off and no action taken. Counsel urged the court to find that there was bad faith in the Respondent’s action as demonstrated in evidence that the Agent of 1st Respondent arrived at 1.00p.m and by 5.00 p.m a letter had already been written to the County Commissioner asking them to close and cancel the license. The sampling was also done by the Respondent's agent alone, the second sample were taken in the absence of the Ex-parte applicant's representative. What could prevent them from introducing foreign bodies to the samples or the containers and why the Ex-parte Applicant was not granted an opportunity to inspect the sampling containers and/or to carry out another sampling were the questions posed by counsel. It was further submitted that there was also bad faith on the 1st and 3rd Respondents part as they did not make any effort to find out whether contamination if any has occurred at the depot. Adamant refusal to draw new additional samples was a clear case of bad faith.

70. Next, counsel engaged the court on the issues of abuse of office, arbitrariness and procedural flaw. It was submitted that the 1st and 3rd Respondents grossly abused the power conferred upon them by the 3rd Respondent issuing a seizure notice which shut down the Ex-parte Applicant's business before the results from a duly authorized body were released; using results of non-authorized body to issue a seizure notice; the 1st Respondent acting on results from a non-authorized body and directing the closing of the Ex-parte Applicant's business premises and withdrawal of its license and converting the ex-parte Applicant's business into a custom bonded warehouse for 22 months without following the right procedure.

71. It was further submitted that DW3, Mutahi Wambui in his evidence in-chief and on cross-examination clearly indicated that at the particular time of issuing the seizure notice there were no official results presented to it by the 1st respondent. He acted on the advice and word of the 1st Respondent's agent SGS Limited. The court was urged to take Judicial Notice of the fact that the only authorized body under our laws to set the standards of products in Kenya is Kenya Bureau of Standards. S.G.S Limited did not therefore, have the legal mandate to set standards. The 1st and 3rd Respondents acted unprocedurally by purporting to act on the advice and the analysis report given by the 1st Respondent’s agent m/s S.G.S Limited. It was further submitted that the 3rd defendant acted contrary to the provisions of the East African Customs Management Act when it sealed off the Ex-parte Applicant’s petrol station.

72. Turning to unreasonableness, it was submitted that the 1st, 2nd and 3rd Respondents' acted with a lot of unreasonableness in refusing to take into consideration the fact that it is not only kerosene that can change the flash point of diesel. DW1 and DW2 acknowledged the fact that the flash point can be altered by the presence of other materials besides kerosene. They, however, did not care to eliminate the possibility the presence of other materials in the fuel that they carried out tests on especially given the fact that all the other 7 tests carried out to check the presence of kerosene were negative.

73. It was further submitted that it was not disputed that out of the eight tests carried to establish the presence of kerosene, seven of them indicated there was no kerosene. This should have informed the Respondent to carry out more tests. It was also concealed by DW1 and DW2 that there existed a disparity between KEBS flash point and that of Kenya Pipeline Company the source of the fuel in the ex-parte applicant's station), which had been subject of debate between the stakeholders and 1st and 2nd Respondents. This was clearly demonstrated via a report of a stakeholder workshop held at Hilton Hotel on 4th June 2014 where DW1 attended. In this workshop it was stated by the stakeholders that there was need to harmonize Kenya Pipeline Company and Kenya Bureau of Standards flash points. This had yet to be effected. It therefore meant that given the disparity, the flash point results given by the 2nd Respondent could be erroneous.

74. Furthermore, counsel for the Applicant submitted, the veracity of the standard used by the 2nd Respondent in the flashpoint test was in doubt. The 2nd Respondent had stated that the standard used was KS EAS 177 but during cross examination, he produced KS EAS 1772012. This was an attempt to create confusion for a purpose. The information available in public domain is that KS EAS 177 2012 was "confirmed" in 2018 meaning that it was still in draft form when the 2nd Defendant used it in 2015. It was therefore not reasonable for the 1st, 2nd and 3rd Respondents to act on the flash point before further tests. Refusal to grant the ex-parte Applicant an opportunity as requested in their numerous letters to sample was also unreasonable. The 1st and 3rd Respondents had acted out of spite as they did not follow the laid down procedure in the issuance of seizure.

75. Regarding the principles of natural justice, it was submitted that the Ex-parte Applicant was entitled to be heard before the Respondents' could take the drastic measures that they took and that the Respondents' violated the Applicant's rights to fair administrative action as guaranteed under Article 47 of the Constitution. It was further submitted that the closure of a business for over 22 months was itself unreasonable and an affront to Article 40(2) (a) of the constitution which protects every person within the Kenya borders from arbitrarily deprivation of property.

76. It was further submitted that despite denying to grant the Ex-parte Applicant a hearing proceeded to act as judges in their own cause as was clearly brought to light by DW1and DW3 who in their evidence stated that the fuel was siphoned from the Ex-parte Applicant's underground tanks, no remediation was done to the fuel, no escort given to the tankers that siphoned off the fuel to ensure it is not dumped in the market if at all it was contaminated, no evidence was lead to show where the fuel ended up. This was clear evidence that the Respondents' acts were actuated by malice, ill will and irrelevant considerations.

77. It was submitted that the seizure notice had never been withdrawn and the results as released by the 2nd Respondent were still in force. Under section 214 of the East African Customs Management Act where a seizure notice is issued, the Commissioner was required to give notice in writing within one month outlining the reasons for such seizure. This requirement is only dispensed if a prosecution has been commenced by the commissioner which was not done.

78. Counsel submitted that after the seizure notice is issued, the commissioner has the power to institute criminal proceedings against the person who has been issued with a seizure notice and maybe liable to a custodial sentence or fine. Alternatively one is required to compound the offence by paying a fine prescribed by the commissioner. Issuance of the seizure notice is also a sure way to kill the Ex-parte Applicant's name as it tarnishes its image within the industry and its customers as it sends the wrong message to the public.

79. As for the courts position in granting judicial review orders, reliance was place on **Judicial Review Application No. 622 Of 2017 Pravin Galot vs The Chief Magistrate's Court At Milimani** and **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8.**

80. It was hence submitted that the Ex-parte Applicant had established beyond doubt that there was failure on the part of the 1st, 2nd and 3rd Respondents to follow procedure, grant it a fair hearing, that they acted unprocedurally, actuated by malice and ill will without sufficient grounds to issue a seizure notice, relied on non-authorized body to wit M/s SGS Limited, acted unreasonably as it did not grant the Ex-parte Applicant an opportunity to resample nor did they test the fuel for other contaminants which had a high possibility of being present in order to eliminate any doubt. The fact that they removed the fuel without supervision, without remediation being carried out and without any escort to the tankers siphoning the fuel creates doubt as to the purported adulteration.

81. On the basis of the foregoing, it was prayed that the orders sought be granted.

82. Through further submissions dated 11th December 2018, Counsel for the Ex-parte Applicant elaborated in detail the relevant provisions in the East African Community Customs Management Act 2012 upon which the Respondents' drew their authority and went further to point out the provisions upon which their actions ought to have been predicated, pointing out what according to them was the correct procedure to be followed in issuing a seizure notice. It was submitted that in the instant case, the 3rd Defendant issued a seizure notice on the very day the 1st and 3rd Respondents' visited the ex-parte Applicant's station to wit on 16th June 2015. The gravamen of the ex-parte applicant was the brazen violation, breach and abuse of the 3rd Respondent's power in refusing to comply and adhere with the procedural requirements that follow after seizure.

83. It was submitted that the 3rd Respondent was in flagrant disregard of the provisions of **Section 216 of the East African Community Customs Management Act 2012** which provides:

(1) Where any notice of claim has been given to the Procedure after notice of Commissioner in accordance with section 214, the claim. Commissioner may, within a period of two months from the receipt of such claim, either

(a) by notice in writing to the claimant, require the claimant to institute proceedings for the recovery of such thing within notice; or two months of the date of such

(b) himself or herself institute proceedings for the condemnation of such thing.

(2) Where the Commissioner fails within the period of two months either to require the claimant to institute proceedings, or the Commissioner fails to institute proceedings, in accordance with subsection (1), then such thing shall be released to the claimant.

84. It was submitted that the commissioner neither issued a notice to the Applicant to institute proceedings nor did he do it himself and even after failure did not release the fuel as he should have done and enforce the seizure notice illegally, unfairly and in clear abuse of the powers conferred but continued to on his office. The fuel was held without any decision being made until early 2016 a period of well over one year and six months. This was gross abuse of power by the 3rd Respondent acting outside its authority. Section 218 also gives the commissioner the power to release seized products whether or not the thing has been condemned upon such conditions as the council may deem fit. It was submitted that this Section was purposely meant to cure the harshness that a seizure could visit upon the owner of the seized goods and the arbitrariness as was occasioned by the 3rd Respondent to the Applicant by shutting down its business. It called upon the Commissioner to be fair in executing his administrative powers and duties. This, the 3rd Respondent failed to do. Nowhere in the act has power being given to the commissioner in exercising his power to shut down a business. The right to carry out trade freely without undue interference is guaranteed in the constitution as a fundamental right which the 3rd Respondent violated by enforcing a seizure notice for over 18 months and without consent converting the Applicant's business premises into as a bonded warehouse.

85. It was further submitted that the 3rd Respondent's act of holding the seized products in the Applicant's premises amounted to unlawfully converting a private premises into a government bonded warehouse without following the laid down procedure. The 3rd Respondent was guilty of arbitrariness denying the Applicant the right to a fair, expeditious, efficient, lawful, reasonable and procedurally fair administrative action as stipulated under Article 47 (1) of the Kenyan constitution.

86. Regarding the powers of the 1st Respondent, it was submitted that no standards were ever submitted by the 1st Respondent to what the Applicant's fuel was required to measure up to. In the absence of set standards therefore, the 1st Respondent was to apply the mandatory terms standards approved by the 2nd Respondent by virtue of the powers granted to it under Section 4 of the Energy Act 2006. It was submitted that from a reading of section 4(1), it was clear that the functions of determining whether commodities comply with the provisions of that Act to wit the Standard Act or any other law dealing with Standards of quality or description was vested on the 2nd Respondent. It was therefore submitted that neither the 1st Respondent nor SGS Limited had this mandate. It was a gross abuse of its authority under the Act for the 1st Respondent to purport to act on the results from SGS.

87. It was submitted that the 1st Respondent was not authorized under the establishing law to carry out conclusive tests on products which would be relied upon by the third Respondent to issue a seizure notices. The only tests that they can carry out are for their internal purposes to help them make a decision on whether to call the 3rd Respondent for purposes of issuing a seizure notice. It was further submitted that the 1st Respondent further went ahead to rely on results from unauthorized persons m/s SGS Limited. The 1st and 3rd Respondents misapprehended the law and thus acted without jurisdiction. It is on this ground that the 1st and 3rd Respondents were culpable and shoulder the highest degree of liability.

The 1st Respondent's Submissions

88. The 1st Respondent's defence was conducted by the firm of Kibatia and Company. Counsel for the 1st Respondent identified the issues for determination as:

a. Whether the 1st Respondent gave the ex-parte applicant a fair hearing

b. Whether there was abuse of office, arbitrariness and procedural flaw on the part of the 1st respondent

c. Whether the court has jurisdiction to issue an order of certiorari directed at the 1st respondent's directive contained in the letter dated 17th June 2015 directed to the 4th respondent to cancel the applicant's licence

d. Courts' position on whether to grant or deny judicial review orders

89. On the first issue, it was submitted that the letter dated 21st July 2015 explained to the Applicant that retesting could not be done on a sample other than that collected on the date of the incident and which was sealed in the presence of the parties concerned. That, in the Ex parte Applicant's letter dated 23rd July 2015, the Applicant acknowledged that previous sampling had been done and the fuel was at all times found to be wholesome but further went ahead to request that new samples be drawn.

90. A submission was made that in response to the letter dated 23rd July 2015, the Energy Regulatory Commission had through a letter dated 27th July 2015 reemphasized that a retest was possible but on the samples collected on 17th June 2015 in order to maintain consistency and transparency on the issue. A further retest date was set for 30th July 2015 at 10.00am where the testing would have been done in the presence

of Kenya Bureau of Standards, Kenya Revenue Authority and the Energy Regulatory Commission in addition to the station operator or his representative. On 29th July 2015, the Applicant responded to the letter dated 27th July 2015 stating that they were not in a position to attend the retest exercise on 30th July 2015 due to their inability to reach their suppliers whom they had wished to attend the retest exercise. It was clear that the 1st Respondent had always been willing to give the ex parte Applicant a chance to have a retest exercise done.

91. Addressing the second issue, counsel submitted that the 1st Respondent was established by the **Energy Act 2006** and **Section 5(a)(ii)** states that the object and functions of the Commission shall be to regulate, importation, exportation, transportation, refining, storage and sale of petroleum and petroleum products. **Section 95 of the energy Act 2006** stipulates that petroleum imported or produced locally for use in Kenya shall conform to the relevant Kenya Standard, and where no such standards exist, the relevant International Standards approved by the Kenya Bureau of Standards shall apply.

92. It was submitted that in exercising its function under **Section 5** of the Act, the 1st Respondent joined the monitoring team from Kenya Revenue Authority, Kenya Bureau of Standards and SGS (Kenya) Limited where a standard procedure for sampling and testing is applied to all retail stations and once adulterated petroleum if found, three samples are taken from the affected storage tank in the presence of the station operator or their representative. It was further submitted that the 1st Respondent was only acting within its mandate pursuant to statute when it visited the ex parte applicant's petrol station on 17th June 2015.

93. Coming to the third issue, it was submitted that Section 89 of the Energy Act 2006 provided for the procedure to be followed by a person who is aggrieved by the actions of the Energy Regulatory commission with regard to licencing which in this case was to appeal to a tribunal. It was submitted that the Applicant had not exhausted all the remedies available to it before approaching the court. It was further submitted that as per the provisions of **Section 9(2) and (3) of the Fair Administrative Action Act**, the ex parte Applicant ought to have sought redress from the Energy Tribunal before coming to the High Court. Section 9 (2) and (3) provides as follows:

> *"(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.*
>
> *(3) The High Court or a subordinate Court shall, if it is not satisfied that remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1)."*

94. Regarding the courts position on whether to grant or deny judicial review orders, reliance was place on the case of **Republic vs National Employment Authority& 3 Others Ex-Parte Middle East Consultancy Services Limited [2018] eKLR** where Hon. Mativo J. held;

> *"The grant of the orders of Certiorari, Mandamus and Prohibition is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the ex parte applicant is using Court processes to avoid the statutory laid down process. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has not satisfied the above conditions. It follows that there is no basis at all for the Court to grant the Judicial Review orders of Certiorari and Mandamus."*

95. Further reliance was placed on **Republic vs Attorney General & 4 Others Ex Parte Diamond Hashim Lalji And Ahmed Hasham Lalji (2014) eKLR.**

96. It was submitted that broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either: the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires) of the person or body responsible for it. A decision is illegal if it: contravenes or exceeds the terms of the power which authorizes the making of the decision; pursues an objective other than that for which the power to make the decision was conferred; is not authorized by any power; and contravenes or fails to implement a public duty.

97. It was the 1st Respondent's humble submission that ex parte applicant was using Court processes to avoid the statutory laid down process of ensuring that the fuel he would sell to consumers is of the required standard pursuant to statute. The court was invited to examine the conduct of the Applicant in that he used the name of one John Onunga to claim that the exercise was flawed. The Applicant did not have other results to challenge the results by the 2nd Respondent and neither had the Applicant provided to the Honourable court any court finding to show that indeed the said John Onunga was found to have been biased towards the ex parte Applicant previously. It was therefore submitted that the ex parte applicant was deliberately trying to hoodwink the Honourable court in a bid to move away from the main issues before the Honourable court.

98. In conclusion, counsel prayed that the ex-parte Applicant's Amended Application dated 16th August 2016 and filed on 18th August 2016 be dismissed with costs.

The 2nd Respondent's Submissions

99. The 2nd Respondent was represented by the firm of Nyakundi and Company Advocates. Counsel surmised the issues for determination as being whether the court has jurisdiction to issue the orders sought by the applicant and what role the 2nd Respondent played in the matter.

100. It was submitted that the **Standards Act CAP 496, Laws of Kenya** was established pursuant to Article 169(1) (d) of the constitution of Kenya 2010 and Legal Notice No. 7 of 2004 which introduced Sections 10 to 16D and its focus is to dispense justice through a fair and open manner and expeditiously without recourse to undue procedural technicalities and without reference. The functions of the Tribunal are spelt

out among which was to hear appeals from any person aggrieved by the decision of the Kenya Bureau of Standards. It was further submitted that the Standards Act-Cap 496 of the Laws of Kenya provided at Section 16G that a party to proceedings before the Tribunal may appeal the decision of the Tribunal to the High Court.

101. The import of these provisions was that the Jurisdiction of the High Court under the Standards Act is that of an appellate court and in that regard parties were not expected to approach it directly in the first instance where a dispute arises under the Standards Act.

102. It was submitted that the Applicant should have pursued the alternative remedy of appeal to the Standards Tribunal which it did not, instead of opting for judicial review. It was submitted that where a process has been provided for seeking relief, that procedure should be adhered to. Counsel placed reliance on the case of **Republic v National Environmental Management Authority (2011)KLR** where the Court of Appeal stated that:

> *"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal 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 at 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."*

103. Regarding the role of the 2nd Respondent in the matter in question it was submitted that this was simply to test samples against clear and well known standards. The samples presented were of Automotive Gas Oil and Premium Motor Spirit drawn from the applicant outlet by a joint inspection team comprising personnel from the 1st, 2nd and 3rd Respondents offices on 16th June 2015. The samples failed to meet specified standards as outlined in the relevant reports. The 2nd Respondent performed its functions strictly within the confines of its mandate. The 2nd Respondent had been granted statutory powers to continuously inspect products in the market for compliance with standards, specifications and quality to protect the public. Further, that the testing of the goods is not only pegged on Kenyan standards but also other standards including international standards. **Section 14(1) of the Standards Act** clearly showed that the 2nd Respondent's inspectors had powers to enter premises, inspect and take samples in respect any process or operation; require production of documents and take copies of the same; require information; seize and detain goods for testing; and seize and detain goods or documents as evidence. After testing, the samples from the Applicant did not meet the standard requirements for Kenya.

104. In conclusion, it was submitted that the application should be dismissed as the Applicant had not pursued the alternative remedy of appeal to the **Standards Tribunal** established by **Section 11 of the Act**. Further, that that the Applicant has not demonstrated any illegality, irrational or breach of rules of natural justice to warrant issuance of the orders sought. The Applicant had not demonstrated that the said orders are deserved and thus the application dated 16th August 2016 should be dismissed with costs.

The 3rd Respondent's Submissions

105. Learned Counsel Pius Nyaga offered his services to the defence by the 3rd Respondent. After succinctly reiterating the facts of the dispute, counsel went on to submit on the nature of judicial review proceedings. He note that it was trite that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process and that its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It aims at ensuring that the individual receives fair treatment, and not see that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court. Reliance was placed on **Municipal Council of Mombasa vs. Republic & Umoja consultant Limited Civil Appeal No. 185 of 2001** where the Court of appeal held:

> *"Judicial review is concerned with the decision making process not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute."*

106. The 3rd Respondent went on to invite the Court to look at the circumstances of this case and confine itself to making a determination on the decision making process as enunciated in the Umoja Consultants Case above and not to delve into the merits of the decision which would inevitably convolute the rather straight forward matter of how State Agencies ought to proceed in cases where a person declines to follow the laid down procedure for remedying adulterated petroleum products.

107. Counsel went on to identify the three issues for determination as:

a. Whether the 3rd Respondent acted within its statutory mandate

b. Whether the 3rd Respondent acted reasonably, rationally and procedurally

c. Whether the Ex parte Applicant is entitled to the reliefs sought

108. Beginning with the question of whether the 3rd Respondent acted within its statutory mandate it was submitted that the 3rd Respondent

is established under the **Kenya Revenue Authority Act, Cap 469 Laws of Kenya**. Under **Section 5 (1),** the 3rd Respondent is an agency of the Government for the collection and receipt of all revenue. Further, under **Section 5 (2)** with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws set out in Part 1 & 2 of the First schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. Under **Part 1 of the First Schedule** to the **Kenya Revenue Authority Act, Cap 469 Laws of Kenya**, the 1st Respondent enforces the **East African Community Customs Management Act, 2004** (herein after referred to as the EACCMA) and the **Customs and Excise Act (Cap 472, now repealed by the Excise Duty Act, 2015)**. That pursuant to the provisions of Section 194A of the repealed Customs and Excise Act the sale of adulterated petroleum products is prohibited and the 3rd Respondent was mandated to fight the vice.

109. It was submitted that it was not disputed that on or about 17th June 2015 the petroleum products on sale by the Ex-parte Applicant were subjected to a random test by members of the inter-agency committee, the 1st, 2nd and 3rd Respondents', dealing with petroleum products. It was further submitted that the preliminary results of the tests conducted by SGS Kenya Limited, an agent of the 1st Respondent, indicated that the petroleum products on sale by the Ex-parte Applicant were indeed adulterated and contravened the provisions of Section 194A of the Customs and Excise Act. The 3rd Respondent, in accordance with the provisions of Section 199(1) of the Customs and Excise Act, proceeded to issue a seizure notice to the Ex parte Applicant, the effect of which was to immediately halt the sale or distribution of the adulterated petroleum products to the public. Section 199(1) of the Customs and Excise Act provides that, *"An officer or police officer may seize an aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he has reasonable grounds to believe is liable to forfeiture; and any such aircraft, vessel, vehicle, goods, animal or other thing may be seized whether or not a prosecution for an offence under this Act which rendered it liable to forfeiture has been, or will be, taken."*

110. Citing **Crywan enterprises Limited vs. Kenya Revenue Authority (2013] eKLR** it was submitted that once it was determined that the Ex-parte Applicant's petroleum products were adulterated, the 3rd Respondent could not abdicate its role of protecting motorists by allowing the Ex-parte Applicant to continue selling or distributing the adulterated products. It was further submitted that the samples submitted for testing to the 2nd Respondent (Kenya Bureau of Standards) confirmed that the petroleum products on sale by the Ex parte Applicant were indeed adulterated. Thus the decision by the Respondent to issue a seizure notice was within the four corners of the provisions of the Customs and Excise Act and specifically Sections 194A and 199 (1). Reliance was placed on **H. C. Miscellaneous Civil Application No. 534 of 2007, Republic vs. Kenya Revenue Authority & 2 Others, Ex-parte Arrow Hi-fi (E. A.) Limited** for the prayer that this Honourable Court finds that the decision to issue a seizure notice was grounded in law and it acted within its statutory mandate.

111. Addressing himself to the second issue, Nyaga advocate submitted that the general principles guiding the grant of judicial review orders were clearly set out by Lord Diplock in the case of **Council for Civil Service Unions v. Minister for Civil Service [1985 A.C. 374**, at 401D when he stated:

> *"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call Illegality' the second irrationality and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."*

112. Counsel denied the contention that the actions by the 3rd Respondent were in flagrant breach of the provisions of Section 216 of the **East African Community Customs Management Act** (EACCMA) and the said actions were unreasonable, arbitrary and illegal.

113. The advocate for the 3rd Respondent submitted that 'unreasonableness' was a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. The 3rd Respondent opined that to justify interference, the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. This was not the case in the instant Application.

114. Counsel referred to Section 202 (1) of the Customs and Excise Duty Act which provides that *"Subject to subsection (2), where the owner of anything seized claims it by notice to the Commissioner pursuant to section 200(4), the owner may, within two months of the date of the notice institute proceedings for recovery of the thing seized."*

115. According to Counsel, in the present case, the Ex-parte Applicant through their advocates Gathenji & Company Advocates and vide a letter dated 8th July 2015 claimed the seized petroleum products. However, as could be discerned from the numerous correspondence attached to the 3rd Respondent's Replying Affidavit, the seized petroleum products could not be released to the Ex-parte Applicant as the said products were the subject of a retest application by the Ex-parte Applicant and the 1st Respondent was in communication with the Ex-parte Applicant. Further, when by a letter dated 21st December 2015 the Ex-parte Applicant was invited by the 3rd Respondent to settle the matter, the Ex-parte Applicant by a letter dated 4th January 2016 reiterated the need to carry out a retest on the seized petroleum products. Moreover, a reading of Section 200 (4) clearly states that the onus of instituting proceedings for the release of the seized petroleum products lay with the Ex-parte Applicant.

116. It was therefore submitted that it was deceptive and self-serving for the Ex parte Applicant to turn around and allege that the 3rd Respondent did not institute proceedings or that the 3rd Respondent detained the petroleum products for an inordinate period.

117. Counsel for the 3rd Respondent submitted that the Ex-parte Applicant's conduct in resolving the impasse in the dispute was not only unconscionable but also the Ex-parte Applicant has not approached this Honourable Court with clean hands. Reliance was placed on **James Kingori Gikonyo vs. Principal Magistrate Nakuru Law Courts [2011] eKLR**

118. On the question of the goods deposited in situ, the 3rd Respondent contended that by dint of Section 35 of the Customs and Excise Act, it is allowed by law to deposit goods at the Applicant's premises when it is undesirable or inconvenient to deposit the goods in a customs warehouse. Section 35 states that:

> *"1) Where under this Act goods are required to be deposited in a customs warehouse, the proper officer may decide that it is undesirable or inconvenient to deposit the goods in a customs warehouse and direct that the goods shall be deposited in some other place; and thereupon the goods shall for all purposes deemed to have been deposited in a customs warehouse as from the time that they are required to be so deposited.*
>
> *2)Where goods are deemed to have been deposited in a customs warehouse then the goods shall, in addition to the rent and other charges to which they are liable under section 34, be chargeable with such expenses incurred in the securing, guarding and removing of them as the proper officer may consider reasonable; and neither the Commissioner nor an officer shall be liable for the loss of or damage to the goods which may be occasioned by reason of their being so deposited and dealt with."*

119. It was submitted that the goods seized in the present case were hazardous and highly flammable in nature thus making it undesirable and inconvenient to move them to a different storage facility. Further, when moving petroleum products one has to be careful to prevent overfills of tanks, spillage and leakages that could be catastrophic. In addition, the three Respondents' did not have storage facilities where the said seized petroleum products would have been stored whilst the parties were deliberating on the matter. Reliance was placed on **Republic vs. Anti-Counterfeit Agency & 3 Others Ex-parte Omega Chalk Industries (1993) Limited & Another [2015] eKLR**.

120. The 3rd Respondent therefore drew the Court to the peculiar circumstances of this case and urged the Court to find that that the acts of the 3rd Respondent and the other Respondents were not outrageous or in defiance of logic as to fall within the definition of Wednesbury unreasonableness.

121. Shifting his gaze to procedural impropriety, Mr. Nyaga submitted that the 3rd Respondent and the other Respondents had through the annexures in their respective Replying Affidavits demonstrated that the Ex-parte Applicant was granted a fair hearing. The basic tenets of procedural propriety would include informing a person the reasons why a particular decision has been made by an authority and affording the person an opportunity to be heard. In the present case, not only was the testing of the petroleum products done in the presence of the Manager of the Ex-parte Applicant, but also the results of the test were shared with the Ex-parte Applicant. Further, a seizure notice was issued by the 3rd Respondent which clearly outlined the reason why the petroleum products had been seized. Thereafter, the parties herein exchanged numerous correspondence on the matter before the Ex-parte Applicant instituted these proceedings. Further reliance was placed on **Republic vs. Kenya Revenue Authority Ex-parte Total Kenya Limited [2012] eKLR.**

122. As to whether the Ex-parte Applicant was entitled to the reliefs sought it was submitted that the remedy of Judicial Review sought by the Ex-parte Applicant was not available to it. Counsel submitted that the Court had previously stated that Judicial Review is not an avenue to pursue an appeal since it is not concerned with the merits of the decision the decision making process. Counsel cited **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others (2013) EKLR**, and **Konton Trading Limited vs. Kenya Revenue Authority & 3 Others [2018] eKLR**

123. The 3rd Respondent also urged the Court to consider the following questions before making a determination whether the orders sought in this application should issue:

a. Was there reasonable cause for the 3rd Respondent to issue a seizure notice?

b. Was the decision to issue the seizure notice supported by sound reason?

c. Did the decision make logical sense in relation to available information?

d. Was the empowering provision of the law correctly applied?

e. Is the adulteration menace a threat to the economy?

124. The 3rd Respondent submitted that if the said questions should be answered in the affirmative, then its actions were reasonable and procedurally fair, thus the orders sought in the application should not issue. The court was urged to find that the application lacks in merit and should be dismissed with costs to the Respondents.

Analysis and Determinations

125. I have taken all the information pertaining to this case as presented to me ably through the affidavit evidence and annexures, the oral evidence of the parties as well as the valuable contributions of the parties' respective advocates. As articulated by the Ex-parte Applicant, its gravamen is rooted in the alleged brazen violation, breach and abuse of the Respondents' power in refusing to comply with and adhere to the procedural requirements that follow after a seizure.

126. To my mind therefore, what bears answering are the following questions:

a. Whether this court has the jurisdiction to entertain the instant proceedings.

b. Whether, if (a) is answered in the affirmative, the Ex-parte Applicant is entitled to:

i. An order of Certiorari quashing the 2nd Respondent's Laboratory Analysis Report dated 13th August 2015 and the 3rd Respondent's seizure notice dated 17th June 2015.

ii. An order of Certiorari quashing the 1st Respondent's directive contained in their letter dated 17th June 2015 addressed to the 4th Respondent cancelling the Applicant's license and directing the closure of the Applicant's business premises.

127. The 1st and 2nd Respondents have raised the issue of whether, in the circumstances of the dispute at hand, the court is seized of the jurisdiction to entertain the Ex-parte Applicant's claim. In the locus classicus case of **Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA stated, inter alia:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

(See Safe Rider Vehicle Technologies (PTY) and 2 Others v National Police Service Commission NRB JR No. 10 of 2017 [2017] eKLR and Republic v National Environment Management Authority NRB CA Civil Appeal No. 84 of 2010 [2011] eKLR.)

128. The case put forth by the 1st Respondent is that, having been aggrieved by the decision contained in the letter dated 17th June 2015 directing the 4th Respondent to cancel the Applicant's licence and ordering for the closure of its business premises, the ex-parte Applicant ought to have sought refuge in the Energy Tribunal first before approaching this Court. Consequently, this court lacked the jurisdiction to entertain the current application as the ex parte Applicant had not exhausted all the remedies available to it.

129. The Energy Tribunal is established by **Section 108** of the Energy Act as below:

"108.For the purpose of hearing and determining appeals in accordance with section 107 and of exercising the other powers conferred on it by this Act, there is established a tribunal to be known as the Energy Tribunal, hereinafter referred to as the "Tribunal"."

130. **Section 107** of the Act provides for appeals from the decisions of the Commission to the Tribunal on the following terms:

" 107. Where under this Act the provision is made for appeals from the decisions of the Commission, all such appeals shall be made to the Energy Tribunal, in accordance with the provisions of this Part."

131. As per **Section 26** of the Energy Act, any person aggrieved by a decision of the Commission may appeal to the Energy Tribunal within thirty days of the decision. Additionally, under **Section 89(a)** of the Act, a person aggrieved by the action of the Commission or a licensing agent in revoking a licence may, within thirty days of receipt by him of written notification of such action, in writing appeal, to the Tribunal in case of an appeal against the Commission whose decision shall be communicated within forty-five days of receipt of the appeal by the Tribunal from any such aggrieved person.

132. From the foregoing, it is evident that the Applicant, whose licence was revoked by the 1st Respondent herein, ought to have first sought refuge with the Energy Tribunal before approaching the court for the remedy of last resort that is a certiorari order.

133. The 2nd Respondent raised the preliminary issue of jurisdiction maintaining that the ex parte Applicant, having felt aggrieved by its decision, should have challenged the laboratory results issued by the 2nd Respondent and dated 13th August 2015 at the Standards Tribunal.

134. Under **Section 11** of the **Standards Act CAP 496, Laws of Kenya,** 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 Standards Tribunal established under **Section 16A** of the same Act. Similarly therefore, having taken issue with the laboratory results issued by the 2nd Respondent and dated 13th August 2015, it is clear that the ex-parte Applicant ought to have approached the Standards Tribunal to challenge the results.

135. That the ex-parte Applicant ought to have exhausted the above mentioned remedies before seeking redress from the Court is a conclusion buttressed by both statute and judicial precedent. Under **Section 9(2)** of the ***Fair Administrative Action Act***, **No. 4 of 2015** it is provided that:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

Subsection (3) thereof provides that:

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

136. Pronouncing itself on the issue, the Court of Appeal in **Republic vs. National Environment Management Authority [2011] eKLR**, held that:

> *"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal 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 at 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 – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute."*

137. In **Judicial Review No. 678 of 2017 Republic v Energy Regulatory Commission & 2 others [2018] eKLR** the court stated that:

> *"13. From the provisions I have cited, it is clear that a party whose licence is revoked by the ERC has a statutory right of appeal to the Tribunal established under the **Act**. Does the fact that this procedure exists exclude the jurisdiction of this court to entertain the application for judicial review" The existence of a statutory remedy vis-à-vis the right to apply for judicial review has been the subject of judicial pronouncement. It has been held that where a statute provides for a mode of resolving a dispute that procedure must be followed. For example in **Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017] eKLR**, the Court of Appeal reiterated this principle that, "[It] is abundantly clear to us that where there is a specific procedure as to redress of grievances, the same ought to be strictly followed."*

138. In **Miscellaneous Application No. 355 of 2015 Republic v Energy Regulatory Commission Ex Parte - Pekenya Gas Supplies Limited [2016] eKLR** Odunga J opined:

> *"62. The Respondent contended that the applicant ought to have appealed to the Energy Tribunal instead of coming before this Court. Section 89(a) of the Act provides for an appeal to the Energy Tribunal in case a person is aggrieved by the decision of the Respondent.*
>
> *63. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013**:*
>
> *"**…**one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.""*

139. In **Civil Application No. Nai. 92 of 1992 Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** the Court of Appeal held that;

> *"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*

140. In the end, the import of the foregoing is that the extant proceedings cannot be entertained by this court as it is not clothed in the requisite jurisdiction. I find solace in the words of Majanja J who in **Republic v Energy Regulatory Commission & 2 others [2018] eKLR [supra]** opined :

> *"21. At the end of the day, the dispute between the ERC and the applicant relates to revocation of its licence which is within the purview of the Tribunal jurisdiction under section 89(a) of the Energy Act"*

141. Having answered the first issue in the negative, I need not go any further. Be that as it may, were this Court to consider granting the certiorari orders sought by the ex-parte Applicant, would the Applicant's case pass muster? I do not think so. Let me elaborate. The Ex-parte Applicant's gravamen is the manner in which the Respondents' executed their respective mandates in the run up to and after the 1st Respondent wrote the letter dated 17th June 2015 asking the 3rd Respondent for the imposition of stiff penalties against the Applicant under the Customs and Excise Act Cap 472 and directing that the 4th Respondent revoke the Ex-parte Applicant's licence.

142. Specifically, the Applicant asks the court to quash the decision contained in the 1st Respondent's letter dated 17th June 2015 directing the 4th Respondent to cancel the Applicant's licence and ordering for the closure of its business premises. The Applicant further asks that the court quash the 2nd Respondent's Laboratory Analysis Report dated 13th August 2015 declaring the fuel as adulterated together with the 3rd Respondent's seizure notice dated 17th June 2015.

143. For the purposes of clarity, I find it necessary to restate the law as it relates to applications for judicial review orders. My point of departure is the position taken in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** where it was held:

> *"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…"*

144. For the current case, the decision making process in question is the one that lead to the cancelation of the Applicant's licence, the closing of its premises and the issuance of a seizure notice. In the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** Lord Diplock succinctly outlined the purview of judicial review when he stated that:-

> *"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."*

145. This position was reaffirmed in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** in which it was held:

> *"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."*

146. At this juncture, it is prudent that I examine the conduct of the Respondents' and juxtapose it against the principles of *illegality, irrationality and procedural impropriety* as discussed in the leading paragraphs. The Applicant contended that there was abuse of power on the part of the 1st Respondent by virtue of directing the closure of the ex-parte applicant's business premises before establishing that indeed there was a case of adulteration through analysis by KEBS, the recognized authority. According to the Applicant, there was open bias and an indication of premeditated harassment on the part of the 1st Respondent by virtue of claiming that the ex-parte applicant's fuel was adulterated with export products which no analysis had suggested such adulteration. Additionally, it is claimed that there was abuse of power on the part of the 3rd Respondent for issuing a seizure notice before a confirmatory report of adulteration was received from the recognized authority, KEBS. Going forward the Applicant accused the 1st and the 3rd Respondents' of procedural impropriety on account of the use of results of a non-authorized person as a basis for ordering the closing of the ex parte applicant and issuing a seizure notice on its fuel respectively.

147. It was argued that there was unreasonableness on the part of the 1st Respondent in not allowing further sampling of the fuel despite there being enough reason to warrant repeat sampling in order to dispel the possibility of biased sampling by a person who has made false claims before and irrationality on the part of the 1st and 3rd Respondents for keeping the ex-parte Applicant's premises closed and for converting its business premises into a customs warehouse for 22 months.

148. Lastly, it was argued that there was violation of the ex-parte applicant's constitutional and natural right to be heard and the 1st and 3rd Respondents' were acting as judges in their own cause.

149. With regard to the actions by the 1st Respondent, the Energy Regulatory Commission, **Section 6(a) of the Energy Act, 2006 Cap. 12 Laws of Kenya** gives the 1st Respondent the power to cancel licences issued in the energy sector in the following terms:

> *"6. Powers of the Commission*
>
> *The Commission shall have all powers necessary or expedient for the performance of its functions under this Act and in particular, the Commission shall have the power to—*
>
> *a. issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector;"*

150. **Section 23 of the Energy Act** gives the Commission power to delegate the conduct of its duties and functions to committees or agent.

Under **Section 24** of the Act, the committee or agent has the power to enter into any premises and inspect or test. It reads:

> *"24. Powers of committees or agents*
>
> *(1) A committee or agent appointed under section 23 may, upon production of*
>
> *evidence of appointment to any person reasonably requiring it, for the purposes*
>
> *of this Act—*
>
> *(a) enter upon any premises at which any undertaking is carried out or an offence under this Act is or is suspected to have been committed;*
>
> *(b) inspect and test any process, installation, works or other operation which is or appears likely to be carried out in those premises;"*

151. Under **Section 85(b)** of the Act, the Commission or licensing agent has the power to revoke licences if it is satisfied that the licensee is either wilfully or negligently not operating in accordance with the terms and conditions of the licence, permit or the provisions of this Act or any regulations thereunder. As per this Section, the Commission may give a licensee fourteen days' notice to show cause why the licence should not be revoked but this is not couched in mandatory terms.

152. In the instant case, the Applicant has taken issue with the 1st Respondent for using SGS Limited to collect the samples, insisting that this was an unauthorised authority. This is not the case however as the 1st Respondent delegated its authority to its agent, SGS Limited, appointed under the provisions of **Section 23 of the Energy Act**. SGS visited the Applicant's premises on the 17th June 2015 together with representatives of the 2nd and 3rd Respondents. Upon conducting the requisite tests based on the authority drawn from **Section 24 of the Energy Act**, the 1st Respondent through its agent SGS Limited adjudged that the Applicant was in contravention of the set standards, proceeded to direct the 3rd Respondent to impose stiff penalties and the 4th Respondent to withdraw the Applicant's license.

153. The 2nd Respondent's mandate in the matter in question was to test the samples drawn from the Applicant's premises against clear and well known standards. The samples presented were of Automotive Gas Oil and Premium Motor Spirit drawn from the applicant outlet by a joint inspection team comprising personnel from the 1st, 2nd and 3rd Respondents offices on 17th June 2015. The samples failed to meet specified standards as outlined in the relevant reports. The 2nd Respondent performed its functions strictly within the confines of its mandate. The 2nd Respondent had been granted statutory powers to continuously inspect products in the market for compliance with standards, specifications and quality to protect the public. Further, that the testing of the goods is not only pegged on Kenyan standards but also other standards including international standards. **Section 14(1) of the Standards Act** clearly showed that the 2nd Respondent's inspectors had powers to enter premises, inspect and take samples in respect any process or operation; require production of documents and take copies of the same; require information; seize and detain goods for testing; and seize and detain goods or documents as evidence. After testing, the samples from the Applicant did not meet the standard requirements for Kenya and the 2nd Respondent indicated as much by its Laboratory Analysis Report dated 13th August 2015.

154. On its part, the 3rd Respondent having received instruction from the 1st Respondent, proceeded to issue a seizure notice the effect of which was to immediately halt the sale or distribution of the adulterated petroleum products to the public. This was done in accordance with the provisions of **Section 199(1) of the Customs and Excise Act**, to wit:

> *"An officer or police officer may seize an aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he has reasonable grounds to believe is liable to forfeiture; and any such aircraft, vessel, vehicle, goods, animal or other thing may be seized whether or not a prosecution for an offence under this Act which rendered it liable to forfeiture has been, or will be, taken."*

155. Analysing the sequence of actions undertaken by the Respondents' vis a vis the allegations made by the ex-parte applicant, I fail to see any instances of illegality, unreasonableness and procedural impropriety. It is clear to me that the respective agencies only acted in accordance with the law and did not take into account irrelevant matters in reaching the decision to cancel the Applicant's licence and seize the adulterated fuel.

156. Given the volatile nature of petroleum products and the fact that the preliminary results from the samples obtained by the multi-agency team showed the likelihood of adulteration, a balance had to be achieved between the implications of adulterated products to the general unsuspecting public and safeguarding the rights of the Applicant to a fair hearing. The procedure followed by the Respondents' was reasonable as it saved the public from potential losses while at the same time according the Applicant with an opportunity for recourse. The onus was upon the Applicant, having felt aggrieved by the decision contained in the letter dated 17th June 2015, to seek redress in the manner proved for under the law.

157. By and by, when the chickens come home to roost, the decision on whether or not to grant judicial review reliefs remains an exercise of discretion. The **Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 at page 270** illustrate the point that:

> *"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into*

account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

158. The above principles set out are relevant to the circumstances and facts of this case. I have examined the entire evidence and material as presented by the ex parte applicant and the rejoinder from the respondents. To begin with this is a matter where the court is called upon to exercise discretion in favour of an applicant who is aggrieved by the decision process of a public body or person. The unfortunate thing Judicial Review Adjudication does not go to the merits of the decision. In the instant case I find no sufficient evidence of such nature to persuade me to grant the reliefs pleaded in the application. I am of the considered view that the pith and substance of the application therefore fails both on jurisdiction and on the merits. It therefore stands dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 3RD DAY OF MAY, 2019

R NYAKUNDI

JUDGE

Representation:

Mr. Maina Njuguna for Applicant

Mr. Pius Nyaga for the 3rd Respondent

Ms Mwaniki holding brief for Mr. Kibatia for 1st Respondent – present

Mr. Nyakundi for 2nd Respondent