



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 226 OF 2018

**IN THE MATTER OF: ARTICLE 2(1) & (2), 3(1), 10, 19, 20, 22, 23(1) & (3), 27(1), 35, 40,
46, 47(1), & (2), 48, (50), 159, AND 258 (1) OF THE CONSTITUTION OF KENYA 2010;**

AND

IN THE MATTER OF: THE STANDARDS ACT CAP 496 OF THE LAWS OF KENYA;

AND

IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT, NO. 2 OF 1995 LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 3, 4(1) (2) (3) (A) (B) (D) & (G), 4,

6, 7(1)(A) & (2) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLE 2(1) & (2), 3(1), 27(1), 35, 40, 46, 47, 48 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010;**

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....PETITIONER

AND

KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

MINISTRY OF TRADE.....4TH RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION.....5TH RESPONDENT

INSPECTOR GENERAL.....6TH RESPONDENT

JUDGMENT

(Further to Orders issued herein on 7.3.19)

The Petition

1. The Petition before the Court is dated 18.9.18. The Petitioner is a Limited Liability Company with one of its objects being trading in Sugar in Kenya. The 1st Respondent (KEBS) and other Respondents, are various governmental agencies as explained in the petition empowered to perform various statutory duties including ensuring compliance with various standards established by the Standards Act Cap 496, collection of taxes on behalf of government, the Attorney General of the Republic of Kenya, the Ministry of Trade and Directorate of Criminal Investigations with powers to investigate crime within the Republic of Kenya.

2. The Petitioner alleges that the Respondents jointly and severally, in the process of performing their various statutory duties, have violated the Constitution and statutory rights of the Petitioner as identified in in the petition.

3. The Petitioner plants, manufactures and trades in sugar within the Republic of Kenya. The Petitioner states that it does not engage in importation of sugar and to date had never imported any sugar from any foreign country in furtherance of its trading activities and it does not have a Sugar Import Permit. At all material times its sugar has been approved as being compliant with KEBS Standard KS EAS 749:2010. On 16.11.18, and in March, 2018, the Petitioner states that KEBS took a random sample of the Petitioner's sugar and certified the sugar as compliant with KEBS standards. This means that the sugar was inspected on two different occasions by KEBS itself and found to be compliant with KEBS standard KS EAS 749:2010. The Petitioner states that in fact on 26th February 2018, KEBS gave the Petitioner Standardization Permit to deal in Unifresh Sugar. The Petitioner further states that it has at all material times paid all the requisite taxes to the Kenya Revenue Authority. However, on 25.6.18, a multi-agency team (comprising of KRA, KEBS and Directorate of Criminal Investigations) without any written or oral notice whatsoever and in violation of its right under Article 47 of the Constitution and without any reason whatsoever purported to raid the Petitioner's Plant situated at Ramisi, Kwale County and proceeded to seal off the factory warehouses and stores and also impounded and sealed off lorries that has been loaded with sugar. The multi-agency team then proceeded to sample the sugar in the warehouses. This was allegedly done in violation of **Section 12(1) of the Standards Act** which provides that: **'Every person to whom a permit has been issued under this Act shall, if so requested by the Council in writing, furnish within such period as may be specified such samples of any commodity to which the permit relates and all such information in regard to that commodity or its manufacture, production, processing or treatment as may be specified in the request.'** The Petitioner states that no written notice of intention to sample was issued in violation of **Section 12 of the Standards Act Cap 496**. The Petitioner avers further that the sampling was done in total violation of **Regulation 10(1) (c) and (d) of the EAS 749:2010** which provides in summary that the sampling process should ensure that: **The sampling instruments are clean and dry when used; the container samples should be sterilized; precaution should be taken to protect the samples against adventitious contamination and that the samples shall be placed in clean, dry and moisture proof containers.** The Petitioner states that in this case although the sugar was being sampled for microbiological purposes, it was sampled by hand and not in sterilized containers.

4. The Petitioner avers that the multi-agency team through KRA then proceeded to seal off the Petitioner's factory, warehouses and stores without issuing any seizure notices and went completely silent thereafter. No information whatsoever was offered to the Petitioner in violation of its right to Article 35 of the Constitution. The Petitioner states that this was just but the beginning of long suffering for the Petitioner's business. The Petitioner then took the following steps:

- On **2.7.18** the Petitioner wrote to the Sugar Directorate, its regulator, complaining about the un-procedural closure of its factory and warehouse beseeching the Sugar Directorate to intervene. The letter did not elicit any response whatsoever.
- On **5.7.18** the Petitioner wrote another letter to the DCI complaining about the un-procedural closure of its factory and warehouses and the negative effects it had on its business but the letter did not elicit any response.
- On **18.7.18** the Petitioner did a press-release to the general public informing the public of the impasse that was continuing but clarifying that it was not importing any sugar as it produced all its sugar locally.
- On **30.7.18** the Petitioner wrote yet another letter to the members of the multi-agency team complaining about the un-procedural closing down of its factory and warehouse. The letter did not elicit any response from the government yet again.
- On **1.8.18** the multi-agency team called directors of the Petitioner for a consultative meeting at the office of the Deputy Head of Public Service Wanyama Musiambo but the Petitioner was merely asked to wait for the KEBS results.
- On **2.8.18**, just a day after the meeting with the multi-agency team, the KEBS came up with alleged results showing that all the Petitioner's sugar had passed all the parameters save for one. The Petitioner contests the alleged results as the sampling was not done in accordance with the general requirements for sampling. The Petitioner avers that KEBS itself had conducted two tests in March 2018 and November 2017 of the same sugar and certified it as fit in accordance with the standards.
- On **6.8.18** the Petitioner therefore wrote a letter to KEBS requesting for re-sampling of the sugar as the initial one was not conducted in accordance with the general conditions for sampling. This request for re-sampling was not respondent to.
- On **17.8.18** the Petitioner wrote another letter to the Deputy Head of Public Service complaining about the illegal seizure of its factory and warehouses and the impact on its business and operations including the sending on compulsory leave of all its employees. This letter did not elicit any responses as well.
- On **7.9.18** the Petitioner wrote yet another letter to KEBS and DCI requesting for re-sampling of the sugar. The letter did not elicit any response. The Petitioner states that it's Directors then immediately went to KEBS only to be slapped with an alleged Laboratory Report that claimed the sampled sugar had higher levels of **Total Viable Count** than allowed which results were different results from the two initial results conducted by KEBS itself on the same sugar. The Petitioner is aggrieved by the contents of this alleged Report dated 2nd August 2018 and avers that there is no way that the same KEBS can have different results over the same sugar. The Petitioner believes that this is nothing short of malice, intimidation and witch hunt as it is not aware what sugar was allegedly sampled and tested by the KEBS to frustrate its trading activities in violation of its consumer and economic rights enshrined under Article 46 of the Constitution.

5. The Petitioner avers that it has since been the recipient of several threats, acts of intimidation and abuse by agents of KEBS of looming destruction of the seized sugar. The Petitioner referred the court to **Section 14A (1) (a)-(b) of the Standards Act Cap 496** which empowers KEBS to destroy goods detained by itself if one: *'testing indicates that the goods do not meet the relevant Kenya Standard; and two, it is reasonably necessary to destroy the goods.*

6. Section 14A (1) (3) of the Standards Act Cap 496 provides that KEBS must give a party at least 14 days' notice if it wants to destroy such party's goods. The Petitioner is reasonably apprehensive that the 1st Respondent wants to abuse its powers under Section 14A (1) of the Standards Act by ordering for destruction of its sugar in violation of its right to property under Article 40 of the Constitution. The Petitioner believes that the consignment in its custody meets the required standards for brown sugar and is agreeable to having the sugar sampled afresh and tested in the presence of both KEBS and an independent expert of its own choice as reflected by the test it ordered from SGC Kenya Limited Laboratory Services. The Petitioner avers that it is just but a victim of the Respondents' need to prove that they are working due to the recent negative publicity they have received as its sugar consignment meets all the required standards.

7. The Petitioner avers that the aforesaid conduct and action of the Respondents jointly and severally have occasioned blatant violation of Petitioner's rights under the Constitution of the Republic of Kenya, including the:

- Right to property (article 40)
- Consumer and Economic Rights (Article 46)
- Right to fair administrative action (Article 47)
- Right to information (Article 35)

8. As a result of the foregoing alleged violations the Petitioner alleges that it has suffered and continues to suffer violation of its rights and harm to its otherwise unblemished reputation as a successful, honest and dependable business enterprise. The Petitioner avers that all the pre-qualified suppliers and contracts entered into by the Petitioner have been breached and thereby irredeemably tarnishing the Petitioner's business brand and reputation. Consequently, the Petitioner prays that this Court be pleased to issue the declarations, orders, directions and any other effective remedy that it may deem fit as to protect the Petitioner against the continued violations of its fundamental rights and freedoms.

9. The Petitioner prays for the following orders:

(a) A declaration that the Respondents herein have violated Articles 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 35, 27, 40, 48 & 50, of the Constitution of Kenya, 2010;

(b) A declaration declaring the seizures of the Petitioner's factory, warehouse and stores on 25th June 2018 by Respondents herein illegal and unconstitutional.

(c) A mandatory injunction compelling the respondents to immediately from the date of the judgment to lift the seizures and allow the Petitioner to access its Factory, warehouse and stores.

(d) The Honourable Court be pleased to issue mandatory orders compelling the 1st Respondent to compel the first respondent to renew the Standardization permit with respect to Kwale Sugar.

(e) An order of permanent injunction restraining the Respondents and any other agent or servant of the Kenya Bureau of Statistics acting under the authority of the Bureau from purporting to seize the Petitioner's sugar consignment stored in its warehouse.

(f) A Judicial Review Order of Certiorari to bring into this Honourable Court and quash the 1st Respondent's illegal laboratory report dated 2nd August 2018.

(g) Compensation for losses suffered as a result of the indefinite seizures of the Petitioner's sugar consignment by the Respondents.

(h) Costs of the Petition

(i) Any other relief that is deemed fit by the Honourable Court.

10. The petition is supported by affidavit of **Benson Nzuka** sworn on 18.9.18; Affidavit sworn by the same person on 4.10.18 and a Further Affidavit sworn on 11.10.18.

The 1st Respondent's Case

11. The Petition is opposed by the Respondents.

12. The 1st Respondent opposed the petition through its Replying Affidavit sworn by Bernard M. Nguyo on 15.10.18.

13. The 1st Respondent's case is that the Petition filed herewith is a non-starter and ill-conceived and ought to be struck out in limine. That

1st Respondent states that is a statutory body established under Section 3 of the Standards Act, Cap 496, with the mandate to provide standardization and conformity assessment with relevant Kenyan Standards, and Section 4 of the Standardization Act, empowers it:

“ ...

b) to make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus, for the determination of their degree of accuracy by comparison with the standards approved by the Minister on the recommendation of Council [the National Standards Council] and for the issue of certificates in regard thereto;

c) to make arrangements or provide facilities for the examination and testing of commodities and any material or substance from or with which and the manner in commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated;

... .

i) to provide for the testing at the request of the Minister, and on behalf of the government of locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of this Act [Cap 496] or any other law dealing with standards of quality or description.

14. In execution of this mandate the 1st Respondent is part of a Multi-Agency Team (hereinafter referred to as the Agency) comprising the Directorate of Criminal Investigations, Kenya Revenue Authority, Anti-Counterfeit Agency and National Police Service. The agency has been tasked to investigate cases involving illicit trade following the influx of contraband, counterfeit and or substandard goods into the country which pose health, safety and environmental risks to member of the public who come into contact with these products on a daily basis. The 1st Respondent states that on 14th March 2018 the 1st Respondent took a sample of “Kwale” brand of brown sugar from the Petitioner’s factory as per the sample collection form number SL No. 89968 (Annexed to the Replying Affidavit and marked “**BMN 1**”). The samples KEBS reference number BS201810208 did not comply with KS EAS 749:2010 as per the Laboratory Test Reports (Annexed marked “**BMN 2**”)

15. The 1st Respondent agrees that indeed the Petitioner was awarded a permit (permit number 32327) for its “**UNI FRESH**” brand of brown sugar on 12.2.18 valid until 11.2.19, (Annexure “**BMN 3**”). However, the permit for the “Kwale” brand of brown sugar (Permit Number 24973) expired on 21.3.18 and has not been renewed due to the failure of the sample taken on 14.3.18 (Annexure “**BMN 4**”). The 1st Respondent states that sampling was done on 26.6.18 as per the Sample Collection from number 96474 and witnessed by the Petitioner’s General Manager Ms. P. Ogada (Annexure “**BMN 5**”). That on 26th June 2018, KEBS sampled “Kwale brand of brown sugar from the Petitioner’s factory warehouse using sterile containers stored in the Petitioner’s own branded new bags provided by them and sealed in their presence contrary to what has been alleged in the petition. The 1st Respondent states that the sample taken on 26.6.18 (KEBS sample reference number BS201821856) did not comply with the standard KS EAS 749:2010 with respect to the **Total Viable Count** which is a measure of the total bacterial load in a product as per the laboratory test report (annexure “**BMN 6**”). The 1st Respondent received a request from the Petitioner to resample/retest via a letter dated 7.9.18. The 1st Respondent responded on 11.9.18 vide letter referenced (annexure “**BMN 7**”) and resampling from the Petitioner’s warehouse was done on 14.9.18 in the presence of the petitioner’s Head of Factory Operations Mr. R. Murali as per the sample collection from number SL.No. 95792 (Annexure “**BMN 8**”). The 1st Respondent states that the samples taken in November 2017, March 2018, and June 2018 were from different production batches and not of the same sugar as alleged.

16. The 1st Respondent states that the subject matter of this petition is a multiagency operation spearheaded by the DCI and any decision/action taken will take into account the requisite mandates and statutory obligations of the said Agencies. The 1st Respondent avers that this Court’s wide discretion to do justice to all Parties, ought not to be unduly invoked to occasion a grave injustice not just to the 1st Respondent in the exercise of its statutory duty, but also against the various consumers of the said products which would otherwise be occasioned should the Court grant the Orders as sought by the Petitioner.

The 2nd Respondent’s Case

17. The 2nd Respondent oppose the petition vide grounds of opposition dated 11.10.18. The 2nd Respondent’s case is that it is authorized under the Kenya Revenue Authority Act, 1995 to administer Revenue Acts of Parliament and regulations listed under the Kenya Revenue Authority Act 1995; The 2nd Respondent states that the Standards Act [Cap 496] is not amongst the Acts administered by the 2nd Respondent as provided under the Kenya Revenue Authority Act, 1995; The 2nd Respondent was part of the multiagency that took part in the activities at the Petitioner’s Premises. However its role was limited to establishing the tax and quality status of imported sugar for purpose of tariff classification as provided under the East Africa Community Customs Management Act, 2004; The 2nd Respondent established that the Petitioner’s sugar was not imported sugar and at that point its individual mandate ended and the seizure is currently at the behest of the 1st Respondent who is mandated under the law to promote specification of commodities, and to provide for the standardization of the commodities under the Standards Act [Cap 496]. The 2nd Respondent states that all the agencies that makes up the multiagency carry out their functions independently and it does not make the mandate of one overlap into the obligations and duties of another, and that the 2nd Respondent has nothing to do with standard checks which are currently being undertaken by the 1st Respondent. However, the 2nd Respondent states that it is also not in dispute that the Petitioner has sought from the 1st Respondent to conduct a further retest which is currently being undertaken. The 2nd Respondent avers that sugar is a perishable product and tests have to be done continuously to establish whether it is still viable for consumption. The fact that previous test on the consignment or similar consignment have been conducted does not mean that no further test can be conducted which may give varying results. The 2nd Respondent states that as late as 18.9.18 the samples of the sugar was collected for retesting and the results are yet to be received. Any release of substandard sugar to public will endanger the life of many and contravene the Constitutional rights and guarantees which the Respondents have been mandated to uphold. The 2nd Respondent

states that the suit herein is premature and made in apprehension of the result of the test which were to be conducted from the same date the suit herein is dated. The 2nd Respondent states it should be struck out of the petition herein as the activities forming part of the suit has nothing to do with its mandate.

The 3rd, 4th and 5th Respondents' Case

18. The 3rd, 4th and 5th Respondents oppose the petition vide Replying Affidavit sworn by **Joseph G. Ng'ang'a** on 4th October 2018. Mr. Ng'ang'a depones that he is the Regional Criminal Investigations Officer, Coast Region. His affidavit represents the case for the 1st – 5th Respondents. The Directorate of Criminal Investigation (hereinafter referred to as the DCI) is part of the Multi-Agency Team comprising the Kenya Revenue Authority, Kenya Bureau of Standards, Anti-Counterfeit Agency, National Police Service and the DCI. In response to the petition, the agency has been tasked to investigate cases involving contraband goods within the Coast Region following the influx of contraband and or substandard goods into the country which are a health risk to the members of the public. The office of the 1st Respondent has been established by the Government to ensure that all products in Kenya meet the requirements of Kenya Standards or any other standards approved by 1st Respondent. The investigation is a country wide operation and is headed by Director of Criminal Investigation. On 26.6.18 the Multi-Agency Team Coast Region visited the premises of Kwale International Sugar Company Limited, the Petitioner herein, located in Kwale County. They obtained samples from the consignments that were packaged as sugar in the Petitioner's warehouse at their Kwale Plant. The samples were marked and forwarded to KEBS headquarters Nairobi for laboratory tests. The warehouse was sealed using Kenya Revenue Authority seals and Police officers placed on guard. The said police officers have remained on guard since the samples were taken. The Kenya Bureau of Standards wrote a letter Ref. No. KEBS/COR/MS/8 VOL.2 (26) dated 2.8.18 enclosing a copy of the test results for sugar sample No. Bs201821856. (**Annexure JGN1**). The aforementioned letter was copied to the Petitioner. The Petitioner wrote several letters to Kenya Bureau of Standards and copied to KRA and DCI appealing for their warehouse to be opened to enable them continue with operations. The DCI received a request from the Petitioner to re-sample the sugar (**Annexure JGN2**). The request was received, deliberated and granted. The decision to conduct the re-sampling was conveyed to all agencies involved in the sugar investigations and to the Petitioner. On 14.9.18 the Multi Agency Comprising of KEBS, DCI and KRA went to Kwale Sugar and a re-sampling exercise was done. On 18.9.18 the samples were forwarded to KEBS headquarters Nairobi under the escort of Mr. Washington Njiru, CP and the samples received on the same date. The Agency is now awaiting the test results from KEBS of the samples delivered on 18.9.18.

19. The Agency's case is that the release of substandard sugar to the public will contravene the provisions of Article 43 (1) (c) of the Constitution of Kenya which protects every person's right to adequate food of acceptable quality. The Respondent avers that this suit has been filed in apprehension of the expected results which are due any time now. That it is prudent to await the outcome of the KEBS results then prosecute this petition. The Multi Agency Team has acted with all fairness and all necessary disclosure and there is no intention to punish the Petitioner.

Submissions

20. Parties filed submissions which were highlighted in Court on the 9.4.19. **Professor Ojienda** learned Senior Counsel for the Petitioner relied on his submissions filed in Court on 16.10.18 and on the 20.3.19 and submitted that the Respondents unlawfully seized the Petitioner's sugar and closed down its warehouse without any notice when they were well aware that under **Section 14** of the Standards Act a Notice was to be given before any seizure and closure. Counsel submitted that the Respondents ought to compensate the Petitioner for the loss of business it was subjected to for 5 months and 19 days, and further that the Respondents should compensate the Petitioner for the value of 8995 bags of sugar at the rates set out in the submission of Kshs. 6,600/=per 50 kg bag hence a total of Kshs. 196,530,900/= and for the illegal seizure and detention of 93,356 bags from 25th June 2018 -19.11.18 when the said sugar were released because during that time both the Respondents' seals remained in place and the Petitioner's business could not continue because of the illegal closure which was in violation of Article 40 of the Constitution. On compensation Counsel relied on the case of **Keroche breweries limited & 6 others vs. Attorney general & 10 others [2016] eKLR** where it was held that there can never be public interest in the breach of the law.

22. On the laboratory report dated 2.8.18, **Prof. Ojienda** submitted the said report ought to be quashed since the sampling was done in violation of regulation 10(1) (c) and (d) of the EAS 749;2010 and the 1st Respondents own results released via a cover letter dated 20.10.18 shows the Petitioner's sugar was compliant with the requisite standards. Further, he stated that there must be a rational ground why the 1st Respondent's above mentioned results differed. Failure to issue that rational ground makes the results dated 2.8.18 illegitimate and only available for quashing.

22. **Prof. Ojienda** submitted that the Respondents should be held accountable for the illegal process they have subjected the Petitioner by being condemned to pay the Petitioner a sum of Kshs. **4,000,000,000/=**

23. **Prof. Ojienda** further submitted that the second tests in relation to the 93,000 bags of sugar showed that indeed the Petitioner was compliant and that the actions by the Respondents were in bad faith and for that reason, Counsel prayed that the petition be allowed with costs.

1st Respondent's submission

24. **Ms. Owesi**, learned Counsel for the 1st Respondent relied on their submission filed in Court on the **9th April 2019** and submitted that they still maintained that this Court lacks jurisdiction to revisit the matter after the orders given on 7.3.19.

25. On the issue of seizure, counsel submitted that the same was for public good and was procedural and lawful as the Act empowers its inspectors to enter premises, seize and detain goods for purposes of sampling and all that was required of them is to identify themselves to the person in charge of the Petitioner's premises. In this case, the seized sugar contained excess bacteria beyond the required limit as the 8995 bags of sugar had been tested twice and failed to meet the required standards.

26. Further, Counsel submitted that the 1st Respondent could not be liable for damages as it was acting within its statutory mandate. Counsel relied on the decision in **Elizabeth Njeri vs. Housing Finance Company of Kenya Limited [2006] eKLR** where it was held that a court would only prevent a party from exercising its statutory right of action if it is exercised in an oppressive manner.

27. **Ms. Owesi** submitted that in any event damages were neither pleaded nor proved in the petition and cannot just be brought up in submissions, and that parties are bound by their pleadings. Counsel referred the court to Kenya **Tourists Development Corporation vs. Sundowner Lodge Limited [2018]** where it was held that damages cannot be awarded where there is no quantum, justification, and proof by way of evidence.

2nd Respondents Submissions

28. **Mr. Ochieng** learned Counsel for 2nd Respondent relied on their submission filed on the 9.4.18 and adopted the 1st Respondent's submissions on the issue of damages. Counsel further submitted that the Petitioner had sneaked into the submissions 2 contracts "BN 9" a fact which is unprocedural as submissions cannot take the place of evidence.

29. **Mr. Ocheing** submitted that the respondents were exercising a statutory function that they have been authorized to do and that the sugar that was found to have met the set standard was released as ordered by the Court. Counsel further submitted that Section 227 of the EACCMA 2004 absolves the 2nd Respondent from any damages or costs when reasonable grounds exist and it is shown that it acted in good faith as it did in this case.

3rd Respondents Submissions

31. **Ms. Waswa**, learned counsel for the 3, 4 and 5th Respondent relied on the submissions by the 1st and 2nd Respondent.

32. In response to the Respondents submission, **Mr. Awuor**, learned Counsel for the Petitioner relied on Rule 3 of Mutunga Rules and submitted that the said rules grant this Court discretion to grant any appropriate reliefs including damages whether or not the same is pleaded.

The Determination

33. The Petitioner avers that it conducted its own independent testing the result of which were furnished to this Court via its supplementary Affidavit dated 8th October 2018. The two reports are dated 20th September 2018 and they give the Petitioner sugar a clean bill of health.

34. On the 25th October 2018 after being furnished with the results of the re-sampled sugar belonging to the Petitioner vide letter dated 18th October 2018, this Court by the consent of the parties ordered the release of the compliant sugar as per the resampling results by the 1st Respondent. The number of bags of sugar released were a total of **93,359 bags** and only a total of 8,995/= bags remained which were found to have been contaminated. Vide Judgment delivered on the 7th March 2019 this Court required more information about the sugar the subject property herein, as well as the operational status of the Petitioner's factory. The Court observed as follows:

(i) The process of sugar testing for quality is still underway, and parties are still awaiting the final results of the tests, whose samples were drawn on 18th September, 2018.

(ii) The Petitioner protests the integrity of the samples which were taken for testing leading to the results dated 2nd August, 2018.

(iii) The issue before the court is purely about allegations that the Petitioner's sugar is substandard and unfit for human consumption and should be destroyed. This is an issue which can be resolved by doing tests whose sampling meets integrity.

(iv) Sugar is a perishable commodity. This means that even if testing had been previously done, the same can be re-done at the time of releasing the same for public consumption. This re-testing would however not prejudice the right of a party who would be vindicated by an earlier testing if the later testing is performed under conditions which may have deteriorated.

(v) Because the court is dealing with a perishable food product, the court has the authority to order re-testing at any time before the release of the products to the public. This can be done notwithstanding that the goods had earlier passed the test. This re-testing is necessary because the goods which may have earlier passed the test are still locked in a warehouse, and may have changed in state during that period.

35. This Court went ahead and directed as follows:

(a) The court hereby directs and orders a fresh testing of the sugar the subject matter of this suit.

(b) The said testing shall be carried out by the 1st Respondent (KEBS) and one or two other independent testing agencies chosen by the Petitioner.

(c) The sampling for testing must strictly comply with the law and utmost integrity must be observed in the process by all

the parties.

(d) The sampling process shall be supervised by the Deputy Registrar of this court.

(e) The sampling will be done on 11th March, 2019.

(f) It has been alleged by the Petitioner that the Respondent closed down the Petitioner's factory which has not been operational since June, 2018. This court reserves the right to visit the Petitioner's factory to verify those allegations. The said visit will be undertaken today the 7th of March, 2019 at 4.00 p.m. so that no party is able to interfere with the situation on the ground.

36. Contrary to the allegations by the Petitioner that it had been closed down by the orders of the Respondent, when the Court visited the factory it established that the factory had been operating since the 13.11.18 when the Respondents had released the sugar which was found to be compliant and that the factory was not operating due to usual maintenance and not by reasons advanced by the Petitioner

37. On the 14.3.19, this Court suspended the 1st Respondent's Notice of Motion dated 9.3.19 together with the order for the re-testing and re-sampling of the remaining 8995 bags of sugar that were found to have been contaminated pending further orders and gave a date for highlighting of supplementary submissions on the 26.3.19.

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

(1) Whether the Respondents acted procedurally and on reasonable grounds.

(2) Whether damages are payable

39. The Petitioner's case is that the failure by the respondents to release its goods amounted to a violation of its rights under Article 47. The said Articles stipulate as follows:

Article 47(1) and (2) of the Constitution

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

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

40. Article 50(1) of the constitution

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

41. The Respondent's position on the other hand, was that it complied with other provisions of Section 14 of the Act regarding the request for samples of the imported goods for purposes of analysis to confirm if the said goods were suitable for consumption, and that the results of the analysis showed that they did not pass the suitability test. The said Section 14 stipulates as follows: -

1) "An inspector may order the destruction of goods detained under Section 14(1) if the following conditions are satisfied:

a) Testing indicates that the goods do not meet the relevant Kenya Standard: and

b) It is reasonably necessary to destroy the goods because the goods are in a dangerous state of injurious to the health of human beings, animals or plants.

2) In an order under subsection (1) the inspector may require the owner of the goods to pay the costs of the destruction of the goods including the costs of transporting and storing the goods before destruction.

3) At least fourteen days' notice shall be given of an order under subsection (1) either by giving the owner of the goods a written notice or by publishing a written notice in the gazette.

4) Any person who is aggrieved by an order under subsection (1) may, within fourteen days of the notice of the order under Subsection (3), appeal in writing to the Tribunal.

5) An order under subsection (1) shall not be carried out until the time for appealing to the Tribunal has expired and, if the order is appealed, the order shall not be carried out until the Tribunal has dealt with the appeal.

6) If the goods in respect of which an order under subsection (1) is made have not been entered into Kenya within the meaning of

the Customs Exercise Act the goods may be exported and, if the owner of the goods gives an undertaking to export the goods, the order shall not be carried out until at least thirty days after the notice of the order under subsection (3).

7) No inspector shall be personally liable for making an order under subsection (1) in good faith.

8) No person shall be personally liable for carrying out an order under subsection (1) in good faith.

9) For greater certainty, subsections (7) and (8) do not relieve the Bureau of any liability it may have with respect to an order that is made or carried out otherwise than in accordance with this section.

10) For the purposes of carrying out his duties under the Act, every inspector shall have the powers, rights and privileges specified in Section 14 and the protection of a police officer.

11) An inspector who-

a) Directly or indirectly solicit for, or receives in connection with any of his duties, a payment or other reward whatsoever, whether pecuniary or otherwise, or a promise or security for any such payment or reward not being a payment or reward which he is lawfully entitled to claim;

b) Enters into any agreement to do, abstain from doing, permit, conceal or connive at any act whereby the Bureau is or may be defrauded, or which is contrary to the provisions of this Act or the proper execution of the duty of that officer; or

c) Discloses, except for the purposes of this Act or when required to do so as a witness in a court of law or with the approval of the Director, information acquired by him in the performance of his duties relating to a person, firm or business of any kind; or

d) Uses his position to improperly enrich himself or others, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding one million shillings or both and any money, property or reward obtained fraudulently or any property acquired using money obtained fraudulently shall be forfeited to the Government.

12) A person who, with the intention of defrauding the Bureau-

a) Directly or indirectly offers to give an inspector a payment or reward, whether pecuniary or otherwise, or makes a promise or security for any such payment or reward; or

b) Promises or enters into an agreement with an inspector in order to induce him to do, abstain from doing, permit, conceal or connive, at, any act whereby the Bureau may be defrauded, or which is contrary to the provisions of this Act for the proper execution of the duty of that inspector,

Shall be guilty of an offence and liable to imprisonment as prescribed under subsection (11).

42. Ms. Owesi cited **Republic vs. Anti Counterfeit Agency & others ex-parte Omega Chalk Industries Ltd [2015] eKLR**, where it was observed that:

“I agree with the interested party that a reading of the above provisions and taking into account the mischief that these provisions were meant to cure, it would defeat the purpose of the Act to require the person in whose possession suspected counterfeit goods are to be heard before the power of seizure is exercised.”

43. Further, in **Selvarajan vs. Race Relations Board [1976] 1 All ER 12** at page 19 of the Judgement Lord Denning MR, with regard to investigative bodies observed thus:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.”

44. The Petitioner contends that the Respondents violated its right to a fair administrative process as guaranteed by Article 47 of the Constitution. The Petitioner asserts that it was never issued with a single notice and/or written request to furnish the 1st Respondent with sample for the purposes of re-testing and resampling in violation of Section 12 of the Standards Act and that its premises were unceremoniously shut down on the 25.6.18 and no written reasons for the Respondent’s actions were given, and neither were they given an

opportunity to respond to any accusations. The Respondents' reply is that the Applicant will be accorded an opportunity to defend itself after the results of the tests on the samples collected come out.

45. The already reproduced Section 14(1) of the Act clearly shows that the Respondent's inspectors have powers to enter premises, inspect and take samples in respect of 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. However, as was pointed out by the Petitioner, in order to exercise the power to seize and detain goods for purpose of testing an inspector should have **"reasonable cause to believe that an offence has been committed."**

46. The reasonable belief must therefore be founded in the law. It infers good faith, rationality and fairness, and cannot be based on mere curiosity or speculation.

47. In the Indian case of **Ganga Saran & Sons v. I.T. officer, AIR 1981 SC 1363**, the expression reasonable belief was held to mean **"the existence of rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and the law could reasonably entertain the belief."**

48. It is common ground that the Petitioner's operations were fully licensed by the 1st Respondent and the petitioner's licence to produce its brand of brown sugar had expired on the 12th March 2018 and had not been renewed due to the failure of their sample to meet the set standards. The grant of a licence however, did not give rise to an expectation that there would be no impromptu tests on its products during the life of the licences. Under **Section 14** of the Act, the appellant can knock at their premises any time for inspection on compliance with the law, as long as there is **"reasonable cause"** or **"reasonable belief"** that an offence is being committed.

49. The Petitioner therefore had a legitimate expectation that it would be allowed to continue operating as long as it manufactured products that met the standards prescribed by the 1st Respondent. The 1st Respondent's inspectors could only act where it had information or doubts about the quality of the Applicant's products. The reasonable thing to do would have been to collect samples and allow operations to continue as tests were awaited but this was not the case since the closure of the Petitioner's stores crippled its operations from the 25th June to the 13th November 2018 when the Petitioner's operations resumed.

50. Consequently, in this case, this Court is satisfied that the Petitioner has demonstrated that its factory was closed without the due process of the law and without disclosure of the written reasons for the decision. The Petitioner was also not given an opportunity to be heard. The Petitioner immediately after the raid on its premises was entitled to know why a seizure and detention order whose effect was to close its business had been issued. That is not to say that the Respondent's inspectors should not have taken samples. They were allowed to do so by the law but the drastic step of seizing and detaining all the goods in the factory by sealing off all the stores and placing their personnel on guard technically amounted to "withdrawing" the Petitioner's licences without informing the Petitioner of the accusations against it and without giving it an opportunity to respond to the allegations. Consequently, this Court finds and holds that the 1st Respondent violated the Petitioner rights guaranteed under Article 47 of the Constitution.

51. The Court of Appeal in **Kenya Bureau of Standards vs. Powerex Lubricants Limited [2018] eKLR** held as follows:

"In our view, without indicating the basis of the belief that an offence had been committed, and why that belief existed, there is no 'reason' that could be attributed to that action. In our view, no basis was laid to support the belief let alone showing that it was 'reasonable.' A decision that was going to paralyse the respondent's operations ought to have been explained to the respondents..."

That conduct cannot, in our view be said to be rational or fair. It cannot be reasonable. The appellant cannot argue that its officers do not have a duty to explain their actions. In our view, the Standards Act may be silent on such a requirement but the test of reasonableness within the context of Section 14(1) of the Standards Act behoves the inspectors to explain their reason for believing that an offence is likely to be committed. There cannot be, in our view, any legal regime that can be immunised from observing the peremptory rules of natural justice. Where rules of natural justice have been denied; where an action is bereft of reasonableness or rationality, then clearly, the case becomes a good candidate for judicial review orders. This was the case here."

52. An argument that the impugned decisions were made in public interest cannot, in the light of blatant violation of the constitutional and statutory provisions, hold. See **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya [2014] eKLR**:

"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi-judicial decision."

Whether damages are payable

53. The Petitioner prays for Compensation for losses suffered as a result of the indefinite seizures of the Petitioner's sugar consignment by the Respondents. The Respondents on the issue of damages submitted that damages were never pleaded in the Petition nor proved by the Petitioner and an attempt to prove damages was done belatedly by the Petitioner via sneaking in 2 contracts "BN 9" in its written submissions which action was not procedural as submissions cannot take the place of evidence. A legion of authorities were furnished to this Court in

support of that position.

54. The Court of Appeal in *Kimakia Co-Operative Society vs. Green Hotel [1988] KLR 242*, held *inter-a-lia* that:

“where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and he did not he cannot have more than nominal damages.”

55. It is the finding of this Court that since the Petitioner did not specifically plead loss to be compensated, then it cannot have more than nominal damages. There is, however, the issue of 8,995 bags of sugar which this Court had directed to be re-tested for compliance. The 1st Respondent did not comply with that direction. That direction was the only way through which the quality of the sugar could be determined. The 1st Respondent had only two options: either to re-test the said sugar to establish their quality or compliance, or to give the Petitioner its value in money terms. It must also be observed that it is now over six (6) months since the order of re-testing of the said 8,995 bags of sugar was ordered by this Court. This Court had noted that sugar is a perishable product, and any delay in re-testing the same can itself cause it to fail the test. It is now not arguable, and this Court finds and holds that any re-testing done now would not be fair or procedural to the interest of the Petitioner, and that the 1st Respondent must be condemned for any such loss. This Court finds and holds that the Petitioner is entitled to be compensated for the value of the said 8,995 bags of sugar in money terms by the 1st Respondent.

56. Having found that the Petitioner’s rights under Article 47 of the Constitution were violated, the issue now is whether the Petitioner is entitled to compensation for damages for those violations. This Court is empowered by Article 23 (3) of the Constitution to grant “appropriate reliefs” in any proceedings seeking to enforce fundamental rights and freedoms such as this one. The most precise definition “appropriate relief” is the one given by the South African Constitutional Court in *Minister of Health & Others vs Treatment Action Campaign & Others (2002) 5 LRC 216* at page 249 thus:-

“...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if need be to achieve this goal.”

57. The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in *Doucet-Boudreau vs. Nova Scotia (Minister of Education)*, 2003 SCC 62 to include, a remedy that will:

(1) Meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.

58. The main purpose of a constitutional remedy is not to be compensatory or punitive, but is to vindicate the rights violated and to prevent or deter any future infringements. In the present case, the Petitioner did not quantify the amount payable to it in damages for the violation of his constitutional rights in its Petition but did the same in its submissions. I am however of the view that an award in the sum of Kshs. 8 million will be adequate compensation for the said violations that resulted to its premises being closed down arbitrarily from the 25.6.18 to 13.11.18. This sum shall also account for the loss suffered during the detention of the 93,359 bags of sugar which was later found to be compliant by the 1st Respondent.

59. This Court is satisfied that the blame in this petition must fall solely on the 1st Respondent. The 2nd Respondent has properly done its statutory duty and cannot be blamed for the shortcomings of the 1st Respondent, while the 5th and 6th Respondents were also carrying out their statutory mandate pursuant to the directions by the 1st Respondent. It is worth the mention in this Judgment that the 1st Respondent, Kenya Bureau of Standards is a body with honoured and hallowed responsibility of protecting the citizens of this country from consumption of substandard goods and products. This is not an easy job to do especially in situations where unscrupulous merchants frequently conspire on how to beat quality supervision mandate of the 1st Respondent. However, the 1st Respondent has no shortcut in carrying out its duties. The Standards Act lays down clear procedures and strictures within which the 1st Respondent must operate. It cannot, like in the matter before this Court, set out in a fishing expedition to find fault. It must always operate on the basis of “a reasonable cause”. The 1st Respondent must always act independently and within the law. The experience in this petition reveals that the 1st Respondent neither acted independently nor within the law.

60. In view of my findings and conclusion in this matter, I find and hold that the following are the appropriate reliefs in this case. I therefore make the following orders:

(a) A declaration that the Respondents herein have violated Articles 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 35, 27, 40, 48 & 50, of the Constitution of Kenya, 2010;

(b) An order declaring the seizures of the Petitioner’s factory, warehouses and stores on 25th June 2018 by Respondents herein

illegal and unconstitutional.

(c) A mandatory injunction compelling the respondents to immediately from the date of the judgment to lift the seizures and allow the Petitioner to access its Factory, warehouse and stores.

(d) Mandatory orders compelling the 1st Respondent to renew the Standardization permit with respect to Kwale Sugar.

(e) An order of permanent injunction restraining the Respondents and any other agent or servant of the Kenya Bureau of Statistics acting under the authority of the Bureau from purporting to seize the Petitioner's sugar consignment stored in its warehouse.

(g) Kshs. 10,000,000/= compensation for losses suffered as a result of the seizures of the Petitioner's sugar consignment and closure of its factory by the Respondents between 25.6.18 to 13.11.18.

(h) Compensation to the Petitioner for the 8995 bags of sugar which the 1st Respondent refused to re-test in violation of this Court order. The compensation shall be based on the market value of each bag.

(i) Costs of the petition shall be for the Petitioner to be paid by the 1st Respondent

Dated, Signed & Delivered at Mombasa this 7th day of November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Arika holding brief Professor Ojienda for Petitioner

Mr. Wachira Nguyo for Hon. Attorney General

Ms. Mwencha holding brief Ms. Kariuki for 1st Respondent

Mr. Ochieng for 2nd Respondent

Mr. Kaunda Court Assistant