REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 10 OF 2018

FRESHCO INTERNATIONAL LIMITED.....1ST APPLICANT

JAMES GIGHANGA KARANJA.....2ND APPLICANT

VERSUS

KENYA PLANT HEALTH INSPECTORATE

SERVICES (KEPHIS).....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, NAKURU.....3RD RESPONDENT

JUDGMENT

1. After duly obtaining the leave of the Court, the *Ex Parte* Applicant herein filed a Notice of Motion dated 22/05/2018 seeking the following prayers:

a) An Order of Certiorari to remove to this Court and to quash the entire Criminal Case and the entire proceedings in Nakuru Chief Magistrate's Court Criminal Case No. 900 of 2018, Republic Vs James Gichanga Karanja.

b) An Order of Prohibition to prohibit the 2nd and 3rd Respondents herein being the Director of Public Prosecutions (DPP) and the Chief Magistrate's Court, Nakuru, from prosecuting, hearing trying or taking any further proceedings whatsoever in the said case Nakuru Chief Magistrate's Court Criminal Case No. 900 of 2018, Republic Vs James Gichanga Karanja.

c) An Order of Certiorari to remove to this Court and to quash the entire decision and action of the 1st Respondent Kenya Plant Health Inspectorate Service (KEPHIS) dated 3/4/18 of Revocation of the 1st Applicant Freshco International Limited's Seed Merchant License.

d) An Order of Certiorari to remove to this Court and to quash the entire decision and action of the 1st Respondent Kenya Plant Health Inspectorate Service (KEPHIS) dated 20/3/2018 of seizure of the 1st Applicant Freshco International Limited's factory/warehouse premises and the seeds contained therein, at the National Cereals and Produce Board Go-down No. 016 in Industrial Area, Nakuru town.

e) An Order of Prohibition to prohibit the 1st Respondent Kenya Plant Health Inspectorate Serve (KEPHIS) from hampering or interfering with the 1st Applicant Freshco International Limited's access and quiet occupation of, and he carrying on of its business at the said Company's factory/warehouse premises at the National Cereals & Produce Board Go-down No. 016 in Industrial Area, Nakuru town.

f) An Order of exemption, exemption the 1st and/or 2nd Applicants from the obligation to first exhaust any alternative remedies, and in particular from appealing to the Seeds Regulations Committee.

g) A declaration that the 1st, 2nd and 3rd Respondents jointly and/or severally have variously violated, infringed, denied and/or threatened the 1st and 2nd Applicants' constitutional rights and fundamental freedoms as contained in the Bill of Rights. The rights

and freedoms which have been this infringed are, inter alia, right to equal protection and equal benefit of the law, freedom from discrimination, right to the respect and protection of human dignity, freedom and security of the person, freedom of movement, right to privacy, right not to have one's property/possessions searched or seized, right to private property and protection from deprivation thereof. Economic/business rights, right to fair administrative action of access to justice, right of an arrested person, and right to fair hearing.

h) A declaration that the entire decisions and/or actions of the 1st Respondent Kenya Plant Health Inspectorate Served dated 3/4/2018 and 20/3/2018 respectively, of Revocation of the 1st Applicant Freshco International Limited's Seed Merchants License, and of Seizure of the 1st Applicant Freshco International Limited's factory/warehouse premises and the seeds contained therein, were unconstitutional, unlawful, ultra vires, irrational disproportionate in bad faith, and null and void.

i) A declaration that Section 3D(1) of the Seeds and Plant Varieties Act, Chapter 326 Laws of Kenya and Rule 21(1, 2,3, 4, 5) of The Seeds and Plant Varieties (Seeds) Regulations, 2016 are unconstitutional and hence invalid and null ans void.

j) Monetary compensation to the 1st and 2nd Applicant's for the violation, infringement and denial of their constitutional fundamental rights and freedoms.

k) Cos of this suit

l) Interest on (9) and (10) above at court rates

m) Any other or further relief as the Court may deem fit to grant.

2. In brief, the facts giving rise to the suit are as follows. On 20/03/2018, officers from the 1st Respondent, Kenya Plant Health Inspectorate Service (KEPHIS), went to the factory/warehouse of the 1st Applicant ("Freshco") in Nakuru where they seized and impounded some seeds, documents and equipment. They also temporarily shut down the warehouse – until that decision was varied by an order of this Court. The parties disagree on the details of what happened – but KEPHIS maintains that its inspectors were carrying out "usual" inspection when they discovered when they discovered what they call "wanton non-compliance" with the law by the two Applicants. On the other hand, the Applicants see it as a pattern of harassment fueled by individual ill-will towards the 2nd Applicant which is espoused by the Managing Director of KEPHIS.

3. In any event, the goods carried away by the KEPHIS inspectors from the warehouse which were presumably tested and allegedly found to be non-conforming became the basis of a criminal prosecution of the two Applicants by the 2nd Respondent in the 3rd Respondent Court.

4. The Applicants are persuaded that both the criminal prosecution of the Applicants as well as the revocation of the seed merchant licence of the 1st Applicant by the 1st Respondent are irrational acts of impunity by KEPHIS to punish the 2nd Applicant. This suit is an avenue for the Applicants to correct what they see as violations of their rights by KEPHIS which, they complain, have been tolerated by the 2nd and 3rd Respondents. In substance, the Applicants argue that the criminal prosecution is illegal because it was driven by a person other than the DPP; was actuated by ulterior motive; bias; and is otherwise illegal. They also, in essence, argue that the revocation of their licence was un-procedural, irrational and outright illegal. Their prayers are fashioned to address these two substantive prongs of their complaints.

5. After the parties filed exhaustive Affidavits, Replying Affidavit and Further Affidavit, at the direction of the Court, they each filed their Written Submissions. The Applicants, with the leave of the Court, filed Further Written Submissions. I must remark that the submissions are exhaustive in their reach and scope; erudite in their depth; scholarly in poise; and elegant in their expressions. I am grateful to all advocates who appeared before me and filed their submissions for their industry. I do not, however, intend to summarize each party's submission. That usually largely pointless exercise faces the extra hazard of diluting the party's stridently positions in addition to lengthening this decision unnecessarily.

6. The suit raises the following five questions for determination:

a. Is the suit premature for failure to file a grievance, in the first instance, at the Seeds Regulations Committee as provided for under Regulation 5(4) of the Seeds Regulations?

b. Is ***Criminal Case No. 900 of 2018: R v James Karanja***, an abuse of the Criminal Justice Process hence deserving to be quashed by an order of *certiorari* and an order prohibiting their continuance?

c. Is the decision to revoke the 1st Applicant's seed merchant licence illegal or un-procedural hence warranting an order of *certiorari* to quash it?

d. Is the decision by KEPHIS to seize the 1st Applicant's seeds and factory/warehouse illegal or un-procedural thus inviting an order of *certiorari* to quash it?

e. Do the actions of KEPHIS amount to unconstitutional violations of the rights of the Applicants warranting compensation in damages?

7. As is readily obvious, some of these questions are compounded and do not necessarily follow the format suggested by any of the parties. As stated, nonetheless, they traverse the whole scope of the suit. I will answer them in *seriatim*.

a. <u>Is the Suit Premature (or is the Suit De-barred by the Doctrine of Exhaustion of Mechanisms)?</u>

8. In ***Republic v IEBC Ex Parte NASA-Kenya & 6 Others [2017] eKLR***, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants' suit in the following words:

> ***42.*** *This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in* ***Speaker of National Assembly v Karume [1992] KLR 21*** *in the following oft-repeated words:-*
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> *Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.*
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> ***43.*** *While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is* ***Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR****, where the Court of Appeal stated that:-*
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> *It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.*
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> ***45.*** *We have read these cases carefully and considered the salutary decisional rule of law they announce…..*

9. In the present case, against this jurisprudential policy, the Respondents urge the Court to preliminarily dismiss the suit for being un-ripe: it should first, they argue, have been brought before the Seeds Regulation Committee.

10. The Seeds Regulation Committee is established under Rule 5(1) of the Seeds and Plant Varieties (Seeds) Regulations, 2016. Among the roles of the Seeds Regulations Committee under Regulation 5(4)(d) is to "hear and determine appeals by aggrieved persons.)

11. On the other hand, Regulation 25 stipulates that a person aggrieved by a decision of an inspector or analyst may appeal to the Managing Director while a person aggrieved by Service may appeal to the Seeds Regulation Committee.

12. The argument, therefore, is simple: the present suit is premature because it should have been brought, in the first instance, to the Seed Regulation Committee.

13. The Applicants seek to parry this salvo by primarily making four arguments:

> a. First, that the Seeds Regulation Committee is not a lawfully established entity. The argument by the Applicants here is that the Seeds Regulation Committee is established under the Regulations and not in the parent Act of Parliament. They find this establishment to be contrary to the statutory intention and are of the view that this makes it an illegal body or entity. Suffice it to say that I am unpersuaded by this reasoning. There is no legal principle that dispute-resolution bodies must be established in a parent statute for them to be legally effective. Further, establishment of a dispute-resolution body in subsidiary legislation does not go contrary to legislative intention where the statute did not explicitly or indirectly rule out such an entity.
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> b. Second, the Applicants argue that the Seeds Regulation Committee has never been constituted, activated or convened. If true, this would warrant an exemption to the doctrine of exhaustion. I discuss this below.
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> c. Third, it is the Applicants' argument that that the Seeds Regulation Committee would not be an independent and impartial tribunal. The Applicants' theory is that the presence of the Managing Director, who they deem to be the provenance of their problems, in the Seeds Regulation Committee, renders it partial. I note that the Managing Director would merely be one out of nine (or eleven) members of the Committee. In a specific case where such a Managing Director has a conflict of interest or was personally involved in an earlier decision, it would, of course, be against rules of natural justice for the Managing Director to sit and hear a grievance before the Committee. The remedy in such a case, would be to ask such a Managing Director to recuse herself from the Committee hearing. The remedy is not, as the Applicants suggest, to file the matter in a different forum. Therefore, I find that the perception or allegation that the Managing Director was conflicted, alone, would not be sufficient to moot the shield of the doctrine of exhaustion.
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> d. Fourth, the Applicants argue that the Seeds Regulation Committee would not have jurisdiction or mandate in the present matter. The argument here is that the Applicants' complaint go beyond a grievance against the decision by an analyst or KEPHIS; it involves complaints of a breach of the constitutional rights of the Applicants – which require the prerogative writs of certiorari and prohibition to address. The Seeds Regulation Committee, the Applicants argue, would not have the mandate to deal with these aspects of their grievances. I address these below as well.

14. In the ***IEBC Case (Supra)***, the Court, after an analysis of case law, discussed the exemptions to the application of the doctrine of

exhaustion. First, the Court held that the doctrine of exhaustion does not apply where its effect would be to defeat important constitutional values especially when the party seeking to approach the Court has pleaded issues verging on constitutional interpretation. The Court explained this exception in the following words:

> ***46.*** *As the Court of Appeal acknowledged in the* ***Shikara Limited Case****, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.*
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> ***47.*** *This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. …*

15. The Court explained the second exception in the following words:

> ***50.*** *The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.*

16. In the LAPSSET Case, the Court re-stated the outer limits of the doctrine of the exhaustion in the following words:

> *While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See* ***The Speaker of National Assembly vs James Njenga Karume****), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of* ***Dawda K. Jawara vs Gambia*** *(ACMHPR 147/95-149 – A Decision of the African Commission of Human and Peoples Rights) it was held that :-*
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> *"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."*

17. In the present case, the Applicants complain that the Seeds Regulation Committee has never been constituted or activated. They stated this clearly in their Further Affidavit while responding to the first complaint by the Respondents that the suit was pre-mature. Their argument is obvious: the so-called alternative forum is not accessible or effective because the forum exists only in paper. Having made this argument, it behooved the Respondents to actually demonstrate that the Seeds Regulation Committee exists and has been activated. They did not do so. Indeed, they did not respond at all to the allegation that it has never been constituted or activated. The deduction is inescapable: that alternative forum does not, as yet, exist. It would be mechanistic, formalistic and plain unfair to ask a party to first exhaust their remedies in a non-functioning forum before approaching Court. In my view, this exempts the Applicants from the requirement that they exhaust the alternative forum.

18. I would reach the same conclusion from the analysis of the type and scope of claim brought by the Applicants. The claims, in their totality, would be beyond the remit of the Seeds Regulation Committee: they require constitutional interpretation (to the extent some of the claims are based on the unconstitutionality of the Seed and Plant Varieties Act; and they also require making a decision on the constitutionality of the actions of the Director of Public Prosecutions to bring criminal charges against the 2nd Applicant. Both these are actions that are not within the institutional competence of the Seeds Regulation Committee even if one was actually in operation.

19. For these reasons, it is therefore my finding that in the specific circumstances of this case, the suit is appropriately before the Court.

b. <u>Is the Decision to Bring Criminal Charges Against the 2nd Applicant Un-procedural, Illegal, or Oppressive?</u>

20. The 2nd Applicant has pleaded at great length blow by blow account of the events leading to his arrest and presentation in Court over criminal charges. He faces four counts all related to sale of seeds and contrary to the Seeds and Plant Varieties Act. All the charges arise from the inspection carried out by KEPHIS inspectors on 20/03/2018 when the inspectors seized seeds they found to be non-conforming.

21. The 2nd Applicant claims the prosecution is actuated by "illegality; impunity; malice; ill-will; bad faith; bias; discrimination; unreasonableness; irrationality; disproportionality; ulterior motive; breach of legitimate expectations; abuse of power; excess of jurisdiction; procedural and substantive unfairness; and error of law…"

22. James Kefa Oganda, KEPHIS' Nakuru Regional Manager, in his Replying Affidavit, also gives a long catalogue of what he describes as "wanton non-compliance with the applicable laws governing seed certification…dating back to the year 1998 just almost immediately after [Freshco's] registration as a seed merchant." The Affidavit proceeds to list at least sixteen (16) letters written by KEPHIS before the arrest of the 2nd Applicant warning the 1st Applicant about what KEPHIS saw as consistent illegal activities by the 1st Applicant. The leitmotif of the narrative seems to be that the cumulative effect of these activities and warnings was a decision by KEPHIS to enforce the law by both revoking the 1st Applicant's seed merchant licence and recommending the prosecution of the 2nd Applicant.

23. The DPP, similarly, opposed the Application. State counsel argued that there has been no showing that there was an ulterior motive in pursuing the criminal prosecution.

24. The Applicants scoff at this narrative. The 2nd Applicant, instead, proffers a narrative of persecution which puts the personal motivation of the Managing Director of KEPHIS and her need to avenge against the 2nd Applicant at the centre. The 2nd Applicant claims that his problems with KEPHIS have stemmed from his activism in the field including his chairmanship of the Seed Traders Association of Kenya (STAK). He insists that KEPHIS is out to personally humiliate him and "coerce him not to faithfully or aggressively execute his duties and the mandate of his office at STAK…"

25. In particular, the 2nd Applicant makes the following arguments in favour of a decision to quash DPP's charging decision:

a. That the decision to charge was made or directed by a person who is not authorized in law to do so. That person, claims the 2nd Applicant, is KEPHIS.

b. That the person who made the decision to charge acted in excess of jurisdiction and abused its office. Again, the person who is alleged to have exceeded their power is KEPHIS since it has not mandate to bring charges.

c. That there is bias or perception of bias in the charging decision. The argument here is that the 2nd Applicant is not even stationed in Nakuru and it is unclear why he was charged yet other senior Freshco officials are based in Nakuru. Further, the 2nd Applicant says that the Police were not interested in recording any statements from Freshco employees before charging.

d. That the 2nd Applicant was not given any opportunity to state his case before a decision to charge him was made.

e. That the decision to charge the 2nd Applicant was procedurally unfair because "no proper investigations were done, no statements were taken….and the [2nd] Applicant was not accorded an opportunity to state his case."

f. That the decision to charge the 2nd Applicant was influenced by error of law, was unreasonable, irrational, unfair, and failed to take into account relevant considerations. The main argument here centres on the fact that the 1st Applicant is the registered seed merchant and the 2nd Applicant find nothing other than malice for the DPP to bring charges against him in person as a director of the 1st Applicant.

g. That there was a violation of the 2nd Applicant's legitimate expectations. That expectation, argues the 2nd Applicant, is that he would be charged by the person who has the legal mandate to do so.

h. That the charges are actuated by ulterior motive, bad faith and malice. The 2nd Applicant, here, rehashes the allegations against the Managing Director of KEPHIS and restates that it is clear that the present charges against him are part of the vendetta of KEPHIS against him.

26. The situations in which a Court would quash the decision by the DPP to bring criminal charges against an individual or prohibit his prosecution have now acquired an aura and status of legal stability through repeated restatement and refinement by our Courts.

27. It is true that "*the Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation*." (***Kuria & 3 Others v Attorney General [2002] 2KLR 69***.) Indeed, our legal history now shows that this was the position in Kenya even before the promulgation of the Constitution of Kenya, 2010. Hence as early as 2001, the High Court stated:

> *A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probably cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.*

28. Odunga J. held similar views in ***R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR***, when he stated that "*where it is clear that the [prosecutorial] discretion is being exercised with a view to achieving certain extraneous goals other than those recognised under the Constitution and the Office of the Director of Public Prosecutions Act, that would….constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion*."

29. In ***Peter Ngungiri Maina v Director of Public Prosecutions & 2 others [2017] eKLR***, I made the following statement:

> *The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit*.

30. Is there evidence in the present case that the DPP is using his authority to prosecute unfairly or oppressively or is, has alleged by the 2nd Applicant, been hijacked by the 1st Respondent and has illegally loaned his powers to it? The 2nd Applicant points to the vendetta he says KEPHIS has against him and also details the exact sequence of events leading to his arraignment in Court which, he says, shows that the DPP was not acting independently to safeguard the Criminal Justice objectives in his decision. Indeed, the 2nd Applicant says that the correspondence from ODPP tends to prove that the ODPP was not in the know of how the charges were brought.

31. On my part, after sifting through the volumes of documents filed by the parties in this case, I am unable to draw the inescapable conclusion that the decision to charge the 2nd Applicant was made illegally by an entity other than the DPP and for motives other than the enforcement of criminal law. In coming to this conclusion, it is important to remember that the High Court does not, in an application of this nature, sit on appeal on merit of the decisions made by the DPP. The correct position is that stated by the Court in ***Republic Vs Attorney General & Four Others Ex-parte Kenneth Kariuki Githii (2014) eKLR*:**

> *The mere fact that the intended or on-going criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is not a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceedings may similarly be a basis for civil suit, is no ground for staying the criminal process if the same can similarly be a basis for criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.*

32. In the present case, I am unable to find the tell-tale signs that the DPP is a mere puppet controlled by KEPHIS; and that the charging decision is ultimately driven by the alleged vendetta or ill-will that KEPHIS has against the 2nd Applicant or that the DPP is acting whimsically or otherwise oppressively. It is true that the 2nd Applicant may have plausible or even concrete defences to the charges raised – including the one he foregrounds – that the charges impermissibly pierces the corporate veil by equating a manager and shareholder of the company with the company – but these are appropriately raised in the criminal trial.

c. Is the decision to revoke the 1st Applicant's seed merchant licence illegal or un-procedural hence liable to be quashed by a writ of certiorari?

33. As I understand it, the Applicants raise two grounds to challenge the revocation of the seed merchant licence issued to Freshco. The first ground they raise is that neither KEPHIS nor KEPHIS Managing Director have the legal competence to revoke seed merchant licences. The second argument –which is attenuated under many different headings which to my mind amount to the same argument – is that the revocation was procedurally infirm. I will take each of the arguments in turn.

34. It is not disputed that Freshco was a licenced seed merchant. It is also not disputed that the KEPHIS issued a revocation letter dated 03/04/2018 referenced "Revocation of Seed Merchant Licence". That letter was conveyed to the Applicants through the 2nd Applicant's email address: karanjajg@freshco.co.ke.

35. The Applicants argue that KEPHIS and/or the Managing Director exceeded their authority in purporting to revoke Freshco's seed merchant licence. While conceding that Regulation 6(5) of Seeds and Plant Varieties (Seeds) Regulations, 2016 gives KEPHIS the power to revoke the licence, the Applicants argue that the Regulations are unlawful to the extent that they give KEPHIS such powers to revoke licences. The reasoning is that the Regulations are made pursuant to section 3 of the Seeds and Plant Varieties Act yet nowhere in that section does the statute give the Minister the power to make regulations for revocation of seed merchant licences. Further, the Applicants argue that section 5 of the statute which creates KEPHIS does not, either, give KEPHIS any such power. Therefore, the Applicants argue, it is *ultra vires* the parent statute for the Regulations to purport to create the power to revoke seed merchant licences.

36. I am unpersuaded by this argument for two reasons.

37. First, it is, in my view, incorrect to say that section 3 of the Seeds and Plant Varieties Act excludes the possibility of the Minister promulgating regulations for revocation of seed merchant licences because such power is not explicitly stated. The Minister is authorized under the relevant section to make regulations "for the production, processing, testing, certification and marketing of seeds". The section then gives the types of particular regulations the Minister may make but not before using the utility phrase "and without prejudice to the generality of this power". The implication is that the phrase quoted above frames and qualifies the specific areas to be covered in the regulations which are particularized in the following part of the section. Simply put, the particularized areas for regulations are not meant to limit the scope of regulations for the Minister but to give examples of what is contemplated in the statute. It is, therefore, unavailing for the Applicant to point to the absence of "revocation" as among the enumerated purposes of the regulations to claim that regulations for revocation of licences are per se *ultra vires* the statute.

38. Second, it is profoundly ironical that the enumerated scope of regulations in section 3 does not, in fact contain the power to make regulations for the licencing of seed merchants! Hence, if we were to take the Applicants' arguments to its logical conclusion, we would reach the untenable position - even by its own arguments - that KEPHIS has no legitimate authority to licence seed merchants. This is untenable factually because KEPHIS is, in fact, Freshco's licensor. It is also untenable because Freshco's substratum of the suit depends on its licence being valid. The absurdity of Freshco's arguments in this regard is compounded by the fact that the power of KEPHIS to licence seed merchants – through which it obtained its licence – is the self-same regulation it claims is ultra vires the statute. *Quod approbo non reprobo*. That which I approve, I cannot disapprove. One who approbates cannot reprobate. The Applicants cannot accept the power of KEPHIS to issue licences while at the same time contesting its power to revoke it when those powers are of the same impugned provenance.

39. The second salvo the Applicants blasts in favour of the argument that the revocation of Freshco's seed merchant is defective procedurally. To rehash, the main claim is that KEPHIS never afforded procedural due process to Freshco before revoking its licence. The main charge is that no process at all was followed; that KEPHIS was hell-bent on revoking the licence and proceeded to do so and only acted retroactively to purport to have issued a Notice to Show Cause. Freshco insists that, in fact, no Notice to Show Cause was issued to it. Hence, the revocation of its licence without a reason was unfair, unprocedural and against the rules of natural justice.

40. I have had occasion to look at the affidavits filed in the case carefully. Freshco's first claim was straightforward: the letter of revocation came as a surprise because it had not been given an opportunity to present its case. KEPHIS responded by claiming that it had, in fact, given Freshco notice and an opportunity to show cause but that Freshco ignored the letter and only acted after the revocation had happened. I have attempted a structural reading of the communications attached by KEPHIS:

> i. A letter dated 14/12/2017 with the reference "Engaging in Illegal Activities Contrary to those Authorized Under the Seed Merchant Licence." This is annexed in the Replying Affidavit of James Kefa Oganda as annexture "JKO 12".
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> ii. A letter dated 07/02/2018 under the reference, "Final Warning and Notice to Show Cause Why Your Seed Merchant Licence Should not be Revoked". This is annexed as "JKO 13"
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> iii. A letter dated 03/04/2018 under the reference "Revocation of Seed Merchant Licence". This letter is annexed in the Affidavit in Verification of Facts deponed by James Gichanga Karanja as annexture "JG 10".

41. The Applicants claim that annextures JKO 12 and JKO 13 are fake documents meant to create a narrative that there was due process when there was none in fact. On a balance of probabilities, my conclusion is that the Applicants are right. I say so for three reasons:

> a. If one looks at all correspondences between Freshco and KEPHIS, they were either letters presumably delivered in person or send by email. Where they are sent by email, the email address of the recipient is printed on the main body of the letter or KEPHIS has annexed actual email print outs showing that the letter was delivered. For examples, the letters marked as Annextures "JKO 9"; "JKO10" and "JKO 11" were sent as email attachments. The email print-outs are clear. On the other hand, the revocation letter was also sent out as an email attachment. The email address to which it was sent is clearly indicated on the face of the letter: karanjajg@freshcoseeds.co.ke. Freshco admits to receiving this letter. On the other hand, if one looks at the two impugned letters of 14/12/2017 and 03/04/2018, the pattern suddenly changes: the letters are purported to have been sent to the attention of "James G. Karanja – General Manager (Nakuru Office)". This is curious because none of the other letters have been so addressed.
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> b. Second, the address of the two impugned letters is odd and a tad incredible because the Applicants have variously pleaded and it is uncontested by the Respondents, that James G. Karanja (the 2nd Applicant) is not, in fact, based in Nakuru – a fact known to KEPHIS. Why, then, would KEPHIS address the two letters to his attention?
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> c. Third, rather than exhibiting copies of the letters, KEPHIS has not attempted to demonstrate how the letter were served on the Applicants. Neither has it made any attempts to contest the allegations by the Applicants that the exhibited letters are, in fact, staged letters crafted in response to the present suit.

42. In the circumstances, it is my finding, on a balance of probabilities, that the two impugned letters were, in fact, not served on the Applicants. Consequently, no due process was followed in revoking the seed merchant licence of the 1st Applicant. While KEPHIS had the legal mandate to revoke the licence, it behooved it to follow procedural due process. It did not do so in this case and its decision in this regard must be quashed.

d. Is the decision by KEPHIS to seize the 1st Applicant's seeds and factory/warehouse illegal or un-procedural thus inviting an order of certiorari to quash it?

43. The Applicant argues that section 3D(1) of the Seed and Plant Varieties Act and Regulation 21(1) of the Seed and Plant Varieties (Seed) Regulations 2016 are unconstitutional. The argument is that the provisions of the Act and Regulations are in contravention of Article 31(a) (b) of the Constitution.

44. Article 31(a) of the Constitution guarantees the right to privacy in the following terms: every person has a right to privacy which includes the right not to have their person, home or property searched or their possessions seized."

45. The Applicant argues that by providing for the seizure of seeds and warehouse, the sections of the law impermissibly limit fundamental rights.

46. I have looked at the impugned provisions of the law. I need only say that I am not persuaded that they do not meet the requirements in Article 24(2) of the Constitution on when and how fundamental rights can be limited. First, the provisions are in written law. Second, they are clearly expressed. Third, given the objective of the impugned Act and Regulations to regulate transactions in seeds which is eminently in the public interest, both the Act and the Regulations are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" as decreed in Article 24 of the Constitution.

47. There is the question, however, whether the application of the impugned provisions of the law by KEPHIS was reasonable in this particular instance. In this Court's ruling dated 16/05/2018, I gave directions varying KEPHIS' orders of seizure of the warehouse and seeds. I now expressly hold that KEPHIS' blanket lock-down of the premises of Freshco was disproportionate. This is to the extent that the seeds KEPHIS considered to be traded in violation of the law were identified and isolated. There was no need for KEPHIS officials to lock down the whole warehouse which was used to conduct Freshco's other businesses. These other businesses are not within KEPHIS' regulatory remit.

48. I therefore now confirm the interlocutory orders granted on 16/05/2018 regarding the Freshco's warehouse and other businesses.

e. Do the actions of KEPHIS amount to unconstitutional violations of the rights of the Applicants warranting compensation in damages?

49. The Applicants have been partly successful in their claims. Their suit survived the procedural bar of the doctrine of exhaustion. It failed in its bid to immunize the 2nd Applicants from criminal prosecution *ante*. The suit, though, succeeded in nullifying the action by KEPHIS to revoke Freshco's seed merchant licence. It is decidedly a mixed bag. Hence, while I acknowledge that a correct reading of Article 23 of the Constitution stipulates that, in an appropriate case an ex parte Applicant in a Judicial Review matter may recover compensation for violations of their rights, in the present case, this is not such a case. One must be careful to remember that the primary purpose of Judicial Review Applications is to check the use of public power. Absent exceptional circumstances misuse of public powers is served by correcting the deviant action taken by the public authority. Rarely does compensation enter the equation. Indeed, a clamour for compensation in such cases might well soil the nature of the claim. In short, I find it inappropriate to consider compensation in the particular circumstances of this case. Perhaps, if the 2nd Applicant obtains a summary acquittal in the criminal case, he may press for compensation in a suit for malicious prosecution. Not here.

50. Additionally, given my findings above, I find it prudent to hold that each party should bear its own costs: the Applicants succeeded in one of its major claims – to nullify the revocation of its licence – and failed in the other – to declare the criminal prosecution against the 2nd Applicant illegal and oppressive. It is fair to split the costs.

(f) Disposition and orders

51. Consequently, the orders that the Court makes are the following:

a. This suit is properly before the Court for the reasons advanced above.

b. The institution and maintenance of *Criminal Case No. 900 of 2018: R v James Karanja* is not an abuse of the Criminal Justice Process and is not otherwise an abuse of the process of the Court. There will be no order prohibiting the prosecution of the 2nd Applicant in that case.

c. The decision by KEPHIS to revoke the 1st Applicant's seed merchant licence was illegal and un-procedural. An order of *certiorari* hereby issues quashing the said decision.

d. The decision by KEPHIS to seize the 1st Applicant's seeds and factory/warehouse is varied only to the extent contained in the ruling dated 18/05/2018.

e. The Court expressly holds that section 3D(1) of Seeds and Plant Varieties Act and Regulation 21(1) of Seeds and Plant Varieties (Seeds) Regulations, 2016 are not unconstitutional.

f. In the circumstances of this case, there is no order for compensation.

g. Each party will bear its own costs.

52. Orders accordingly.

Dated and delivered at Nakuru this 14th day of December, 2018.

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JOEL NGUGI

JUDGE