

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CONSTITUTIONAL AND HUMAN RIGHTS PETITION NO.

E001 OF 2023

SBL INNOVATE MANUFACTURERS LIMITED.....

...PETITIONER

VERSUS

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1ST

RESPONDENT

THE HONOURABLE THE ATTORNEY GENERAL.....2ND

RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE....3RD

RESPONDENT

JUDGMENT

1. The petitioner herein is a body corporate duly registered in the Republic of Kenya.
2. The 1st respondent is established under section 28 of the National Police Service Act (No. 11A of 2011) Laws of

Kenya, whereas the 2nd respondent is an office established under Article 156 of the Constitution of Kenya and Government Principal legal advisor, responsible for representing the national Government in legal matters.

3. The 3rd respondent is established under Article 245 of the Constitution of Kenya and exercises independent command over the National Police Service and performs any other functions prescribed by national legislation.
4. By a petition herein dated 24th April 2023, supported by the affidavit of the even date sworn by the Josiah Kimani Kariuki, a director cum shareholder of the petitioner, the deponent avers that, the petitioner is a leading manufacturer with the requisite approvals, compliances and permitted to carry out business of production of organic fertilizer with the brand name of; SBL-GPC Original.
5. That it was issued with a permit to use the standardization mark issued on 28th January 2023, expiring on 28th January 2025. Further, the petitioner has

a scheme for supervision and control with the Kenya Bureau of Standards (KEBS) SCC Certificate Agreement.

6. However, since 1st April 2023, the 1st respondent has been holding and stopping the petitioner's lorries from leaving its factory. Further, they have been detaining and searching the said lorries in order to obtain samples of its products therein on the grounds that they are governing and maintaining standards, which is a function they do not have authority over. That, section 3 of the Standards Act, establishes KEBS as the agency responsible for governing and maintaining standards and practices, and not the 1st respondent herein.
7. He avers that on 19th April 2023, the 1st respondent visited the petitioner's premises without any written communication and harassed and intimidated its staff, which action was unlawful and unreasonable and in total disregard of Article 47 of the Constitution of Kenya, 2010.
8. That, the petitioner seeks to examine the powers of the 1st respondent against the provisions of Article 47 of the

Constitution which if left unchecked, the general public will continue to suffer for lack of fair administrative action and will lead to a loss of public confidence in public institution.

9. The petitioner thus prays for the following orders: -

a) Declarations be issued that:

(i) The decisions and actions of the 1st respondent to detain and visit the petitioner's premises for intimidations were unlawful, capricious and in breach of Article 47 of the Constitution of Kenya.

(ii) The Officers of the respondents are in breach of Articles 10(2) and 73(a) and (b) of the Constitution and section 7 of the Leadership and Integrity Act by failing to serve the people in an equitable, inclusive, accountable and transparent manner and failing to uphold the rule of law which amounts to abuse of power and disregard for property

rights and the right to fair administrative action.

(iii) It is unreasonable to detain a manufacturer's goods leaving the factory who has complied with all requirements.

(iv) That the Petitioner has a right to a fair administrative action and ought to be given written reasons for the action.

b) An Order of Prohibition directed at the 1st to 3rd respondents from future detaining any of the Petitioner's goods and visiting the Petitioner's premises without written reasons for the actions.

c) An Order of Mandamus compelling the 1st and 3rd respondent's full compliance with Article 47 of the Constitution and Fair Administration Actions Act to avoid unreasonable and unlawful action against manufacturers and ordinary citizens.

d) The 1st to 3rd respondents do unconditionally and without demanding any payment from the Petitioner

of costs, warehouse rent or any charges whatsoever do forthwith release the Petitioner's goods.

10. However, the respondents opposed the petition vide the replying affidavit dated; 16th May 2023, sworn by No. 880998 Sargent Hesbon Otieno, an officer attached to Gilgil Sub-County Headquarters. He avers that there is a WhatsApp group by the name Gilgil Agendas and Updates formed by Gilgil Sub-County Community which has been incorporated by the Sub-County Security Committee to discuss matters affecting inter alia; security and sharing intelligence information.
11. That, on 16th April 2023, the DCI Gilgil received information through the WhatsApp group that a group of people at Diatomite Company dumping site at Kariandusi, Gilgil Sub-County were packaging waste products in bags labelled Government of Kenya (GOK) and disguised as true fertilizer and loading them onto lorries.
12. That, the Deputy County Commissioner Gilgil, Rebecca Muturi, informed the SCCIO Gilgil to investigate the same.

On 19th April 2023, officers from DCI Gilgil intercepted two lorries registration No(s). KCW 117H and KBY 721X from Diatomite Factory dumping site fully loaded with unknown substances packaged in 25kg bags labelled ORIGINAL PLUS FERTILIZER THE FORMULAR OF SUCCESS.

13. That the lorries were escorted to Gilgil Police Station yard and the bags inspected where it was revealed that they contained a greyish powder. Further, the bags had labels outlining the chemical analysis of the substances and that, the substances had been manufactured for SBL Manufacturers SI together with a QR scan and KEBS standardization mark but did not have a physical address for the company. That the two lorries were documented and one (1) bag from each lorry taken for purposes of further investigations and/or analysis.

14. Further the lorries were later on the same day released to the drivers vide OB 43/20/4/2023. Subsequently, on 25th April 2023, an exhibit memo was prepared and together with samples were forwarded to the Government Chemist

to establish the type of fertilizer and whether the chemical components were in order.

15. He avers that the assertion by the petitioner that the DCIO Gilgil has been stopping its motor vehicles from 1st April 2023 and visiting its premises to harass and intimidate the staff are false. That, the DCI does not know the location of the petitioner's premises or offices.
16. That, on 20th April 2023, the SCCIO Gilgil had a telephone conversation with Andrew Okemwa, the petitioner's Advocate, who agreed to avail his client to shed light on the situation, but he never did so.
17. Further, the allegations that the DCI has failed to release the two bags is untrue as the matter is still under investigation and that an inventory was taken and samples are pending analysis by the Government Chemist, Nairobi awaiting the Government Analyst report.
18. He argues, that the DCI is not limited by any law from investigating any malpractice or offence against any written law including the Anti-Counterfeit Act No. 13 of

2008. Further, the powers of the DCI under the National Police Service Act to stop, search and detain are well stipulated in section 26 (1) (a), (b) (c), (2), and (3) of the Criminal Procedure Code. Furthermore, the police officers were carrying out their constitutional mandate to protect the citizens in a manner that respects the rule of law and does not have any ill motive against the petitioner.

19. That the petitioner has failed to show how the 1st and 3rd respondents obtained the goods unlawfully, harassed and/or intimidated the petitioner and its agents. Therefore, the application does not meet the threshold to grant the orders sought or to warrant the court's intervention.

20. Further, that if the petitioner is granted the interim orders sought, the 1st and 3rd respondent will not be able to ascertain the correct position on components of the samples and will consequently defeat justice. In the circumstances, it is in the interest of justice the interim

orders are denied and the application dismissed with costs.

21. However, the petitioner in response filed a further affidavit dated, 24th May 2023 sworn by the said Josiah Kimani Kariuki, and stated that the respondents had failed to comply with court orders issued on; 5th May 2023 by refusing to respond to the notice to show cause, despite being served with the same. That, they should be held in contempt of court and the orders in the application herein be granted.

22. Further, the respondents have failed to produce evidence of the alleged packaging of products in bags marked GOK. That, the petitioner packs its products under the brand name GPC Original as permitted by KEBS. Furthermore, the petitioner has obtained a permit to use the standardization mark which is only issued after the product is tested and found to be up to the required standard.

23. That, the complaint and/or intelligence received by the respondents was not against the petitioner but the African Diatomite Industries Limited, an incorporated company. Thus the respondents unfairly targeted the petitioner and are trying to justify their actions and omissions.
24. He argues that, the respondents claim to be carrying out investigations yet they still to report or consult KEBS that has the mandate to governs and maintains standards. Furthermore, the respondents admit to continuing with investigations despite a court order barring them from interfering with the petitioner's business.
25. That, the respondents have never carried out any investigations on the raw intelligence they received but only visited the petitioner's premises after which they intercepted and detained the petitioner's lorries without ascertaining the destination of the bags or the source of the goods.

26. Further, the power of the DCI is provided for under section 35 of the National Police Service Act and does not include power to stop, search and detain. Furthermore, the Advocate by name Andrew Okemwa referred to by the respondents does not exist as proved by a quick search of the Law Society of Kenya (LSK) Advocates search engine.

27. That, the respondents have abused their powers, assumed powers bestowed to other State Agencies and have failed to demonstrate any proper need for investigations but are being used by the petitioner's competitors to eliminate its business and ruin its good name.

28. The petition was disposed of by way of written submissions. The petitioner in submissions dated 25th July 2023, argued that, the respondents' actions of; stopping and searching the lorries, and detaining the petitioner's goods were generally unconstitutional and in breach of Articles 10(2), 40(3), 47, 73(1) (a) & (b), and 232 of the

Constitution of Kenya, and sections 4, 5 and 6 of the Fair Administrative Action Act, 2015.

29. That, although their actions may have been done in exercise of powers vested upon them pursuant to section 35 of the National Police Service Act, their powers do not extend to maintaining standards which is the purview of another state agency.
30. The petitioner submitted that, the respondents are bound by the provision of Article 10 of the Constitution on adherence to; the rule of law, national values and principles while discharging their duties. However, the actions of the respondents failed to adhere to the same despite the fact that the petitioner complied with all necessary requirements for organic fertilizer production.
31. Further, the respondents act of detaining its goods amounted to deprivation of its property in violation of Article 40 (3) of the Constitution. That, the detention and/or deprivation did not serve the interest of the public and is therefore unreasonable and unlawful.

32. Furthermore, the respondents did not give any written reasons nor did they give the petitioner an opportunity to be heard before searching and detaining its goods, which actions were arbitrary and contrary to the provision of Article 47 of the Constitution.

33. The petitioner relied on the case of; Kituo cha Sheria & 8 Others v AG (2013) eKLR where the court in stated that, Government directives, which are administrative decisions, must meet constitutional standards including Article 47 and cited with approval Minister of Health & Another v Treatment Action Campaign where it was held that the State was constitutionally bound to respect, protect, promote and fulfil the bill of rights.

34. The petitioner argued that, the raw intelligence reports relied on by the respondents actually pointed to a different person and/or company and therefore their decision was arbitrary and inconsistent with the Constitution as it failed to meet the principles of natural justice and rule of law.

35. Further reliance was placed on the case of; Judicial Service Commission vs. Mbalu Mutava a Another [2015] eKLR where the Court of Appeal discussed the importance of Article 47 of the Constitution and stated that it laid a constitutional foundation for the control of the power of State Organs and other administrative bodies while entrenching the right to fair administrative action. That the court further stated that the right to fair administrative action is a reflection of national values under Article 10 of the Constitution of Kenya.

36. The petitioner submitted that, the respondent's officers did not act in a manner consistent with Article 73 of the Constitution and relied on the case of, Keroche Breweries Limited 6 Others vs. Attorney General and 10 others (2016) eKLR where it was held that the authority assigned to a State Officer should be exercised in a manner set out in Article 73 (1) (a) & (b) of the Constitution.

37. Further, the officers of the respondent being public officers as defined under Article 260 of the Constitution and in the case of *Fredrick Otieno Outa vs Jared Odoyo Okello SCK Petition No. 6 of 2014*, must adhere to the laid principles and values, specifically on accountability for administrative acts and are required by law to uphold high standards of professional ethics. However, the actions of the respondents and their officers grossly violated Article 232 of the Constitution.

38. Lastly, the petitioner submitted that, the court is empowered to give reliefs beyond those envisaged under Article 23 of the Constitution and utilize its discretion to ensure the bill of rights is protected and cited the case of; *Abdul Mohammed Gulleid vs Registrar of Persons & another [2021] eKLR* where the court quoted with approval the case of; *Minister of Health and Others vs Treatment Action Campaign and Others (2002) 5LRC 216 at page 249* where the South African Constitutional Court held that an appropriate relief is one that is required to

protect and enforce the Constitution which includes inter alia such other relief as may be required to ensure the rights enshrined in the Constitution

39. That the South African Constitutional Court further stated that, if necessary courts may fashion new remedies to secure protection and enforcement of all-important rights. That courts are obliged to forge new tools and shape innovative remedies if need be to achieve this goal.

40. Reliance was further placed on the case of; Nancy Makokha Baraza vs Judicial Service Commission & 9 others [2012] eKLR where the court stated that the Constitution gives the court wide and unrestricted powers that are inclusive thus allows the court to make appropriate orders and grant remedies as the situation demands. The petitioner urged that it has demonstrated how its rights were infringed and prayed that the petition be allowed as prayed.

41. However, the respondent in submissions dated 17th August, 2023 submitted that, the petitioner had the burden to prove that the respondents conduct amounted to an infringement of its fundamental rights and freedoms as held in the case of; Communication Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR where the Supreme Court of Kenya stated that, a party invoking Article 22 of the Constitution has to show the rights said to be infringed and the basis of his/her grievances.
42. Further, in the case of Anarita Karimi, and Mumo matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR where the court stated that a petitioner ought to demonstrate with precision how the respondent's actions and conducts constitute a violation and/or infringement of fundamental rights and freedoms.
43. The respondents cited sections 107, 109 and 112 of the Evidence Act (Cap 80) Laws of Kenya which provide that, the legal and evidential burden of proof lies on the party

that invokes the aid of the law and which party desires the court to believe in the existence of a particular fact.

44. The respondents argued that the petitioner failed to prove any violations of its rights as it did not tender any evidence on how the respondents breached its rights and relied on the case of; Constitutional Petition No. 128 of 2006 Lt. Col Peter Ngari Kagume & others vs Attorney General where the court held that it was incumbent on the petitioners to avail tangible evidence of violation of their rights and freedoms as the court is guided by evidence of probative value.

45. The respondents reiterated that the DCI powers to stop, search and detain are provided for under sections 26(1) (a), (b), (c), (2) and (3) of the Criminal Procedure Code. That, the respondents cannot be held liable for executing statutory duties outlined under the National Police Service Act No. 11A of 2011.

46. The application is considered in the light of the materials before the court mainly; grounds, supporting and replying

affidavits, and the submissions. The first issue to consider is whether the petition meet the threshold of a constitution petition.

47. In that regard, the court in the case of Anarita Karimi Njeru v Republic [1979] eKLR stated that: -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

48. Further in the case of; Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR the court stated:

“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times

with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective. Principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extract of this principle”.

49. Furthermore, it is trite law that where a petitioner alleges that his rights have been contravened it is incumbent upon that petitioner to prove that such right has indeed been violated. The Court of Appeal in Mohammed Abduba

Dida v Debate Media Limited & another [2018] eKLR

stated that: -

“In the Zimbabwean case of Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General (1993) 2 LRC (Const) 279, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”.

This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to

another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party."

50. In this case the petitioner argues that the respondents' action of unlawfully detaining its good contravened Article 40(3) of the Constitution. The provisions of Article 40 of the Constitution state that:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

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

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

(ii) allows any person who has an interest in, or right over, that

property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

51. Discussing the right to property under Article 40, the Supreme Court of Kenya in the case of; *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)* stated that:

“79 By virtue of article 40 of the Constitution, every person either individually or in association with others, has the right to acquire and own property of any description, and in any part of Kenya. This right to property is however not absolute. Under article 40(3)

the State may deprive a person of property through a process of acquisition of land for a public purpose or in public interest in accordance with the Constitution. Further, under article 40(6) the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

80. While article 40 has an internal limitation on the right to property, the general limitation of rights provision at article 24 of the Constitution provides that any limitation on a right shall be by law, and only to the extent that the limitation is reasonable and justifiable, in an open and democratic society based on human dignity, equality and freedom. Other relevant factors to be taken into account include the nature of the right, the importance and purpose of the limitation, and relation between the limitation and the purpose of such limitation. It further, provides that the person seeking to justify a particular limitation has the obligation to justify the limitation.”

52. On whether the respondents' action of searching and detaining the petitioner's goods contravened its right to fair administrative action, Article 47 states that:

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

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

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

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

(b) promote efficient administration.

53. Further, Section 4 of the Fair Administration Action Act No. 4 of 2015 provides:

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.*
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—*
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action*
 - b. an opportunity to be heard and to make representations in that regard*
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable*
 - d. a statement of reasons pursuant to section 6*

- e. notice of the right to legal representation, where applicable;*
- f. notice of the right to cross-examine or where applicable; or*
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

- a. attend proceedings, in person or in the company of an expert of his choice*
- b. be heard*
- c. cross-examine persons who give adverse evidence against him; and*
- d. cross-examine persons who give adverse evidence against him; and*

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be

represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

54. On what entails administrative action, the Supreme Court in the case of; *Ethics and Anti-Corruption Commission & another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others (Petition 30 & 31 of 2019 (Consolidated)) [2022] KESC 59 (KLR) (7 October 2022) (Judgment)* stated that:

“54. So, what constitutes “an administrative action” within the meaning of article 47(1) of the Constitution? Articles 47 and 260 of the Constitution do not define an “administrative action”. Section 2 of the FAA Act which was enacted to give effect to article 47, defines ‘administrative action’ as follows:

“Administrative action” includes—i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates”.

55. Unfortunately, the foregoing definition does not provide an accurate picture of the meaning of an “administrative action” as it simply addresses the elemental aspects of the phenomenon before describing its nature. On the face of it therefore, any power, function, and duty exercised by authorities or quasi-judicial tribunals constitutes an “administrative action”. Likewise, any act, omission or decision of any person that affects the legal rights or interests of any person to whom such action relates constitutes an “administrative action”. Such definition, without more, would bring within the ambit of an “administrative action” just

about anything done, or any exercise of power by an “authority” or “quasi-judicial tribunal”.

56.A close scrutiny of article 47 of the Constitution gives a glimpse of what an “administrative action” entails. Towards this end, the said Article provides that:

Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall- (b)promote efficient administration.”

57.By stipulating that the legislation so contemplated has to among other things, promote efficient administration, the Constitution leaves no doubt that an “administrative action” is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as “administrative” as opposed to any other action. The Concise Oxford Dictionary (9th Ed) defines the

word “administrative” as “concerning or relating to the management of affairs” Black’s Law Dictionary, (11th Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or a business’s management”. Burton’s Legal Thesaurus (4th Ed) defines the adjective “administrative” to mean among others, “directorial, guiding, managerial, regulative, supervisory.”

55. On determining whether an action meet the threshold of fair administrative action, the Supreme Court in the case of; NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ) had this to say:

*”176. The right to just administrative action is today a constitutional imperative, or what may be called the **constitutionalisation** of administrative justice. By*

entrenching the standard of reasonableness, expedition, efficiency, lawfulness, and procedural fairness as the correct measure of judicial scrutiny of administrative decision, article 47 of the Constitution has revolutionised the general administrative law in Kenya.

177..

178....

179...

180.The standard of measurement established by the Constitution and the law outlined in the preceding paragraphs leaves no doubt that a contest of administrative action today involves, as a minimum the application of the Constitution. Compared to the common law standard of reasonableness, today's constitutional standard simply turns on whether there was unreasonableness, procedural unfairness, illegality, delay or inefficiency in the decision-making process

or in the decision itself. Section 7(2)(a) to (o) of the Fair Administrative Actions Act, following upon these constitutional parameters detail some of the factors to guide the court in reviewing administrative action or decision.”

56. The question that begs an answer is whether the action of the respondents in searching and detaining the petitioner’s goods amounted to an administrative action.

57. The respondents have argued that, they were investigating a complaint in accordance to section 26 of the Criminal Procedure Code, which provides:

(1) A police officer, or other person authorized in writing in that behalf by Inspector-General of the National Police Service, may stop, search and detain

—

(a) any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or

(b) any aircraft, vessel or vehicle which there is reason to suspect

has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or

(c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

(2) No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention under this section of an aircraft, vessel or vehicle.

58. In the case of; *Ethics and Anti-Corruption Commission & another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others (Petition 30 & 31 of 2019 (Consolidated))*, the Supreme Court was tasked with considering whether the power of the Ethics and Anti-

Corruption Commission (EACC) to carry out investigations were administrative actions or not.

59. The Supreme Court examined the what constitutes administrative action and pronounced itself thus: -

“58. ...The powers granted therein include powers, privileges and immunities of a Police Officer under section 23(3), to search premises under section 29, to apply for surrender of travel documents under section 31, to arrest persons under section 32 amongst others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by a specific legal regime, to be exercised for a special purpose.

61. Having already concluded that the investigative actions of the 1st appellant cannot be categorized

as “administrative action” within the context of article 47 of the Constitution, we find no basis upon which we can hold, that the 1st respondent’s rights were violated for failure to observe the requirements of the said article. Therefore, in the absence of proof of violation of his other fundamental rights and freedoms guaranteed by the Constitution, the impugned warrants ought not to have been quashed on the basis of this claim.

73. ... If the conditions so specified obtain, then the Commission may issue notice in writing to the affected parties. If the Commission is carrying out a police operation or an intelligence gathering or asset tracing exercise, it cannot be required to issue a prior mandatory notice to the intended targets. In such a situation, the provisions of section 23 of ACECA, the Evidence Act, the CPC, and any other enabling legislation come into play. It is however worth emphasizing that, at all times, whatever the

nature of the investigations the Commission may be undertaking, it must do so within the confines of the Constitution and the law.”

60. In the case of; *Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment)*, the Supreme Court outlined situations where courts can interfere with the powers of the Inspector General of Police and the DCI and stated that:

“91.A review of the constitutional and statutory provisions herein shows without any doubt that the Inspector General and the Director, DCI have the mandate to perform multi-faceted functions as provided under articles 244 and 245 of the Constitution. Accordingly, article 244 provides for the objects and functions of the National Police Services and article 244(c) in particular requires the National Police Services to comply with

constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. This is important because human rights and fundamental freedoms and the rule of law are founding values in our Constitution.

92.A court should only interfere with the powers granted to the Inspector General and the DCI under articles 244 and 245 of the Constitution and under the provisions of the National Police Service Act if the constitutional and statutory provisions are not adhered to or if the actions are illegal and unlawful.”

61. To revert back to the matter herein, the respondent has conceded that the officers from SCCIO intercepted two lorries. These lorries belong to the petitioner. The question is why were the lorries intercepted? The respondents state that they had information received through a WhatsApp group that the lorries were carrying

unknown substances. The 1st respondent has annexed to the supporting affidavit messages from that group.

62. The respondents further aver that the lorries were documented and they took a bag from each lorry and then released them the same day. That the samples were taken to the Government analyst for analysis. The 1st respondent has availed an inventory of the two (2) bags and exhibit memo to prove submission of the exhibits for analysis.

63. Pursuant to the afore said, the respondents aver that they were investigating the matter. Notably, section 26 of the Criminal Procedure Code, empowers the 1st respondent to; stop, search and detain any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence.

64. Pursuant to the SCOK finding that in the case of; Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates (supra) that investigative powers conferred by a statute

do not amount to an administrative action that violates Article 47 of the constitution, then the action of the 1st respondent of stopping, detaining, conducting a search on the petitioner's vehicle and obtaining sample exhibits does not amount to violation of the petitioner's constitution right under Article 47 of the Constitution unless there is any other act of infringement.

65. Further to the aforesaid, the goods that are a subject of investigation cannot be unconditionally released to the petitioner and consequently, prayer (c) and (d) of the petition cannot be allowed as prayed.

66. The petitioner also seeks for a declaratory order under prayers (a) and (b) on the ground that the respondents' action of, visiting their premises and intimidating its workers was unlawful and in breach of Article 47. Further that the respondents are in breach of Articles 10(2) and 73(a) and (b) of the Constitution and section 7 of the Leadership and Integrity Act by failing inter alia, "to serve

the people in an equitable, inclusive, accountable and transparent manner and failing to uphold the rule of law”

67. First and foremost, prayer (a) and (b) of the petition as framed does not meet the threshold in Anarita’s case, due to lack of specificity of the alleged infringed right and secondly, prayer (b) is also framed in a very broad manner seeking to address alleged violation of “peoples” rights as opposed to the petitioner’s personal rights. Thirdly, the 1st respondent has denied visiting the petitioner’s premises and therefore, it calls for evidence in proof thereof. That burden lies on the petitioner and has not been discharged.

68. Finally, the 1st respondent averred that the petitioner lawyer Mr Okemwa was contacted and he promised to avail his client but failed to do. The petitioner states that they are strangers to the alleged lawyer, but notably the lawyer herein is “Okemwa” whether he is one and the same will also call for evidence.

69. However, before the court rounds up this matter, it is important to stress that as much as the 1st respondent has investigative power, the same must be exercised in total adherence to the constitutional provisions that uphold fundamental and human rights under the constitution and the rule of law.

70. The police are not immune to prosecution or any other legal action where they act blatantly and intentionally and infringe on an individual's human rights under the guise of investigation. This court's sentiments are based on the petitioner's averments that the company that was alleged to be involved in packaging was "African Diatomite Industries Limited" and not the petitioner.

71. However, as the matter is under investigation this court will not delve into the merit or lack of that allegation and of course if at the end of the day the afore turns out to be true, the petitioner has other avenues in law to enforce its rights.

72. Pursuant to the aforesaid, I find that the petition has no merit and I dismiss it. Taking into account the circumstances of this case, I order that each party meet their own costs.

It is so ordered.

Dated, delivered and signed on this 30th day of March 2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

N/A for the petitioner

N/A for the respondents

Ms. Hannah: Court Assistant