IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & KANTAI, JJ.A)

CIVIL APPEAL NO. 273 OF 2019

BETWEEN

UNITED MILLERS LIMITED.....APPELLANT

AND

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

THE DIRECTOR,

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

THE DIRECTOR PUBLIC HEALTH.....4TH RESPONDENT

THE EXECUTIVE DIRECTOR,

ANTI COUNTERFEIT AUTHORITY.....5TH RESPONDENT

THE DEPARTMENT OF HEALTH SERVICES

NAKURU COUNTY.....6TH RESPONDENT

(An appeal from the Judgment and decree of the High Court of Kenya at Nairobi ***(J.M. Mativo, J.)*** *dated 13th May, 2019* in **H.C. Judicial Review No. 396 of 2018**)

JUDGMENT OF THE COURT

The appellant was aggrieved by the decision of the 1st respondent to seize and not to release its 29,714 bags of sugar each weighing 50kg in line with the multi-agency task force team release protocol ("the multi-agency team") decision contained in its letter dated 7th September 2018. The multi-agency team consisted of the 1st to 5th respondents. The appellant therefore initiated judicial review proceedings in the court below seeking orders of certiorari to bring into the court for purposes of quashing the decision of the 1st respondent contained in the above letter, an order of prohibition directed at the 1st to 5th respondents herein restraining them from destroying the subject bags of sugar, Mandamus directed at the 1st respondent to release the seized bags of sugar, a declaration that the 1st respondent had infringed its rights under Article 47 of the Constitution and section 4(1) of the Fair Administrative Action Act and finally, that it be paid costs.

It was the appellant's case before the court that it was the 1st respondent's obligation to carry out its duties in a way that not only upheld the Standards Act, ("the Act") and the subsidiary legislation thereunder, but also in a manner consistent with the terms, principles and values of the Constitution and the Fair Administrative Action Act ("FAA Act") that guarantees every person the right to an administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair. The appellant pleaded that it had been granted a licence to import sugar from Mauritius pursuant to the requirements of the Agriculture and Food Authority, Sugar Directorate on 11th July, 2017 and proceeded to import 997.7 Metric Tonnes of brown sugar having complied with all import procedures and requirements. It contended that despite having

obtained a Certificate of Conformity from South Africa, (a pre-shipment verification body contracted by the 1st respondent under Section 4 of The Verification of Conformity to Kenya Standards of Imports Order, 2005), the 1st respondent issued a seizure notice in respect of the said sugar and wrote the impugned letter to the 2nd, 3rd and 4th respondents conveying its decision to destroy the sugar. The appellant urged that, that decision was unreasonable, arbitrary and irrational since the sugar had been tested prior to shipment as was evidenced by the Certificate of Conformity. That on 24th August, 2018 the 6th respondent who was joined in the proceedings as an interested party, wrote to the 1st to 5th respondents informing them that the sugar had been analyzed by its staff and found to have conformed to the 1st respondent's standard. Further, the appellant contended that given those circumstances the decision of the 1st respondent was unreasonable, arbitrary and irrational. It further contention was that the decision infringed its right to a fair administrative action under Article 47 of the Constitution and Section 4(1) of the FAA Act.

The proceedings were as expected opposed. The 1st respondent first filed a preliminary objection in which it raised the issue of the jurisdiction of the court to entertain the proceedings pursuant to Sections 11 and 14A (4) of the Act which entails the doctrine of exhaustion of statutory provisions provided in an Act for dispute resolution mechanisms before reverting to court. It was the 1st respondent's view that the appellant's motion was incurably defective as the appellant had not exhausted the remedies provided by the said sections of the Act. That under the Act, provision is made that when a party is aggrieved by the decision of the 1st respondent then it ought to, firstly, address the grievances before the standards tribunal (" the tribunal") for adjudication prior to proceeding by way of an appeal to the High Court, if at all.

The 1st respondent subsequently filed a replying affidavit to the motion sworn by one, Caroline Outa-Ogweno, its acting Director, Market Surveillance, in which she reiterated that by dint of Sections 11 and 14A (4) of the Act, the High Court lacked jurisdiction to hear and determine the case as the appellant had not exhausted the dispute resolution mechanisms provided therein. She further deposed that every commodity imported, manufactured or processed for consumption in the Kenyan market had to undergo routine testing to ascertain that they conform to the set standards. She deposed further that the 1st respondent's laboratory was the only one accredited in accordance with the recognized international standard. That it was the 1st respondent's duty to test, monitor and inspect products at the port of entry into Kenya to provide assurance as to quality and also prevent harmful products from entering the Kenyan market. She further stated that the 1st respondent randomly takes samples from products in the market and carries out laboratory tests to ascertain if the products conform to the set standards. Inspections are conducted by the 1st respondent's officers whose powers are provided for under Section 14 of the Act. She deposed further that it was in exercise of those statutory powers that the 1st respondent's officers collected samples of sugar from the appellant's consignment on 26th June, 2018 for purposes of establishing its quality and safety. That the said samples were tested in their accredited laboratory where they failed to comply with the set standard in relation to parameters of yeast and moulds, that is, the sugar had a yeast and mould content of 200 against the legal requirement of 50. That this information was conveyed to the appellant and the relevant authorities by the impugned letter. She reiterated that due regard to the law was observed during the exercise and maintained that the health and wellbeing of the public comes first and should never be sacrificed at the altar of commercial interests. She stated that the 1st respondent was a stranger to the tests conducted by the 6th respondent since it was not an accredited laboratory and insisted that such tests ought to be carried out at an accredited laboratory facility by the 1st respondent only. She went on to depose that the court was being invited to rely on a report by a third party and to disregard the report by the 1st respondent despite the fact that its report originated from a duly accredited laboratory in the performance of its constitutional and statutory mandate.

With regard to the pre-shipment testing, she stated that the 1st respondent tests products within the country to ensure that standards are met throughout the intended lifespan of the products because shipping, handling and packaging might degrade the fitness of food products. That the Agriculture and Food Authority's mandate is limited to registration of importers and does not deal with the quality and standards of the proposed imports. She therefore urged the court to consider that the decision was arrived at by experts in the relevant field and was meant to protect the general public from consuming hazardous and substandard products and that, the appellant had failed to state the legal basis upon which substandard sugar could be released to the public.

The 2nd, 3rd, 5th and 6th respondents did not file any papers in support of or in opposition to the proceedings. Counsel for the 3rd and 5th respondents attended the hearing and opted to rely on the pleadings filed by the 1st respondent.

The court in the impugned judgment first dealt with the notice of preliminary objection.

The 1st respondent had argued that a court has no power where it has no jurisdiction and that a court downs its tools the moment it holds that it is without jurisdiction. Counsel argued that jurisdiction must be exercised in accordance with the enabling statute and contended that Sections 11 & 14A of the Act divested the court of the jurisdiction to hear the case since the import of the above provisions was that the jurisdiction of the trial court under the Act was that of an appellate court and parties were not expected to approach it directly in the first instance where a dispute arose under the Act. That the appellant had not demonstrated exceptional circumstances to warrant the exemption from the statutory requirement nor had it pleaded the existence of virgin constitutional questions to warrant bypassing the said mechanism.

The appellant's argument on the other hand was that the preliminary objection on jurisdiction was mistaken on grounds that the existence of an alternative remedy was not jurisdictional but a matter of discretion and that there was no alternative remedy available to the appellant since the tribunal did not have jurisdiction to entertain the complaints raised in the case and that the matters raised were legal and ideally suited for determination by the trial court which could provide the most efficacious remedies. Counsel contended that the principle laid down in Section 9(2) of the FAA Act had no application in the case and that Sections 11 and 14A of the Act were not relevant as their relevance could only be viewed in relation to Section 10 of the Act. That the impugned decision was issued under the aegis of the multi-agency task force and therefore the provisions of the law relied upon by the 1st respondent were inapplicable. The appellant further contended that the tribunal had no jurisdiction over the rest of the respondents.

Relying on the provisions of Section 16(4) of the FAA Act and the case of **Speaker of National Assembly v Karume [1992] KLR 21** and **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR,** the court made a finding that the question of exhaustion of administrative remedies arose when a litigant aggrieved by an agency's actions sought judicial review of that action without

pursuing available remedies before the agency itself. The court observed that the appellant's reasons for bypassing the dispute resolution mechanism provided under the Act was that the impugned decision was made by Caroline Outa-Ogweno in her capacity as the Ag. Director of Market Surveillance of the 1st respondent and not as an inspector as contemplated under Section 14A of the Act and that the impugned decision was issued under an amorphous collection of state agencies operating as multi agency team and that the tribunal had no jurisdiction over the rest of the respondents. The court found these reasons to be perfect ones for the appellant to have applied for exemption from exhausting the remedy requirement first. The appellant should therefore have applied for such exemption from the court under Section 9(4) of the FAA Act and demonstrate such exceptional circumstances. The court held that the appellant's reasons failed because all the complaints and the key prayers sought in the application were directed against the 1st respondent thereby disclosing a dispute under the Act, and that the argument that the impugned decision was taken by an Ag. Director of the 1st respondent as opposed to an inspector contemplated under Section 14A of the Act held no water as there was no dispute that the decision was taken under the Act. Hence, the decision having been made under the Act, any aggrieved person was obligated to exhaust the mechanisms provided under the Act or apply for an exemption.

The court further held that there was no attempt to demonstrate that the internal remedy would not be effective and or that its pursuit would be futile for the court to permit the appellant to approach it directly. Neither was it established that applying the dispute resolution mechanism provided for in the Act would be impractical.

The learned Judge held that it was compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review unless exempted from doing so by way of a successful application under Section **9**(4) of the FAA Act.

Turning on the merits of the case, the court held that the argument that the impugned decision was arbitrary, unreasonable and capricious because testing had been done at the port of entry by the 6th respondent who confirmed that the goods satisfied the standards failed because; Regulation 3 of the Verification of Conformity to Kenya Standards of Imports Order, 2005 placed an obligation on a person who imports goods to ensure that the goods meet Kenyan Standards or approved specifications, secondly it was a legal requirement that all goods entering the country must be tested and or verified as provided for under Regulation 5 irrespective of whether the goods had been tested at the port of origin or not and thirdly that it was common ground that the law permitted the 1st respondent to inspect any goods entering the country to confirm conformity with the set standards and that Section 14A(1) of the act provides that an inspector may order the destruction of goods detained under Section 14(1).

The court also discounted the claim by the appellant that the decision was again arrived at arbitrarily, capriciously, unreasonably by holding that having diligently examined the circumstances of the case before it, it was unable to establish any of the above elements and that the appellant had failed to demonstrate that the impugned decision was arrived at in that manner. The court concluded that the decision was not influenced by other considerations nor was it was made in utter abuse of power and discretion.

With regard to the argument that the 1st respondent's Ag. Director signed the Seizure Notification yet she was not an officer appointed under the Act, the court observed that the 1st respondent's replying affidavit was clear that the inspection was conducted by its officers whose powers are provided under Section 14 of the Act. She did not depose that she did it herself nor were the averments rebutted. The learned Judge held that the appellant had not demonstrated that the impugned decision was tainted with illegality or any judicial review grounds to warrant the judicial review orders sought by the appellant in the application.

Accordingly, the appellant's application was dismissed on those two grounds with no orders as to costs.

Dissatisfied with the impugned judgment, the appellant lodged the present appeal in which 11 grounds were raised to wit that; the court erred in law and fact in: dismissing the appellant's application; proceeding on the basis that the impugned decision was made under Section 41A of the Act when on its own terms it was made in line with the multi-agency team; failing to find and hold that the jurisdiction of the Tribunal under Section 16A of the Act did not extend to decisions made pursuant to the multi-agency team; failing to find and hold that even if the tribunal otherwise had jurisdiction, as the multi-agency task force comprised other government entities, over which the said tribunal had no jurisdiction, the appellant could not challenge the impugned decision before them; failing to follow binding decisions of this Court cited to it; interpreting Section 9(4) of the FAA Act in an unduly restrictive manner by requiring that a formal application be made; relying on decisions of various courts which had not been cited to it without giving the appellant an opportunity to submit on them; failing to find and hold that the impugned decision was improper as the 1st respondent had failed to defend it on the terms upon which it was made, in line with the multi-agency task force; allowing the 1st respondent to defend the impugned decision on the basis other than that which it was made; failing to find and hold that reliance on the 1st respondent's decision was an outlier one, thus irrational; and failing to find and hold that Section 11 of the FAA Act gave the court sufficient flexibility to curve out the appropriate relief, even if not sought, which in this case included an order for independent testing of the sugar.

When the appeal came up for hearing, **Mr. Dar, Mr. Munyiri,** and **Mr. Muruka,** learned counsel appeared for the appellant, 1st and 3rd respondents respectively. The other respondents did not participate in the proceedings though served as appropriate. Counsel relied on their written submissions which they briefly highlighted.

Mr. Dar submitted that the appellant's application for judicial review was denied on the basis of the multi-agency team recommendation though the 1st respondent had deposed in its replying affidavit that the decision was based on the Act but reversed this position at the hearing stating that it was based on the decision of the multi-agency team which position in his view was an afterthought. That it was not open for a public body to make a decision and later justify it using another totally different consideration. He maintained that there were two test reports, one in favour of and another against the appellant. Counsel faulted the court for failing to determine the proceedings before it on the basis of the actual decision in respect of which judicial review orders had been sought and not the reconstructed version in the 1st respondent's replying affidavit. That the impugned decision was made in the exercise of the 1st respondent's powers under Section 16 of the Act hence the court erred in accepting the ex post facto explanation which was at odds with the actual decision. That decision of the multi-agency team was judicially reviewable which would wholly undercut the alternative remedy argument that formed the basis of the 1st respondent's preliminary objection. On the alternative remedy, counsel submitted that it was not possible to pursue the alternative remedy as the decision was not made under the Act. That the appellant did not contest the general principle that barring exceptional circumstances, a

party must exhaust all other statutory remedies available to it before seeking judicial review of an administrative action or decision. What the appellant contested was whether it had an alternative statutory remedy available to it under the Act as the impugned decision had not been made under the Act and so it was incumbent upon the court to look at the actual terms of the impugned decision so as to determine under what provisions of the law it was made. He reiterated that the terms of the impugned letter were quite clear and invited no controversy. That the basis of the condemnation of the sugar was multi agency team hence there was no plausible reason for the court to conclude that the impugned decision was made under the Act as there was nothing that would have alerted the appellant that the actual powers being exercised were under the Act. That it was erroneous for the 1st respondent to rely on Section 14A (4) since the decision was made by a director of the 1st respondent and not an inspector as envisioned in Section 14A. He also faulted the court for failing to hold that the jurisdiction of the tribunal under Section 16A did not extend to the decisions made by or actions taken pursuant to the multi-agency team. That even though the case of **Fleur Investments Limited v Commissioner of Domestic Taxes & Anor. [2018] eKLR** was cited to the court, it declined to be bound by it though it was binding on the basis of the doctrine of stare decisis or even explain why it was not so binding on the basis of Wednesbury unreasonableness. Lastly, counsel maintained that the two functions of the 1st respondent under Section 4(1) (c) and (i) are limited to providing facilities for examination and testing of goods and commodities with a view to determining whether such goods and commodities complied with the provisions of the Act or any other law dealing with standards of quality or description.

On his part, Mr. Munyiri pointed out that jurisdiction is everything, without it, a court has no power to make one more step. He relied on the oft cited case of **The Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1**) for this proposition. That pursuant to Sections 11 and 14A (4) of the Act, the court lacked jurisdiction to hear and determine a suit arising from a dispute between a party and the 1st respondent at the first instance as the relevant body vested with original jurisdiction to deal with such grievances and disputes was the tribunal. Therefore, the procedure adopted by the appellant in approaching the High Court directly, was wrong and that the appellant should have first exhausted the appellate procedure provided for in the Act. That the reliefs sought and indeed the entire dispute was between the appellant and the 1st respondent. Accordingly the other issues raised about the participation of other respondents were irrelevant. Counsel further submitted that the doctrine of exhaustion was ignored and the appellant never sought leave to bypass the procedure and remedies provided for in the Act. Citing the cases of **Speaker of National Assembly v Njenga Karume [2008] eKLR** and **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others, [2015] eKLR** counsel submitted that 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 since there are good reasons for such special procedures. That it was imperative that where dispute resolution mechanism exists outside courts, the same be exhausted.

That the remedies the appellant had sought were within the purview of the tribunal and that it was in the interest of upholding and promoting the provisions of Article 159(2) (c) of the Constitution which will otherwise be rendered futile if the High Court had to accept all kinds of litigation. That the tribunal was established as a forum of first instance and not a total ouster to the jurisdiction of the courts. Counsel further stated that Section 16G of the Act gives the High Court appellate jurisdiction from the decision of the tribunal.

Counsel then submitted that the FAA Act provides for exemption from the obligation to exhaust any remedy prior to moving the High Court on exceptional circumstances and upon application by the affected party. He pointed out that the appellant neither applied nor demonstrated attainment of the requisite exceptional circumstances that justified or allowed it to appear before the High Court at first instance. That it is settled law that it is upon an applicant to demonstrate to the court that there were exceptional circumstances warranting exemption from the obligation to exhaust any other remedy available to it under the law and there must be an application for such exemption for the court to consider on its merits thus it is a procedural substantive requirement which cannot be wished away. Counsel submitted that the court correctly applied itself to the provisions of the law and arrived at a just and sound determination in line with the dictum of this Court on the question of exhaustion. That the suit before the trial court was therefore fatally defective as it neither qualified as an appeal as contemplated by the Act nor as an exempted suit hence the court was divested of jurisdiction at first instance. He thus urged us to dismiss the appeal.

Ms. Muruka did not file written submissions but associated herself with the submissions made by the 1st respondent. She also urged us to dismiss the appeal.

We have carefully considered the record and grounds of appeal, the impugned judgment, the rival written submissions by counsel and the law. The issues for determination are in our view, whether the court below properly exercised its discretion in rejecting the appellant's motion, whether it was right in invoking the principle of exhaustion in rejecting the Motion and finally even on the merits of the Motion whether the court was right in holding that the Motion had not attained the threshold for the grant of the judicial review orders sought therein.

A close reading of some of the grounds of appeal demonstrate an attack by the appellant on the court's exercise of discretion in rejecting its motion. For instance the appellant complains that the court erred in rejecting the motion, that it proceeded on the basis that the impugned decision was made under section 14A of the Act when in fact it was made in line with the multi-agency task team, relying on decisions not cited to him, that the impugned decision was improper, in failing to find and hold that reliance on the 1st respondent's decision was an outlier one and thus irrational and finally failure by the court to curve out appropriate relief, even if not sought like in this case ordering for independent testing of the sugar in terms of section 11 of FAA Act.

It is trite that judicial review orders are discretionary. Emphasizing the discretionary nature of judicial review remedies, the court in the case of **Republic v Judicial Service Commission *ex parte* Pareno (2014) eKLR** held that judicial review orders are discretionary and are not granted automatically, hence a court may even refuse to grant them even where the requisite threshold has been attained since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one , it must be exercised on evidence of sound legal principles. The appellant may feel that it had made a strong case for the grant of the orders it had sought, however in the exercise of its discretion the court declined to do so for good reason espoused in the judgment.

Further, whenever the court is vested with discretion to do certain acts as mandated by statute the same has to be exercised judiciously and not in an arbitrary and capricious manner. Once the foregoing is demonstrable from the record, it will be difficult for the appellate court to interfere with the exercise of the court's discretion. See R **v Wilkes 1770 ER 327**.

We have carefully searched the record and we have not come across anything that would remotely suggest that the trial court acted in manner to suggest it had acted outside or beyond its remit in matters judicial review. We are satisfied that the trial court in reaching its determination was guided by the need to do real and substantive justice to the parties. It exercised the discretion soundly and on reasonable judicial principles. It considered all the relevant materialsplaced before it and eschewed irrelevant considerations. On the whole we are satisfied that the court properly exercised its discretion before reaching its conclusions in the matter contrary to the appellant's insinuations. Thus the grounds of appeal that challenge the court's exercise of discretion are unmerited and must fail.

The 1st respondent contended that the proper forum with original jurisdiction to entertain the dispute by dint of Sections 11 and 14A of the Act was the tribunal with appeals from its decision lying to the High Court as a court of appellate jurisdiction. He contended that sections 11 and 11A of the Act divested the court of the jurisdiction to entertain the matter. That the tenor and purport of the above provisions of the law was that the jurisdiction of the court is that of an appellate court. It maintained that there were a chain of decisions of this Court to the effect that where a statute provides for a remedy, the court must exercise restraint, and first give an opportunity to the relevant bodies to deal with the dispute as provided for in the statute. See the cases of **Speaker of the National Assembly and Geoffrey Muthinja Kabiru & 2 others** (all Supra). Further the case of **The Owners of Motor Vessel "Lilian S"**(supra) was cited for the proposition that a court has no power where it has no jurisdiction, and must down its tools the moment it holds that it is without jurisdiction. Finally it was the case of the 1st respondent that the appellant had not demonstrated that exceptionalcircumstances to warrant an exemption from the statutory requirement nor had it pleaded existence of virgin constitutional questions to warrant bypassing the said mechanism.

On the hand, the appellant charged that the High Court was the proper forum to determine the dispute and not the tribunal for reasons that the dispute was not merit based, had been reached by a multi-agency task force and was not even based on the Act. Therefore the tribunal had no jurisdiction to entertain the dispute since even the decision in the impugned letter was arbitrary, illegal, unreasonable and capricious and the deci sion to impound the sugar was reached by a director as opposed to an inspector pursuant section 14A(1) of the Act.

Sections 11 of the Act establishes the tribunal as follows:

> **"Any person who is aggrieved by a decision of the Bureau or the Council may within 14 days of the notification of the act complained of being received by him, appeal in writing to the Tribunal".**

Whereas Section 14A (4) provides as follows:

> **"Any person who is aggrieved by an order under subsection**
>
> **(1) may, within 14 days of the notice under subsection (3), appeal in writing to the Tribunal".**

From these provisions it is clear that the first point of call for a party aggrieved by the decision of the 1st respondent made pursuant to the Act is the tribunal and not directly to the High Court. It is however common ground that the appellant on getting the impugned letter bypassed the above provisions of the law and moved straight to court by way of judicial review without first approaching the tribunal, thereby breaching the doctrine of exhaustion of administrative remedies. This doctrine is now an accepted and entrenched doctrine in this country as espoused in a line of cases including **Speaker of the National Assembly** and **Geoffrey Muthinja Kabiru** (supra).

In the case of **Speaker of National Assembly v Njenga Karume** (Supra) this Court expressed itself thus on the issue:

> ***"…where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…"*** Emphasis ours. (See also: **Narok County**

Council v Trans Mara County Council & Another [2000] eKLR). And in the case of **Godffrey Muthinja Kabiru**, (Supra) this Court stated thus:

We may further add that in the case of **Albert Chaurembo Mumba &7 others v Maurice Munyao & 148 others (2019) eKLR the** Court in addressing similar circumstances was emphatic that:

> ***"In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute".***

The 1st respondent has argued that the appellant was bound by the doctrine of exhaustion and we agree. Indeed in its own submissions the appellant concedes to this fact. It has been said that the rationale for the doctrine is that it serves the purpose of ensuring that there is postponement of judicial intervention of matters to ensure a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts which accords well with Article 159 of the Constitution that commands courts to encourage alternative means of dispute resolution. However the doctrine is not cast in stone. There may be occasions where the invocation of the doctrine would not serve the values enshrined in the Constitution or law in which case a party may perfectly be entitled to move to court directly. In this case the appellant justified the non-adherence to the dispute resolution mechanisms provided in the Act on the grounds that

the impugned decision was made by the Ag. Director of the 1st respondent and not an inspector as envisaged by section 14A of the Act and secondly that the decision was reached by an amorphous collection of state agencies operating as a multi-agency team that the tribunal had no jurisdiction over.

The court in determining these issues delivered itself thus:-

" 18. In my view, the above arguments presented by counsel for the exparte applicant present perfect reasons for a litigant to apply for exemption from exhausting the remedy. This is because as explained below, for a litigant to bypass the dispute resolution mechanism provided under a statute, he must apply for exemption from the court. The applicant ought to have moved the court under section 9(4) of the FAA Act and demonstrate exceptional circumstances as explained below in this judgment.

19. In addition, the said reasons fail for the following reasons, first, a look at the exparte applicant's application shows that the key prayers sought in the application are directed against the first respondent. In addition, all the complaints in the application are directed against the first respondent. This tells with sufficiency detail the substance of the exparte applicant's case, which discloses a dispute under the Act. Joinder of the other parties has not changed the character of the pith and substance of the case.

20. Second, there is no argument before me that adequate and effective remedy cannot be obtained from the tribunal.

21. Third, on the argument that the impugned decision was taken by an Ag. Director of the first respondent as opposed to an inspector contemplated under section 14A of the act, it is my view that there is no dispute that the decision was undertaken under the Standards Act. Section 11 of the Act refers "To any person aggrieved by a decision of the Bureau". Fourth, this being a decision under the act, any aggrieved person is obliged to exhaust the mechanism provided under the act or apply for exemption. Sixth and more fundamental is the fact that the only way out to bypass this mechanism is to cite exceptional circumstances and move the court under section 9(4) of the FAA Act discussed below.

22. Section 9(2) of the FAA Act provides that the High Court or Subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanism including internal mechanisms for the appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or Subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection

(1)"

We entirely agree and endorse the above reasoning. Clearly therefore the criticism that the court interpreted section 9 (4) of the FAA Act in an unduly restrictive manner is obviously unfounded. Similarly the ground of appeal that in reaching its aforesaid decision the court violated its rights under the FAA Act suffers similar fate; the same goes for the claim that the decision was arrived at by the Ag. Director of the 1st respondent as opposed to the inspector under the Act. Finally, is the complaint that the decision was initially made outside the Act, but during the hearing, the 1st respondent shifted goal posts and it suffers the same fate.

In our view the court did a sterling job in its interpretation of the provisions of the law.

Further it does appear to us that section (9)(2) and (3) of the FAA Act is couched in mandatory terms. So that the only way out is the exemption provided by section 9 (4) thereof which is to the effect that the High Court or Subordinate Court may in exceptional circumstances and on the application by a party, exempt such a person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Accordingly having failed to revert to the internal dispute resolution mechanisms provided for in the Act and having also failed to apply for exemption from the requirement as provided for under the FAA Act the court was divested of jurisdiction to entertain the judicial review proceedings as it correctly found. Having reached this conclusion, the court ought to have downed its tools in line with the case of **"The Owners of Motor Vessel Lilian S"** (Supra). However the court went ahead to determine the Motion on merit. In doing so it reasoned that whereas courts should defer to specialized tribunals and other alternative dispute resolution statutory bodies created by parliament to resolve certain specific disputes, courts cannot sit back and watch such institutions infringe upon the rights of parties who seek refuge under the Constitution and other laws for protection hence courts would be perfectly in order to intervene where there is clear abuse of discretion by such bodies on account of, arbitrariness, malice, capriciousness and disrespect of the rules of natural justice. We are inclined to that reasoning. In **Republic v Commissioner of Co- Operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd [1999] 1 EA 245** the Court noted that:

> ***"It is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith."***

In the instant case, it is clear from the record that the 1st respondent in exercise of its statutory duty took samples of sugar from the appellant. Upon testing the said samples in its accredited laboratory, it was found that the said sugar was not fit for human consumption. The 1st respondent in exercise of its authority under Section 14A (1) of the Act then ordered that the sugar be destroyed. It is not disputed that the 1st respondent had the authority to test the sugar or destroy the same if it did not meet the required standards. It was not proved that in taking the decision, the 1st respondent acted unreasonably, capriciously or arbitrarily or that it failed to give reasons for arriving at the decision it did so as to term the decision irrational, unreasonable, made in bad faith, and constituted a serious abuse of statutory power so as to attract the judicial review orders sought.

The appellant claims that there were two letters regarding the testing of the sugar, one in its favour written by the 6th respondent to the effect that the sugar met the set standards and the 2nd letter authored by the 1st respondent which condemned the sugar as not having met the

standard. The court opted to go by letter of the 1st respondent. To the appellant the court erred in this regard and manifested its capriciousness and unreasonableness. However in its judgment the court advanced its reason(s) why it believed in the report by the 1st respondent, as it was the only accredited body to undertake such an exercise. The court cannot be faulted for reaching this conclusion on account capriciousness or unreasonableness. There was no proof that the 6th respondent was an accredited body as well.

Finally, on the issue that the trial court refused to be bound by the decision of this court in Fleur Investments Ltd (Supra), we note that the proposition in that case was that it was proper for a relief to be granted on the basis of *Wednesbury* unreasonableness and unlawfulness notwithstanding the unexploited statutory appeals process. However considering the issues framed for determination by the court being, the doctrine of exhaustion and whether the appellant had demonstrated grounds for the grant of the orders sought, the authority may not have come in handy. Further the court addressed the doctrine of Stare decisis at length in the judgment. Finally the court also addressed at length the *Wednesbury* principles of unreasonableness and unlawfulness and found that they were not proved in this case. So that whichever way one looks at it, it is not right to accuse that court of disrespecting the doctrine of stare decisis. It had it at the back of its mind all the time.

We have said enough to demonstrate that this appeal has no merit. The appeal is accordingly dismissed with no order as to costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR