REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 398 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER ARTICLES 21(1), 23(1), 23(3)(f), 25(c), 27(1),47(1), 49(1)(d) & 50 (2) OF THE CONSTITUTION

And

IN THE MATTER OF THE LAW REFORM ACT SECTIONS 8 AND 9

AND

IN THE MATTER OF THE STANDARDS ACT, CAP 496 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE VERIFICATION OF CONFORMITY TO KENYA STANDARDS OF INPORTS ORDER 2005

BETWEEN

UNIFRESH EXOTICS (K) LIMITED.....APPLICANT

VERSUS

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

SGS KENYA LIMITED.....2ND RESPONDENT

HELIOPATASSE SAS.....3RD RESPONDENT

KCB BANK KENYA LIMITED.....4TH RESPONDENT

RULING

The Introduction

1. Unifresh Exotics (K) Limited, hereinafter "the Applicant", is a private company incorporated in Kenya under the provisions of the Companies Act Cap 486 of the Laws of Kenya. It has sued the Kenya Bureau of Standards (KEBS) which is the 2nd Respondent, and is a statutory body established under the Standards Act, Chapter 496 of the Laws of Kenya for the provisions of standards, metrology and conformity assessment. Further, that 1st Respondent in the discharge of its functions, is empowered under order 4 of the Verification of Conformity to Kenya Standard of Imports Order 2005 to appoint an inspection body or bodies in the country of origin of goods to undertake verification of conformity to Kenyan standard or approved specification. SGS Kenya Ltd, which is the 2nd Respondent herein was appointed as one such inspection body, as the 1st Respondent's agent in terms of the Pre-export Verification of Conformity (PVOC) inspection program. The remaining Respondents are Heliopatasse SAS, which is the 3rd Respondent and is a company registered in Belarus, while the 4th Respondent is a registered Bank under the Banking Act of the laws of Kenya.

2. The Applicant filed a Chamber Summons application dated 27th September 2018, seeking leave to institute judicial review proceedings as against the Respondents. The Applicant seeks leave to commence proceedings for the following orders:

1. THAT this Court be pleased and do hereby suspend any payments by the 4th Respondents to the 3rd Respondents on account of Credit issued on 3rd April 2018 pending the hearing and determination of this application;

2. THAT the Applicant be granted leave to apply for Judicial review order of Mandamus to remove into this High Court and compel the 1st and 2nd Respondents to re-sample and re-test the subject consignment of a contract dated 5th March 2018 between the Applicant and the 3rd respondent for purchase of 1000 metric tones of compound fertilizer in presence of the Applicants Agronomist to ascertain their compliance with the Kenyan set standards.

3. THAT the Applicant be granted leave to apply for Judicial review order of Mandamus to remove into this High Court and compel the 1st and the 2nd Respondents jointly and severally to pay the Applicant a total of USD 427,098= including demurrage fees and consignment re-shipping fees plus interests.

4. THAT in the alternative a permanent injunction do and is hereby issued restraining the 3rd Respondent, its representatives, employees, servants and/or agents or anybody working under or for its from demanding the payment of a total of USD 427,098/= or any money for that matter from the Applicant towards the payment of the consignment that was declared non-compliant to Kenyan Standards by the 1st Respondent.

5. THAT such further and other relief that this Court may deem just and expedient to grant.

6. THAT costs of and incidental to the applications be provided for.

3. This Court directed that the application for leave be heard and determined *inter partes*, and parties were directed to file their respective pleadings and submissions in this regard. Despite various directions that the 3rd Respondent which is resident out of the jurisdiction be served, no satisfactory evidence was provided of such service, and the said Respondent did not participate in these proceedings.

The Applicant's Case

4. The Applicant's leave application is supported by its statement of facts dated 27th September 2018 and a verifying affidavit sworn on the same date by Mathew Lomosi, the Applicant's Legal Officer, and a supplementary affidavit he swore on 11th January 2019. The Applicant's Advocates on record, Prof. Tom Ojienda and Associates also filed submissions on the application dated 28th January 2018. Their case is as follows.

5. The Applicant claims that entered into contract with the 3rd Respondent on 5th March 2018 for the supply of 1000 metric tons of compound fertilizer for farming use from Belarus, for the sum of 420,000/= US dollars, which to be supplied in three lots. Further that the said contract provided the terms of payment, pursuant to which a Letter of Credit was opened on 3rd April 2018 with the 4th Respondent to facilitate payments between the Applicant and 3rd Respondent. According to the Applicant, among the documents to be presented before the Letter of Credit was to be paid/honored was a certificate of conformity to the 1st Respondent, issued by the

2nd Respondent.

6. The Applicant explained that the 1st Respondent under order 2 of the Verification of Conformity to Kenya Standard of Imports Order 2005 may publish a list of goods which shall be subjected to verification of conformity to Kenya standards or approved specifications, and that the 1st Respondent therefore issued a list on 4th June 2018, where the fertilser consignment fell under goods that were to be mandatorily subjected to testing upon docking.

7. It is the Applicant's case that on the 4th May 2018, the 2nd Respondents received samples for testing with regard to the 1st lot of the consignment of fertilizer and issued a test report, and on the strength of the successful results, the 2nd Respondent issued the Certificate of Conformity on the 22nd May 2018. That the 1st consignment was thus cleared and dispatched and arrived at the port of Mombasa on 1st July 2018. Further, that the 1st Respondent took the samples when the consignment of fertilizer arrived, carried out testing and found it to be non-compliant in a test report made on 9th August 2018. However that despite this finding, the 3rd Respondent proceeded to present Certificate of Conformity issued by the 2nd Respondent on 22nd May 2018 to the 4th Respondent, who intends to pay USD 79,380/= for the 1st lot to the 3rd Respondent under the terms of the Letter of Credit.

8. Likewise that 2nd Respondent further issued Certificates of Conformity on 29th May 2018 and 6th July 2018 respectively in respect of the 2nd and 3rd lots of the consignment, which were was equally found to be non-compliant with Kenyan standards upon retesting of the samples by the 1st Respondent. Further that the payment for the 2nd lot was scheduled on 4th October 2018 for the amount of USD 79,380/=, and for the 3rd lot on 7th November 2018 for the total value of USD 268,338/= . In addition, that the 4th Respondent has intimated that it will proceed to pay the amounts secured by the Letter of Credit dated 3rd April 2018 unless restrained by the Court, and that lots of the consignment found to be non-compliant are subject to being reshipped, returned or destroyed at the expense of the Applicant.

9. The Applicant further contends that it while would be against public policy to allow non-compliant products to be dumped in the country if the tests by the 1st Respondents are accurate, it would be unreasonable and illegal to allow the 3rd Respondent to benefit from the illegal supply of defective goods. Lastly, the Applicant disclosed that there is another suit namely **Nairobi Comm HCCC No 346 of 2018** pending in court between the Applicant and the 3rd and 4th Respondents on the issue of the release of the money by the 4th Respondent to the 3rd Respondent.

10. The Applicant in its submissions relied on the cases of **Seven Seas Technologies Limited vs Eric Chege (2014) e KLR, Owners of the Motor Vessel "Lilian S"v Caltex Oil (Kenya) Ltd, (1989) KLR 1,** and **Pravin Galot vs Magistrates Court at Milimani Law Courts (2017) eKLR** for the proposition the jurisdiction is everything and without it the court downs its tools, and it should be raised at the earliest stage. The Applicant further submitted in this regard the function of the Standards Tribunal is provided for at section 11 as that where any person who is aggrieved by the decision of the bureau may within fourteen days of the notification of the Act complained of being received by him appeal in writing to the Tribunal. However, that the real issue is that the 1st Respondent conspired and the 2nd Respondent to clear the consignment at the port of origin to facilitate letters of credit being drawn as against the 3rd Respondent while fully aware that the consignment was non-compliant.

11. Further, that it's unfair, unreasonable and illegal that the 1st and 2nd Respondent can test the same consignment and come out with different results. The Applicant submitted that it is not the one that chose the body to conduct the test; and that this was done by the 1st Respondent which is a public body, and that it is a basic principle of agency that the act of the agent is binding on the principle. Therefore the scope and the remedy sought are beyond the powers and functions of the Standards Tribunal which cannot grant the remedies sought, and as such the Tribunal would be ineffective and insufficient. The Applicant placed reliance on the case of **Solomon Muyeka Aubala vs Capital markets Authority & Another, (2018) eKLR** for the proposition that where an alternative forum for resolution is insufficient and in effective, the courts adjudicate on the dispute.

12. On the issue of leave, the Applicant submitted that the law on leave is fairly settled, and relied on the case of **Pravin Galot vs Chief Magistrates Court at Milimani Law Courts, (supra**) for the proposition that leave stage is meant to exclude frivolous applications or those which appear to be abuse of the Court. They submitted that the order for, leave to apply for mandamus to compel the 1st and 2nd Respondents for retesting and resampling of the consignment is sought as a consequence of their breach and abuse of their public duty.

13. The Applicant pointed out that if from the hearing it turns out that the consignment is compliant, the Court would establish that the 1st Respondent was being malicious and abusing its powers. That it is therefore important for the Court to get the true perspective of the dispute. In addition, that if the product is found to be compliant there would no need for the applicant to pay the

amount of USD 427,098/= including demurrage fees and consignment re-shipping fees, as the consignment would be available for the applicant. Lastly, the Applicant contended in response to the submission by the 1st and 2nd Respondents submit that there is no statutory duty imposed on them to retest and resample, that they are only at this point seeking leave and the argument can be interrogated during the hearing.

The Respondents' Cases

The 1st Respondent's Case

14. The 1st Respondent filed Grounds of Opposition dated 19th December 2018 were as follows:

1. That the Applicant has not demonstrated that it has exhausted the appeal process at the Standard tribunal set out in the Standard Act hence necessitating that the need for the present proceedings are called for.

2. That the Applicant has not demonstrated that the 1st Respondent has a public duty to resample and/or retest the consignment subject of these proceedings, and that the 1st Respondent has failed to perform such public duty.

3. That the Applicant has not demonstrated that its own agent acted within the scope of Authority/Agency and or that the 1st Respondent ratified the acts complained of.

4. That the application is bad in law as leave to institute a prayer for a writ of mandamus can only issue against a body if

a) The person/body is under a statutory or legal duty which is inoperative in nature to do or not to do something; and

b) That body/person has failed to perform the said duty to the detriment of a party who has a legal right to expect the performance of the same; and

c) The aggrieved party has made demand to the body/person to perform the public duty and it has refused and or failed to do so; and

d) Provided there is no other appropriate remedy.

e) That leave sought by the applicant is therefore not available the instant proceedings as filed against the 1st Respondent is bad in law and ought to be struck out with costs.

15. The 1st Respondent also filed a replying affidavit sworn on 18th January 2019 by Birgen Rono, its Acting Head of Department- Quality assurance filed on 18th January 2019. Its Advocates on record, Lilan and Koech Associates, also filed submissions dated 11th February 2019. He deposed that the 1st Respondent's acted within its mandate, object and functions under the Standards Act, and that in accordance with its functions and mandate established standards for compound fertilizers and the parameters to be tested.

16. The 1st Respondent confirmed that it started the Pre export Verification of Conformity to standards program in the year 2005 and also established the Verification of Conformity to Kenya Standards of Import, Order 2005, and the 2nd Respondent is one its verification agents. In addition that it has the statutory power and authority not to permit into the country any goods that do not conform to Kenya standards , and overriding powers to reject any consignment if it is found to be non-conforming on verification at the port of entry, even if its agent has issued a Certificate of conformity on the said consignment.

17. The 1st Respondent contended that the 1st lot of the Applicant's consignment was subjected to testing on 13th July 2018 in accord with the standards specification for Compound fertilizers and that the sample taken failed to comply with the set standards in relation to Nitrogen parameter. That they notified the Applicant of this results through a letter dated the 16th August 2018 and ordered the Applicant, either to reship it back to the country of origin within 30 days from receipt of the letter or it be destroyed. Further, that it is unable to respond with regard to allegations on Lot 2 and 3 of the consignment as the sample reference number, which would enable it track them in their system, was not provided by the Applicant.

18. Lastly, it was the 1st Respondent's case that under section 11 ,the Standards Act, provides for an appeal to the Standards Tribunal which is anchored under section 16 A and 16 C of the Act, and therefore the Applicants decision to seek leave to file judicial Review is premature.

19. The 1st Respondent in its submissions contended that section 11 of the Standards Act provides for an appeal to the Standards Tribunal and therefor any person aggrieved with the decision of the 1st Respondent has the right to appeal within 14 days of the decision, and a further appeal lies from the tribunal to the High court as an appellate court. The 1st Respondent cited the cases of **Kenya National Chamber Of Commerce and Industry & 2 Others vs Kenya Bureau Of Standards & Another, Meru Constitutional Reference No.08 of 2016**, **Alice Mwera Ngai versus Kenya :Power & Lighting Co Ltd, Kerugoya ELC Case No 287 of 2014** and **Republic vs Attorney General & Another Philip Ndungu Karanja, Nairobi Civil Application No 522 of 2016** for the holding that where the law has granted jurisdiction to other organs of government to handle specific grievances, the court must respect and uphold the law. Also cited was the case of **Joseph Njuguna Mwaura & others vs Republic, Nairobi CA Criminal Appeal No 5 of 2008** for the holding and proposition that before a court tries a matter it must first determine its jurisdiction. The 1st Respondent therefore submitted that the Court does not have the requisite Jurisdiction.

20. It was the 1st Respondent's submission that the real issue in contention is the 1st Respondents decision to reject and to order Reshipment and/or destruction of the Applicant's consignments with regard to lot No 1, and that to address the issue the Applicant is required by the Standards Act to pursue his claim in the Standard Tribunal first. Further, that if the real issue as submitted by the Applicant is that the 1st and 2nd Respondents conspired to clear the consignment at the port of origin in order to facilitate letters of credit being drawn in favor of the 3rd Respondent, they urged the court to question then what is the purpose of filing judicial review.

21. On the case of **Solomon Muyeka Alubala vs Capital Markets Authority & Another (supra)** , the 1st Respondent submitted that the doctrine is only applicable where the alternative forum is inaccessible, affordable timely and effective, and that the Applicant has not shown that the Standards Tribunal was inaccessible unaffordable and not effective in the circumstances. It was the 1st Respondent's submission that the Applicant has not made out a *prima facie* case to warrant the grant of the Judicial review Reliefs.

The 2nd Respondent's Case

22. The 2nd Respondent responded by filing grounds of opposition dated 27th November 2018 as follows:

1. The application is bad in law because leave to institute a prayer for mandamus can only issue against a person or body if;

a) A public duty is imposed against that person or body to perform such public duty and ;

b) That person or body had failed to perform the said duty to the detriment of a party who has a legal right to expect the duty to be performed.

c) The aggrieved party has made a demand to the person or body to perform the public duty and the person or body has refused and /or failed to do so.

2. The Applicant has not shown that the 2nd Respondent has a public duty to re-sample and re-test the consignment subject of these proceedings, and that the 2nd Respondent has failed to perform such public duty hence necessitation the instant proceedings.

3. That the applicant has not shown that the 2nd Respondent has a public duty to jointly and severally pay the Applicant the sum of USD 427,098 and the 2nd Respondent had failed to perform such public duty hence necessitating the instant proceeding.

4. The applicant has failed to show that SGS Klalpeda Limited Lithuania and the 2nd Respondent herein are one and the same company.

5. The Applicant has failed to show that it instructed the 2nd Respondent test and verify its goods prior to importation and has not adduced evidence that it paid the 2nd Respondent for conducting any tests of its goods.

6. The applicant has not shown that SGS Vostok Limited- Moscow Russian federation which issued the Certificate of Conformity, is the same entity as the 2nd Respondents herein.

7. The leave as sought by the Applicant is therefore unavailable and the instant proceedings as filed against the 2nd respondent is bad in law hence should be struck with costs.

23. In addition, the 2nd Respondent filed a replying affidavit sworn on 6th February 2019 by Hellen Achieng, its Government and Institutions Contract Manager, and its Advocates on record, Muriu Mungai & Company Advocates, filed submissions dated 3rd March 2019 of the 2nd Respondent. The 2nd Respondent contend that the Applicant has not shown whether the 2nd Respondent has a public duty to resample and re-test the consignment and whether the duty has been breached. Further, that the Test Reports annexed to the Applicants pleadings were done by SGS Klalpeda Limited in Lithuania, which is a different and separate legal entity from the 2nd Respondent, and that the 2nd Respondent was neither instructed to conduct testing on the Applicants goods neither was money paid for the testing. Likewise that the Certificates of Conformity indicate that they were issued by SGS Vostok based in Moscow, Russian Federation, which entity is different and separate from the 2nd Respondent.

24. The 2nd Respondent in its submissions relied on the case of **Republic vs Sacco Societies Regulatory Authority ex parte Joseph Kiprono Maiyo & 3 Others, (2017) eKLR** for the position that leave that it is supposed to exclude frivolous, vexatious or applications which primafacie appear to be abuse of the process. Further, that leave is granted if on the material available the court consider without going into the matter in depth that there is arguable case for granting leave, and that no prima facie case has been established against the 2nd Respondent since an order of mandamus can only issue against a person or body if there is a public duty imposed against that person or body. However that it is uncontroverted that the 2nd Respondent is a duly registered company in Kenya and not a public body or person and therefore does not have a public duty imposed on it.

25. The 2nd Respondent also placed reliance on the case of **Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge & Others ,Civil Appeal No 266 of 1996** for the scope and reach of the order of mandamus, and the case of **Republic vs Kenya Association of Music producers(KAMP) & 3 Others ex-parte Pubs, Entertainment and Restaurants Association of Kenya (PERALK), (2014) eKLR** where the court declined to grant the orders of prohibition and mandamus against the Respondents as they were public bodies. It was also submitted that there was misjoinder of the 2nd Respondent.

The 4th Respondent's Case

26. The 4th Respondent's case was stated in the replying affidavit sworn on 21st January 2018, by John Langat its Senior Manager, Trade Service. The 4th Respondent contended that it is not privy to the contract entered into between the Applicant and the 3rd Respondent, , and that it issued a Letter of Credit to the 3rd Respondent on instructions from the Applicant, and dishonoring the said Letter of Credit would expose it to litigation by the 3rd Respondent. Further, that the Applicant has not brought any evidence before court to demonstrate that documents presented to the 3rd Respondent by the 2nd Respondent are fraudulent. That in any event, the Applicant's remedies lies against the 1st and 2nd Respondents for issuing conflicting reports on the quality of goods involved. The 4th Respondent further contended that the subject amount has already been fully paid to the 3rd Respondent.

27. These pleadings were reiterated in the 4th Respondent's submissions, and the case of **Scope Telematics International Sales Limited vs Stoic Company Limited and Another**, **Civil Appeal No 285 of 2015** was cited for the proposition that its vital that every bank that issues a letter of credit should honor its obligations, and that the Bank is in no way concerned with the dispute the buyer may have with the seller.

28. Further, that the section 3 of the Fair Administrative Action Act 2015 at section provides that the Act applies to all state and non- state agencies, including any person exercising administrative authority or performing a judicial or quasi- judicial function under the Constitution or any written law. However that the 4th Respondent is not a public body, and the decisions in **St Patrick Hill School Ltd vs Permanent Secretary Ministry of Foreign Affairs (2008) eKlR** and **Environmental & Combustion Consultants Ltd vs Kenya Pipeline Company Ltd, Nairobi H.C JR No 106 of 2016** were cited for the proposition that judicial review remedies will only be invoked if the Respondents are performing a public duty.

The Determination

29. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which

provides that no application for judicial review orders should be made unless leave of the court was sought and granted. On whether leave once granted should operate as a stay, Order 53 Rule 1(4) of the Civil Procedure Rules further provides as follows:

"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."

30. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

31. The criteria for granting leave is multifarious, and relevant factors to be considered can be summarized as the capacity and interests of the applicant, the nature of the applicant's claim, the merit or otherwise of the applicant's claim and the propriety of judicial review proceedings to resolve the claim. the In the present application, as regards the first factor it is evident that the Applicant has legal personality and is directly affected by the decisions of the Respondents, as its consignment of fertilizer it imported is required to be returned or destroyed, and it is required to pay a significant sums of money to the 3rd Respondent for the said fertilizer under a Letter of Credit issued by the 4th Respondents The Applicant therefore has *locus* and sufficient interest to bring the present proceedings.

32. The nature of an Applicant's claim is relevant as there are certain decisions and actions that many not be amenable to judicial review, particularly arising from the requirement the decision or actions should emanate from the exercise of a public function. In this regard purely private law matters are not suitable for determination by judicial review proceedings, and in the present application the issues of payment as between the Applicant and the 3rd and 4th Respondents are a private and contractual dispute that is not amenable to judicial review. In addition, the said dispute will require the adducing of evidence as regards the terms of the contract between the Applicant and the Letter of Credit issued by the 4th Respondent, which are not matters that are amenable to judicial review. Lastly, there is another suit pending on the issue of payment, namely **Nairobi Comm HCCC No 346 of 2018,** and there is thus the risk of this Court being *sub judice* and issuing contradictory orders.

33. On the merits of the Applicant's claim, it is trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. The merits test commonly applied is whether the challenge of challenge is arguable. In **Sharma vs Brown Antoine (2007) I WLR 780**, Lord Bingham explained that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success, however, that the test is flexible depending on the nature and gravity of the issues.

34. In the present application, the dispute between the Applicant and Respondents emanates from the retesting by the 1st Respondent of the Applicant's consignment of fertilizer imported by the Applicant which it found to be non-compliant, and after the said consignment had been allegedly tested and approved for export by the 2nd Respondent. The 1st Respondent alleges it followed due process and acted according to the law in reaching the said classification. The 2nd Respondent claims that it was not the party that tested and cleared the consignment for export and there has been misjoinder in its relation to these proceedings. The Applicant on the other hand alleges that the 1st and 2nd Respondent acted fraudulently to enable payment of monies to the 3rd Respondent.

35. The allegations made arise from the statutory functions of the 1st Respondent under the Standards Act, and to this extent I find that an arguable case has been made as to the legal and proper exercise of these powers. The proof of the allegation and involvement

of the 2nd and 3rd Respondents will have to be left to the substantive hearing, as this Court cannot make a detailed examination of the evidence at this stage. The propriety of the 2nd and 4th Respondent's joinder in light of these finding will also have to be the subject of separate proceedings, upon formal application.

36. This brings into play the last factor as regards the exercise of this Court's discretion to grant leave, which is whether this Court is the proper forum to hear this aspect of the Applicant's claim. The Respondent argued that the Applicant is yet to exhaust the internal review mechanisms, and in particular that the Applicant has not exhausted the review mechanism provided for under section 11 of the Standards Act, which provides that any person who is aggrieved by a decision of the 1st Respondent may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Standards Tribunal. The said decisions will arise from the functions of the 1st Respondent set out in section 4 of the said Act as regards the management, implementation and regulation of standards.

37. Sections 9(2) and (3) and (4) of the Fair Administrative Action Act in this regard provides as follows:

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

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

38. The Applicant on its part did not dispute that its first port of call in terms of review is the Standards Tribunal, but urges that the said Tribunal is not suited to hear and determine its dispute to the extent that it is wider than issues of standardization It is trite law that judicial review is a remedy of last resort, and where an adequate alternative is available, the Court will usually refuse permissions to apply for judicial review, unless there are exceptional circumstances justifying the claim proceedings as provided for in section 9 (4) of the Fair Administrative Action.

39. In this regard, I am in agreement with the Applicant that the issues raised by the Applicant as regards its claim is beyond the jurisdiction granted to the Tribunal under the Standards Act, as it involves issues beyond the decision of the 1st Respondent as regards whether the Applicant's fertilizer met the necessary standards, and involves allegations of fraud and collusion by third parties. In this respect this Court did hold as follows in **Solomon Muyeka Alubala vs Capital Markets Authority & Another (supra):**

"While it is this Court's jurisprudential policy in this regard to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute as required by section 9(2) and (3) of the Fair Administrative Action Act, and as held in various decisions (see Republic vs National Environment Management Authority (2011) eKLR and Speaker of National Assembly vs Njenga Karume, (2008) KLR 425), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Where such an alternative remedy cannot be used by an applicant as in the present case, this Court can exempt such an applicant from its application as provided by section 9(4) of the Fair Administrative Action Act."

40. In the premises, I find that the Applicant's Chamber Summons dated 27th September 2018,is partially merited, and I grant the leave sought by the Applicant only to the extent of the following orders:

I. The Applicant be and is hereby granted leave to apply for judicial review orders of Mandamus to remove into this High Court and compel the 1st and 2nd Respondents to re-sample and re-test the subject consignment of a contract dated 5th March 2018 between the Applicant and the 3rd Respondent for purchase of 1000 metric tones of compound fertilizer in presence of the Applicants Agronomist to ascertain their compliance with the Kenyan set standards.

II. Leave is denied as regards the prayers sought in prayers 2, 4 and 5 of the said Chamber Summons.

III. The costs of the said Chamber Summons shall be in the Cause.

41. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MAY 2019

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2019

J. MATIVO

JUDGE