IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO.63 OF 2019

BETWEEN

ATTORNEY GENERAL.....1ST APPELLANT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND APPELLANT

AND

PHOENIX GLOBAL KENYA LIMITED.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

ANTI- COUNTERFEIT AGENCY.....3RD RESPONDENT

FINANCIAL REPORTING CENTRE.....4TH RESPONDENT

KENYA BUREAU OF STANDARDS.....5TH RESPONDENT

MITCHELL COTTS (K) LIMITED.....6TH RESPONDENT

MITCHELL COTTS FREIGHT (K) LIMITED.....7TH RESPONDENT

Being an appeal from the judgment of the High Court of Kenya at Mombasa, (E.K. O Ogola, J.) dated 24th January, 2019

in

H.C.C Petition No. 205 of 2018.)

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JUDGMENT OF THE COURT

1. ***Phoenix Global Kenya Limited***, the 1st respondent, (Phoenix) claims to be one of the largest commodity trading company in Kenya. Sometimes in the year 2018 Phoenix imported 10,327.80 metric tons of rice and stored it at warehouses belonging to ***Mitchell Cotts Freight (K) Ltd***, the 7th respondent. The rice was imported from India, Pakistan and Thailand. In Pakistan, SGS Pakistan (Private) Limited and Intertek Pakistan Pvt Limited are the Pre-verification of

Conformity ***(Pvoc)*** agents of the ***Kenya Bureau of Standards (KEBS)*****,** the 5th respondent, whereas in Thailand the Pvoc agent is Intertek Testing services (***Thailand***) Limited and Bureau Veritas (***Thailand Limited***). There was no dispute that the two pre-verification agents had tested and passed the rice before it was imported into the country.

2. Sometimes in the year 2018 the Government of Kenya established a multi-agency team comprising of the 2nd appellant, the 2nd, 3rd and 5th respondents as well as the National Police Service to establish the quality of sugar and other commodities that were being imported into the country in an effort to crackdown on contraband commodities. On 13th July, 2018, the multi-agency team visited the 7th respondent's warehouses in which the 1st respondent's rice and sugar were kept. The warehouses also contained sugar and other commodities imported by some third parties.

3. The multi-agency team sealed and locked up the 7th respondent's warehouses and denied Phoenix access to its rice stored there. On 19th and 25th July, 2018, the 7th respondent wrote to the Directorate of Criminal Investigations requesting for the opening of the warehouses to enable their client access the rice therein, and particularly to enable its fumigation. As no response was forthcoming, on 3rd August 2018, Phoenix moved to court and filed a petition under ***Articles 2, 10, 19, 20, 21, 22, 23, 24, 27, 35, 40, 47*** and ***50*** of the ***Constitution of Kenya*** (***the Constitution***) seeking the following orders: -

"(a) A declaration that your Petitioner's fundamental rights to the protection of its property from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to a fair hearing have been breached;

(b) A declaration that the Respondent has acted inconsistently with and in a breach of its powers, duties and obligations under the provisions of Articles 10, 35, 47 and 50 of the Constitution particularly when the importation of rice as a commodity is not under investigation;

(c) A declaration that the purported Multi-Agency team comprising of the Respondents is not anchored in law and the sealing of the Seventh Respondent's warehouses where the Petitioner's rice is stored by the First Respondent at the behest of the Third Respondent was illegal and unlawful;

(d) Consequently, an Order prohibiting the Respondents whether by themselves or through their agents, servants or employees from interfering with your Petitioner's proprietary rights or its access to their rice consignments presently stored at the Mitchell Cotts warehouses in Mombasa or accessing the said warehouses for purposes of depositing further consignments of rice therein in the normal course of its business;

(e) General damages for unlawful and illegal detention of the Petitioner's consignments of rice.

(f) The costs consequent upon this petition be paid and borne by the Respondents;

(g) All and other such orders or relief as this Honorable Court may deem just and fit to grant."

4. Together with the Petition, Phoenix also filed an application by way of a Notice of Motion under ***Articles 22*** and ***23 (3)*** of the ***Constitution*** seeking, *inter alia*, a conservatory order in the form of an injunction to restrain the multi-agency team and/or its agents from interfering with or blocking its access to the rice consignment. The Petition and the application were supported by an affidavit sworn by ***Biren Jasani***, a director of Phoenix stating, *inter alia*, that Phoenix had lawfully imported the rice consignment in question and stored it at the 7th respondent's warehouses; that the multi-agency team, for no stated reason, had denied it access to its goods; that the rice was likely to be damaged unless Phoenix was allowed to remove or fumigate it; and that the multi-agency team was violating the Phoenix's constitutional rights.

5. In response to the Notice of Motion, the multi-agency team filed a replying affidavit that was sworn by ***Joseph G. Ng'ang'a***, the Regional Criminal Investigation Officer, Coast Region, who affirmed that on 13th July, 2018 the multi-agency team sealed the 7th respondent's warehouses, having discovered a consignment of rice and sugar stored there; that on 16th July, 2018 samples of sugar were collected for testing and that on 20th August, 2018 the multi-agency team collected samples of Phoenix's rice for testing at KEBS' laboratory in Nairobi.

6. The test results, according to KEBS, revealed that some of the rice samples had not complied with the required standard in terms of grading and therefore ought to be destroyed, whereas some of it had complied with the set standard and could be released to the importer.

7. Reacting to the test results, two affidavits to that effect were also sworn by ***Caroline Outa Ogweno***, Acting Director, Market Surveillance, KEBS. The first one was sworn on 9th October 2018. A further affidavit to the amended petition was sworn on 2nd November 2018.

8. Phoenix argued that prior to its importation, the rice had been inspected by the Pvoc agents aforesaid at the countries of origin and ascertained that it conformed to Kenya's Standards and it attached the inspection results. Phoenix further asserted that there was a likelihood that in the process of the handling of the rice after its importation some of it could have broken. It further contended that of the 28 samples drawn by the 2nd appellant, ***(DCI)*** and KEBS, only 16 results had been submitted; 3 of the results were of rice brands that had not been imported by the 1st respondent – "***Spring***""***Eland Thai***" and "***Double Horse***".

9. Phoenix argued that it had paid all the taxes and duties on the rice that it had imported, which fact was not disputed by the ***Kenya Revenue Authority (KRA)***, the 2nd respondent. That notwithstanding, the actions by the multi-agency team had occasioned its loss amounting to Kshs.53,938,446.60 as itemized in a schedule annexed to Phoenix's petition.

10. In his judgment, the learned judge ***(E.K. Ogola, J.)*** held that: the multi-agency team was anchored in law; that KEBS had failed to submit some of the results of the rice samples that it had taken for testing; the integrity of the results and the samples were questionable; although the rice had been inspected and its quality verified before importation, that could not stop further verification upon its arrival in Kenya but that had to be done transparently and not capriciously.

11. The learned judge further held that there was no reasonable explanation as to why the rice that had been verified and cleared for entry into Kenya and KEBS had issued Pre-verification Certificate of Conformity was still locked up in a warehouse; however, KEBS' sampling and testing of the rice was in performance of its constitutional and statutory roles of protecting consumers.

12. Regarding the size of the rice, the Court held that the deviation in the size cannot be considered "*a life threatening issue*" as submitted by the multi-agency team; the percentage of the broken rice as per the results submitted by the DCI was 8.7% instead of the 5% maximum permissible under the Kenyan Standard, whereas the SGS test results showed less than 2% was broken rice; the method of determining the percentage of the broken rice was not scientific, was at the discretion of the multi-agency team and the sampling was deliberately skewed and in some instances deliberately wrong to achieve a particular result. In view of all those discrepancies regarding the local verification and sampling, the only dependable sampling size result, the Judge held, was the pre-shipment verification results from the independent organizations accredited by KEBS to do that work.

13. The Court concluded that the subject rice met all the import required standards and ordered it released to Phoenix.

14. Regarding the claim for damages, the learned judge faulted KEBS for refusing to recognize the results of verification from its own Pvoc agents; and for failure to avail to court all the test results. The Court awarded Phoenix, against KEBS, **Kshs.15,000,000**/- in general damages for unlawful and illegal detention of Phoenix's rice but disallowed all the other pecuniary claims.

15. Further, the court granted prayers (a) and (b) regarding the declarations sought and also an order prohibiting the multi-agency team from interfering with Phoenix's proprietary rights over the rice consignment in terms of prayer (d) of the amended petition.

16. Being aggrieved by that decision, the Attorney General and the Director of Criminal Investigations, the appellants, preferred

this appeal. KEBS, the 5th respondent, also filed a cross appeal dated 30th May 2019. The appellants faulted the learned judge for; contravening ***Article 46*** of the ***Constitution*** by ordering the release of substandard rice for sale; for overlooking the affidavit evidence of the appellant and the recent testing and sampling done by the 5th respondent and without a basis choosing to rely on the pre-shipment verification.

17. KEBS stated in its cross appeal that the learned judge erred in law and fact in;

a) "Finding that the 5th respondent did not provide the test results to court and further erred in ignoring the affidavit of Caroline Outa filed on 9th October 2019;

b) Determining without jurisdiction and contrary to statute the criteria to be used by the 5th respondent in discharging its statutory duties;

c) Apportioning blame on the 5th respondent for conducting its statutory duty as set out in statute;

d) Approbating and reprobating by finding that the pre-verification at the point of origin was not a bar to further testing of the rice once it reached Kenya but also blaming the 5th respondent for conducting further tests after the rice consignment reached Kenya;

e) Upholding a legal notice against clear provisions of statute; the Standards Act Cap.496 against the verification of Conformity to Kenya Standards of Imports Order, 2005;

f) Ordering for unconditional release of the rice, the subject of the suit, having been declared to have failed in grading as per the standards;

g) Ignoring the statutory mandate of KEBS and holding that the deviation in grading was negligible;

h) Comparing the test results provided by the DCI with those of SGS, a private company operating outside the Standards Act remit set for the cross-appellant without the sanction of the court;

i) Trivializing the failure of the rice in grading, hence downplaying the economic rights of the purchasing public;

j) Awarding damages without any legal or factual basis and without any proof at all and in the absence of proper pleadings and evidence to substantiate the claim as such;

k) Awarding Kshs.15,000,000/- as general damages against the cross appellant without any basis;

l) Finding that no explanation was offered for the need for the re-testing once the goods entered the country and further erred in inferring malice in the re-testing;

m) Shifting the burden of proof to the cross-appellant;

n) Finding that the size variations are negligible, the method to determine the size of broken rice was not scientific and at the discretion of the agency and that sampling for the same was deliberately skewed, and in some instances deliberately wrong to achieve a particular result.

o) Finding that the subject rice met all the import required standards;

p) Finding that the blame solely falls on the cross appellant."

18. KEBS sought orders that;

a. "The judgment delivered on 24th January 2019 be set aside or varied;

b. The award of Kshs.15,000,000/- as general damages be set aside;

c. The judgment in question be substituted with an order dismissing the 1st respondent's case against the appellant;

d. The rice be released upon the same being downgraded and upon payments of the assessed amounts by KEBS being settled; and

e. Costs of the appeal."

19. The appeal was canvassed by way of oral and written submissions, with lists of authorities that were highlighted by learned counsel. At the hearing of this appeal ***Ms. Kiti*** held brief for ***Mr. Nguyo Wachira*** for the appellants, ***Mr. Sanjeev Khagram*** appeared for Phoenix, while ***Ms. Janet Lavuna*** appeared for, KRA, the 2nd respondent. ***Mrs. Rose Kariuki-Owesi*** appeared for KEBS, the 5th respondent and ***Mr. William Mogaka*** appeared for the 6th and 7th respondents. The Anti Counterfeit Agency and the Financial Reporting Centre, the 3rd and 4th respondent respectively did not participate in the appeal.

20. In our judgment we shall consider the submissions made by learned counsel for the appellants as well as by the 1st and 5th respondents' counsel. Ms. Lavuna briefly submitted that KRA acted within its mandate in supporting the other entities in the multi-agency; that the matter did not involve a tax issue but a standards issue; that KRA supports the findings by KEBS; that to the extent that Phoenix had paid all the required duty for the rice, KRA had no claim over it. She urged the Court to allow the appeal and the cross appeal. Mr. Mogaka told the court that the 7th respondent did not participate in the hearing of the petition. He however, submitted that the 7th respondent's warehouses had been unlawfully sealed for a long period of time and his client had suffered loss and damage. He urged the court to dismiss the appeal and the cross appeal. In this judgment we shall not make any findings regarding the 7th respondent's alleged loss, considering that it is the subject of its cross petition dated 25th September 2018 that is not the subject of the impugned judgment.

ISSUES FOR DETERMINATION

21. The grounds raised by the appellants and the 5th respondent in its cross appeal are cross-cutting. We shall therefore merge them and determine the appeal on seven broad grounds as follows:-

(i) Whether the learned judge interfered with the statutory duty of KEBS;

(ii) Whether the learned judge erred in law by ordering unconditional release of the rice and whether by so doing he contravened the provisions of Articles 43 and 46 of the Constitution regarding consumer protection;

(iii) Whether the learned judge, in stating that no responses to the petition had been filed overlooked two affidavits filed by KEBS which provided test results of the rice and thereby substituted KEBS' tests results with his own decision;

(iv) Whether the learned judge erred in law by relying on the pre-shipping verification to order release of the rice;

(v) Whether the cause of the variation in the percentage of the broken rice between the pre-shipping status and the post-offloading status was due to mishandling or otherwise;

(vi) Whether the percentage of the broken rice as it existed at the 7th respondent's warehouse was negligible or not.

(vii) Whether the learned judge erred in awarding general damages against KEBS.

DETERMINATION

(i) Whether the learned judge interfered with the statutory duty of KEBS

22. KEBS is a statutory body duly established by the Standards Act Cap 496 Laws of Kenya and its functions are, *inter alia*;

"(i) to promote standardization in industry and commerce,

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

(iii) to prepare, frame, modify or amend specifications and code of practice."

23. Mrs. Owesi submitted that the Standards Act mandates KEBS to conduct continuous testing of commodities and its inspectors are mandated to enter upon any premises at which there is or is suspected to be a commodity in relation to which any standard specification or standardization mark exists, and to inspect and take samples of any such commodity or material.

24. The rice in issue had been imported on various dates from 9th December, 2016 and was stored at the 7th respondent's warehouses awaiting orders for dispatch and sale to the public. It was conceded that the rice had undergone pre-export verification which it passed; and underwent testing at the point of entry which it also passed. The further testing conducted was done at the point of the rice awaiting release for sale in the country, counsel added. The samples that were tested showed that some of the rice had not met the required standard.

25. Counsel submitted that the High Court interfered with the statutory mandate of KEBS in making a determination that the percentage of the broken rice was a negligible deviation from the Kenya Standard; that ***section 14A*** of the ***Standards Act*** provides that where a product is found not to meet the standard provided it ought to be destroyed; that notwithstanding KEBS made a decision pursuant to ***World Trade Organisations Agreement on Technical Barriers to Trade*** to allow Phoenix to apply for downgrading of the rice, which the 1st appellant did after sometime; and this was a clear manifestation that the rice had indeed failed in grading. In the circumstances, it was therefore improper for the trial court to order unconditional release of the rice, Counsel stated.

26. The appellants supported the above submissions by KEBS. They added that under ***section 11*** of the ***Standards Act*** if Phoenix was aggrieved by the decision of KEBS that some of the rice had not met the required standard it ought to have appealed in writing to the

KEBS Appeal Tribunal; that according to the "*doctrine of exhaustion*", Phoenix was obligated to exhaust the administrative law options before moving to the High Court. In support thereof the appellants' counsel cited ***Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR***, where this Court held:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with** Article 159 **of the** Constitution **which commands Courts to encourage alternative means of dispute resolution"

27. ***Section 11*** of the ***Standards Act*** states as follows:-

"Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act

complained of being received by him, appeal in writing to the Tribunal."

We do not think that in the circumstances of this matter the above provision of the law was applicable. Phoenix waited patiently from 13th July, 2018 when it was denied access to its goods without any explanation until 3rd August, 2018 when it moved to court. And even after the petition was filed and interim conservatory orders granted, KEBS and other members of the multi-agency team did not take any action until 20th August, 2018 when it drew samples of the rice for testing. There was therefore no decision that could have been referred to the Tribunal.

28. In response to the question whether the learned judge had interfered with the statutory duty of KEBS, Phoenix submitted that following promulgation of the 2010 Constitution, in the discharge of its statutory duties and functions, KEBS is required to comply with its obligations under the Act and to act lawfully and fairly but in this particular incident it failed to do so. In support of that submission counsel cited this Court's decision in ***Krish Commodities Limited vs Kenya Revenue Authority, Civil Appeal No. 67 of 2017*** where it was held that exercise of powers by public officers ought to be reasonable, rational, fair and in accordance with ***Articles 10*** and ***47*** of the ***Constitution***; that every person has the right to fair administrative action in an expeditious, efficient, lawful, reasonable and procedurally fair manner, even in the exercise of statutory powers.

29. In ordering unconditional release of the rice, did the learned judge therefore interfere with the statutory role of KEBS"

On 20th August, 2018 after more than one month of sealing the 7th respondent's warehouses without taking any action at all, the multi-agency team collected samples of the rice and sent them to KEBS' headquarters in Nairobi to ascertain whether the rice met the set standards of any grade; the percentage of moisture thereof; if it had aflatoxin contamination; whether it had arsenic, cadmium, mercury and lead content; and whether it was fit for human consumption.

30. Some of the rice was found to be fully compliant with the required standard and could therefore be released for sale, but some of it was said to have failed in grading and therefore ought to be condemned for destruction; which was the initial stand taken by the multi-agency team. However, it was not demonstrated that under the provisions of ***section 14 A (1)*** of the ***Standards Act*** an order for destruction of the rice was merited. The section states as follows:-

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

(a) testing indicates that the goods do not meet the relevant Kenya Standard; and

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

31. Subsequently, it was established that the question of unfitness for human consumption of the rice did not arise and KEBS was agreeable to its downgrading. There were also various issues that were raised by Phoenix regarding the test results that showed that some of the rice did not meet the required standards. Among the issues were that some of the results were in respect of rice brands that allegedly did not belong to Phoenix; and the integrity of the DCI's sampling process and submission of the samples for testing.

32. It was also argued that there was no reasonable explanation for the variation between the pre-shipment tests conducted by KEBS Pvoc agents and the test results conducted after the rice was impounded at the 7th respondent's warehouses.

33. The learned judge appreciated that the pre-shipment verification was not a bar to further testing once goods are off-loaded; and that KEBS has a statutory duty to ensure that goods that are consumed in the country are of the required standard. However, the learned judge expressed some misgivings about the manner in which the multi-agency team, particularly the DCI and KEBS, had conducted the whole exercise of impounding and testing the rice in issue. The learned judge stated, *inter alia*:-

"84. All along there has never been an issue of substandard, contraband or poisonous rice. The issue is alleged failure in

size. This cannot be considered a life threatening issue as submitted by the respondents. I have also looked at the alleged deviation in the size, which appears negligible. As I have already observed in issue number two above, a comparative analysis of results attached to the Petitioner's and Respondents Affidavits shows margins of deviation. The First Result on the DCI's Second Affidavit relates to 'Himalaya Pearl Biryani Rice' has been failed on the basis of there being 8.7% broken rice instead of the 5% maximum permissible under the Kenyan Standards. All other parameters meet the Standard. Compare this to the SGS test report done by the Petitioner's Independent Testing Agent in results appearing at Pages 241 and 248 of the Petitioner's Fourth Affidavit where for the same 'Himalaya Pearl Biryani Rice' Brand, the broken kernels were found to be 1, 34% and 0.63%. At Page 255 is another test report showing 0.30% broken kernels. The testing done and Pre-verification of conformity for the same brand appears at Pages 325 to 334 of the Petitioner's Sixth Affidavit showing the broken rice at 1.5% on the basis of which the PVOC was issued by KEBS through its contracted agent.

85. In my view, this margin of deviation is marginal and has been explained by the Petitioner. I have accepted that this kind of deviation can be caused simply by the way the cargo is handled both at loading and offloading and indeed dependent on the position of samples taken. This in my view is a kind of deviation that constitutes occupational hazard which should be accepted by the Respondents. To do otherwise will expose the fallacy of KEBS conduct to be discerned from a result in respect of Grade 3 rice issued by KEBS for a consignment that has long been sold and disposed of appearing as Exhibit 'BJ6' to the Petitioner's Sixth Affidavit where Grade 3 rice is said to have had only 2% broken elevating it to Grade 1 in terms of the KEBS Milled Rice Specification appearing at Page 572 of Petitioner's 6th Affidavit. "

34. In so expressing himself, the Judge does not appear to have had any regard whatsoever to the affidavits sworn on 9th October 2018 by Caroline Outa-Ogweno, the Acting Director, Marketing Surveillance of KEBS. It may well be that that affidavit escaped the attention of the learned judge as no reference was also made to it in paragraph 2 of the impugned judgment where he set out the affidavits filed. In the affidavits sworn by Caroline Outa-Ogweno on on 9th October 2018 and 2nd November 2018 , it was deposed that samples of rice were taken for testing between 13th July 2018 and 20th August 2018; the contention by Phoenix that some of those samples were not taken from its stock was contested with KEBS maintaining that all the samples in question were taken from Phoenix's stock of rice.

35. More significantly, it was demonstrated through those affidavits that some of those samples failed the results analysis and Phoenix acknowledged as much. In a letter dated 7th September 2018 exhibited to the affidavit of Caroline Outa-Ogweno sworn on 9th October 2018, Biren Jasani, a Director of Phoenix, wrote to the Managing Director, KEBS and admitted that some of the samples failed the test on brokenness. The letter stated in part:

"Factually this rice is fit for human consumption and only failed on basis of broken percentage of maximum 5% and not any other tested parameters. Phoenix humbly requests your office to consider:

(a) Downgrading the rice to Grade 2 to enable us continue with our sales.

(b) *We will ensure that we mark out all the bags as Grade 2 before dispatch to the market."*

36. Also exhibited to the affidavit was the KEBS standard prescribing that milled rice grains shall comply with the maximum limits given, which in respect of the characteristic of damaged broken kernels was 5% for grade 1, 15% for grade 2 and 25% for grade 3. There is no suggestion that those standards are arbitrary. Those standards recognize that there is an acceptable level of broken kernels beyond which the rice cannot be marketed as grade 1 rice. It is not, in our respectful view, the function of the court to, in effect, set its own standard as to what an acceptable standard is. By proceeding on the basis that the deviation was marginal or negligible, the lower court thereby substituted its own standard with that of KEBS, the body with the statutory mandate to do so.

37. In view of the foregoing, we agree with the appellants and with KEBS that the learned judge interfered with the statutory duty of

KEBS by purporting to substitute its own standard on brokenness with that of KEBS and thereby erred in ordering unconditional release of the rice. This finding also disposes of the 5th and 6th issues for determination.

(ii) Did the learned judge contravene the provisions of Articles 43 and 46 of the Constitution"

38. ***Article 43 (1) (c)*** guarantees every person the right to adequate food of acceptable quality; while ***Article 46*** states as follows: -

"46.

(1) Consumers have the right-

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and (d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons."

39. The submission by the appellants that ordering release of the rice was tantamount to risking the health of consumers who may be "*exposed to the probability of consuming rice that has failed in grading*", is not entirely accurate. It was not demonstrated that the rice in question was in any way unfit for human consumption. No sample was found to have any aflatoxin or any harmful chemical or compound. It was the percentage of the broken rice that was said to be higher than the required standard, and that is why KEBS was not opposed to its downgrading.

40. The learned judge was cognizant of the constitutional role of KEBS under ***Article 46*** of the ***Constitution***. He delivered himself as follows: -

"It is the statutory obligation of the 6th Respondent to ensure that the goods being consumed are of the required standards, failure of which the Public risks consuming harmful and/or substandard products. Further Article 46(1) (a), (b) and (c) of the Constitution of Kenya, 2010 protects consumers' economic rights, rights to quality, safe and healthy products which the 6th Respondent is mandated by statute to enforce among other Agencies. So, the 6th Respondent in sampling and testing the Rice consignment is performing its constitutional and statutory obligation of protecting the consumers."

41. However, the learned judge observed that whereas KEBS has an important constitutional and statutory duty, it has to undertake it in a lawful manner and without destroying the Phoenix's business.

The learned judge did however downplay the statutory duty of KEBS of protecting the public from substandard products.

(iii) Did the learned judge overlook two affidavits filed by KEBS which provided test results of the rice" Did he substitute KEBS' test results with his own decision"

42. As already indicated, the answer to this question is in the affirmative. As already stated, there were two affidavits that were sworn by Caroline Outa-Ogweno, Acting Director, Market Surveillance, KEBS. The first affidavit was sworn on 9th October, 2018 shortly after the Petition and Cross Petition were filed. The deponent stated, *inter alia*, that 28 samples of rice were drawn for testing and some of them failed the test while others complied and the rice represented by the samples that complied was released, while that did not comply was withheld; that subsequently the 1st respondent wrote to KEBS requesting to have the non-compliant rice

downgraded instead of being destroyed.

43. In the second affidavit sworn on 2nd November, 2018, Caroline Ogweno stated, *inter alia*:-

"7. That it is in my knowledge and that of the Cross - Petitioner that part of the rice tested failed in terms of grading. This has an impact on the grade of the rice. The grade of the rice has an impact on the price of the rice. A higher grade attracts a higher price. A lower grade deserves a lower price.

8. That it is in the consumers' economic interest to get value for their money. It would be unjust, unconstitutional and unconscionable for the consumers to pay a higher price for rice whose grade is much lower.

9. That it is necessary to hold onto the non-compliant rice until a decision is made respect to its destruction or otherwise."

44. At paragraph 16 of the judgment, the learned judge extensively dwelt on the affidavit sworn by Caroline Outa-Ogweno on 2nd November, 2018. At paragraphs 57, 58, 59 and 60, the learned judge again considered the submissions by KEBS' learned counsel, Miss Ombati, and made reference to the an affidavit dated 19th October 2018. The affidavit of 19th October 2018 referred to is the "Petitioner's further replying affidavit" that was sworn by Biren Jasani. Quite clearly, the learned judge did not consider one of the affidavits by Caroline Outa-Ogweno, namely the affidavit of 9th October, 2018.

45. In considering whether the deviation in the size of the rice should lead to its destruction, re-classification or otherwise, the learned judge acknowledged that:-

"It is the statutory obligation of the 6th Respondent (KEBS) to ensure that the goods being consumed are of the required standards, failure of which the public risks consuming harmful and/or substandard products… so the 6th Respondent in sampling and testing the rice consignment is performing the constitutional and statutory obligation of protecting the consumers."

46. That notwithstanding, the learned judge for reasons that he expressed, was not satisfied that the deviation in the grade of the rice called for its destruction. Whereas we agree with the learned judge that it did not call for destruction, it did not, in our view, call for unconditional release of the rice as grade 1 rice. We reiterate that it was not demonstrated the requirements of ***section 14A (1)*** of the ***Standards Act*** had been satisfied as to warrant the destruction of the rice.

(iv) Whether the learned judge erred in law by relying on the pre-shipping verification to order release of the rice.

47. We have already alluded to this issue. At paragraph 86 of the impugned judgment, the learned judge observed that before the rice was shipped, KEBS' Pvoc Agents had inspected it and verified that it met the required standards (and the results were shown); that upon its arrival at the Port of Mombasa it was randomly sampled by KEBS and released upon confirmation that it met the relevant standards; and that there was likelihood of a variance in the broken percentage of the rice, "*based on whether the bag had been stepped on or handled harshly (by throwing) during the exercise of stacking or loading /unloading into or from trucks/containers/warehouses*", as the learned judge put it.

48. The court went on to state that the size variations were negligible; that the method to determine the percentage of the broken rice was not scientific, and that the subsequent results were not totally accurate, considering that some of the results were in respect of rice samples that did not even belong to Phoenix. We note that the Phoenix in one of its affidavits had annexed videos showing how the rice was handled during loading and off-loading and storage.

49. On our part we have no basis of affirming the learned judge's view that the method used by KEBS to determine the percentage of the broken rice was not scientific. That said, the learned judge acknowledged that "*the fact that the rice was tested and did pass the test at the country of origin is not a bar to further testing once the goods are in Kenya and being traded*" and that "*it is the statutory obligation of* [KEBS] *to ensure that the goods being consumed are of the required standards*…" Yet, the Judge went ahead to order the unconditional release of the goods despite the testing done in Kenya showing that rice of a lower grade would be passed

off to the public as grade 1 rice and not withstanding that Phoenix itself acknowledged in its letter dated 7th September 2018 that the rice failed on basis of broken percentage of maximum 5%". We think the learned judge erred in doing so..

(v) Whether the learned judge erred in awarding damages against KEBS

50. Having concluded that the Judge erred in ordering the unconditional release of the rice, the question of awarding damages does not arise.

51. In view of the foregoing, we find this appeal and the cross appeal have merit. We allow the appeal and the cross appeal. We set aside the judgment of the High Court at Mombasa in Constitutional Petition No. 205 of 2018 delivered on 24th January 2019 and substitute therefor an order dismissing the petition with no orders as to costs. The 1st respondent shall however bear the costs of the appeal and of the cross appeal

It is so ordered.

DATED and Delivered at Mombasa this 19th day December, 2019.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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