



**Car Importers Association of Kenya v Kenya Revenue Authority & another  
(Petition E035 of 2021) [2022] KEHC 312 (KLR) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E035 OF 2021  
JM MATIVO, J  
APRIL 22, 2022**

**BETWEEN**

**CAR IMPORTERS ASSOCIATION OF KENYA ..... PETITIONER**

**AND**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner is an association of car importers in Kenya. Its 75 members are listed at paragraph 20 of the Petition. They undertake the business of importing used motor vehicles into the country. On behalf of its members, the association instituted this Petition against the 1<sup>st</sup> Respondent, Kenya Revenue Authority (the KRA), a body corporate with perpetual succession and a common seal established under section 3 of the Kenya Revenue Authority Act (the KRA Act.<sup>1</sup>), and, the 2<sup>nd</sup> Respondent, the National Transport and Safety Authority (the NTSA) a body corporate established under section 3(2) of the National Transport and Safety Authority Act<sup>2</sup> (The NTSA Act).
2. The Petitioner states that its members earn their living by importing and selling used motor vehicles. It admits that their trade is regulated by the following bodies:- (i) the Kenya Bureau of Standards (the KEBS), a body established under section 3 of the *Standards Act*<sup>3</sup> (to inter alia) test locally manufactured and imported commodities with a view to determining whether they comply with the provisions of the Act or any other law dealing with standards of quality or description); (ii) the KRA, to ensure

<sup>1</sup> Act No. 2 of 1995.

<sup>2</sup> Act No. No. 33 of 2012.

<sup>3</sup> Cap 496, Laws of Kenya.



payment of the applicable taxes/duties; and, (iii) the NTSA which undertakes registration of motor vehicles and issuance of number plates.

3. The Petitioner avers that prior to the release of imported motor vehicle(s), its members pay the applicable revenues and the vehicles are only allowed to enter into the country after they pass the quality control tests, a requirement also applicable to new motor vehicles. However, their disputation is that there are notable different conditions imposed on used motor vehicles which are not imposed on new motor vehicles imported into the country. For example, the franchise dealers of imported new motor vehicles are not required to pay the customs and excise duties prior to the dealers procuring buyers for the units; that taxes on imported new vehicles are paid and the motor vehicles registered at the point of sale which means that the vehicles are allocated number plates as at the date of the sale. On the contrary, imported used motor vehicles over and above paying the applicable revenue prior to clearance from the port, the dealers are required by the KRA and the NTSA to register the motor vehicles prior to the motor vehicles exiting the KRA's customs holding areas. They contend that a new motor vehicle imported by the franchise dealers will attract a registration number that may be much more current than an imported used motor vehicle despite the fact that the same may be held by the respective traders for the same period of time prior to its sale.
4. The Petitioner's grievance is that on account of the imported used motor vehicles being assigned registration number plates at the point of clearance (as opposed to the point of sale to the end home user), its members have been suffering economic losses because the end users discount a substantial amount of money because the units were registered quite a while back, which does not arise with regard to imported new motor vehicles. It contends that such disparity is discriminatory against its members.
5. It contends that the registration numbers for motor vehicles flow at a very fast rate such that if a motor vehicle registered today remains unsold for a period, at the time of sale it may be viewed as though it is very old forcing the seller to lose an average of 20% of the realizable sales value had the motor vehicle attracted a current number plate like the imported new motor vehicles. It also contends that despite severally discussing the above issues with the Respondents, they have refused to accede to the request, causing its members loss of income. It states that the failure to respond to its members requests is an infringement of their rights to information under Article 35 of the Constitution. It avers that under section 229 of EACCMA, such failure is deemed as evidence that the KRA accepted the terms thereof. Also, the said failure amounts to favourism or bias.
6. Additionally, the Petitioner contends that prior to 2009, its members were allowed to remove their imported used motor vehicles from the customs areas without the motor vehicles having the Kenyan registration number plates; but on the basis of the same bearing Kenya Garage (KG) number plates, which enabled the vehicles to be driven to the respective member's car showrooms, but, the said arrangement was withdrawn as against the Petitioner's members. It contends that a similar arrangement was left intact for the franchise dealers who import new motor vehicles. Further, no reasons were provided why such a discriminatory action was taken and despite the Petitioner's persistent calls to the Respondents to rescind the said action, they have refused to do so.
7. The Petitioner avers that the franchise importers of new motor vehicle do not pay revenues to the Government at the time of removing the motor vehicles from the customs areas to their showrooms unlike dealers in imported used motor vehicles who pay revenues to the Government prior to the vehicles exiting the customs area. It avers that the dealers in imported new motor vehicles pay the revenues at the point when they procure a purchaser which means that importers of used motor vehicles have huge sums of money tied up with the Government because the vehicles take some time to be sold. It states that the importers of new motor vehicles install the car number plates at the point



of sale so they sell the said units without suffering a reduction in price on the basis of the old age of the number plate.

8. it avers that the requirement that imported used motor vehicles be issued with number plates at the point of exiting the customs areas automatically means that by the time the vehicles are sold, several months later, the number plates assigned thereon will be reflecting the vehicle as older compared to new motor vehicles of the same age imported later in time which leads to reduction of the selling price. It avers that no justification has been offered for the said disparity. As a consequence of the foregoing, the Petitioner prays for: -
  - a) A declaration that the Respondents have violated Articles 1, 2 (4), 10, 21, 22, 23,27, 28, 35, 43, 47, 201, 209,210 and 215 of the *Constitution* by requiring the Petitioners members to install the Kenya Government number plates upon clearance of imported used motor vehicles prior to the use of the said motor vehicles on the Kenyan roads.
  - b) A declaration that the said decision is null and void for want of legality and for want of compliance with the aforesaid provisions of the Constitution.
  - c) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
  - d. The costs of the petition.
9. KRA's case is articulated in the Replying affidavit of John Gathatwa dated 15<sup>th</sup> October 2021, an Officer appointed in accordance with Section 13 of the *KRA Act*, currently engaged in the Customs and Border Control, Policy and Tax Advisory Department. Essentially, it states that it is an agency of the Government for the collection and receipt of all revenue and its functions include administering and enforcing the written laws set out in Part 1 and 11 of the First Schedule to the Act<sup>4</sup> for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
10. Further, KRA states that under EACCMA, the Commissioner may authorise any officer to exercise any of the powers conferred by the Act and shall be responsible for the management and control of Customs including the collection of, and accounting for Customs revenue. It averred that all goods enter into Kenya as provided under Section 34 EACCMA either for home consumption, warehousing, transshipment, transit or export processing zones. Further, section 47 of EACCMA provides that subject to any regulations, goods liable to import duty may upon first importation be warehoused without payment of duty in a Government warehouse or a bonded warehouse. Further, section 50(1) of the EACCMA provides that goods may be entered for – home consumption; exportation; removal to another warehouse; use as stores for aircraft or vessel; re-warehousing; removal to an export processing zone; or removal to a free port. It avers that franchise importers of new motor vehicles and the importers of used motor vehicles fall under different regimes as provided for under Sections 34 and 50 (1) of the EACCMA hence the different treatment, and, more often than not, the franchise owners

<sup>4</sup> **PART I** 1. The Income Tax Act (Cap. 470). 2. The Customs and Excise Act (Cap. 472). 3. The Value Added Tax Act (Cap. 476). 4. Road Maintenance Levy Fund Act, 1993 (No. 9 of 1993). 5. Air Passenger Service Charge Act (Cap. 475). 6. Entertainment Tax Act (Cap. 479). 7. East African Community Customs Management Act, 2004. 8. The Annexes to the Protocol on the Establishment of the East African Community Customs Union. 9. Value Added Tax Act, 2013. 10. Excise Duty Act, 2015. 11. Tax Procedures Act, 2015. 12. Miscellaneous Fees and Levies Act, 2016. **PART II** 1. Traffic Act (Cap. 403). 2. Transport Licensing Act (Cap. 404). 3. Second-Hand Motor Vehicles Purchase Tax Act (Cap. 484). 4. The Civil Aviation Act (Cap. 394). 5. The Widows' and Children's Pensions Act (Cap. 195). 6. The Parliamentary Pensions Act (Cap. 196). 7. The Betting, Lotteries and Gaming Act (Cap. 131). 8. The Stamp Duty Act (Cap. 480). 9. The Horticultural Crops Development Authority (Imposition of Fees and Charges) Order, 1995 (L.N. 228 of 1995). 10. The Standards Levy Order, 1990 (L.N. 267 of 1990). 11. The Government Lands Act (Cap. 280). 12. The Sugar Act (No. 10 of 2001). 13. The National Social Security Fund Act, 2013. 14. Public Finance Management Act, 2012.



import the motor vehicles under the warehousing, re-warehousing or removal to another warehouse regime whereas the Petitioners import motor vehicles under the home consumption regime.

11. KRA also avers that where goods are entered for home consumption under Section 60 (1) of the EACCMA the importer is required to remit all duties due and payable to the Commissioner and remove the goods from a Customs warehouse within 14 days. Such goods are thereafter not under Customs control and ought to be closely monitored and secured as they enter the local market, hence the need for registration of the vehicles prior to release. Also, under section 6 (1A) of the Traffic Act,<sup>5</sup> no motor vehicle imported for home use shall be used on Kenya roads unless the same has been registered, and, registration can only be done once duty has been paid and the vehicle is released for home use. KRA also states that for goods entered under the home consumption regime, it is essential that they are registered prior to release from Customs control for the security of other road users.
12. Additionally, KRA states that where motor vehicles are warehoused, the goods are moved from a Customs warehouse to a bonded warehouse and are not meant to be used on the Kenyan roads unless under special circumstances. Further, where goods are warehoused by dint of Section 34 or 51 of the EACCMA the Commissioner imposes such conditions as he might deem fit as these goods are still deemed to be under Customs control as duties are yet to be remitted. Additionally, KRA states that one such condition is that in the case of finished articles like motor vehicles, duty is charged on the goods thereof according to the first account taken upon warehousing, and, despite the value of a motor vehicle depreciating while stored at a warehouse, the franchise dealers at the point of selling the motor vehicles are not allowed to depreciate the value of the motor vehicle because the taxes are levied at the value as at when the motor vehicle was imported. Further, by dint of Section 57 (1) of the EACCMA only new motor vehicles by approved motor assemblers and dealers are allowed to be warehoused or re-warehoused as they are entered for warehousing and not for home use, and, that, such goods are deemed to be under Customs control as taxes and duties have not been remitted to the Commissioner, and, upon securing a buyer, the franchise dealers then register an import entry and proceeds to pay duties for the vehicles under Section 50 of the EACCMA.
13. Also, KRA avers that under Regulation 64 of EACCMA Regulations, the Commissioner of Customs has the power to gazette the goods that are not eligible for warehousing and vide Gazette Notice No. 3530 of 15<sup>th</sup> May 2020, the Commissioner notified the public of the goods that would not be eligible for warehousing, and, vide the said Notice, second-hand motor vehicles were listed as part of the goods that were not eligible for warehousing which means that the said motor vehicles on first importation must be entered for home consumption and applicable taxes paid to the Commissioner of Customs.
14. It is the KRA's case that when considering the decision not to allow warehousing of secondhand vehicles, the KRA took into account the Kenya Standard Code of Practice for the Inspection of Road Vehicles KS 1515:2000 which provides among other things, that used motor vehicles must not be older than 8 years upon importation, must not be left-hand drive, and must be roadworthy. It also provides for inspection of used motor vehicles to check radioactive contamination and verification of odometer integrity which is aimed at protecting the citizenry and environment from pollution, degradation of natural resources and radioactive contamination.
15. Additionally, KRA contends that one of the objectives of taxation is the protection policy, such as imposing taxes on selected products that are considered harmful to society and individuals, and, that, Kenya's Vision 2030 defines priorities to establish Kenya as a middle-income economy by 2030 and the strategy divides the policy targets into pillars – Economic, Social, and Political. The policy's Second

<sup>5</sup> Cap 403, Laws of Kenya.



Medium Term Plan identifies a goal of attaining a “clean, secure, and sustainable environment” in the Social Pillar.

16. KRA states that the Kyoto Protocol is an international treaty which expounds the 1992 United Nations Framework Conventions on Climate Change and was ratified by Kenya in 2005. Its main goal is to control emissions of the main anthropogenic (human-emitted) greenhouse gases (GHGs). Further, that the Paris Agreement entered into force in November 2016 and builds upon prior global climate agreements, such as the Kyoto Protocol which Kenya ratified. KRA also states that the Constitution guarantees the rights to a clean and healthy environment. Further, that the Climate Change Act<sup>6</sup> establishes a framework to respond to climate change.
17. KRA states that in line with the Constitution, national legislations and international treaties, the State has put in place mechanisms to discourage the importation of second-hand motor vehicles and new and old motor vehicles are imported under two different regimes so, the difference in treatment is legitimate, lawful and premised on a legitimate and reasonable aim/purpose. Additionally, the used motor vehicle importers are allowed to depreciate the vehicles, computed from the year of manufacture before taxes are levied unlike the franchise dealers who are not allowed to depreciate the value of the motor vehicles.
18. It also states that the Petitioners and the franchise dealers belong to different categories regulated by different rules and the applicable levies are different. Further, KRA has a duty to ensure that consumers are protected in accordance with Article 46 of the Constitution, so, granting the Petitioner’s prayer to give KG registration numbers and thereafter registration numbers of similar age with franchise importers of new vehicles will amount to misleading the consumers into believing that the vehicles are of similar age.
19. The NTSA’s Response to the Petition is contained in the Replying affidavit Mr. Hared Hassan its Deputy Director in charge of Registration dated 12<sup>th</sup> October 2021. The nub of its case as I glean it from the said affidavit is that NTSA registers motor vehicles, conducts motor vehicle inspections and certifications, regulates public service vehicles, develops and implements road safety strategies, conducts research and audits of road safety among others. It avers that registration comes at the tail end after KBS inspects the motor vehicles to confirm conformity with the Kenyan standards and assessment of duty by the KRA. It also avers it is guided by section 6 (i) of the Traffic Act<sup>7</sup> which provides that no person shall possess a motor vehicle or trailer, other than a vehicle exempted from the provisions of this Part, unless such vehicle is registered under the Act. Further, section 6 (1A) provides that no motor vehicle imported for home use shall be used on a road unless it is registered.
20. In its supplementary affidavit dated 17<sup>th</sup> November 2021 sworn by Peter Otieno, the Petitioner disputes that its members import broken spare parts and assemble them locally, and reiterates that franchise dealers of new cars pay taxes after selling their vehicle(s)
21. All the parties filed written submissions which they highlighted in court (virtually). The Petitioner submitted that the disparity complained of amounts to bias and it is prejudicial to its members. Further, the disparity has negatively affected its members socio-economic rights under Article 43 of the Constitution. It argued that the Respondents have violated Articles 10 and 47 of the Constitution for want of fairness, credibility and accountability.

<sup>6</sup> Act No. 11 of 2016.

<sup>7</sup> Cap 403, Laws of Kenya.



22. The Petitioner also submitted that the impugned decision discriminates its members contrary to Article 27 of the Constitution. It argued that under Articles 201, 209, 210 of the Constitution, handling of National revenue should be open, fair, accountable and credible. It cited *Car Importers Association of Kenya v Kenya Revenue Authority & 3 others*<sup>8</sup> in which the court found that the KRA was discriminating against the Petitioners compared to how they were treating importers of new motor vehicles nor was the impugned decision subjected to proper public participation, so it violates Articles 10 and 35 of the Constitution. It cited *Republic v County Government of Kiambu Ex-parte Robert Gakuru & another*<sup>9</sup> which held that public participation is not a mere cosmetic venture. It also cited *Doctor's for Life International v The Speaker National Assembly and Others*<sup>10</sup> which held that the general right to participate includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.
23. Additionally, it argued that since the vehicles are stored at the respective show rooms of its members, it is possible to allocate them KG number plates for purposes of moving them, just like they do to imported new vehicles, so, the failure to allocate used motor vehicles with KG number plates is discriminatory. It submitted that the Petitioner's members have a reasonable and legitimate expectation that the Respondents will treat them in the same manner as the dealers in new motor vehicles. It submitted that the existence of section 6 of the Traffic Act, cannot justify the unreasonable unwarranted and discriminatory directive for the Petitioners to fit the motor vehicles with number plates irrespective of the period such motor vehicles may remain parked in their showrooms. It argued that importers of new vehicles are allowed to move their vehicles from the port and retain them until they sell which it submitted is an affront to Articles 10 and 27 of the Constitution.
24. Lastly, it submitted that granting the orders sought will not prejudice the Respondents because the Petitioners will pay the revenue prior to the vehicles exiting the port nor will the vehicles be used on the Kenyan roads prior of being fitted with registration number plates, but they may be fitted with the KG number plates to allow their movement to the showrooms and to allow for the road-testing as in the case of new vehicles.
25. On its part, the KRA cited *Nelson Andayi Havi v Law Society of Kenya & 3 others*<sup>11</sup> which defined discrimination as treating differently, without any objective and reasonable justification, persons in similar situations. It also cited *Willis v The United Kingdom*<sup>12</sup> in which the European Court of Human Rights described discrimination as treating differently, without an objective and reasonable justification, persons in similar situations. It argued that considering that the Petitioners members only import used cars while the franchise owner import new cars, and since the two businesses are regulated by different provisions of the law, the two are not in a similar situation, so, discrimination cannot arise.
26. It argued that under Article 24 of the Constitution, fundamental rights may be limited to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom and cited *Nelson Andayi Havi v Law Society of Kenya & 3 others* (Supra) which held that law or conduct which promotes differentiation

<sup>8</sup> {2019} e KLR, Mombasa Constitutional Petition No. **190** of 2018.

<sup>9</sup> {2016} e KLR.

<sup>10</sup> (CCT12/05) [2006] ZACC 11).

<sup>11</sup> {2018} e KLR

<sup>12</sup> No. 36042/97, ECHR 2002.



must have a legitimate purpose and should bear a rational connection between the differentiation and that the right to equality does not prohibit discrimination but prohibits unfair discrimination. Additionally, KRA cited *Harksen v Lane NO and Others*<sup>13</sup> which laid down a three-stage test for determining whether a claim based on unfair discrimination should succeed, namely: - “(a) does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination. (b) does the differentiation amount to unfair discrimination? This requires a two-stage analysis: (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to ‘discrimination,’ does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...(c) if the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause...”

27. KRA submitted that from authorities and jurisprudence, it is clear that differentiation and unequal treatment is generally frowned upon, but it is also clear that there is no discrimination where the distinctions are legitimate and lawful if premised on a legitimate and reasonable aim or purpose. Heavily relying on the above decisions, KRA argued that courts are required to be guided by the following steps; first step is to establish whether the law differentiates between different persons. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair.
28. It submitted that the unequal treatment between the Petitioner’s members and the franchise importers is lawful and is premised on a legitimate and reasonable aim and purpose. It argued that under Section 34 of EACCMA, all goods entered into Kenya are entered as provided for either for home consumption, warehousing, trans-shipment, transit or export processing zones. It submitted that the Petitioner imports its vehicles under a different regime from franchise importers because franchise importers import their new motor vehicles under the warehousing regime while the Petitioner’s members import under the home use regime. To buttress its argument, it submitted that section 47 of EACCMA provides that subject to any regulations, goods liable to import duty may upon first importation be warehoused without payment of duty in a Government warehouse or a bonded warehouse. Additionally, it argued that section 50 (1) of the Act provides that goods may be entered for – home consumption; exportation; removal to another warehouse; use as stores for aircraft or vessel; re-warehousing; removal to an export processing zone; or removal to a free port.
29. KRA submitted that where goods are entered for home consumption by dint of section 60 (1) of the EACCMA, a person is supposed to remit all duties due and payable to the Commissioner and remove the goods from a Customs warehouse within 14 days. It argued that such goods are not under customs control and ought to be closely monitored and secured as they enter the local market, hence the need for registration of the vehicles prior to release. It submitted that section 6 (1A) of the *Traffic Act*<sup>14</sup> provides

<sup>13</sup> {1997} ZACC 12.

<sup>14</sup> Cap 403, Laws of Kenya.



that no motor vehicle imported for home use shall be used on Kenya roads unless the same has been registered, and such registration can only be done once duty has been paid and the vehicle released for home use. It submitted that franchise importers on the other hand import their vehicles under the warehousing regime, under which the goods are moved from a customs warehouse to a bonded warehouse and are not meant to be used on the Kenyan roads unless under special circumstances.

30. KRA further submitted that where goods are warehoused by dint of Section 34 or 51 of the EACCMA the Commissioner imposes such conditions as she might deem fit because the goods are still deemed to be under Customs control because duties are yet to be remitted. Further, under Section 57 (1) of the EACCMA only new motor vehicles by approved motor assemblers and dealers are allowed to be warehoused or re-warehoused as they are entered for warehousing and not for home use. It submitted that such goods are deemed to be under Customs control as taxes and duties have not been remitted to the Commissioner and upon securing a buyer the franchise dealers then register an import entry and proceeds to pay duties for the vehicles under section 50 of the EACCMA.
31. Additionally, KRA submitted that under Regulation 64 of the EACCMA Regulations, the Commissioner of Customs has the power to gazette the goods which are not eligible for warehousing. It argued that pursuant to the said Regulation, the Commissioner vide Gazette Notice No. 3530 of 15<sup>th</sup> May 2020 notified the public the goods that would not be eligible for warehousing and in the said Notice, second-hand motor vehicles were listed as not eligible for warehousing, which means that second-hand motor vehicles on first importation must be entered for home consumption and applicable taxes paid to the Commissioner of Customs.
32. Also, KRA submitted that in considering the decision not to allow warehousing of second-hand vehicles, it took into account the Kenya Standard Code of Practice for the Inspection of Road Vehicles KS 1515:2000 which provides among other things, that used motor vehicles must not be older than 8 years upon importation, must not be left-hand drive, and must be roadworthy. It argued that the Code also provides for inspection of used motor vehicles, which must be done to check for radioactive contamination and verification of odometer integrity which aims at protecting the Kenyan Citizenry and environment from pollution, degradation of natural resources and radioactive contamination.
33. Additionally, KRA submitted that one of the objectives of taxation is the protection policy, which is, the use of taxation to put limits on selected products that are considered harmful to society and individuals, so, the State has put in place mechanisms to discourage the importation of second-hand motor vehicles to curb air pollution. It submitted that the Constitution establishes the rights of Kenyan citizens, including the rights to a clean and healthy environment while the Climate Change Act<sup>15</sup> establishes a framework to respond to climate change. Further, KRA submitted the franchise importers are not allowed to depreciate their vehicles no matter how long it takes for them to sell the vehicles unlike the Petitioners members who are allowed to depreciate the vehicles.
34. Also, KRA argued that the differentiation in treatment is justified on the basis of consumer protection in accordance with Article 46 of the Constitution because if the Petitioners are allowed to fit KG number plates and the vehicles are fitted with new numbers plates at the point of sale, unsuspecting clients will be misled into thinking that the vehicles are new. KRA argued that the Petitioner has not challenged the constitutionality of the relevant legal provisions. It cited *Mohammed Abduba Dida v Debate Media Limited & another*<sup>16</sup> which quoted with approval *Kedar Nath v State of W.B.*<sup>17</sup> thus:

<sup>15</sup> Act No. 11 of 2016.

<sup>16</sup> {2018} e KLR.

<sup>17</sup> {1953} SCR 835 (843).



-“Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. It submitted that the Petitioner has not demonstrated any constitutional grievance and cited *Federation of Women Lawyers Kenya (Fida-K) & 5 others v Attorney General & Another*<sup>18</sup> in which the court described a Petition as a missile fired before ascertaining the target, and stated that the Petition was not just against the Respondent but also against the Constitution without tangible aggression, complaint or grievance.

35. NTSA argued that franchise owners are governed by Section 34 of the EACCMA while the Petitioners are governed by section 50(1) of EACCMA hence the different treatment. It argued that the Franchise owners import motor vehicles under the warehousing, re-warehousing or removal to another warehouse regime while the Petitioner import motor vehicles under the home consumption regime. It argued that the Traffic Act<sup>19</sup> provides that no motor vehicle imported for home use shall be used on the Kenyan roads unless the same has been registered, and the registration can only be done after duty has been paid.
36. It cited *Council of Governors v Salaries and remuneration Commission*<sup>20</sup> which cited the *Black's Law Dictionary*<sup>21</sup> which defines discrimination as-(1) “the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship” (2) “Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” It submitted that discrimination is such conduct that subjects a person to unfair, unreasonable and unjustifiable differential treatment based on any of the prohibited considerations including position or class and argued that the Petitioner has not demonstrated discrimination. It cited *Mbona v Shepstone and Wylie*<sup>22</sup> which held that: -

“(26) The first step is to establish whether the respondent’s policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.”

37. Additionally, it submitted that it is a legal requirement for the Petitioner to clearly set out the acts and/or omissions that in its view contravene the Constitution and to specify the provisions of the Constitution that those acts or omissions contravene and relied on *Republic v Truth Justice and Reconciliation Commission ex parte Augustine Kathangu*<sup>23</sup> and *Anarita Karimi Njeru v The Republic*.<sup>24</sup>

<sup>18</sup> {2011} e KLR.

<sup>19</sup> Cap 403, Laws of Kenya.

<sup>20</sup> Constitutional Petition No 328 of 2016

<sup>21</sup> 10<sup>th</sup> Edition.

<sup>22</sup> {2015} ZACC11.

<sup>23</sup> {2011} e KLR.

<sup>24</sup> (1976-1980) KLR 1272.



Lastly, NTSA submitted that the Petitioner did not enjoin the franchise owners as parties in this Petition, yet the orders sought may if granted affect them.

38. For starters, I will address a pertinent issue argued by the NTSA, which is the Petitioner's failure to enjoin the franchise owners in these proceedings yet they are likely to be affected by the reliefs sought if granted. The law in cases of this nature was articulated by the Supreme Court of India in *Prabodh Verma v State of U.P.*<sup>25</sup> and *Tridip Kumar Dingal v State of W.B.*<sup>26</sup> The principles discernible from the said decisions are that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought in a legal forum. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, because there would be violation of natural justice. This is because the principle of *audi alteram partem* has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail. As was held in by the Supreme Court of India in *Canara Bank v Debasis Das*<sup>27</sup> :-

"Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

39. And again: -

"Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."

40. The notion and dogma of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision-making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

<sup>25</sup> {1984} 4 SCC 251.

<sup>26</sup> {2009} 1 SCC 768.

<sup>27</sup> {2003} 4 SCC 557.



41. Importantly, the constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.<sup>28</sup> Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.<sup>29</sup>
42. I have referred to the above excerpts because they state the basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. The Supreme Court of India put it succinctly in *J.S. Yadav v State of U.P. & Anr*<sup>30</sup> at Paragraph 31 thus: -
- “No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure,... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail...”
43. Even though the orders sought as framed do not directly affect the franchise owners, the alleged discrimination is premised on their alleged preferential treatment. The decisions cited above are graphically clear on who are necessary parties. Guided by the said decisions, it is my view that franchise dealers being the purported beneficiaries of the alleged discrimination, they are necessary parties in these proceedings. They have a legal and legitimate expectation to be heard before any orders flowing from the alleged preferential treatment are granted. A court ought not to decide a case without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large.
44. I am alive to the fact that before me is a constitutional Petition governed by The Constitution of Kenya (Protection on of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.<sup>31</sup> Rule 5 (b) provides that a Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every proceeding deal with the matter in dispute. This being the position, I will proceed to address the Petition on merit.
45. Next, I will address the Petitioner's argument that its members have a reasonable and legitimate expectation that they will be treated by the Respondents in the same manner that the Respondents

<sup>28</sup> Kioa v West (1985), Mason J.

<sup>29</sup> See *Onyango v. Attorney General, Nyarangi, JA* asserted at page 459 that: “I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.” At page 460 the learned judge added: “A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.” And in *Mbaki & others v. Macharia & Another*, at page 210, the Court stated as follows: “The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

<sup>30</sup> {2011} 6 SCC 570.

<sup>31</sup> L.N. No. 117 of 28 June 2013.



treats the dealers in new motor vehicles. The contestation here as I see it is that its members ought to have their imported used vehicles released to them on KG number plates just like the franchise dealers of new imported vehicles and they be allowed to drive them to their show rooms and only pay duty and register the vehicles upon selling.

46. This court is entitled to intervene under section 7(2) (m) of the *Fair Administrative Action Act*<sup>32</sup> where an administrative action or decision violates the legitimate expectations of the person to whom it relates. De Smith, Woolf & Jowell, in “Judicial Review of Administrative Action”<sup>33</sup> states: -

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

47. In *Keroche Industries Limited v Kenya Revenue Authority & 5 others*<sup>34</sup> the court adopted the test outlined by Schieman LJ in *R (BIBI) v Newham London Borough Council* thus: - (i) What has the public authority, whether by practice or by promise committed itself; (ii) Whether the authority has acted or proposes to act unlawfully in relation to its commitment; (iii) What should the court do?’

48. The decision in *Republic v Commissioner of Domestic Taxes and another, ex-parte Kenton College Trust*,<sup>35</sup> summarized the ingredients of legitimate expectation as follows: -

“...After reviewing various decisions and books, I have come to the conclusion that for one to successfully rely on the principle of legitimate expectation it must be demonstrated that:

- (i) The representation underlying the expectation is clear and unambiguous and devoid of relevant qualifications.
- (ii) The expectation is reasonable
- (iii) The representation was made by a decision maker and
- (iv) The decision maker had the competence and legal backing for making such presentations”

49. The Court of Appeal in *Justice Kalpana Rawal v Judicial Service Commission & 3 others*<sup>36</sup> enumerated the vital aspects of the doctrine of legitimate expectation as follows: -

“...Legitimate expectation is a doctrine well recognized and established in administrative law. In *Commonwealth Commission of Kenya & 5 others*, SC Petition Nos. 14,14A,14B & 14C of 2014, the supreme Court stated that legitimate expectation would arise when a body, by representation or by past practice has around an expectation that is within its power to fulfil.

<sup>32</sup> Act No. 4 of 2015.

<sup>33</sup> 6<sup>th</sup>Edn. Sweet & Maxwell page 609.

<sup>34</sup> {2007} e KLR.

<sup>35</sup> Nairobi H.C Judicial Review No. 294 of 2010.

<sup>36</sup> {2016} e KLR, CA.



For an expectation to be legitimate, therefore, it must therefore be founded upon a promise or practice by a public authority that is expected to fulfil the expectation. Other important aspects of the doctrine:

- (a) The Law does not protect every expectation save only for the those which are legitimate (South African Veterinary Council v. Szymanski 2003 ZASCA 11)
- (b) Clear statutory words override any contrary expectations however founded (R.v.DPP ex parte Kebilele Wainanina Kigathi Mungai, HC J.R Misc. 356 of 2013.
- (c) The representations must be one which the decision-maker can competently and lawfully make without which reliance cannot be legitimate (Hauptleisch v Caledon Divisional Council (1963) (4)SA53)
- (d) Legitimate expectation does not arise when it is made ultra the decision-maker's powers (Rowland v. Environment Agency (2003) EWCA Civ. 1885; and;
- (e) A public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make (Republic v. Kenya Revenue Authority ex-parte Aberdare Freight Services Ltd (2004) KLR 530)”

50. From the catena of authorities cited above, it is manifestly clear that a procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. Second, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.
51. The first step in the analysis has both an objective and a subjective dimension. First, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. There cannot be legitimate expectation contrary to the law. In *Republic v Kenya Revenue Authority Exparte Shake Distributors Limited*,<sup>37</sup> it was held- “...For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law... “
52. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.<sup>38</sup> Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation. By now it evident that the basic premise underlying the protection of legitimate expectations seems to be the

<sup>37</sup> {2012} e KLR.

<sup>38</sup> Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.



promotion of legal certainty.<sup>39</sup> Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.<sup>40</sup> Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows: -

“Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public’s fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.”<sup>41</sup>

53. In summary, the requirements for the existence of legitimate expectation were restated in *National Director of Public Prosecutions v Philips*.<sup>42</sup> They include:- (i) that there must be a representation which is “clear, unambiguous and devoid of relevant qualification,” (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner. As H. W. R. Wade & C. F. Forsyth<sup>43</sup> writes:-

“It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... Second, clear statutory words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....”

“An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.” (Emphasis added)

54. It follows that statutory words override an expectation howsoever founded. A decision maker cannot be required to act against clear provisions of a statute just to meet one’s expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. A reading of the

<sup>39</sup> Søren Schönberg, *Legitimate Expectations in Administrative law* 118 (2003); C.f. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 C.A.M.B. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, *see*, *Administrative Law of the European Union, its Member States And The United States* 285 (Rene Seerden & Frits Stroink eds., 2002).

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

<sup>43</sup> *Administrative Law*, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000, at pages 449 to 450.



express statutory mandates of both Respondents as clearly provides in the enabling statutes, and also a faithful reading of the provisions of sections 34, 47, 50(1) and 60(1) of EACCMA, the EACCMA Regulations and section 6 of the Traffic Act and KS1515:2000 leave no doubt that the Respondents are not only implementing the clear statutory edicts, but also confirms that the alleged differentiation is engrained in the said provisions. The two categories forming the nub of the instant complaint, that is importation of new motor vehicles and importation of used motor vehicles are provided for under the law. The manner in which each category is to be treated, that is, import requirements and conditions of testing conformity, age requirement, mode of assessment and or computation of tax including depreciation and point of release from port and conditions of release and registration of vehicles are all provided for under the law. It follows that the claim for legitimate expectation argued in this case goes against the clear provisions of the law. Flowing from the foregoing, the plea premised on alleged breach of the right to legitimate expectation collapses because there cannot be a legitimate expectation against express statutory provisions. Simply put, the Petitioner is inviting this court to ignore clear statutory edicts. Such a finding is tantamount to inviting this court to permit the Respondents to act contra-statute. None of the tests in *National Director of Public Prosecutions v Philips (supra)* has been satisfied.

55. Next, I will address the KRA's argument that the impugned decision is made in public interest. The argument here as I see it is that certain tax decisions are imposed to safeguard the public from possible harm. It was argued that used cars must not be more than 8 years old, they must undergo inspection to ascertain conformity with local standards and rule out gas emission. These measures, it was argued are made for public good. These measures are provided for under the law and Regulations. The different legal requirements are reasonable and they serve public interest.
56. In any event, like most constitutional rights, the socio-economic rights cited are not absolute. A law, decision or conduct prescribing standards and safety of imported used vehicles cannot be said to be hurting socio-economic rights. On the contrary, such provisions and the ensuing enforcement decisions made in accordance with the law and Regulations advance a compelling public interest to enforce standards and safety. A law or decision aimed at promoting the legitimate public interest is fair, reasonable, and in my view it satisfies the Article 24 analysis test.
57. I now turn to the gravamen of the Petitioner's case as I glean it from the Petition and the submission. This is whether the different treatment accorded to importers of new cars and used cars amount to discrimination. Our Constitution requires a purposive approach to statutory interpretation. The technique of paying attention to context in statutory construction is now required by the Constitution.<sup>44</sup> The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.<sup>45</sup> The often-quoted dissenting judgment of Schreiner JA eloquently articulates the importance of context in statutory interpretation: -

“Certainly, no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of

<sup>44</sup> Ngcobo J while interpreting a similar provision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

<sup>45</sup> Thornton *Legislative Drafting* 4ed (1996) at 155 cited in *JR de Ville* above n 18 at 244.



a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.”<sup>46</sup>

58. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation or a decision which is not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required to declare the legislation or decision unconstitutional and invalid. However, before me is not a challenge on the constitutional validity of the various statutory provisions implicated in this dispute. The contestation relates to the constitutional validity or otherwise of the different treatment accorded to the Petitioners members who import used motor vehicles and importers of new motor vehicles.
59. In adjudicating the claim for the alleged differential treatment, it is inevitable we shall make reference to the source of the complained decision, which is the enabling statute and Regulations. It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that statutes be articulated clearly and, in a manner, accessible to those governed by the legislation.<sup>47</sup> A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, which would bring about the result of rendering the statute unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue. It is important to bear in mind the goal and objects of the act of Parliament. What was the mischief the legislation was intended cure? The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.
60. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.
61. Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the legislature had in view in using the words in question. As the Supreme Court of India stated in *Reserve Bank of India v Peerless General Finance and Investment Co. Ltd. and others*: -<sup>48</sup> “interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the

<sup>46</sup> University of Cape Town vs Cape Bar Council and Another 1986 (4) SA 903 (AD). See also Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662-3.

<sup>47</sup> Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; *Thomas and Another v Minister for Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

<sup>48</sup> {1987} 1 SCC 424.



colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”

62. Perhaps, I should add that there are important principles which apply to the construction of statutes such as (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result; (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly, (e) the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise."
63. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it. Mindful of the imperative to read legislation in conformity with the Constitution, but only to do so when that reading would not unduly strain the legislation, I turn to an analysis of the constitutionality or otherwise of the alleged differentiation.
64. Section 34 (1) of EACCMA reads: - save as otherwise provided in the Customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded shall be entered by the owner within twenty-one days after the commencement of discharge or in the case of vehicles on arrival or such further period as may be allowed by the proper officer, either for— (a) home consumption; (b) warehousing; (c) transshipment; (d) transit; or (e) export processing zones. The word either connotes different categories listed in the above provision. The used vehicles are brought into the country for home consumption.
65. Section 47 of the EACCMA provides those dutiable goods may be warehoused. It reads: - Subject to any regulations, goods liable to import duty may on first importation be warehoused without payment of duty in a government warehouse or a bonded warehouse. Section 50 (1) of EACCMA provides that: - Goods which have been warehoused may be entered either for— (a) home consumption; (b) exportation; (c) removal to another warehouse; (d) use as stores for aircraft or vessel; (e) re-warehousing; (f) removal to an export processing zone; or (g) removal to a freeport. Further, section 51 (1) provides that where any goods are warehoused, the Commissioner may, subject to such conditions as he or she may impose conditions as therein stated. Section 60(1) of EACCMA provides that goods entered for home consumption or sold in accordance with the Act shall be removed from a warehouse within fourteen days after such entry or sale as the case may be.
66. Vide Gazette Notice No. 3530 of 15<sup>th</sup> May 2020, the Commissioner notified the public, second-hand motor vehicles were listed as part of the goods that were not eligible for warehousing which means that the said motor vehicles on first importation must be entered for home consumption and applicable taxes paid to the Commissioner of Customs. Also relevant is section 6 of the Traffic Act<sup>49</sup> provides that: -
- (1) No person shall possess a motor vehicle or trailer, other than a vehicle exempted from the provisions of this Part, unless such vehicle is registered under this Act.
- (1A) No motor vehicle imported for home use shall be used on a road unless it is registered: Provided that a commercial vehicle which requires inspection shall be inspected and registered within thirty days of release by the customs.

<sup>49</sup> Cap 403, Laws of Kenya.



67. In determining the alleged discrimination, I find myself in agreement with the jurisprudence cited by KRA. (The bulk of the cases cited are decisions of this court, so I am familiar with the principles laid therein). At the risk of repeating the principles laid down in the said cases, it will suffice to state that the first step is to establish whether the law or conduct differentiates between different persons.<sup>50</sup> The second step entails establishing whether that differentiation amounts to discrimination.<sup>51</sup> The third step involves determining whether the discrimination is unfair. In *Willis v The United Kingdom*<sup>52</sup> cited by KRA, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.
68. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization. The test for determining whether a claim based on unfair discrimination should succeed was laid down in *Harksen v Lane NO and Others*<sup>53</sup> as follows: -

“At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on article 27 the Constitution.

They are: -

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: -
  - (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.....

<sup>50</sup> See note 18 below (at para 48).

<sup>51</sup> Ibid Par 54

<sup>52</sup> No. 36042/97, ECHR 2002 – IV

<sup>53</sup> {1997} ZACC 12; 1998 (1) SA 300(CC); 1997 (11) BCLR 1489(CC) (Harksen) at para 48.



- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (.....of the ..Constitution).
69. Decided cases are in agreement that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination. In the instant case, the Petitioner’s members import used cars. The franchise importers import new vehicle. The two are categories are totally distinct. They are regulated by different provisions of the law and the taxes payable are different and founded on the enabling statutes and Regulations. By subjecting the two categories to different treatment in accordance with the enabling provisions of the law, the Respondents are not only performing their statutorily ordained mandate, but they are also doing what the law requires them to do. There is no argument that the Responded have exceeded their powers. Their decisions are within the law. To the extent that the decisions are founded on the law, then the alleged discrimination cannot arise. Importantly, before me is not a challenge on the Constitutional validity of the various statutory provisions, but a challenge to a decision(s) made pursuant to provisions of the law and within the ambit of the Respondents statutory mandate. The great defect in this case is purporting to challenge decisions made pursuant to statutory provisions without challenging the provisions. The ensuing decisions enjoy statutory underpinning and they cannot be said to be discriminatory. So long as a decision make remained within the areas ordained by the enabling legislation, the decision is safe. In this case, there is no claim that the Respondents surpassed their statutory mandate.
70. In view of the conclusions arrived at on each and every issue discussed above, the Petitioner’s prayer for declarations the Respondents have violated Articles 1, 2 (4), 10, 21, 22, 23,27, 28, 35, 43, 47, 201, 209,210 and 215 of the Constitution by requiring the Petitioners members to install the Kenya Government number plates upon clearance of imported used motor vehicles prior to the use of the said motor vehicles on the Kenyan roads and that the impugned decision is null and void for want of legality and for want of compliance with the said provisions fails.
71. As I stated in *Car Importers Association of Kenya v Kenya Revenue Authority, Kenya Bureau of Standards and National Transport Safety Authority (Interested Party)*<sup>54</sup>(a Petition which was also filed by the Petitioner herein against the Respondents herein) as was stated by Hoexter, a declaratory relief is a “non-invasive,” flexible remedy” which assists “in clarifying legal and constitutional obligations.”<sup>55</sup>The declaratory orders’ ....“... clarifies the legal position rather than requiring action to be taken, “which has “advantages in a constitutional democracy ... since it allows the court to state the law while leaving it to the other arms of government to decide how the law should best be observed.”<sup>56</sup>
72. As authorities suggest, “a declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand ontheir own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances. It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one

<sup>54</sup> Petition No. 36 of 2021.

<sup>55</sup> Hoexter Administrative Law in South Africa 2 nd ed (Juta & Co Ltd, Cape Town 2012) at 557-558, citing *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 107.

<sup>56</sup> Hoexter op cit at 558-559.



hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed.”<sup>57</sup>

73. In conclusion, in view of my analysis of the law, facts and authorities enumerated above, I find that this Petition fails. Consequently, I dismiss this Petition with no orders as to costs.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22<sup>ND</sup> DAY OF APRIL 2022**

**JOHN M. MATIVO**

**JUDGE**

<sup>57</sup> See Petition No. 36 of 2021.

