



**Republic v National Transport and Safety Authority & 2 others; Bhavin Motors Limited & another (Interested Parties); Executive Super Rides Limited (Exparte) (Judicial Review Application E030 of 2021) [2022] KEHC 11831 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11831 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E030 OF 2021  
JM MATIVO, J  
AUGUST 19, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
COMMISSIONER OF CUSTOMS , KENYA REVENUE AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**BHAVIN MOTORS LIMITED ..... INTERESTED PARTY  
HARSHA JAGDISH PANDYA ..... INTERESTED PARTY**

**AND**

**EXECUTIVE SUPER RIDES LIMITED ..... EXPARTE**

**JUDGMENT**

1. The facts which triggered this dispute are essentially uncontested or common ground. In April 2020, the applicant imported into the country from Japan a Toyota Land Cruiser Prado Chassis No. TRJ 150-0074269. The vehicle arrived in Kenya on 23<sup>rd</sup> July 2020. It purchased it at a price of USD 31500 and on 29<sup>th</sup> December 2020, Excise duty, VAT and other charges were assessed at Kshs. 2,115,452/=. It paid the said amount on 19<sup>th</sup> May 2021. The contestation is that the applicant states that on 20<sup>th</sup> May 2021, its clearing agent went to verify and collect the vehicle but it could not be found. It claims that subsequently it established that the vehicle had been auctioned and later it learnt of the existence



of Gazette Notice No. 1057 of 5<sup>th</sup> February 2021 which advertised the said vehicle for auction and it was sold.

2. The applicant contends that the details contained in the aforesaid Gazette Notice which advertised the said vehicle were untrue and they were part of a corrupt scheme to fraudulently sell the vehicle. In its bid to overturn the sale, the applicant states:- (i) that its decision/auction was procedurally unfair, unlawful; (ii) that the mandatory procedure prescribed by section 42 of the East African Community Customs and Management Act, 2004, (EACCMA), sections 34 and 222 of the Customs and Exercise Act<sup>1</sup> which requires service of a Notice upon the applicant was not adhered to; (iii) that the auction was done with ulterior motive aimed at prejudicing the applicant; (iv) that the 1<sup>st</sup> Respondent's officers failed to take into account relevant considerations which is the applicant was the consignee; (v) that the decision and the auction were done in bad faith, it was irrational, unreasonable, and in breach of the applicant's legitimate expectations and a violation of the right to be heard and the rules of natural justice.
3. Additionally, the applicant states: - (i) that the 1<sup>st</sup> Respondent received Kshs. 2,111,542/= despite having auctioned the vehicle; (ii) that the vehicle could not be classified as abandoned goods; (iii) that it failed to determine the applicant's complaint expeditiously; (iv) it failed to disclose to the applicant the purchaser's name; (v) that the Interested Party cannot obtain a good title following a fraudulent process; and, (vi) that the auction violated the applicant's right under Article 40 *the Constitution*.
4. Aggrieved by the aforesaid auction/decision vide the amended Notice of Motion dated 8<sup>th</sup> October 2021, the ex parte applicant seeks the following orders: -
  - a. Certiorari to quash the 1<sup>st</sup> Respondent's decision contained in Gazette Notice Number 1057 of 5.2.2021 to auction the said vehicle.
  - b. Prohibition and/or an injunction prohibiting/restraining the Interested Party from selling, leasing or in any manner dealing with the said vehicle.
  - c. An injunction restraining the 3<sup>rd</sup> Respondent from registering the said vehicle in the name of the 2<sup>nd</sup> Interested Party or any person other than the applicant, Executive Super Rides Limited or its nominee.
  - d. Mandamus compelling the 1<sup>st</sup> Respondent to recover the said vehicle from Interested Parties or any other person and deliver it in the condition it arrived it from Japan to the ex parte applicant.
  - e. A declaration that the sale by auction of the said vehicle was fraudulent, illegal, unconstitutional and null and void and it did not pass any title to the 2<sup>nd</sup> Interested Party or any other person.
  - f. General, punitive and aggravated damages against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally.
  - g. Punitive and aggravated damages against the Interested Parties for moving the said vehicle from the 1<sup>st</sup> Interested Party's show room and, in the process, damaging the same vehicle after the 1<sup>st</sup> Interested Party was served with the orders of 22<sup>nd</sup> June 2021 and for the announcement by the 1<sup>st</sup> Interested Party's director, Bipin that the 1<sup>st</sup> Interested Party will use Kshs. 50,000,000 in court to make sure that the judicial review application will not succeed.

<sup>1</sup> Cap 472, Laws of Kenya.



- h. A declaration that section 38 of the [Auctioneers Act](#) is unconstitutional and it contradicts section 2, 8 and 243 of the East African Community Customs Management Act and is therefore null and void.
  - i. A declaration that the [Auctioneers Act](#) 1996 and the Rules made thereunder apply to Customs Auction and therefore the reserve price for the said motor vehicle should have been based on the market value Kshs. 7,500,000/=.
  - j. A declaration under Article 10 of [the Constitution](#) and section 10 of the Public Officers Ethics Act in deciding to auction and in auctioning the vehicle, the 1<sup>st</sup> Respondent failed to carry out his duties in accordance with the law, violated section 10 (2) of Public Officers Ethics Act which prohibits public officers from violating the rights and freedoms of any person under [the Constitution](#) and for that reason the 1<sup>st</sup> Respondent should take personal responsibility for the decision to auction under section 9 as read with section 52(1) of the [Leadership and Integrity Act](#).
  - k. A mandatory injunction compelling the Interested Parties to deliver the said vehicle to the Regional DCI headquarters, Mombasa for safe custody.
  - l. Costs of this judicial review application and the application for leave to be provided for.
5. The 1<sup>st</sup> Respondent filed the Replying affidavit of Stephen W. Mwangi, sworn on 26<sup>th</sup> August 2021. Its salient points are that the vehicle arrived in Mombasa Port on 23<sup>rd</sup> July 2010 and upon the expiry of 21 days, it was deemed imported into customs warehouse because the owner had not complied with section 34 (4) & (5) of the EACCMA because it was not removed from the Customs Warehouse within 30 days, so, the Respondent published Gazette Notice No. 1057 Lot Number 288/2021 in the Kenya Gazette Vol. CXXX111 No. 26 dated 5<sup>th</sup> February 2021 deeming the motor vehicle to have been abandoned to customs for sale by public auction.
6. The 1<sup>st</sup> Respondent states the applicant never requested for the withdrawal of goods from auction at least 7 days before the auction, and the Respondent's Simba 2005 & ICMS Systems shows that: -
- a. That the applicant's agent M/S Kandito International C. Kenya Limited made an ICMS entry No 2020MBAIM401229820 on 29<sup>th</sup> December 2020 of Kshs. 2,115, 452/= on behalf of the importer, which remained at the registered status as no payment was made.
  - b. On 9<sup>th</sup> March 2021, the Motor vehicle was offered for sale in a public auction held at Kilindini and it was sold to the highest bidder a one Harsha Pandya of PIN No. A007655062D for Kshs. 5,120,000/= at the Kilindini Customs Warehouse and the proceeds of the auction were paid vide F147s2021MSA16549333 & 2021MSA1655009 of Kshs. 1,500,000 and Kshs.3,620,000 respectively.
  - c. That the proceeds of the auction were paid vide F147S2021MSA16549333 & 2021MSA1655009 of Kshs. 1,500,000 and Kshs. 3,620,000 respectively.
  - d. That a C405 entry 2021MSA7766529 was made on 23<sup>rd</sup> March 2021 and approved by HQ vide DOO92AUCTION/288/21 to facilitate the registration of the Motor vehicle.
  - e. That the motor vehicle was registered by NTSA on 13<sup>th</sup> April 2021 and released on the same day.



- f. That the initial importer of the motor vehicle paid the pending entry on 19<sup>th</sup> May 2021 at 1515 hours, way after the auction date; and, that there is no violation of the applicant's rights and that the applicant can always apply for a refund of the taxes paid.
7. The National Transport and Safety Authority did not file any response to the application nor did it participate in the proceedings.
8. The Hon. Attorney General) filed the grounds of opposition dated 1<sup>st</sup> November 2021 stating: - prayers (h) & (i) seeks to amend the law without following the laid down procedure; that no evidence has been tendered to show that the formulation and enactment of the Auctioneers Act<sup>2</sup> was tainted with illegality, irrationality and procedural impropriety; that the applicant has not demonstrated how section 38 of the Auctioneers Act is unconstitutional.
9. The 1<sup>st</sup> Interested Party filed the Replying affidavit dated 27<sup>th</sup> August 2021 sworn by a one Bhupendra Rathod its director. He denied that the 1<sup>st</sup> Interested Party ever purchased the said vehicle nor is it its registered owner.
10. The 2<sup>nd</sup> Interested Party filed the Replying Affidavit dated 3<sup>rd</sup> December 2021 stating that the applicant did not comply with section 42 of the EACCMA, that the vehicle was advertised on 5<sup>th</sup> February, 2021 and her Agent a Mr. Bipin successfully bid on her behalf and she was the highest bidder at Kshs. 5,120,000/= which she fully paid. Additionally, the 2<sup>nd</sup> Interested Party states she paid all the required payments including inspection and registration before the vehicle could be released to her and it was registered as KDC 880T in her name. Further, vide Kenya Gazette Notice No. 1057 of 5<sup>th</sup> February, 2021 the 1<sup>st</sup> Respondent gave notice of the goods to be sold. Lastly, by the time the applicant paid the Kshs. 2,115,452/= on 19.5.2021 the vehicles had been sold by public auction on 9<sup>th</sup> March, 2021.
11. In his submissions, the applicant's counsel cited sections 34 and 222 (2) of the Customs and Excise Act,<sup>3</sup> sections 42, 203 (b), 243, 253 of EACCMA and underscored the need to serve a notice before auction. He cited section 38 of the Auctioneers Act which he argued was ousted by section 54 of the Finance Act<sup>4</sup> which provides that the provisions of the Auctioneers Act shall not apply to actions conducted under EACCMA and argued that the said section is invalid, null and void because it purports to have unregulated auction.
12. Additionally, the applicant's counsel cited Article 10 (1) (a) of the Constitution and argued that by shielding customs auctions from the provisions of section 243 of EACCMA, Parliament created an avenue for abuse of power because customs goods can now be sold by a person who is not an auctioneer without adhering to the auctioneering rules. He submitted that section 38 of the Auctioneers Act is in conflict with section 243 as read with section 253 of EACMMA and urged the court to grant prayers (h) and (i) of the application.
13. Regarding section 38 of the Auctioneers Act, he submitted that Parliament cannot throw out the said Act and Rules without providing an alternative. He submitted that the prayer sought seeks to cure the lacuna created by the said failure.
14. Regarding the prayer for certiorari, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not give any notice to the applicant under sections 34 and 22(2) of the Customs and Excise Act and section 42

<sup>2</sup> Act No. 5 of 1996.

<sup>3</sup> Cap 472, Laws of Kenya.

<sup>4</sup> Act No. 57 of 2012.



- of EACCMA. He submitted that the sale violated the principles of natural justice and Article 47 (2) of *the Constitution*.
15. Regarding the writ of prohibition, he submitted that the vehicle was displayed in the showroom of the 1<sup>st</sup> Interested Party where the 2<sup>nd</sup> Interested Party works; that it was purchased fraudulently for Kshs. 5,120,000/= intending to make a profit of Kshs. 3,000,000/=. On the prayer for injunction, he submitted that the temporary injunction has already been violated or there has been an attempt to violate it by registering the vehicle first as grey 2014 Toyota Voxy and as a 2018 Prado with two different certificates of registration.
  16. Regarding the prayer for mandamus, he submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no right to auction the vehicle. He urged the court to consider that the vehicle was imported for sale at a profit and award the applicant Kshs. 8,000,000/=. On the prayer for a declaration, he argued that the applicant has justified the said relief arguing that the fact that the applicant had delayed payment is irrelevant.
  17. Submitting on the prayer for general, punitive and aggravated damages against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, he cited Republic v Kenya Revenue Authority ex parte W.E Tilley (Muthaiga) Ltd & another<sup>5</sup> and Kenya Revenue Authority v W.E. Tilley Limited & another<sup>6</sup> and urged the court to be guided by the said decisions and award punitive damages which should be double the market value of the vehicle which is Kshs. 16,000,000/=. He also urged the court to award punitive and aggravated damages against the Interested Parties.
  18. Additionally, counsel urged the court to grant a declaration that the 1<sup>st</sup> Respondent's actions violated Articles 10 (2) of *the Constitution* and section 10 of the Public Officers Ethics Act. He urged the court to grant a mandatory injunction compelling the Interested Party to deliver the said motor vehicle to the Regional DCI headquarters. He argued that the court has the power to reverse the situation. Lastly, he prayed for costs of the proceedings.
  19. The 1<sup>st</sup> Respondent's submitted that the vehicle arrived at the Port of Mombasa on 23<sup>rd</sup> July 2020, and 21 days after its arrival the consignee or its agent had not complied with section 34 (1) & (4) of EACCMA, so it was deemed as imported into the customs warehouse. He submitted that the details contained in the Gazette Notice sufficiently described the vehicle and on 9<sup>th</sup> March 2021 the vehicle was offered for sale by public auction and it was sold to the 2<sup>nd</sup> Interested Party, the highest bidder. Further, no request was made for the withdrawal of the goods at least 7 days before the auction. He submitted that at the fall of the hammer, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had exhausted their lawful mandate and passed the property to the successful bidder, and, in any event, the applicant made an entry on 29<sup>th</sup> December 2020 which remained unregistered because no payment was made until 19<sup>th</sup> May 2021 long after the auction. Lastly, he submitted that there was no violation of the applicant's rights.
  20. The Hon. AG submitted that the applicant has not shown how section 38 of the Auctioneer's act is unconstitutional nor does the said section contradict the provisions EACCMA. He submitted that the law relating to custom sales is EACCMA and that the *Auctioneers Act* does not apply.
  21. The 1<sup>st</sup> Interested Party's counsel submitted that he has wrongfully been sued. He cited Section 120 of the *Evidence Act*<sup>7</sup> and Serah Njeri Mwobi v John Kimani Njoroge<sup>8</sup> in support of the holding that the

<sup>5</sup> [2006] e KLR High Court Civil Ap No.214 of 2005.

<sup>6</sup> Civil Appeal No 21 of 2013.

<sup>7</sup> Cap 80, Laws of Kenya.

<sup>8</sup> [2013] e KLR.



doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. He submitted that the 1<sup>st</sup> Interested Party is not the registered owner of the vehicle, it is not in possession of the vehicle nor is responsible for the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Lastly, he submitted that the applicant has not established a basis to merit the damages sought and relied on *D K Njagi Marete v Teachers Service Commission*.<sup>9</sup>

22. The 2<sup>nd</sup> Interested Party's submissions were: - (a) that the 1<sup>st</sup> Respondent advertised a fleet of motor vehicles in the Kenya Gazette Notice No. 1057 of 5<sup>th</sup> February 2021 pursuant to section 42 of the EACCMA to be auctioned on 9<sup>th</sup> March 2021; (b) at the time of the auction, the applicant was in default contrary to section 42 of EACMMA; (c) the 2<sup>nd</sup> Interested Party was a bona fide purchaser for value and cited *Lawrence Mukiri v Attorney General & 4 others*<sup>10</sup> which defined a bona fide purchaser for value as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly and relied on section 85 and 86 (1) of the *Evidence Act* and section 34(1) of the EACCMA which provides for sale of goods which are not lawfully cleared within 30 days.
23. As a preliminary point, I will address the question whether this suit offends the doctrine of exhaustion of remedies. Even though this is a pertinent point of law, the parties did not address it. Granted, the governing statute is EACCMA. Part XX of the EACCMA, at section 229 provides for application for Review to the Commissioner in the following words: -
1. A person directly affected by the decision or Application omission of the Commissioner or any other officer on matters for review or relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.
  2. The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.
  3. Where the Commissioner is satisfied that, owing to absence from the Partner State, or omission, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the a time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).
  4. The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.
  5. Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.
  6. During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner.

<sup>9</sup> [2020] e KLR.

<sup>10</sup> [2013] e KLR.



24. Section 230 of EACCMA provides as follows: -
1. A person dissatisfied with the decision of the commissioner under section 229 may appeal to a tribunal established in accordance with section 231 of the tax appealtribunal established in accordance with section 231.
  2. A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner.
25. Section 231 of EACCMA provides for establishment of Tax Appeals Tribunals in the partner states in the following words: -
231. Subject to any law in force in the Partner States with respect to tax appeals, each Partner State shall establish a tax appeals tribunal for the purpose of hearing appeals against the decisions of the Commissioner made under section 229.
26. Section 3 of the *Tax Appeals Tribunal Act*<sup>11</sup> establishes the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner. The act defines “tax law” means— (a) the *Income Tax Act*; (b) the *Customs and Excise Act*; or (c) the Value Added Tax; (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner. It defines the “Tribunal” to mean the Tax Appeals Tribunal established under section 3 of the Act.
27. The preamble to the TPA provides that it is an act of Parliament to harmonize and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected purposes. Also, of great significance is section 2 which states as follows: - 1) The object and purpose of this Act is to provide uniform procedures for— a) consistency and efficiency in the administration of tax laws; b) facilitation of tax compliance by taxpayers; and 2) Unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under this Act shall apply.
28. Section 2 (3) of the TPA provides that the Act shall be interpreted to promote the object of the Act. Section 52 (1) of the Act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the *Tax Appeals Tribunal Act*.<sup>12</sup> The act defines an “appealable decision” to mean an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision.
29. The foregoing provisions of the law warrant no explanation. The applicant is aggrieved by a decision made by the Commissioner to advertise and auction his vehicle. After the gazette, before the auction, and even after the auction the applicant never invoked the mechanism for review provided under the foregoing provisions. The question is whether this court is divested of jurisdiction on account of the doctrine of exhaustion of remedies.
30. The question here is whether this suit offends the provisions of section 9(2) (3) (4) of the *Fair Administrative Action Act*<sup>13</sup> (the FAA Act) which was enacted to operationalize Article 47 of *the Constitution*. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before

<sup>11</sup> Act No. 40 of 2013.

<sup>12</sup> Ibid.

<sup>13</sup> Act No. 4 of 2015.



the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. The doctrine is now of esteemed juridical lineage in Kenya.<sup>14</sup> The Court of Appeal<sup>15</sup> in *Speaker of National Assembly v Karume*<sup>16</sup> stated: -

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

31. Even though the above case was decided before the promulgation of the 2010 Constitution, many post-2010 court decisions have embraced the reasoning and have provided justification and rationale for the doctrine under the 2010 Constitution.<sup>17</sup> The Court of Appeal provided the constitutional rationale for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others*<sup>18</sup> in the following words: -

“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 fora of last resort and not the first port of call the moment a storm brews... 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 the courts...These accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

32. The High Court in the often-cited case of *Matter of the Mui Coal Basin Local Community*<sup>19</sup> had this to say: -

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases...”

<sup>14</sup> *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] e KLR

<sup>15</sup> Ibid.

<sup>16</sup> {1992} KLR 21.

<sup>17</sup> Ibid.

<sup>18</sup> {2015} e KLR.

<sup>19</sup> {2015} e KLR.



33. Two principles emerge from the above jurisprudence. One, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.<sup>20</sup> The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.
34. Section 9(2) of the FAA Act provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Sub-section (3) provides that "the High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
35. The use of the word shall in the above provisions is imperative. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.<sup>21</sup>
36. Section 9(2) & (3) of the FAA Act is couched in mandatory terms. The only way out is the exception provided in section 9(4), which provides that: - "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Key requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances.
37. Section 9(4) of the FAA Act postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine. Second, the impugned decision constitutes an administrative action as defined in section 2 of the FAA Act. Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the applicant can show exceptional circumstances to exempt him from this requirement.<sup>22</sup> Flowing from the above analysis of the law, it is my conclusion that this judicial review application offends section 9 (2) of the FAA Act. On this ground alone, this Judicial Review application is dismissed.
38. The other ground of assault mounted by the applicant is the attack on the constitutional validity of section 38 of the *Auctioneers Act*. The said section reads: - 38. Act not to apply to Customs auctions- The provisions of this Act shall not apply to any auction conducted in accordance with the provisions of the East African Community Customs Management Act.

<sup>20</sup> Ibid.

<sup>21</sup> See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109(SC) at page 78, paras C - E, Adekeye, JSC .

<sup>22</sup> *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).



39. The applicant argued that the above section was introduced by section 54 of the Finance Act<sup>23</sup> which provides that the provisions of the *Auctioneers Act* shall not apply to actions conducted under EACCMA. The applicant submitted that the said section is invalid, null and void because it purports to have unregulated auctions and that it contradicts sections 243 as read with section 253 of EACCMA. He submitted that the Parliament created a lacuna in the law by permitting unregulated auctions.
40. The applicant's argument that Parliament created a lacuna in law ignores the fact that while enacting the section 54 of the Finance Act, Parliament was not writing on a clean slate in the sense of taking an unprecedented step. On the contrary, it had before it several cognate provisions of EACCMA governing public auctions under the said Act. In particular, section 243 of EACCMA provides: -
243. Where any goods are sold under this Act, then the Auctioneers legislation to apply to sales provisions of any legislation of any of the Partner States relating to auctioneers inconsistent with this Act shall not apply to such sale.
41. As the Supreme Court held in *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*<sup>24</sup> consolidated with Petition 14 of 2013 and Petition 15 of 2013<sup>25</sup>: - [117]
- “Ouster clauses can be categorized as constitutional or statutory. Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute, and not outside it.”
42. Where Parliament in a legislative enactment assigns specific mandate to a public body, then another public body no matter how well intentioned it may be cannot purport to confer it with authority outside what is stipulated in its enabling statute. The legislature in its wisdom included clear provisions mandating the Commissioner to auction goods in accordance with section 34 of the Act. The legislative intent is so clear that to suggest otherwise would be a distortion of the legislative intent. I find no conflict between section 38 of the Auctioneers Act and the cited provisions of EACCMA.
43. I now address the applicant's challenge on the constitutional validity of section 38 of the *Auctioneers Act*. The applicant argued that Parliament could not have intended to create unregulated auctions. The applicant also cited alleged contravention of Articles 10 and 232 of *the Constitution*. The power of judicial review is one of the basic features of our Constitution and that aspect of the power which enables courts to test the constitutional validity of statutory provisions is vested exclusively in the High Court. An enacted law may be constitutional or unconstitutional. Traditionally, courts have provided very limited grounds on which an enacted law could be declared unconstitutional. A law may be unconstitutional on a number of grounds: (i). Contravention of any fundamental right(s); (ii). Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made; (iii). Contravention of any of the mandatory provisions of *the Constitution* which impose limitations upon the powers of a Legislature; (iv) vagueness or overboard.
44. The principles to be borne in mind by the courts while determining constitutional validity of a statute are:- (a) there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional

<sup>23</sup> Act No. 57 of 2012.

<sup>24</sup> S.C Petitions 13A of 2013.

<sup>25</sup> [2014] e KLR.



principles; (b) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; (c) that the legislature is free to recognize decrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest; and, (d) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

45. Whether it is the Constitution that is expounded or the constitutional validity of a statute that is considered, a cardinal rule is to look to the Preamble of the Constitution and the statute as the guiding light and to ascertain the intention sought to be achieved by the statutory provision. We must strive to give such an interpretation as will promote and give effect to the legislative intent. It would be necessary for the court to examine the reasons of enactment of a particular provision so as to find out its ultimate impact vis-a-vis the constitutional provisions. Therefore, we must examine the contemplations leading to the enactment of the EACCMA. A reading of the Act leaves no doubt that it is self-contained in that the member states where clear that auctions under the Act are governed by the Act and nothing else. The member states consciously excluded the provisions of the Auctioneers Act. To find otherwise is to distort the intention of the EACCMA which in clear terms ousts the provisions of the Auctioneers Act. The argument that sections 38 of the Auctioneers act is unconstitutional has no basis.
46. The other ground upon which the applicant's application collapses is its failure to comply with the provisions of section 34 (4) (5) of the EACCMA which provides: -
- (4) Where any goods remain unentered within the period specified under subsection (1) then such goods shall, if the proper officer so requires, be removed by, or at the expense of, the agent of the aircraft or vessel in which such goods were imported to a Customs warehouse.
- (5) Where entered goods are not removed from the port of discharge after the expiry of the twenty-one days prescribed under subsection (1), the goods shall be deemed to be in a customs warehouse.
47. Section 34(1) of the EACCMA provides:-
34. (1) 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 etc
48. The applicant never complied with the 21 days requirement under the above section. The vehicle, by the applicant's own admission states that the vehicle arrived into the country on 23<sup>rd</sup> July 2020. He claims to have lodged an entry for payment through his agent on 29<sup>th</sup> December 2020 long after the expiry of the 21 days. It claims to have paid on 19<sup>th</sup> May 2021, again long after the 21 days had lapsed. Sincerely, the applicant cannot be hard to fault the 1<sup>st</sup> Respondent. The law is very clear on the action to be taken in the event of such default.
49. As I have stated in my numerous decisions, public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with



the law. It would in general be wrong to whittle away their obligation as a public body to uphold the law. A lenient approach could be an open invitation to the 1<sup>st</sup> Respondents to act against its statutory ordained mandate.

50. The other important point to note is that after the notice in the Gazette, the applicant never made any attempts to withdraw the goods from the auction at least within 7 days prior to the auction. The applicant argues that after he was not able to locate the vehicle, it later learnt of the advertisement in the Gazette Notice. He blames the 1<sup>st</sup> Respondent for not serving him with the Notice. This argument, attractive as it is, collapses because it cannot surmount the hurdle created by section 69 of the *Interpretation and General Provisions Act*<sup>26</sup> which provides: - 69. Gazette, etc., to be prima facie evidence

The production of a copy of the Gazette containing a written law or a notice, or of a copy of a written law or a notice, purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.

51. By dint of the above provision, the allegation that the applicant was never served with the notice collapses. Also, the applicant cites alleged misdescription of the vehicle's details. Again, this ground fails for the simple reason that the container/chassis marks and number are correctly captured in the Gazette Notice annexed by the applicant to his affidavit which is TRJ 150-0074269, Used Toyota Landcruiser. The details sufficiently describe the vehicle. It follows that the attempt to fault the gazettement and subsequent auction fails for want of clarity or false details fails. The advertisement, auction and transfer of the vehicle was done strictly in accordance with the law.
52. The applicant cites procedural impropriety in auctioning the vehicle. Again, this argument is attractive. But that is how far it goes because the term procedural impropriety was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v Minister for the Civil Service*<sup>27</sup> to explain that a public authority could be acting ultra vires (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.<sup>28</sup>
53. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.<sup>29</sup> Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.<sup>30</sup> Other than using the term procedural impropriety in the loose sense and citing procedures in the *Auctioneers Act* whose provisions are expressly ousted by the law from customs auctions, the applicant never came close to citing any of

<sup>26</sup> Cap 2, Laws of Kenya.

<sup>27</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

<sup>28</sup> Ibid.

<sup>29</sup> Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", *Textbook on Administrative Law* (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.

<sup>30</sup> Supra, note 18.



the above two categories of procedural impropriety. On the converse, the 1<sup>st</sup> Respondent adhered to the provisions of EACCMA at all stages while undertaking the auction.

54. Form the pleadings, the applicant is aware that the vehicle was sold, transferred and registered in the name of the 2<sup>nd</sup> Interested Party, yet he seeks an order restraining the National Transport and Safety Authority from registering the said vehicle. The said prayer is overtaken by events. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.<sup>31</sup>
55. The applicants attacked the impugned decision/auction on the ground that it is irrational. Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of Act which provides that: - “A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to-(a) the purpose for which it was taken; (b) the purpose of the empowering provision; (c) the information before the administrator; or (d) the reasons given for it by the administrator.”
56. Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*<sup>32</sup> summarized the law as follows:
- “The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise, a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”
57. In applying the test of rationality, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the materials made available and the conclusion/decision arrived at.<sup>33</sup> Applying the law to the facts before me, I find and hold that the auction viewed from the lens of the applicable law is rationally connected to the purpose of the governing statute. Differently put, the auction passes the rationality test.
58. Next, I will address the argument that the auction is tainted with bad faith. Under section 7 of the FAA Act, a decision or administrative action may be judicially reviewed if, among other things, it was taken in bad faith or arbitrarily or capriciously. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker’s approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power. A power is exercised fraudulently if its repository intends for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

<sup>31</sup> See *Plateau State vs. A.G.F.* {2006} 3 NWLR (Pt. 967) 346 at 419 paras. F-G wherein the Nigerian Supreme court defined an academic suit or petition the above terms

<sup>32</sup> *2000 (4) SA 674 (CC)* at page 708; paragraph 86.

<sup>33</sup> *Trinity Broadcasting (Ciskei) v ICA of SA* 2004(3) SA 346 (SCA) at 354H- 355A Howie P



59. Bad faith has been defined rarely, but an Australian case defined it as “a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker.”<sup>34</sup> Even though “Bad faith” has not been given a precise definition, it has been frequently associated with actions involving malice, fraud, collusion, illegal conduct, and dishonesty, abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness. In *MacMillan Bloedel Ltd. v Galiano Island Trust Committee*<sup>35</sup> Justice Southin articulated the concept of bad faith as follows: -

“The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.”(Emphasis added)

60. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that “the contextual nature of the duty of impartiality” enables it to “vary in order to reflect the context of a decision maker’s activities and the nature of its functions.”<sup>36</sup> The Supreme Court of Kenya expressed the same view in *Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Anther*<sup>37</sup> citing Professor Groves M. in “The Rule Against Bias”<sup>38</sup> where it stated that- “... claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand.”

61. The greatest defence to allegations of this nature is that the act must have been performed in good faith. The act complained of must have been done in the performance or intended performance of a duty or authority under the enabling act or by-law passed under it. The words “good faith” must be read in the context of the act. If there is clear evidence of an intention to act illegally or outside the scope of authority, dishonestly or with malice, in other words, a blatantly dishonest exercise of power, then a party cannot rely on the good faith defence. However, to lose the immunity of “good faith” involves more than negligence or an error in judgment. If there is an honest attempt to give effect to the law, the good faith defence should prevail. I have evaluated the facts and the law. I find no bad faith in this case.

<sup>34</sup> *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19]. Recklessness was held not to involve bad faith (*NAFK v Minister of Immigration* (2003) 130 F.C. 210, [24]).

<sup>35</sup> {1995} B.C.J. 1763.

<sup>36</sup> *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

<sup>37</sup> Supreme Court No. 11 of 2016.

<sup>38</sup> {2009} U Monash LRS 10.



62. The applicant prays for an order *ma Mandamus* to compel the 1<sup>st</sup> Respondent to recover the vehicle. First, as alluded to earlier this order has been overtaken by events. *Mandamus* will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.<sup>39</sup> Simply put, *Mandamus* is a judicial command requiring the performance of a specified duty which has not been performed. (See *Makupa Transit Shade Limited & Anor vs. Kenya Ports Authority & Another*<sup>40</sup>).
63. The applicant prays for a writ of *certiorari* to quash the Gazette Notice. This is rather perplexing. The vehicle was sold and transferred. Of what value will a writ of *certiorari* serve? The court is being invited to issue orders in vain. *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one need respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. No material has been presented before me to show that the advertisement/ gazette notice was tainted with illegality or procedural impropriety to warrant the writ of *certiorari*. Even if I were to be persuaded to issue such an order, it will be an order made in vain.
64. The applicant also seeks an order of Prohibition restraining the interested parties from selling the vehicle. First, the 2<sup>nd</sup> Interested Party is a bona fide purchaser for value. The sale has not been impugned and her title has not been shown to be illegal. Second, the writ of Prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, the 2<sup>nd</sup> Interested Party has already been registered as the owner following a lawful auction. A writ of prohibition cannot issue in the circumstances.
65. The applicant seeks a declaration citing fraud. He who alleges fraud must prove fraud. Prayer (i) is premised on the *Auctioneers Act*. I have already held that the *Auctioneers Act* is expressly ousted from sales under EACCMA. Lastly, is the prayer for a mandatory injunction at paragraph (k). First, there is no basis for granting such an order. Second, a "mandatory" injunction is seen as upsetting the status quo and is subjected to a heightened injunction standard of scrutiny. The test whether to grant a mandatory injunction or not either at the interlocutory stage or after full hearing is stated in Halsbury's Laws of England<sup>41</sup> which reads: -'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted...'"
66. Flowing from my analysis of the law, the authorities and the facts of this case and the conclusions arrived at, it is my finding that this is not a proper case for the court to unleash any of the orders sought. The upshot is that the applicant's amended application dated 8<sup>th</sup> October 2021 is totally unmerited. Accordingly, dismiss the said application with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

Orders accordingly

**SIGNED, DATED AT MOMBASA THIS 18<sup>TH</sup> DAY OF AUGUST 2022.**

<sup>39</sup> See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

<sup>40</sup> {2015} e KLR.

<sup>41</sup> Vol. 24, 4th Edition, paragraph 948.



**JOHN M. MATIVO**

**JUDGE**

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF AUGUST  
2022.**

**J. N. ONYIEGO**

**JUDGE**

