



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 63 OF 2020**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 23, 27, 35, 40, 47, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF RULES 10, 11, 22, 23 & 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE & PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 23, 27, 40, 47, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY**

**BETWEEN**

**TRIPPLE ONE MOTORS LIMITED.....1<sup>ST</sup> PETITIONER**

**GRACE WAMBUI WAIRAKI .....2<sup>ND</sup> PETITIONER**

**FLORENCE AMBOKA.....3<sup>RD</sup> PETITIONER**

**ANTHONY MUNYIRI.....4<sup>TH</sup> PETITIONER**

**PATRICK NDERITU.....5<sup>TH</sup> PETITIONER**

**MARGARET WANJIRU KIARIE.....6<sup>TH</sup> PETITIONER**

**EDWARD VITALIS AKUKU.....7<sup>TH</sup> PETITIONER**

**ANDREW PETER NGIRICI.....8<sup>TH</sup> PETITIONER**

**OMAR ABUBAKAR.....9<sup>TH</sup> PETITIONER**

**NAZRA SHAH CHAUDHRY.....10<sup>TH</sup> PETITIONER**

**ZACHARIAH SHARIF ABDILLAHI.....11<sup>TH</sup> PETITIONER**

**VERSUS**

**THE NATIONAL TRANSPORT AND SAFETY AUTHORITY.....RESPONDENT**

**JUDGEMENT**

**THE PETITION**

1. The Petitioners through a Petition dated 21<sup>st</sup> February, 2020 seek the following orders:-

- a) A declaration that by making the directive entitled “unlawful registration” as opposed to sending individual notices to the Petitioners the Respondents have violated the principles enshrined in Article 27 of the Constitution.
- b) A declaration that by issuing a directive “Unlawful Registration” without notice to the Petitioners the Respondents have violated the principles enshrined in Article 40 of the Constitution.
- c) A declaration that the Petitioners have a right to access all the information in the possession of the Respondents pertinent to the issues as set out in the declaration entitled “Unlawful Registration” in accordance with Article 35 of the Constitution.
- d) An order restraining the Respondents from taking any punitive or penal action against the Petitioners on account of failing to comply with the subject directive.
- e) An order of certiorari bringing to the court the subject directive for purposes of being quashed.
- f) A conservatory order restraining the Respondents by their servants, authorized agents, employees or any person acting under their direction from impounding, seizing, confiscating or in any manner interfering with the Petitioners’ possession, ownership or quiet enjoyment of their motor vehicles as set out hereunder:-

Vehicle Number	Registration	Registered Owner
KCH 800N		TRIPPLE ONE MOTORS
KCU 786 V		SHEIKH KHALIFA INVESTMENTS LIMITED
KCU 002A		
KCW 873H		
KCU 003A		
KCS 786Z		BARAKA KIBERIA MWANGI
KCT 666H		
KCE 216D		
KCA 011A		
KCS 090K		
KCQ 771A		
KCT 666L		
KCP 966J		LUCY NYAGUTHI
KCK 477G		SHADRACK KIPKEMOI SAWE
KCP 896F		PRISCILLA NYAKAIRU KIMANI
KCU 003A		KHALIFA KIMANI OMARI
KCU 093A		THOMAS OMBATI OMARI
KCS 786N		ABDULRAHMAN MOHAMED SHEIKH
KCS 002K		
KCT 444X		
KCC 932C		JACOB MECHUMO KISUYA

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***g) This Honourable Court to issue such further orders and give such directions as it may deem fit to meet the ends of ends of justice and the protection of the Constitution and in the context of the declarations made.***

***h) The costs of the Petition be awarded to the Petitioners.***

2. The Respondent was duly served with Petition and Notice of Motion on 25<sup>th</sup> February 2020 as per filed Affidavit of Service by Michael Njonjo dated 26<sup>th</sup> February 2020. The Respondent was also on 26<sup>th</sup> February 2020 served with mention notice. The Respondent todate have not appeared nor filed any response.

3. ***Rule 15(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***, otherwise known as ***the Mutunga Rules*** provides thus, the Attorney-General or any other state organ shall within 14 days of service of a Petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the Replying Affidavit.

4. ***Rule 16(1) of the Mutunga Rules***, provides that if the Respondent does not respond within the time stipulated in ***Rule 15***, the Court may hear and determine the Petition in the Respondents' absence.

5. This matter came up severally for directions and the Respondent though duly served with the Petition and mention and hearing notices, it never turned up and the Petitioner was heard in absence of the Respondent and Court, directed the Petitioner to file submissions on the Petition for determination by the Court in accordance with ***Rule 16 of the Mutunga Rules***.

#### **ANALYSIS AND DETERMINATION**

6. Upon perusal of the Petition herein and supporting affidavit and submissions in support of the Petition the following issues arises for consideration:-

***a) Whether there were constitutional violations on the rights of the Petitioners under the Constitution in light of Articles 27, 35, 40, 47, 50 and 259 of the Constitution?***

***b) Whether Respondent failed to avail key information to the Petitioners regarding issuance of a directive entitled "Unlawful Registration"?***

***c) Whether the Court should quash the decision of the Respondent to classify the Petitioners' vehicles as "Unlawfully Registered motor vehicles"?***

***A. Whether there were constitutional violations on the rights of the Petitioners under the Constitution in light of Articles 27, 35, 40, 47, 50 and 259 of the Constitution?***

7. The Petitioners contend that the Respondent issued directive entitled "***Unlawful Registration***" without notice to the Petitioners and started impounding the Petitioners motor vehicles and arresting the drivers, informing them that the said vehicles were subject of investigations for "***Unlawful Registration***" and demanded the owners do surrender their motor vehicles' importation documents for inspection.

8. The Petitioners further aver that the Respondent did not give personal notice to the Petitioners nor did they make reasonable attempts to ensure that the directive was brought to the attention of the Petitioners in a manner which could enable them comply within a short directive.

9. The Petitioner state that each of them hold a valid motor vehicles ownership documents duly issued by the Respondent upon compliance with requirements as to importation of motor vehicles into Kenya and satisfying the Respondent that they had paid the required taxes for the motor vehicles.

10. It is Petitioners contention that without any reasonable basis and without subjecting the Petitioners to fair administrative process, the Respondent has already made a decision, that the subject motor vehicles were registered in Kenya unlawfully. It follows therefore the purported investigations by the Respondent is duly meant to entertain a prejudicial position, that has already been communicated in the said notice which read in part that "***Unlawfully Registered Motor Vehicles***".

11. It is stated by the Petitioners upon becoming aware of the said directive they proceeded to the National Transport and Safety Authority offices in a bid to get further and better particulars of the aforesaid "***Unlawful Registration***" but the Respondent unlawfully withheld the said particulars from the Petitioners without giving reasons.

12. The Respondent has opted not to file any response to the Petition and has as such not controverted any of the Petitioners' averments in the Petition.

13. I find that the Respondent by issuing the directive entitled "***Unlawful Registration***" and without notice to the Petitioners, the Respondent has breached the Petitioners' right to equal benefit of the law contrary to the provisions of ***Article 27 of the Constitution***, which vests locus standi for the enforcement of the bill of rights and affirms that each person is entitled to equal benefit before the law and has the right to equal protection, which equality includes the full and equal enjoyment of all rights and fundamental freedoms.

14. **Article 35 of the Constitution** on access to information is clear that every citizen of Kenya has a right to access information, that is held by the state or any other person required for protection of any fundamental right or freedom.

15. The recognized international standards or principles on freedom of information include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.

16. In view of provision of **Article 35(1)(a) of the Constitution** it is evident that state organs or public entities have a constitutional obligation to provide information to citizens as of right. It is clearly expressed that to be so and there is no norm for escape that constitutional requirement that they provide access to such information as they hold to citizens.

17. Further the Constitution does not impose any conditions precedent to the disclosure of information by the state. All information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. Public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information.

18. In the instant Petition I find that the Respondent's failure to grant access of information to the Petitioners concerning "**outstanding tax issues**" despite that efforts to personally visit the Respondent's premises, the Respondent has breached the Petitioners right to access to information as enshrined in **Article 35 of the Constitution**.

19. **Article 40 of the Constitution** protects the right of every person to, either individually or in association with others, to acquire and own property. The thrust of **Article 40** is to protect proprietary rights under the law and which rights are grounded in the statutes and in the Constitution. Due process is paramount when dealing with proprietary rights. This proposition was brought out clearly by Justice D. S. Majanja in *Everlyn College of Design Ltd v Director of Children's Department & another [2013] eKLR* where he stated:-

***"Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of the Constitution. First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description."***

20. I find that the Respondent by putting the Petitioners on demand to justify the ownership of their vehicles yet the Respondent is the custodians and the issuing authority of the said ownership documents, the Respondent is threatening to infringe on the right of the Petitioners to own and hold property as enshrined in **Article 40 of the Constitution**.

21. **Article 47 of the Constitution** confers on every person the right to administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair. The article also provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

22. I find that here is no doubt that procedural fairness is a Constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made; the tribunal or authority entrusted with the mandate of making the decision must act fairly.

23. I find that **Article 47 of the Constitution** marks an important and transformative development of administrative justice for it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in **Article 10 of the Constitution**, such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by **Article 47(1) of the Constitution** to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

24. To buttress the aforesaid proposition the Petitioners sought reliance in the case of *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR* where Justice C. Mwita cited the Court of Appeal Judgment in the case of *Judicial Services Commission v Mbalu Mutava & another [2014] eKLR*; that;

***"Article 47(1) of the constitution marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of Constitutionality rather than to the doctrine of ultra vires form which administrative law under the common law was developed."***

25. It should further be noted that **Section 4 of the Fair Administrative Action Act, 2015** clearly provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-

a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

- b) An opportunity to be heard and to make representations in that regard;
- c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d) Statement of reasons pursuant to section 6;
- e) Notice of the right to legal representation, where applicable.

26. The **Fair Administrative Action Act, 2015** sets out some of the parameters that administrative bodies should look at when making decisions. In the instant Petition prior and adequate notice and reasons for proposed administrative action; an opportunity to be heard and to make representation; notice of right to a review amongst others was not accorded to the Petitioners. I find the decision should have reflected on Petitioners rights, interest or privileges made in a fair, impartial and a proper process and appropriate to statutory, institutional and social context of the decision. In view of the aforesaid I find the Respondent in breach of the Petitioners right to fair administrative action as enshrined in **Article 47 of the Constitution** since the Respondent did not specify the exact nature and, amount of the **“Outstanding Tax Issues”** and further did not accord the Petitioners prior and adequate notice.

27. **Article 50(2) (1) of the Constitution** gives every person a right **“to refuse to give self-incriminating evidence.”** The demand by the Respondent through the directive calling upon the Petitioners to declare and hand over documents which in turn could form the evidence in their prosecution is inconsistent with the Constitutional requirements and is a violation of a fundamental right. The Respondent has, by the impugned notice, coerced the Petitioners to give self-incriminating evidence in a manner contrary to the Constitution.

28. The Petitioners to buttress the above mentioned principle relies in the decision by L. N. Mutende J. in **Stanley Mutua Titus & 5 others v. Republic [2018] eKLR** where the Judge pronounced herself as follows on the right of a person to refuse to give self-incriminating evidence:-

**“From the foregoing, it is apparent that the order of the learned Magistrate compelling the Applicants to present themselves before the investigation Officer to enable him obtain information from them was erroneous and unconstitutional. Therefore, I do set it aside the order and direct the trial Court to proceed with the trial.”**

29. **Article 259 of the Constitution** provides that the Constitution shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law, and contributes to good governance. The Respondent is thus in violation of the principles in the said Article.

30. Upon consideration of the Petitioners submission and relevant Articles relied upon, I am satisfied that the Petitioners in their uncontroverted evidence have demonstrated that their Constitutional rights were violated by the Respondent herein.

**B. WHETHER RESPONDENTS FAILED TO AVAIL KEY INFORMATION TO THE PETITIONERS REGARDING ISSUANCE OF A DIRECTIVE ENTITLED “UNLAWFUL REGISTRATION”?**

31. The Petitioner aver that upon being aware of the directive issued by the Respondent herein, they proceeded to the Respondent offices in a bid to get further and better particulars of the aforesaid **“Unlawfully Registration”** but the Respondent herein unlawfully withheld the said particulars from the Petitioners without reason. The Petitioners were left with no other recourse but to move this Honourable Court for appropriate redress.

32. I note that despite the fact that the said directive, directly and overwhelmingly affects the Petitioners right to own and hold property, their right to earn a living and the right to fair administrative action, the Respondent issued a short notice and further withheld information regarding the **“unlawful registration”** as set out in the aforesaid directive. I find the continued withholding of the said information is an infringement and violation of the provision of **Article 35 of the Constitution of Kenya**.

**C. WHETHER THE COURT SHOULD QUASH THE DECISION OF THE RESPONDENT TO CLASSIFY THE PETITIONERS VEHICLES AS “UNLAWFULLY REGISTERED MOTOR VEHICLES”?**

33. It is contended by the Petitioners that each of them hold valid motor vehicle ownership documents duly issued by the Respondent upon compliance with requirements as to importation of motor vehicles into Kenya and upon satisfying the Respondent that they had paid the required taxes for the motor vehicles. It is further averred that without any reasonable basis or without subjecting the Petitioners to fair administrative processes, the Respondent has already made a decision that the subject motor vehicles were registered in Kenya unlawfully. It is further contended by the Petitioners that the purported investigations by the Respondent is only meant to entrench a prejudicial position that has already been communicated in the said notice which read in part that, **“unlawfully registered motor vehicles”**.

34. The Respondent has not field any response controverting the Petitioners averments and this Court has no alternative but to take such uncontroverted averments as correct. I find no reasons advanced as to why the court cannot proceed to issue orders as sought in favour of the Petitioners.

35. **The upshot is that the Petitioners Petition is meritorious and I proceed to make the following orders:-**

- a) A declaration be and is hereby issued that by making the directive entitled **“unlawful registration”** as opposed to sending individual notices to the Petitioners the Respondent has violated the principles enshrined in **Article 27 of the Constitution**.

*b) A declaration be and is hereby issued that by issuing a directive “Unlawful Registration” without notice to the Petitioners the Respondent has violated the principles enshrined in Article 40 of the Constitution.*

*c) A declaration be and is hereby issued that the Petitioners have a right to access all the information in the possession of the Respondents pertinent to the issues as set out in the declaration entitled “Unlawful Registration” in accordance with Article 35 of the Constitution.*

*d) An order of certiorari be and is hereby issued bringing to the court the subject directive for purposes of being quashed.*

*e) No orders as to costs.*

**Dated, Signed and Delivered at Nairobi on this 28<sup>th</sup> day of January, 2021.**

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**J. A. MAKAU**

**JUDGE**