



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW & HUMAN RIGHTS DIVISION

MISC. CIVIL APPLICATION NO. 522 OF 2016

**IN THE MATTER FOR AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND MANDAMUS BY BISHOP PHILIP NDUNGU KARANJA.**

-AND-

IN THE MATTER OF ARTICLE 10, 40, 47 & 48 OF THE CONSTITUTION OF KENYA 2010

-AND-

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT

-AND-

IN THE MATTER OF SECTION 8 OF LEGAL NOTICE NO. 78 OF 2005 LAWS OF KENYA

AND

**IN THE MATTER OF THE DECISION BY THE KENYA BUREAU OF STANDARDS TO
DECLINE REVALIDATION OF WAIVER TO REGISTER MOTOR VEHICLES: TOYOTA 4
RUNNER AND MITSUBISHI MONTERO.**

AND

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, THE LAW REFORM
ACT CAP. 26, THE JUDICATURE ACT CAP 8, SECTION 8 OF LEGAL NOTICE NO. 78 OF
2005 LAWS OF KENYA**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1st RESPONDENT

THE KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

EX-PARTE

PHILIP NDUNGU KARANJA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd November, 2016, the *ex parte* applicant herein, **Philip Ndungu Karanja**, seeks the following orders:

1. That an order of Certiorari be issued to bring before the court and quash the decision of the Kenya Bureau of Standards Waivers and Evaluation Technical Committee actions made on 21st July, 2016 declining the revalidation of authority to import the subject motor vehicles granted under letter referenced MOI/ADM/1/28 of 2008.

2. That an Order of Mandamus do issue directed against the Kenya Bureau of Standards Waivers and Evaluation Technical Committee to validate and grant the requisite waiver for the purpose of registration of motor vehicles known as Toyota Runner Chassis No. JTE414R530011814 and Mitsubishi Montero Chassis No. JA4LS21H92J025008.

3. That the costs of this application be borne by the Respondent.

Ex Parte Applicant's Case

2. According to the applicant, an ordained Bishop ministering at Victory Centre Church in Nairobi, in the year 2008, while a resident in Georgia State, United States of America, he applied for a credit facility from the Associated Credit Union, a lender in the said State and purchased Toyota Runner Chassis No. JTE414R530011814 and Mitsubishi Montero Chassis No. JA4LS21H92J025008 (hereinafter referred to as "the said vehicles") for himself and his wife, though being the holder of a social security number, the said vehicles were registered in his name.

3. It was averred that upon the expiry of their stay in the United States, the applicant applied for permission to bring the said vehicles into the county and sought waiver to import, duty free, the said vehicles, which are left hand driven, as an exemption from the requirements of the Kenya Standards KS 1515:2000. It was further averred that the applicant lawfully and regularly applied for waiver and exemption from the then Minister of Industrialisation as per the requirements, and upon consideration, he was granted the said waiver and permission as returning Kenya Residents in the year 2009.

4. The applicant averred that he finished payments for the said vehicles a week before his departure from the United States and as such did not have the opportunity to secure registration of the Mitsubishi in his wife's name, **Gloria Wairimu**, who also qualified to import and bring into the county one vehicle as of right, hence the said vehicles were imported and brought into the country bearing the applicant's name as the owner.

5. According to the applicant he caused to be shipped into the country the said vehicles by Zim Intergrated Shipping Services through the global Oceanfreight Inc. aboard vessel known as Johanna Russ, container number ZCSU2721351 destined to the port of Mombasa, and final destination being ICD Embakasi in 2009.

6. It was confirmed that the said vehicles were safely delivered into the country and deposited in the customs warehouse awaiting clearing as per the customs requirements and regulations. It was the applicant's case that he contracted a clearing agent, Tyke Logistics Limited, to complete the necessary paperwork and apply for the requisite inspections and approvals necessary to facilitate release of the said vehicles from the customs clearance warehouse which action the said agent embarked on. However the said vehicles were not released to the applicant due to the investigations by the Ethics and Anti-corruption Commission on the irregularity of their imports over that period.

7. It was disclosed that the said investigations were concluded and the applicant vindicated as having regularly and lawfully imported the same upon grant of the authority by the then Minister for Industrialisation. Accordingly a no-objection communication was made to the Kenya Revenue Authority Customs Office. It was however averred that the said vehicles accumulated staggering storage charges and other levies by the KRA during the period they were impounded hence incapacitating the applicant in clearing them and he was constrained to seek for the requisite waivers thereof which the KRA granted as the same had been previously inspected and the requisite inspection certificates by the Kenya Bureau of Standards issued.

8. It was averred that upon presenting his formal documentation at the Customs Office to facilitate the release of the said vehicles, the applicant was advised to obtain a revalidation of the said letter of reference No. MOI/ADM/1/28 of 2008. However upon his application for the same the KEBS declined to approve his application and directed the applicant to ensure that the said vehicles were shipped out of the country. According to the applicant the KEBS considered the said application as a fresh application and disregarded the earlier permission granted to him by the then Minister in the exercise of his lawful authority.

9. It was the applicant's case that the issue of the grant of permission to import the subject vehicles was investigated by the Ethics and Anti-corruption Commission and litigated in court and a decision made that the waiver was lawful and regular hence was not subject to review by the KEBS Waivers and Evaluation Technical Committee (hereinafter referred to as "the Committee").

10. According to the applicant the said Committee acted ultra vires and was unreasonable in its said decision. According to the applicant the said decision was tainted with illegality, irregularity, malice, capriciousness, discrimination, bias, unfairness, abuse of office and was in contravention of the established tenets of natural justice and the applicant's legitimate expectation.

11. In his submissions the applicant relied on Article 165(6) of the Constitution of Kenya 2010, which grants this Court power to review decisions of administrative bodies performing public duties such as the Respondent's Committee. With respect to the grounds for judicial review, the applicant cited section 7(2) of the ***Fair Administrative Action Act, 2015*** which empowers this Court to review decisions of a public bodies if the decision was made by a person with no authority, acted in a manner beyond their powers, was biased, there was procedural impropriety, illegality, abuse of discretion or acted in bad faith among other grounds. On the same issue he relied on **Pastoli vs. Kabale District Local Government Council & Others [2008] 2 EA 300** and **Republic vs. Commissioner of Investigation & Enforcement & Another Ex-Parte Eldoret Grains Limited [2014] eKLR.**

12. It was submitted that the reach of the judicial review orders was laid down by the Court of Appeal in **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996.**

13. It was contended on behalf of the applicant that the Respondent's Committee in rendering its decision the subject of this proceedings acted ultra vires or acted in excess of its jurisdiction in sitting, deliberating upon and discarding a lawfully granted authority and permission to import left hand driven subject motor vehicles by the then Minister for Industrialization exercising lawful discretion and powers conferred to him by section 8 of Legal Notice Number 78 of 2005 to grant waivers to the requirements of Kenya Standard KS 1515:2000. To the applicant, the Respondent's Committee purported to review and repeal the decision of the Minister granting waiver and exemption to the Applicant without any legal justification and basis and thus tainting the decision with illegality. They considered the request for revalidation as a new application for waiver without considering relevant facts.

14. It was submitted that the Committee's action amounted to abuse of office and discretion by the Committee which also considered irrelevant factors and failed to consider an important consideration, the fact that the Applicant had been lawfully granted an exemption and waiver by the then Minister. In this respect reliance was placed on **Municipal Council of Mombasa Vs. Republic & Umoja Consultants Limited Nairobi Civil Appeal No. 185 of 2001 (2002) eKLR.**

15. According to the applicant, the right to be heard is a constitutional right guaranteed under Articles 47(1) & 50 of the Constitution of Kenya, 2010. However, the actions by the Respondent's Committee breached and violated the Applicant's right to a fair administrative action as enshrined in Article 47(1) of the Constitution of Kenya, 2010 and he relied on **Republic vs. The Honourable The Chief Justice of Kenya & Others ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004.**

16. **The applicant submitted that** he was not given a prior notice by the Respondent's committee and allowed to make a representation of his case before the Committee before the adverse decision was made thus violating his constitutional rights to a fair hearing and rules of natural justice that entitled him to be heard before being condemned. It was contended that the procedure adopted by the Committee violated the Applicant's rights to be heard thus making the procedure improper for failing to issue notice inviting him during the hearing and thus the decision was unfair, biased, oppressive, discriminatory and arbitrary.

17. The applicant asserted that he had a legitimate expectation that the Respondent would revalidate the earlier waiver and exemption that had been granted by the then Minister of Industrialization which initial waiver and exemption had formed a contract between the Applicant and the Respondent. His case was that he had shipped the subject motor vehicles pursuant to the waiver and exemption granted and he had a legitimate expectation that the said motor vehicles will be cleared and registered in the country. Moreover, the Applicant had a legitimate expectation that the subject motor vehicles would be cleared and registered after the Respondent had issued a certificate of inspection of their roadworthiness. Therefore, the Respondent's Committee acted contrary to the Applicant's legitimate expectation thus unfair and an abuse of power. In support of this submission the applicant cited **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006(2007) KLR 240** and **Republic vs. Commissioner for Higher Education Ex-parte Peter Shoita Shitanda (2013) eKLR.**

18. To the applicant, decision by the Respondent is one tainted with malice after directing the Applicant to ship out of the country the subject motor vehicles having imported the same pursuant to a waiver granted by the then minister for industrialization. The Respondent's committee acted in a biased and malicious manner as can be seen from their outrageous and illogical decision to compel the Applicant to ship out of the country the two subject motor vehicles.

19. The applicant therefore argued that his motion was merited and should be allowed with costs him.

Respondent's Case

20. The application was opposed by the Respondent.

21. According to the Respondent, it is mandated under the ***Standard Act*** Cap 496 Laws of Kenya to prepare, frame, modify and amend specifications and codes of practice amongst other duties. The Respondent revealed that it has a specific code of practice for inspection of road vehicles which is Kenya Standard 1515:2000, which prohibits the registration of left hand drive vehicles unless they are special purposes.

22. According to the Respondent in the year 2005, a Gazette Notice was published allowing the Minister of Industrialisation to exempt imports from existing provisions if satisfied that it is of national interest. However the vehicles mentioned by the applicant were registered in his name for his personal use and not for special purposes and/or national interest as required by the law. The Respondent further averred that both vehicles belonged to the applicant as the letter written by himself does not show proof of ownership by his wife. It was further contended that the exemption was granted to Victory Centres Church of Kenya and not to the applicant. Accordingly, it was the Respondent's case that the application for revalidation should have been made by the Church and not the applicant.

23. To the Respondent since the Mitsubishi was not registered in the applicant's wife's name, she did not qualify a right to import the same as of right. It was the Respondent's case that the applicant ought to have registered the said vehicle before departing from the United States. It was the Respondent's case that there was no explanation why the application for exemption was made in the name of the Church if the

applicant qualified for the same.

24. It was the Respondent's case that the applicant took too long to seek intervention. As the applicant never applied for waiver as an individual, it was contended that it was impossible to revalidate the exemption. The Respondent asserted that waivers are granted on temporary basis since the vehicles deteriorate over time and the laws and circumstances change over time hence it is impractical and unreasonable for the applicant to expect the waiver to be revalidated without consideration 7 years later.

25. While not disputing the waiver and exemption granted in 2009, the Respondent however averred that the Committee did not deliberate on its validity when considering the revalidation application by the applicant.

26. It was therefore the Respondent's position that its action was regular, fair and reasonable and that the inspection certificates granted in 2011 were to certify the road worthiness of the vehicles as required by the law on any imported vehicle.

27. It was the Respondent's case that since the vehicles have been lying at the port for 7 years they are no longer roadworthy and releasing the same will endanger the lives of its users.

28. It was the Respondent's case that this application is premature as there is established under the **Standards Act** a functional tribunal dealing with such matters and the applicant ought to have appealed to this Court from the decision of the said tribunal.

Determinations

29. I have considered the application, the affidavits in support of and in opposition to the application, the submissions made and the authorities cited in support thereof.

30. The Court of Appeal set out the grounds upon which the judicial review reliefs of certiorari, prohibition and mandamus may be granted in **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR** when it stated:

“That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128...The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

31. In his letter dated 18th February, 2009, the Minister for Industrialization, *Henry K. Kosgey*, acting pursuant to the provisions of section 8 of the Legal Notice No. 78 of 2005 granted Victory Centre exemption from the requirements of the Kenya Standard KS 1515:2000, to facilitate importation and registration of the two Left Hand Drive vehicles the subject of this application. The said exemption was however expressed to be subject to the presentation of the vehicles to the Ministry of Roads for worthiness mechanical inspection and payment by the applicant of the applicable fees and charges due to the Government as required by the law. The said letter referred expressly to Victory Centres Church, Kenya.

32. Section 8 of the aforesaid Legal Notice provides:

The Minister may, on the advice of the national standards council, exempt any imports from the provisions of this order where the minister is satisfied that it is in the national interest to do so.

33. In this case the applicant has expressly averred that the two vehicles were imported for his use and the use of his wife. He has not contended that they were to use the same for the benefit of the Church at all. It is however clear that the Minister in the exercise of his discretion was clear that the exemption was granted to Victory Centre Church. Assuming that it is the Church that sought exemption, could that exemption inure for the benefit of the applicant? It is clear that the exercise of the Minister’s discretion is restricted to his satisfaction that the exemption s for national interest. It is therefore my view that if the entity that requested to exemption nolonger requires the use of the goods in question, a third party cannot purport to fit into the shoes of the said entity and seek to take advantage of the exemption.

34. There is no material before this Court on the basis of which the Court can find that in granting the exemption the Minister addressed his mind to the fact that the importation was for the benefit of the applicant rather than the Church. In those circumstances the applicant cannot rely on the exemption granted to the Church in order to have the importation solely for himself and his spouse. I therefore find no fault with the Respondent’s decision that the applicant applies for revalidation. In making a decision on the said revalidation, the Respondent did exercise a discretion and I have no reason to fault that discretion as that power was no doubt based on policy. Being a policy issue I associate myself with the position in the Canadian case of **Just Versus R in Right of B.C. (Vancouver No. C822279)**, in which **Justice McLachlin** of the Supreme Court of British Columbia observed thus:

“In general, policy refers to a decision of a public body at the planning level involving the allocation of scarce resources or balancing such factors as efficiency and thrift. The operational function of government, by contrast, involves the use of governmental powers for the purpose of implementing, giving effect to or enforcing compliance with the general or specific goals of a policy decision...one hallmark of a policy, as opposed to an operational, decision is that it involves planning...A second characteristic of a policy decision as opposed to

an operational function is that a policy decision involves allocating resources and balancing factors such as efficiency or thrift.”

35. I gather support for this position in **Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL** to the effect that:

“But the latter phrase must not in turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. .”

36. In this case there is no basis upon which I can interfere with the Respondent’s decision not to revalidate the exemption granted to Victory Church in favour of the applicant herein. In other words the facts of this case does not bring it within the contemplation of the decision in **Kenya National Examination Council vs. Republic, Ex parte Geoffrey Gathenji & 9 Others** (supra).

37. It is therefore my view that the applicant cannot successfully invoke the principle of legitimate expectation in his favour since as was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012:**

“...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law.”

38. As no discretion was exercised in favour of the applicant to grant the exemption to him whether the Minister did not address his mind to an application made by the applicant and for his benefit would be contrary to law in particular Kenya Standard 1515:2000, which prohibits the registration of left hand drive vehicles unless they are special purposes.

39. Apart from the foregoing section 11 of the *Standards Act* provides that:

Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal.

40. The Tribunal referred to in the said section is the one established under section 16A of the Act.

41. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute...Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

42. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**,

that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”

43. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, where it held that;

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure....In our view, there is considerable merit in the submission that 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”

44. Section 9(2), (3) and (4) of the **Fair Administrative Action Act**, No. 4 of 2015 provides:

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

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

(4) 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.

45. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. The applicant has not attempted to justify his failure to invoke the alternative remedies before coming to this Court.

46. In the premises it is my view and I hold that there is no merit in this application.’

Order

47. Consequently, the Notice of Motion dated 3rd November, 2016 fails and is dismissed with costs.

Dated at Nairobi this 29th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Ooko