



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 100 OF 2012

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF: ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

AND

**IN THE MATTER OF: CHIEF MAGISTRATE'S COURT IN MOMBASA ANTI-CORRUPTION
CASE NO. 8 OF 2010**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE CHIEF MAGISTRATE'S COURT MOMBASA....RESPONDENT

2. THE DPP.....RESPONDENT

JOSEPH MBITHI MUNYAO.....EX PARTE APPLICANT

RULING

1. In his Notice of Motion dated and filed on 7th January, 2013, Joseph Mbithi Munyao (the ex parte Applicant) sought two orders -

(a) An order of prohibition prohibiting the Chief Magistrate Mombasa or any other magistrate under him/her and the Director of Public Prosecution from hearing, trying prosecuting or in any manner whatsoever proceeding with the case known as **Anti-Corruption Case No. 8 of 2010, REPUBLIC VS. JOSEPH MBITHI MUNYAO**;

(b) The costs of the Application be provided for.

2. The application was supported by the Affidavit Verifying the Facts of the Applicant sworn on 19th December, 2012, and filed together with the Chamber Summons for leave to commence Judicial Review Proceedings dated 19th December, 2012, and filed therewith on 20th December, 2012, and summarized in

the grounds to the said Application that –

- (a) the Application is solely based on the Kenya Bureau of Standards, Standard No. KBSS 1515:2000;
- (b) the said standard is not law, and cannot be enforced by way of criminal prosecution;
- (c) the Applicant had been interdicted and suffered loss and income;
- (d) the continued prosecution of the Applicant is illegal.

3. In addition to the said grounds and Affidavit Verifying the Facts, counsel for the Applicant also filed on 23rd September, 2015, written submissions and a List of Authorities dated 21st September, 2015, and attached the said authorities to the submissions. Counsel for the Applicant adopted and relied on those submissions and case law all in support of the order sought, that the prosecution of the Applicant was **illegal, irrational and procedurally improper**. The cases cited in support include –

- (a) Rahab Wanjiru Njuguna vs. Inspector General of Police & Another [2013] eKLR;
- (b) Deluxe Black's Law Dictionary, 6th Edition;
- (c) Republic vs. Director of Public Prosecutions and another, ex parte Patrick Omwenga Kiage (Nairobi Criminal Misc. Application No. 435 of 2011);
- (d) Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair & 8 others, Nairobi Misc. Application No. 1279 of 2004;
- (e) Exemption letters by the then Minister of Industrialization dated 19/11/2009 and 09/02/2010;
- (f) Inspection and Verification Reports Entry Numbers: 2009/MSA/1752523 and 2009/MSA/1752616.

4. The Application was however opposed by the Interested Party (the Ethics & Anti-Corruption Commission) through grounds of opposition dated 16th October, 2014 and filed on 19th October, 2014 to the effect that –

- (1) the applicant's application is an abuse of the process of court as it is in contravention of Section 9(3) of the Law Reform Act (Cap 26, Laws of Kenya) requiring the Applicant to seek leave not later than six (6) months after the commencement of proceedings;
- (2) the applicant was charged in Mombasa Anti-Corruption Case Number 8 of 2010 but sought leave more than thirty (30) months later on 24/12/2012 without explanation for his laches, indolence and inordinate delay;
- (3) the matters in issue in these proceedings are *res judicata* having been heard and determined in Mombasa High Court Petition Number 10 of 2011, Yuasa International Limited vs. KEBS & others;
- (4) It is already settled that the Kenya Bureau of Standard, the subject in this application namely, KS 1555:2000 was declared and/or published under Gazette Notice Number 1924 of 2000 on 31st March, 2000;
- (5) the said Kenya Standard (KS 1515:2000) was subsequently operationalized by Legal Notice Number 69 of 2001 which declared that no person could import motor vehicles aged more than 8 years after 18th May, 2001;

(6) the computation of time with regard to the age limit of motor vehicles imported into Kenya was determined in Mombasa High Court Misc. Application (JR) Number 8 of 2014 – Republic vs. KEBS & others, ex parte Car Importers Association, where it was held that the relevant point of computation was the year of first registration and not the date of first registration;

(7) the application lacks merit and ought to be dismissed so that the Applicant can submit himself to the due process of law in the Anti-corruption Court with all the constitutional safeguards remaining available to him.

5. Apart from the above grounds of opposition, the application was also opposed by the Second Respondent through oral submissions of Mr. Wamotsa, Senior Prosecution Counsel who argued *inter alia* that –

(1) Legal Notice Number 924 of 2000 came into force through Legal Notice Number 69 of 2001, and the question of the legality of these Legal Notices and Standards, was determined in the case of **Yuasa International Limited & 4 others vs. Kenya Bureau of Standards & 12 others [2012] eKLR** and the case of **Republic vs. Minister for Transport & Communications & others, ex parte Gabriel Reminion Kaura** (Nairobi High Court Misc. Application Number 109 of 2004);

(2) the charges are proper and the lower court has jurisdiction to determine the matter and that the charges are not duplex and are drawn in compliance with the provisions of Section 134 of the Criminal Procedure Code (Cap 75, Laws of Kenya);

(3) the court should ignore paragraphs 5 to 7 of the Applicants Verifying Affidavit which raise issues of defence at the trial and are not questions for judicial review;

(4) particularly the court should also ignore the Applicant’s counsel’s submissions set out at pages 2 – 7 which introduce matters which were not pleaded by way of Affidavit and cannot be introduced as attachments to the submissions, a procedure unknown to the law, and the court cannot conduct a mini-trial by way of judicial review;

(5) the charges before the trial court are lawful and legal and that the Applicant is properly before the court.

6. With those submissions counsel for the Second Respondent urged the court to dismiss the Applicant.

Consideraton

7. I have considered the respective arguments set out above as well as the cited cases. The single issue raised by the Application is whether the prosecution of the ex parte Applicant, or to put it differently, whether the decision to prosecute the ex parte Applicant, was illegal, or irrational, or procedurally improper.

8. The questions of illegality, irrationality and procedural impropriety were defined by Lord Diplock in the often cited case of **COUNCIL OF CIVIL SERVANTS UNION VS. MINISTER FOR CIVIL SERVICE [1985] A.C. 324 at 401D** (the GC HQ. case) where the learned Judge said –

“Judicial review has, I think developed to a stage today when one can conveniently classify into three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality” the second, “irrationality”, and the third procedural “impropriety”. By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.... By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as

“procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

9. The question in this case is whether the Kenya Standards KS 1515:2000 code is lawful in itself and in relation to the Seven Counts (I-VII) against the ex parte Applicant.

10. Though counsel for the ex parte Applicant argued that the said Standard KS1515:2000 is unlawful, but having myself considered the law relating to the establishment of that Standard, and perused the decision of the court in Mombasa High Court Petition Number 10 of 2011, **Yuasa International Limited vs. KEBS & Others (supra)**, as well as in **REPUBLIC VS. KENYA BUREAU OF STANDARDS & 4 OTHERS, ex parte Car Importers Association**, (Misc. Application No. 8 of 2014 (JR)), I am satisfied that the Standard KS 1515:2000 which was published under Gazette Notice Number 1924 of 31st March, 2000 and came into operation as Legal Notice No. 69 of 2001 under the hand of the then Minister for Tourism, Trade and Industry were lawful.

11. For avoidance of doubt, Section 9(1) & (2) of the Standards Act (Cap 496, Laws of Kenya), donate to the Kenya Bureau of Standards power to regulate the quality and condition of road vehicles for safety, environment and economic reasons.

12. Section 20 of the Kenya Standards Act likewise donates the Minister (Cabinet Secretary) responsible for the matter in question, the power to publish or issue the legal notice in issue. Consequently, the question of illegality does not arise. And having reached this conclusion it is unnecessary to consider the other grounds of irrationality or procedural impropriety.

13. Before concluding this Ruling, there was the question of limitation under Section 9(3) of the Law Reform Act requiring application for orders of certiorari to be brought to court within six months from the date not of commencement of proceedings, but rather from the date of the decision being impugned.

14. Though there is power generally in Section 59 of the Interpretation and General Provisions Act, Cap 2, (Laws of Kenya), there ought to be substantial grounds for extending the period for leave to commence judicial review proceedings. I think extension of time would generally be refused if there is undue delay, and where the relief sought would cause undue hardship to any person. That is the position under the Supreme Court Act, 1981, (Section 31(6)) of the United Kingdom which is of course not our law but the same considerations would influence the mind of the Judge where extension of time is sought.

15. In this matter, leave was sought more than thirty (30) months (on 20th December, 2010) from the commencement of proceedings (on 20th May, 2010) and without any reasonable explanation for the laches, indolence and inordinate delay. This is however a moot point at this stage as leave herein was granted to commence the proceedings herein and there was no application to set the leave aside.

16. The other peripheral issue was whether the proceedings herein were *res judicata* by virtue of the decision in **YUASA INTERNATIONAL LIMITED VS. KEBS & OTHERS (supra)**, where it was determined that the Standard KBS 1515:2000 was lawfully established and is legally valid and enforceable.

17. The Common law principle of *res judicata* is codified under Section 7 of the Civil Procedure Act (Cap 21, Laws of Kenya). It prohibits any court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been bound and finally decided by such court.

18. As already stated, the matter decided in the former suit (Yuasa International Limited vs. KEBS & Others) concerned the legality of the Standard KEBS 1515:2000, and not whether the prosecution of the ex parte Applicant was lawful. The reference to the proceedings herein being *res judicata* is misplaced.

19. Finally, there was the procedural point that the submissions included attachments by way of evidence such as the Exemption Letters by then Minister for Industrialization dated 19th November, 2009, and 9th February, 2010, and Inspection and Verification Reports Entry Numbers 2009/MSA/1752523 and 2009/MSA/1752616. I agree with counsel for the Interested Party that these may be grounds of defence to the ex parte Applicant's prosecution, they are not grounds for judicial review which is about process and not merit of the case.

20. For all those reasons, I agree with the submission by counsel for the Respondents and the Interested Party, that the Application herein lacks merit and the ex parte Applicant's Notice of Motion dated and filed on 7th January, 2013 is hereby dismissed with a direction that each party bears its own costs.

Dated, Signed and Delivered in Mombasa this 28th day of April, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Karega holding brief Maina for Applicant

Mr. Wamotsa for Respondents

Mr. S. Kaunda Court Assistant