



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW NO. 8 OF 2014**

**CAR IMPORTERS ASSOCIATION OF KENYA ..... APPLICANT**

**VERSUS**

**KENYA BUREAU OF STANDARDS ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INDUSTRIALIZATION**

**AND ENTERPRISE DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**KENYA PORTS AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KENYA MARITIME AUTHORITY ..... 1<sup>ST</sup> INTERESTED PARTY**

**ETHICS AND ANTI-CORRUPTION COMMISSION..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. This is a ruling on the question whether leave granted to file judicial review proceedings in this suit shall operate as a stay of the decision challenged in these judicial proceedings.
2. By a Chamber Summons dated 4<sup>th</sup> March 2014, the ex parte applicant sought leave of court to commence judicial review and for orders as follows:

*“2. THAT this Honourable court be pleased to grant the Applicant leave to apply for the following orders:-*

- a. *An Order of Certiorari be issued to quash the 1<sup>st</sup> Respondent’s decision contained at page 29 of the ‘Standard Newspaper’ of 8.11.2013 and at page 17 of the ‘Daily Nation’ of 8.11.2013 to the effect that motor vehicles that were first registered anytime before 1<sup>st</sup> January, 2007 could not be allowed to be imported in Kenya as from 1<sup>st</sup> January, 2014.*
- b. *An Order of Certiorari be issued to quash the 1<sup>st</sup> Respondent’s decision contained at page 29 of*

the 'Standard Newspaper' of 8.11.2013 and at page 17 of the 'Daily Nation' of 8.11.2013 to the effect that motor vehicle units that were first registered in 2006 which has been imported in Kenya between August to December, 2013 were to undergo re-inspection despite the said units having had Certificates of Road worthiness that were valid for 90 days from their respective dates of import. For the avoidance of any doubt, the grant of the order herein be deemed to be to the effect that as long as the subject motor vehicle has arrived in the country within the 90 days validity period of the aforesaid Certificate of Roadworthiness, then the same should not be subjected to re-inspection by the 1<sup>st</sup> Respondent; Further, that in reckoning the 90 days period, any period certified by the ship captain as a period which the vessel could not sail on account of bad weather or security issues be discounted.

- c. **The grant of leave do operate as a stay of any further implementation of the 1<sup>st</sup> Respondent's aforesaid decision so that the subject motor vehicles may be deemed to be compliant of the 8 years age limit rule and therefore free for release to the importers.**

3. That it be ordered that the 3<sup>rd</sup> and 4<sup>th</sup> respondent respectively should not charge the Applicant Custom Warehouse Rent and Port Charges for the period that the aforesaid motor vehicles have been detained at the port of Mombasa on account of the 1<sup>st</sup> Respondent's unreasonable and unwarranted stand as pertains to the enforcement of the 8 years age limit rule applicable to importation of second hand motor vehicles."

3. The application was based principally on two grounds set out at paragraphs 3 and 4 of the Grounds of the application as follows:

"3. THAT on 8<sup>th</sup> November, 2013, the 1<sup>st</sup> Respondent publicized in the Local Dailies that 2006 model motor vehicles would not be allowed into the country from 1<sup>st</sup> January 2014 on account of the 8 year age limit for importation of used/second hand motor vehicles.

4. THAT the Applicant was aggrieved by the said Notice on the basis that computation of the 8 year age limit for importation of motor vehicles as provided for by clause 2.5 of KS 1515:2000 Code of Practice for Inspection of Motor vehicles amended through Amendment Slip No. 2 published in July 2008, was meant to be interpreted that the year of 1<sup>st</sup> registration was to run as a block year of 12 months. Consequently, the 8 year age limit for the 2006 model motor vehicles was to lapse at the end of the year 2014 and not end of year 2013 as purported by the 1<sup>st</sup> Respondent."

4. The court granted leave to file judicial review proceedings but in terms of Order 53 rule 4 of the Civil Procedure Rules 2010 directed that the issue of leave operating as a stay be heard *inter partes* on a subsequent date. Order 53 rule 4 is in these terms:

**(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:**

**Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.**

5. The 1<sup>st</sup> respondent filed a replying affidavit of its Director, Quality assurance and Inspection sworn on 17<sup>th</sup> March 2014 and the 4<sup>th</sup> respondent filed grounds of opposition dated 18<sup>th</sup> March 2014 and Counsel for the parties - Mr. Gikandi for Applicant Mr. Chabala for 3<sup>rd</sup> Respondent, Mr. Ashitiva for 1<sup>st</sup> Respondent Mr. Eredi for 2<sup>nd</sup> Respondent, Miss Ikegu for 4<sup>th</sup> Respondent and

- holding brief for Mr. Okello for 1<sup>st</sup> Interested Party, and Mr. Kagucia for 2<sup>nd</sup> Interested Party – made oral submissions and ruling was reserved.
6. For the applicants, it was argued that the correct interpretation of the standard rule was with regard to the month and year of registration and not only the year as interpreted by the 1<sup>st</sup> respondent in the newspaper notices aforesaid, and that the applicants had on the tests of *Giella v. Casman Brown* (1973) EA 358 demonstrated that there was a prima facie case which had been confirmed by the court on the grant of leave to file judicial review proceedings; that damages was not an adequate remedy for the applicants who had spent money in importing the vehicles for purposes of trade in commercial transport and that, in the event the court was in doubt, the balance of convenience favoured the release of the vehicles to the applicants in the interests of the principles of sustainable development of the country under Article 10 of the Constitution and to prevent demurrage and port charges accruing with continued detention of the vehicles.
  7. The composite response of the respondents was that the applicants had not demonstrated a prima facie case as the 1<sup>st</sup> respondent had in the newspapers notices not made any decision that could be challenged by judicial review proceedings in view of the existence of 8 year rule against the importation of motor vehicles that were more than eight years old. The rule, it was urged, which was set out in clause 2.5 of the Kenya Standard Code of Practice for Inspection of Road Vehicles promulgated in under 2000 in accordance with section 9 of the standards act vide Gazette Notice No. 1924 of 2000 and given legal effect by Legal Notice No. 69 of 2001; that the value of the vehicles and the charges levied by the respondents were ascertainable and recoverable in damages should the applicants eventually succeed in the case; and the balance of convenience lay with the respondents in the interests of consumer protection under Article 46 of the Constitution and that the court should not injunct the respondents who were exercising their statutory duties. .
  8. The respondents relied on a decision of the High Court in Nairobi HC Misc. Appl. No. 369 of 2013 *R. v. Kenya Bureau of Standards and 2 Ors. ex parte Peter Mbwiri Ikamiti* (Majanja, J) which held that the computation of the age of motor vehicle pursuant to the eight year rule was to be done with regard to the date of manufacture and not the date of registration. While I agree with finding of Majanja. J that the intent of the Standard is to prohibit over-age vehicles in Kenya, the issue whether computation of time is to be reckoned from the date of manufacture or date of registration is not in issue in this proceeding. Moreover, at the stage of a determination whether leave should operate as a stay the court cannot go into the merit of the suit which is a matter for the trial court.

### **Issue before the court**

9. The only question at this stage is whether leave already granted by the court to file judicial review proceedings should operate as a stay of the notices by the 1<sup>st</sup> respondents. In the course of argument counsel for the applicants modified the applicants request for the release of the vehicles and rather sought the maintenance of status quo pending hearing of the suit. Counsel for the applicant did not pursue the prayer for waiver of the levies as sought in Prayer No. 3 of the Chamber Summons.
10. In the interest of substantial justice principle under Article 159 of the Constitution, I allow the applicants to amend their request with regard to the terms of the stay sought so that the issue becomes whether the court will order, not the release of the vehicles but rather, that status quo be maintained pending the determination of the judicial review proceedings.

### **Determination**

11. It is trite that leave to commence judicial review proceedings will be granted when an applicant demonstrates an arguable case and not a prima facie case for the grant of the judicial review orders sought. See Court of Appeal decisions in *Aga Khan Education Service Kenya v. R and Ors.* (2004) 1 EALR 1 and *Meixner & Anor. v. Attorney General* (2005) 2 KLR 189. As held in the Aga Khan decision supra, “once there is an arguable case, leave is to be granted and the court, at that stage is not called upon to go into the matter in depth.” This coincides with the civil cases standard for interlocutory injunctions as held by Platt, JA in *Mbuthia v. Jimba Credit Corporation Ltd.* (1988) KLR 1 that in application for interlocutory injunctions the court is not required to make final

- findings of contested facts and law and the court should only weigh the relative strength of the parties' cases.
12. In addition, as held in *The Judicial Commission of Inquiry into the Goldenberg affairs and Ors v. Job Kilach*, CACA N O. NAI 177 of 2003, a party question of leave operating as a stay who wishes to challenge the grant of leave to commence judicial review proceedings should seek the setting aside of the leave by the court that granted it or appeal therefrom.
  13. I do not agree that in considering whether leave granted is to operate as a stay the court should now investigate the matter further to determine whether the applicant has a prima facie case over and above the arguable case already established and which is the basis of the leave granted. As the court could under the provisions of Order 53 rule 4 of the Civil Procedure Rules, set out above, without more have made an Order for leave to operate as a stay, the proviso for the hearing *inter partes* of the issue of leave operating as stay must start from the point that leave has already been granted and the determination on the question should rest on the further tests whether damages are adequate remedy and where the balance of convenience lies. In accordance with the authorities and consistently with logic because the court cannot, at the leave stage, have heard the full merit of the case, the test for leave must be on an arguable case and not *prima facie* basis.
  14. I have noted the decision of Weldon Korir J in *R v. Registrar of Societies and 3 Ors. ex parte Samuel Maina and 2 Ors.*, Nairobi HC JR case No. 313 of 2013 that without an identified decision that can be challenged by way of judicial review proceedings, the court will be acting in vain if it grants leave to the applicants. The position in the present proceedings is different in that the court has already granted leave to file judicial review proceedings. Moreover, having seen the newspapers notices which the applicants challenge as decisions, I am not prepared at this stage of the proceedings to hold that they do not disclose decisions within the meaning of judicial review.
  15. The loss of the vehicles and the amount of levies and charges payable by the applicant's members with respect to the detained vehicles should they be destroyed in accordance with L.N. No. 78 of 2005 are, of course, ascertainable, quantifiable and capable of remedy by an award of damages.
  16. The general principle that injunctions shall not **normally** be given where damages may be an adequate remedy must in a particular case be mitigated by exceptional circumstances which make the award of damages inconvenient or where the payment of damages would cause undue hardship to any party. Such, in my view, is the case where in proceedings against public institutions the damages recoverable are to be paid from public funds raised from tax payer's money. There must be public interest in avoiding payment of unnecessary, unbudgeted damages from tax payers' money.
  17. The public interest in protection against dumping of goods and the right of consumer protection in proscribing importation of old motor vehicles will be addressed by not granting any order for the release of the vehicles into the local market, as sought in the original rendition of the applicant's prayer for stay.
  18. The justice of the case therefore requires the holding of the status quo to prevent the destruction of the motor vehicles pending the interpretation of the terms of the Standard KS 1515:2000 in relation to the vehicles at the full hearing of the judicial review proceedings with liberty to the parties to agree on reshipment or re-export at the applicant members' cost in the meantime.

### **Orders**

19. Accordingly, for the reasons set out above, I make an order that leave granted herein to commence judicial review proceedings do operate as a stay of the decision of the 1<sup>st</sup> Respondent relating to the implementation with respect to the applicants' motor vehicles of the Standard KS 1515:2000 Regulations on importation of vehicles under the eight year rule to the effect that the status quo now obtaining in the matter is maintained pending the hearing and determination of the judicial review proceedings.
20. For avoidance of doubt, the status quo to be maintained is that the subject motor vehicles shall not be destroyed or otherwise dealt with under Legal Notice No.78 of 2005 subject to any agreement between the 1<sup>st</sup> Respondent and the applicants/motor vehicle owners for the release the motor vehicles for reshipment or re-export as the applicant motor vehicle owners may wish at their own cost. Costs in the cause.

**EDWARD M. MURIITHI**

**JUDGE**

**Dated and delivered this 25<sup>th</sup> day of April, 2014.**

**M. MUYA**

**JUDGE**

In the presence of: -

Mr. Gikandi for the Applicant

Odundo for Achila for the 1<sup>st</sup> Respondent

Mr. Chebala for the 2<sup>nd</sup> Respondent

No appearance for the 3<sup>rd</sup> Respondent

Mrs. Ikegu for the 4<sup>th</sup> Respondent

Mr. Odundo for the 1<sup>st</sup> Interested Party

Mr. Kagucia for the 2<sup>nd</sup> Interested Party