



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELENEOUS CIVIL APP. JR NO. 41 OF 2013**

**R E P U B L I C**

**VERSUS**

**KENYA REVENUE AUTHORITY (KRA) ..... RESPONDENT**

**EX PARTE**

**FUJI MOTORS E. A. LIMITED ..... APPLICANT**

**JUDGMENT**

**BACKGROUND**

1. The applicant is a limited liability company incorporated in Kenya, whose head office is situate in Mombasa and which engages in the business of importation and sale of imported motor vehicles and related services to clients within Kenya and the East African Community region.
2. Upon grant of leave to file judicial review proceedings, the applicant filed a Notice of Motion dated 23<sup>rd</sup> July 2013 for orders that:

“1. An order of MANDAMUS be issued to compel the respondent to release the following nine (9) containers together with the said seventeen (17) motor vehicles contained therein as hereunder, and to further, register the said seventeen (17) vehicles.

Container Number	Vehicle Chassis Number
MAEU 828 1998	FK619L - 521038
	CXZ70J - 3000248
TCNU 915 2273	FK617J – 512088
	CXZ19J – 2017800
TCKU 970 3957	FK619J – 520456

	CXZ19J – 3005465
SEAU 861 5746	FK618J – 511229 CXZ21U – 3000109
CAIU 828 1230	CD458FN – 00082
MSKU 985 0119	FK618K – 501902 CXZ71S – 3000204
MSKU 038 8761	FK618J – 501416 CXZ71Q – 3001518
KNLU 507 6503	FE658E – 520526 CD458BN – 20138
TRLU7621429	FK628J – 532537 CXZ71Q – 3001426

2. The costs of this application be to the applicant.”
3. The allegations of fact upon which the applicant claims is as follows: On various dates about December 2009, the applicant imported 17 motor vehicles (trucks) estimated to be valued at Kshs.40,000,000/- contained in 9 containers as stated above. The applicant is said to have contacted HEMES FREIGHTERS for the purpose of clearing and delivering the 9 containers carrying the 17 vehicles to the applicant. All duties and taxes on the 17 motor vehicles amounting to Kshs.4,042,581/- were paid to the respondent. However, before the containers and vehicles could be released, the applicant was informed that they had been impounded pending investigations following an incident in which the clearing agent, HEMES FREIGHTERS, was alleged to have hacked the profile of an officer of the respondent and attempted to pass three entries. In the meantime, the clearing agent's password was blocked. Upon conclusion of the investigation HEMES FREIGHTERS was cleared of wrongdoing and their password restored. Notwithstanding that the ex parte applicant had been an innocent client of HEMES FREIGHTERS, they were presented with additional penalties by the respondent amounting to Kshs.900,000/- which they nonetheless paid. The respondent failed to clear for release the 9 containers with 17 vehicles, and the applicant sued.
4. The applicant averred in its Notice of Motion application that the refusal by the respondent to clear the containers and vehicles for release was unreasonable, and or in breach of the rules of natural justice for the reasons that:
  - a) The detention of the containers and motor vehicles has sabotaged the applicant's business, occasioning significant losses and immeasurable suffering to it and inconveniencing both itself and its customers.
  - b) The applicant has not (been) given sufficient, if any, hearing, or opportunity to show cause why its vehicles should not be detained.
- c. Section 14 of the Kenya Revenue Authority Act, 1995 provides that any person employed by the Kenya Revenue Authority is personally liable for their wrongful acts or omissions.

d) The decision of the Respondent has violated or threatened to violate the applicant's right under Article 47 of the Constitution of Kenya, 2010 to a administrative action that is lawful, reasonable and procedurally fair.”

5. The application was supported by the affidavit of Ghalib S. Kara, a director of the applicant who set out the facts as rehased above and annexing relevant documentary evidence of incorporation, shipping and tax payment.
6. The respondent’s case is set out in an replying affidavit sworn on the 11<sup>th</sup> November 2013 by Kenneth Magawi, a Senior Revenue Officer within the respondent's customs office. The tenor of the affidavit was that the applicant's motor vehicles were legally detained while in the process of being cleared some of them through HEME FREIGHTERS and some by GAEVA SERVICES, by the respondent as they were liable for forfeiture owing to the commission of various offences, which also entitled the respondent to require the payment of penalties for the offences from the applicant.
7. Specifically, the respondent alleged that:
  - i. The following 9 motor vehicles were detained after HEME FREIGHTERS were found to be using a fake manifest contrary to section 203 of the East African Community Custom Management Act (EACCMA). It was compounded under section 219 of the EACCMA, concluding the matter:

Container	Chassis No.	Entry No.	YOM	Agent
SEAU 861 5746	FK618J – 511229	2010 MSA 2120730	1999	HEME
	CXZ21U – 3000109	2010 MSA 2120815	1989	HEME
CAIU 828 1230	CD458FN – 00082	2010 MSA 2120600	1989	HEME
MAEU828 1998	FK619L - 521038	2010 MSA 2121201	N/A	HEME
	CXZ70J - 3000248	2010 MSA 2121150		HEME
TCNU 915 2273	FK617J – 512088	2010 MSA 2121049	N/A	HEME
	CXZ19J – 2017800	2010 MSA 2121009		HEME
TCKU 970 3957	FK619J – 520456	2010 MSA 2121244	N/A	HEME
	CXZ19J – 3005465	2010 MSA 2121272		HEME

- ii. The following 4 vehicles were found to be prohibited/ restricted goods within the meaning of EACCMA, 2004 as read together with paragraph 2.5 (on age limit) of Code 1515:2000 of the Kenya Bureau of Standards Code of Practice for Inspection of Road Vehicles, the importation of which constituted an offence under section 200 of the EACCMA:

Container	Chassis No.	Entry No.	YOM	Agent
SEAU861 5746	FK618J – 511229	2010 MSA 2120730	1999	HEME
	CXZ21U – 3000109	2010 MSA 2120815	1989	HEME
CAIU 828 1230	CD458FN – 00082	2010 MSA 2120600	1989	HEME
MSKU9850119	FK618K – 501902	2010 MSA 2093714	1992	GAEVA

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iii. The following motor vehicles were impounded for the offence of hacking into the profile of one of the respondent's officers and using it to pass entries contrary to section 191 as read with 192 of the EACCMA:

Container	Chassis No.	Entry No.	YOM	Agent
MSKU9850119	CXZ71S – 3000204	2010 MSA 2093632	N/A	GAEVA
MSKU0388761	FK618J – 501416	2010 MSA 2093900	N/A	GAEVA
	CXZ71Q - 3001518	2010 MSA 2093797		GAEVA

iv. The entries for the entire consignment were canceled and reversed upon discovery of the hacking incident, after which it was incumbent on the applicant through its authorized agent to pursue clearance of its goods in accordance with the law upon furnishing genuine documents.

v. The clearance of the said goods is subject to penalties prescribed in sections 191, 200, 203, 210 (a), (b) and (g) of the EACCMA, 2004.

8. The parties filed written submissions and counsel for the parties – Mr Kurgat for the applicant and Mr. Chabala for the Respondent – made supplementary oral argument and judgment was reserved.

9. In its submissions dated 28<sup>th</sup> February 2014 the applicant contended that the respondent, after receiving all necessary payment of taxes, duties and penalties on the containers/ motor vehicles has illegally failed to release the said containers/ motor vehicles as they are dis-entitled and estopped from detaining them any further. The applicants claimed it was wrong for the respondent to hold them liable for actions of an independent contractor. It submitted that the actions of its clearing agents, HEME FREIGHTERS, in hacking the respondent's officer's password was performed outside the scope of agency and could not legally to be linked to the applicant. In any event, they added, the said agent had been cleared of any wrong doing and by their own admission, upon compounding, the respondent could do no more. The continued detention of the containers/ motor vehicles after compounding of the offences was faulted as the applicant was never formally informed of the reasons up until this suit was filed, contrary to the principle of legitimate expectation and Article 47 of the Constitution of Kenya, 2010. The applicant also pointed out that the Kenya Bureau of Standards whose role the respondent has illegally purported to assume, had not made any complaint to justify the respondent's actions. The applicant complained that the compounding of offences stated by the respondent was used unfairly against the applicant.

10. The court was urged to make a finding on the alleged offence relating to the Kenyan Standard for Motor vehicles, terming the same as suspect since it is not known in law. The standard/code purported to have been executed by the respondent was said to be lacking in force of law for the reason that it was not laid before parliament as required by section 34 (1) of Interpretation & General Provisions Act and Articles 10 and 94(6) of the Constitution of Kenya. The respondent was therefore said to be enforcing an illegality. The respondent was also accused of acting in excess of its powers and failing to give the applicant opportunity to present its case as required. In addition, the applicant maintained that the motor vehicles were not restricted when they landed in Kenya as they were within the 8 year rule.

11. By its submissions and further submissions dated 2<sup>nd</sup> February 2014 and 11<sup>th</sup> March 2014, respectively, the respondent contended that while indeed tax due was paid on the applicant's containers/ motor vehicles, the said payment was made on the basis of fake manifests presented by the applicant's agent and was therefore a fraudulent transaction which the applicant ought not benefit from. The said illegality was compounded and penalties imposed, thus closing the issue. The respondent also pointed out the applicant was at liberty to apply for a tax refund, and as such payment is not an estoppel.

12. On the issue of importation of over age motor vehicles, the respondent argued that it was

empowered under section 236 of EACCMA to verify and examine goods entering the country and did establish that the motor vehicles were over age as at the time of importation per the verification website <http://www.japan-partner.com/check-manufacture-year.php>, which is known to all clearing agents. The regulation regarding age of imported motor vehicles is implemented through a requirement to obtain a mandatory Certificate of Conformity without which a consignment can be denied entry into the country. The absence of this certificate from KEBS was the basis for the detention of the over age motor vehicles. The applicant was challenged to produce the certificate to signify that KEBS had inspected and cleared the goods to enable the respondent release the same. The respondent relied on section 213 of the EACCMA which donates power to it for the seizure of goods liable for forfeiture.

13. The respondent maintained that the applicant was liable for the action of its authorized agent per section 148 of the EACCMA, justifying its decision to detain the motor vehicles. The agents having been appointed and operating under sections 145 and 146 EACCMA could not be termed as independent contractors. It was further submitted that the applicant was afforded opportunity to be heard over the offences for which, it and / or its clearing agent were liable for prosecution. This is evident from the fact that the applicant admits to paying a penalty for some of the offences which were compounded. The compounding process is such that before the pronouncement is made, the offender is given opportunity to present his case in writing and request the Commissioner to deal with it, knowing that such decision would be final and have the same force as a decree or order of the High Court. The respondent claimed that it was the duty of the clearing agent to inform the applicant of the reasons for detention after subjecting itself to the compounding process, and admitting to have committed offences. It was the respondent's submission that none of the applicant's constitutional rights have been breached, and the respondent cannot be faulted for carrying out its mandate since no illegality, unfair administrative action or unreasonableness had been proved against it.

14. The issues emerging from the submissions of the parties and which are to be determined herein are:

- i. Whether the Kenya Bureau of Standards (KEBS) Code 1515:2000 imposing restriction on the importation of motor vehicles over the age of 8 years from the year of manufacture is illegal and/ or unconstitutional.
- ii. Whether the applicant was liable for the actions of its agents.
- iii. Whether the respondent is justified in detaining the applicant's goods.
- iv. Whether the order of Mandamus or what orders may issue in the circumstances of the case.

### **The facts.**

15. An analysis of the facts reveals that the Respondent impounded/ detained the applicants containers/ motor vehicles for the following reasons:

#	Container Number	Vehicle Number	Chassis	Entry No.	Agent	Reason for impound/detention
1	MAEU 828 1998	FK619L - 521038		2010 2121201	MSA HEME	FAKE MANIFEST
2		CXZ70J - 3000248		2010 2121150	MSA HEME	FAKE MANIFEST
3	TCNU 915 2273	FK617J - 512088		2010 2121049	MSA HEME	FAKE MANIFEST
4		CXZ19J - 2017800		2010 2121009	MSA HEME	FAKE MANIFEST
5	TCKU 970 3957	FK619J - 520456		2010	MSA HEME	FAKE MANIFEST

6		CXZ19J – 3005465	2121244 2010 2121272	MSA	HEME	FAKE MANIFEST
7	SEAU 861 5746	FK618J – 511229	2010 2120730	MSA	HEME	FAKE M, OVER AGE
8		CXZ21U – 3000109	2010 2120815	MSA	HEME	FAKE M, OVE RAGE
9	CAIU 828 1230	CD458FN – 00082	2010 2120600	MSA	HEME	FAKE M, OVER AGE
10	MSKU 985 0119	FK618K – 501902	2010 2093714	MSA	GAEVA	OVER AGE
11		CXZ71S – 3000204	2010 2093632	MSA	GAEVA	HACKING
12	MSKU 038 8761	FK618J – 501416	2010 2093900	MSA	GAEVA	HACKING
13		CXZ71Q – 3001518	2010 2093797	MSA	GAEVA	HACKING
14	KNLU 507 6503	FE658E – 520526	2010 2094083	MSA	GAEVA	
15		CD458BN – 20138	2010 2093983	MSA	GAEVA	
16	TRLU7621429	FK628J – 532537	2010 2093474	MSA	GAEVA	
17		CXZ71Q – 3001426	2010 2093562	MSA	GAEVA	

16. Although the respondent is silent on whether any discrepancies were found with regard to the four (4) motor vehicles chassis nos. FE658E – 520526, CD458BN – 20138, FK628J – 532537, and CXZ71Q – 3001426, the respondent has however explained that upon the hacking incident, the entire consignment was detained and the agent was required to seek the clearance of the goods in accordance with the law. The documents attached to the applicants own verifying affidavit indicate that it used two clearing agents – HEME FREIGHTERS LTD and GAEVA SERVICES.

17. It is not disputed that the Commissioner compounded the offence of using fake manifests but the details of the decision compounding the offence were not given by either party.

**Whether the Kenya Bureau of Standards (KEBS) Code 1515:2000 imposing restriction on the importation of motor vehicles over the age of 8 years from the year of manufacture is illegal and/ or unconstitutional.**

18. The standard was obviously made and adopted before the coming into force of the Constitution of Kenya 2010 and the constitution cannot therefore be applied retrospectively. However, it has not been shown that the adoption of the Kenya Bureau of Standard Code 1515:2000 offends Articles 10 and 94 (6) of the Constitution. The former Article demands people participation and the latter a

clear mandate to make subsidiary legislation in terms as follows:

**10.** (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and ***participation of the people***;

94 (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.”

19. Writing on public participation with the respect of delegated/subordinate legislation in the case of South Africa in University of Oxford’s A Comparative Survey of Procedures for Public Participation in the Law Making Process – Report for National Campaign for People’s Right to Information (NCPRI) April 2011, the authors of the Report observe that:

*“Public participation is also required in the adoption of delegated legislation. This involves lawmaking by the Executive (involving the issuing of regulations, proclamations, rules, orders, declarations, directives, decrees or schemes) where so empowered by statute. However, the precise source of this obligation is presently unclear in South African law. In Minister of Health v. New Clicks South Africa (Pty) Ltd and Ors. (2005) ZACC 14, (2006) SA 311 (CC), the Constitutional Court failed to reach a consensus on whether the making of subordinate legislation is appropriately classified as administrative action or non-administrative action. If classified as administrative action, then it would be subject to detailed public consultation requirements under section 4 of the Promotion of Administration of Justice Act. If it is not administrative action, Sachs J suggests that it would still be subject to public consultation requirements. In his minority judgment, he argues that the Constitution contains an implied duty to engage in transparent public participation procedures in making subordinate legislation.”*

20. While I agree with the need for public participation even in the making of subsidiary legislation in accordance with our people participation principle of Article 10 of the Constitution of Kenya 2010, there was no evidence by the applicant, as he was bound to prove, that the preparation of the Standard 1515:2000 did not involve public stakeholder consultation by the Kenya Bureau of Standards before the standard was adopted.

21. If it is a question of the standard not having been laid in Parliament, in accordance with section 34 of the Interpretation and General Provisions Act cap 2., I concur with the position taken by Ojwang, J (as he then was) in Republic –Vs- Minister for Transport & Communication & Others Exparte Gabriel Limion Kaurai (Nrb High Court Misc. Application No. 109 of 2004) that the fundamental purpose of the rule making power is the concern of the court, when he said:

*“... I was not convinced that if ministerial instruments are not laid before the National Assembly they become utterly void. It is clear at the very least, that all things done under such rules will not become void, even if the National Assembly were to revoke the rules in question. General national practice is a highly relevant consideration in such a matter. If it were to be found that routinely, the Executive rarely lays regulations before Parliament, and Parliament itself does not regularly call upon Ministers to comply with the requirement, so that large amounts of ministerial rule-making has gone on without Parliament raising a finger, then the Court would have to take judicial notice of that practice. Although in the present matter, there was no positive evidence that Legal Notice No. 161 of 2003 had been or had not been laid before the National Assembly, the appearances are that it was not laid. Yet much activity on the ground has taken place, during times when the National Assembly has indeed been in session; and yet the point has, apparently, never once been raised at that forum. I think the practical judicial attitude in such a situation is to look to fundamental issues only.”*

22. Section 34 (1) of the Interpretation and General Provisions Act cap. 2 provides as follows:

*“34.(1) All rules and regulations made under an Act shall, **unless a contrary intention appears in the Act**, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.”*

23. The requirement of a clear mandate to legislate under Article 94 (5) and (6) of the Constitution appear to have been the clear intention of the provisions of sections 9(1) and (2) of the Standards Act which provides the procedure for adoption of the Kenya Standard as follows:

***“9. Declaration of Kenya Standard***

*(1) The Council may by notice in the Gazette—*

*(a) declare any specification or code of practice framed or prepared by the Bureau to be a Kenya Standard;*

*(b) notify from time to time any amendment to, replacement of, or abolition of, a Kenya Standard declared under paragraph (a).*

*(2) Where a Kenya Standard has been declared under subsection (1), the Minister, on the advice of the Council, shall, by order in the Gazette, prescribe a date after which no person shall manufacture or sell any commodity, method or procedure to which the relevant specification or code of practice relates unless it complies with that specification or code of practice.”*

These provisions clearly qualify as expressing a contrary intention in terms of section 34 (1) when applied to Standards Act by requiring only that the Council declares a standard in the Gazette and for the minister to appoint the effective date of the Standard.

24. Two courts have concurred in the view that the section 9 of the Standards act provides for the making of the Kenya Standards by the Bureau and adoption of the Minister without the

requirement of parliamentary approval. In the first Tuiyott, J in *Yuasa International & 4 Others vs KEBS & 12 others*, HC Mombasa, Constitutional Petition No. 10 of 2011 held that:

“The decision I reach is that subsidiary legislation made pursuant to Sections 9(1) and 9(2) are exempt from the provisions of Section 34 of The Interpretation & General Provisions Act. The laying of Gazette Notices 1924 and Legal Notice 69 before Parliament was not necessary. But it may not be so with Legal Notice NO. 78 which was made pursuant to the Ministers general power to make regulations under Section 20 of the Act (see paragraph 39 above). Yet I do not think that a failure to lay the Legal Notice No. 78 before the House would render it void.”

25. In the second Mumbi Ngugi, J in *Michael Mutua Ndunda & Another vs AG & 3 Others* (2013) eKLR, Nairobi HC Constitutional Petition No. 226 of 2011 held on the same question of laying regulations before Parliament that:

“Whether the Two Orders Are Invalid for Not Being Laid Before Parliament

40. The petitioners have alleged that the two Orders are null and void as they were not laid before Parliament as required under Section 34 of the Interpretation and General Provisions Act.....

42. I take the view that the provisions of the Standards Act did not require that the Orders that are impugned in this Petition should be laid before Parliament in order for them to have the force of law. I therefore find that they are not in violation of the Constitution. ....

43. The petitioners have asked the court to be guided by the decision of the court in the case of *Republic –v- Director of Public Prosecutions & Another, Ex Parte Henry Kiprono Kosgey*, Criminal Misc Applic No. 435 of 2011 where Ombija J held that it was mandatory to lay all subsidiary legislation before the National Assembly for approval without unreasonable delay, and where this is not done, the regulations in question did not have the force of law. With respect to the Learned Judge, bearing in mind the exception provided in Section 34 of the Interpretation and General Provisions Act, I am unable to agree with the decision reached by the court in that matter.”

26. For my own part, I consider that the Standards Act by its section 9 on the declaration of Standards complies with the requirements of Article 94 (6) and it cannot be said to be unconstitutional and on the issue of laying regulations before Parliament, I agree that the fundamental purpose of the regulations and the circumstances of the case including the length of usage of the regulations are important considerations. I do not find the lack of their being laid before Parliament as an invalidating fact. Moreover, I did not hear anything in the submissions made before me to warrant my departure from the persuasive decisions of the two courts aforesaid.

27. With respect, I am unable to agree with the decision of Ombija, J in *Republic vs. Director of Public Prosecutions & Another Ex Parte Henry Kiprono Kosgei & Another* (2012) eKLR, Nairobi HC Criminal Misc. Application No. 435 of 2011 in which criminal prosecution was sought for the importation of over age vehicles, holding that:

“...The respondent adduced no evidence before the subordinate court to demonstrate that the impugned regulations were so laid. Hence, Legal Notice No. 69 of 2001 and Legal Notice No. 78 of 2005 are void – has no force of law. Accordingly, the edifice upon which the 12 counts rest collapses. The charges as laid against the Applicant cannot lie in law.”

28. It is clear that the court in *Ex Parte Henry Kiprono Kosgei*, with respect, only superficially accepted the failure to lay the regulations before parliament as making them void without dealing with the especial procedure under section 9 of the Standards Act as to the making of Standards as opposed to other subsidiary legislation, which is within the exception under the section 34 (1) of Interpretation and General Provisions Act with regard to the requirement for laying of subsidiary

legislation before Parliament or to the length of usage of the standard since adoption or to the fundamental purpose of the regulations.

29. I therefore hold that the Kenya Standard 1515:200 is valid and made in accordance with the enabling statute, the Standards Act. Without challenging the constitutionality of the statute itself, the applicant cannot challenge the constitutionality of the regulations made *intra vires* the Act. See *Andrew Lionel Philips & 15 Ors. v. National Director of Public Prosecutions*, CCT 55 of 2004 and *Norman Murray Ingledeu v. The Financial Services Board and 2 Ors.*, CCT 6/02. For the same reason, the applicant cannot complain against the respondent's action *intra vires* the provisions of EACCMA in seizing the goods which in accordance with the Act were liable to forfeiture, without challenging the constitutionality of the EACCMA. A cardinal principle of the Constitution of 2010 is the rule of law which requires compliance with all laws enacted by parliament unless they are declared unconstitutional and void.
30. From the foregoing, the applicant's prayer to find that its constitutional rights have been violated in so far as the KEBS Standard Code 1515:2000, Code of Practice for the Inspection of Road Vehicles, specifically paragraph 2.5 on the age limit must be declined.

**Whether the respondent is justified in detaining the applicant's goods.**

31. Section 210 of EACCMA provides for forfeiture of goods in the following terms:

“210. In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall be liable to forfeiture—

**(a) any prohibited goods;**

**(b) any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;**

(c) any uncustomed goods;

(d) any goods which are imported, exported or transferred, concealed in any manner, or packed in any package, whether with or without other goods in a manner appearing to be intended to deceive any officer;

(e) any goods which are imported, exported or transferred contained in any package of which the entry, application for shipment, or application to unload does not correspond with such goods;

(f) any goods subject to Customs control which are moved, altered, or in any way interfered with, except with the authority of any officer;

**(g) any goods in respect of which, in any matter relating to the Customs, any entry, declaration, certificate, application or other document, answer, statement or representation, which is knowingly false or knowingly incorrect in any particular has been delivered, made or produced; and**

(h) any goods in respect of which any drawback, rebate, remission or refund of duty has been unlawfully obtained.”

32. Are the applicant's goods prohibited or restricted and was there false entry, declaration, certificate, application or other document et al made in respect of the goods? Section 2 of the EACCMA defines prohibited and restricted goods as follows:

“prohibited goods” means any goods the importation, exportation, or carriage coastwise, of which is prohibited under this Act or any law for the time being in force in the Partner States;

“restricted goods” means any goods the importation, exportation, transfer, or carriage coastwise, of which is prohibited, save in accordance with any conditions regulating such importation, exportation, transfer, or carriage coastwise, and any goods the importation, exportation, transfer, or carriage coastwise, of which is in any way regulated by or under the Customs laws.’

33. The respondent is mandated to restrict the importation of motor vehicles older than 8 years from date of manufacture under Section 18 paragraph 1 of Parts A and B of the Second Schedule to the EACCMA. Overage Motor vehicles are prohibited goods within the meaning of the EACCMA:

**18.** (1) The goods specified in Part A of the Second Schedule are prohibited goods and the importation thereof is prohibited.

(2) The goods specified in Part B of the Second Schedule are restricted goods and the importation thereof, save in accordance with any conditions regulating their importation, is prohibited.

The provisions of Part A and Part B of the Second Schedule provide generic descriptions of Prohibited Goods (Part A) as ‘*All goods the importation of which is for the time being prohibited under this Act or by any written law for the time being in force in the Partner State*’ and Restricted Goods (Part B) as ‘*All goods the importation of which is for the time being regulated under this Act or by any written law for the time being in force in the Partner State.*’

34. The Kenya Standard 1515:2000, Code of Practice for Inspection of Road Vehicles provides at Clause 2.5 –

**‘Age Limit – all road vehicles which are more than eight years old from the date of manufacture shall not be allowed for importation.’**

Clearly, the clause makes provision for both prohibited goods and restricted goods in terms of section 18 of the EACCMA.

35. The respondent has power to seize goods that are liable to forfeiture as follows:

**213.** (1) An officer or a police officer or an authorised public officer may seize and detain any aircraft, vessel, vehicle, **goods**, animal or other thing **liable to forfeiture** under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.

36. The respondent has statutory power under section 5 of its establishing Act, the Kenya Revenue Authority Act cap 469 to administer all the laws set in Parts 1 and 2 of the Act including the EACCMA. In enforcing the EACCMA which has provision for prohibited and restricted goods, the respondent must make reference to the Standards established with respect to different goods by the Kenya Bureau of Standards under the Standards Act. In so doing, the respondent does not usurp any powers of the Kenya Bureau of Standards as urged by the applicant. It merely enforces within its own mandate under section 18 of EACCMA the Standard set by Kenya Bureau of Standards. Failure to do so would be to act contrary to statute and therefore **ultra vires**.

37. The respondent has demonstrated that it has the mandate to act as it did, and its actions are backed by law. However, forfeiture is not automatic upon seizure of goods liable to forfeiture; there must be proceedings for condemnation under section 216 of the EACCMA, which provides as follows:

**216.** (1) Where any notice of claim has been given to the Commissioner in accordance with section 214, the Commissioner may, within a period of two months from the receipt of such claim, either—

(a) by notice in writing to the claimant, require the claimant to institute proceedings for the recovery of such thing within two months of the date of such notice; or

(b) himself or herself institute proceedings for the condemnation of such thing.

***(2) Where the Commissioner fails within the period of two months either to require the claimant to institute proceedings, or the Commissioner fails to institute proceedings, in accordance with subsection (1), then such thing shall be released to the claimant:***

***Provided that if the thing is prohibited goods or restricted goods which has been imported, or carried coastwise or attempted to be exported in contravention of this Act, the thing shall not be released to the claimant but may be disposed of in such manner as the Commissioner may direct.”***

38. What is the impact of the payment of the taxes by the applicant? The mere payment of taxes did not compel the release of the motor vehicles which are liable to be forfeited under the Act. The Act provides for a refund of the taxes paid as follows:

“143. (1) Subject to section 144 and to such conditions as the Commissioner may impose, where

it is shown to the satisfaction of the Commissioner—

(a) that goods were imported in pursuance of a contract of sale and that the description, quality, state or condition of the goods was not in accordance with the contract or that the goods were damaged before the goods were delivered out to Customs control; and

(b) that the importer with the consent [of] the seller has either—

*(i) returned the goods unused to the seller and for that purpose complied with the provisions of section 75 as to entry in like manner as if they had been goods to which that section applies; or*

*(ii) destroyed the goods unused, the Commissioner shall refund any Customs duty paid on the importation of the goods.*

(2) Repayment of duty shall not be granted under subsection (1) unless the person claiming the repayment presents a claim within a period of twelve months from the date of the payments of the duty.”

39. The court (Kasango, J) in ***R v. KRA ex parte Syed Zeshan T/A Umair Enterprises***, Mombasa High Court JR No. 122 of 2010 came to the same conclusion in similar circumstances holding that taxes paid in respect of vehicles which were over 8 years from the date of registration could be refunded:

“I therefore find that the decision of the respondent to disallow the release of the two motor vehicles was within the law. Is the Respondent obligated to release the vehicles having received the requisite taxes? The clear answer is No. The elaborate procedure of refund of such taxes set out in EACCMA are there to ensure that such persons as applicant can be refunded their taxes. Receipt of those taxes cannot act as statutory estoppels against the respondent because the release of the vehicles would be in contravention of the clear provisions of the law.”

I would agree. It is trite law that there can be no estoppel against statute.

## Whether the applicant was liable for the actions of its agents.

40. It is the applicant whose agents have been shown to have been involved in illegality by using fake manifests and hacking into respondent's officer's profile with a view to fraudulently clearing the goods. Can the same applicant use the court process to avoid the consequences of his agent's actions? The applicants' agents were, as confirmed by the compounding of the offences, guilty of criminality with respect to their attempt to clear the goods by fake manifests and hacking of the respondent's computer system. I agree with the judicial policy set out in, among others, the decisions of *Scott v. Brown, Doering, McNab & Co* (1892) 2 QB 728, *Snell v. Unity Finance Ltd.* (1963) 3 ALL ER 50, and *National Bank of Kenya v Wilson Ndolo Ayah* (2009) eKLR that the court will not enforce an illegal contract or transaction or a cause of action arising *ex turpi causa* and that once the facts of the illegality have been brought to the attention of the court at any stage of the proceedings including appeal, the court must fulfill its duty under overriding rule of public policy that courts do not lend their assistance to the enforcement of illegal transactions. This would affect the clearance of the goods for which the fake manifests and hacking were utilized.
41. The consequences of compounding an offence are set out in section 219 of the EACCMA as follows:

**219.** (1) The Commissioner may, where he or she is satisfied that any person has committed an offence under this Act in respect of which a fine is provided or in respect of which any thing is liable to forfeiture, compound the offence and may order such person to pay a sum of money, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may deem fit; and ***the Commissioner may order any thing liable to forfeiture in connection with the offence to be condemned.***

(2) The Commissioner shall not exercise his or her powers under subsection (1) unless the person admits in a prescribed form that he or she has committed the offence and requests the Commissioner to deal with such offence under this section.

(3) Where the Commissioner makes any order under this section—

(a) the order shall be put into writing and shall have attached to it the request of the person to the Commissioner to deal with the matter;

(b) the order shall specify the offence which the person committed and the penalty imposed by the Commissioner;

(c) a copy of the order shall be given to the person if he or she so requests;

(d) the person shall not be liable to any further prosecution in respect of the offence; and if any prosecution is brought it shall be a good defence for the person to prove that the offence with which he or she is charged has been compounded under this section; and

(e) the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court.”

42. **Condemnation of seized goods liable to forfeiture can only be done upon compounding of an offence if the goods were liable to be condemned by virtue of the offence or in the words of the statute, ‘in connection with the offence.’ The forfeiture that the Commissioner may in discretion order upon the compounding of the offences of fake manifests as alleged would only be such goods as were involved in the fake manifests and not goods liable to forfeiture by virtue of being prohibited or restricted goods. Sections 191, 200 and 203 under which it is alleged by the respondent that the applicant's agents committed offences do not have liability to forfeiture of the goods. Accordingly forfeiture for the other goods liable to**

**forfeiture on account of being prohibited goods or restricted goods must be dealt with in accordance to section 216 of the EACCMA.**

43. Section 148 of the EACCMA provides for criminal liability of the owner for the offences of the agent –

“148. An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:

Provided that—

(i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;

(ii) nothing herein contained shall relieve the duly authorised agent from any liability to prosecution in respect of any such offence.”

**I take the view however that in such circumstances, in accordance with principles of criminal law, the prosecution must in prosecuting the owner of goods for the offence committed by the agent show common intention to commit the offences under section 21 of the Penal Code.**

44. As regards the civil liability for forfeiture of the goods, the condemnation of goods liable to forfeiture is unaffected by the innocent action of owner as follows:

**“217. (1) Where any thing has been seized under this Act, as being liable to forfeiture, then the condemnation of the thing shall in no way be affected by the fact that any owner of the thing was in no way concerned with the act which rendered the thing liable to forfeiture.”**

45. I therefore find that the goods are liable to forfeiture notwithstanding that the acts for which forfeiture arises are the actions of the agents. However, with regard to the goods which do not meet the Kenya Standard 1515:2000, their forfeiture is based on their being prohibited or restricted goods and it is immaterial that the agents committed additional offences of fake manifests and hacking during the clearing process. If the offences of fake manifests and hacking were compounded by the Commissioner, details of which were not disclosed, the forfeiture would be lifted with regard to goods liable to forfeiture on account of false declarations leaving only those liable to forfeiture on the ground of contravening the Standard 1515:2000.

**Whether Mandamus or what orders may issue in the circumstances of this case?**

46. As discussed in the *Republic v. Kenya National Examination Council ex parte Geoffrey Gathenji Njoro* (1997) eKLR, mandamus will issue to direct the performance of a public duty. Such a duty will exist in this case with regard to the goods which, not being prohibited or restricted, have had the applicable taxes paid on them and were not otherwise liable to forfeiture. So that mandamus can properly issue where it is shown that the vehicles imported by the applicant were not affected by the Standard 1515:2000 and were not liable to forfeiture. Mandamus will also issue where it is shown that the respondent has failed to comply with the procedure set out in the enabling Act in dealing with a matter.

47. The respondent did not give an account for the detention of four motor vehicles as shown in the table at paragraph 15 above. The detention of these motor vehicles is unjustified unless they offend the Kenya Standard 1515:2000 making them liable to forfeiture. Accordingly, subject to conformity certificate by Kenya Bureau of Standards pursuant regulation 6 of the Legal Notice

No. 78 of 2005, the court does issue an order of Mandamus for the release of the two containers containing four motor vehicles as follows:

**Containers Nos. –**

**KNLU5076503 containing Motor Vehicles Chassis Nos. FE658E – 520526 and CD458BN – 20138**

**TRLU7621429 containing Motor Vehicles Chassis Nos. FK628J – 532537 and CXZ71Q – 3001426**

48. The respondent did not in accordance with section 216 of EACCMA commence proceedings for condemnation of such goods as were liable to forfeiture for reasons other than being prohibited or restricted goods on account of being overage under the Kenya Standard 1515:2000. Such of the goods that are not affected by the Standard must be released to the applicant in accordance with sub-section (2) of that section. **Accordingly, the court further makes an order of Mandamus with respect of such of the applicant's goods the subject of these proceedings that are not affected by the Kenya Standard 1515:2000, as at the date of entry.**
49. **The parties are at liberty pursuant to clause 6 of the Legal Notice No. 78 of 2005 to negotiate reshipment or return of the remainder of the vehicles that offend the Kenya Standard 1515:2000 as the less grievous option to the destruction of the goods.** Legal Notice No. 78 of 2005 made under the Standards Act provides for the dealing with verification of conformity of goods to Kenya standards and the consequences of non-conformity as follows:

“6 (1) The Kenya Bureau of standards shall issue a certificate of conformity in respect of goods that conform with Kenya Standards or approved specifications and a non conformity report in respect of goods which do not.

6(2) No goods that do not conform to the Kenya standards or approved specifications shall be permitted into Kenya, and shall be re-shipped, returned or destroyed at the expense of the importer.”

50. Save as ordered in paragraphs 47, 48 and 49 hereinabove, the Notice of Motion dated 23<sup>rd</sup> July 2013 is for the reasons set out above declined with an order on costs that, since the applicant has been partly successful, each party to bear its own costs. For compliance with the orders of the court, this matter will be mentioned after 30 days.

**Dated, Signed and Delivered this 5<sup>th</sup> day of August, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the Presence of:**

Mr. Kurgat for the Ex Parte Applicants

Mr. Siminyu for Mr. Chabala for the Respondent

Miss Linda - Court Assistant