



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APP. JR NO.8 OF 2014

R E P U B L I C

VERSUS

KENYA BUREAU OF STANDARDS 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF INDUSTRIAL
AND ENTERPRISE DEVELOPMENT 2ND RESPONDENT
KENYA REVENUE AUTHORITY 3RD RESPONDENT
KENYA PORTS AUTHORITY 4TH RESPONDENT

AND

KENYA MARITIME AUTHORITY INTERESTED PARTY

EX PARTE

CAR IMPORTERS ASSOCIATION APPLICANT

JUDGMENT

INTRODUCTION

1. The Kenya Bureau of Standards (KEBS) was established by an Act of Parliament - the Standards Act, Chapter 496 of the Laws of Kenya with the object of promotion and formulation of standards and specifications of commodities and codes of practice. In 2000, KEBS formulated the Kenya Standard Code of Practice for Inspection of Road Vehicles (KS 1515:2000) in accordance with section 9 (2) of the Standards Act, Cap 496 of the Laws of Kenya to regulate the quality and condition of road vehicles for safety, environmental and economic reasons. The standard KS 1515:2000 was promulgated vide Gazette Notice No. 1924 of 31st March 2000 and given legal effect in Legal Notice No. 69 of 2001 by the Minister for Tourism, Trade and Industry. The KS 1515:2000 as amended in July, 2008 at Clause 2.5 provides that:

*“Age Limit – All road vehicles which are more than eight years old **from the year of first registration** shall not be allowed for importation. The difference between the date of registration and date of manufacture shall not be more than one year.”*

The underlined portion of the clause was originally *“...from the date of manufacture...”* and was amended to *“...from year of manufacture...”* in 2003, before the 2008 amendment which changed it to *“...from year of first registration...”* demonstrating its clearly organic life and indicating that amendments are not closed.

2. The ex parte applicant is a registered association with the objective of promotion and protection of the legitimate car importation and allied trades. Pursuant to leave granted by the court on 5th March 2014, the applicant filed a Notice Motion dated 27th March 2014 seeking judicial review orders:

1. *THAT an order of Certiorari be issued to quash the 1st 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 1st January 2007 could not be allowed to be imported in Kenya as from 1st January 2014.*

2. *THAT an order of Certiorari be issued to quash the 1st 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 had 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 Road-worthiness, then the same should not be subjected to re-inspection by the 1st 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.*

3. *THAT it be ordered that the 3rd and 4th Respondents 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 1st 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 1st Respondent's alleged 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 (the notice) read as follows:

“NOTICE TO IMPORTERS OF USED/SECOND HAND MOTOR VEHICLES

We wish to inform all importers of used motor vehicles including returning residents, diplomatic staff and the general public that in observance of clause 2.5 of KS 1515:2000 the 8 (eight) year requirement, only Right Hand Drive (RHD) motor vehicles whose Year of First Registration is from 1st January 2007 and later shall be allowed into the country as from 1st January 2014.

This requirement is to ensure that compliance to the provisions of KS 1515:2000 – Kenya

Standard Code of Practice for Inspection of Road Vehicles and Legal Notice No. 78 of 15th July 2005; verification of Conformity to Kenya Standards of Imports Order.

Vehicles that are exported from Japan, UK, UAE, Singapore or South Africa shall also be accompanied by a Certificate of Road worthiness issued in the country of export (country of supply) by KEBS appointed inspection bodies.

It is further advised that Certificates of Road worthiness for vehicles whose year of first registration is 2006 shall not be valid after 31st December, 2013. All vehicles issued with such certificates must have arrived at the Port of Destination/ Entry point by 31st December 2013. Any 2006 model vehicle arriving after that date will be deemed not complying with KS 1515:2000 and shall be rejected at the importer's expense.

Importers are therefore advised to take necessary measures and comply with the requirements to avoid rejection of their 2006 motor vehicle models after 31st December 2013

Ag. Managing Director”

THE PRELIMINARY OBJECTION

4. The 1st respondent filed a Notice of Preliminary Objection dated 11th April 2014 on the grounds of lack of jurisdiction contending that the decision sought to be reviewed was declared on 13th March 2000 and that the Notice of Motion was filed on 28th March 2014 which is 2 days after expiry of 21 days since the grant leave on 5th March 2014 as prescribed under Order 53 of the Civil Procedure Rules.

THE NOTICE OF MOTION DATED 27TH MARCH 2014

5. The application for judicial review is supported by the Verifying Affidavit of Peter Otieno, National Chairman of the Car Importers Association of Kenya, sworn on 4th March 2014, and a Statement of the same date. It is the applicant's case that the 1st respondent has declined to release motor vehicle units first registered in the year 2006 that came on board M. V. Morning Conductor, M. V. Tranquil Ace and M. V. Grete Maersk/ Jumme Trader (the vessels) by reason of the notice in the newspaper. These vessels left their ports of loading between 30th November 2013 – 1st December 2013, and were expected to be in the country between 21st and 26th December 2013. Due to shipping logistics, the vessels arrived later, after 31st December 2013.

The applicants' case

6. The applicants' case is based on the interpretation that the 8 year age limit for the 2006 model motor vehicles was to lapse at the end of the year 2014 and not at the end of the year 2013 as purported in the notice. It is their claim that a motor vehicle which was first registered in January 2006 would be 8 years too old in so far as KS 1515:2000 is concerned, on 1st February 2014 and not before then. KEBS maintains that KS 1515:2000 does not make reference to the month of registration of a motor vehicle in determining its age and therefore, motor vehicles registered in 2006 cannot be released if they arrive on 1st January 2014 and thereafter. This issue had been raised before the 1st respondent by the applicants as well as other stakeholders in different forums and correspondence between January and February 2014, but had not been resolved, prompting the present application.

7. The ex parte applicant had by its letter dated 17th January 2014 to the Director

General of the Interested party set out its dispute with 1st respondent as follows:

“Re: Dispute on the 2006 Units

We wish to bring to your attention that we are having a problem with Kenya Bureau of Standards on the above subject as hereunder:

1. *That Kenya Bureau of Standards is frustrating trade instead of facilitating the same by declining to release 2006 which were on board MV Cassiopela Leader, Morning Christina, Morning Melody etc. on the basis that their certificates of Roadworthiness have expired hence cannot be used anymore.*
2. *That they have declined to release units that came on board MV Morning Conductor, MV Tranquil Ace and Grete Maersk/Jumme Trader, these vessels left their Ports of Loading between 30th November and 1st December 2013 respectively and were to be here between 21st ad 26th December 2013 days before the end of the year but due to Shipping logistics it was not possible and as a result they arrived late after the 31st December 2013 which was to be the deadline of 2006 Units according to Kenya Bureau of Standards.*
3. *That a vehicle which was first registered in January 2006 will be 8 years old by the end of January 2014 and due to that the Kenya Bureau of Standards do not have powers to claim that a vehicle was registered in January 2006 is over unless one full year is not 12 Months period.*

In view of the above we are hereby requesting your office to give instructions to KEBS to allow all the units that were inspected by their agents and found to be compliant to Kenya standards without any charges.”

The intervention by the Interested Party did not bear fruit with 1st respondent which insisted that the correct interpretation of the applicable law allowed its actions.

The respondents’ case

8. The 1st respondent (KEBS) filed an affidavit in opposition to the application, sworn on 14th April 2014 by John Wambutta Abong's, its Director – Quality Assurance and Inspection. The application was said to be out of time for the dual reason that first, the decision sought to be reviewed was actually introduced on 31st March 2000, and second the substantive motion was filed outside of the 21 days after grant of leave prescribed under the Rules. It was deposed that KEBS has the sole discretion to inspect and/or re-inspect any commodity, as well as, at the expense of the importer, to reship, return or destroy any goods or vehicle that does not conform to the Kenya Standards as envisaged in Legal Notice No. 78 of 15th July 2005. The notices which the applicant seeks to be reviewed, it was stated, were merely done to remind all concerned and members of the public of the existence of the rule that had been in operation well before then, **and that such notices (reminders) are and have always been done from time to time as a matter of good practice even though KEBS is under no obligation to issue reminders.** It was further stated that the computation and reckoning of time is a matter statutorily provided for under the Laws of Kenya and the applicant ought to lobby for appropriate prescriptive remedy to the Legislature and not in court. The applicant's claim that KMA had agreed to the applicant's position was refuted, especially with regard to the issue of congestion of the port which none of the parties had complained about. The court was urged to dismiss it with costs.

9. For the 3rd respondent (KRA) one Aquilino Mwithalii, Senior Revenue Officer,

swore an affidavit on 6th May 2014 on its behalf. It stated that KRA is mandated under the KRA Act to enforce the East Africa Community Customs Management Act (EACCMA). In its execution of sections 34 and 43 of the EACCMA, KRA is duty bound to charge customs warehouse rent. It was contended that the applicant had not produced the requisite documents to facilitate the release of the motor vehicles from the Customs Control where they are warehoused pending conformity with the customs requirements. As such, in accordance with section 34 of EACCMA, the vehicles were legally accruing customs warehouse rent which is due and payable to the Commissioner of Customs in execution of its statutory mandate, which the court ought not to injunct. He further pointed out that despite the KEBS notice in the dailies on 8th November 2013, the applicant knowingly consigned a cargo of 2006 model motor vehicles between 30th November 2013 and 1st December 2013, thereby assuming a huge risk. KRA contended that as the consignment arrived after 31st December 2013 contrary to the terms of the notice issued on 8th November 2013, the applicant was in breach of KS 1515:2000 and urged the court not to sanction an illegality.

10. The 4th respondent (KPA) filed the Replying Affidavit through Hannington Thoya, its Superintendent in charge of the Car Section at the Conventional Cargo Operations, sworn on 3rd July 2014 to oppose the application. He deposed that KPA records indicate the ship M. V. Morning Conductor arrived at Mombasa on 6th January 2014 discharging 227 vehicles and M. V. Tranquil Ace on 10th January 2014 discharging 527 vehicles. KPA stated it was unable to verify the same details for the ship M. V. Grete Maersk/Jumme Trader as the applicant had not included the information relevant for that purpose. As regards the prayers sought against KPA, it was stated that the same would be futile since KPA is no longer in custody and is not owed any charges in respect of the motor vehicles as the motor vehicles were all transferred to various Container Freight Stations who upon receipt indemnify KPA from any responsibility. KPA urged the court not to issue orders in vain, adding that the applicant has not in any event demonstrated any breach of law on the part of KPA.

NOTICE OF MOTION DATED 13TH MAY 2014

11. The applicant filed a Notice of Motion dated 13th May 2014 seeking an extension of the 21 days period since leave to file the substantive judicial review application. The leave granted on 5th March 2014 expired on 26th March 2014 before the applicant filed the substantive motion. The motion was eventually filed two days later. The application of 13th May 2014 asked the court to deem the motion of 28th March 2014 as having been filed within the prescribed time. The oversight was attributed to a honest mistake by counsel.

12. On 23rd May 2014, the 1st respondent (KEBS) filed Grounds of Opposition to this application stating that it was an abuse of court process and an attempt by the applicant to steal a march from KEBS, specifically, the Preliminary Objection on a point of law - KEBS had previously raised on the same issue. It was alleged that the application was an afterthought meant to defeat the Preliminary Objection by KEBS, and consequently, time cannot be extended long after the event. It was also stated that no good reason had been advanced to explain the delay of over 1 month in moving the court to extend time.

HEARING AND DETERMINATION

13. Before court are three applications. The first is the Notice of Motion dated 27th March 2014 seeking substantive orders for judicial review. The second is the Preliminary Objection dated 11th April 2014 opposing the motion for judicial review for being filed out of time. The third is the Notice of Motion 13th May 2014 seeking to have the Notice of Motion dated 27th March 2014 admitted despite being filed out of time. The parties on 28th May 2014 consented to having the three applications heard simultaneously. Written submissions were filed and

highlighted on 3rd July 2014 and on 8th July 2014 and judgment reserved. On 17th July 2014, the court upon application granted the applicant leave to file and serve any additional authority with any brief submissions, within 3 days while the respondents were granted leave file any brief submissions in response as well as any counter authorities, if necessary. The 3rd respondent (KRA) filed its further submissions on 14th August 2014 and the 1st respondent on 18th September 2014. Counsel for the parties – Mr. Gikandi for the ex parte applicant, Mr. Ashitiva for the 1st respondent, Ms. Lutta for the 2nd respondent, Mr. Chabala for the 3rd respondent, Mrs. Ikegu for the 4th respondent, Mr. Okello for the 1st Interested Party and Mr. Kagucia for the 2nd Interested Party, the Kenya Anti-Corruption Commission - made supplementary oral submissions and judgment was reserved.

ISSUES

Which is the decision under review?

14. The applicant states that it has no issue with the 8 year rule as contained in KS 1515:2000 but simply questions the decision contained in the notices of 8th November 2013 on the computation of the said 8 year rule. For that reason, the decision in the notices is well within time for filing for certiorari. According to KEBS, the decision sought to be reviewed is essentially the KS 1515:2000 and which per Hon. Nyamu J. in *Kithome vs the District Land Adjudication and Settlement Officer, Mwingi District and Others*, Nairobi HC CC No. 1108 of 2004, would not be in the public interest to challenge since it was made over 9 years ago. The notice complained of said to have been a mere reminder of KS 1515:2000 which was declared on 31st March 2000 and which rule was made pursuant to wide consultation involving a wide range of stakeholders which included car dealers. The notices cannot for that reason be construed to be the decision at all. It was submitted for the 2nd respondent that every first week of the month of November, each calendar year, KEBS puts out a notice in the print media notifying members of the public to take cognizance of the rolling over of the year, so that vehicles on the limit can arrive before 31st December of that year. In the premises, the notice cannot be open to judicial review. The applicant maintained that the notice issued in the year 2013 bore a difference in the interpretation of the 8year rule as envisaged by the KS 1515:2000.

15. In its material parts the Notice of 8th November 2013 was in the following terms:

“NOTICE TO IMPORTERS OF USED/SECOND HAND MOTOR VEHICLES

We wish to inform all importers of used motor vehicles including returning residents, diplomatic staff and the general public that in observance of clause 2.5 of KS 1515:2000 the 8 (eight) year requirement, only Right Hand Drive (RHD) motor vehicles whose Year of First Registration is from 1st January 2007 and later shall be allowed into the country as from 1st January 2014.”

16. Having looked at the notice of 8th November 2013, it is clear that the 1st respondent did make a decision rendering an interpretation of the 8 year rule in clause 2.5 of the KS 1515. The ex parte applicant was entitled to move the court for a determination whether the interpretation given by the 1st respondent was correct according to the provisions of the clause 2.5 and in its application to its members’ motor vehicles that were affected by the interpretation. The ex parte applicant did not challenge the validity of the Kenya Standard 1515:2000 but rather the interpretation given to it by the 1st respondent in its notice of 8th November 2013, in relation to or as it affected 2006 vehicles.

Is the application for Certiorari time barred?

17. The ex parte applicant, applying the *ejusdem generis* rule to Order 53 rule 2

submitted that the 6 months limitation for the filing for certiorari relates only to a class of decisions of a court of law and not to ministerial decisions such as in this case. Accordingly, the prohibition in the rule as in section 9 of the Law Reform Act does not apply in this case. On this, the case of ***R. vs Judicial Commission of Inquiry into the Goldenberg Affair & Others***, Nairobi Misc Civil Application No. 1279 of 2004 was cited, in which the court of appeal (Nyamu, Ibrahim & Makhandia, JJA) held that the 6 months bar applied only when questioning formal judgments, orders, decrees, conviction or other proceedings of an inferior court or Tribunal and not to the act of publishing an ultra vires rule stating that, “...*We hold that nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle due to the nature of the nullities...*”. Also cited was the case of ***R. vs Maseno University Staff & Others***, Nairobi Misc. Civil Application No. 963 of 2007 in which Wendo, J applied the Goldenberg Case stating that, “...*a nullity can not be subject of the 6 months period because it does not exist and so can be challenged outside the 6 months...*”.

18. Leave to file judicial review proceedings to challenge the 1st respondent’s decision of 8th November 2013 was sought and granted in March 2014 within the 6 months period prescribe for Certiorari application. Therefore no question of extension of the 6month period prescribed under the law reform act and the Civil Procedure Rules for commencement of proceedings for judicial review orders arises.

Whether the Notice of Motion dated 27th March 2014 may be admitted when it was filed out of time

19. It is not in dispute that the substantive motion herein dated 27th March 2014 was filed 2 days out of time. The applicant urged the court to find that the motion although filed 2 days late can be saved by exercising the court's discretion in extending time. The court was therefore urged to allow the application dated 13th May 2014 and deny the 1st respondent's Preliminary Objection on this issue.

20. The applicant submitted that the court has jurisdiction to extend time beyond the statutory 21 days citing Article 159 of the Constitution requiring the court to do justice without undue regard to technicalities. The applicant also cited section 95 of the Civil Procedure Act, Order 50 rule 6 of the Civil Procedure Rules and Section 59 of the Interpretation and General Provisions Act as empowering the court to enlarge time. Further, it was submitted that the 21 days rule is a subsidiary law and cannot override Article 159 of the Constitution. Relying on ***Kenya Commercial Bank Limited vs Kenya Planters Co-operative Union***, (2010) eKLR, Court of Appeal at Nairobi, Civil Application No. 85 of 2010, the applicant asked the court to consider the inherent jurisdiction of the court conferred via the overriding objective (“O2 Principle”) contained in sections 1A, 1B and 3B of the Civil Procedure Act as read together with Article 159 of the Constitution, and to find that this principle is applicable in all matters that come up for consideration in a court of law so as to ensure that justice is served at all times. The case of ***Fatuma Zainabu Mohamed vs Ghati Dennitah***, (2013) eKLR Kisii High Court Election Petition No. 6 of 2013 and ***Concord Insurance Company Limited vs Susan Nyambura Hinga***, (2003) eKLR, Civil Appeal No. 251 of 2002 were cited on the proposition that the court has jurisdiction to entertain an application for extension of time.

21. The applicant also pointed out that none of the parties had alleged or proved that an extension of time by 2 days would prejudice them, noting that they had each filed their responses to the said substantive application. It was said therefore that it was fitting that the application be heard and determined on merits so that the legal position on the computation of time in this matter would be ascertained. The court was urged not to visit the advocate's mistake on his client. The case of ***Pithon W. Maina vs Thuku Mugeria*** was cited in that regard.

22. The Interested Party (KMA) noted that the application was only 2 days late. It added that even though judicial review proceedings are special proceedings, they are part and parcel of

the Civil Procedure Act and Rules, and the court has inherent jurisdiction to do justice between the parties if it finds that the applicant had good reason for the delay.

23. The 1st respondent KEBS contended, however, that Order 53 rule 3 (1) is couched in mandatory terms to the effect that the substantive motion pursuant to leave granted must be filed within 21 days. The court, it added, may abridge the period to less than 21 days but cannot extend it. KEBS cited Court of Appeal at Kisumu, Civil Appeal No. 27 of 1989 **AKO vs Special District Commissioner Kisumu & Another** stating that this prohibition is statutory and absolute and is not, therefore, challenge-able under the provisions of the Civil Procedure Rules under the then Order 49 Rule 5, now Order 50 Rule 6 which makes provision for enlargement of time. In **Kithome vs DLASO Mwingi District & Others**, the court held that Order 49 Rule 5, (now Order 50 Rule 6) which makes provision for enlargement of time does not apply to judicial review. In **Re an Application by the Owners of the Motor Vessel "GLOBE YOUR"** (1998) eKLR, Waki, J held that there was no room for the exercise of any discretion under Order 53 rule 3 as it is drafted in mandatory terms thereby affecting the jurisdiction of the court. . In Malindi ELC JR No. 3 of 2013 **Republic vs Kahindi Nyafula & 3 Others ex parte Kilifi South East Farmers Cooperative** Angote, J held that the extension cannot be effected even with the aid of Article 159 (2) of the Constitution.

24. With respect, I have taken the view that while the provision relating to the 6month period for commencement of proceedings certiorari is statutory being expressly provided for under section 9 of the Law Reform Act, the requirement for filing of the Notice of Motion upon grant of leave is prescribed by the subsidiary legislation of the Civil Procedure Rules, which contain a rule (O.50 r.6) providing expressly for enlargement of time for doing any act prescribed under the Rules. I also consider that the 21-day rule for the filing of the Notice of Motion is a matter of procedure rather than substantive rule of jurisdiction of the court in judicial review matters, and is therefore open to extension in accordance with the substantial justice principle of Article 159 of the Constitution.

25. In the case of ***R v. The General Manager Moi International Airport, ex parte Jared Adimo Odhiambo and Anor.*** Mombasa HC JR 12 of 2014, I dealt with a similar question as follows:

There is no consensus of judicial opinion with regard to authority to enlarge time and I have noted decisions of the Court taking the view that judicial review is a special procedure to which the regular Civil Procedure Rules do not apply, and that therefore there is no power to enlarge time since it is not provided for under the applicable Order 53 of the Civil Procedure Rules. See for example Nyamu, J. in Kithome v The District Land Adjudication and Settlement Officer Mwingi District and others [2006] 1 EA 116 (HCK), holding that it is trite law that the Civil Procedure Rules and the Civil Procedure Act do not apply to judicial review. It was further held in that case that the provisions of Order LIII, rule 3(1) are mandatory and that an application for judicial review must be filed within 21 days, and that there is no provision for extension. See also Angote J. in Republic v Kahindi Nyafula & 3 others Ex Parte Kilifi South East Farmers Co-Operative [2014] eKLR; and Emukule, J. in R vs Nyandarua District Oljoro Orok Division Land Disputes Tribunal & Moses Ndirangu Njuguna ex parte Cyrus Kamau Ng'ang'a, Susan Njoki Ndirangu & Godfrey Kinyori Wamwega, (2010) eKLR, Nakuru HC Misc. Appl. 505 of 2006 (JR).

With respect, I take the view that the substantial justice principle of Article 159 of the Constitution applies to empower the court to enlarge time prescribed for doing any act or taking any step under the procedure rules of the court. In my view, the time prescribed for filing of the Notice of Motion for judicial review orders is a matter of procedure for litigating the judicial review claims and not a rule of substantive law on sustainability, enforceability or justiciability of the claims, and it is, therefore, properly amenable to Article 159 principle.

As shown above Order 50 rule 6 of the Civil Procedure Rules contemplates extension of time for purposes of anything prescribed under the Rules without excepting Order 53 of the Rules. Even if the 6-month period for the commencement of judicial review proceedings were taken to be statutorily insulated, by the provisions of section 9 of the Law Reform Act, from the court's power of extension under Order 50 rule 6, the same cannot be said of the 21-day period prescribed only by the Rules.

For the reason that the prescription as to time of filing is a matter of procedure rather than substantive ingredient of the right or claim, and consequently subject to Article 159 of the Constitution and Order 50 rule 6 of the Civil Procedure Rules, I agree with the school of opinion that the court has power to extend the 21-day period prescribed by the rules for the filing of the Notice of Motion upon grant of leave under Order 53 Rule 3 (1) of the Civil Procedure Rules. See R vs City Council of Nairobi & 2 others ex parte Alice Wahito Ndegwa & 5 others (2012) eKLR, Nairobi HC Misc. Appl. 7 of 2012; R vs The Commissioner of Value Added Tax ex parte Iron Art Limited (2012) eKLR, Nairobi HC JR Misc. Appl. 19 of 2012; R vs City Council of Nairobi ex parte Wilfred Obiero, Nairobi HC JR Misc. Appl. of 2012; and R vs The Commissioner of Value Added Tax ex parte Iron Art Limited (2012) eKLR, Nairobi HC JR Misc. Appl. 19 of 2012.

Even where courts have found that the Order 53 is unaffected by the rest of the provisions of the Civil Procedure Rules, so that reliance cannot be placed on the power to extend under Order 50 rule 6, court have fallen back to their inherent power to ensure justice is done. I particularly concur with the reasoning of Githua J. in R v. National Environmental management Authority and Anor. ex parte Elizabeth Njeri Hinga and Anor. (2012) eKLR where the learned judge said:

“It is therefore my finding that since Order 53 Rule 3 (1) is not part of the substantive law governing the conduct of judicial review proceedings, this court can exercise its discretion to extend time within which to file a substantive motion for judicial review even after expiry of the 21 days prescribed under Order 53 Rule 3 (1) under its inherent powers, if it is satisfied that it is fair and just to do so.”

See also W. Korir J. in R vs City Council of Nairobi & 2 others ex parte Alice Wahito Ndegwa & 5 others (2012) eKLR, Nairobi HC Misc. Appl. 7 of 2012.

Moreover, even with regard to enlargement of the 6 months period prescribed by statute for commencing judicial review proceedings under section 9(3) of the Law Reform Act and Order 53 of the Civil Procedure Rules - which is not in issue here - I have noted the decision of Emukule, J. in Apex Finance International Ltd & Anor. v Kenya Anti-Corruption Commission (2012) eKLR upholding the court's discretion. I agree with the learned judge that the court has authority to enlarge time for the filing of judicial review proceedings even after expiry of the 6 months period in appropriate cases especially cases of nullity or illegality. A fortiori, the court has discretion to enlarge the 21-day period for the filing of the Notice of Motion upon grant of leave to commence judicial review proceedings which is sought and granted within six months of the impugned decision.

26. The ex parte applicant's counsel states that the two-day delay in filing the Notice of Motion was due to oversight by counsel. I have not seen that the respondents will be prejudiced by extending the time for filing of the Notice of Motion as they have already responded to the Notice of Motion by respective replying affidavits. I also considered that the matter in issue is of substantial importance to the public as well as the ex parte applicants for a determination as to the computation of the 8year rule for importation of secondhand motor vehicles. Accordingly, I will allow ex parte applicant's application dated 15th May 2014 for extension of time for filing of the Notice of Motion herein by two days so that the Notice of Motion herein dated the 27th March 2014 is deemed properly to be on record.

Whether KEBS is prohibited from ordering re-inspection of goods pre-inspected at port of loading.

27. The applicant sought to clarify the terms of the order of certiorari sought as follows:

“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 Road-worthiness, then the same should not be subjected to re-inspection by the 1st Respondent;”

Clause 5 of the of Legal Notice 78 of 15th July 2005 provides for verification of conformity in terms that:

5. All goods which are specified by the Kenya Bureau of standards in accordance with paragraph 2 shall be subjected to verification of conformity to Kenya Standards or approved specifications in the country of origin by an inspection body authorized by the Bureau, and may be re-inspected at the port of entry by the Bureau if it is deemed necessary.

Clause 7 provides that goods arriving at the port without a certificate of conformity shall be subjected to destination inspection at a fee. Clearly, KEBS is within its mandate to re-examine goods upon arrival. It will also be noted that the certificate of conformity issued by the external agents were to expire on 31st December 2013, therefore, KEBS would not be acting ultra vires by requiring the applicant to have its goods re-examined.

Should the order of Certiorari be issued?

28. The applicant opines that an arithmetic computation of time from 1st January 2007 to 1st January 2014 translates to 7 years and 1 day. Therefore the 8th year would run from 1st January 2014 – 31st December 2014 and for this reason, the notice was wrong. It relied on section 2 of the Interpretation and General Provisions Act which provides that a year is to be reckoned in accordance with the British Calendar. Blacks’ Law Dictionary defines a year as 12 months beginning January 1st and ending in December 31st. The 1st respondent's (KEBS) notice was said to have reduced the prescribed 8 year period by 1 year and therefore amounted to unreasonableness within the meaning of *Wednesbury Unreasonableness (LSK vs Judicial Commission of Inquiry into the Tribal Clashes in Kenya, Mombasa HC Misc. Civil Application No. 141 of 1998.)*

29. The applicant claimed that the Interested Party (KMA) who is the regulator in Maritime affairs did not approve of the 1st Respondent's (KMA) decision. This would be inaccurate since in the letter dated 29th January 2014, KMA sought advice from KEBS on the issue of late arrival of shipment and not on the issue of computation at all. The applicant stated that the 3rd Respondent (KRA) had collected revenue on some of the subject motor vehicles which they should not have, if indeed the importers were in contravention of the law. The applicant averred that KEBS was estopped from rejecting the motor vehicles in question since they had been issued with Certificates of Road worthiness at the port of loading by KEBS appointed agents and were valid for 90 days.

30. It is KRA's submission that despite the notice published by KEBS on 8th November 2013 clearly advising that 2006 model motor vehicles would not be allowed into the country as from 1st January 2014, the applicant, between 30th November and 31st December 2013, knowingly loaded 2006 model motor vehicles on board vessels destined for Mombasa. The clause 2.5 of the Kenya Standard KS1515:2000 on age limit meant that motor vehicles manufactured in the year 2006 would not be allowed into the country after 31st December 2013. KEBS duly warned

importers in its notice that the Certificates of Road worthiness for motor vehicles whose year of first registration is 2006 would not be valid after 31st December 2013. The case of ***Peter Mbwiri Ikamati vs Kenya Bureau of Standards and 2 others***, Nairobi Misc. Application No. 369 of 2013 was cited. KRA is mandated to collect warehouse rent by section 34 and 42 of the EACCMA Act and such rent begins to accrue when the goods are not removed from the first point of entry. The goods in question cannot be released by KRA until KEBS issues the applicant with a clearance certificate to indicate that the goods have complied with KS 1515:2000. The applicant is accused of failing to seek waiver or exemption from the standard in accordance with section 9(3) of the Standards Act, or even a waiver of the Customs Warehouse Rent under regulation 85 of the EACCMA Regulations, opting instead to seek a peremptory order of the court to compel KRA to abdicate execution of its statutory mandate. This suit was in the premises, premature and an abuse of court process. KRA submitted that as the applicant's motor vehicles were in violation of the Kenyan standard for importation, they were liable to either destruction under section 14A of the Standards Act or re-exportation to the country of origin under section 248 of the EACCMA. KRA also submitted that the relief sought against it does not lie within the realm of judicial review and ought to be dismissed. In any event, it added, the person found liable for occasioning the deposit of the motor vehicles in the customs warehouse will be expected to pay the warehouse rent.

31. KEBS submitted that the computation is a matter of statute and urged that the applicant ought to lobby the legislature for an appropriate prescriptive remedy to making adjustments to computation and reckoning of time. KEBS also urged the court to follow the reasoning of Majanja, J in ***Republic vs Kenya Bureau of Standards & 2 others ex parte Peter Mbwiri Ikamati***, Nairobi JR Misc. Appl. No. 369 of 2013 that computation of time must commence at the beginning of the year on 1st January. KEBS further submitted that quashing the 8 year rule would negatively expose the public as consumers, as the reliefs sought are not the most efficacious in the circumstances.

32. The 2nd respondent attributed the alleged disharmony between the documents used by KEBS and KRA to the fact that the two agencies drawing their mandate from separate statutes, and their primary concern was therefore separate, KEBS being to maintain Kenya Standards under the Standard Act and KRA being to collect revenue under the EACCMA and related statutes. The 2nd respondent further submitted that while the Cabinet Secretary has authority to exempt an importer from the provisions of LN. 78 as well as KS 1515:2000, there has been no indication that the applicant sought such exemption hence it would be incorrect to accuse the Cabinet Secretary or KEBS for acting ultra vires.

33. It is clear from the wording of the KS 1515:2000 as amended in 2008, that the computation relates to "...year of first registration..." and not "...date of first registration..." or "date of manufacture" as clause 2.5 read before the amendment. Had the Standard intended to apply the date of registration of a motor vehicle for purposes of computing time, it would have retained the provision for the 'date' of registration; the amendment to remove the reference to 'date' discloses the intention of the standard to shift from 'date' to 'year' as the point of computation of the 8year period. I would agree with the 1st respondent's counsel that any change to the rule should be made by the Rule Committee of the 1st respondent under the Standards Act.

34. I do not find that the interpretation by the 1st respondent of the Standard as requiring all 2006 motor vehicles to have entered the country by the 31st December 2103 as unreasonable decision on the point. I note the concurrence of the court in ***Republic vs Kenya Bureau of Standards & 2 others ex parte Peter Mbwiri Ikamati***, supra, on the method of computation using the 1st January of the year as the starting point. It is conceivable that for reason of establishing only one cut-off date for ease of regulation and management of the Standard, the rule committee may have opted for the 'year' rather than the 'date' of registration so that instead of 365 cut-off dates, consistent with the days in a year, only the last date of a year - the 31st December 2013 - is relevant.

35. The computation of time under Article 259 of the Constitution clearly refers to time prescribed under the Constitution. However, nothing turns on it because the significant point in reckoning time is the *date on which the period began*, the date from which time is deemed to begin to run. Article 259 (5) provides in relevant parts that -

“(5) In calculating time between two events for any purpose ***under this Constitution***, if the time is expressed—

(c) as years, the period of time ends at the beginning of the date of the relevant year that corresponds to *the date on which the period began*.”

If it is agreed that with respect to the 2006 motor vehicles ‘*the date on which the period began*’ for purposes of counting the 8years is **1st January 2006**, the period of time will end *at the beginning* of **1st January 2014**, which is also the *end* of **31st December 2013**.

36. I agree with the definitions of the word year in Interpretation and General Provisions Act cap 2 and in the Blacks dictionary cited above, but the clause 2.5 of the Kenya standard 1515:2000 (though not subject of review in these proceedings) and the 1st respondent’s interpretation of it in the notice of 8th November 2013 do not purport to change the meaning of the word ‘year’ as defined by the two authorities. As I understand it the Standard only means that for purposes of computing time, the ***year of registration*** is deemed to commence on the 1st of January of the year when the motor vehicle is registered and not in the ***actual date*** in that year when the registration is effected.

37. For the motor vehicles in issue in this proceedings, the 8-year period is, therefore, accounted as follows:

1. **Year of First Registration – 2006**
2. **Second year – 2007**
3. **Third year – 2008**
4. **Fourth year – 2009**
5. **Fifth year – 2010**
6. **Six year – 2011**
7. **Seventh year – 2012**
8. **Eighth year – 2013.**

Accordingly, I do not find that the 1st respondent has in its interpretation of the cause 2.5 of Standard 1515:2000 acted unreasonably within the *Wednesbury Principles* – see ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*** (1947) EWCA Civ 1.

38. I also find that in enforcing the standard, the respondents are acting within their statutory mandate and they cannot be deemed to have acted ultra vires or in breach of the applicant’s right to property to which the applicant is entitled to enjoy within and in accordance with the law. There has not been in these proceedings any challenge on the constitutionality of the enabling statutes or indeed of the Standard 1515:2000.

Who should bear the costs of these proceedings?

39. The respondents sought the striking or dismissal of the application with costs. Particularly, KRA contended that the provisions of the Kenya standard are clear and despite the notice published on 8th November 2013, the applicant assumed the risk and consigned 2006 model motor vehicles between 30th November and 31st December 2013. The court was asked to find that the respondents were only seeking to enforce the law and should be allowed to undertake their statutory duties unhindered. The court was urged to dismiss the application as a belated attempt to circumvent the law and order costs in favor of the respondents as against the applicant.

40. I have found that the ex parte applicant had genuine concerns over the 1st respondent's decision in its interpretation of the provisions of Clause 2.5 of the Kenya Standard 1515:2000 and was therefore entitled to move the court for review of the decision. I further find that the case had a public interest element as the notice of 8th November 2013 affected and indeed was addressed to the public category of '*all importers of used motor vehicles including returning residents, diplomatic staff and the general public.*' On account of the public nature of the proceedings, I consider that the appropriate order on costs is that each party will bear its own costs.

Conclusion

41. I have found that the decision challenged in the proceedings is the 1st respondent's interpretation of Kenya Standard 1515:2000 with respect to the reckoning of time for purposes of the 8year rule for importation of second hand motor vehicles in relation to the 2006 units, which decision was set out in the Notice published in the local dailies on the 8th November 2013. The ex parte applicant's application for leave which was filed on 4th March 2014 was within the statutory period of 6 months from the date of the impugned decision.

42. The ex parte applicant's Notice of Motion filed upon leave granted on the 5th March 2014 was filed out of time 2 days outside the 21-day period after grant of leave prescribed under Order 53 Rule 3(1) of the Civil Procedure Rules. However, in view of the public interest in the matter of the interpretation of the Standard 1515:2000 on computation of time for purposes of the 8year rule of importation of secondhand motor vehicles, I allowed the application dated 15th May 2014 for extension of time, in accordance with the substantial justice principle of Article 159 of the Constitution and pursuant to the provisions of Order 50 rule 6 of the Civil Procedure Rules.

43. On the merits of the Notice of Motion, however, I have found that the reference to the 'year' in the prohibition of importation of motor vehicles that are more than 8years old since the year of registration must relate to the period in years on the basis of a calendar year ending on the 31st December of any year without regard to the date or month of registration so that the first year of motor vehicle is the year in which it is registered regardless of the actual date and month of the said year.

Orders

44. Accordingly, for the reasons set out above, the ex parte applicant's Notice of Motion dated the 27th March 2014 is declined with an order that each party bears its own costs of the proceedings before the Court.

45. The court hopes that the 1st and 2nd respondents will prove magnanimous in victory to exercise their discretion to consider favourably the ex parte applicant's request for waiver of provisions of the LN. No. 78 of 2005 with regard to the 2006 motor vehicles which arrived in the country late after the 31st December 2013 when the 8year bar took effect with regard to such vehicles.

Dated, signed and delivered on the 22nd September 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Gikandi for the Applicants

Mr. Ashitiva for the 1st Respondent

N/A for the 2nd Respondent

N/A for the 3rd Respondent

Mrs. Ikegu for the 4th Respondent

N/A for the Interested Party

Ms. Linda Court Assistant