



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 226 of 2011

MICHAEL MUTUA NDUNDA.....1ST PETITIONER

OSMAN GEDI.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER FOR INDUSTRIALIZATION.....2ND RESPONDENT

THE KENYA BUREAU OF STANDARDS.....3RD RESPONDENT

KENYA REVENUE AUTHORITY.....4TH RESPONDENT

JUDGMENT

1. In the petition dated 31st October 2011, the petitioners challenge the application of the Standards Act (No.1) Order made by the Minister for Tourism, Trade and Industry on 27th April 2001 (the 2001 Order) and the Verification of Conformity to Kenya Standards of Imports Order, 2005 (the 2005 Order) which they allege violate their rights under Article 47 of the Constitution.

2. They aver that the two Orders were enacted in a manner that was inconsistent with the Constitution as they were not laid before the National Assembly and consequently, they are null and void. They therefore seek various declarations as follows:

- i) ***that their rights under Article 47 of the Constitution have been infringed;***
- ii) ***that the Standards Act (No.1) Order made by the Minister for Tourism, Trade and Industry on 27th April 2001 as legal Notice No. 69 of 2001 and Verification of Conformity to Kenya Standards of Imports Order, 2005 gazetted on 15th July 2005 as Legal Notice No. 78 of 2005 were not laid before the National Assembly and therefore were enacted in a manner inconsistent with the constitution thus are null and void.***

iii) that the Standards Act (No.1) Order made by the Minister for Tourism, Trade and Industry on 27th April 2001 as legal Notice No. 69 of 2001 and Verification of Conformity to Kenya Standards of Imports Order, 2005 gazetted on 15th July 2005 as Legal Notice No. 78 of 2005 do not have the force of law and cannot be enforced in a manner that infringes, violates or denies the petitioners their constitutional right to their property.

3. The petition is supported by two affidavits sworn separately by each of the petitioners, Michael Mutua Ndunda and Osman Gedi on 31st October 2011.

4. The petition is opposed. The 1st and 2nd respondents filed grounds of opposition dated 28th February 2012 while the 3rd respondent filed a replying affidavit sworn by its Principal Legal Officer, Kuchio Tindi on 17th November 2011. The 4th respondent filed a replying affidavit sworn on 15th December 2011 by its Principal Legal Officer, Ms. Ann Maitho. All the parties save for the 4th respondent filed written submissions setting out their respective cases.

The Petitioners' Case

5. The petitioners claim that they had imported motor vehicles from England and the United Arab Emirates respectively, had paid the requisite duties to the 4th respondent, but the 3rd respondent declined to release the vehicles for allegedly being imported in violation of the Standards (No. 1) Order of 2001 which prohibits the importation of any vehicle which is more than eight years old from the year of manufacture.

6. The 1st petitioner avers that he imported a used Nissan Pick-Up, Chassis Number JN1BPUD22U0078380 and Engine number YD25-056515 from England which was shipped on 30th December 2010 and arrived at the Mombasa Port on 24th January 2011. The 2nd petitioner states that he imported a used Toyota Wish Station Wagon, Chassis No. ZNE10-0040678, engine No 122-A032759 from United Arab Emirates which arrived in Mombasa on 5th January 2011. They both state that by a letter dated 2nd March 2011, they requested the 3rd respondent to release their respective motor vehicles, but it declined and the motor vehicles had been advertised for sale.

7. According to the petitioners, the 2001 Order was made by the then Minister for Tourism, Trade and Industry, the Honourable Nicholas Biwott on 27th April 2001 and gazetted on 18th May 2001 as Legal Notice No.69 of 2001 as KS 1515:2000 Kenya Standard Code of Practice for Inspection of Road Vehicles. This Standard Code was subsequently amended in June 2003 through Amendment No. 1 which deleted and replaced Clauses 2.4 and 2.5. Clause 2.5 which is in regard to age limit was amended to prohibit importation of 'All road vehicles which are more than eight (8) years from the year of manufacture'. Prior to the amendment, the prohibition was on vehicle which were eight years from the date of manufacture.

8. The petitioners raise two arguments against the validity of the two Orders. First, they contend that while in gazetting the 2001 Order, the Minister purported to act in exercise of powers conferred under Section 9(2) of the Standards Act, the said section does not give the Minister any statutory power or authority to make subsidiary legislation or to make any regulations with regard to the importation of motor vehicles. Accordingly, the 2001 Order was made under a provision that did not vest any powers on the Minister to make any regulations. It only conferred power to prescribe dates. Accordingly, the 2nd and 3rd respondents had no constitutional or statutory mandate to make subsidiary legislation that prohibits the importation of motor vehicles of any specification, and the petitioners relied in this regard on the case of Samuel Muchiri W'Njuguna & 6 Others –v- the Minister for Agriculture, HCCC No. 621 of 2000 (unreported) where Visram J (as he then was) declared regulations and directives made by the Minister of Agriculture illegal for having been made in excess of his authority. They urged the court to be guided by this decision in making a similar declaration with regard to the Standards Orders.

9. The petitioners make a similar argument with regard to the 2005 Order. They submit that by Legal

Notice No. 78 of 2005, the then Minister for Trade and Industry, Hon. Mukhisa Kituyi, gazetted the Verification of Conformity to Kenya Standards of Imports Order, 2005 in purported exercise of powers conferred by Section 4 and 20 of the Standards Act. They contend, however, that the said section does not give the 2nd respondent any statutory mandate to make regulations.

10. The second argument made by the petitioners, as I understand it, is that even if the 2nd and 3rd respondents had power to make regulations, the two Orders were invalid for failure to comply with the provisions of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya. They submit that while Section 20 of The Standards Act donates power to the Minister to make regulations for the better carrying out of the provisions and purposes of the Act after consultation with the Standards Council, Section 34 of the Interpretation and General Provisions Act makes it mandatory that 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. They allege that by the letter dated 17th October 2011, the Clerk of the National Assembly confirmed that neither of the two Orders were ever laid before the National Assembly. They submit that because of this failure to comply with the provisions of section 34(1) of the Interpretation and General Provisions Act, the Orders were devoid of any validity or legal force. In support of this contention, they relied on the English decisions in *Regina v Sheer Metalcraft LD and Another* (1954) 1QB 586 and *Metcalf v Cox* (1895) AC 329.

11. The petitioners therefore contend that in light of the above provisions of the law and the judicial precedents cited, the court should find that the 2nd and 3rd respondents had violated their rights under Article 40 and 47 by relying on legislation that was unconstitutional and of no legal effect to deny them fair administrative action under Article 47 and their right to property under Article 40.

The Case for the 1st and 2nd Respondents

12. The 1st and 2nd respondents take the position that this petition is based on a misapprehension of the law. They submit that while Article 94 of the Constitution vests legislative power on Parliament, it also recognises that legislation can be made by any other person or body other than Parliament as long as the power to make the said legislation is derived from the Constitution or an Act of Parliament.

13. They argue, further, with regard to section 20 of the Standards Act that the Minister is given power to make regulations, after consultation with the National Standards Council, generally for the better carrying out of the provisions and purposes of the Act; that section 34 of the Interpretation and General Provisions Act does not require that all rules and regulations made under an Act of Parliament are laid before the National Assembly as there are situations that are exempted which are inferred from the provisions of the said Act of Parliament. They argue that section 9(2) and 20 of the Standards Act provide a contrary intention as contemplated under Section 34 of the Interpretation and General Provisions; that the two Orders did not therefore need to be laid before the National Assembly to attain legality; and the Minister did not therefore violate the provisions of Article 94 of the Constitution 2010 in publishing the said regulations.

14. On the petitioners' allegation that the 3rd respondent had declined to facilitate the registration and release of their motor vehicles, and that this refusal was a violation of the petitioners' right to property and breach of their right to fair administrative action, the respondents submitted that these rights have not been violated; that the rights are in any event not absolute and are subject to limitations; that the 3rd respondent is responsible for the promotion and enforcement of standards under the Standards Act; and that to the extent that the petitioners' motor vehicles did not comply with the Standards No. 1 Order 2001 and the Verification of Conformity to Kenya Standards of Imports Order, 2005, the 3rd respondent could not facilitate the registration and release of their motor vehicles.

15. The 1st and 2nd respondents also took the position that the petitioners have failed to demonstrate the public interest their motor vehicles serve in order to qualify for an exemption under the Standards Act, and that it was in the public interest, which interest outweighed the petitioners' individual interests, that all imports conform to the standards set under the Standards Act.

The 3rd Respondent's Case

16. The 3rd respondent challenges not only the jurisdiction of this court to hear and determine this matter, but also both the factual and legal basis of this petition. With regard to jurisdiction, the 3rd respondent argues, first, that the petitioners have not demonstrated the constitutional rights alleged to have been violated and the manner in which they have been violated; and that in any event, the orders they were seeking should have been sought by way of judicial review.

17. On the challenge to the two Orders, the 3rd respondent contends that the Orders were enacted in conformity with both the Constitution and the relevant statute. While conceding that section 30 of the former constitution and Article 94 of the Constitution of Kenya 2010 vest legislative power in the National Assembly, they submit that the practice of Parliament delegating law making power is well established; that Parliament had in this instance delegated power to the Minister by Section 20 of the Standards Act; that in this case, unlike the position in the case of **Samuel Muchiri W'Njuguna & 6 Others –v- Minister for Agriculture** (supra) relied on by the petitioners, the Minister had not exceeded the mandate vested in him by the Act. They submitted therefore, on the authority of **R- v-Council for Legal Education Misc Civil Case No.134 of 2004**, that the court should only interfere where the statutory power had been exceeded.

18. To the petitioners' argument that the Orders were invalid for failure to comply with the provisions of Section 34 of the Interpretations and General Provisions Act, the 3rd respondent contends that failure to table the regulations before Parliament does not render them null and void. They rely in this regard on the English case of **Bailey –v Williamson (1866) LR.1. HL 200** and the decision of Ojwang J (as he then was) in **Republic –v- Wilfred Onyango Nganyi and Another Criminal Appeal No.96 of 2005**.

19. With regard to the factual basis, the 3rd respondent, questions the accuracy of the description of the motor vehicles imported by the petitioners. In his replying affidavit, Mr Kuchio Tindi states that the 1st petitioner imported a used Nissan Pick-up, Chassis No NIBPUD22U0078380, engine No YD25-056515 first registered in the year 2003 in the UK; that the vehicle arrived in Kenya on 24th January 2011; that the 2nd petitioner imported a used Toyota Wish Station Wagon, Chassis No zne10-0040678, engine No 1ZZ-A032759 first registered in the year 2003 from the United Arab Emirates; that this vehicle arrived in Kenya on 5th January 2011; that both of the petitioners' vehicles were not inspected from their country of origin as is required by law.

20. The 3rd respondent contends that under the amended Clause 2.5 of the Kenya Standard Code of Practice for Inspection of Road Vehicles (KS 1515:2000), all road vehicles which are more than Eight (8) years old from the year of first registration shall not be allowed for importation; that the said amended clause was published in July 2008, and its terms are mandatory; that it was applicable to both the petitioners' vehicles as their year of registration is 2003, a fact that was not disputed by the petitioners; that under the law, time begins to run from the first year of registration, and not the date or month of registration of the vehicle as insinuated by the petitioners. Accordingly, by the time the two vehicles arrived at the port of Mombasa, they had exceeded the age limit permissible for importation; that the petitioners were fully aware of this fact, hence their application for exemption by the 2nd respondent.

21. The 3rd respondent submits that the importation of any goods into the country is subject to the Verification of Conformity to Kenya Standards of Import Order 2005 (Legal Notice No 78 of 2005; that one of the standards that the petitioners' vehicles are required to conform to is the standard related to age of the vehicle, an absolute and mandatory standard; that the petitioners' vehicles failed to meet this standard and the vehicles can therefore only be allowed if exempted by the Minister under advice from the National Standards Council; that the petitioners had failed to have the vehicles inspected from source as the suppliers were allegedly unable to inspect and have since applied for them to be inspected in Kenya (domestic inspection), and the vehicles thus clearly did not conform to Kenyan Standards for being over eight years old; that destination inspection cannot be allowed for over age cars and only the Minister can allow over-age cars to be imported.

The 4th Respondent's Case

22. The 4th respondent's position is that it levied import duty on the petitioners' vehicles on the basis of the declarations by the petitioners with regard to the year of manufacture of the vehicles. The 1st petitioner's vehicle had arrived in the country on 24th January 2011; that in the import entry form, the 1st petitioner declared the year of first registration of his vehicle as June 2003, meaning that at the time of its entry into the country, it was 7 years and 8 months old and therefore complied with standard K\$1515:2000. However, the 4th respondent states that it was unable to release the motor vehicle as the 1st petitioner failed to produce a Clearance Certificate from the 3rd respondent.

23. Similarly, with regard to the 2nd petitioner's vehicle, duty on the vehicle, which arrived in the country on 7th January 2011, was levied on the basis of the year of manufacture which according to the 2nd petitioner's self-declaration form was December 2003. However, further verification and release of the vehicle was not possible as the 2nd petitioner failed to supply the 4th respondent with a clearance certificate from the 3rd Respondent.

24. According to the 4th respondent, vehicles which do not comply with Standard KS 1515:2000 are restricted imports into Kenya under Part B of the 2nd Schedule to the East African Community Customs Management Act, 2001. Where a vehicle does not comply with Standard KS 1515:2000 with regard to age, the importer has the option of re-exporting the motor vehicle and thereafter he qualifies for a refund of the import taxes paid to the 4th respondent upon producing evidence of re-exportation. The 4th respondent submitted therefore that it was awaiting a determination by the 3rd respondent or this court on whether the two motor vehicles comply with Standard KS1515;2000 so that it can process them for release for home use; and that if they do not comply with Standard KS1515:2000 to advise the petitioners to apply to re-export the motor vehicles and apply for refund of import taxes.

Issues for Determination

25. The petitioners are aggrieved by the failure to release their motor vehicles on the basis that they do not comply with the Standards (No.1) Order of 2001 and Verification of Conformity to Kenya Standards of Imports Order, 2005. They see the failure to release their vehicles on the basis of subsidiary legislation which they deem to be null and void as violative of their right to property and to fair administrative action as provided for under Article 40 and 47 of the Constitution. The 3rd respondent questions the jurisdiction of this court to hear and determine this matter, arguing that section 47(3) of the Constitution enjoins Parliament to create legislation to provide for review of administration action, and that the petitioners should have filed a judicial review application and not a constitutional petition; that the filing of this petition was due to the fact that the petitioners were time barred from seeking judicial review orders, and that it was therefore an abuse of the court process to file this petition.

Violation of Constitutional Rights

26. On one level, the 3rd petitioner is right. While the petitioners have brought this matter as a petition alleging violation of constitutional rights, it is difficult to discern a violation of either Article 40 or 47 of the Constitution.

27. The relevant provisions of Article 40 of the Constitution are in the following terms:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

28. My reading of the two Orders or their applications against the above provisions of the Constitution does not disclose any violation. I have not heard the petitioners allege that the respondents have deprived them of the right to own property in Kenya, nor do they allege that the Orders have been applied against them in a discriminatory manner contrary to the provisions of Article 27(4), the two elements of the prohibition contained in Article 40(2). What they have been required to do is to comply with certain legal provisions related to the importation of motor vehicles into the country.

29. Similarly, I see no violation of Article 47 of the Constitution which provides as follows:

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

30. The petitioners are aggrieved by the decision not to register and release their motor vehicles to the domestic market. From the facts before me, they were given, in reasonable time, the reasons for the refusal to register their motor vehicles, and they have not complained about the procedural fairness of the process leading to that decision. In arriving at the decision, the respondents were acting on the basis of regulations that were, on the face of it, lawful and which had been in force for 10 and 6 years respectively. Clearly, therefore, the requirements of Article 47 with regard to the administrative action being '***expeditious, efficient, lawful, reasonable and procedurally fair***' have been met.

Jurisdiction

31. The question that then arises is whether the finding that the petition discloses no violation of the petitioners' constitutional rights brings an end to the matter. In the view of the respondents, it does: they argue that the petitioners should have come to this court by way of judicial review, not by way of a petition alleging violation of constitutional rights; that consequently, this court has no jurisdiction to entertain this matter.

32. The question of the court's jurisdiction and the form that the petitioners' claim should have taken can be fairly easily dispensed with. From the pleadings before me and the submissions by the petitioners, they are in essence questioning the constitutionality of the Standards (No.1) Order of 2001 and

Verification of Conformity to Kenya Standards of Imports Order, 2005. Clearly, a constitutional petition filed in the High Court is the right mechanism for challenging the constitutionality of statutes, subsidiary legislation and all acts done under the authority of the Constitution. Article 165(3)(d) of the Constitution provides that:

(3) subject to clause (5), the High Court shall have—

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.'

33. In light of the above provision, I am satisfied that this court has jurisdiction to hear and determine this matter.

Constitutionality of the Standards (No.1) Order of 2001 and Verification of Conformity to Kenya Standards of Imports Order, 2005

34. I have set out above at some length the respective arguments of the parties with regard to the constitutionality of the two Orders. In determining this matter, aside from the legal arguments made by the parties, I must bear in mind certain undisputed facts. First, the two Orders in question were gazetted and have been in force since 2001 and 2005 respectively. Secondly-and this is tacitly conceded by the respondents-the two Orders were not laid before the National Assembly. Thirdly, the petitioners were aware of the existence of the two Orders, which have been applicable to all motor vehicle inspections, when they imported the motor vehicles in question, hence the applications for exemption that they made.

35. In dealing with the question of whether the two orders meet the constitutional test, I will need to address my mind to two questions:

- i) **Whether the Minister had Power Under the Standards Act to Make the Two Orders**
- ii) **Whether the Failure to Lay the Two Orders Before Parliament rendered the Two Orders Null and Void**

Whether the Minister had Power under the Standards Act to Make the Two Orders

36. Sections 9(1), (2) and (3) of the Standards Act provide as follows:

9. (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.

(3) Notwithstanding the provisions of any order made under subsection (1), the Minister, on the advice of the Council after a resolution thereof to the effect that-

(a) it is satisfied that it is temporarily impossible or impractical for a person, industry or trade to

comply with the order; and

(b) it is nevertheless desirable in the public interest that that person, industry or trade should be permitted to manufacture or sell any commodity, method or procedure referred to in the order, may, by notice in the Gazette, exempt that person, industry or trade, either generally or for the purposes of a particular transaction or particular transactions, from compliance with the order for such period and subject to such conditions, to be specified in the notice, as the Council shall advise.

37. At Section 20, the Act is in the following terms:

20. (1) The Minister, after consultation with the Council, may make regulations generally for the better carrying out of the provisions and purposes of this Act.

(2) Without prejudice to the generality of subsection (1), regulations may -

(a) make provision for all matters in respect of which fees shall be payable under this Act or the regulations;

(b) prescribe the amount of any such fees and the persons who shall be liable for payment thereof;

(c) prescribe forms to be used under this Act and the regulations;

(d) provide for matters connected with appeals under this Act;

(e) make provision for requiring persons to supply information relevant to the provisions of this Act and the regulations;

(f) prescribe anything which under this Act is to be prescribed, and in particular the procedure to be followed by the Bureau in the performance of any of its functions under this Act.

38. The power to make regulations under the Act is clearly vested in the Minister, in consultation with the Standards Council. While both Section 30 of the former Constitution and Article 94 of the Constitution of Kenya 2010 vest legislative power in the Legislature, they also contemplate situations in which the legislature can delegate power to other persons and bodies to make legislation. Article 94 in particular, on which the petitioners specifically rely, provides as follows:

94. (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2)....

(3)....

(4)....

(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.

39. I take the view, therefore, that the powers exercised by the Minister in gazetting the two Orders was not only in conformity with the provisions of the Act itself, but also with the Constitution.

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, which provides that:

'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.'(Emphasis added)

41. A reading of the above provision makes it clear that while the law requires that rules and regulations made under an Act of Parliament should be laid before the National Assembly, there are instances where this will not be required if the provisions of the Act in question make it apparent that this is not required. The provisions of Section 9 and 20 of the Standards Act are, in my view, such instances. They empower the Standards Council to declare standards, and for the Minister, by notice in the Gazette, to prescribe dates from which the standards shall apply. Section 20 empowers the Minister, *'after consultation with the Council'* to *'make regulations generally for the better carrying out of the provisions and purposes of this 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.

The Fundamental Issue

44. Even were I to find that the Orders were required to be laid before Parliament in order to attain the force of law, however, would the remedy, as proposed by the petitioners, be to declare the Orders unconstitutional, null and void?

45. As I stated earlier, the Orders in question have been in force for over 10 and 7 years respectively. The petitioners were fully aware of their existence, operation and effect at the time they imported their motor vehicles. They sought exemption from the operation of the Orders, and the only basis for their challenge of the Orders is the alleged failure to comply with the requirements that they be laid before Parliament in order to attain the force of law. Even had I found that the Standards Act required that the Orders be laid before Parliament in order to attain legal validity, and while appreciating the various English decisions cited by the petitioners in support of their case, I find the decision of Ojwang, J (as he then was) in **Republic –v- Wilfred Onyango Nganyi and Another Criminal Appeal No.96 of 2005** persuasive in the manner in which the court should deal with circumstances such as are presented by this petition. In that case, the appellant was challenging Legal Notice No. 95 of 1966 which made Part III of the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) applicable. The Learned Judge, after referring to the case of **Republic –v- The Minister for Transport & Communications & Others, ex parte Gabriel Limion Kaurai, Nairobi High Ct. Misc.Application No. 109 of 2004** in which he had dealt with the same issue, observed as follows:

“...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.”

46. I agree with the Learned Judge, and I note also that the petitioners are also in agreement with the reasoning of the court in that matter on the correct judicial attitude to adopt. What they consider the fundamental issue, however, as they argue in their submissions in reply to the 3rd respondent’s submissions, is whether the 2nd respondent could purport to make subsidiary legislation that is contrary to the enabling statute and the Constitution. Their basic grievance with the two Orders, however, is not that they are contrary to the enabling statute—just that the Minister did not have power to make them, and that the requirement that they be laid before Parliament was not complied with.

47. As indicated above, I take the view that the Minister did have power under the Standards Act to make the legislation. Should he have failed to comply with the requirement that he lays the Orders before Parliament, the question is whether the court can properly nullify Orders that have been in operation for a decade solely because parties in the position of the petitioners are unwilling to comply with their requirements and, after failing to obtain exemption from their operation, seek to nullify them on the basis that they were not laid before Parliament. As I see it, the substance of the Orders is not contrary to the Standards Act or the Constitution.

48. Even had I found that Section 34 of the Interpretation and General Provisions Act required that they be tabled before Parliament in order to attain validity, I would, in line with the reasoning of Ojwang J in **Republic –v- Wilfred Onyango Nganyi and Another** (supra) find that the fundamental issue that the court should be concerned with is the achievement of the statutory purpose under the Standards Act, which is to set standards for manufacture and importation of goods into the country. The impugned Orders relate to standards aimed at ensuring the regulation of the quality and condition of road vehicles for safety, environmental and economic benefit of the citizen of Kenya. I am therefore unable to find, from the facts of this case, that the Standards (No 1) Order of 2001 (Legal Notice No. 69 of 2001) and the Verification of Conformity To Kenya Standards of import Order 2005 (Legal Notice No 78 of 2005) are inconsistent with the Constitution.

49. This petition is therefore dismissed but with no order as to costs.

50. I am grateful to the parties for their well-researched submissions and authorities.

Signed at Nairobi this 18th day of January, 2013

MUMBI NGUGI
JUDGE

Dated Delivered and at Nairobi on 18th January, 2013

D. S. MAJANJA
JUDGE

Mr. Issa instructed by Issa & Co. Advocate for the Petitioners

Ms Muchiri instructed by the Attorney General for the 1st and 2nd Respondents

Ms Mwangi instructed by the firm of Igeria & Ngugi Advocates for the 3rd Respondents

Mr. Matuku instructed by the Kenya Revenue Authority for the 4th Respondent