



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MOMBASA**

**Petition 10 of 2011**

**IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 22, 23,**

**25, 31, 40, 50(2) (n), 165(3), 262 AND SECTION 7 OF PART 1 OF THE 6<sup>TH</sup> SCHEDULE OF THE  
CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: 108 MOTOR VEHICLES IMPORTED INTO**

**KENYA AND LYING WITHIN VARIOUS CONTAINER FREIGHT STATIONS, IN MOMBASA**

**UNDER ENTRY NOS. 2026649, 2027180, 2027220, 2027320, 2027408, 2026021, 2024411,  
2024583, 2025203, 2025352, 2025353, 2025501, 2026947, 2027262, 2027374, 2026059,  
2026104, 20242349, 2024503, 2024547, 2025354, 2025421, 2025451, 2025544, 2096451,  
2096510, 2096552, 2096597, 2096629, 2096658, 2096724, 2096782, 2096871, 2155933,  
2155558, 2284880, 2156001, 2156027, 2156049, 2156092, 2156114, 2155598, 2155618,  
2156245, 2279179, 2155580, 2279063, 2279033, 2279005, 2279085, 2281707, 2281950,  
2281779, 2282009, 2025077, 2025129, 2024455, 2022572, 2027007, 2027340, 2027302,  
2027309, 2024333, 2024996, 2027372, 2027298, 2027229, 2027696, 2027814, 2024337,  
2027544, 2023881, 2027739, 2146379, 2146394, 2146348, 1789043, 1789042, 1789077,  
1789098, 1789083, 1789046, 1789088, 1789087, 1789060, 1789047, 1789075, 1789086,  
1789057, 1789062, 1789072, 178045, 178044, 1789058, 1789061, 1789041, 1789085,  
1789059, 1789096, 1789066, 1789073, 1789076, 1789084**

**AND**

**IN THE MATTER OF: THE STANDARDS ACT, THE KENYA REVENUE AUTHORITY ACT,  
THE CUSTOMS & EXCISE ACT, THE EAST AFRICAN COMMUNITY CUSTOMS  
MANAGEMENT ACT, 2004, THE CRIMINAL PROCEDURE CODE, THE ANTI  
CORRUPTION AND ECONOMIC CRIMES ACT, 2003 AND THE KENYA PORTS  
AUTHORITY ACT**

**IN THE MATTER OF: MOMBASA CHIEF MAGISTRATE'S CORRUPTION CASE NO. 6 OF  
2010 (REPUBLIC -VS- STEPHEN KARUMA GACHUKIA & OTHS)**

**BETWEEN**

- 1. YUASA INTERNATIONAL LTD ..... 1<sup>ST</sup>  
PETITIONER
- 2. HOMAYOUN AKHTAR CHOUDHRY ..... 2<sup>ND</sup>  
PETITIONER
- 3. PAKEN INVESTMENT LTD ..... 3<sup>RD</sup>  
PETITIONER
- 4. ASGHAR MUHAMMAD ..... 4<sup>TH</sup>  
PETITIONER
- 5. SAIED IMRAM ..... 5<sup>TH</sup>  
PETITIONER

AND

- 1. KENYA BUREAU OF STANDARDS ..... 1<sup>ST</sup>  
RESPONDENT
- 2. KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup>  
RESPONDENT
- 3. KENYA ANTI-CORRUPTION COMMISSION 3<sup>RD</sup> ..... 3<sup>RD</sup>  
RESPONDENT
- 4. KENYA PORTS AUTHORITY ..... 4<sup>TH</sup>  
RESPONDENT
- 5. THE ATTORNEY GENERAL ..... 5<sup>TH</sup>  
RESPONDENT
- 6. THE CHIEF MAGISTRATE, MOMBASA  
.....6<sup>TH</sup> RESPONDENT
- 7. STEPHEN KARUMA GACHUKIA ..... 7<sup>TH</sup>  
RESPONDENT
- 8. GEOFFREY MAINA ..... 8<sup>TH</sup>  
RESPONDENT
- 9. DAVID MULI ..... 9<sup>TH</sup>  
RESPONDENT
- 10. STEPHEN MURIITHI KABUI ..... 10<sup>TH</sup>  
RESPONDENT
- 11. PETER ODHIAMBO MBUYA ..... 11<sup>TH</sup>  
RESPONDENT
- 12. YUDA VENANT MWASHUMA ..... 12<sup>TH</sup>  
RESPONDENT

**JUDGMENT**

(1) The Petitioners, separately, imported some 108 vehicles into Kenya. They paid the requisite duties but were unable to have custody of them. The vehicles had been impounded because, it is said, they were all older than 8 years and that their importation contravened a Kenya Standard known as Ks 1515:2000.

(2) Frustrated by this the Petitioners have come to Court under the provisions of Article 22 of The Constitution and seek some sixteen (16) prayers. Many as they are, they must be reproduced here;

***“(a) A declaration that no Kenyan Standard has been***

***declared by the National Standards Council in the Kenya Gazette under Section 9(1) of the Standards Act, Chapter 496 Laws of Kenya to be a Kenyan Standard and that therefore there is no Law or Standard in Kenya prohibiting the importation into Kenya of motor vehicles above the age of 8 years or the sale of such motor vehicles.***

***(b) A declaration that Legal Notice NO. 78 of 15<sup>th</sup> July 2005 and Gazette Supplement No. 53 of 2005 having been published in the Gazette prior to the declaration of a Kenya Standard under Section 9(1) of the Standards Act are premature, null and void and any monies paid under that Legal Notice and Gazette Supplement amounted to illegal taxation.***

***(c) A declaration that the vehicles crushed at the Port of Mombasa or elsewhere in Kenya on the allegation that they were more than 8 years old were crushed maliciously as there was no law and there is no law or Standard in Kenya prohibiting the importation of such vehicles.***

***(d) A declaration that the Kenya Standard Ks 1515:2000 referred to as the Code of Practice for Inspection of Road Vehicles is not a Standard within the meaning of Section 9(1) of the Standards Act and has not been published in the Gazette under Section 9(1) of the said Act.***

***(e) A declaration that the document entitled Kenya Standard 1515:2000 referred to as the code of Practice for Inspection of Road Vehicles and protected by copyright law and subject to the payment of royalties is not a Standard or Kenyan law but is a report under Section 7 of the Standards Act.***

***(f) A declaration that all persons in Kenya and all persons proposing to have any dealings in Kenya are under no obligation to pay any royalty to any person or body in order to read or learn of Kenyan law of Kenyan Standards.***

***(g) A declaration that motor vehicles of any age constitute property of any description under Section 40 of the Constitution of Kenya and that the threat to crush vehicles older than 8 years would constitute malicious damage to private property if carried out and would be unconstitutional and null and void.***

***(h) A declaration that investigations carried out by the 3<sup>rd</sup> Respondent and Corruption cases being prosecuted by the 3<sup>rd</sup> Respondent and detention of motor vehicles as well as corruption charges based upon the Kenya Standards Ks 1515:2000 Code of Practice for Inspection of Road Vehicles constitutes abuse of office as those investigations and corruption cases are based on a law that does not exist.***

***(i) A conservatory order before and after the hearing and determination of this Petition restraining the 1<sup>st</sup> to 6<sup>th</sup> Respondents jointly and severally from crushing any of the said 108 motor vehicles or ordering the re-exportation or reshipment of those vehicles from Kenya.***

***(j) A declaration that storage charges charged by container freight stations, court charges and customs warehouse charges on those 108 vehicles accruing after the payment of duties and V.A.T should be paid by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents jointly and severally.***

***(k) A mandatory injunction compelling the 1<sup>st</sup> to 6<sup>th</sup> Respondents jointly and severally to release or order or authorize the release of all the 108 motor vehicles subject only to the verification of payment of duties, V.A.T, registration charges, Port charges, storage charges by container freight stations and Customs warehouse rent up to and including the date when duties and V.A.T were paid.***

***(l) A mandatory injunction compelling the 2<sup>nd</sup> Respondent, Kenya Revenue Authority by itself, the Registrar of Motor Vehicles and all relevant departments to register the said 108 motor vehicles subject only to payment of registration charges, application for registration, if any and subject to recovery of duties and V.A.T that was payable only up to the time the entries were made and the duties and V.A.T were paid.***

***(m) An order compelling the Respondents jointly and severally or either of them as the case may be to refund to the Petitioner such monies as the Petitioner may be required to pay to container freight stations as storage charges accruing from the date or dates that entries were passed and duties and V.A.T were paid for the said vehicles.***

***(n) Damages to be calculated on the basis of the profit and interest that would have been made had the vehicles been released when duties and V.A.T were paid and entries passed on the said 108 vehicles.***

***(o) An order of prohibition prohibiting the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents from holding on to 32 motor vehicles belonging to the 1<sup>st</sup> Petitioner and the subject of Mombasa Chief Magistrate's Corruption Case No. 6 of 2010.***

***(p) An injunction prohibiting the 3<sup>rd</sup> Respondent from investigating, questioning, demanding statements from and/or preferring any charges against the 2<sup>nd</sup> Petitioner on the basis of alleged offences relating to the importation into Kenya of motor vehicles older than 8 years.”***

(3) The Petitioners have led some evidence in support of the petition through an affidavit of Homayoun Akhtar Choudhry, (the 2<sup>nd</sup> Petitioner) sworn on 3<sup>rd</sup> March 2011. That evidence tells this Court that the Petitioners were surprised by the stance to impound the vehicles as they were not aware of the Kenya Standard Ks 1515:2000. For this reason they enlisted the help of their lawyer Mr. Kinyua Kamundi to find the alleged standard.

(4) Mr. Kinyua Kamundi's effort to find the standard was, I am told, not plain sailing. He read the Standards Act (Chapter 496) and the Regulations and orders thereunder but could not find the Standard. The High Court library, Mombasa was completely unaware of it. He then, as a good lawyer would want to, perused the Gazette Notices published under the Act but, according to the Petitioners, was unable to find the Standard. Next he made an inquiry from the Government Printer. The Government official printer was not aware. Eventually he contacted the 1<sup>st</sup> Respondents Mombasa office.

(5) Upon payment of Kshs. 2,500/- charged by the 1<sup>st</sup> Respondent the lawyer obtained a copy of a document entitled Ks 1515:2000 Code of Practice for Inspection of road vehicles on 25<sup>th</sup> May 2010. It turns out that Ks 1515:2000 was declared by the 1<sup>st</sup> Respondent as a Standard vide Gazette Notice No. 1924 of 21<sup>st</sup> March 2002 and published on 31<sup>st</sup> March 2000 (***hereinafter Gazette Notice No. 1924***). Following this the Minister for Tourism, Trade and Industry made The Standards (No 1) Order, 2001 prescribing the operationalisation of the Standard by a special issue of the Kenya Gazette Legal Notice No. 69 published on 18<sup>th</sup> May 2001 (***hereinafter Legal Notice No. 69***). There is then Legal Notice No. 78 of 29<sup>th</sup> June 2005 published on 15<sup>th</sup> July 2005 (***Legal Notice No. 78***) in which the Minister for Trade and Industry made an order christened “***The verification of conformity to Kenya Standards of Imports Order, 2005 (The 2005 Order)***.” Quite a mouthful. The order pronounced that a person who

imports goods must ensure that the goods meet Kenya Standards of approved specifications but also allowed the Minister to exempt any imports in National interest.

(6) In the petition, and for reasons discussed in greater detail below, this Court is asked to find that Ks 1515:2000 is not a Kenya Standard nor a law as contemplated by The Standards Act, the Interpretation and General Provisions Act and The Constitution. Once this is answered then an answer to the many prayers sought in the petition will fall in place.

### **The Petitioners Case**

(7) As I turn to consider the very able arguments made on behalf of the parties, it has to be remembered that these proceedings are brought under Article 22 of the Constitution on the enforcement of the Bill of Rights. A Petitioner who approaches the Court in this way must specifically state which right or fundamental freedom is denied, violated or threatened and how that denial, violation or threat has occurred. The petition is in my view specific enough and it will be needless for the Court to consider submissions that are not relevant to the specific grievances raised. Counsel will, therefore, notice that I have not discussed some of the arguments they made. I mean no disrespect to their effort.

(8) The petition was deposited of by way of both oral and written submissions. A pivotal argument by the Petitioners is that Ks 1515:2000 Code of Practice is not a Standard as envisaged under the Standards Act. Legal Notice No. 69 of 18<sup>th</sup> May 2001 which is said to have operationalised the Standard reads as follows-

**“LEGAL NOTICE NO. 69  
THE STANDARDS ACT  
(Cap. 496)**

***IN EXERCISE of the powers conferred by Section 9(2) of the Standards Act, the Minister for Tourism, Trade and Industry on the advice of the National Standards Council, makes the following Order:-***

### ***THE STANDARDS (No. 1) ORDER, 2001***

***1. This Order may be cited as the Standards (No.1) Order, 2001.***

***2. The Kenya Standard having been declared as set out in the first and second column of the Schedule, no person shall manufacture or sell the commodity or use the methods and procedures on or after the date of publication of this Order unless the commodity or methods or procedures comply with the requirement of the relevant Kenya Standard.***

### ***SCHEDULE***

<b><i>Number</i></b>	<b><i>Code of Practice</i></b>
<b><i>KS-1515:2000</i></b>	<b><i>Kenya Standard code of practice for inspection of road vehicles</i></b>

***Made on the 27<sup>th</sup> April, 2001.***

***NICHOLAS BIWOTT***

***Minister f or Tourism, Trade and Industry.”***

(9) The Petitioners think that this Notice is wholly insufficient as it does not notify the public that the importation into Kenya of vehicles older than 8 years from the date of manufacture or first registration is

restricted. This Court is urged to find that the 1<sup>st</sup> Respondent should have published the entire document.

(10) Then the document containing the Standard is itself protected by copyright law, it is said; The following words appear on the cover of that document;

***“No copying of this Standard without KEBS permission except as permitted by copyright law.”***

The Courts attention was drawn to Section 2 of The Copyright Act 2001 which excludes a written law from the definition of a literary work. The position taken by the Petitioners is simply this, a document protected by Copyright cannot be written law.

(11) A further contention by the Petitioners is that the warning on the document made use of the document conditional upon obtaining permission from the 1<sup>st</sup> Respondents Manager Director and on payment of a royalty. There is no law that requires one to pay a royalty or seek permission of another before accessing it.

(12) Related to this, it was argued, by insisting on a payment of a royalty of Kshs. 2,500/- before availing the Document, the 1<sup>st</sup> Respondent was imposing a charge or taxation not permitted by law. That no provision of The Standards Act permitted the levy of a charge for a Standard declared under Section 9 thereof.

(13) The Petitioner stressed that the imposition of the royalty and the protection by copyright of The Code was evidence that the document was a report produced under Section 7 of The Standards Act and not a Standard.

**(14)** That in any event the document Ks 1515:2000 was not printed by the Government Printer and was not published in the Gazette as required by Section 27(1) of The Interpretation and General Provisions Act. The Petitioners could not locate any provision in the Standards Act that exempted the Code of Practice or Kenya Standard from publication in the Gazette. The Court was also asked to find that Legal Notices 69 and 78 are void as they were not laid before the National Assembly as required by Section 34 of The Interpretation & General Provisions Act. For this proposition I was referred to the decision in **Nrb Misc. Appl. No. 435 of 2011 Republic –Vs- D.P.P & Another Exparte Henry Kiprono Kosgey.**

(15) Voicing their support for the petition, the 7<sup>th</sup> to 13<sup>th</sup> Respondents argued that Ks 1515:2000 is a private property belonging to the 1<sup>st</sup> Respondent and cannot possibly be a law. That, in addition, the so called Standard is the product of a technical committee and not the Bureau as contemplated by Section 4(e) of The Standards Act.

### **The Response**

(16) The 1<sup>st</sup> – 6<sup>th</sup> Respondents pooled together in opposing the petition. That under Section 9(1) of The Standards Act, the National Standards Council, is empowered to declare a Standard as a Kenya Standard. The manner, extent or form of that declaration is not specified in the Statute. Section 9(2) empowers the Minister in charge to prescribe the effective date of the Standard. In the 1<sup>st</sup> respondents view Gazette Notices 1924 and 69 fulfilled the requirements of Section 9(1) and 9(2) respectively and was sufficient.

(17) The 2<sup>nd</sup> Respondent made the point that the effect of the Legal Notice NO. 78 was to restrict and not to prohibit the importation of used motor vehicles of more than 8 years from the date of the first registration of the country of origin. This is because under Section 8 of that order the Minister in charge may give exemption from a Kenya Standard where the Minister is satisfied that it is in the national interest to do so.

(18) Under The Standards Act, the 1<sup>st</sup> Respondent is the custodian of Standards. Once the Standard is declared (as required by Statute) then it is upto anyone wishing to know the contents of the Standard to

obtain a copy from the 1<sup>st</sup> Respondent. And that there is nothing unconstitutional about the 1<sup>st</sup> Respondent charging a fee for it. Counsel for the 1<sup>st</sup> Respondent gave the analogy of fees required by the Government Printer for availing copies of The Constitution, Statute and the Kenya Gazette.

(19) It was the further argument of the 1<sup>st</sup> Respondent that the Standards were reached after consultation with various stakeholders and was necessary for the protection of the Kenyan Public and Consumer. That the objective of the Standard is laudible and in line with Articles 42 and Articles 46 of The Constitution. These are rights to a clean and healthy environment and consumer rights respectively. That further it is not discriminatory as it applies to all persons wishing to import motor vehicles into the country.

(20) Supporting the 1<sup>st</sup> Respondents position, the 3<sup>rd</sup> Respondent thought that the Petitioners argument on Copyright Law was self-defeating. That if it is true that the 1<sup>st</sup> Respondent had attempted to copyright the declared Standard then that attempt would be in vain as the law does not provide for it.

(21) It was also the position of the Respondents that the Petitioners were not only aware of the Standard but also the procedure of seeking exemption. The Courts attention was drawn to a letters dated 24<sup>th</sup> May 2010 to the 4<sup>th</sup> and 5<sup>th</sup> Petitioners and another dated 17<sup>th</sup> May 2010 which were in respect to exemptions made from the Standard for some vehicles which are the subject of this Petition and which exemptions were as a result of the Petitioners own requests.

### **The Decision**

(22) The parties herein did not frame the issues for this Courts consideration but I think that I need to determine the following-

- Standard?**
- (i) ***What is the procedure for declaring a Kenya Standard?***
  - (ii) ***Did the declaration of Ks 1515: 2000 conform to that procedure.***
  - (iii) ***Were Legal Notices 69 and 78 duly published as subsidiary legislation as required by law?***

(23) The legislative regime dealing with the declaration of a Kenya Standard is found in The Standards Act (Chapter 496 of The Laws of Kenya) (hereinafter the 'Act'). Section 9(1) (a) provides the manner for declaration of a Kenya Standard as follows-

***“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.”***

The Council here refers to a Council of the 1<sup>st</sup> Respondent established under Section 6(1) of The Act and named The National Standards Council.

(24) That in matters of Standards, the provisions of Section 9(1) of The Act takes priority over any other written law is clarified in Section 21 of the Act which reads-

***“where there is conflict between the provisions of a specification declared to be a Kenya Standard under Section 9(1) and a specification made or declared under any other written law, the Kenya Standard shall prevail.”***

(25) For a specification or code of practice to qualify for declaration as a Kenya Standard it must be

framed and prepared by The Kenya Bureau of Standards (Section 9(1) (a) above). The code Ks 1515:2000 was published by the 1<sup>st</sup> Respondent. Its preface reads-

***“This Kenya Standard has been prepared by the Motor Vehicle Components and Accessories Technical Committee under the guidance of The Mechanical Industry Standards Committee, and it is in accordance with the procedures of the Bureau.”***

Evidently the Standard Ks 1515:2000 was framed and prepared by a committee of the 1<sup>st</sup> Respondent. It would not matter, in my view that representatives of industry participated in the deliberations. Public involvement is to be applauded and not scorned at. The Standards Act itself encourages the Bureau to secure the cooperation of stakeholders in carrying out its duties. Section 4(b) provides-

***“The functions of the Bureau shall be-***

...  
...

***(h) to provide for cooperation with the Government or the representatives of any industry or with any Local Authority or other public body or any other person, with a view to securing the adoption and practical application of standards.”***

(26) The law then requires that the specification or code of practice be declared a Standard by the Council in the Gazette. The word used in the Statute is “declare”. That word is neither defined in the Act itself or The Interpretation and General Provisions Act (Chapter 2). In ordinary parlance, declare means (as is relevant)-

***“announce solemnly or officially, make clearly known.”***  
***(12<sup>th</sup> Edition Concise Oxford English Dictionary)***

While Blacks Law Dictionary (8<sup>th</sup> Edition) assigns the following definition-

***“A formal statement, proclamation or announcement, especially one embodied in an instrument.”***

(27) On a plain reading of the law the directions to the Council is that it may declare a specification or code of practice a Kenya Standard by formally stating or announcing or proclaiming that the specification or code is a Kenya Standard in the Kenya Gazette. Section 9(1) (a) does not, as suggested by the Petitioners Counsel, require the contents or document containing the specification or code to be published in the Gazzette. Whether this is adequate is an issue this decision shall revisit shortly.

(28) Once a Kenya Standard is declared the Minister may bring the Standard into effect by an order in the Gazette. This would be pursuant to the following provisions of Section 9(2) of The Act-

***“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.”***

The Ministers role is to prescribe the effective date.

(29) It is agreed, I think, that Legal Notice declaring Ks 1515 2000 to be a Standard conformed with Section 9(1). Again, it is not in dispute that The Minister for Tourism, Trade and Industry by The Standards (No 1 Order 2001) order published in the Gazette on 18<sup>th</sup> May 2001 prescribed the effective dates of the Standard to be the date of publication of the Order (i.e. 18<sup>th</sup> May 2001). The manner this order was published does not breach Section 9(2).

(30) That notwithstanding, the Petitioners insist the two Notices fall short of subsidiary legislation. As I



turn to examine the arguments it will do well to reproduce them—

Gazette Notice No. 1924 of 2000 reads (as is relevant) –

***“Pursuant to Section 9(1) of The Standards Act, the National Standards Council declares the specification or code of practice appearing in the Schedule hereto to be Kenya Standards with effect from the date of publication of this Notice.”***

...

**Schedule**

<b><u>Number</u></b>	<b><u>Title of Specification or Code of Practice</u></b>
Ks 1515	Kenya Standard Code of Practice for inspection

of road vehicles.”

Legal Notice No. 69 reads-

***“In exercise of the powers conferred by Section 9(2) of the Standards Act, the Minister for Tourism, Trade and Industry on the advice of the National Standards Council makes the following Order-***

- 1. This Order may be cited as the Standards (No.1) Order, 2001.***
- 2. The Kenya Standard having been declared as set out in the first and second column of the Schedule, no person shall manufacture or sell the commodity or use the methods and procedures on or after the date of publication of this Order unless the commodity or methods or procedures comply with the requirement of the relevant Kenya Standard.”***

(31) For a start, it is argued, the words appearing are insufficient to notify the public of the contents of the Standard. It is argued that anything short of publication of the entire code of practice breaches Section 27(1) of The Interpretation and General Provisions Act. That Section provides-

***“All subsidiary legislation shall, unless it is otherwise expressly provided in a written law, be published in the Gazette, and shall come into operation on the day of publication, or, if it is enacted either in the subsidiary legislation or in some other written law that the subsidiary legislation shall come into operation on some other day, or that day, subject to annulment where applicable.” (emphasis mine)***

How does the procedure in Section 9 of the Act sit with the provisions of Section 27(1) of The Interpretation & General Provisions Act on Publication and Commencement of Subsidiary Legislation? The underlined part of the Section 27 allows an enabling statute to exempt the making of subsidiary legislation under it from the rigours of Section 27(1). Simply put, Section 27(1) contemplates that an enabling legislation can prescribe different procedure for making of subsidiary legislation under it. The Standard Act in Sections 9(1) and 9(2) has expressly set out the procedure for declaration of a Standard and the manner in which it is brought into effect. I have already held in paragraph 27 of this decision that all that Section 9(1) directs the Council to do is to declare the specification or code and that a formal statement, announcement or proclamation in the Gazette that a specification or code is a Kenya Standard is sufficient. Nothing requires the Council to publish the contents of the specification or code.

(32) The attention of this Court was drawn to the recent decision of Justice N.R.O. Ombija in **Nrb Criminal Misc. Application No. 435 of 2011 Republic –Vs- D.P.P & Another Exparte Henry Kiprono Kosgey**. In it the Judge held-

***“However, he cannot be guilty of the offences charged under the regulations pursuant to Legal Notice No. 69 of 2001 as read together with Legal Notice No. 78 of 2005 because of the said Legal Notices issued by the Minister were not tabled as required by Section 30 of the Repealed Constitution. Hence the said regulations lack any force of law.”***

The Judge discussed the provisions of Section 30 of the Repealed Constitution and Section 34 of The Interpretation and General Provisions Act vis-à-vis the validity of the Legal Notices No. 69 and 78.

Section 30 of The Repealed Constitution reads-

***“The legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly.”***

While Section 34 of The Interpretation & General provisions Act provides-

***“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 henceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.***

***2. Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor to rules of court.***

***3. In this section, “rules” and “regulations” mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be.”***

(33) It was the view of the Judge that-

***“... It is mandatory to lay all subsidiary legislative before The National Assembly for approval and this should be done without unreasonable delay. The rationale for this is that the legislative power is vested by the Constitution in the National Assembly.”***

He then reached the conclusion that as no evidence was adduced to demonstrate that the two Legal Notices had been so laid then they were void.

(34) I need to observe that in the decision the Judge did not discuss the validity or otherwise of Gazette Notice No. 1924 which declared Ks. 1515 2000 a Kenya Standard. The Judge made a decision on the validity of Legal Notices No. 69 and 78. What are my views?

Granted, legislative power vests in Parliament. Yet Parliament can delegate the power to make subsidiary legislation to another body, the rationale being-

***“The practice of the legislature delegating the power to make subsidiary legislation to another body is a long standing one. It stems from pragmatic consideration, serving the need to promote efficiency, so as to enable the legislature to prioritise its resources by focusing on issues of policy importance, leaving detailed and technical matters and matters which require flexibility and frequent or urgent changes to be set out in subsidiary legislation.”***

***(Report of the Subcommittee to the study issues relating to the power of the legislative council to amend subsidiary legislation)www.info.sou.hk.***

This does not amount to an abdication of duty as Parliament retains supervisory power over subsidiary

legislation.

(35) A tool of supervision is by generally requiring subsidiary legislation to be laid before it. That is the essence of Section 34 of The Interpretation of General Provision Act. But it is axiomatic that Parliament can choose to disapply a general principle or rule. So borrowing from the language of that Section **“all rules and regulations made under an Act, shall unless a contrary intention appears in to the Act, be laid before the National Assembly.”** Did the legislature have a contrary intention in the Standards Act?

(36) I start by looking at the provisions of Section 9(1). That deals with the declaration of a Kenya Standard. Whilst in my view the Kenya Standard is subsidiary legislation, I very much doubt that it is the type of legislation that required laying before the National Assembly. Section 34 of the Interpretation and General Provisions Act requires rules and regulations to be laid before the National Assembly. That requirement does not extend to all subsidiary legislation. Subsection (3) clarifies this as follows-

**“In this Section, “rules” and “regulations” mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be.” (my emphasis)**

There might be doubt that the Kenya Standard is a rule or regulation as contemplated by the above subsection and so is exempt from Parliamentary sanction altogether. Yet if it was a rule or regulation one needs to examine whether a contrary intention in the Standards Act removes it from the application of Section 34 of The Interpretation and General Provisions Act.

(37) It needs to be remembered that Section 9(1) is an express departure from the procedure provided under Section 27 of the Interpretation & General Provisions Act in respect to publication of subsidiary legislation. The preamble to The Standards Act reveals the objective of The Act to be-

**“An act of Parliament to promote the standardization of the specification of commodities, and to provide for the standardization of commodities and codes of practice; to establish a Kenya Bureau of Standards, to define its functions and provide for its management and control; and for matters incidental to, and connected with, the foregoing.”**

The core function of the 1<sup>st</sup> Respondent is to develop, promote and control standardization. The Bureau is charged with framing and preparation of specifications or codes of practice that may eventual be declared Kenya Standards. So in matters of Standards, the Kenyan people have through this Statute left this task to Bureau. The Bureau ought to have the expertise and technical ability in these matters. The statute then empowers the Council of the Bureau to declare any specification or code of practice framed or prepared by the Bureau to be a Kenya Standard by notice in the Gazette. I do not read any intention requiring routine control of this function by Parliament. In fact I think the intention was that in standardization the Bureau would have the last word as long as it adheres to procedure.

(38) In respect to Section 9(2), the provisions empower the Minister to prescribe the effective date of a Standard. The Authority to the Minister is specific. It is infact limited. This authority is akin to that given in respect to commencement dates of statutes. This specific authority can be contrasted with the General power and authority given by Statute to a Minister to make regulations generally for the better carrying out of objects of the Statute. Section 20 of The Standards Act is in those terms and reads-

**“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 or its functions under this Act.”**

Where the power is that general then it seems sensible that Parliament should retain the power to sanction the regulations. It is in this instance that Section 34 of The Interpretations & General Provisions Act would apply. I do not read an intention by Parliament to supervise the Minister’s discretion to prescribe the effective date.

(39) 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.

(40) There is a view that failing to lay subsidiary legislation before the Legislature does not deal a fatal blow to the legislation. The High Court of Hong Kong had an opportunity of considering the effect of this failure in **AuburnTown Ltd –Vs- Town Planning Board [1994] HKCF1 323**. Section 34 of The Interpretation & General Clauses Ordinance (Cap 1) of that country is not too dissimilar to our own legislation and provides-

***“1. All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of the subsidiary legislation.***

***2. Where subsidiary legislation has been laid on the table of the Legislation Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.”***

Discussing this S. S. Rhind, J had this to say-

***“The notion of tabling approved plans in the Legislative Council at first struck me as slightly incongruous, and I cannot help wondering whether it in practice happens, but, on more mature, reflection, I see no reason why it should not be done, and, moreover, even if it is not done, such omission would in no way be fatal to an approved plan’s qualifying as subsidiary legislation, since the tabling contemplated by Section 34 of Cap. 1 is in my view not mandatory but directory only. See Halsbury’s Laws of England, (4<sup>th</sup> Ed.) Vol. 34, para. 1433.” (my emphasis)***

(41) The Hong Kong and the Kenyan legislation can be contrasted with mandatory language used in Section 4(1) of The Statutory Instruments Act of 1946 of England. To illustrate this, I quote this passage from the decision of the High Court of Malawi in **Misc. Cause 163, 164, 165, 166 of 2007 (The State & The Minister for Finance & Another)**.

***“This is in accordance with Section 4 (1) which provides-***

***Section 1 where by this Act or any Act passed after the commencement of this Act any statutory***

***instrument is required to be laid before Parliament after being made, a copy of the instrument shall be laid before each house of Parliament and subject hereafter as provided, shall be so laid before the instrument comes into operation.”***

Thus, the learned authors de Smith, Woolf and Jowell argued-

***“If, however, the instrument is required to be laid before Parliament, it is arguable that the instrument acquires legal validity only when it is so laid. It is true that the laying requirement have generally been regarded as directory by both the Courts and learned commentators, but the wording of the 1946 Act is strong (a copy of the instrument shall be so laid before the instrument comes into operation) and there is a dictum to the effect that these words are to be read in their literal sense.”***

(42) Back home, discussing the same notion of negative sanction by the National Assembly 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)** 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.” (my emphasis)***

(43) On my part, I have held that the subsidiary legislation (Gazette Notices No. 1924 and Legal Notice No. 69) made under Sections 9(1) and 9(2) of The Standards Act are exempt from Parliamentary sanction. But, had I reached a different result, I would take the route of Ojwang, J (as he then was) and Rhind, J that the omission would not be fatal. The less stringent language used by our Statute (when compared with the English position) allows for this view. Secondly the preliminary procedures prescribed by the Standards Act were observed in declaring the Standard Ks 1515: 2000 and publishing its effective date.

(44) Even if I were to hold that Legal Notice No. 78 is void, Gazette Notices No. 1924 and Legal Notice No. 69 standing alone would still bar the importation of the Petitioners vehicles. To recap Gazette Notice No. 1924 declared the Standard 1515:2000 to be a Kenya Standard while Legal Notice No. 69 prescribed 18<sup>th</sup> May 2011 as the date after which all persons were to comply with the Kenya Standard. Legal Notice No. 78 provided procedure for inspection, verification and exemption. At the date it was published, the Standard Ks 1515: 2000 was already a Kenya Standard and effective.

(45) I now turn to the next issue. I had earlier held that the law did not require the publication of the contents of the specification. How then is the public to know of the content of the specification or code of practice? The Notices unequivocally state that they are made pursuant to provisions of The Standards Act. Under that Act it is the Bureau that is charged with the function of framing or preparing the Standard (see Section 9(1) and Section 4 1 (e) on the Functions of the Bureau). Even its very name (Kenya Bureau of Standards) suggests that the 1<sup>st</sup> Respondent is a Bureau of Kenya Standards. A Bureau would be the custodian of the specifications and codes that are Kenya Standards. It is little wonder that the Petitioners lawyer was able to find the document containing the Standard Ks 1515 2000 when its representatives visited the offices of the 1<sup>st</sup> Respondent.

(46) The Petitioners lawyers had to pay some Kshs. 2,500/- before obtaining the document. What is to be said about these fees? The Petitioners made the point that no fees should be levied at all for purposes of

accessing a statute or subsidiary legislation. I would agree that statutes and other legislation should be made readily accessible and perhaps at no fees to all Kenyans. That is how it should be in the best of worlds! But surely anyone who wants to obtain a copy thereof must pay for it. It is for this reason that The Government Printer charges a fee for a statute or Kenya Gazette. What is critical is that the fee imposed must be reasonable and affordable. Whether or not the sum of Kshs. 2,500/- charged by the 1<sup>st</sup> Respondent reasonable is a matter this Court cannot determine. And nothing much could possibly turn on that as it is not the Petitioners argument that they were inhibited from obtaining a copy because they could not afford the fees.

(47) Also in respect to the fees charged the Petitioners had argued that it was an unlawful charge as it was not sanctioned by the law. If the fee charged was a royalty as argued by the Petitioners then it would be unlawful because no royalty is payable for a law. If however the fee was a charge for availing a copy of the document then the levying of that fee would not be inconsistent with Section 3 of The Act that gives the 1<sup>st</sup> Respondent the authority to enter into contracts and to perform such things or acts for the proper performance of its function. One such function is the preparation of specifications or codes of practice. Where a person wishes to make or get a copy thereof then it would not be unreasonable that the 1<sup>st</sup> Respondent would ask for a reasonable fee for it. That said, I do hold that if what the 1<sup>st</sup> Respondent charged was a royalty then it would be an unlawful charge that can be recovered. That nevertheless does not render the Standard unlawful. It is the charge not the Standard that is unlawful.

(48) I now turn to consider, what in my assessment, is a less contentious argument. The following words appearing in the text of code caught the eye of the Petitioners-

***“Copyright Users are reminded that by virtue of Section 6 of the Copyright Act, Cap. 130 of the Laws of Kenya, copyright subsists in all Kenya Standards and except as provided under Section 7 of this Act, no Kenya Standard produced by Kenya Bureau of Standards may be reproduced, stored in a retrieval system in any form or transmitted by any means without prior permission in writing from the Managing Director.”***

This to the Petitioner makes Code 1515 2000 a document protected by Copyright. They then reasoned that as Section 2 of the Copyright Act excludes written law from the definition of literary work then the protection of the code under Copyright law meant that the code could not be written law. With respect that could be an ingenious, but incorrect, inference to draw. Written law cannot be eligible for Copyright under Section 22 of The Copyright Act. If The Standard 1515: 2000 is subsidiary legislation then it cannot be eligible for Copyright. Any words on the code purporting to state that it is a protected document, however fervently expressed, would be Otiose. I am inclined to agree with Counsel for the 3<sup>rd</sup> Respondent that such misplaced effort cannot have the effect of taking away the force of law clothed on the code as a Standard under Section 9(1) and subsequent operationalization under Section 9(2) of The Act.

(49) This is my conclusion. If the levy charged for the Standard Ks 1515:2000 was a royalty then it was unlawful and must be refunded. The 1<sup>st</sup> Respondent can only ask for reasonable charges for the copy availed to the Petitioners. Save in this very limited way, I am not persuaded that the petition dated 1<sup>st</sup> March 2011 has merit. In a sum I would, as I hereby do, dismiss it with costs.

***Dated and delivered at Mombasa this 13<sup>th</sup> day of September, 2012.***

**F. TUIYOTT**  
**JUDGE**

**Dated and delivered in open court in the presence of:-**

**Kinyua for the Petitioner**

**Odundo for Ashitwa for the 1<sup>st</sup> Respondent**

**Maluku for the 2<sup>nd</sup> Respondent**

**Kagucia for the 3<sup>rd</sup> Respondent**

**Ikegu for the 4<sup>th</sup> Respondent**

**Jamii for Lutta for the 5<sup>th</sup> Respondent**

**Kinyua for Magolo for the 7<sup>th</sup> Respondent**

**Mabonga for Kipsang for 11<sup>th</sup> Respondent**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**