REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 120 OF 2008

CONSOLIDATED WITH

MISCELLANEOUS CIVIL APPLICATION NO. 952 OF 2007

REPUBLIC

VERSUS

KENYA BUREAU OF STANDARDS..... RESPONDENT

EX PARTE

KENYA AIRWAYS LIMITED.....APPLICANT

AND

KENYA CIVIL AVIATION AUTHORITY.....1ST INTERESTED PARTY

KENYA ASSOCIATION OF AIR OPERATORS.....2ND INTERESTED PARTY

RULING

A: PRAYERS SOUGHT

The applicant's Notice of Motion dated 1st April, 2008 seeks the following orders:

"1. An order of judicial review by way of an order of certiorari to remove into the High Court for the purposes of quashing the Kenya Bureau of Standards, Standards known as KS ISO 3324-1:1997 Kenya Standard – Aircraft tyres and rims Part 1: specifications, First Edition; and KS ISO 3324-2:1998 Kenya Standard – Aircraft tyres and rims – Part 2: Test methods for tyres, First Edition ("the KEBS Standards").

2. An order for judicial review by way of an order of mandamus to compel Kenya Bureau of Standards to refund to the applicant all monies that have been paid by it in respect of and under the KEBS Standards, together with interest.

3. An order of judicial review by way of an order of mandamus to compel the Kenya Bureau of Standards to release to the applicant, without cost, all of its spare parts and tyres that are currently being held by it at the customs bonded warehouse at Jomo Kenyatta International Airport in ostensible enforcement of the KEBS Standards.

4. An order for judicial review by way of an order of mandamus compelling the Kenya Bureau of Standards to refund the amount of Kshs.790,676/= it has collected todate from the applicant under the KEBS Standards.

5. An order for judicial review by way of an order of prohibition preventing the Kenya Bureau of Standards from levying any fees, charges or penalties against the applicant under the KEBS Standards.

6. Without prejudice to the foregoing and in the alternative to paragraph 1 above, an order of mandamus compelling the Kenya Bureau of Standards, through its National Standards Council to pass a resolution as envisaged by section 9(3) of the Standards Act to the effect that it is impractical for the Aviation Industry to comply with the KEBS Standards and advise to the Minister accordingly.

7. Declaration do issue that:

a. The Kenya Civil Aviation Authority (KCAA) is the only statutory body mandated to make, implement and enforce standards concerning the Aviation Industry in Kenya.

b. The Kenya Bureau of Standards has no statutory authority to make standards concerning the Aviation Industry in Kenya.

c. The KEBS Standards are ultra vires of the Standards Act, void and of no legal effect.

d. The actions by the Kenya Bureau of Standards in the collection of monies, detention of tyres and spare parts and purported enforcement of penalties and sanctions in respect of the KEBS Standards was and is illegal.

8. Costs be awarded to the applicant against Kenya Bureau of standards."

B: THE GROUNDS

The application was made on the grounds that:

"1. Excess of jurisdiction:
a) The Kenya Bureau of Standards had no power to make the KEBS Standards or in any event any standards with respect to the Aviation Industry.

b) It is the Kenya Civil Aviation Authority that has the sole function of regulating the Aviation Industry in Kenya.

2. Illegality

(a) The KEBS Standards are illegal and made ultra vires of the Standards Act.

(b) The KEBS Standards which the Kenya Bureau of Standards seeks to impose are in direct conflict with the functions of the Kenya Civil Aviation Authority as set out in Section 3(b) of the Civil Aviation Act.

(c) The Kenya Bureau of Standards has illegally collected and continues to collect inspection fees and charges ostensibly in accordance with the KEBS Standards.

(d) The action by the Kenya Bureau of Standards in the collection of monies, detention of tyres and spare parts and purported enforcement of penalties and sanctions in respect of KEBS Standards is illegal."

C: <u>THE APPLICANT'S DEPOSITIONS</u>

The application was supported by a statutory statement and an affidavit sworn by **Kamau Mbogoh,** the applicant's Acting Aircraft Material Logistics Manager. The contents of the ten pages affidavit may be summarized as hereunder:

The applicant is described as one of the successful airlines in Africa and flies to about 42 domestic and international destinations. It operates on average between 40 to 45 flights everyday out of which about 35 are to international destinations. The shareholding of the applicant is as follows:

KLM 26%

Government of Kenya 23%

Other private shareholders 51%

Vide a Kenya Gazette Notice dated 21st September 2007, the National Standards Council of the Kenya Bureau of Standards published *inter alia*, the standards known as:

a) KS ISO 3324-1: 1997 Kenya Standard – Aircraft tyres and rims Part 1: specifications, First Edition and

b) KS ISO 3324-2: 1998 Kenya Standard – Aircraft tyres and rims – Part 2: Test methods for

tyres, First Edition,
hereinafter both standards referred to as **"the KEBS Standards".** The aforementioned gazette notices are a replication of the International Organization for Standardization Internal Aviation Standards known as **"ISO 3324 – 1: 1997 (E) and ISO 3324 – 2: 1998 (E)"** respectively hereinafter referred to as **"the ISO Standards".**

Prior to the publication of the aforementioned KEBS Standards, the Kenya Bureau of Standards (KEBS) had in or about March 2007 started demanding that the applicant obtain certificates of conformity indicating that the aircraft parts and spares imported by it also met the requirements of KEBS. By a letter dated 22nd March, 2007 the applicant sought clarification from the Kenya Civil Aviation Authority (KCAA) regarding the position taken by KEBS. KCAA wrote to KEBS on 29th March, 2007. The relevant part of the letter was worded as follows:

"We are in receipt of communication from Kenya Airways, Association of Kenya Operators and Wilfreight Express Cargo expressing concern on aircraft tyres and aircraft parts held due to lack of required KBS certificates of conformity.

As you are aware, civil aircraft, aircraft parts and/or spares are manufactured to ICAO defined standards which are enforceable by the responsible Civil Aviation Authorities under whose jurisdiction the manufacturing process is undertaken.

Kenya being an ICAO contracting State ensures that importation and fitment of parts and/or components on Kenya Civil Aircraft is in compliance with the requirements of the Civil Aviation Act Cap 394, the Air Navigation Regulations, and the relevant KCAA published requirements. The responsibility of ensuring conformity on the above standards on behalf of the Kenya Government has been placed on KCAA, hence the mandate of the Finance Bill No. 5 of 1998.

All aircraft parts or spares are accompanied by certificates of conformity particularly designed by Civil Aviation Authorities containing details agreed upon internationally as they are based on the above referenced standards. Kenya Civil Aviation Authority (KCAA) has accepted and approves these certificates in the evaluation process of the spares before acceptance. KCAA recommendations after evaluation are acceptable to KRA for the release of these parts."

Despite the aforesaid communication, KEBS continues to demand that the applicant either obtains certificates of conformity from it or the applicant pays a penalty of 15% of the contract and freight value of the aircraft parts and spares in default. The applicant made effort to discuss the matter with KEBS but no solution was arrived at. KEBS indicated that it would continue to hold the applicant's aircraft parts and spares unless the applicant accedes to its demands or in the alternative meets the costs of sending its officers to the plants of the manufacturers in the United States of America and Europe, where the applicant mainly sources aircraft parts and spares from, for purposes of inspecting them. Due to the nature of the Aviation Industry, the United States of America and Europe the Civil Aviation Authorities in those regions insist on very strict adherence to standards.

Mr. Mbogohfurther deposed that the applicant has a well equipped workshop for the repairs and maintenance of its aircrafts. The workshop is from time to time audited by KCAA, the International Organization of Safety Associations (IOSA) and KLM.

The certificates that accompany imported aircraft parts and spares are sent by the manufacturers who have to have received approval of the plant, equipment and personnel from the appropriate Civil Aviation Authority.

Mr. Mbogoh added that before a manufacturer is allowed to prepare a certificate they have to be audited

by the appropriate Civil Aviation Authority. The audit entails *inter alia*, evaluation of the plant and equipment which may be both physical inspection or a desk evaluation and assessment of the key personnel.

The applicant is not permitted by KCAA to fit any parts of spares into an aircraft which do not have the appropriate certificate. The standards set by both the European and American Civil Aviation Authorities (**EASA** and **FAA**) respectively have been in use since 1903. These standards are accepted worldwide.

Regarding aircraft tyres, Mr. Mbogoh stated that the applicant purchases them from two companies namely Dunlop in Europe and Bridgestone in the United States of America. The applicant has for many years imported tyres from the two companies without question from KCAA which accepts the certificates issued by EASA and FAA. KCAA carries out random inspection on the tyres from time to time to confirm that they meet the requisite international standards. KCAA also audits the manufacturers of aircraft spare parts and tyres from time to time to ensure that they conform to the standards set out by EASA and FAA. Upon such inspection KCAA issues certificates to the approved manufacturers. KCAA also frequently inspects aircrafts. EASA also does random inspections at airports in Europe. Given that the applicant flies to various cities in Europe it is also subject to the EASA inspections.

In view of the foregoing, the demand by KEBS that the applicant finances the cost of sending its representatives overseas for purposes of inspecting the manufacturers of aircraft parts is unreasonable, the applicant stated. The applicant was the second African airline to receive IOSA certification in the year 2005, Mr. Mbogoh added.

The applicant further lamented that since March 2007 and the subsequent introduction of KEBS Standards it has been forced to make certain payments to KEBS to enable it secure release of some of the tyres it has brought into the country. The payments were made under duress and therefore under protest and purely to mitigate the losses that it would have suffered by reason of unavailability of tyres if it had failed to do so. The applicant has paid a total of **Kshs.790,676/=** to KEBS.

The enforcement of the KEBS Standards has the effect of causing the applicant to incur unnecessary huge expenses and may also adversely affect its business and operations.

The applicant is doubtful whether KEBS has personnel with competence to set standards for aircraft parts and spares. It also does not have equipment to check that they meet those standards. The applicant concluded that:

"(a) The KEBS Standards are made out of the statutory authority of KEBS.

(b) Collection of monies or alleged enforcement by KEBS under the KEBS Standards is illegal.

(c) The KCAA is the only statutory body in Kenya mandated by Parliament to regulate the Aviation Industry.

(d) It could not have been the intention of Parliament that two statutory bodies perform the same function in duplication."

D: <u>THE RESPONDENT'S DEPOSITIONS</u>

The respondent filed a replying affidavit that was sworn by **John Waliaula Wepukhulu,** the Senior Principal Quality Inspector, heading the Pre-Export Verification of Conformity Standards Department of the respondent, who is specifically designated to monitor standards relating to imports in Kenya. He deposed that the applicant's application is bad in law because the applicant had previously filed before this court another application **No. 952 of 2007** between the same parties where similar orders as in this one have also been sought.

With regard to the merits of the current application, Mr. Wepukhulu stated that it is the statutory responsibility of the respondent to design and maintain a National Standardization System in the country. It is mandatory to comply with the standards set by the respondent save where the Minister has made exceptions. The respondent stated that the functions of the KCAA are regulatory with respect to aircraft and civil aviation, they do not relate to standardization which is the respondent's sole preserve. With respect to aircraft spare parts and tyres, it is the statutory duty of the respondent to design and enforce standards, it was contended. The respondent may opt to supervise an enforcement of its standards through the KCAA, the Kenya Revenue Authority or any other body or even intervene directly, the respondent added.

On 29th June, 2005 by virtue of the powers conferred upon the Minister for Trade and Industry by **Sections 4** and **20** of the **Standards Act Cap 496,** the Minister issued **Verification of Conformity to Kenya Standards of Imports Order 2005** which is in line with **World Trade Organization (WTO) Technical Barriers to Trade Agreements (BTB) Article 5**. The respondent added that the said order was published in the **Kenya Gazette Supplement No. 53 as Legal Notice No. 78 of 2005**. In terms of Regulation No. 2 of the said order, the respondent was required to publish a list of goods to be subjected to verification of conformity to Kenya standards or approved specifications. Regulations 3 and 5 of the said order require any importer to ensure that imported goods meet Kenya standards or approved specifications and should be inspected by an inspection body in the country of origin approved by the respondent. The goods would still be subject to re-inspection by the respondent on arrival at its sole discretion.

Regulation 7 requires that goods that do not have a certificate of conformity from the country of origin to be inspected by the respondent on arrival at a fee of 15% of the cost, the insurance and freight value of the goods. In compliance with the Minister's order aforesaid, the respondent published the requisite list which includes, *inter alia*, all types of tyres. The respondent stated that it is merely enforcing the Minister's order and its statutory mandate. The applicant is not exempt from the application of the Minister's order and the Civil Aviation Act does not and cannot grant such exemption because such a function is not within its jurisdiction, the respondent added.

The respondent conceded that it had published the KEBS Standards referred to by the applicant and that it had been legally and procedurally inspecting the applicant's tyres and charging the prescribed fees. The respondent further admitted that these standards are a replication of the prevailing international standards. However, the respondents added that:

"For the standard to have legal effect locally it has to be gazetted by the National Standards Council. This is an international standard which the applicant admits that it is aware of and which applies all over the world under international conventions. The applicant is required to observe it in its operations throughout the world. All the respondent did was to give it local legal effect. The applicant cannot be heard to say that this was a unilateral decision in which it was not given a hearing. In any case the applicant admits that a meeting took place and correspondence was exchanged. It even complied with the requirements for a while."

The respondent further stated that the purpose of domesticating the standard is to enable Kenyan aircraft operators to observe safety and standardization requirements under the respondent's statutory mandate

and World Trade Organization (WTO). KCAA has no role whatsoever in the creation and publication of ISO standards. Its role is to enforce standards on behalf of the respondent and not formulation of standards, the respondent averred.

The respondent referred to the provisions of **Section 21** of the **Standards Act** which states that:

"Where there is a 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."

The respondent further acknowledged the applicant's working relationship with the FAA, IASA and KCAA but insisted that Kenya as a sovereign country must adhere to its own standards and laws since those standards do not offend international aviation standards.

The respondent further stated that enforcement of standardization requirement has become particularly stringent in view of several aviation incidents and accidents involving aircraft and aircraft operators in Kenya. The requirements are aimed at the safety of passengers and crew of all aircraft operations in Kenya and do not target the applicant or any particular aircraft operator. The respondent urged the court to dismiss the application.

E: MISCELLANEOUS CIVIL APPLICATION NO. 952 OF 2007

Prior to the publication of the KEBS Standards, the applicant had filed Miscellaneous Civil Application No. 952 of 2007 seeking the following orders:

"1. An order for judicial review by way of an order of certiorari to remove into the High Court for the purposes of quashing the decision of the Kenya Bureau of Standards to levy penalties upon aircraft parts and spares imported by the applicant.

2. An order for judicial review by way of an order of certiorari to remove into the High Court for the purpose of quashing the decision of the Kenya Bureau of Standards that the Kenya Bureau of Standards shall issue Kenya Airways Limited with certificates of conformity for all aircraft parts and spares imported by the applicant.

3. An order for judicial review by way of an order of certiorari to quash the Kenya Bureau of Standards's assumption of jurisdiction over the applicant.

4. An order for judicial review by way of an order of mandamus to compel the Kenya Bureau of Standards to refund the sum of Kshs.790,676/- paid under duress by the applicant on diverse dates.

5. An order of judicial review by way of an order of mandamus to compel the Kenya Bureau of Standards to release all aircraft spare parts including tyres imported by the applicant and held at the customs bonded warehouse at Jomo Kenyatta International Airport.

6. An order for judicial review by way of an order of prohibition to prohibit the Kenya Bureau of Standards from:

(a) Demanding that the aircraft parts and spares imported by the applicant be inspected by it

with a view to issuing certificates of conformity.

(b) Demanding from the applicant payment of any penalty on account of aircraft parts and spares.

(c) Seizing aircraft parts and spares imported by the applicant for use on its aircraft.

7. An order that in view of the orders sought in paragraphs 1 to 6 above declarations do issue that the Kenya Bureau of Standards:

(a) Is not entitled to retain the sum of Kshs.790,676/- paid to it under protest by the applicant.

(b) Has no legal basis to insist that on the applicant obtaining certificates of conformity.

(c) Has no legal basis to levy any penalty upon the applicant.

8. An order that costs to be awarded against the Kenya Bureau of Standards."

It is evident that the orders sought are more or less the same as in Miscellaneous Application No. 120 of 2008 save that in prayer 1 there were no specific standards which were sought to be quashed simply because the KEBS Standards aforesaid had not been formulated. The applicant's affidavit in support of the said application was sworn by **Alfred Muhoho** who was then the Manager, Aircraft Material Logistics. The affidavit contains more or less the same depositions as those made by Kamau Mbogoh in this application.

The respondent had filed a replying affidavit sworn by John Waliaula Wepukhulu which is more or less a replica of the respondent's affidavit herein. It was by consent agreed that these two matters be heard together.

The interested party, KCAA, did not file any replying affidavit because it is not opposed to the applicant's application. The interested party however, filed submissions. **The Kenya Association of Air Operators** was also joined as an interested party and it supports the applicant's application. The 2nd interested party filed neither a replying affidavit nor written submissions basically because it supports the applicant's position.

Mr**. Kiragu Kimani** and **Mrs. Otaba** appeared for the applicant while **Mr. Nzamba Kitonga** appeared for the respondent. **Mr. Mwiti** and **Mr. Mugambi** appeared for the 1st and 2nd interested parties respectively.

Counsel for the applicant, respondent and 1st interested party highlighted their respective clients' written submissions and Mr. Mugambi for the 2nd interested party made brief oral submissions.

The facts of the applicant's case are well set out in its application and in the affidavit sworn in support thereof.

F: <u>PRELIMINARY ISSUES</u>

The respondent stated that in seeking leave to institute these judicial review proceedings the applicant did not disclose the existence of **Miscellaneous Civil Application No. 952 of 2007.** The applicant further stated that the current application is a duplication of the aforesaid Miscellaneous Civil Application. In view of the aforesaid issues the respondent contended that the two applications amount to an abuse of the court process and ought to be dismissed. Although Mr. Kitonga conceded that the applicant made reference to Miscellaneous Civil Application No. 952 of 2007 in its certificate of urgency filed herein, in his view, that reference does not amount to sufficient disclosure and was merely intended to explain the urgency of the matter with a view to obtaining ex parte orders.

Regarding the filing of this application, the respondent's contention was that subsequent to filing of a replying affidavit in the earlier application where the respondent indicated that the two KEBS Standards had been formulated, the applicant hurriedly filed the present suit instead of waiting for determination of the earlier one.

In response thereto, Mr. Kimani for the applicant submitted that in the certificate of urgency by **Mr. Gitonga Murugara** advocate, dated and filed on 20th March, 2008 he disclosed the existence of the other matter and the disclosure as sufficient for all purposes. In the said certificate of urgency Mr. Gitonga stated as follows:

"I Gitonga Murugara, an advocate of the High Court and partner in the firm of Hamilton Harrison and Mathews, the advocates for the applicant, do certify that the application filed herein and dated 20th March, 2008 is urgent and should be heard during the court vacation for the following reasons:

1. There is before the court miscellaneous civil application no. 952 of 2007 between the same parties and which is coming up for hearing on 28th May, 2008. It will be necessary for both applications to be heard together."

In my view, the applicant cannot be accused of having failed to disclose the existence of Miscellaneous Application No. 952 of 2007. The advocate for the applicant stated that the said application was between the same parties and it was desired that that application and this one be heard together.

Regarding duplication of applications, the issue of the KEBS Standards, that is, KS ISO 3324 – 1: 1997 and KS ISO 3324 – 2: 1998, is a matter that arose from the respondent's publication of the Standards in the Kenya Gazette on 21st September, 2007. As at that date Miscellaneous Application No. 952 of 2007 had already been filed. One of the orders sought in the earlier application was that of certiorari and such an application has to be made within six months from the date of the decision sought to be quashed. Since an amendment of the statement in that application would not have been possible in view of passage of time, it was therefore necessary that the applicant files the present application. It was also necessary to refer to the specific KEBS Standards aforesaid. That is why, I believe, the applicant sought to have the two matters heard together.

Further, under **Order 53 rule 4(2)** any amendment to a party's statement must not be inconsistent with the orders prayed for in the notice of motion. See **REPUBLIC vs COMMUNICATIONS COMMISSION OF KENYA [2001] 1 EA.** The applicant could not therefore have amended the statement in the earlier application and introduce prayers for orders to which no leave had been granted by the court.

For these reasons, I dismiss the respondent's objection to the applicant's application on the aforesaid grounds and will now proceed to determine the application on its merits.

G: EXCESS OF JURISDICTION

The applicant's contention is that the respondent has no power to make the KEBS Standards or any Standards with respect to the aviation industry. It states that it is the KCAA that has the sole mandate of regulating the Aviation Industry in Kenya. The applicant submitted that it operates in conformity with the ISO standards.

On the other hand, the respondent argued that it is charged with the exclusive mandate of formulating Standards in respect of all goods and services and the enforcement thereof. That mandate is given by the **Standards Act.** The Standards include those related to the Aviation Industry. The enforcement may be done either directly by itself or through other agencies or both. However, the respondent stated, in formulating local aviation Standards it chose to adopt the prevailing international Standards for purposes of uniformity. Upon proclamation of the Standards by the National Standards Council it became the duty of the respondent, the interested party and other relevant regulatory authorities to enforce the Standards.

The respondent submitted that all international, continental or regional Standards must be sanctioned by itself for them to have legal effect in the country and in that regard cited the provisions of **Sections 4** and **8** of the **Standards Act**. **Section 4** of the Act sets out the functions of the respondent. **Section 8** relates to financial provisions of the respondent and I do not think it is of any relevance in respect of the issue of jurisdiction.

The genesis of the dispute between the applicant and the respondent is **Legal Notice No. 78** that was published on 15th July, 2005 by the Minister for Trade and Industry. The relevant portions of the same are as follows:

"LEGAL NOTICE NO. 78

THE STANDARDS ACT

(Cap 496)

IN EXERCISE of the powers conferred by Section 4 and 20 of the Standards Act, the Minister for Trade and Industry, in consultation with the National Standards Council, makes the following order: -

THE VERIFICATION OF CONFORMITY TO KENYA STANDARDS OF IMPORTS ORDER, 2005.

1. This order may be cited as the Verification of Conformity to Kenya Standards of Imports Order, 2005.

2. The Kenya Bureau of Standards shall publish a list of goods which shall be subjected to Verification of Conformity to Kenya standards or approved specifications.

3. A person who imports goods must ensure that the goods meet Kenya standards or approved

specifications.

4. The Kenya Bureau of Standards shall appoint an inspection body or bodies in the country of origin of goods to undertake verification of conformity to Kenya Standards or approved specifications.

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.

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

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

7(1) Goods specified in accordance with paragraph (2) arriving at the port of entry without a certificate of conformity shall be subjected to destination inspection at a fee of 15% of the Cost, Insurance and Freight value of the goods.

(2) The importer of such goods shall, in addition to the fee imposed in paragraph (1) execute a security bond equivalent to the said fee.

(3) Where goods subjected to destination inspection under subparagraph (1) fail to conform to Kenya Standards or approved specifications, they shall be re-shipped, returned or destroyed at the expense of the importer.

8. The Minister may, on the advice of the National Standards Council, exempt any imports from the provisions of this order where the Minister is satisfied that it is in the national interest to do so."

When the respondent started enforcing the contentious standardization measures against the applicant's imported tyres the respondent had not formulated the KEBS Standards now in question. To that extent, it was contended that the respondent had no mandate to do so. The applicant's contention to that effect cannot be disputed since the KEBS Standards were published on 21st September, 2007.

But prior to coming into effect of the KEBS Standards with respect to tyres and rims, the applicant was already complying with the ISO standards aforesaid. The ISO Standards are enforced in Kenya by the KCAA. **Section 3(1)** of the **Civil Aviation Act Cap 394 Laws of Kenya** establishes the KCAA as a statutory body**. Section 3A** of the **Act** sets out the objectives of the authority which are:

"To plan, develop, manage, regulate and operate a safe, economical and efficient civil aviation system in Kenya in accordance with the provisions of this Act."

Section 3B (1) sets out the functions of KCAA. They include licensing of air services, provision of air navigation services, establishment and maintenance of a system for the registration and the marking of civil aircraft, securing sound development of the Civil Aviation Industry in Kenya, advising government on matters concerning civil aviation, co-ordination and direction of search and rescue services, **safety and technical regulation of civil aviation, enforcement of approved technical standards of aircrafts**, ensuring the integrity of the systems, equipment and facilities of the authority, planning development and accommodation for the safe and efficient utilization of Kenyan air space, etc.

Under **Section 3B (4),** KCAA is required to carry out its functions in a manner consistent with the **Chicago Convention**, any Annex to the Convention relating to international Standards and recommended practices and any amendment thereto or other international conventions and protocols relating to Civil Aviation that Kenya is party to. Further, it is the responsibility of the Authority to perform any obligations required by any agreement, treaty or arrangement between Kenya and any other country, inter-governmental organization or other body with respect to the safety, regularity and efficiency of air navigation and aviation safety in general. See **Section 3B (5).**

In discharge of its responsibility for aviation safety and security, KCAA is required to co-ordinate its activities with other government agencies including the Kenya Ports Authority, the Department of Defence and the Police.

KCAA is a member of International Civil Aviation Organization and is responsible for the implementation and enforcement of the ISO aviation standards in Kenya.

The Chicago Convention referred to in **Section 3B (4)** was signed on 7th December, 1944 and came into force on 4th April, 1947. According to "**Halsbury's Laws of England**", 4th Edition Volume 2 at page 394, its professed object is:

"To lay down principles and make arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity, and may be operated soundly and economically."

The Convention contains various provisions relating to safety requirements of aircrafts. Kenya is one of the countries that have ratified the Chicago Convention. Each contracting state undertakes to corroborate in securing the highest practicable degree of uniformity in regulations, Standards, procedures and organization in relation to aircrafts, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To secure this end, the International Civil Aviation Organization (ICAO) adopts and amends from time to time international standards and recommends practices and procedures dealing with a variety of subjects. These are designated as annexes to the Chicago Convention.

Apart from the Chicago Convention, the annexes to the Convention and other international conventions and protocols, Civil Aviation in Kenya is controlled and regulated by the Civil Aviation Act.

As regards **Legal Notice No. 78**, the respondent was required to publish a list of goods which had to be subjected to verification of:

(i) Conformity to Kenya standards or

(ii) Approved specifications

All persons who import goods were required to ensure that the goods meet either of the above Standards or specifications. The respondent was required to inspect or cause to be inspected all imported goods to ensure that they complied with the law as aforesaid. The certificate which is required to be issued under

Regulation 6(1) is to certify that the goods conform to either the Kenyan Standards or approved specifications.

The interested party's **Civil Aviation (Approved Maintenance Organization) Regulations, 2007,** ("The AMO Regulations") defines inspection in regulation 2 as:

"The examination of an aircraft or aircraft component to establish conformity with a standard approved by the Authority."

It is important to note that an approved Standard is defined under the AMO Regulations as:

"A manufacturing, design, maintenance, or quality Standard approved by the Authority."

The ISO standards are approved by the KCAA which was also enforcing them long before the respondent started doing so.

In the context of the applicant's applications herein, aircraft rims and tyres are included in **"aircraft component"** and therefore the respondent has no jurisdiction to inspect the applicant's aircraft tyres. It is only the interested party that has the mandate to do so.

The respondent argued that there is an overlap of functions between itself and the interested party, KCAA. It cited the provisions of **Section 21** of **Standards Act** which state that:

"Where there is a 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."

The commencement date of the **Civil Aviation Act** was **19th December, 1997** whereas the commencement date of the **Standards Act** was **12th July, 1974**. According to Wilson and Galpin, **"MAXWELL ON THE INTERPRETATION OF STATUTES"** 11th Edition (1962), London, Sweet and Maxwell at page 154:

"If the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later."

However, I do not think that there is any conflict or inconsistency between the two Acts as regards the respondent's role and that of the KCAA as relates to formulation and enforcement of safety standards of aircrafts and components. The respondent replicated the ISO Standards which had already been adopted as approved specifications and were being enforced by KCAA. But even if there is any inconsistency between the roles of the two bodies as stipulated under the Standards Act and the Civil Aviation Act, the latter would override the former to the extent of the inconsistency, if at all. But with respect to the provisions of Section 21 of the Standards Act, there is no conflict between the KEBS Standards in reference and the ISO Standards since the former is a replica of the letter.

The object of the Civil Aviation Act is:

"To make provision for the control, regulation and orderly development of civil aviation in Kenya and for matters incidental thereto or connected therewith."

It was the intention of Parliament to vest all aspects of control of civil aviation in the KCAA. The functions of the Authority which are stipulated under **Section 3B (1)** of the **Act** were as a result of amendments effected to the Act vide **Statutory Miscellaneous Amendment Act No. 6 of 2002**. It is KCAA which is responsible for the safety and technical regulation of Civil Aviation in Kenya and therefore it is mandated to formulate, implement and enforce Standards concerning Aviation Industry in Kenya. A close reading of the Civil Aviation Act so reveals.

Odgers, C.E., **"THE CONSTRUCTION OF DEEDS AND STATUTES"** 4th Edition, 1956, London, Sweet and Maxwell at page 172 lays down several rules of construction of a statute. One of them states as hereunder:

"The statute must be read as a whole and the construction made of all the parts together. The meaning of the statute and the intention of the Legislature in enacting it can only properly be derived from a consideration of the whole enactment and every part of it in order to arrive if possible at a consistent plan. It is wrong to start with some *a priori* idea of that meaning or intention and to try by construction to work that idea into the words of the statute in question."

The respondent's advocate cited the case of **BOURNE (INSPECTOR OF TAXES) v NORWICH CREMATORIUM LIMITED [1967] 2 All ER 576** where at page 578, Stamp J. stated as follows:

"That one must construe a word or phrase in a section of an Act of parliament with all the assistance one can from decided cases and, if one will, from the dictionary, is not in doubt; but having obtained all the assistance, one must not at the end of the day distort that which has to be construed and give it a meaning which in its context one does not think it can possibly bear."

In citing the above authority, the respondent's advocate was emphasizing the plain meaning of the provisions of **Section 21** of the **Standards Act** that where there is a conflict between the provisions of a specification declared to be a Kenya Standard and a specification made or declared under any other written law the Kenya one shall prevail.

But as earlier stated, in my view, there is no conflict between the KEBS Standard in issue and the ISO Standards since the Kenya one is a replica of the international one.

The issue for determination is whether the KEBS Standards were formulated in accordance with the Standards Act.

There is no dispute that the functions of the Kenya Bureau of Standards include promotion of standardization in industry and commerce and such other functions as stated under **Section 4** of the **Act**. However, as regards Civil Aviation industry in Kenya, vide the amendments to the Act made in 2002, the Legislature specifically mandated the KCAA to deal with safety and technical regulations including enforcement of approved technical standards of aircrafts in a manner consistent with the Chicago Convention relating to international Standards and recommended practices. That being the case, this court's considered view is that all aspects of aircraft safety and enforcement of approved standards

ought to be undertaken by KCAA exclusively but in so doing it should co-ordinate its activities with other government agencies.

In view of the foregoing, this court finds that the respondent acted in excess of its statutory jurisdiction under the Standards Act by formulating the Standards known as **KS ISO 3324-1:1997 Kenya Standard** – Aircraft tyres and rims Part 1: specifications, First Edition; and **KS ISO 3324-2:1998 Kenya Standard** – Aircraft tyres and rims – Part 2: Test methods for tyres, First Edition ("the KEBS Standards").

"Any administrative Act or which is ultra vires or outside jurisdiction is void in law i.e. deprived of legal effect."

See WADE H.W.R., **ADMINISTRATIVE LAW** (6th Edition) 1988, Oxford University Press at page 41. Such an act is amenable to the judicial review order of certiorari to quash it.

H. ILLEGALITY

Was the respondent's aforesaid decision illegal? "A decision is illegal if:

(i) it contravenes or exceeds the terms of the power which authorizes the making of the decision; or

(ii) it pursues an objective other than that for which the power to make the decision was conferred."

See De Smith, Woolf and Jowell, **"JUDICIAL REVIEW OF ADMINISTRATIVE ACTION"**, 5th edition, page 295. The learned authors further state:

"The task for the courts in evaluating whether a decision is illegal is essentially one of construing the contents and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners". In so doing the courts enforce the rule of law, requiring administrative bodies to act within the bounds of powers they have been given. They also act as guardians of Parliament's will – seeking to ensure that the exercise of power is what Parliament intended."

In view of the finding that the respondent's decision was made in excess of its jurisdiction, it follows that the decision is illegal.

I. DID THE RESPONDENT ACT IN BAD FAITH?

Whereas I agree with the applicant and the interested party that the respondent acted in excess of its jurisdiction as aforesaid, I do not agree that the respondent had any improper motive or acted in bad faith in formulating the KEBS Standards. The respondent believed that it was its responsibility to put in place the said standards. I also do not agree with the applicant that the publication of Legal Notice No. 78 was intended to generate income for the respondent. The intention, I believe, was to check importation of substandard goods into the country.

J. REFUND OF KSHS.790,676/=

The applicant has sought a refund of Kshs.790,676/= which the respondent collected from it in enforcement of the said Gazette Notice. The applicant argues that there was no legal basis for charging the 15% inspection fee. The court has so established. Should the respondent be compelled by way of an order of mandamus to refund the money to the applicant?

In **WOOLWICH EQUITABLE BUILDING SOCIETY v INLAND REVENUE COMMISSIONERS (No. 2) [1993] 1 A.C. 70**, the House of Lords held that where a person makes payment in response to an unlawful demand for tax he has on that basis alone, a prima facie right to automatic repayment of the money. The applicant is therefore entitled to a refund of Kshs.790,676/= as claimed.

The respondent ought to refund the aforesaid sum. The respondent should also release to the applicant without any cost or charge whatsoever all its spare parts and tyres that are being held at the customs bonded warehouses at Jomo Kenyatta International Airport.

As regards the prayer for various declarations, I agree with the respondent that in judicial review proceedings the court can only grant orders of certiorari, mandamus and prohibition. The court cannot grant declaratory reliefs in such an application. Declaratory reliefs belong to the ordinary civil jurisdiction of the courts. See **DIRECTOR OF PENSIONS v COCKAR [2000] 1 EA 38**.

In conclusion, I grant prayers **1, 2, 3, 4** and **5** of the applicant's application dated 1st April, 2008 in **Miscellaneous Civil Application No. 120 of 2008.** I also grant prayers **1, 2, 3, 4, 5 and 6** of the applicant's application dated 24th August, 2007 in **Miscellaneous Civil Application No. 952 of 2007**. The respondent shall bear the costs of the two applications.

In view of the fact that the orders sought in the two applications are more or less the same and that the two applications were heard together, the costs payable by the respondent (excluding disbursements) shall be in respect of one matter only, Miscellaneous Civil Application No. 120 of 2008.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH OF JULY, 2011.

D. MUSINGA

JUDGE

In the presence of:
Nazi – Court Clerk
Mr. Kiragu Kimani for the Applicant
Mr. Nzamba Kitonga for the Respondents
Mr. Mwiti for the 1st Interested Party
Mr. Mushweshwe for Mr. Mugambi for the 2nd Interested Party