



REPUBLIC OF KENYA



KENYA LAW
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**Car Importers Association of Kenya v Kenya Revenue Authority & another
(Petition E027 of 2024) [2024] KEHC 8667 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E027 OF 2024**

OA SEWE, J

JULY 16, 2024

**IN THE MATTER OF VIOLATION OF ARTICLES 10, 27, 35, 47,
201 & 210 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT,
CAP 469 OF THE LAWS OF KENYA, EAST AFRICAN
COMMUNITY CUSTOMS MANAGEMNRT ACT, 2004 AND
CUSTOMS & EXCISE ACT, CAP 472, LAWS OF KENYA**

AND

**IN THE MATTER OF THE INTENDED REVIEW OF THE
APPLICABLE CURRENT RETAIL SELLING PRICES (CRSP) FOR
IMPORTED NEW AND USED MOTOR VEHICLES FOR
PURPOSES OF COMPUTING TAX PAYABLE ON SUCH UNITS**

AND

**IN THE MATTER OF FAILURE TO ACCORD CAR IMPORTERS
ASSOCIATION OF KENYA THEIR CONSTITUTIONAL RIGHT TO
FULLY PARTICIPATE IN THE SAID PROCESS**

BETWEEN

BETWEEN

CAR IMPORTERS ASSOCIATION OF KENYA PETITIONER

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT



RULING

1. The Notice of Motion dated 4th June 2024 was filed by the petitioner, Car Importers Association of Kenya. It is expressed to have been filed under Sections 1A, 1B & 3A of the [Civil Procedure Act](#) and Orders 40 Rule 2 of the [Civil Procedure Rules](#) for the following orders:
 - a) Spent
 - b) Spent
 - c) An order of injunction restraining the 1st and 2nd respondents, their agents, servants and/or employees from going around the country to collect the views of members of the public on the intended Current Retail Selling Prices (CRSPs) for the purposes of publication of the intended CRSPs and/or taking any action towards publishing new CRSPs pending the hearing and determination of the Petition.
 - d) That an order of injunction restraining the respondents from proceeding to actualize any part of the resolutions made in the meeting held by the respondent on 20th May 2024 or proceeding with any further deliberations or publication of new CRSPs in furtherance of the deliberations of the said meeting.
 - e) Such other orders and directions be made as the Court may deem just and expedient in the circumstances.
 - f) That the petitioner be awarded the costs of the application.
2. In support of the application, the applicant relied on the affidavit sworn on 4th June 2024 by its National Chairman, Mr. Peter Otieno (hereinafter, “the Chairman”). The Chairman averred that the applicant consists of over 71 importers/dealers of new and used imported motor vehicles. He explained that, in the process of assessing and collecting government revenue, the respondent publishes what is known as the Current Retail Selling Prices (hereinafter, “CRSPs”) to enable the petitioner’s members, clearing and forwarding agents and other motor vehicle dealers calculate the duty payable for specific imported motor vehicle units.
3. The Chairman further averred that, in the course of the month of May 2024, while executing his duties as the National Chairman of the petitioner, he received an email from the 1st respondent seeking his assistance in inviting the individuals and entities listed in the attached list of invitees to a stakeholder forum slated for 20th May 2024 to discuss the proposed CRSPs. He noted that the petitioner had been allocated only 5 slots with a total time allocation of only 20 minutes. The Chairman observed that the petitioner’s competitors, who are dealers in new imported motor vehicles, had been given 22 slots.
4. The Chairman also mentioned that, after consultations amongst the members of the petitioner, he responded vide a letter dated 16th May 2024, notifying the respondent that they would not participate in the forum unless the petitioner was given equal representation as their competitors. They also put in a request that the Managing Director of the Kenya Bureau of Standards, a key stakeholder, be invited to the forum. They nevertheless confirmed that its members were ready and willing to engage in the stakeholders’ forum if their concerns were addressed.



5. The Chairman further pointed out that, in his response, the petitioner drew the attention of the 1st respondent to the judgment of the High Court (Hon. Ogola, J.) in an earlier dispute over CRSPs, namely Mombasa High Court Constitutional Petition No. 190 of 2018: *Car Importers Association of Kenya v Kenya Revenue Authority & 3 Others* by which the 1st respondent had been ordered to establish new CRSP values within 12 months and subject the process to public participation.
6. The petitioner was therefore aggrieved that the 1st respondent proceeded with the meeting in spite of the concerns raised by its members, and without sharing the draft CRSPs. It therefore insists that without equal representation and participation in the deliberations for the validation of the new CRSPs by key stakeholders, chances are high that the same will be oppressive and unreasonable to key segments of the affected sector. It was on this account that the petitioner sought conservatory orders pending the hearing and determination of the Petition.
7. It is noteworthy that in its Petition dated 4th June 2024, the petitioner alleged breaches of the provisions of Articles 10, 27, 33, 35 and 47 of the *Constitution*; and more particularly the right to public participation. Accordingly, the petitioner prayed for the following reliefs, among others:
 - a) A declaration that the 1st respondent violated Articles 10, 27, 33, 35, 47, 201 and 210 of the *Constitution* of Kenya in so far as the respondents' computations of the CRSP values on used motor vehicles is concerned.
 - b) A declaration that the forum held by the 1st respondent on the 20th May 2024 was held unlawfully without notice to the stakeholders and without furnishing the stakeholders with a draft copy of the intended new CRSPs, and hence the deliberations and decisions emanating therefrom are null and void.
 - c) A declaration that the 1st respondent may only alter the CRSPs published in its website and/or public portal in September 2017 after full compliance by the respondents with the law, particularly with regard to giving the public in general and the stakeholders in particular, in the importation of used motor vehicles, the right to participate in the decision making process.
8. The application was opposed by the respondents vide the affidavit sworn on 20th June 2024 by Mr. David Kirui, one of the 1st respondent's officers deployed under the 2nd respondent in the Valuation & Tariff Unit. He explained that part of the mandate of the Valuation and Tariff Unit is the determination and implementation of valuation regulations for motor vehicles in Kenya. He explained that the rules on customs valuation are necessary to regulate and provide certainty of international trade to exporters, importers and Governments forming the East African Community. He made reference to the World Trade Organization Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, 1994 (the WTO Agreement).
9. The respondents explained, in great detail, the customs valuation process in respect of new and used motor vehicles and how the CRSP values are fixed. They also explained the shortcomings of the approaches employed in this regard; and the need for regular review of the applicable database.
10. The respondents conceded that, on the 16th May 2024, the 1st respondent issued a public notice titled "Public Participation on Valuation of Used Motor Vehicles through its website inviting views from the public and other stakeholders, and informing them of the following:
 - a) That the 1st respondent was conducting public participation to obtain views on the Free on Board values of used motor vehicles before implementation of a new motor vehicle valuation database.



- b) That the 1st respondent was conducting engagement sessions with motor vehicle importers value chain, the general public and any other interested party, encouraging such ones to send submissions and feedback.
- c) Where to channel their feedback by 15th June 2024.
11. The respondent further confirmed that, on 16th May 2024, the petitioners, through their letter of even date, objected to their participation in the stakeholder engagement process citing unfair representation and lack of involvement of the Kenya Bureau of Standards (KEBS). They explained that they responded to the letter with a view of allaying the petitioner's fears, by stating that:
- a) The purpose of the planned engagement was a public participation process to seek views to guide the process of CRSP review in line with the Constitution and did not entail voting on issues;
- b) The CRSP process review is the respondent's mandate as per Section 122 as read with the Fourth Schedule to the EACCMA;
- c) KEBS's presence, while welcome, would not be required at that stage because the stakeholder engagement process was on valuation of used motor vehicles and not on standards;
- d) The Authority was aware of and in compliance with the judgment in Mombasa Constitutional Petition No. 190 of 2018.
12. It was conceded by the respondent that on 17th May 2024, the petitioners responded and declined to participate in the process which was undertaken on 20th May 2024. Thereafter, on the 21st May 2024, the petitioners wrote to them directing the 1st respondent to cancel the public participation process within 7 days or else be sued. Hence, the respondents asserted that their actions are steeped in law and that the petitioner is simply out to frustrate the CRSP review process. They further averred that, it was in compliance with the judgment of the Court in Petition No. 190 of 2018 that the public participation exercise had been arranged.
13. The respondents further averred that, contrary to the petitioner's assertions, the suggested representations to the stakeholder deliberations of 20th May 2024 were equitable and fair considering the following factors:
- a) The petitioner and Kenya Auto Bazaar Association as the umbrella bodies of various motor vehicle dealers were each given 5 slots of representation.
- b) Local new motor vehicle dealers holding different franchises of different makers of motor vehicles were given 2 slots each of representation, because their franchise interests vary amongst each other.
- c) The petitioner's and Kenya Auto Bazaar Association's interests as umbrella bodies were the ones with the highest number of representations.
- d) Different local franchise holders represent different interests and as such cannot be collectively lumped up as having the same interest.
14. Accordingly, the respondents opposed the grant of the reliefs sought contending that it is in the public interest that the 1st respondent be allowed to continue with the stakeholder engagement process, because it will lead to the development of new guidelines for customs valuation of motor vehicles pursuant to Section 122 as read with the Fourth Schedule of EACCMA, in accordance with the order of the Court in Petition 190 of 2018. They prayed for the dismissal of the application.



15. Directions were consequently given on 12th June 2024 that the application be urged by way of written submissions. It appears only the respondents complied and filed written submissions dated 24th June 2024. They reiterated the factual basis of their case as set out in their Replying Affidavit and proposed the following issues for determination on the basis of the settled law on injunctions:
- a) Whether the petitioner has made out a prima facie case with probability of success;
 - b) Whether the petitioner will suffer irreparable loss not capable of adequate compensation by an award of damages;
 - c) Where does the balance of convenience lie?
16. Counsel relied on various precedents in support of their argument that the petitioner has utterly failed to establish a prima facie case with a probability of success as all their concerns were addressed in the correspondence exchanged between the parties and in the Replying Affidavit. In particular, the respondent cited *Giella v Cassman Brown* [1973] EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as to what amounts to a prima facie case. The cases of *Nairobi Kiru Line Services Ltd v County Government of Nyeri & 2 Others* [2016] eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR were likewise relied on to buttress the argument that the facts as presented by the petitioner do not disclose irreparable harm.
17. Lastly, it was the submission of the respondent that the balance of convenience lies in allowing the respondents to continue with the planned stakeholder engagement process and directing the petitioner to join the process. In this regard, the respondents relied on *Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another* [2019] eKLR and *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Others* [2016] eKLR.
18. On a without prejudice basis, the respondents submitted that they are willing to hold another public participation engagement in Mombasa for all stakeholders, including the petitioners and KEBS, even as it continues with its country-wide stakeholder engagements. They otherwise prayed for the dismissal of the petitioner's application.
19. I have given due consideration to the application, the averments in the affidavits filed in respect thereof as well as the respondent's written submissions. I note that the application was brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 40 Rule 2 of the Civil Procedure Rules and yet the dispute is presented as a constitutional petition. Authorities abound for the proposition that the applicable procedural rules in constitutional petitions and the applications made thereunder, including applications for injunctions, are the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (otherwise known as the Mutunga Rules).
20. Consequently, I entirely endorse the position taken by Hon. Musyoka, J. in *Francis Angueyah Ominde & Another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties)* [2021] eKLR that:
- “...it should be pointed out that the constitutional petitions are governed and regulated by the *Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the *Civil Procedure Act*, Cap 21, Laws of Kenya. So far as procedure is concerned, the *Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 captures the spirit of Article 159(2)(d) of the *Constitution*, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to



protect and promote the principles of the Constitution. The focus is trained on substance rather than process. the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.

21. The foregoing notwithstanding, there is no gainsaying that court has the jurisdiction to issue the orders sought. This is plain from a reading of Article 23(3) of the Constitution, which states:

In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- a) a declaration of rights;
- b) an injunction;
- c) a conservatory order;
- d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e) an order for compensation; and (f) an order of judicial review.

22. In the same vein, under Rule 23(1) of the Mutunga Rules, the Court has powers to grant such interim measures as may be necessary to meet the ends of justice. The provision states:

“Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”

23. Hence, in *South Imenti Bar Owners S.H.G through its Chairman James Gikunda Ntaragwi v County Government of Meru* [2018] eKLR, it was held:

“Provision of the relief of an injunction in constitutional petitions is doubtless a development of law...Such development of law on injunctions orchestrated by the new Constitution justifies what Ojwang Ag. J. (as he then was) stated in the case of *SULEIMAN vs. AMBOSELI RESORT LTD* (2004) eKLR 589 at page 607 that:-

‘...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in *Giella Vs Cassman Brown*, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel on that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of *Films Rover International* made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-

“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”...”



Traditionally, on the basis of the well accepted principles set out by the court of Appeal in *Giella Vs Cassman Brown* the court has had to consider the following questions before granting injunctive relief.

- i. Is there a prima facie case...
- ii. Does the applicant stand to suffer irreparable harm...
- iii. On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...”

24. Nevertheless, it is imperative to note the distinction drawn by the Supreme Court between injunctions and conservatory orders in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR. The Supreme Court held:

“86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

25. Accordingly, even in an application for injunction in a constitutional matter such as this, the Court ought not to lose sight of the public aspect angle.

26. As was pointed out by Hon. Ibrahim, J. (as he then was) in the *Muslim for Human Rights & 2 Others v Attorney General & 2 Others* [2011] Eklr, the Court ought not to look at the merit of the case closely as this stage. The learned judge cautioned:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

27. Similarly, in *Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General*, it was held:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.”



28. Hence, an applicant for interim orders for injunction purposes of Articles 22 and 23(3)(c) of the Constitution must satisfy the Court as to the following three elements:
- a) A prima facie case with a high likelihood of success;
 - b) That the Petition will be rendered nugatory; and,
 - c) That public interest weighs in the applicant's favour.
29. What amounts to a prima facie case was aptly stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 thus:
- “A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
30. Similarly, in *Kevin K Mwititi & Others v Kenya School of Law & others* (supra), it was held that:
- “A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.
31. With the foregoing in mind I have considered the application dated 4th June 2024 and the response thereto by the respondents. There is no dispute that an attempt had been made by the respondents to revise the CRSP values in 2018 and that that attempt was forestalled by the Court for lack of public participation. The Court was referred to the Judgment rendered by Hon. Ogola, J. in Petition No. 190 of 2018 on 16th October 2019. A copy of the decision was annexed to the petitioner's Supporting Affidavit as Annexure PO-5(a). It confirms that an order was made for the 1st respondent to establish new CRSP values in accordance with the law within 12 months from the date of the Judgment.
32. It was therefore common ground that the public participation scheduled for 20th May 2024 was in compliance with that order. From the material presented before the Court, the petitioner's only cause for complaint was that it was allocated only 5 slots with a time allocation of only 20 minutes; and that out of its own volition it declined to participate in the exercise, concluding beforehand that representation was not equitable. The petitioner now seeks an order:
- “...restraining the 1st and 2nd respondents, their agents, servants and/or employees from going around the country to collect the views of members of the public on the said intended new CRSP for the purposes of publication of the intended new CRSP and /or taking any actions intended towards publishing a new CRSP pending the hearing and determination of the Petition.”
33. It is plain from the foregoing that the petitioner has not only failed to demonstrate a prima facie case for the issuance of such a sweeping order, but also that it is not in the public interest for the Court to



stop an exercise that is mandated by the Constitution itself and is long overdue from the perspective of the judgment dated 16th October 2019. It is also noteworthy that the respondents are prepared and ready to repeat the exercise for the Mombasa County stakeholders such as the petitioner, even as it carries out the exercise in other Counties in the Republic of Kenya.

34. In the premises, I find no merit in the petitioner's application dated 4th June 2024. The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16th DAY OF JULY 2024.

OLGA SEWE

JUDGE

