



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 190 OF 2018

IN THE MATTER OF: ARTICLE 1, 2 (4), 10, 21, 22, 23, 27, 28, 35, 47, 201, 209, 210& 215 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT 9 (CAP 469 LAWS OF KENYA), EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004 AND CUSTOMS & EXERCISE ACT (CAP 472) LAWS OF KENYA

AND

IN THE MATTER OF: VIOLATION OF ARTICLES 10, 27, 47, 35, 201 AND 210 OF THE CONSTITUTION BY KENYA REVENUE AUTHORITY

AND

IN THE MATTER OF: VIOLATION OF SECTION 5 OF THE KENYA REVENUE AUTHORITY ACT 9 (CAP 469 LAWS OF KENYA), SECTIONS 120 TO 129 OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004 AND SECTION 9 OF THE CUSTOMS & EXCISE ACT (CAP 472) LAWS OF KENYA

AND

IN THE MATTER OF: DECLARE CURRENT RETAIL AND SELLING PRICE VALUES ON ENTRY NOS. 2012 MSA 6919255 AND 6919345- USED TOYOTA LAND CRUISER V8 CHASIS NOS. URJ202-4118269 AND URJ202-4117405 OF MODEL CBA-URJ202W 4600CC PETROL

AND

IN THE MATTER OF: UNLAWFUL DETENTION AND/ OR FAILURE TO CLEAR USED TOYOTA LAND CRUISER V8 CHASIS NOS. URJ202-4118269 AND URJ202-4117405 OF MODEL CBA-URJ202W 4600CC PETROL

BETWEEN

CAR IMPORTERS ASSOCIATION OF KENYA.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE COMMISSIONER, CUSTOMS AND BORDER CONTROL DEPARTMENT,

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE CHIEF MANAGER, VALUE AND TARIFF, CUSTOMS

SERVICE DEPARTMENT, KENYA REVENUE AUTHORITY....3RD RESPONDENT

JUDGMENT

1. The Petitioner is an Association of Car Importers operating within Kenya and has filed the petition herein on its own behalf and on the behalf of its members.
2. The 1st Respondent is the Kenya Revenue Authority, while the 2nd and 3rd Respondents are agents of the 1st Respondent. The 4th Respondent is Kenya Ports Authority sued herein for purposes of execution of the orders that may be issued herein.

The Petitioner's Case

3. The Petitioner states that pursuant to Section 120 of the East African Community Customs Management Act, 2004 as read together with the Kenya Revenue Authority Act, Cap 469 Laws of Kenya and the Customs & Excise Act, Cap 472 Laws of Kenya the 1st Respondent publishes the **Current Retail Selling Price** (herein after referred to as "**CRSP**") which the Petitioner's members and clearing and forwarding agents use for the purpose of calculating import duty payable to the 1st Respondent. The Petitioner states that sometime in August, 2017 the 1st to 3rd Respondents Published in the Kenya Revenue Authority Portal new CRSP values which became effective 5.2.18 for each and every model of used motor vehicles being imported in Kenya by car importers. The Petitioner states that being a stake holder in the car importation industry, representing seventy-three (73) car importers, the Petitioner ought to have been given a chance to participate in the process in which the "new" CRSP values were determined. The Petitioner avers that the reason why the CRSP was introduced by the law was to ensure that taxes payable by car importers was fair, reasonable, uniform and neutral to all importers of used motor vehicles in Kenya and should reflect commercial reality to the extent possible. Because the Petitioner was not consulted in the new CRSP, the Petitioner on 30.1.18 wrote a letter to the Respondents to suspend the new CRSP pending deliberations by all stakeholders on the same. Pursuant to this request there were meetings held on 23.2.18, 9.3.18, 22.6.18, 29.6.18 and 6.7.18 by the Petitioner, the Respondents, the Kenya Ports Authority and other stake holders in the car importation industry to resolve the Petitioner's grievances regarding the new CRSP, but the aforesaid meetings did not resolve the matter and the Respondents are still holding to the CRSP values they unlawfully published. There has been no further attempt to address the Petitioner's grievances hence this petition. The Petitioner states that the new CRSP values are oppressive and unreasonable as the Petitioner's members cannot make any profit in their businesses unless they raise their retail prices which would not be consumer friendly. The Petitioner avers that since the new CRSP values were arrived at without public participation, the new values are unconstitutional, null and void, and any action premised on those values are not valid.

4. The Petitioner states further that even within the new CRSP value there is inconsistency and discrimination in the way motor vehicles are assessed for import duty. By way of example the Petitioner states that based on the aforesaid CRSP chart the CRSP value for **Toyota Land Cruiser URJ201/202-GNTGKQ-UR-FE V8, 4-wheel** drive, station wagon with an engine capacity of 4600 cc and a petrol tank specification, is Kshs. 14,400,000/=. However, the Respondents have demanded a CRSP value of Kshs. 17,986,500/= for a similar motor vehicle being imported by one of its members, being **Al-Husnain Motors Ltd**. The Petitioner states the charges imposed by the Respondents are for **Toyota Land Cruiser URJ202R-GNTGKQ TZ AT VX** with a CRSP value of Kshs. 17,986,500/=. Al-Husnain Motors are prepared to pay the CRSP value of Kshs. 14,400,000 for their model **Toyota Land Cruiser URJ201/202-GNTGKQ-UR-FE V8** but the Respondents have refused to accept the same and have detained the said motor vehicle. The Petitioner avers that the action by the Respondents disclose open discrimination of **Al-Husnain Motors Ltd** as against other members of the Petitioner, being **Lota Automobiles Limited** and **United Ssiaiss Investment Limited** who imported similar motor vehicles on 13.6.18 and 21.4.18 respectively.

5. The Petitioner pleads the same discriminative application of the CRSP in relation to a second motor vehicle being **URJ 202-4117405 Model CBA-URJ 202W 4600 petrol** also belonging to Al-Husnain Motors.

Particulars Of Breach Of Public Trust And Constitutional Provisions By The Respondents

6. The Petitioner avers that the aforesaid excessive CRSP values imposed upon its members and on Al-Husnain Motors specifically by the Respondents was done in breach of public trust, the law, and the constitution in that:

a) The 1st to 3rd Respondents are bound by the CRSP values published in the Kenya Revenue Authority portal and/ or the public portal and cannot charge more value than what they have published. As such, the purported excessive charges imposed upon **Al-Husnain Motors Ltd** are in violation of **Article 47 of the Constitution of Kenya**.

b) The 1st to 3rd Respondents have violated **Article 27 of the Constitution of Kenya** which provides that the 1st to 3rd Respondents must treat all people equally before the law, **by charging Al-Husnain Motors Ltd** CRSP value of Kshs. 17,986,500/= while all the other members of the Petitioner have been charged Kshs. 14,400,000/= as per the CRSP chart published by the 1st to 3rd Respondents in the public portal.

c) The 1st to 3rd Respondents have violated **Article 47 of the Constitution of Kenya, 2010** as read together with the **Fair Administrative Action Act, 2016** by failing to give reasons to the Petitioner as to why they have imposed a different value to **Al-Husnain Motors Ltd** from what they have indicated in the CRSP chart in their public portal.

d) The 1st to 3rd Respondents have violated **Article 10 of the Constitution of Kenya, 2010** as read together with **Section 5 of the Kenya Revenue Authority Act** and **Section 122 of the East African Community Customs Management Act, 2004** as the 1st to 3rd Respondents, have failed to act in an accountable and transparent manner so as to uphold the rule of law, transparency, accountability and good governance.

e) The 1st to 3rd Respondents have violated **Article 35 of the Constitution of Kenya, 2010** as read together with **Section 120 and 122 of the East African Community Customs Management Act, 2004** as the 1st to 3rd Respondents have failed to give a written explanation to the Petitioner as to why **Al-Husnain Motors Ltd** is being charged a different value of CRSP from what the 1st to 3rd Respondents have posted in their portal despite repeated requests by the Petitioner.

7. The Petitioner states that even though **Al-Husnain Motors Ltd** has paid the sum of Kshs. 4,126,042/= as duty based on the CRSP value published by the 1st to 3rd Respondents in the Public Portal, the Respondents have declined to release its motor vehicles. The Petitioner states that the continued detention and/or failure to release the imported used Toyota Land cruiser V8 Chassis Nos. URJ202-4118269 and URJ202-4117405 model CBA-URJ202W 4600 petrol by the Respondents is a continuing act of violation of the rights of **Al-Husnain Motors Ltd** as enshrined in the **Constitution of Kenya, 2010**.

8. The Petitioner avers that the unlawful detention of the aforesaid motor vehicles have resulted to warehouse charges and delay charges which the 4th Respondent is demanding from **Al-Husnain Motors Ltd**. The Petitioner states that its members are in the business to make profits, and so changes in CRSP Guide should not be changed without notice to them or their participation thereof and any action to the contrary is prejudicial to their business and unlawful and unconstitutional. The Petitioner states that as a result of the aforesaid violations, the Petitioner's members are fearing to import motor vehicles for they are not clear what regime of taxation will apply since the 1st to 3rd Respondents are not keen to stick to the published CRSP Portal values, and are also discriminatory. The Petitioner states that as the 1st to 3rd Respondents failed to invite the relevant stake holders before coming up with the new CRSP values, the CRSP values are null and void and should be declared as such, and a new CRSP value established after stakeholders' participation.

9. Arising from above alleged violations the Petitioner prays for the following orders:

a) A declaration that the Respondents have violated **Articles 10, 27, 35, 47, 201 and 210 of the Constitution of Kenya, 2010** in so far as the Respondents computations of the Current Retail Selling Price (CRSP) values on used imported motor vehicles is concerned.

b) A declaration that the 1st to 3rd Respondents are bound by the Current Retail Selling Price (CRSP) values of used imported motor vehicles published in the Kenya Revenue Authority website and/or the public portal of the Kenya Revenue Authority and that the Current Retail Selling Price values (CRSP) therein are the applicable values in respect of imported used motor vehicles in Kenya.

c) A declaration that the Current Retail Selling Price (CRSP) values of used imported motor vehicles published by the 1st to 3rd Respondents which took effect on 5th February, 2018 are null and void for want of public involvement and/ or relevant stake holders.

d) A declaration that the 1st to 3rd Respondents may only alter the Current Retail Selling Price (CRSP) values published in the Kenya Revenue Authority website and/or the public portal of the Kenya Revenue Authority on September, 2017 only after the said Respondents fully comply 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.

e) An order directing the Respondents to pass and/ or release imported used Toyota Land cruiser V8 Chassis Nos. URJ202-4118269 and URJ202-4117405 model CBA-URJ202W 4600 petrol to **Al-Hussein Motors Ltd** unconditionally without subjecting them to further charges.

f) Costs of this petition.

g) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

10. The petition is supported by affidavit sworn by Peter Otieno on 9th July, 2018.

The Respondents' Case

11. The 1st – 3rd Respondents opposed the petition through an affidavit sworn by Joseph Legei, Chief Manager of the 1st Respondent's Customer Border Control Department on 7.8.18. The deponent avers that the 1st Respondent is established under the Kenya Revenue Authority Act, Cap 469 Laws of Kenya. Under Section 5 (1), the 1st Respondent is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5 (2) with respect to the performance of its functions under subsection (1), the 1st Respondent is required to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the First Schedule for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. Under Part I of the First Schedule to the Kenya Revenue Authority Act, Cap 469 Laws of Kenya, the 1st – 3rd Respondents' are mandated to enforce the provisions of the East African Community Customs Management Act, 2004 (hereinafter referred to as the **EACCMA**).

12. It is the 1st to 3rd Respondents' case that all goods entering the Country, and the East African Community at large, the Commissioner of Customs has to determine the value of the goods in order to determine the correct amount of any customs duty to be paid on imported goods. In order to calculate the amount of duty payable the customs value must first be determined and in the majority of cases, customs duty is charged as a percentage of the value of the goods being imported, "**ad valorem duty**". The Respondents refer to Section 122 of the EACCMA which provides that where imported goods are liable to import duty *ad valorem*, then the value shall be determined in accordance with the Fourth Schedule of the Act. The Fourth Schedule to the EACCMA provides for six (6) methods for calculating the customs value of goods which are:

- a. The Transactional Value Method;
- b. The Transactional Value of Identical Goods Method;
- c. The Transactional Value of Similar Goods Method;
- d. The Deductive Value Method;
- e. The Computed Valued Method; and
- f. The Fall-back Value Method.

13. The Respondents aver that in ideal cases, the customs value of imported goods ought to be determined using the Transactional Value Method, which is the price actually paid or payable for the goods when sold for export. However, where the transactional value method cannot be applied owing to the conditions laid for use of the method, the other methods are applied sequentially. In the case of used/second-hand motor vehicles, the application of the Transactional Value Method is not ideal for reasons which may not be reproduced here. So, the Commissioner applies the Fall-Back Method, under which the customs value is based on the value of a brand new motor vehicle when sold in Kenya less an amount for loss of value due to the usage/depreciation, the profit margin and taxes paid in Kenya. In Kenya the value of a brand new motor vehicle is commonly referred to as the '**Current Retail Selling Price – CRSP**'. The CRSP was introduced to ensure that taxes payable by car importers was fair, reasonable, uniform and neutral to all the Kenya citizens importing motor vehicles in Kenya.

14. The Respondents' case is that the CRSP being the value of a brand new motor vehicle when sold in Kenya, the same is technically determined based on the vehicle, make, model and trim levels (extra specifications). In order to obtain the information on the CRSP, the Commissioner of Customs calls for information from the local franchise holders who furnish the Commissioner with the values from the official dealers. The Commissioner calls for information from franchise holders such as; RMA Motors for Jaguar, Land Rover and Ranger Rover brand of motor vehicles; Toyota Kenya for Toyota brand of motor vehicles; Trans Africa Motors for Honda brand of motor vehicles; Subaru Kenya for Subaru brand of motor vehicles; and Crown Motors for Nissan brand of motor vehicles.

15. The call for information from the franchise holders not only provides for an accurate, fair, logical and reasonable assessment of the customs value of a new motor vehicle but also an inclusive method of determining the customs value of a new motor vehicle. The call for information from franchise holders is premised on the provisions of Paragraph 8 (2) (c) of the Fourth Schedule to the EACCMA which bars the Commissioner from applying the price of goods on the domestic market of the country of exportation. Under Paragraph 8 (2) (c) of the Fourth Schedule to the EACCMA the Commissioner of Customs must derive the CRSP from local franchise holders who can scientifically determine the customs value of a new motor vehicle when sold in Kenya. The value is determined scientifically based on the cost of production of a unit which constitutes; the manufacturing cost, administrative costs and operating expenses of the manufacturer which makes up the Free on Board (FOB) value of the vehicle. The franchise dealer then has to load the following costs to the unit; freight, insurance, clearance charges, taxes, operating costs and a reasonable mark-up to arrive at the customs value of new motor vehicle when sold in Kenya.

16. It is the 1st to 3rd Respondents' case that since the customs value of a new motor vehicle when sold in Kenya is determined scientifically, the public participation is limited to persons who can scientifically determine the customs value of a new motor vehicle when sold in Kenya. The Respondents believe that in the circumstances of the conditions set out under the Fourth Schedule to the EACCMA, adequate public participation was undertaken.

17. Further, the 1st to 3rd Respondents aver that sometime in the year 2004, the Petitioner herein and the 1st – 3rd Respondents by consent agreed that the 1st – 3rd Respondents should consult the local dealers on the CRSP to be applied as the benchmark. This is affirmed by the Petitioner's letter dated 30.11.18. It is the 1st – 3rd Respondents' case that they have always obtained the CRSP from the local dealers and shared with the Petitioner prior to publishing and implementing the same as evidenced by the Petitioner's letter dated 30.1.18. That they regularly consult with local importers of used motor vehicles on applicable CRSP values. In the circumstances, adequate public participation is undertaken prior and upon publication of the CRSP hence the 1st – 3rd Respondents have not breached the provisions of Article 1 (1), 10 or 47 of the Constitution.

18. As regards the CRSP value for Toyota Land Cruiser URJ202-4118269 and URJ202-4117405, the 1st – 3rd Respondents aver that based on the CRSP chart published, the CRSP value for TOYOTA Land Cruiser URJ201/202-GNTVKQ-UR-FE V8, 4-wheel drive with an engine capacity of 4600 CC and a petrol tank specification is Kshs. 17,986,500/=. That the importers of TOYOTA Land Cruiser Chassis No. URJ202-4118269 and TOYOTA Land Cruiser Chassis No. URJ202-4117405 both applied the CRSP value of Kshs. 14,400,000/= instead of Kshs. 17,986,500/= to arrive at the total taxes of Kshs. 4,126,042/=. Upon presentation to the 2nd Respondent's officers of the Customs Entry documents for both motor vehicles, the 2nd Respondent made enquiries of the model and modification of both motor vehicles.

The 2nd Respondent sought to physically examine the two motor vehicles and established that the two motor vehicles were of a superior car modification that is ZX. That the 2nd Respondent's officers proceeded to key in the chassis number of the two motor vehicles on a website that gives information on Japanese motor vehicles, <https://www.japan-parter.com/check-manufacture-year.php>, which confirmed that the motor vehicles were of a superior modification ZX.

19. The 2nd Respondent avers that the Land Cruiser ZX is not common in Kenya but upon inquiring from TOYOTA Kenya Limited, the 2nd Respondent was informed that the Land Cruiser ZX was the equivalent of a Land Cruiser VX and its CRSP is Kshs. 17,986,500/=. The 2nd Respondent was informed by TOYOTA Kenya Limited that the Land Cruiser V8 has several modifications such as; GX which is the base model, then an AX which is superior to GX, then an AXL which is superior to AX, then VX (ZX) which is superior to AXL and the most superior modification is VXR (ZXR). That the two motor vehicles, TOYOTA Land Cruiser Chassis No. URJ202-4118269 and

TOYOTA Land Cruiser Chassis No. URJ202-4117405, both being of the superior ZX modification have a CRSP value of Kshs. 17,986,500/=. The Respondents further aver that they have treated the two motor vehicles in accordance with the CRSP published on 5.2.18 (see supporting affidavit page 153). The Respondents aver that the importer's application of a CRSP value of Kshs. 14,400,000/= is not only an under-declaration of the value of the motor vehicles but is also without basis or justification. The 1st – 3rd Respondents aver that they have applied the principle of horizontal and vertical equity in taxation by ensuring persons in similar circumstances bear a similar tax burden and persons with greater tax liability discharge their obligation.

20. The 1st to 3rd Respondents further accuse the Peter Otieno the deponent of the Affidavit in Support of the Petition, who is also the Chairman of the Petitioner, of concealing the fact that he is a Director at Petrosa General Contractors Limited, the clearing and forwarding firm that is responsible for the alleged under-declaration. The 1st to 3rd Respondents aver that Mr. Peter Otieno is not only abusing the office he holds as such Chairman, but also abusing the Court process to avoid paying the rightful taxes to the 2nd Respondent.

21. The 1st to 3rd Respondents aver that at all material times they have been in touch with the clearing agents who entered the two motor vehicles and have explained the reasons for the value uplift. The Respondents have not violated the provisions of Article 10, 27, 35, 47 or any other Article of the Constitution. Further, the Respondent have not acted contrary to the Fair Administrative Action Act or the EACCMA. The Respondents have been transparent and accountable to both the Petitioner and the general public on the CRSP and its application. The 1st – 3rd Respondents are guided by the principles of Article 201 (b) (i) and 210 of the Constitution of Kenya in determining the taxes due and payable for the two motor vehicles TOYOTA Land Cruiser Chassis No. URJ202-4118269 and TOYOTA Land Cruiser Chassis No. URJ202-4117405.

22. In reply to the 1st – 3rd Respondents claim, the Petitioner further avers that the two motor vehicles in question were ordered on 13th June, 2018 whereby Al-Husnain Motors Limited did a telegraphic transfer of funds to the supplier in Japan. The aforesaid order was made after confirming the CRSP value at the 1st – 3rd Respondents portal. As such, it is wrong for the 1st to 3rd Respondents to deviate from the said values, for whatever reason, after the aforesaid motor vehicles have already been imported in Kenya. The Petitioner avers that the 1st to 3rd Respondents have abused the purpose, intention and spirit under which the CRSP was introduced, which was to ensure fairness, reasonability, uniformity and neutrality of the taxes payable by all Kenyans importing used motor vehicles. It is unfair to use different CRSP values for some models of motor vehicle, for example as regards the unit of model URJ292, some vehicles pay the correct taxes of Kshs. 14,400,000/= as per their CRSP while others are being subjected to a wrong CRSP for a unit of model URJ202R which is attracting a CRSP of Kshs. 17,986,500/=. The Petitioner avers that the correct CRSP for Land Cruiser URJ201/202 GNTGKQ UR-FE V8 without letter R is Kshs. 14,400,000/=. The motor vehicle with CRSP of Kshs. 17,986,500/= is for Land Cruiser URJ202R GNTGKQ TZ AT VX. The unit in question is not URJ202R hence it is a wrong vehicle to be compared to the units under dispute. The Petitioner referred the Court to the Respondent's self-filled document at page 93 of the Replying Affidavit. Item No. 14 from the top is the said model of the vehicles in question, Land Cruiser URJ201/202 GNTGKQUR-FE V8 and the value given is Kshs. 14,400,000/=; at item 16 is the vehicle which the Respondent is referring to, being Land Cruiser URJ202R GNTGKQ TZ AT VX with a value of Kshs. 17,986,500/=. The Petitioner notes that the motor vehicles in question are V8 and not VX as alleged by the 1st to 3rd Respondents. The Petitioner supports this position by the bill of lading annexed to the Supporting Affidavit dated 9.7.18.

23. The Petitioner disputes the Respondents allegation that the motor vehicles in question are a superior modification ZX as per the documents annexed by the Respondents. The Petitioner states that the said documents clearly show that the 1st to 3rd Respondents downloaded the said forms or documents from Facebook which is an unreliable source whose authenticity cannot be verified. The Petitioner states that the Respondents are not being honest to the Court because whenever there is any minor change in any value on the CRSP the Respondents do the same under a Tariff Ruling which is published in their portal. However, there has been no minor or major change in respect of the CRSP value for the subject motor vehicles herein.

24. Further, the Petitioner avers that the 1st to 3rd Respondents have annexed price list from car dealers at pages 108 to 116 of the Replying Affidavit in support of the fact that there was consultation while coming up with the CRSP, 2018. However, the 1st to 3rd Respondents have failed to inform the Court that the said price lists were in respect of the CRSP values which took effect in 2017 and have no applicability to the CRSP values of 2018. Indeed, the 1st to 3rd Respondents have nothing to show for the CRSP values of 2018. The importers are normally guided by the two documents, being the Commercial Invoice and the CRSP during importation of motor vehicles. The Car Importers Association of Kenya is to use either of the aforesaid documents depending on which would yield higher taxes to the government.

25. The Petitioner further avers that the units being imported as “used motor vehicles” have never been used before in Kenya market. As such, it is not possible for Toyota Kenya to know the value of a unit that they have never sold. Indeed, Toyota Kenya and the other companies stated by the Respondents do not deal with used motor vehicles which are sold in Kenya at all since they only sell new motor vehicles. In any event these franchise holders from whom the 1st to 3rd Respondents have been getting quotations are Petitioner's competitors and cannot be relied upon to give current values, and would be inclined to provide higher values aimed at driving the Petitioner's members out of business. Again Toyota Kenya and other franchise holders do not do the assembling in the country but import fully assembled units except sometimes lorries, canters and buses. As such, they cannot quantify the costs of manufacturing motor vehicles since they do not know.

The Hearing

26. The petition was heard *viva voce*. **PW 1 – Peter Otieno** testified for the Petitioner and he was cross examined on his Supporting Affidavit, which he adopted as his evidence. PW 1 testified that he is a Clearing and Forwarding Agent under the company called Petrosa General Contractors Limited. He is also the Chairman of the Petitioner, which is a duly registered association of car importers. He annexed his authority to represent members of the Petitioner in the petition. He referred the Court to pages 8-83 which is the Current Retail Selling Price (CRSP) –of new vehicles. The witness testified that KRA gets these values from local importers of motor vehicle on the basis of which KRA levies import tax. Example page 8 – entry No. 1 Alfa Romeo – if it is new it costs Kshs. 2,574,000. This figure has to be depreciated to calculate the tax due. These figures are displayed on the portal of KRA, which is a public portal. Page 153 relates to a Toyota Land Cruiser V8. KRA has given CRSP figure of Kshs. 14,400,000 (see column 16). It is then depreciated depending on when it is brought into

the country. Page 203 is same model V8, also the same value of Kshs. 14,400,000. The same is page 207. These vehicles were passed and cleared. The Petitioner's complaint is that their motor vehicle is the same vehicle as ones in pages 203 and 207. Yet those others were accepted at CRSP value of Kshs. 14,400,000/= but theirs was rejected. Instead page 212 shows how a V8 value of 14,400,000/= was rejected and instead a value for VX which is a more superior version which is Kshs. 17,986,500/= when new was used. The witness referred Court to page 6 of his Further Affidavit and testified that their vehicle is clearly a V8 and not a VX.

27. The witness referred Court to pages 221-231 being correspondences between the parties on the different values of motor vehicles.

28. PW 1 testified that they held one meeting with the Respondents, which was to be followed by other meetings to agree on the new CRSP. This did not take place. However, in February, 2018 KRA uploaded the new CRSP, which the Petitioner has disputed for lack of public participation.

29. The witness prayed that KRA should pass and clear their vehicles and that CRSP for 2017 should continue and the one of 2018 should wait further consultations.

30. Further, PW 1 testified that the Respondent has maligned his name in the Replying Affidavit and thereby damaging his reputation. He testified that he is a person of good standing and chair of several school boards and that he pays his taxes. At one time KRA contracted him to lecture on tax in its college. They could not do that if he had a dubious character or if he did not understand taxation system.

31. PW 2 testified that indeed there can be different values given by local dealers and KRA. But after consultations they reach an agreement. Consultations is normally wide, because the intention is to reach a fair assessment for all parties.

32. **DW 1 was Victor Maina** who testified as an expert witness. He works for KRA at Times Tower Nairobi in the valuation department and his daily duties entail valuation of imports for determination of tax. The witness testified that they base valuation of motor vehicles on make, model and Trim Level, that is, vehicle comfort; leather seats, etc. For determining the value of imported vehicles they use CRSP which means current retail selling price. That means that if one were to buy the car in Kenya brand new how much would it cost. These guidelines are developed through consultations with stakeholders. The final product comes from KRA. The local dealers give them their current prices for all new models. The CRSP list contains the make, model, chassis, engine rating, number of seats. For commercial vehicles they have the gross vehicle weight (GVW), the drive e.g. 4 wheel or 2-wheel drive, fuel type, transmission whether manual or automatic and the price.

33. The witness testified that for the year February, 2018 there was a CRSP valid from 5th February, 2018. In this case the Petitioner's members were not consulted. Only the franchise holders were consulted.

34. As for the two detained motor vehicles DW 1 testified that the Petitioner did a self-declaration for a Land Cruise URJ202 VX. However, upon verification it was found to be of higher trim (comfort) level. That is why valuation was moved from Kshs. 14.4 million to Kshs. 17.9 million. The engine type is V8. The trim level is a VX. That was the basis for the said valuation.

35. DW 1 testified that there is a V8 which is more superior than another V8. The one costing Kshs. 14,400,000/= is the lower version while the one of Kshs. 17,986,500/= is the higher version. The witness referred the Court to page 203 of petition where there is the self-declaration form. But it does not show which motor vehicle it refers to. (See also page 205 where the position is the same). DW 1 testified that the applicable CRSP for the suit motor vehicles is that of 2017 when the vehicles were imported. DW 1 testified that the difference in valuation is based on chassis model. One is G the other E. These differentiate different drive or comfort levels. There are ways of differentiating V8. The letters E and G are used to do that. These letters are found in the chassis or may be visible behind the vehicle. There are also internal comfort levels e.g. climate – which distinguishes them. In this particular case a verification was done showing that the vehicle was a V8 ZX-the highest level. So the suit motor vehicles were valued on the rate of VX on advice from M/S Toyota Kenya.

The witness disowned the allegation in the Replying Affidavit sworn by Joseph Legei who at paragraphs 47 and 48 states that Peter Otieno is abusing Court process to avoid paying taxes. The witness denied these allegations stating that he has no evidence of such allegation against Mr. Otieno.

Submissions

36. Parties filed submissions which I have carefully considered together with the petition. In my view, the following are the issues to be determined by this Court.

- i. Whether there was stakeholder participation in formulating and/or implementing the CRSP which took effect on 5th February, 2018, and if not, whether the resultant CRSP is unlawful.
- ii. What is the CRSP value for Toyota Land Cruiser URJ201/202-GNTGKQ-UR-FE V8.
- iii. Whether the used Toyota Land Cruiser V8 Chassis Nos. URJ202-4118269 and URJ202-4117405 should be released to the Petitioner.

37. Before I deal with the main issues in the petition, I need to comment on the contents of the Replying Affidavit as they touch on the character of Mr. Peter Otieno. In Replying Affidavit of Joseph Legei sworn on 7.8.18, the 1st – 3rd Respondents accuse Mr. Peter Otieno, who deposed to the Supporting Affidavit herein, and is the Chairman of the Petitioner, of concealing facts, under valuation, and abusing the Court process to avoid paying rightful taxes.

38. In response to the allegations, the said Peter Otieno, PW 1 herein, stated that those allegations by the Respondents have maligned his character and have painted him as a person who is careless, cannot be trusted and does not pay his tax or conceals them. Mr. Otieno on his Further Affidavit states that he is a member of Archdiocese of Mombasa, Treasurer of St. Mary's School, Changamwe, a Chairman of Board of Governors at St. Charles Lwanga Secondary School and that he does not owe the Respondents any tax. He has clear anti-corruption and criminal record. Besides these Peter Otieno states that he teaches tax courses and has been consulted by the Respondents who know him to be a law abiding citizen. Mr. Otieno asked the Court to cite Mr. Joseph Legei for perjury.

39. In response to these allegations DW 1 stated that he was not aware of the allegations against Mr. Otieno, and that the person who made the allegations did not come to Court to give evidence.

40. On those allegations this Court observes that it is the duty of parties to testify the truth of documents they rely on in Court. Intentional falsehood is punishable. The damaging averments by Joseph Legei in the Replying Affidavits were not proved, and the said Mr. Legei did not come to Court to shed more light on them. However, there is no prayer in the petition concerning those allegations in the Replying Affidavit. The best this Court can do is to castigate the author of those allegations for failure to explain, substantiate or prove the same.

(i) Whether there was stakeholder participation in the formulation of CRSP which took place on 5.2.18

41. The Petitioner is an Association of Car Importers of Kenya duly registered as such and claims to represent over seventy-three (73) Car-Importers. This allegation has not been challenged or denied. The Petitioner avers that being a stake holder in the car importation business it was entitled to be given a chance to participate in the process which resulted in the CRSP values which took effect on 5.2.18. This, according to the Petitioner, is a constitutional imperative, established under Article 10 of the constitution which provides that:

“10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.”

Article 10 (1) (c) makes it clear that a public body like the 1st Respondent herein has constitutional obligation when it makes or implements public policy decisions. In **Republic vs. County Government of Kiambu Ex-parte Robert Gakuru & another [2016] eKLR** the Court held that, **“Here I must say that public participation ought not be equated with mere consultation. Whereas “consultation” is defined by Blacks Law Dictionary 9th Edition at page 358 as “the act of asking the advice or opinion of someone”. Participation on the other hand is defined at page 1229 thereof as “the act of taking part in something, such as partnership ...” Therefore, public participation is not mere cosmetic venture or a public relations exercise.”**

42. The importation of motor vehicle is something which affects the public at large. As such, while coming up with the CRSP values (regulations) which determine the amount of taxes payable for imported motor vehicles the public must be involved. In particular, the car importers association of Kenya which is the association governing car importers, should have been given a chance to give its views. As state organs, the Respondents were under an obligation to ensure that all the stakeholders in the car importation industry were involved in the formulation of the CRSP values. However, the 1st to 3rd Respondents do not consider this constitutional imperative an important consideration. Their witness, an expert witness, testified that for the year 2018 there was a CRSP valid as from 5th February, 2018. In this case, the Petitioner's members were not consulted. Only franchise holders were consulted. According to him, this was adequate consultation to constitute public participation. The Respondents' case is that since the customs value of a new motor vehicle is determined scientifically, the public participation is limited to persons who can scientifically determine the customs value of a new motor vehicle when sold in Kenya. The Respondents believe that in the circumstances of the conditions set out under the Fourth Schedule to the EACCMA, adequate participation was undertaken. However, in my view public participation is a constitutional imperative which requires that the public, or that section of the public, that would be affected by a policy implementation should be involved in the formulation of that policy, or at least, be informed or made aware of the formulation of that policy.

In **The Speaker of the Senate & Another vs. The Hon. Attorney General & Others [2013] eKLR** the Supreme Court expressed itself thus:

“213. Public participation in governance is an internationally recognized concept. This concept is reflected in international human rights instruments. The Universal Declaration of Human Rights of 1948 proclaims in Article 21 that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. The International Covenant on Civil and Political Rights (ICCPR) affirms at Article 25, that:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;

a. To take part in the conduct of public affair, directly or through freely chosen representatives;

b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

c. To have access, on general terms of equality, to public service in his country.”

214. The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 1 of the constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions, and the government should respond to them. Therefore, participation must certainly entail citizens’ direct involvement in the affairs of their community as the people must take part in political affairs. This principle was captured by Majanja J in Association of Gaming Operators – Kenya & 41 others versus Attorney General & 4 others (supra) when the learned Judge held that:

“Public participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the constitution is one of the sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty.”

43. The Respondents have stated clearly that they did not consider the Petitioner’s views, but instead sought the views of franchise holders. In other words the Respondents preferred to seek the views of Petitioner’s competitors but completely disregarded the people who would be most affected by its decision. In light of Article 2 (4) of the Constitution, there is a clear proof of infringement of a constitutional provision in the manner in which the said regulations were passed. They are clearly unconstitutional.

44. However, the issue now is whether or not the CRSP values which took effect on 5.2.18 should be declared a nullity. This question is important because transactions have taken place with these CRSP values since 5.2.18. A declaration of unconstitutionality of the process would lead to a lot of inconveniences which this Court should not allow. This Court is aware that prices of motor vehicles keep changing and that the CRSP of 5.2.18 may soon be outdated and a new one brought in as a result of price changes. It would therefore not be prudent to nullify the transactions which have so far proceeded on the basis of CRSP of 5.2.18. However, the Respondents would be constitutionally obligated to comply with the law on public participation when formulating the next CRSP.

(ii) What is the CRSP value for Toyota Land Cruiser URJ201/202-GNTGKQ-UR-FE V8

45. On 30th January, 2018 the Respondents published the “new” CRSP which was to be effective from 5th February, 2018 for each and every model of used vehicles being imported in Kenya by car importers. Based on the aforesaid CRSP chart the CRSP value for Toyota Land Cruiser URJ201/202 GNTGKQ-UR-FE V8, 4-wheel drive, station wagon with an engine capacity of 4600 cc and a petrol tank specification, is Kshs. 14,400,000/=. This is the description of the motor vehicle imported by Al-Husnain Motors, who made the importation of the said motor vehicles on 13.6.18 and transferred the purchase price to the supplier in Japan. Even though Al-Husnain Motors Ltd paid the sum of Kshs. 4,126,042/= to the 1st Respondent as per the CRSP value published, the Respondents declined to pass and release its motor vehicle. Instead, the Respondents are demanding a CRSP value of Kshs. 17,986,500/= which from the Portal, appears to be for a different motor vehicle, being Toyota Land Cruiser URJ202R-GNTGKQ TZ AT VX. To contract this position on 10.4.18 and 3.5.18 Al-Husnain Motors Ltd imported similar motor vehicles and was subjected to the CRSP value of Kshs. 14,400,000/= (see the documents marked as annexure “P.O-9 at pages 207 to 210 in the Petition document). Even though the Respondents contend that the CRSP value for Toyota Land Cruiser URJ201/202-GNTGKQ-UR-FE V8, 4-wheel is Kshs. 17,986,500/= at paragraph 33 of the Replying Affidavit sworn by Joseph Legei the CRSP value chart annexed in support of the above fact indicates that the CRSP value for Toyota Land Cruiser URJ201/202-GNTGKQ-UR-FE V8, 4 is Kshs. 14,400,000/= and not Kshs. 17,986,500/= as alleged by the 1st to 3rd Respondents. (See page 93 paragraph 14 of the aforesaid Replying Affidavit.)

46. It is apparent that the 1st Respondent is applying double standards in the way in which it assesses the applicable taxes. The Petitioner’s case is that the 1st Respondent is estopped from using a different value. However, the Respondent states that the said motor vehicles were modified and therefore they attract a different CRSP value. However, DW 1 testified for the Respondents that applicable CRSP figures are those contained in the public portal. As such, if they intended to charge a different fee for alleged modified motor vehicles, the Respondents would have simply made the changes through a Tariff Ruling deposited in the public portal.

47. In their defence the Respondents aver that they got the applicable figures from Toyota Kenya, the Toyota brand franchise holders. This is a clear admission of dereliction of duty. Toyota Kenya are competitors of the Petitioner and cannot, without participation by members of the Petitioner, be relied upon to give impartial data affecting its opponents. In this matter, the Respondent appears quite contradictory. While it says they got their data from Toyota Kenya, in the Replying Affidavit of Joseph Legei, the Respondents’ aver that the said data was found in a website that gives information on Japanese motor vehicles, and which confirmed that the motor vehicles were of a superior modification ZX. In my view, competition of tax due cannot be based on guesswork, conjecture, trial and error and Facebook data. The policy which citizens must pay their taxes cannot be left to a data to be sources in the website.

48. Furthermore, the CRSP value of Kshs. 17,986,500/= being claimed by the Respondents is in respect of Land Cruiser URJ202R GNTGKQ TZ AT VX (See page 93 of the Replying Affidavit item number 16) while the motor vehicles subject to this application is Land Cruiser URJ201/202 GNTGKQ UR-FE V8 without letter R whose CRSP value is Kshs. 14,400,000/=. The unit in question is NOT URJ202R hence it is wrong for motor vehicle Land Cruiser URJ201/202 GNTGKQ UR-FE V8 to be subjected to the CRSP value of Land Cruiser URJ202R GNTGKQ TZ AT VX.

49. It is the finding of this Court that the Respondents’ submission that a modified V8 will become a VX is not supported by the manufacturer’s certificate and is a submission based on unknown principle or policy in taxation. A modified V8 will simply be a modified V8 and not a VX. This explains why the engine capacity of the motor vehicle will remain that of a V8. As testified by DW 1, the Respondent’s witness, Version 8 motor vehicle can never be version VX (10). The Respondents cannot subject a Toyota V8 to the taxes of a VX on the basis of alleged modifications. If the Respondent intended to charge a different figure for a modified V8, the Respondents should have stated so in the public portal. The motor vehicles in question are **V8** and not **VX** as the Respondents allege. It is trite law that any taxation regime must be clear and unambiguous. Where there are any inconsistencies or grey areas, the interpretation which the Court must adopt is that one which favours the tax payer. This is what is called “strict interpretation” of tax statute. The intention is to shield a tax payer from unclear or unclarified demands for tax. In **Stanbic Bank Kenya Limited vs. Kenya revenue Authority Civil Appeal No. 77 of 2008**,

the Court of Appeal affirmed this legal principle in interpretation of tax status. It said:

“I would wish to repeat again what I said in the case of Commissioner of Income Tax vs. Westmont Power (K) Limited 2006 1EA 54, that taxation laws that have the effect of depriving citizens of their property...must be interpreted with great caution. It is paramount that their provisions must be express and clear so as to leave no room for ambiguity. Any ambiguity in such a law must be resolved in favour of the tax payer and not the public revenue authority which are responsible for their implementation.”

50. This Court is satisfied that the Respondents have no legal mandate to extract more taxes from Al-Husnain Motors on the basis of Facebook website data, or data offered in unclear circumstances by Toyota Kenya who are the Petitioner’s competitors. Clearly, the basis of such taxation is guesswork whose result is ambiguity which has led to some importers being left off the hook while others being forced to pay. This practice if allowed to continue will promote bias, unfairness and discrimination in assessment of tax due.

51. **Articles 10 and 47 of the Constitution** as read together with **Section 5 of the Kenya Revenue Authority Act** and **Section 122 of the East African Community Customs Management Act, 2004** provide that the Respondents shall act in an accountable, credible and transparent manner so as to uphold the rule of law and good governance. The Respondents are not seen to have upheld these virtues in regard to the way they have sought to assess tax due on the two suit motor vehicles.

(iii) Whether the Toyota Land Cruiser V8 Chassis Nos. URJ202-4118269 and URJ202-4117405 should be released to the Petitioner or the importer Al-Husnain Motors Limited

52. Al-Husnain Motors Limited has already paid the CRSP value of Kshs. 14,400,000/= in respect of imported used Toyota Land Cruiser V8 Chassis Nos. URJ202-4118269 and URJ202-4117405 model CBA-URJ202W 4600 petrol. This Court has rejected any further attempt by the Respondents to subject these motor vehicles to further taxation on the basis of ambiguity and source of data. This Court has also found that the Respondents have violated the constitutional and statutory requirements of accountability, credibility and transparency in assessing the tax due. It is the finding of this Court that further demand of taxes by the Respondents is not explained and is not justified. The doubt and ambiguity that exists in the policy regarding the assessment of tax for the two suit motor vehicles must be given to the benefit of the importer or tax-payer. The Respondents are therefore estopped from running away from the CRSP value of Kshs. 14,400,000/= in respect of the two (2) suit motor vehicles as declared in the public portal. As such, there is no basis upon which the Respondents should continue holding on the Al-Husnain aforesaid motor vehicles and the same shall forthwith be released to the importer.

Disposition

53. Arising from the foregoing it is the finding of this Court that the Petitioner has proved the petition on a balance of probability. The petition is allowed as follows:

(a) A declaration hereby issues that the Current Retail Selling Price (CRSP) values of used imported motor vehicles published in the Kenya Revenue Authority Website and/or Public Portal which took effect on 5.2.18 were arrived at without public participation and violate Articles 10 and 47 of the constitution and are unconstitutional.

(b) A declaration that for the purposes of continuity and in the interest of the public the transactions already effected via the said CRSP in (a) above shall remain valid for all intents and purposes, and that the said CRSP in (a) above shall continue to apply until such a time as the Respondents will establish a new CRSP value in accordance with the law within twelve (12) months from the date of this Judgement.

(c) An order is hereby given for immediate unconditional release to the Petitioner on behalf of the importer Al-Husnain Motors Limited the two (2) suit motor vehicles being used Toyota Land Cruiser V8 Chassis Nos. URJ202-4118269 and URJ202-4117405 model CBA-URJ202W 4600 petrol.

(d) The costs of the petition are for the Petitioner.

Dated, Signed and Delivered at Mombasa this 16th day of October, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ondeng holding brief Gikandi for Petitioner

No Appearance for Respondents

Mr. Kaunda Court Assistant