



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**PETITION NO. 23 OF 2016**

**BETWEEN**

**VIPUL KAKAD T/A KAVICO AUTO SPARES**

**& 328 OTHERS..... PETITIONERS**

**AND**

**KENYA BUREAU OF STANDARDS ..... RESPONDENT**

**JUDGMENT**

1. The petitioner has brought this petition on his own behalf and on behalf of 328 others (“the petitioners”). Several interested parties have also joined these proceedings. They are business owners in various parts of the Republic operating as wholesalers and or retailers of locally manufactured and imported products.

2. The respondent, **Kenya Bureau of Standards (“KEBS”)** is a statutory body established under **Standards Act (Chapter 496 of the Laws of Kenya)**, mandated to promote standardization in industry and commerce for the facilitation of trade and protection of consumers and environment. It is charged with promoting a level playing field in the market for both locally manufactured and imported products and regulating the quality of products imported into Kenya through issuance of certificates of conformity for products that meet the required standard.

3. In exercise of its mandate under the **Standards Act**, KEBS published the **Import Standardization Mark Guidelines** (“the Guidelines”) pursuant to **Legal Notice No.78 of 2005** dated 28<sup>th</sup> July 2015 titled, “*The Verification of Conformity to Kenya Standards of Import Order, 2005*”. Under the Guidelines all imported products are required to bear **Import Standardization Mark (“ISM”)** stickers to signify that products meet the required standards and are certified by KEBS.

4. Under Guideline 7.2, the implementation date for new imports was 1<sup>st</sup> September 2015 whereas imported products already in the market on the effective date could continue to be sold without the ISM stickers up to 30<sup>th</sup> June 2016 after which no imported products would be allowed in the market without the ISM stickers. Accordingly, Guideline 7.3 advised importers with huge old stock likely to be in the market after the 30<sup>th</sup> June 2016 deadline to apply and acquire the ISM stickers from KEBS. The relevant part of the Guidelines provide as follows:

*7.1 This guideline is effective for new imports as from 1<sup>st</sup> September 2015.*

*7.3 Imported products already in the market can be sold without the new ISM stickers up to*

*30<sup>th</sup> June 2016. No imported product subject to this regulation will be allowed for sale in Kenya marked after 30<sup>th</sup> June 2016.*

*7.4 Importers with a huge old stock likely to be in the market after the above deadline are advised to apply and acquire the new ISM stickers.*

5. Aggrieved by the Guidelines 7.2 and 7.3, the petitioners filed this petition alleging violation of their constitutional rights guaranteed under **Articles 27 and 50** of the Constitution. The petitioners allege that the Guidelines only deal with importers and the products in the hands of such importers but they do not go further to provide a way forward for wholesalers and retailers who are in possession of old merchandise which do not bear any certification stickers. The petitioners allege that such treatment is discriminative. They complain that if the Guidelines are implemented, any business or person found in possession of products without an ISM sticker after 30<sup>th</sup> June 2016 shall be liable to prosecution, punitive fines, forfeiture and destruction of goods and any imported goods without ISM stickers will be deemed to be substandard.

6. The petitioners further complain that the Guidelines were formulated and published without any consultation with stakeholders in the wholesale and retail sector yet the guidelines also affected them. They argue that failure by the respondent to consult all the stakeholders was a breach of the provisions of **sections 5, 6, 7, 8 and 13** of the **Statutory Instruments Act, 2013**. They also complain that the Guidelines are not valid as they are in violation of **section 21** of the **Statutory Instruments Act** as they are deemed to automatically revoked upon expiry of 10 years.

7. The petitioners argue that affixing ISM stickers on old stock as provided for in Guideline 7. 3 would result in conflict with the provisions of the **Income Tax Act** and hence subject the petitioners to adverse consequences from Kenya Revenue Authority.

8. The petitioners' case is supported by the affidavit in support of the petition sworn by Vipul Kakad on 30<sup>th</sup> June 2016 and a further affidavit sworn on 13<sup>th</sup> October 2016. The interested parties support the petitioners' case. The petitioners reiterated their case by oral submissions and for the above reasons, asked the court to allow their petition and grant the following prayers:

*a) A declaration that petitioners' constitutional rights to equal protection and equal benefit of the law, non-discrimination, protection of right to property, fair hearing, fair administrative action and to be subjected to equal and fair hearing and consultations before implementation of the Import Standardization Mark with regard to old pre-existing stock have been violated and infringed.*

*b) A declaration that the respondent has abdicated and/or abused its authority by insisting on old imported pre-existing stock having to be standardised and Certificates of compliance presented which is discriminatory and amounts to retrospective application of the law.*

*c) A declaration that the petitioners' fundamental rights against being treated in a discriminatory manner as guaranteed by Articles 10, 19, 20, 27 and 50 of the Constitution of Kenya have been and are likely to be violated by selectively addressing importers' issues allowing them to apply for backdated ISM stickers while failing to consider or address the issues arising with respect to the same stock with regards to retailers and wholesalers yet the implications of non-compliance directly and primarily fall on these two stakeholders.*

*d) An order of prohibition prohibiting the Respondent its officers or agents or any other person or entity acting under its authority from implementing and enforcing the provisions of regulation 7.2 and 7.3 of the Import Standardization Mark Guidelines subject of this petition and restraining the prohibiting the harassment and prosecution of the petitioners and their businesses.*

*e) An order of prohibition restraining the respondent, its officers and or agents or any other person*

*or entity acting under its authority from seizing, alienating, destroying, damaging, dealing with or in any other way interfering with the goods of the petitioners who have pre-existing imported stocks without the current ISM mark.*

*f) The above prohibitory orders do remain in force until the respondent and the petitioners consult and arrive at a mutual agreement on the modus operandi and implementation of the standardization marks regulation on pre-existing imported goods held by the petitioners prior to the date of implementation of the standardization mark, 1<sup>st</sup> July 2016.*

*g) An order of Certiorari to remove into this Honourable Court to be quashed regulations 7.2 and 7.3 contained in the ISM Guidelines dated 28<sup>th</sup> July 2015.*

*h) An order of mandamus be issued to the respondent compelling it to constitute a committee to immediately enter into consultations and meetings with the committee to be constituted by the petitioners, with a view to discussions and arrival at a consensus on the application of ISM on old pre-existing stocks.*

*i) Such further orders, writs and directions as this Honourable court may deem just and expedient.*

9. KEBS opposed the petition and set out its case in the Replying Affidavit sworn by its Acting Director Quantity Assurance and Inspection, Mr. Eric Kiptoo Chesire on 7<sup>th</sup> September 2016 and its written submissions. KEBS argued that consultative meetings with key stakeholders were held in Nairobi and Mombasa on 30<sup>th</sup> July 2015 and before such meetings were held, notices were put in the daily newspapers inviting stakeholders to the meetings. KEBS stated further that in addition to the consultative meetings held in Nairobi and Mombasa, it wrote a letter to the National Chairperson of the United Business Association (UBA) to which the petitioners are members answering the concern of the members and indicating among other things that old stocks with old stickers would be allowed to stay on the shelves until the stocks were exhausted. KEBS denied that it discriminated against the petitioners.

10. KEBS also argued the petition is defective as it does show, with relative precision, what rights were infringed and how the rights have been infringed or threatened to be infringed. Further that the petition is incompetent as it seeks for orders of certiorari outside the mandatory period of six months.

11. From the pleadings and submissions of the parties, I find that the main constitutional issues for determination are whether there were consultations with stakeholders before formulation and publication of the Guidelines and whether the petitioners were discriminated against.

12. I will deal with the issue of discrimination first. It implies that there is a distinction between importers, wholesalers, retailers and other persons dealing with imported products who have been treated differently or unfairly. I think it is important to understand the context of the Guidelines and the complaints raised by the petitioners. KEBS was mandated by **Legal Notice No. 78 of 2005** to inspect and certify imported products under the terms and conditions set out therein. To implement these provisions, KEBS issues guidelines from time to time. It is worth noting that **Legal Notice No. 78** came into force in 2005 so that it is not necessarily retrospective as it would apply to imports from that date subject to the relevant Guidelines. Hence the petitioners' complaint that they have held stocks from the 1970's which would be affected by the Guidelines is somewhat misplaced and their fears unfounded.

13. Guideline 7.1 is effective for new imports from 1<sup>st</sup> September 2015. The effect of Guideline 7.2 is that products imported between 1<sup>st</sup> September 2015 and 30<sup>th</sup> June 2016 are exempted from application of the requirement to have ISM stickers. Therefore, old stock referred to in Guideline 7.3 is stock imported between 1<sup>st</sup> September 2015 and 30<sup>th</sup> June 2016 and not all pre-Guideline stock. The petitioners' fears were addressed by the letter dated 16<sup>th</sup> June 2016 to the Chairman of UBA in which the Managing Director of KEBS addressed the issue of old stock on the following terms;

*Handling of Old Stock*

*With regard to existing stock with old stickers those products will be allowed to stay on the shelves until the stocks are exhausted. However, any stocks coming into the country effective July 1, 2016 should comply with the new requirement.*

14. The petitioners' case hinges on **Article 27(1)** and **(2)** of the Constitution which states as follows:

*27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

15. A person alleging a violation of **Article 27(1)** and **(2)** of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of **Article 27**. Differentiation is permitted if the law, regulation or policy is justified and reasonable and intended to achieve a legitimate government objective (see ***Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another***, NRB Petition No. 102 of 2011 [2011]eKLR and ***Community Advocacy and Awareness Trust & 8 Others v Attorney General***, NRB Petition 243 of 2011 [2012]eKLR).

16. Do the Guidelines make any distinction between importers, wholesalers, retailers or others who deal in imported goods? Guideline 4.3 defines importer as *"The person who receives goods manufactured in another country and places them in Kenyan market."* This definition, in addition to Guideline 7.0, does not make a distinction between importers, exporters, wholesalers and retailers in the narrow sense since the aim of the Guidelines is to deal with imported products which get into the Kenyan market from another country by whatever means. Thus, within the context of the Guidelines, an importer is any person who deals with imported goods irrespective of their actual status. This finding is consistent with the purpose of **Legal Notice No. 78 of 2005** to prevent counterfeit and low quality goods from getting into the market, to protect consumers and ensure that they have access to quality goods and to protect the environment. In this respect, I reject the argument that the Guidelines make a distinction between wholesalers, importers, retailers and the like for the prohibition against discrimination to kick in. I therefore find and hold that there is no basis upon which a case for discrimination can be made.

17. The petitioners have challenged the constitutionality of the Guidelines on the basis that there were insufficient consultations with stakeholders before their formulation and publication. The necessity for consultations is now embodied in the National Values and principles of governance enshrined in **Article 10** of the Constitution.

18. The petitioners have argued that the Guidelines also violate **section 5** of the ***Statutory Instruments Act, 2013*** for failing to provide for public participation in the manner set out by the *Act*. In response, counsel for the respondent pointed out that since **Legal Notice No. 28** came into force in 2005, it is exempted from application of the *Act* because of **section 27(2)** of the *Act* which provides:

*Despite the provisions of subsection (1), any regulations, order or notice issued immediately before commencement of this Act shall continue in force as it were made under this Act unless it is expressly revoked by an Act of Parliament under which it is made.*

**I agree with the respondent's submission that section 27 of the *Statutory Instruments Act, 2013* preserves existing subsidiary legislation passed before the *Act* came into force and does not therefore apply to **Legal Notice No. 78 of 2005** (see ***Richard Dickson Ogendo and 2 Others v Attorney General and 5 Others*** NRB Petition No. 70 & 92 of 2014 [2014]eKLR). Furthermore, the Guidelines are not new legislation or rules but are Guidelines for implementing **Legal Notice No. 78 of 2005**. As Guideline 3.0 states:**

***This document provide(s) information and guidelines on issuance and use of Import Standardization Mark (ISM) by authorized importers to ensure control of non-complying***

***imported products and also to promote a level playing field in the market for both locally manufactured and imported products.***

20. The fact that ***Statutory Instruments Act, 2013*** does not apply to this case does not relieve the respondent from its obligation to comply with constitutional provisions as to public participation. In the seminal case of ***Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 CC***, the South Africa Constitutional Court summarized the importance of public participation and consultation in a democracy thus:

*[145] It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.*

21. Whether there was consultation is a question of fact. The petitioners complain that the public consultation was geared toward all importers and clearing agents and that there was no provision for wholesalers and retailers who were not specifically targeted. As I stated elsewhere in the judgment, the use of importers in the Guidelines is refers to those who deal in imported products howsoever named.

22. The respondent's answer by setting out, in the replying affidavit, how it consulted different stakeholders. It has annexed newspaper advertisements showing that stakeholders were invited to attend sensitization workshops in Mombasa and Nairobi and provided a list of names of business entities represented in the said workshops. In addition, there is evidence on record that KEBS answered concerns raised by UBA through the letter to the chairperson of UBA dated 16<sup>th</sup> June 2016.

23. Considering the material before me, I find and hold that there was sufficient opportunity for public participation. Moreover, I do not think that every single individual or business should be consulted for **Article 10** of the Constitution. It was held in ***Moses Munyendo and 908 Others v Attorney General and Another, NRB Petition No. 16 of 2013[2013]eKLR*** that:

*The organisations consulted are, in my view, broadly representative of agricultural interests in the country. This evidence is not controverted by the petitioners. Furthermore, I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10. Thus the contention that by the first petitioner, "I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law" is not necessarily decisive of the lack of public participation...*  
[Emphasis mine]

24. Likewise, in ***Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County of Nairobi Government and 3 others, Petition No 486 of 2013***, the Court observed that:

*Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd where he expressed himself as follows; "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."*

25. I also find that there is evidence on record that KEBS replied to their concerns through its letter to the chairperson of UBA and even answered questions raised by individual business persons. By the letter

dated 16<sup>th</sup> June 2016, the Managing Director of KEBS addressed some of the issue complained about by the petitioners. It is immaterial that to this finding that some of the petitioners are not members of the UBA.

26. My impression is that the gravamen of the petitioners' complaint concerns implementation of the Guidelines. The respondent has the statutory authority to promulgate and implement the Guidelines. The manner of implementation is wholly within the scope of KEBS and the fact that the Guidelines are inconvenient or difficult to implement does not of itself give the court licence to annul them absent clear violation of the Constitution or enabling law (*Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013[2014]eKLR*).

27. I therefore find and hold that the petitioners have on a whole failed to show that there was no consultation or that they were discriminated against to warrant intervention by the court. It is now clear that the petition must fail. In view of the decision I have reached I do not find it necessary to deal with the respondent's technical objections to the petition.

28. The petition is dismissed. There shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 6<sup>th</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Onsongo with him Mr Menezes and Mr Ngala Awino instructed by L. G. Menezes and Company Advocates for the petitioners.

Rachier and Amollo Advocates for the respondent.