



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS JR APPLICATION NO. 24 OF 2015

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS**

AND

**IN THE MATTER OF: INDEPENDENT ETHICS AND ANTI-CORRUPTION COMMISSION
OF KENYA**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLE NO. 22, 23, 40, 43
AND 47**

AND

**IN THE MATTER OF: THE EAST AFRICAN CUSTOMS COMMUNITY MANAGEMENT
ACT SECTION 18 AND 200**

AND

IN THE MATTER OF: KENYA BUREAU OF STANDARDS CODE 1515:2000

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**THE ETHICS AND ANTI-CORRUPTION COMMISSION
KENYA.....RESPONDENT**

AND

KENYA BUREAU OF STANDARDS.....INTERESTED PARTY

NIPPON KOREA INVESTMENTS KENYA LTDEX PARTE

RULING

1. In its Notice of Motion dated 7th October, 2015 and filed on 8th October, 2015 (the Application), Nippon Korea Investment Kenya Limited (the Applicant) sought two orders namely -

- (a) an order of mandamus compelling the Respondent to release to the Applicant the twenty (20) motor vehicles listed in the Application;
- (b) costs of the proceedings (the Chamber Summons for leave, dated 22/06/2015), and the Application.

2. As required by law, the Application was supported by -

- (i) the Statutory Statement and Affidavit Verifying the Facts attached to the Chamber Summons aforesaid of 22/06/2015;
- (ii) the Applicant's Written Submissions and authorities referred to and attached thereto.

3. The application was however opposed by the Respondent, through –

- (a) the Replying Affidavit of **Abdulhamid Low** sworn and filed on 14th August, 2015, and
- (b) the Further Affidavit of the said **Abdulhamid Low** sworn on 10th December, 2015, and filed on 11th December, 2015;
- (c) the Respondent's **Written Submissions** dated and filed on 15th March, 2016 and the authorities relied upon and cited in the said submissions;
- (d) the **Replying Affidavit** of **Eric Chesire** sworn on 9th December, 2015 and filed on 10th December, 2015, on behalf of the Interested Party, the Kenya Bureau of Standards, which was enjoined to the Application pursuant to its Application dated 16th November, 2015 and filed on 19th November, 2015 and orders made on 27/11/2015;
- (e) the Interested Parties **Written Submissions** dated in March, 2016 and filed on 7th March, 2016 along with the cases cited therein and relied upon.

4. I have perused and considered the Application, the Applicant's written submissions and cases relied upon, the submissions of the Respondent together with cases relied upon by the Respondent, and the submissions of counsel for the Interested Party. I have also considered carefully the respective affidavits on behalf of the Applicant, the Respondent and the Interested Party **for**, and **against** the order of **mandamus** sought by the Applicant against the Respondent herein. There is only issue raised by the Applicant whether an order of **mandamus** should be granted as sought by the Applicant. The Applicant pleads that the orders be granted because the decision to seize the Applicant's twenty (20) vehicles was made -

- (a) unreasonably;
- (b) in abuse of power;
- (c) contrary to law;
- (d) contrary to public policy and public interest;
- (e) contrary to the legitimate expectation of the Applicant;
- (f) unfair, unjust and discriminative in nature;

- (g) arbitrary, capricious and made in bad faith;
- (h) made in breach of the rules of natural justice.

5. The Respondent and Interested Party opposed the application, through the Replying Affidavit and Further Affidavit of **Abdulhamid Low**, and the Replying Affidavit of **Eric Chesire**, and submitted that the seizure of the motor vehicles was in accord with all the applicable law, the Standards Act, (Cap 496, Laws of Kenya), the Kenya Anti-Corruption and Economic Crimes Act (Cap 65, Laws of Kenya), and the East African Community Customs and Management Act (“EACMA”).

DETERMINATION

6. The remedy of **mandamus** is a mandatory order (formerly an order of mandamus), from the High Court ordering the performance of a public or statutory duty, requiring the subordinate court, the public body or authority to perform the statutory duty imposed upon such body, authority, or subordinate court to perform.

7. The claim herein is for issue of an order of mandamus compelling the Respondent to release the motor vehicles to the Applicant. If it were a civil matter, the relief sought would be an order for a mandatory injunction the claim here for the judicial review order or mandamus. Before making such an order, there is need to establish the statutory mandate of the Respondent. The mandate of the Respondent is set out in Article 79 of the Constitution. Article 79 says –

“Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.”

8. The Chapter six referred in Article 79 is titled **Leadership and Integrity**. That chapter covers a host of provisions, including, **responsibility of leadership, the oath of office of state officers, the conduct of state officers, restriction on activities of state officers, citizenship and leadership, legislation to establish the ethics and anti-corruption commission and legislation and leadership.**

9. As a commission, the Respondent has authority under Article 252(2)(a) to conduct investigations on its own initiative or on a complaint made by a member of the public. In addition the Respondent is established under Section 3 of the Ethics and Anti-Corruption Act, pursuant to the constitutional mandate granted to Parliament under Article 79 of the Constitution. Under the said Act, the Respondent is vested with additional functions under Section 11(1)(d)(i) and (j) of the Act to –

“(1) investigate and recommend to the Director of Public Prosecution of any acts of corruption or violation of the codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution;

(2) subject to Article 31 of the Constitution, monitor, the practices and procedures of public bodies to detect, corrupt practices and to secure the revision of work methods or procedures that may be conducive to corrupt practices, and

(3) institute and conduct proceedings in court for purposes of recovery or protection of public property or for the freeze or confiscation of proceeds of corruption or related to corruption or the payment of compensation or other punitive and disciplinary measures.”

10. Article 31 of the Constitution guarantees the protection of every person’s right to privacy, which includes the right not to have –

“(a) their person, home or property searched;

(b) **their possessions seized;**

(c) **information relating to their family or private affairs unnecessarily required or revealed; or**

(d) **the privacy of their communications infringed.”**

11. In light of the above provisions of the Constitution and the Ethics and Anti-Corruption Act, (Cap 65, Laws of Kenya), the Respondent has both the constitutional and statutory power, duty and obligation to monitor the practices and procedures of public bodies, such as the Kenya Revenue Authority (KRA), to detect corrupt practices and to secure the revision of work methods or procedures that may be conducive to corrupt practices for the protection of public property or for the freeze or confiscation of proceeds of corruption or related to corruption.

12. the Applicant’s complaint in this Application related to the decision to seize its twenty (20) motor vehicles which decision the Applicant submits was unreasonable, an abuse of power, contrary to law, and contrary to public policy and the public interest, and the Applicant’s legitimate expectation, and that it was unfair, unjust and discriminative nature, arbitrary capricious and made in bad faith.

13. Issues of unreasonableness, abuse of power, illegality or public policy and public interest, fairness, arbitrariness, caprice, or determination go to the merit of the **action** and **not inaction**, which is the Applicant’s claim.

14. No claim in **mandamus** lies against either the Respondent or the Interested Party for the action the Respondent has taken to instruct Kenya Revenue Authority to hold and not to release the motor vehicles or any of them as their importation is in breach of the eight year rule as established under Standard KS:515:2000 Code of **Practice for Inspection of Road Vehicles**, and declared by the **National Standards Council** pursuant to Section 9(11) of the Standards Act (Cap 496, Laws of Kenya). There was no claim that that Act is illegal or that Standard is illegal.

15. Finally, this matter is in all **fours** with the case of **NAYALI AUTO INVESTMENTS (K) LIMITED VS. THE KENYA ETHICS & ECONOMIC CRIMES COMMISSION OF KENYA (Kenya Bureau Standards – Interested Party)** [Mombasa Judicial Review Application No. 21 of 2015]. In a ruling delivered on 8th December, 2015, this court discussed the various claims in this case, and concluded that like in that case, this case -

“...under EACCMA, it is the Commissioner of Customs & Excise or officers subject to EACCMA, under the Kenya Revenue Authority (“KRA”) who has the legal authority or duty or responsibility to detain or release the motor vehicles. KRA is not a party to the Application herein. KRA is cooperating with the Respondent lest they too fall under suspicion of conspiracy to deprive the Exchequer revenue by allowing illegal importation and clearance of over-age motor vehicles, contrary to Kenya law or standards. KRA is however not a party to this Application, and no orders may issue against a person who is a stranger to the suit or action. Consequently, no order of mandamus can issue against KRA as the body liable to release the motor vehicles. On this score too, the Application fails and must be dismissed.”

16. The application herein is not dissimilar. It is the constitutional and statutory mandate of the Respondent to monitor practices and procedures of public bodies to detect corrupt practices and to secure the revision of work methods or procedures that may be conducive to corrupt practices, and carry out investigations accordingly. It cannot be compelled by order of **mandamus** to carry out a mandate that it is already carrying out.

17. Having come to the above conclusion, I must add for good order, transparency and accountability of processes of both the Respondent and Kenya Revenue Authority that investigations cannot last forever. There is a need to bring them to an end, with a recommendation to either forfeit the vehicles and have

them destroyed according to law or prefer charges against those found answerable in law.

18. Save as aforesaid, the Application herein has no merit at all, and is dismissed with costs to the Respondent and the Interested Party.

19. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 10th day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

No Appearance for Applicant

Mr. Makuto (State Counsel) holding brief Bii for Respondent

Mr. Odindo holding brief Mr. Ashitiva for Interested Party

Mr. S. Kaunda Court Assistant