



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO.234 OF 2014

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF LEGAL NOTICE NO. 217 OF 2013

IN THE MATTER OF THE TRAFFIC ACT, CAP 403

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL, REVIEW ORDERS

BETWEEN

REPUBLIC

VERSUS

CABINET SECRETARY FOR TRANSPORT &

INFRASTRUCTURE.....1ST RESPONDENT

PRINCIPAL SECRETARY-

STATE DEPARTMENT OF TRANSPORT.....2ND RESPONDENT

THE NATIONAL TRANSPORT & AUTHORITY....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE TRAFFIC COMMANDANT.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

DIRECTOR OF MOTOR VEHICLE

RULING

Introduction

1. In 19th November, 2014, this Court delivered a judgement in this case in which it expressed itself *inter alia* as follows:

“With respect to the issue whether the Legal Notice No. 217 sets out standards or requires particular speed governors and the effect thereof, this Court in Judicial Review No. 2 of 2014 held that prescription of the brands of speed governors rather than the standards was a departure from what was expected of the Cabinet Secretary and hence unlawful. In that case what had been prescribed were two types of speed governors being KS-2295-1-2011 and KS-2295-2-2011. In Legal Notice No. 217 of 2nd December, 2013, the schedule similarly provided for the speed limiters as KS 2295-1-2011 and KS 2295-2-2011. One does not need to be a rocket scientist to realise that the brands are exactly the same. It follows that Legal Notice No. 217 in so far as it prescribed brands of speed governors or limiters, is unlawful and is accordingly quashed.”

2. It was the aforesaid decision which provoked the filing by the 3rd Respondent herein of the Notice of Motion dated 21st November, 2014, in which the said Respondent seeks substantially an order that this Court be pleased to review, vary and/or set aside part of its judgement and orders made herein on 19th November, 2014, only to the extent that the same quashes Legal Notice No. 217 of 2013 for prescribing brands for speed limiters/governors.

3rd Respondent’s Case

3. The 3rd Respondent’s case was that the said decision was arrived at on the basis that what was prescribed were brands as opposed to the standards. It was however contended that the said decision was arrived at in error since Legal Notice No. 217 of 2014 only prescribed standards and not brands hence there was an error on the face of the record of the said judgement.

4. It was contended that as a result of the said error on the face of the judgement, the 3rd Respondent is unable to perform its statutory mandate of enhancing road safety and *inter alia* administering the **Traffic Act** since most of the PSV and Commercial vehicle operators are taking advantage of the error in the court’s judgement and declining to comply with the requirement for tamper proof speed limiter as set out by KEBS. To the 3rd Respondent, unless the Court grants the orders sought, many innocent lives would be lost as a result of accident arising from over-speeding.

5. The application was supported by supporting affidavits sworn by **Francis Meja**, the Director General of the 3rd Respondent and **Charles Ongwae**, the Chief Executive Officer, KEBS. According to the said affidavits the prescriptions contained in the Legal Notice No. 217 of 2013 were standards and not brands.

6. It was submitted by **Mr Agwara**, learned counsel for the 3rd Respondent while reiterating the contents of the supporting affidavits that KS stands for Kenya Standards and that whereas the Court appreciated that the Cabinet Secretary had the power to prescribe standards the Court proceeded to quash the standards on the premises that they were brands which was an error since had the Court been of the view that the prescriptions were in fact standards the Court would not have quashed the said Legal Notice.

7. It was submitted that in Judicial Review No. 2 of 2014, this Court held that the Cabinet Secretary could only set standards and not brands. In his view having demonstrated that there is an error the Court has the jurisdiction under Article 165 and 159(2)(d) of the Constitution to grant the orders sought by resorting to its residual powers for the purposes of attaining the ends of justice in order to effectuate the judgement.

The position of the other Respondents

8. On his part **Mr Munene** who appeared for the 1st, 2nd, 4th to 7th Respondents associated himself with the submissions of **Mr Agwara**.

Ex Parte Applicants' Case

9. The application was opposed by a replying affidavit sworn by **Paul G. Gathumbi**, the Chairman of the 1st applicant herein on 15h December, 2014.

10. According to him, he was shocked that the 3rd Respondent sought in prayer (b) of the said Motion the staying of the entire Judgment when there are no grounds of the review of the entire Judgement.

11. He deposed that as none of the other Respondents have appealed against the said decision of 19th November 2014 in these proceedings, they are taken to have been content with the decision of the Court. It was his view that since it was the Cabinet Secretary 1st Respondent who was the maker of the Legal Notice 217 of 2013 and not the 3rd Respondent, there was no objection by the 1st Respondent of the Judgement of the Court. To him, for intents and purposes, the Cabinet Secretary is not only happy but content with the decision of the Court of November 19th 2014.

12. The deponent added that as the very Legal Notice 217 of 2013 sought to be stopped from being quashed has already been quashed as of 19th November 2014 and the decision having been made, there is no stay order that can be granted. It was deposed that since the maker of the impugned Legal Notice No.217 of 2013 is the 1st Respondent pursuant to the powers he stated therein exercisable under Section 119(1) of the **Traffic Act**, Cap 403 and as the 3rd Respondent has no power to make or revoke any instrument made by the 1st Respondent Cabinet Secretary under Section 119(1) of the **Traffic Act**, the application is made in vain.

13. It was averred that the 1st Respondent had not demonstrated that he acted within his power under Section 119(1) of the **Traffic Act** and at no time has the said 1st Respondent shown this Court that indeed the said decision is outside the scope of the law. Further, the 3rd Respondent has not explained at all on what bases he now presents material on the existence of Legal Notice 217 of 2013 as a valid instrument setting out standards yet the entire scope of the hearing of these proceedings no such "evidence" was tendered. In the deponent's view, the 3rd Respondent wishes to re-litigate these proceedings using the guise of review which is unlawful and a violation of the principle of Res Judicata. To the deponent, the allegation in paragraph 4 of **Francis Meja's** deposition that the Legal Notice 217 of 2014 only prescribes "standards" of speed governors is neither new to him nor a discovery he made after November 19th 2014 and he could very easily have said this is the proceedings filed in Judicial Review Case No.2 of 2014 but did not.

14. It was contended that this Honourable Court has already made a finding in respect of these 2 speed governor brands that are described as "KS2295-1-2011 and KS2295-2-2011 and nowhere has he explained the contents of the Legal Notice 217 of 2014 which specifically states that the 2 "Speed Governors" yet there are many Kenya Bureau of Standards speed governor standards. By the same token, he has not explained at all why he never appealed the decision of the Court in Judicial Review Case No.2 of 2014 when the very same speed governor types were quashed and the same finding applies in respect of Legal Notice 217 of 2013 subject of these proceedings.

15. It was therefore his belief that the 3rd Respondent cannot have its way in these proceedings while a valid and solid Judgment in Judicial Review Case No.2 of 2014 over the very same issue remains unchallenged. In his view, the entire deposition of **Francis Meja** completely avoided addressing the issue hence he cannot challenge the decision of the Court herein and leave the same decision in Judicial Review Case No.2 of 2014 standing.

16. I believe that the Ex Parte Applicants are entitled to enjoy the fruit of their Judgement and hence the move by the 3rd Respondent is an afterthought.

17. The 3rd Respondent has not explained why he never produced the very same documents that he has now attempted to produce before this Court. I believe that litigation must come to an end. Obviously the documents he relies on were in his possession at the time the Court heard all the parties on merit, and it is not open to **Mr. Francis Meja** to fish out documents such as he has now to re-litigate over the same issue. To the deponent, the deponent of the supporting affidavit was inviting this Honourable Court to sit in Judgement over its own decision yet the 3rd Respondent has not cited the specific provision of the law under the Judicial Review Procedure for the setting aside and stay orders. To him, this application constitutes a gross abuse of the Court process and the 3rd Respondent cannot be permitted to abuse the Court process as in the manner done. He reiterated that the alleged “evidence” of **Charles Ongwae** could very easily have been brought before the Court before the hearing was conducted so that we could address the allegations made therein, but not now.

18. He therefore asserted that if the 3rd Respondent seeks to appeal to the Court of Appeal then the said decision can be overturned, but not through the manner now sought as to so act would bring dishonour and disrepute to the Judicial Process as the parties to litigation will always seek to re-open litigation that has been decided upon, which is a violation of Judicial Policy.

19. On behalf of the ex parte applicant, it was submitted that without citing the Constitutional Practice and Procedure Rules which would have leveraged the application brought pursuant to Article 159(2)(d) of the Constitution, the application was grossly incompetent. Based on **Biren Amritlal Shah & Another vs. Republic & 3 Others [2013] eKLR**, it was submitted that the High Court has no jurisdiction to review its previous decision made on judicial review.

20. Having not cited section 80 of the **Civil Procedure Act** or any provision of Order 53, it was submitted that Article 159(2) of the Constitution cannot be a panacea to cure this defect. Based on **Pancras T Swai vs. Kenya Breweries Limited [2014] KLR**, it was submitted that discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 450 relates to issue of fact emerging from the evidence and not to issues of law. In the same case the Court cited the case of **Francis Origo & Another vs. Jacob Kumali Mungalia Civil Appeal No. 149 of 2001** in which it was held that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Since the 3rd Respondent, contends that the Court fell into error when it interpreted what the applicant deems as “standards” when all along the Court deemed the same as “brands”, it was submitted this was an issue of law, not fact which cannot be a basis of a review application.

21. It was submitted that since none of the Respondent appealed against the decision of 19th November, 2014 they must be taken to be content with the same. It was submitted that since the Cabinet Secretary, the maker of the Legal Notice has not objected to the decision of this Court, it must be taken that he is content therewith.

22. It was submitted that the 3rd Respondent had not explained in what basis he was presenting the material on the said Legal Notice as a valid instrument setting out standards yet the entire scope of the hearing of these proceedings no such evidence was tendered. It was therefore submitted that the 3rd Respondent wishes to re-litigate these proceedings using the guise of review which is unlawful and a violation of the principle of *res judicata* since the allegations now being made are neither new nor are they a discovery made after the judgement but could have easily been made before.

23. It was submitted that without challenging the decision in Judicial Review No. 2 of 2014, the 3rd Respondent cannot have his way in the instant application.

24. According to the ex parte applicant, the 3rd Respondent cannot invoke the Court’s jurisdiction and

apply for review under section 80 of the **Civil Procedure Act** in light of the decision to appeal since the avenues of appeal and review are incompatible and the law forbids a party from appealing a decision and at the same time proceeding on review.

25. It was submitted that the 3rd Respondent does not stand to suffer any prejudice if the decision of 19th November, 2014 is implemented. To the contrary it is the ex parte applicants who stand to be prejudiced if not implemented.

Determinations

26. The first issue for determination is whether in light of the fact that a Notice of Appeal has been filed this Court has jurisdiction to entertain an application for review.

27. The 3rd respondent has invoked the provisions of Article 159(2)(b) of the Constitution. That provision provides that “*in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall not be delayed*”. Obviously that provision has nothing to do with the current application. Even if the provision that was meant to be cited was Article 159(2)(d) which requires that justice shall be administered without undue regard to procedural technicalities, my view is that the said provision does not confer jurisdiction on the Court but only requires the Court in exercising its jurisdiction to do so without undue regard to procedural technicalities. Where therefore the Court has no jurisdiction, the said provision cannot be invoked in order to clothe the Court with jurisdiction which does not exist.

28. The known provisions which deal with review are section 80 of the **Civil Procedure Act** and Order 45 of the **Civil Procedure Rules**, both of which however do not apply to judicial review matters. Nevertheless, I will deal with the applicability of the said provisions where a Notice of Appeal has been filed as that was one of the issues raised by the ex parte applicant.

29. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the **Civil Procedure Rules**, certain requirements must be met. The said provision provides as follows:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

30. Section 80 of the **Civil Procedure Act** Cap 21 Laws of Kenya upon which the said rule is based provides:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal

has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

31. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. See **Orero vs. Seko [1984] KLR 238**. Who, then is a party who is appealing. As far as this Court is aware there are two contradictory decisions from the Court of Appeal. In **Kisya Investments Ltd vs. Attorney General and Another Civil Appeal No. 31 of 1995** the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However in **Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992** the Court of Appeal was of the following view:

“The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal”.

32. In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the **Haryanto Case** reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review.

33. However, the same Court in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005** had this to say:

“The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed. An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under Order 9A rule 2 Civil procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved

party has “preferred” an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal in *Yani Haryanto Vs. E. D. & F. Man (Sugar) Ltd Civil Appeal No. 122 Of 1992 (UR)*... The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other”.

34. Whereas under Order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a *carte blanche* for abuse of the process of the Court. In the case of **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 Kimaru, J** dealing with the issue of abuse of the process of the Court stated as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

35. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the *Civil Procedure Act* under which section 3A reserves the inherent powers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court’s seal of approval to persons who wish to play lottery with judicial process. Accordingly I associate myself with the decision in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi** (supra) that both options cannot be pursued concurrently or one after the other.

36. I however disagree that the mere fact that a person has given a notice of intention to appeal, he is

thereby precluded from applying for review.

37. The next jurisdictional issue is whether the High Court has power to review its decision made on judicial review. The Court of Appeal in **Biren Amritlal Shah & Another vs. Republic & 3 Others** (supra) expressed itself on section 8(5) of the *Law Reform Act* as follows:

“It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the *Law Reform Act*, the High Court had no jurisdiction to review its previous order.”

38. The same Court however held in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction. In my view where a mistake has been brought to the attention of the Court which is capable of being remedied, be it by review or otherwise, I do not see any bar to the Court invoking its inherent powers to do so.

39. In my view to the extent that the Court has no powers under Order 45 of the Civil Procedure Rules to review its orders made on judicial review, I agree that the Court of Appeal’s decision in **Biren Amritlal Shah & Another vs. Republic** (supra) cannot be faulted. It was submitted that this Court is bound by the decision in the said case. However in light of a different view taken by the same Court in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax** (supra) this Court is free where there is a conflict of authorities to choose between the two especially and as it seemed to have been the position in this case where the second decision is given in ignorance of the former without being fully analysed. See **Major Joseph Mwateri Igweta vs. Mukiri M’ethare & Another Civil Application No. Nai. 8 of 2000.**

40. It is therefore my view that whereas the Court has no power to review a decision made on judicial review pursuant to section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, it has a residual jurisdiction pursuant to its inherent powers to correct its mistakes and this may where merited include granting orders whose effect may amount to a review. That the Court may not review its decisions under the *Civil Procedure Act* is in my view informed by the provisions of section 3 of the *Civil Procedure Act* which provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

41. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the *Civil Procedure Act* are inapplicable. It must be remembered that apart from Order 53 of the *Civil Procedure Rules*, the provisions of the *Civil Procedure Act* and the Rules made thereunder do not apply to judicial review proceedings. Accordingly Order 45 of the *Civil Procedure Rules* would similarly not apply to these type of proceedings. In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the *Civil Procedure Act* and Rules do not apply unless expressly provided by such an Act and the provisions of the *Civil Procedure Act* and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the *Civil Procedure Rules* render the application wholly incompetent.

42. However, where a mistake is shown to have been committed which is remediable by the Court the

same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the **Civil Procedure Act** which strictly speaking does not apply to judicial review proceedings. That section it has been held time and again does not confer inherent jurisdiction on the Court but only reserves the same. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice and inherent power is not donated by Section 3A of the **Civil Procedure Act**. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the **Civil Procedure Act** is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

43. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

44. Similarly, in **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

“It is....accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

45. I therefore hold that this Court has powers to review its decisions made in judicial review proceedings pursuant to its inherent powers.

46. That now brings me to the merits of the application. The decision whether or not to review a Court's decision was well captured by the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002**, where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

47. In this case, the ground upon which the review is sought is that this Court misconstrued **KS-2295-1-2011** and **KS-2295-2-2011** to be brands when they are in fact standards. The ex parte applicant contends that that would be an error of law. With due respect I disagree. If it is true that the said descriptions are standards rather than brands that would be a mistake as to the actual nature of the said gargets which in my view is an error of fact rather than one of law. However, in order to make a finding as to whether the said descriptions are in fact standards rather than brands, this Court would necessarily have to consider the elaborate arguments presented by way of an affidavit evidence by **Ongwae**, the Chief Executive Officer, KEBS and that is not the permissible under a review application. Whereas I agree with **Warsame, J** (as he then was) in **Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004** that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the Judgement intended to be reviewed, otherwise parties would loose direction as to the finality of a decision made by a particular court, on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in **Atilio vs. Mbowe (1969) THCD** where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

48. Therefore where the review would have the effect of arriving at a decision which was contemplated

by the Court, the Court ought to grant the review in order to give the judgement its true meaning. In this case and in Judicial Review Application No. 2 of 2014, this Court was clear in its mind what the Respondents ought not to do is to prescribe brands of speed limiter/governors as opposed to standards. Therefore if what the Respondents did prescribe were in fact standards, this Court would not have any difficulty in reviewing its decision to reflect its true intention. I emphasise that the Respondents are not barred from prescribing standards of speed governors/limiters.

49. However in judicial review No. 2 of 2014, this Court expressed itself *inter alia* as follows:

“It was further contended that the 3rd Respondent’s application form contains a form which demands that the ex parte Applicants fit only 2 brands of speed governors, which is illegal and unconstitutional contrary to the holding by Hon Justice J. B. Ojwang (as he then was) in Misc. Civil Case (Judicial Review) No. 109 of 2004 that the 3rd Respondent has no power to restrict the ex parte Applicants in a liberalized economy as to which brand of speed governors they are to buy. To the applicants the 3rd Respondent can only regulate what specifications speed governors are to possess but not to restrict the speed governors to 2 brands or who the supplier will be. I have perused the requirements attached to the application for licence. One of the requirements is original copy of valid speed governor compliance certificate, tested and approved by Kenya Bureau of Standards, Chief Mechanical and Transport Engineer as competent Speed Limiter and thereto is a schedule in which two types of speed governors are indicated as KS-2295-1-2011 and KS-2295-2-2011. Dealing with a similar issue Justice J B Ojwang in Nairobi Misc. Civil Case (Judicial Review) No. 109 of 2004 – Republic vs. The Minister for Transport & Communications & Others ex parte Gabriel Limion Kaurai & Another held:

“It is obvious that the Minister departed from the requirements of section 119(1)(d) when he went out of his way to prescribe brands of speed governors and to name dealers from whom these were to be obtained”.

I similarly have no hesitation in finding that the Cabinet Secretary acted *ultra vires* his powers in prescribing the brands of speed governors. In my view the requirement for certification from the specified agencies provided sufficient safeguards for ensuring that the speed governors in use met the requisite standards.”

50. It is clear that in that decision the Court was of the view that **KS-2295-1-2011** and **KS-2295-2-2011** were brands. That decision has not been set aside either on review or on appeal. To grant the orders sought in the present application would leave that decision intact. It is therefore my view that it would be futile to grant the orders sought in the present application.

51. It was argued that unless the present application is granted, the public would be exposed to a risk since the 3rd Respondent would be unable to enforce the speed limits. I do not think so. In Judicial Review No. 2 of 2014, the Court appreciated that the requirement for certification from the specified agencies provided sufficient safeguards for ensuring that the speed governors in use met the requisite standards. One of the said agencies is KEBS. In my view if the officers of KEBS and other agencies carry out their duties properly, the vehicles being licensed as public service vehicles would still have to fit in the governors whose specifications or standards are given by the said agencies. I therefore do not see any prejudice which is likely to be occasioned to either the public or the 3rd Respondent if the review sought is not granted.

Order

52. It follows that the Notice of Motion dated 21st November, 2014 fails and is dismissed with costs to the ex parte applicants.

Dated at Nairobi this 10th day of February, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the ex parte applicant/respondent

Mr Agwara for the 3rd Respondent/Applicant and holding brief for Mr Bitta for the 1st, 2nd, 4th to 6th Respondents.

Cc Patricia