



**IN THE HIGH COURT  
AT NAIROBI  
MILIMANI LAW COURTS  
JUDICIAL REVIEW DIVISION  
MISC. APPL. NO. 369 OF 2013**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT**

**THE KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

***EX PARTE***

**PETER MBWIRI IKAMATI**

**JUDGMENT**

**Introduction**

1. Pursuant to leave granted by the Court, the *ex-parte* applicant ('the applicant') moved the court by a Notice of Motion dated 30<sup>th</sup> October 2013 seeking the following orders;

- a. *An order of certiorari to remove into this Honourable Court and quash the decision of Kenya Bureau of Standards as communicated by the Director of Quality Assurance and Inspection through a letter reference KEBS/OP/10/1/Vol. 68(62) dated 15<sup>th</sup> May 2013.*
- b. *An order of mandamus to compel the Kenya Bureau of Standards to exercise its discretion and approve the registration of motor vehicle registration YG 55UUC in Kenya.*
- c. *An order of Mandamus to compel the Kenya Revenue Authority by itself, the Registrar of Motor vehicles and all relevant departments to register motor vehicle registration YG 55UUC and issue it with Kenyan number plates subject only to the payment of registration charges, application for registration, if any and subject to recovery of duty as may be necessary.*
- d. *An order of Mandamus to compel the Kenya Bureau of Standards to pay for the demurrage charges at port of Mombasa.*

- e. *Costs and incidentals to this application be provided for.*
- f. *Such further and other relief that the Honourable Court may deem just and expedient to grant.*

2. The applicant relies on his verifying affidavit sworn on 7<sup>th</sup> October 2013 and the statement dated 17<sup>th</sup> October 2013 and a supplementary affidavit sworn on 10<sup>th</sup> February 2014. The applicant's claim is in respect of a motor vehicle registration YG 55UUC which he purchased in the United Kingdom while pursuing post graduate studies.

### **Applicant's Case**

3. After completion of his studies, he returned with his personal effects including a motor vehicle. The vehicle is now at the Port of Mombasa as it could not be cleared due to the fact that it was beyond the eight year age limit. He applied for a waiver from Kenya Bureau of Standards (KEBS) and by a letter dated 15<sup>th</sup> May 2013 (Ref: KEBS/OP/1/Vol.68(62)), he was informed that, "[Y]our application for waiver for P.V.C requirements was evaluated by the Waivers Technical Committee on 13/05/13. However your application was not approved by the committee because your request does not fit into any of the established categories for waiver consideration."

4. The applicant argues that the decision to deny him the waiver was based on the wrong computation of time as the eight years from the time of first registration and manufacture had not elapsed at the time of importation. The applicant avers that the importation was on 29<sup>th</sup> March 2013 and the first registration was on 14<sup>th</sup> September 2005. The applicant relies on the KEBS ***Kenya Standard Code of Practice of Inspection of Road Vehicles (KS 1515:2000)***. The extract annexed to the applicant's states as follows; "***2.5 Age Limit – All road vehicles which are more than eight years old from the date of manufacture shall not be allowed for importation.***" [Emphasis mine]

5. In computing time, the applicant submits that the time must be calculated from the date and month of registration and or manufacture. He argues that as the year of manufacture was in 2005, and the first date of registration was 14<sup>th</sup> September 2005, the time must be calculated from 14<sup>th</sup> September 2005. Counsel referred to the provisions of the ***Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)*** to support the applicant's case. She also cited ***MAE Properties Ltd v Davidson Nginu Milimani HCCC No. 313 of 2004[2005]eKLR***, ***Hezekiah Oira v Gilbert Joel Manye Nairobi HCCC No. 8 of 2002 [2004]eKLR*** and ***R v Municipal Council of Mombasa and Another ex-parte Mbole Nzomo Anthony Mombasa Misc. JR No. 6 of 2011[2012]eKLR*** to buttress the point that in computing time, the calendar month is to be calculated from the day of the happening of a thing, to the day numerically corresponding to that day in the following month, less one day.

6. The applicant therefore submits that that decision by KEBS to reject his application for waiver is therefore unreasonable, unfair and exercised in bad faith and as such the orders of judicial review should be granted.

### **Respondents' Case**

7. The 1<sup>st</sup> respondent, KEBS, opposes the application through the replying affidavit of Maurice Ager, its Director Finance and Strategy, sworn on 21<sup>st</sup> January 2014. The substance of its argument based on the ***Kenya Code of Practice for Inspection of Road Vehicles***, is that time starts to run from the first year of registration and not the date or month of registration or manufacture of the vehicle as submitted by the applicant. That taking into account the year of manufacture, the subject vehicle was over-aged by the time it arrived at the port of Mombasa.

8. KEBS argues that according to ***Standards Act*** and the ***Verification of Conformity of Kenya Standards of Import Order, 2005 (Legal Notice No. 78 of 2005)***, it discharged its responsibility by rejecting the application for waiver as the vehicle failed to meet the age standard which is absolute and mandatory. KEBS avers that the same could only be allowed if exempted by the Minister upon advice from the National Standards Council. KEBS urges that the application be dismissed.

9. The 2<sup>nd</sup> respondent, Kenya Revenue Authority (KRA), opposes the application on the basis of the affidavit of Aquiliano Mwithali, a Senior Revenue Officer in the Customs Department. KRA's case is that it administers the ***East Africa Community Customs Management Act, 2004*** ('EACCMA') which also restricts the importation of motor vehicles of more than 8 years from the date of first registration in the country of origin under Section 18 paragraph 1 of Part B of the 2<sup>nd</sup> Schedule to ***EACCMA***.

10. Counsel for KRA argues that in order for KRA to clear the vehicle by way of payment of customs duty, the applicant must obtain a KEBS certificate that the vehicle meets the relevant standard. In the absence of such a certificate, KRA cannot clear the vehicle and therefore the order of mandamus sought against it cannot lie.

11. The 3<sup>rd</sup> respondent supported the case by the 1<sup>st</sup> and 2<sup>nd</sup> respondent and argued that the application be dismissed.

### **Determination**

12. Before I deal with the merits of the application, I will first deal with objection raised by KEBS that the application has been filed outside the clear and mandatory timelines for applying for orders of certiorari under ***Order 53 rule 2 of the Civil Procedure Rules***. The rule provides that for prayers of certiorari to be granted, the proceedings must be filed in court within six months of the date of the order/decision being challenged. KEBS submits that the only factor the Court needs to consider is the date of the cause of action which is the date that the vehicle was imported into the country that is 29<sup>th</sup> March 2013 as such the application ought to have been filed latest by 29<sup>th</sup> September 2013.

13. I reject the argument by KEBS and agree with the applicant that the applicable date in terms of the rule is that date of the decision sought to be challenged. The decision challenged was made on 15<sup>th</sup> May 2013 and the application was filed on 22<sup>nd</sup> October 2013 well within the time prescribed by the rule.

14. The issue in this case is whether the 1<sup>st</sup> respondent was entitled to reject the applicant's application to be allowed to import a motor vehicle in terms of ***Kenya Standard Code of Practice of Inspection of Road Vehicles (KS 1515:2000)***. Unfortunately all parties rely on different versions ***KS 1515:2000*** and my task is to ascertain the proper version of the Standard in order to determine whether the decision impugned was *ultra vires*, irrational or unreasonable.

15. The extract annexed to the applicant's verifying affidavit marked as MK 3 states, "***All road vehicles which are more than eight years old from the date of manufacture shall not be allowed for importation.***" The replying affidavit filed on behalf of KEBS at paragraph 5 states as follows, "*THAT amended Clause 2.5 of the Kenya Standard Code of Practice of Inspection of Road Vehicles (KS 1515:2000) states clearly that, "all road vehicles which are more than eight (8) years old from the year of first registration shall not be allowed for importation ..."* The said amended clause was published in July 2008, and the terms therein are mandatory ..." Annex MA-1 to the affidavit of Maurice Ager which reads as follows, "***All road vehicles which are more than eight years old from the date of manufacture shall not be allowed for importation.***"

16. KRA's version is at paragraph 10 of Aquilino Mwithali's affidavit which states, "*THAT therefore per Section 18 and paragraph 1 of Part B of the 2<sup>nd</sup> Schedule to the EACCMA 2004, the importation of motor vehicles of more than 8 years from the date of first registration in the Country of Origin is restricted in Kenya under Standard KS 1515:2000.*" Attached to the affidavit is annexure of a Notice in the newspaper issued by KEBS to the effect that, "*We wish to inform all importers .... and the general public that only Right Hand Drive (RHD) motor vehicles whose first Year of Registration is from 1<sup>st</sup> January 2006 and later shall be allowed into the country as from 1<sup>st</sup> January 2013.*"

17. I have also seen a decision by Korir J., ***R v Kenya Bureau of Standards and Others ex-parte Gladys Nyawira Wanjohi Nairobi JR Misc. No. 102 of 2013[2014]eKLR*** delivered on 21<sup>st</sup> February 2014 in

which **KS 1515:2000** was in issue and where he stated as follows, “It is not disputed that the Applicant’s motor vehicle was manufactured in 1993. It is also not disputed that the **Kenya Standard Code of Practice of Inspection of Road Vehicles (KS 1515:2000)** as amended in July, 2008 at Clause 2.5 provides that: “Age limit – All road vehicles which are more than eight years old from the date of manufacture shall not be allowed for importation.”

18. In light of the foregoing, I find and hold that the version annexed to affidavit of Maurice Ager which refers to the “**date of manufacture**” is the proper version as it is supported by the copy of the relevant Standards published by KEBS which is the statutory body empowered to promulgate and publish Standards. In the absence of a further published version to support reference to an amendment of rule or another version as deposed in paragraph 5 of Maurice Ager’s affidavit, I must adopt the publicly available version that the public are entitled to rely on. Furthermore, KEBS is estopped from relying on any other version in view of its position in **R v Kenya Bureau of Standards and Others ex-parte Gladys Nyawira Wanjohi (Supra)**. I also discount the application of the notice issued by KEBS referred to by Aquilino Mwithali as the notice in effect excludes the applicant’s vehicle which was manufactured in 2005 and was thus not covered by the period notified by KEBS.

19. I therefore find and hold that the applicable version of **KS 1515:2000** is the one that refers to the age based on the date of manufacture. The issue is then whether the applicant’s vehicle is more than eight years old from the “**date of manufacture.**” The applicant’s case is anchored on the date of first registration, that is, 14<sup>th</sup> September 2005 hence it was imported within eight years under the said Standard. Unfortunately, the applicant’s argument cannot be correct as **KS 1515:2000** refers to the date of manufacture and not the date of first registration. The date of manufacture is not stated but it is not disputed that the year of manufacture of the motor vehicle is 2005. I therefore distinguish the submissions and decisions cited by the applicant on how the time is to be computed on the ground that they refer to the actual date fixed for doing an act and not the year.

20. Since time is to be calculated by reference to the year and the year commences on 1<sup>st</sup> January, it follows that eight years under **KS 1515:2000** lapsed on 1<sup>st</sup> January 2013. By the time the motor vehicle arrived at the Port of Mombasa in March 2013, it was over-aged and could not be allowed into Kenya. My interpretation of the rule accords with the intent of the Standard, that is to prohibit over-age vehicles in Kenya. The date of first registration will not necessarily coincide with the year of first registration as the date of first registration may be years after date or year of manufacture.

21. I therefore hold that the decision of the KEBS to reject the applicant’s application for a waiver cannot be said to be *ultra vires*, illegal, unreasonable or irrational in order to attract the orders of judicial review sought.

22. I agree with the submission by KRA that KEBS is the statutory body mandated to inspect goods being imported in Kenya and it can only register the applicant’s motor vehicle once KEBS approves its importation. In the circumstances, there is no cause of action against the KRA.

23. The applicant has submitted that its right to the protection of property and the right to fair administrative action under **Articles 40 and 47(1)** of the Constitution have been violated by the respondents’ action. In my view, the provisions of the Constitution regarding protecting the applicant from arbitrary deprivation of property have been given effect in various provisions of the law. The right to property is not absolute and may be limited by the kind of rules such as those prescribing standards. The adjudication of property rights under the said statute is guaranteed by the procedures prescribed under the **Law Reform Act** and **Order 53** of the **Civil Procedure Rules**. In the circumstances it cannot be said that the applicant’s rights have been violated nor is there a necessity to invoke the Constitution in the circumstances.

### **Disposition**

24. It must now be apparent that the Notice of Motion dated 30<sup>th</sup> October 2013 is for dismissal. It is hereby dismissed with costs to the respondents.

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> MARCH 2014**

**D.S. MAJANJA**

**JUDGE**

Ms Atsieno instructed by Barongo Ombasa and Company Advocates for the ex-parte applicant.

Mr Ndolo instructed by Igeria and Ngugi Advocates for the 1<sup>st</sup> respondent.

Mr Chabala, Advocate instructed by the 2<sup>nd</sup> respondent.

Ms Mwangi, Litigation Counsel, instructed by the State Law Office for the 3<sup>rd</sup> respondent.