



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APP. NO. 99 OF 2013 (J.R)**

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

**AND**

**IN THE MATTER OF: JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS  
AND PROHIBITION**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY .....RESPONDENT**

**THE CO-OPERATIVE BANK OF**

**KENYA LIMITED .....INTERESTED PARTY**

**EX PARTE APPLICANT .....PETER WAINAINA GITHU T/A**

**QUICKSERVE CARGO LOGISTICS**

**JUDGEMENT**

1. By a Notice of Motion dated 26<sup>th</sup> March, 2013, the *ex parte* applicant herein, **Peter Wainaina Githu T/A Quickserv Cargo Logistics**, seeks the following orders:
1. **THAT** this Honourable court be pleased to grant an Order of Certiorari directed to Commissioner, Investigations and Enforcement Department of the Kenya Revenue Authority to remove into this court for purposes of quashing the decision of the Respondent given vide its letter of 19<sup>th</sup> February 2013 that the registration plate of motor vehicle registration no. KBQ 871U lorry truck Mitsubishi FH 215 is fraudulently registered.
2. **THAT** this Honourable Court be pleased to grant an Order of Mandamus directed to Commissioner, Investigations and Enforcement Department of the Kenya Revenue Authority to unconditionally release motor vehicle registration no. KBQ 871U lorry truck

**Mitsubishi FH215 herein to the Applicant.**

3. **THAT this Honourable court be pleased to grant an Order of Prohibition directed to the commissioner, Investigation and Enforcement Department of the Kenya Revenue Authority form impounding, detaining, seizing, forfeiting, levying distress and or in other way interfere with the Applicant's motor vehicle registration no. KBQ 871U lorry truck Mitsubishi FH215 and the property therein.**
4. **The costs of this Application be in the cause.**

### Ex Parte Applicant's Case

2. The same application is based on a Statement filed on 19<sup>th</sup> March, 2013 and the verifying affidavit sworn by the applicant herein on 18<sup>th</sup> March, 2013.
3. According to the applicant, he is the duly registered owner jointly with the Co-operative Bank of Kenya Limited of motor vehicle registration number KBQ 871U Lorry Truck Mitsubishi FH215 (hereinafter referred to as the suit motor vehicle) which he bought from the then registered owners **Moses Muiruri Ng'ang'a** and **Wilfred T. Gathiomi**. **Before buying the same, he** conducted a search with the Respondent to verify the details and ownership of the vehicle after which he entered into a Sale Agreement with the owners who were selling the vehicle at Kshs.4.8 Million assisted with financing from Co-operative Bank of Kenya Limited in the sum of Kshs.3,360,00.00 while he paid the balance amounting to Kshs.1,440, 000.00.
4. Upon payment of the full purchase price, the vehicle was released to him by the sellers upon authorization by the said Financier and the applicant and the said Financier presented the Transfer form alongside the sellers copies of Pin Certificate and Identity cards for registration into their joint names whereby the transfer was effected and they were then issued with a log book.
5. The applicant deposed that from 24/5/2012, upon complying with all the conditions by the Financier he took control of the vehicle which is a commercial vehicle and has been trading with the same in his transport business with part of the proceeds therefrom being applied towards repaying the monthly instalments on the loan facility. According to him, all was well until on or about 25<sup>th</sup> October, 2012 when he received a Notice dated 25<sup>th</sup> October, 2012 from the Respondent requiring him to appear to answer questions relating to the importation, handling and clearance of the vehicle and to produce documents on the importation, sale or registration which he did. However, on or about the 22<sup>nd</sup> November, 2012 his motor vehicle was impounded by the Respondent while in transit carrying timber and the vehicle with the consignment was detained at the Respondent's yard at Forodha. However the timber was later released but the vehicle was detained.
6. The applicant averred that he sought for the release of his vehicle by the Respondents who have continued to detain the vehicle on the ground that investigations were on going with regard to the vehicle. Following a letter to the Respondent by the applicant's advocates dated 17<sup>th</sup> January, 2013 requesting for the release of the vehicle, the Respondent responded vide its letter of 19<sup>th</sup> February 2013 stating that the registration plate of the applicant's vehicle is currently under investigation for fraudulent registration and that the vehicle will not be released until the investigations are concluded.
7. The applicant deposed that he is aggrieved by this turn of events as he is a *bona fide* purchaser of value of the vehicle and was not involved in its importation and registration and had no notice of the alleged fraudulent registration and that before he bought the vehicle, he conducted a search with the Respondent who verified all the details on the vehicle and issued him with the copy of the records thus it is only after due diligence and relying on the results of the search with the Respondent that he was able to proceed with the sale transaction after which the Respondent transferred the vehicle into the joint names of his Financier and himself and issued them with the log book/registration book of the vehicle. According to him, it is the preserve of the Respondent to verify on the details of the vehicle on its importation before its registration and the respondent having done all verification and registered the vehicle and issued log book cannot now turn around and allege otherwise that the registration was fraudulent as the verification and registration was undertaken by the Respondent itself hence the impounding and detention of his vehicle by the Respondent and its refusal to release the vehicle is illegal, unjust and against the tenets of natural

- justice.
8. To the applicant, he has been denied the use of his vehicle which is a commercial vehicle used in transport business and have thereby suffered immense financial loss yet he was financed to the tune of Kshs.3,360,000.00 in meeting part of the purchase price and he has not been able to pay the monthly instalments of the loan hence stands to lose the vehicle, his other assets and be declared un-creditworthy thus affecting his further borrowing capacity.
  9. In what the applicant entitled a “further replying affidavit” sworn on 5<sup>th</sup> December, 2013, he reiterated the contents of his verifying affidavit and denied knowledge of the earlier similar registration numbers and that it was upon the Respondent to explain how the registration occurred when they were in possession of e earlier registration numbers especially after being given clean bill of health by the Respondent. Given the Respondent’s actions, he deposed that the Respondents impounding the suit motor vehicle is unlawful and illegal in the circumstances obtaining.
  - 10.He therefore seeks therefore seek this court to intervene and grant the leave and orders sought and order the immediate release of his vehicle so that justice may prevail.

### **Respondent’s Case**

- 11.On the part of the Respondent, a replying affidavit was filed sworn by **Kevin G. Njoroge**, the Respondent’s Revenue Officer II on 11<sup>th</sup> June, 2013.
- 12.According to the deponent, Motor vehicle registration number KBQ 871U was initially registered on 21<sup>st</sup> November, 2011 and was declared vide Entry No.2011MSA3098304 dated 13<sup>th</sup> October, 2011 which was passed on 17<sup>th</sup> October, 2011
- 13.According to him, the vehicle’s details when registered on 21<sup>st</sup> November 2011 were as follows: Chassis/Frame: 9BSP6X440003690099, Make: Scania, Body: Prime Mover, Man. Year: 2011, Engine no.: 8173899, Color: White, Tare weight: 8500, Name/owner: RT (East Africa) Ltd, a subsidiary company in Tanzania that usually re-exports some of its motor vehicle there to operate under contract. Apart from being registered owners of the vehicle aforesaid, RT (East Africa) Ltd also owned other vehicles as follows; KBQ 872U, KBQ 873U, KBQ 874U and KBQ 875U.
- 14.According to the deponent, to re-export a motor vehicle which is already registered here in Kenya, it is required that a deregistration be done which process require the recorded owner of the motor to surrender the original registration certificate, the registration number plates and payment of some fees and which process would be complete once a document known as certificate of ownership is availed to the previous owner of the motor vehicle for his own use to register the motor vehicle afresh in another country.
- 15.It was deposed that on 5<sup>th</sup> December, 2011, RT (East Africa) Ltd wrote to the Respondent requesting deregistration among others motor vehicle registration number KBQ 871U in order to re-export the vehicle to its subsidiary company in Tanzania permanently to operate under contract and further submitted the original logbook and the registration certificate for motor registration number KBQ 871U and made payment of Kshs.500 for deregistration fees. Thereafter RT (East Africa) Ltd was awarded the certificate of ownership dated 15<sup>th</sup> December, 2011. According to the deponent, once deregistration is done, the registration number plates are not assigned and or allocated to any other motor vehicle.
- 16.However, it came to the Respondent’s notice and awareness later that the plate number KBQ 871U was used to fraudulently register another vehicle and On 22<sup>nd</sup> September, 2012 during surveillance in Nairobi, the deponent came across a motor vehicle Mitsubishi Fuso, bearing registration number KBQ 871U and he was aware that the registration number KBQ 871U was deregistered and in no way the Mitsubishi Fuso could be having registration number KBQ 871U, the Mitsubishi Fuso was therefore impounded and deposited in a customs warehouse at Forodha House, Nairobi pending confirmation of registration and a notice of goods deposited in customs warehouse dated 22<sup>nd</sup> September 2012. Upon checking the records of the suit motor vehicle, it was found out that it is a Mitsubishi Fuso owned jointly by the Applicant and the Interested Party. The deponent further averred that Respondent’s motor vehicle records further shows that the Mitsubishi Fuso was declared vide Entry No.2011MSA30998304, the same entry used to import the Scania Prime Mover Chassis /Frame No. 9BSP6X40003690099, which should not be the case. Accordingly, a letter to appear and produce documents under Section 235 and 236 of the *East*

***African Community Customs Management Act***, 2004 (EACCMA) was sent to the Applicant and the Interested Party to answer questions relating to the registration of the suit motor vehicle but neither the Applicant nor the Interested Party appeared .

17. According to the deponent, the details of the suit motor vehicle are as follows: Chassis/Frame: BAVFH215J9SA05033, Make: Mitsubishi, Body: Lorry/Truck, Man. Year: 2011, Engine no.: 6D14A3011, Color: White, Tare weight: 8500
18. It was deposed that the Respondent investigated the issue of fraudulent registration by writing to Simba Colt Motors Ltd, a Kenyan registered company which imports Mitsubishi Lorries/Trucks on 10<sup>th</sup> December, 2012, requesting to ascertain whether a vehicle bearing chassis and engine number BAVFH215J9SA05033 respectively are appearing in their system and on 19<sup>th</sup> December 2012, Simba Colt Motors responded that the chassis and engine number the Respondent provided do not appear in their system.
19. According to the deponent, it is clear that the Applicant's motor vehicle was fraudulently registered by using registration number KBQ 871U which was deregistered and the Applicant has failed to avail documents relating to importation of the motor vehicle. Further, the vehicle having been fraudulently registered without proper importation documents shows that revenue in terms of customs duty and VAT had not been paid and Section 2 of the EACCMA, 2004 defines unaccustomed goods as goods on which full duties have not been paid hence the Respondent has powers to seize any unaccustomed goods under Section 210(c) and (g) of the EACCMA, 2004. Under Section 203 (a) and (b) of the EACCMA, 2004 it is an offence to make or use fake documents as is the case on the Applicant's motor vehicle and an offence had been committed under the Act and further, the Applicant had been holding unaccustomed motor vehicle contrary to Section 200(d) (iii) of the EACCMA, 2004 and the Respondent lost a colossal amount of government revenue. According to him, under Section 130(1) of EACCMA, 2004 customs duty is levied on the goods imported and the person in possession of the unaccustomed goods is the one with the responsibility to pay such duty and that owner in respect of a vehicle under Section 2(1) of the EACCMA, 2004 includes a person who is in possession of or control of the vehicle.
20. It was therefore the deponent's view that there has been no illegality and breach of natural justice on the part of the Respondent; that due diligence in commercial transaction dictates that "buyer beware" and therefore the Applicant should have requested for authentic import documents from the persons who sold the motor vehicle to him that The Respondent can carry out investigation or examination of any goods at any time after importation under Section 236(d) of the EACCMA, 2004; that the decision of the Respondent is not unreasonable and oppressive; and that under the EACCMA, 2004, the sale of the subject motor vehicle by the initial importer to the Applicant herein does not forbid the Respondent from asking for relevant importation duty and unpaid duty.
21. It was contended that the fraudulent registration of the vehicle, involved a breach of the Respondent's motor vehicle registration system and under Section 5E of the *Traffic Act* (Cap 403) is an offence to interfere with computerized motor vehicle registration system and that the Respondent's letter of 19<sup>th</sup> February, 2013 was written in order to complete investigation into fraudulent registration of the Applicant's vehicle and it was therefore justified to do so.
22. By a further replying affidavit sworn by the same deponent on 26<sup>th</sup> November, 2013, it was deposed that the dispute, contrary to what the Interested Party stated at paragraph 3 of the Interested Party's Supplementary Affidavit, is the manner in which ex-parte Applicant's Motor vehicle registration number KBQ 871U Mitsubishi Lorry/Truck was registered using registration number plates initially belonging to another vehicle which was deregistered and further no evidence of importation documents like an entry and evidence of payment of import duty has been produced.
23. It was however conceded that the Respondent does not rule out fraud in its massive organization that is why it has mechanism in place to investigate post import investigations to confirm that all motor vehicles have all their import duties properly paid and accounted for hence the claim of negligence for registering two different motor vehicles with same registration number KBQ 871U is vehemently denied. To the contrary, the Respondent had registered a motor vehicle Scania as stated in its Replying Affidavit and the ex-parte Applicant's motor vehicle Mitsubishi Fuso was fraudulently registered using some details which were used to register motor vehicle Scania, contrary to the fact that two different motor vehicles cannot be registered with the same date or on any other date and if it is attempted, the system will refuse.

24. In his view, in investigating the fraudulent registration of the ex parte Applicant's Mitsubishi Fuso, the Respondent had to seek information from Simba Colt Motors Limited because other than the reason of it being the major importer and or may be sole importer of new Mitsubishi Trucks/Lorries, the Respondent could not find in its system evidence of any import entry to show that ex-parte Applicant's Mitsubishi Fuso was imported and duty paid for. Since the ex-parte Applicant's Mitsubishi Fuso was fraudulently registered there cannot therefore any records of the previous owner of the suit motor vehicle apart the names of the previous owners who were fraudulently registered.
25. To him, since each motor vehicle has a history, indication in the logbook of the suit motor vehicle that duty was paid for is not enough; there should be evidence of the import entry and bank payment receipt(s) which the ex-parte Applicant neither did he avail himself nor the vehicle as required vide the Respondent's Notice dated 25<sup>th</sup> October 2012 and as the Respondent is empowered to do under section 236(d) of the EACCMA, 2004.
26. In the deponent's view, the issues before this Honourable Court can be well canvassed by viva voce evidence rather than by way of Judicial Review as there is so much facts and evidence which require oral evidence.
27. To the Respondent, Judicial Review deals with administrative decisions and therefore the Respondent herein has exercised its decision in accordance to the Act and therefore the Applicant's prayers should be dismissed with costs.

### **Interested Party's Case**

28. The Interested Party, in response to the application filed a replying affidavit sworn by **Anne Wanjiku Gichuki**, the Head of Asset Finance Department of the interested party on 5<sup>th</sup> June, 2013.
29. According to the deponent, on 16<sup>th</sup> April, 2012, upon the ex parte Applicant's own application to the Bank, the Interested Party Bank granted an asset finance facility of Kshs.3,360,000/= to the ex parte Applicant herein to purchase motor vehicle registration number KBQ 871U make Mitsubishi FH215 lorry and upon approval of the said loan facility, the Interested Party bank applied for an official search at the Respondent herein where the bank confirmed that the said motor vehicle was jointly registered owned by the intending sellers namely; **Moses Muiruri Ng'ang'a** and **Wilfred T Gathiomi**. Thereafter, on receipt of the transfer documents, the interested party bank presented the logbook and the transfer documents to the Respondent for purposes of effecting joint registration in the name of the Interested Party and the ex parte Applicant and the financing was done and the transfer of the motor vehicle was duly effected at the office of the Respondent and the ex parte Applicant and the Interested Party bank were registered as joint owners of the said motor vehicle.
30. Based on legal advice from the interested party's advocates, it was deposed that after conducting all the due process, the interested party bank is thus a *bona fide* financier for value without notice and therefore not liable for any omissions and/or commissions which were not within the bank's information and/or notice. According to him, the Interested Party Bank financed the said purchase on the understanding that the said motor vehicle was to be engaged in the provision of transport business and which in turn would generate income towards repayment of the loan and thus the impounding of the said motor vehicle is prejudicial to the bank's position to recover the advanced loan facility which continues to run into debt hence the interested party stands to suffer irreparable loss if the suit motor vehicle is not released and the ex parte Applicant allowed to trade using the said motor vehicle to enable him repay his outstanding facility with the interested party bank. On other hand, the Respondent stands to suffer no prejudice if the said motor vehicle is released by this Honourable court pending the investigations being conducted by the Respondent pursuant to its letter dated 19<sup>th</sup> February, 2013.
31. By a supplementary affidavit sworn by **James Karanja**, the interested party's Asset Finance Officer on 2<sup>nd</sup> September, 2013, it was deposed that it is not in dispute that the suit motor vehicle is duly registered by the Respondent and jointly owned by the ex parte Applicant and the Interested Party herein. According to him, as stated in the Respondent's Replying affidavit, when deregistration of the suit motor vehicle was done and completed, the registration number plates of the deregistered motor vehicle were surrendered to the Respondent by the previous owner and the

- same was not assigned to and/or allocated to any other motor vehicle; thus it defeats logic how the previous owner of the suit motor vehicle surrendered the said motor vehicle registration number plates to the Respondent and at the same time the ex parte Applicant and/or the Interested Party acquired the same registration number plate for another motor vehicle and the same registration number recorded in a different logbook without the assistance and/or approval of the Respondent. Further, the registration date indicates that the suit motor vehicle was registered by the Respondent herein on the same date as the alleged motor vehicle owned by the alleged RT (East Africa) Limited was registered.
32. Emerging from the foregoing, the deponent opined is the fact that the Respondent herein acted negligently in registering and issuing two different motor vehicles with the same registration number KBQ 871U on the same date and for that reason alone, both the ex parte Applicant and Interested Party herein should not be subjected to loss of any kind for the Respondent's failure of the statutory duties imposed upon it more so as neither the ex parte Applicant nor the Interested Party herein were the importers of the suit motor vehicle.
33. To the deponent, the Respondent has not alleged and/or proved to this court that the alleged Simba Colt Motors Limited is the sole importer of Mitsubishi lorries and trucks to Kenya hence the Respondent ought to have conducted a historic search in its attempts to resolve the mischief and/or allegations of fraud of the suit motor vehicle but it has not done so and neither has it attached any records of the previous owner of the suit motor vehicle.
34. To the deponent, it is against the rules of natural justice that the Respondent thought it prudent to invite only the current owners of the suit motor vehicle to answer questions regarding the importation and registration of the suit motor vehicle without interrogating the people who sold the vehicle to them when the ex parte Applicant is a *bona fide* purchaser for value without notice. The deponent averred that the ex parte Applicant appeared before the Respondent and informed the Respondent that he was merely a purchaser of the suit motor vehicle as indicated in the ex parte Applicant's Verifying Affidavit.
35. It was further deposed that contrary to the Respondents allegations, it has not been proved that duty for the said motor vehicle was not paid to the Respondent and in fact, duty for the said motor vehicle was paid and the same is indicated in the logbook of the suit motor vehicle.
36. In the circumstances, it is in the interests of justice that the said motor vehicle be released to enable the ex parte Applicant to trade with his lawfully acquired and registered motor vehicle to enable him fulfil his outstanding obligations with the bank as the registration by the Respondent is apparently procedural and legal and the registration was effected at no fault of either the interested Party nor the ex parte Applicant.

### **Applicant's Submissions**

37. On behalf of the applicant the contents of the supporting affidavits were reiterated and it was submitted that it is against the rules and tenets of natural justice to require a totally innocent party who is not aware of the import and registration process to answer to questions on the same.
38. It was submitted that based on Mombasa Court of Appeal Civil Appeal No. 157 of 2007 – **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel**, the applicant has demonstrated the procedural impropriety by the Respondent and that its actions are clearly against natural justice.

### **Respondent's Submissions**

39. On behalf of the Respondent, it was submitted based on **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel** (supra) that there is no estoppel against statute and that although the Commissioner initially erred in deciding the substance was not dutiable and possibly was negligent not to have analysed the sample, the Commissioner was bound under the law to correct the matter and levy duty on the basis that the substance had always been dutiable. It was further submitted based on the same authority that the grounds on which administrative action is subject to judicial review are well known and include illegality, irrationality and procedural impropriety. Further reliance was placed on **Athumani Juma Gannzori & 3 Others vs. The Commissioner General, Kenya**

Revenue Authority and 2 Others Nairobi HCMA No. 60 of 2006 and the Court was urged to dismiss the applicant's application.

### Determinations

40. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivaling submissions, this is the view I form of the matter.
41. The parameters of judicial review were set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision..... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..... The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way..... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done..... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

42. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account**

relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

43. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.
44. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282*, at P. 285.
45. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

46. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**:

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality,

irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

47. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “3I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.
48. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law.”

49. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.
50. In this case it is contended that the Respondent in making its decision breached the rules of natural justice. In **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moiwo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** the High Court expressed itself as follows:

“Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting

individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively. Depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence..... Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as top the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a canon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated because there is no particular safeguards provided under section 62 that deals with the removal of a Judge in instances where there is a complaint against him.”

51. Similarly in Msagha Vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553 the High Court expressed itself as follows:

“The Court observes firstly that the rules of natural justice “*audi alteram partem*” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision. Where suspension was made as a holding operation pending enquiries the rules of natural justice did not apply because the suspension was a matter of good administration. Suspension is merely expulsion *protanto*. Each is penal and each deprives the member concerned of the enjoyment of the rights of membership of offices. Accordingly in my judgement the rules of natural justice *prima facie* apply to any such process of suspension in the same way that they apply to

expulsion. Those words apply no doubt to suspensions which are inflicted by way of punishment as for instance a member of the Bar is suspended from practice for six months or when a solicitor is suspended from practice. But they did not apply to suspensions which are made as a holding operation pending inquiries.

Very often irregularities are disclosed in a government department or in a business house and a man may be suspended on full pay pending inquiries. Suspicion may rest on him and he is, suspended until he is cleared of it. No one so far as I know, has ever questioned such a suspension on the ground that it would not be done unless he is given notice of the charge and opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicion, the others will not trust the man. In order to get back the proper work he be suspended. At that stage the rules of natural justice do not apply..... The principle of legitimate expectation lies in the proposition that where a person or a class of persons has previously enjoyed a benefit or advantage of procedure which, on reasonable grounds, seemed likely to be continued as a standard way or guide, with respect to the resolution or disposal or certain questions a claim of legitimate expectation may arise. Put differently, legitimate expectation is but one variant aspect of the duty to act fairly and natural justice is but a manifestation of a broader concept of fairness. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to “act judicially”. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decisionmaker is that his decision in its own context be made with due regard for the affected parties’ interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias (*nemo iudex in sua causa*) and in respect of] the right to a fair hearing [*audi alteram partem*].”

52. In this case it is not contended by the applicant that he was not afforded an opportunity of being heard before the decision by the Respondent was taken. In fact according to the applicant, he did proffer an explanation and availed documentary evidence in support of his case hence the Respondent ought not to have taken the decision it did. Whereas the Respondent’s decision made after hearing the applicant may or may not be sound based on the material before it, that is not a matter for determination of this Court in the exercise of its judicial review jurisdiction since the Court in such proceedings is not called upon and does not deal with the merits of the challenged decision but only deals with the process.
53. The applicant however contends that since the transaction for the sale of the suit motor vehicle was approved by the Respondent and since the applicant was not a party to the alleged fraudulent registration of the suit motor vehicle, the Respondent’s decision in impounding the said vehicle is unjust. That challenge can only be upheld by the Court if it is found that the said decision is either irrational or unreasonable since there is no allegation that the decision itself is illegal.
54. In my view, the mere fact that the Respondent approved the transaction would not legalise the same if the same was found to be unlawful since estoppel does not operate against a statute. See **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel** (supra).
55. In this case the Respondent has adduced prima facie evidence that the registration of the suit

- motor vehicle was at least irregular. That the said irregularity was contributed to a certain extent by the agents or employees of the Respondent cannot be ruled out since, it is the Respondent that ought to have ensured that the suit motor vehicle was not registered with the same particulars as the vehicle whose registration had been withdrawn and that the number plates were not released for registration by another vehicle.
56. Whereas I agree with the decision of the Court of Appeal in **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel** (supra) as I am bound to, that if the process of verification would ultimately result in the applicant being required to pay duty and taxes, the Respondent would not lawfully be estopped from exercising its statutory duty and recovering the duty imposed by the law which should have been paid but for the fraud of the importers and that it would be contrary to public policy to shield the applicant through judicial review from operation of the law and allow him to retain unaccustomed goods contrary to the law, Article 47(1) of the Constitution of Kenya provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
57. To indefinitely impound a vehicle belonging to a person due to negligence or mistakes perpetrated partly by the agents of the, unless it is shown that the person played a part in the fraudulent transaction, in my view goes against the letter and spirit of Article 47(1). Once the Respondent discovers that fraud may have been committed legal action ought to be expeditiously taken against the perpetrators while those who are responsible for the payment of the taxes ought to be required to do so. In this case it has not been contended that any person has been arrested or charged with the fraudulent transaction despite the fact that the same could not have been effected without participation by some of the Respondent's agents and/or employees.
58. It is therefore the Court's view that taking into account the period it has taken the Respondent to take action in this matter, the Respondent has contravened the Applicant's right to expeditious and efficient administrative action. As was held in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya)** (supra), categories of intervention by the Court are likely to be expanded in future on a case to case basis.
59. Where the Court finds that a person's constitutional rights have been contravened, the remedies available are not limited to the one specified under Article 23 of the Constitution. In determining allegations of contraventions of the Bill of Rights, Article 20(3) of the Constitution, provides that the Court is enjoined, to the extent that it does not give effect to a right or fundamental freedom, to develop the law and adopt an interpretation which favours the enforcement of a right or fundamental freedom.
60. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. First the court issue a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a preset date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in

the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The 'check in' hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights. Finally structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalize the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent 'queue jumping' in access to Economic and Social Rights. See [Structural interdicts | Law Teacher](http://www.lawteacher.net/human-rights/essays/structural-interdicts) <http://www.lawteacher.net/human-rights/essays/structural-interdicts>.

61. In the instant case, there is no evidence that the Applicant participated in the fraud surrounding the suit motor vehicle. Yet the Applicant took a loan to finance the said purchase from the interested party. To compel the applicant to service the said facility when he is not benefiting from the same partly as a result of actions by the Respondent's agents would in my considered view be unreasonable. On the other hand based on the decision in **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel** (supra), the Respondent is clearly entitled to recover the duties and taxes due from the importation of the suit motor vehicle from the Applicant. It follows therefore that this Court mandates the Respondent to comply with Article 47 of the Constitution and in so doing I direct the Respondent to prepare and submit a comprehensive report on how it intends to ensure that the Applicant's rights are protected while it recovers the taxes due to it within 30 days after which the Court will make further orders.

**Dated at Nairobi this 3<sup>rd</sup> day of March 2014**

**G V ODUNGA**

**JUDGE**

*Delivered in the presence of Miss Osoro for the interested party.*