



**Republic v Officer Commanding Ruai Police Station & another;  
Nehemiah (Exparte) (Judicial Review Application 178 of 2022)  
[2023] KEHC 1329 (KLR) (Judicial Review) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1329 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION 178 OF 2022  
AK NDUNG'U, J  
FEBRUARY 23, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**OFFICER COMMANDING RUI POLICE STATION ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DOMINIC GECHONGE NEHEMIAH ..... EXPARTE**

**RULING**

1. Before court is the applicants' chamber summons application dated 3<sup>rd</sup> December. Orders sought are as follows;
  1. Spent.
  2. That the honourable court be pleased to grant leave to the applicant to apply for judicial review orders to wit;
    - a. *Certiorari* directed to the respondents to removing into this court for purposes of being quashed, the respondent's decision to hold and detain motor vehicle KCV 028L.
    - b. *Mandamus* directed towards the 1<sup>st</sup> respondent, compelling him/her to unconditionally release motor vehicle registration number KCV 028L to the applicant.



- c. Prohibition directed to the 1<sup>st</sup> respondent, prohibiting him from detaining the motor vehicle registration number KCV 028L and from demanding any money from the applicant.
  3. That leave so granted does operate as a stay of the decision and actions of the 1<sup>st</sup> respondent in detaining the motor vehicle registration KCV 028L and from demanding any money from the applicant.
  4. That costs of this application be provided for.
2. The application is grounded on the following grounds:
  - a. Excess of jurisdiction: the decision by the 1<sup>st</sup> respondent to detain the motor vehicle in an attempt to force the applicant to pay the sums so demanded by a non-disclosed complainant and amounts to converting the powers of the 1<sup>st</sup> respondent into some civil debt collector which is outside the jurisdiction of the 1<sup>st</sup> respondent and substantively *ultra-vires*. Even if taking an assumption that the amounts so demanded emanated from a criminal activity then the respondents should have sought orders to detain the said motor vehicle if they could demonstrate to court any nexus between keeping the motor vehicle and pursuing the crime.
  - b. Illegality: the decision of the 1<sup>st</sup> respondent to demand money without disclosing to the applicant the material facts as to who the complainant is and when the said sums accrued amounts to illegality in the face of the law.
  - c. Fettering of discretion: the actions of the 1<sup>st</sup> respondent, in releasing the person presented to him as to be he hirer of the motor vehicle as at the time that the alleged offense is said to have taken place amounts to festering his discretionary powers to investigate, arrest and prosecute the suspects of various offenses.

The application is further supported by the annexed affidavit Dominic Gechonge Nehemiah.

3. At the *ex parte* stage where the court granted leave to the applicant to institute judicial review proceedings, an order was made that prayer 3, being the question whether the leave so granted was to operate as a stay of the decision and actions of the 1<sup>st</sup> respondent in detaining motor vehicle registration No KCV 028L and demanding money from the applicant, be heard *inter partes*. The same was to be canvassed through written submissions. This ruling resolves that question.
4. Counsel for the applicant has submitted that the prayer 3 is not opposed since at the time of filing the said submissions, the respondents had not filed a response. It is urged that stay orders are necessary to ensure that the applicant's case is not rendered nugatory. It is a discretionary power that ought to be exercised judiciously. Am asked to be guided by the case of *Giella v Cassman Brown & Co Ltd* as the stay order will offer temporary relief.
5. Counsel argues that the applicant will suffer irreparable injury which would not be adequately compensated by an award of damages. It is urged that in instances where a motor vehicle is subject to investigations, the practice is that pictures of the same are taken and motor vehicle released.
6. In submissions dated January 16, 2023, counsel for the respondents' counsel sets out the functions of the Kenya Police Service as provided for in section 24 of the Kenya *Police Service Act*. He asserts that the police took up the matter and investigations are ongoing and that is why the vehicle cannot be released. It is their position that the orders sought are unconstitutional as they seek to prevent the 1<sup>st</sup> respondent from performing their mandate as required by law. Counsel adds that should the motor vehicle be released the whole substratum of the case shall be lost thus rendering the judicial



review proceedings nugatory. There would be nothing left to determine in these judicial review suit.

7. Counsel has submitted in depth on the judicial review orders of mandamus and certiorari. I elect to bypass that submission as it should find its rightful place during arguments in the substantive motion safe to note that, yes, by seeking release of the motor vehicle at the *ex parte* stage, the applicant is in a way seeking an order of mandamus before the application is heard. I shall revert to that question in my analysis.

7. The legal principles guiding the grant of an order that leave granted to institute judicial review proceedings operates a stay of the impugned action is well settled. Though the same may find some similarity with the principles guiding injunctions, there is a clear distinction in the parameters to be achieved and in that regard, counsel for the applicant misses the point when he relies on the decision in *Giella v Cassman Brown & Co, Ltd.*

8. In [\*Republic v National Assembly & another Ex-parte Coalition for Reform and Democracy \(CORD\)\*](#) [2016] eKLR Odunga J (as he then was) stated;

“The purpose of stay was restated by Dyson, LJ in *R (H) v Ashworth Hospital Authority* [2003] WLR 127 at 138 where the Lord Justice held that:

“The purpose of a stay in a judicial review is clear. It is to suspend the “proceedings” that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase “stay of proceedings” must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *vehicle and supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review... Thus it is common ground that “proceedings” includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect.” [Underlining mine].

12. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review proceedings nugatory or an academic exercise that the court would stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding.”

9. Maraga, J (as he then was) in [\*Taib A Taib v The Minister for Local Government & others\*](#) Mombasa HCMISCA No 158 of 2006 was of the view that:

“As injunctions are not available against the government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the court should always ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application and therefore where the order is efficacious the court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not



limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act...A stay order framed in such a way as to compel the respondents to reinstate the applicant before hearing the respondent cannot be granted.”

14. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability, rather than the possibility, of a determination being made in the challenged proceedings, is high and that the same would render the judicial review proceedings futile that the stay ought to be granted. It follows that the stage at which the said proceedings under challenge have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.

10. Further exposition of the law is found in the decision by the High Court in Kaduna in *Econet Wireless Limited v Econet Wireless Nigeria Ltd and another* [FHC/KD/CS/39/208] that the exercise of the discretion involves:

“a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the court...a situation of complete hopelessness or render nugatory any order of the...court or paralyse in one way or the other, the exercise by the litigant of his constitutional right...or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds...there would be no return to the status quo.”

11. The court must hence guard against any action or inaction whose effect may render these proceedings nugatory. If the subject vehicle was to be released, what would be the substratum of these proceedings? I associate myself with the holding of Court of Appeal in *Dr Alfred Mutua v Ethics & Anti-corruption Commission & others* civil application No Nai 31 of 2016 in which it cited the Nigerian Court of Appeal decision of *Olusi & another v Abanobi & others* [suit No CA/B/309/2008] that:

“It is an affront to the rule of law to... render nugatory an order of court whether real or anticipatory. Furthermore...parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”

12. It is generally agreed that parties who have invited the court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the court would be of no use. In that event as held by the Nigerian Court of Appeal in *United Cement Company of Nigeria v Dangote Industries Ltd & Minister of Solid Mineral Development* [CA/A/165/2005], the court ought to ensure that:

“appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order.”

13. In the present application the question that the court must decide is therefore whether acceding to the request to release the subject motor would destroy the subject matter of the proceedings before the police and foist upon the court a situation of complete helplessness so that even if the respondents



were to succeed there would be no return to the status quo the substratum of the investigations having been lost.

14. The police are mandated by section 24(e) of the *National Police Service Act* to investigate crimes. There is an ongoing investigation over a crime in which the subject motor vehicle is central. This court must respect the legal space of the police to conduct investigations. The court cannot prescribe how and what outcome the investigations should have. Doing so would amount to usurping the mandate of the body statutorily mandated to undertake the exercise.
15. The prayer for stay in this matter takes a peculiar trajectory as it seeks a mandatory order for release of the motor vehicle before the investigations are complete. As clearly enunciated in the exposition of the law on leave applying as a stay, the remedy is applicable for the purpose of preventing a decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. In my view the remedy cannot therefore be available to the applicant to have the motor vehicle released at this stage. That must await the hearing of the substantive motion where the court shall have the opportunity to scrutinize the process all the way from investigations to charging, if at all, and pronounce itself on the legality, rationality and procedural propriety of the whole process.
16. That is not to say that the police have a carte blanche without proper basis to hold a citizen's asset depriving him of its use and benefit. Any investigations requiring such detention must be pegged on a genuine complaint backed by evidence. Any derogation from this requirement would surely invite damages through a civil action for malicious prosecution or other appropriate legal process including under the bill of rights in the *constitution*.
17. From the foregoing, prayer 3 of the chamber summons application dated December 3, 2022 fails and is declined. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023**

**A. K. NDUNG'U**

**JUDGE**

