



**Republic v Kenya Ports Authority & another; P.M.A Motors Limited (Exparte) (Judicial Review Application E029 of 2022) [2023] KEHC 1185 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1185 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E029 OF 2022**

**JN ONYIEGO, J**

**FEBRUARY 17, 2023**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26, SECTION 2(B), 11(1) (2) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, LAWS OF KENYA**

**AND**

**IN THE MATTER OF CUSTOMS AND EXCISE ACT CAP 472 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE KENYA PORTS AUTHORITY ACT CAP 391 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT NO 2 OF 1995 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

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

**AND**

**P.M.A MOTORS LIMITED ..... EXPARTE**

**RULING**

1. On November 29, 2022, the ex-parte applicant herein filed a Chamber Summons Application dated the November 25, 2022 seeking leave to institute Judicial Review proceedings for the orders of certiorari



- to quash the decision of the Respondent to hold a Motor Vehicle make, Toyota Land Cruiser and an order of *Mandamus* to compel the Respondents to release the said vehicle as it is being held without any basis or legal backing of the law.
2. The Chamber Summons application was placed before court on the December 1, 2022 whereby leave to file and serve a substantive motion was granted. Subsequently, the Ex-parte Applicant duly complied by filing a Notice of Motion application dated December 14, 2022, seeking the following orders: -
    1. That an order of *Certiorari* do issue into this court and quash the decision of the respondents in holding the Motor Vehicle Make: Toyota Land Cruiser, Chasis [sic] Number: JTMHV09J904168289, Colour: Black, Model; 2015, HS Code:87032332, Engine Number: 1VD-0285579.
    2. That an order of *Mandamus* to compel the Respondent to release Motor Vehicle Make: Toyota Land Cruiser, Chasis [sic] Number: JTMHV09J904168289, Colour: Black, Model; 2015, HS Code:87032332, Engine Number: 1VD-0285579.
    3. That costs of this application be provided for.
  3. The application is anchored on grounds set out on the face of it together with the averments contained in the affidavit in support wherein the applicant stated that it duly imported the aforementioned motor vehicle from the United Arab Emirates through the port of Mombasa on the October 19, 2022. That since its arrival at the port and subsequent fulfilment of the attendant conditions precedent to its clearance and release, the 1<sup>st</sup> Respondent has stored it at Awanad Container Freight Station as it purportedly awaits clearance by the 2<sup>nd</sup> respondent.
  4. It is the ex-parte applicant's case that the respondents have not provided it with any written reasons or explanation explaining their decision not to release the car. That the only excuse given verbally is that the motor vehicle is under investigations a claim that is not supported by any evidence.
  5. That due to the respondents' decision not to release the motor vehicle, the applicant continues to suffer losses as the motor vehicle is fast depreciating due to harsh climate conditions and lack of maintenance. The applicant further added that storage costs will continue to accrue and escalate to their detriment.
  6. It was further averred that the Respondents having not instituted any legal proceedings against the Applicant with regard to the said vehicle, it is only right and fair that the motor vehicle be released as it being held by the Respondents without any proper information being relayed to them amounts to violation of their right to fair administrative action as provided for under article 47 of the [Constitution of Kenya](#).
  7. Despite being served with both the Chamber Summons application as well as the substantive motion, the Respondents did not file any response. The substantive Motion is therefore unopposed.
  8. As stated above, this application was not opposed. It has been stated time and again that a court of law is bound to look at the merits of an application before it before making a determination. It is not automatic that such an application will be allowed just because it has not been opposed. This position was succinctly stated in Civil Application No. 26 of 2018 *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR, where the Supreme court held as follows: -

“[10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application is meritorious and the



prayers may be granted. The court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this court...”

9. I have considered the undisputed facts regarding the background to the present Notice of Motion and the only issue for determination is whether the applicant is entitled to the judicial review orders sought.
10. The parameters for granting judicial review orders were set out in the Court of Appeal Civil Appeal No. 185 of 2001 *Municipal Council of Mombasa v Republic & another* [2002] eKLR, where it 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’s touching on violation of fundamental rights. These are issues within this court’s jurisdiction, hence, on this ground, this case passes the exception requirement...”

11. Further, Hon. Justice Odunga (as he then was) in the case of *Isaac Gathungu Wanjohi & another v Director of City Planning of Nairobi & another* (2014) eKLR had this to say: -

“...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...”

12. In this case the court has not been able to determine the reasons as to why the Respondents have not released the subject motor vehicle neither has the procedure for detention of the subject motor vehicle been explained. The Ex parte applicant has explained how it has paid the requisite taxes and or necessary duties payable to the respondents. Unfortunately, the respondents in their wisdom have opted to keep off these proceedings for their own reasons. The Ex parte applicant has performed its obligation as exhibited from the attached documentation.
13. The failure to release the motor vehicle nor offer any explanation in writing as to why the MV should not be released is unacceptable. In my view, this attitude and action is in breach of the provisions of section 4 the *Fair Administrative Actions Act* No. 4 of 2015 that requires and binds any administrative body such as the Respondents to give reasons in writing for any administrative action taken against any person/s. It is therefore my finding that it is unfair and irrational for the Respondents to hold the subject motor vehicle captive without offering any information to the Applicant and affording them a chance to be heard as required under article 47, 48 and 50 of the *Constitution* of Kenya.
14. In view of the foregoing, it is my holding that the Notice of Motion application dated December 14, 2022 which is not challenged is merited hence allowed as prayed. Regarding costs, the same shall follow the event and in the instant case, the same is awarded to the Ex parte applicant.



Dated, signed and delivered virtually at Mombasa this 17<sup>th</sup> day of February 2023.

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**J.N. ONYIEGO**

**JUDGE**

