REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

APPLICATION NO. 38 OF 2020

REPUBLIC.....APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY.....RESPONDENT

AND

NATIONAL SAFETY TRANSPORT AND SAFETY AUTHORITY.....INTERESTED PARTY

ex parte: **DENNIS JOSEPH SHIJENJE**

JUDGMENT

Before court is the applicant's application by way of a motion dated 22 April 2021 filed under Order 53 Rule 3 Civil Procedure Rules and Section 3A of the Civil Procedure Rules. The prayers for the orders sought have been couched as follows:

> ***"1. THAT an order of certiorari and is hereby issued to quash the decision of the Respondents to apply and/or contained in the application/request for the entry of a Caveat against/on motor Vehicle Toyota Fortuner registration number KCQ373F belonging to the Applicant.***
>
> ***2. THAT an order of certiorari be and is hereby issued to quash the Caveat that was placed by the National Transport and Safety Authority at the request of the Respondent on Motor vehicle Registration number KCQ 373E.***
>
> ***3. THAT an order of mandamus be and is hereby issued compelling the Respondent and/or the Interested Party to lift and or cause to be lifted the caveat entered in Motor Vehicle Toyota Fortuner KCQ 373E.***
>
> ***4. THAT an order of Prohibition be and is hereby issued prohibiting the Respondent from applying to the interested party to enter subsequent caveat based on the same reasons/ grounds that formed the basis of the expunged caveat herein.***
>
> ***5. THAT the costs of this Application be provided for.***
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> ***6. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances."***

The motion is based upon statement of facts dated 3 February 2020 and a verifying affidavit sworn by the applicant himself on even date.

It is the applicant's case that sometimes in April 2018 he entered into a financial arrangement with NIC Bank Limited according to which the bank financed the the applicant's acquisition of the motor vehicle registered as KCQ 373 E from Toyotsu Kenya Limited.

After repayment of the bank's loan, he sought to have the motor vehicle transferred into his name. However, he was informed by the interested party that the respondent had placed a caveat on the motor vehicle. The decision to place a caveat on the applicant's vehicle was never communicated to the applicant by the respondent and therefore it is the applicant's case that the caveat was placed without his prior knowledge.

The applicant also swore that at the time of purchase of his motor vehicle, it was free of any encumbrances and it was in bad faith for the

respondent to have only placed the caveat against the vehicle after he cleared his loan to the bank.

Dominic Kengara swore an affidavit in response to the application; he deposed, *inter alia*, that he is engaged as an officer in the respondent's Investigations and Enforcement Department and in that regard, he has been involved in the investigations relating to what he alleges to be tax evasion schemes by the Applicant.

During his investigations, Kengara established that the applicant was a director of a company called Bachmann Enterprises Limited which was incorporated in the year 2012. Despite earning what the deponent described as 'huge income' this company had been filing nil returns ever since its incorporation. The investigations also revealed that the company and others were involved in a tax fraud scheme according to which the government lost Kshs. 821, 973, 607/= and of this amount, Kshs. 599, 013, 562/= was diverted to the applicant's company accounts held in various banks.

As a result of the applicant's fraudulent contact, the respondent through the Office of the Director of Public Prosecution (ODPP), instituted **criminal case no. 2091 of 2018: Republic —vs- Denis Joseph Shijenje & Bachman Enterprises Limited** against the Company and its directors for offences committed including; failure to comply with obligations in the Income Tax Act and the VAT Act and the failure to pay taxes that were due and payable.

Besides the criminal case, the respondent also wrote to the Director of Asset Recovery Agency (ARA), on 11 January 2019 requesting the director to institute recovery of tax measures against the applicant and his company in line with ARA's statutory mandate.

Kengara has denied, however, that the respondent has ever lodged any caveat on the applicant's vehicle and that, in any event, none has been demonstrated to exist. In the circumstances, the order for certiorari cannot issue. To quote Kengara, he swore as follows:

> ***"26. That from the Applicant's Affidavit and records before this Honourable Court, despite the tax investigations carried out by the Commissioner, there is no evidence to show that the Respondent placed a caveat against the Applicant's Motor Vehicle Toyota Fortuner registration no. KCQ373E.***
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> ***27. THAT without proof that the Respondent placed the caveat on the Applicant's motor vehicle, the Respondent is a stranger to the current application and as such is not in a position to respond to the allegations levelled against it."***

The interested party did not respond to the motion but in an affidavit sworn earlier on its behalf, in response to the applicant's application for leave to file the present motion, the interested party was categorical that indeed it had registered a caveat on the applicant's vehicle at the instance of the respondent; in the pertinent paragraphs of the affidavit sworn by Christopher Wanjau, the interested party's director in charge of registration and licensing, it was deposed as follows:

> ***"5. That in our duty of being the custodian of records we secure interest of the registered owners of motor vehicles and as such we place caveats to the motor vehicles at the request of the registered owner, Court Order, requests from institutions conducting investigations as police, Kenya Revenue Authority, Ethic and Anti-Corruption Commission, Asset Recovery just to mention but a few.***
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> ***6. That as per the National Transport and Safety authority records the motor vehicle registration number KCQ 373E is registered jointly in (sic) between the applicant and NIC Bank Kenya PLC.***
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> · ***7. That on 22nd November 2018 a caveat was placed by National Transport and Safety Authority at the request of the Respondent on grounds of fraudulent activity.***
>
> · ***8. That the caveat was placed lawfully by the National Transport and Safety Authority on the 22nd November 2018 on the request of the Respondent."***

Indeed, a copy of an extract of the records in respect of the motor vehicle KCQ 373 E exhibited to the affidavit of Wanjau shows a caveat was placed upon it on 22 November 2018. The reason given for the caveat is endorsed on the record as 'fraudulent' and there is a remark to the effect that 'placed by KRA VAT issues'.

No doubt Wanjau's affidavit and that of Kengara are contradictory but as far as the applicant is concerned Wanjau's affidavit together with the annexed exhibit confirm the applicant's case that indeed a caveat was registered on his vehicle.

Contrary to the respondent's counsel's submission that there is no evidence of a caveat and therefore the order of certiorari ought not to issue, it has been demonstrated that the impugned caveat exists. All that is lacking is the evidence of the respondent's instructions to the interested party to lodge the caveat.

Now that the respondent has disowned the caveat, there is no reason why it ought to have been registered against the applicant's vehicle in the first place. For the same reason and, in the absence of any evidence from the interested party that the caveat was prompted by the respondent, it is unnecessary to delve into the question any of the prerogative orders sought should issue against the respondent. Suffice it to say, the interested party's decision to register a caveat on the applicant's vehicle without having been prompted by any of the agencies which Wanjau swore could register such a caveat, is tainted by all the three traditional grounds of judicial review of illegality, irrationality and procedural impropriety. The grounds were explained in the case of **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410; Lord Diplock spoke of these grounds as follows:**

> ***"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.***
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> ***By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.***
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> ***By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.***
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> ***I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."***

When one considers the impugned decision from this perspective, it can safely be concluded that the decision was illegal because there was neither factual nor legal basis for placement of the caveat on the applicant's vehicle.

If Wanjau's affidavit is anything to go by, a caveat of the nature that was lodged on the applicant's vehicle could only be lodged on the strength of a court order or at the request of any of the investigation agencies in exercise of the mandate for which they are established under the law. In the absence of any order from the court or request for such a caveat by any of the investigative agencies, the decision to lodge it was illegal.

For the same reasons, the decision was also irrational or unreasonable in the sense that, considering that the respondent has denied having placed the caveat on the applicant's vehicle, the decision by the interested party to place the caveat was, no doubt, so outrageous in its defiance of logic and that no sensible person who had applied his mind to the question at hand could have reached same conclusion, based on the same facts.

The applicant who was obviously affected by the decision was never informed of it until he sought to transfer the vehicle in his name. I need not say anything more on this except to state that the decision lacked procedural propriety in that respect.

In the circumstances, I am satisfied that the applicant has made out a case for the grant of the orders of certiorari and mandamus. I will therefore allow the applicant's motion in terms of prayers (2) and (3) of the motion; to be precise:

> ***1. An order of certiorari be and is hereby issued to quash the Caveat that was placed by the National Transport and Safety Authority on 22 November 2018 on Motor Vehicle Registration number KCQ 373E.***
>
> ***2. An order of mandamus be and is hereby issued compelling the Interested Party to lift and or cause to be lifted the caveat entered in Motor Vehicle Toyota Fortuner KCQ 373E.***

Prayer (1) is declined for it is somewhat ambiguous and it would be superfluous in any event since prayer (2) which seeks the order for certiorari has been granted. The applicant will have costs of the suit. It is so ordered.

SIGNED, DATED AND DELIVERED ON 28TH JANUARY 2022

NGAAH JAIRUS

JUDGE