



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 80 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....3RD RESPONDENT

AND

GIDEON KIOKO MUTUNGI.....1ST INTERESTED PARTY

STEVEN ONYANGO ODHAO.....2ND INTERESTED PARTY

EX PARTE APPLICANT:

PEARLYNE CHIEMA EDEL OMAMO

JUDGMENT

1. Pearlyne Chiema Edel Omamo, the *ex parte* Applicant herein, is a female adult of sound mind, residing and working for gain within the Republic of Kenya. She has sued the Respondents herein arising from the **seizure and impounding of** motor vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon and seizure of the said motor vehicle’s original Log book The 1st Respondent is the Director of Criminal Investigations Department, a state office established under section 28 of the National Police Service Act with the responsibility to undertake investigations on serious crimes. The 2nd Respondent is the Inspector General of Police, a constitutional office established in accordance with Article 245 of the Constitution and which is responsible for matters relating to command and discipline of the police service.

2. The National Transport and Safety Authority, which is established under section 3 of the National Transport and Safety Authority Act. is sued as the 3rd Respondent. Its mandate includes the registration and licensing of motor vehicles. The *ex parte* Applicant also joined Gideon Kioko Mutungi and Steven Onyango Odhau, the agent and principal respectively who sold her a motor vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon as the 1st and 2nd Interested Parties herein.

3. The *ex parte* Applicant has moved this court by way of a Notice of Motion application dated 5th May, 2020, in which she is seeking the following orders:-

a) An order of Certiorari directing all the Respondents, by themselves, their servants and/or agents or any other official acting under their authority to hereby bring to this Court for the purpose of being quashed, their decision made on or about 14th February, 2020, to seize and impound motor vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon and seize its original Log book both of which belong to the *ex-parte* Applicant.

b) An order of Mandamus directing all the Respondents, by themselves, their servants and/or agents or any other official

acting under their authority to hereby release Motor Vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon to the *ex-parte* Applicant.

c) An order of Mandamus directing all the Respondents, by themselves, their servants and/or agents or any other official acting under their authority to hereby release the original Log Book registered and issued in the name of the *ex-parte* Applicant for Motor Vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon to the *ex-parte* Applicant.

d) An order of Prohibition prohibiting the Respondents by themselves, their servants and/or agents or any other official acting under their authority, from seizing and impounding Motor Vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon, which belongs to the *ex-parte* Applicant.

e) Costs of the Application be hereby provided for.

4. The Application is supported by the Statutory Statement dated 8th April, 2020, the Verifying Affidavit of Pearlyne Chiema Edel Omamo dated 3rd April, 2020 and a Further Affidavit dated 28th May, 2020. The Respondents did not file any response to the application despite being served with the same. In response to the Application, the 1st Interested Party swore a Replying Affidavit dated 16th June, 2020.

The *ex-parte* Applicant's Case

5. The *ex parte* Applicant deponed that she is an Advocate of the High Court of Kenya, and that sometime in December 2018, she saw an advertisement for the sale of Motor Vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon (herein after referred to as "the subject motor vehicle"). Further, that the advertisement was published by the Interested Parties on www.cheki.co.ke, a website that deals with the sale of motor vehicles. She averred that she met with the 1st Interested Party who assured her as to the integrity of the transaction, and inspected the subject motor vehicle. Further, that she conducted all relevant due diligence prior to the purchase of the motor vehicle which efforts did not indicate any purported defect in its title, and that the 1st Interested Party also allowed her to inspect various documents concerning the motor vehicle which included a motor vehicle search which did not indicate any anomaly.

6. According to the *ex parte* Applicant, she agreed to purchase the said motor vehicle at an initial purchase price of Kshs. 1,050,000/=, and that she executed a Sale Agreement dated 4th January 2019 on the above-noted terms, and thereafter paid the 1st Interested Party a deposit of Kshs. 120,000/= in cash. Further, that the balance of the purchase price was to be settled once she obtained a facility from her bank. However, that due to an administrative delay by her bank in disbursing the facility, the 1st Interested Party requested to increase the purchase price by Kshs. 20,000/= to KShs. 1,070,000/= which she was agreeable to. She contended that, once the facility was disbursed to her account, she transferred KShs. 950,000/= to the 1st Interested Party's account on 1st February, 2019. The *ex parte* Applicant deponed that upon satisfying the above-noted conditions of sale, the motor vehicle was transferred to her through the 3rd Respondent's TIMS Platform from the 2nd Interested Party, who was the initial registered owner. Thereafter, that a new Log Book for the said motor vehicle was duly issued in her name by the 3rd Respondent.

7. The events that occurred on 14th February 2020 were narrated by the *ex parte* Applicant, after she had been using the said motor vehicle for more than 1 year. She deponed that that date, at around 4.00 PM, she was driving home from work with a colleague when the 1st Respondent acting on instructions from the 2nd, 3rd and 4th Respondents, seized the said motor vehicle, in a surprising, traumatizing and embarrassing experience for her. She added that the 3rd Respondent later demanded to inspect the original log book for the motor vehicle, and acting in good faith, she obliged and shared the same with the 3rd Respondent.

8. However, that the 3rd Respondent has since declined to return the same to her despite her numerous requests. She contended that there has been no formal communication and/or information from the Respondents as to why they seized and continue to detain the motor vehicle despite her numerous written requests. The *ex parte* Applicant asserted that she has neither been invited by the 1st Respondent to record a statement nor have any charges of a criminal nature been preferred against her. In the meantime, that the motor vehicle was inspected and given "a clean bill of health" by the 1st Respondent.

9. The *ex parte* Applicant further averred that out of an abundance of caution, she sent a letter dated 26th February, 2020 to the Kenya Revenue Authority concerning the seizure of her motor vehicle and requested *inter alia* for them to verify whether the said motor vehicle was indeed seized as a result of a purported customs issue and if so what purported amounts were due and owing. She deponed that three (3) months later, she was yet to receive any response from the Kenya Revenue Authority or the Respondents providing any insight in this matter and therefore it is still unclear to her why her motor vehicle was seized.

10. The *ex parte* Applicant's case therefore is that as a result of the irregular, unlawful and unconstitutional seizure of her motor vehicle and log book, and the 1st Respondent's admission that she is an innocent purchaser for value, she has suffered prejudice which she particularized. The particulars include that the said motor vehicle being vandalized and parts stolen by unknown persons while in the custody of the 1st Respondent; her chances of exposure to ill health as a result of using public means of transport; and the travel and legal expenses she has incurred. On the other hand, that no prejudice would occasion the Respondents who had no lawful reason to withhold the motor vehicle from her. In addition, that she had at all material times co-operated with the Respondents and undertook not to transfer the motor vehicle to any third party during the pendency of the proceedings, and to provide it to the 1st and 2nd Respondents or to the Court should the same be required at any time.

11. The *ex parte* Applicant annexed copies of the sale agreement entered into with the 1st Interested Party dated 4th January 2019 for the purchase of the subject motor vehicle; the credit facility and bank statements showing payment for the motor vehicle; and the log book and an official search of the motor vehicle from the 3rd Respondent indicating that she is the registered proprietor of the motor vehicle.

The Interested Party's Case

12. The 1st Interested Party deponed that he was the sales agent on commission for the motor vehicle registration number KCN 116N, and that he was given the car by one Newton Lumiri (now deceased) of Chaka Motors Limited to sell on commission. He deponed that unfortunately, the said Newton Lumiri died on a road accident on the 23rd day of April, 2020. He averred that after satisfying the terms of the agreement, the 2nd Respondent executed the transfer documents in favour of the *ex-parte* Applicant upon which the transfer was made through the 3rd Respondent's TIMS platform.

13. He averred that he had never owned the said car save for the commission he earned by its sale to the *ex parte* Applicant. It was his contention that in light of the facts, it was necessary, just and proper that his name be struck out from the suit to effectually and completely adjudicate the dispute as between the *ex-parte* Applicant and the Respondents since the *ex-parte* Applicant had no cause of action against him.

The Determination

14. The parties were directed to canvass the instant application by way of written submissions. The counsel on record for the *ex-parte* Applicant filed written submissions dated 28th May, 2020, while the 1st Interested Party's counsel filed written submissions dated 1st July, 2020. A preliminary issue has been raised by the 1st Interested Party as regards his joinder in this suit, that needs to be disposed of before determination of the substantive issues arising in the suit.

On the 1st Interested Party's Joinder

15. The 1st Interested Party submitted in this respect that there was no cause of action against the 1st Interested Party and thus should not have been joined as an Interested Party in the suit. He cited the case of **Kwame Kariuki & Another vs Hassconsult Limited & 2 others [2014] eKLR** which defined what constituted a cause of action and relied on Order 1 Rule 2 of the Civil Procedure Rules, 2010 which set out who may be joined as a Defendant in a suit. It was submitted that the 1st Interested Party ought not to be joined in the suit as no remedy existed against him.

16. It was further submitted that no documents had been provided to show that there was any illegality committed by the 1st Interested Party, no non-action, error of commission or omission, no fraud or collusion pleaded or mistake on his part. It was also averred that there was no question of law or fact that arose to hold the 1st Interested Party capable of any misdoing. It was the 1st Interested Party's submission that his name should be struck out from the suit under Order 1 Rule 10(2) of the Civil Procedure Rule, 2010, so as to enable the Court reach a speedy and just finding.

17. In support of his argument, the 1st Interested Party relied on the case of **Francis Kariuki Muruatetu and Another v Republic and 5 Others, [2016] eKLR** where the Supreme Court at paragraph 42 stated that in every case, whether some parties are joined as interested parties or not, the issues to be determined by the Court will always be the issues as presented by the principal parties or as framed by the Court from the pleadings and submissions of then principal parties. In conclusion, the 1st Interested Party submitted that no prayer was sought against him, and thus it was not necessary that he be a party and should be struck out of the suit with costs.

18. The principles that guide joinder of interested parties in judicial review proceedings are set out in Order 53 rule 3(2) and (4) of the Civil Procedure Rules which provides as follows:

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

19. Therefore, where an applicant or the Court is of the view that a person ought to be joined to the proceedings the that person be joined notwithstanding that such a person has not made an application to be joined. Likewise, the Supreme Court in **Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 Others [2014]eKLR** defined an interested Party as follows:

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

20. A person is thus directly affected or legally interested in the proceedings if the suit will lead to a result that will affect him by either establishing or curtailing his or her legal rights. The 1st Interested Party, having admitted to have sold the *ex parte* Applicant the motor vehicle that is the subject of these proceedings is thereby a person directly affected. He also needs to be given a forum and opportunity to state his case in light of the Respondent's actions, and in the event of any orders that may be granted by the Court as regards the said motor vehicle that might have a bearing on his rights and interests. The 1st Interested Party is therefore properly joined in these proceedings for

these reasons.

On the seizure of the motor vehicle and logbook

21. The two substantive issues arising are firstly, whether the Respondent's actions to seize the *ex parte* Applicant's motor vehicle and logbook were lawful, and secondly whether the *ex parte* Applicant merits the relief sought.

22. The *ex parte* Applicant submitted that the Respondents had no lawful reason to withhold the subject motor vehicle from her, and that their actions adversely affected her constitutional right to property as enshrined under Article 40 of the Constitution. Moreover, it was averred that the Respondents' actions violated Article 47 of the Constitution and breached Section 4 of the Fair Administrative Act. Further, that the said violations were occasioned by the failure by the Respondents to accord her prior and adequate notice of the nature and reasons concerning their seizure of the motor vehicle; an opportunity to be heard and to make representations prior to the seizure; a statement of reasons for the contemplated seizure and/or information; and the materials and evidence they relied upon in making the decision to seize her motor vehicle and log book. She relied on the case of **Kenya Human Rights Commission & Another vs Non-Governmental Organizations Co-ordination Board & Another, [2018] Eklr**, wherein it was held that it is a constitutional requirement that a person is entitled to be heard.

23. The *ex parte* Applicant further submitted that if at all the unlawful seizure of the motor vehicle related to any purported customs duty issues, she had brought notice of her claim for the motor vehicle to all the Respondents, including the Kenya Revenue Authority for safe measure, within the statutory period of one month enumerated under section 214 of the East African Customs Management Act, 2004. Further, that the Kenya Revenue Authority were yet to issue any notice pursuant to section 216 (1) of the East African Customs Management Act, 2004 within two (2) months from the date the *ex parte* Applicant issued the Respondents and the Kenya Revenue Authority with the notices of her claim to the motor vehicle. Reliance was placed on the case of **Kenya Revenue Authority vs Rajendra Ratilal Sanghani, (2006) eKLR** to buttress this argument.

24. Submissions were also made on the proportionality of the Respondents' actions in relation to the interests and rights of the *ex-parte* Applicant, and the case of **Okiya Omtatah Okoiti vs. Communication Authority of Kenya & 8 Others, [2018] eKLR** was cited for the position that the Respondents could have used less drastic and restrictive means in the event there was any anomaly concerning the subject motor vehicle. It was further submitted that section 220 (3) of the East African Customs Management Act, 2004 clearly indicates that any purported offence under the Act shall be dealt with in criminal proceedings unless expressly stated otherwise.

25. Lastly, reliance was placed on Article 50 of the Constitution and the case of **Republic vs. Ismail Hussein Ibrahim [2018] eKLR** for the submission that there is a presumption of innocence guaranteed in the Bill of Rights and the contrary requires to be proved by the state beyond reasonable doubt. The *ex-parte* Applicant contended that the Respondents condemned her unheard and without due process, by unlawfully and violently depriving her of her motor vehicle and log book, and relied on the decision in **Peter Igiria Nyambura vs. Director of Public Prosecutions (2018) e KLR** that the right to a fair hearing and due process in Article 50 is a fundamental anchor in the administration of justice.

26. It is notable that the Respondents did not respond to, or file any submissions on the *ex parte* Applicant's application. They have not brought any evidence to justify their action of seizing the subject motor vehicle and logbook. The *ex parte* Applicant has on the other hand brought evidence to show her ownership of the said motor vehicle and processes of acquisition of the said ownership. Article 40 of the Constitution guarantees every person the right to own and have property of any description in any part of Kenya, and if for any reason the Respondents' believe that the subject motor vehicle was illegally acquired by the *ex parte* Applicant, they were under a duty to at the very least present evidence of the alleged illegality, and reasons for the actions taken against the *ex parte* Applicant.

27. The Respondents have not provided any such evidence or reasons, or demonstrated that they accorded the *ex parte* Applicant a hearing concerning the ownership and possession of the subject motor vehicle before it was seized and impounded. It is thus my finding that in the circumstances, the Respondents acted unlawfully in seizing and impounding the motor vehicle, which is registered in the *ex parte* Applicant's name, without any justifiable reason. They also acted unfairly by not giving the *ex parte* Applicant a hearing, or reasons for the said seizure and detention of the subject motor vehicle and log book.

On the reliefs sought.

28. The *ex parte* Applicant has sought orders of certiorari, prohibition and mandamus in relation to the Respondents' impugned actions. These remedies were discussed extensively in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** 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”.

29. An order of *certiorari* therefore nullifies the decision to which it relates, with the same effect as if the relevant decision had never been taken or made in the first place, and therefore has retrospective effect. The principles governing the grant of a quashing order are that it will only be granted where there is an identified decision upon which such an order can take effect, and the Court will not quash incomplete processes. In the present application, the *ex parte* Applicant has not brought evidence of any decision made by the Respondents on 14th February 2020.

30. The action of the Respondents of seizing the subject motor vehicle and logbook, while unlawful, cannot be equated with a decision, in the sense of a deliberate resolution made after consideration of the relevant facts and communicated to the persons affected by it. The said action may have been taken pursuant to a decision, however no evidence of that decision has been provided. To this extent the orders of *certiorari* sought cannot lie, and the *ex parte* Applicant’s remedy must lie elsewhere.

31. Orders of *mandamus* on the other hand are granted to enforce public law duties, and arising from the findings of this Court, the Respondents were under a duty to act lawfully and fairly in relation to the *ex parte* Applicant’s motor vehicle and logbook. To this extent the orders of *mandamus* are merited to remedy the unlawful and unfair acts of the Respondents.

32. Lastly, the orders of prohibition are meant to restrain further intended unlawful conduct of the part of the Respondents, and to this extent are merited, given the continued detention of the *ex parte* Applicant’s motor vehicle and logbook without justifiable reason. However, the remedy should also not be granted on terms that will unreasonably prevent the Respondents from undertaking their statutory duties.

33. The *ex parte* Applicant’s Notice of Motion dated 5th May, 2020 therefore succeeds to the extent of the following orders:

i. An order of Mandamus be and is hereby issued compelling and directing all the Respondents, by themselves, their servants and/or agents or any other official acting under their authority to release Motor Vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon to the *ex parte* Applicant.

ii. An order of Mandamus be and is hereby issued compelling and directing all the Respondents, by themselves, their servants and/or agents or any other official acting under their authority to release the original Log Book registered and issued in the name of the *ex-parte* Applicant for Motor Vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon to the *ex parte* Applicant.

iii. An order of Prohibition be and is hereby issued prohibiting the Respondents by themselves, their servants and/or agents or any other official acting under their authority, from seizing and impounding Motor Vehicle registration number KCN 116N, Subaru Legacy 2011, Station Wagon without following the due process of the law.

iv. The Respondents shall meet the *ex parte* Applicant’s and 1st Interested Party’s costs of the Notice of Motion application dated 5th May, 2020.

34. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF AUGUST 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant’s, Respondents’ and Interested Parties’ Advocates on record.

P. NYAMWEYA

JUDGE