



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 389 OF 2009

IN THE MATTER OF ILLEGAL DETENTION OF MOTOR

VEHICLE REGISTRATION NUMBER KAY 660N.

AND

IN THE MATTER OF LOCAL GOVERNMENT ACT CHAPTER 265 OF THE LAWS OF KENYA

ANNA SYOMBUA MUSYOKI.....APPLICANT

VS

THE TOWN CLERK MUNICIPAL

COUNCIL OF MACHAKOS.....RESPONDENT

JUDGMENT

Introduction

1. The Applicant's judicial review application for orders of Certiorari and Mandamus by way of Judicial Review against the Respondents was accompanied by a statement of facts stating as follows:

- a. That the Applicant is the owner and operator of motor vehicle registration number KAY 660N (herein after referred to as the "vehicle") a public service vehicle plying Kitui-Nairobi route.
- b. On 30/10/2009 the Respondent arrested the Applicant's aforesaid vehicle and its driver and detained and continues to detain the vehicle.
- c. The detention complained of is illegal and unlawful as the same is neither being used as an exhibit neither has it committed any offence.
- d. The Respondent is acting Ultra vires the local government Act 265 of the Laws of Kenya from which he derives his mandate.
- e. By detaining the vehicle the Respondent has constructively convicted the Respondent without according her a hearing and is acting as a judge in his own cause.
- f. The Applicant is suffering damages due to the Respondents unlawful acts.
- g. The by continuing to detain the vehicle the Respondent is subjecting the Applicant to double jeopardy as he has already charged her driver and a passenger.
- h. As the motor vehicle remains at the Respondent's yard it is in danger and risk of misuse, vandalism and destruction or wear and the applicant continues to suffer damages.
- i. The Applicant's pleas with the officers to at least release to her the vehicle have fallen on deaf ears.

j. The Applicant's motor vehicle is for transport business and she is incurring daily minimum loss of Ksh. 11,000/- in terms of income.

k. The Respondents acted in excess of their powers and their acts were an infringement on the Applicant's Constitutional rights to own property and use the said property as she pleases and this has led to her suffering damages.

Reliefs Sought

- a. An Order of Mandamus compelling the Respondents to release motor vehicle registration number KAY 660N to the Applicant.
- b. An order of Certiorari to remove to this Court and quash the Respondent's decision dated 30/10/2009 to detain the Applicant's motor vehicle registration number KAY 660N until he pays illegal and unspecified fine and penalties.
- c. Costs of this application to be provided for.

2. The statement was accompanied by the Verifying Affidavit of Anna Syombua Musyoki which annexed the following documents.

- a. Logbook to motor vehicle Reg. No. KAY 660N.
- b. Municipal Council of Machakos charge sheets for case No. 521 and 522 of 2009.
- c. Bond receipt for the driver dated 20/11/2009
- d. Parking receipt for motor vehicle Reg. No. KAY 660N dated 30/10/2009.
- e. Demand letter to the Respondent demanding release dated 10/11/2009.
- f. The Respondents By-laws.

3. The substantive application was filed on 2nd December 2009 seeking the following orders:

- a. An order of Mandamus do issue compelling the Respondents to release motor vehicle registration number KAY 660N to the Applicant.
- b. An order of Certiorari do issue removing to this Court and quashing the Respondent's decision dated 30/10/2009 to detain the Applicant's motor vehicle registration number KAY 660N until he pays illegal and unspecified fine and penalties.
- c. Costs of this application to be provided for:

The application is supported by the affidavit of ANNA SYOMBUA dated 30/11/2009 and on the following grounds;

- a. The Respondent acted ultra vires.
- b. That the Respondent action and /or omission are unreasonable and illegal.
- c. That the Applicant continues to suffer damages

The application is accompanied by a statement of facts and affidavit of ANNA SYOMBUA MUSYOKI similar to that which accompanied the application for leave.

4. The Respondent filed a Replying Affidavit on 16/12/2009 stating that the application is misconceived and without merit and merely seeking to perpetuate illegalities committed by the applicant, the applicant's employee/driver where it alleges that on 30/10/2009 at about 8.35am the Applicant's employed driver one Michael Mutunga Muia unloaded/dropped passengers along Syokimau Road which is outside the bus park (designated area and was subsequently charged in Machakos Traffic Case No. 521 of 2009.

5. The Respondent avers that the Applicant vowed not to pay the storage charges of the impounded vehicle which accrued Ksh. 15,000/- daily. The Affidavit also states that alongside the driver of the Applicant Mr. John Chepkeny who had resisted arrest and impounding of motor vehicle Reg. No KAY 660N was charged in Machakos criminal case No. 522 of 2009 and pleaded guilty and was convicted accordingly, thus they contend that the Respondent did not act ultra vires, unreasonably or illegally and that the Applicant has not brought herself within the mandatory requirements of the laws under which she has moved this Honourable Court and thus the application lacks legal basis and the orders sought should be declined with costs.

6. That on 18th December 2009 parties filed a consent in the following terms:

- a. The Applicant do deposit into Court on or before 23/12/2009 the sum of Ksh. 78,120/- which is claimed by the Respondent on account of the impounded motor vehicle Reg. No. KAY 660N as the date herein pending the hearing and determination of the Notice

Motion herein.

b. Upon the said deposit the Respondent do forthwith release the said motor vehicle to the Applicant.

c. That the matter be mentioned on 9/2/2010 for directions.

7. That on the 27/11/2009 the Applicant herein had filed chamber Summons dated 25/11/2005 under certificate of urgency but the said application was not prosecuted but overtaken by events with the consent order filed on 18/12/2009.

8. The Applicant filed submissions on 1/11/2012 which allege that the only provision for impound is under by law 15 which does not provide for pounding fees and thus it is Ultra vires. They further submit that it doesn't matter if there is a gazette notice imposing the same as it has not been defined or described what this fees is. The Respondent therefore acted ultra vires when it decided to impose monetary penalties pegged on the impounding.

9. The Applicant also submit that the action was illegal as annexure S1b a gazette notice No. 2873 of 10th May 1996 show that they were approved but there is no proof that they were gazetted with the alterations contained therein. They also submit that the by-laws were not valid as they go against the Local Government Act Chapter 265 section 205. Section 204 (4) of the Act provides.

“No by-law made under this act shall have the force of law until it has been approved, whether with or without alteration by the minister and published or notice thereof published in the matter provided by section 205 (1) or.....”

Section 205 (1)

“upon the signification of the approval of the minister of any by law, the clerk of the local authority which made such by law shall cause the by-law, or a notice stating that the by law has been approved to be published in the gazette.”

They thus submit that Gazette Notice No. 2873 of 2010 published on 10/5/1996 by which time they had not been approved as they were approved on 30/5/1996, which date they submit may have been altered from 1966.

10. They cited the case of **R v. Lemmy Bindany Njiru & Anor, ex-parte Guidio Kaunyangi Nabe Meru HCCC Misc Civil App No. 104 of 2002**, where Lenaola, J. held that such an omission was not fatal especially where no party is prejudiced by the same.

Civil Application No. 190/2006 (Kisumu) Mohammed Aden Abdi v. Nuru Omar & Anor where in the Court of Appeal case the Applicant had failed to cite **rule 80** of the Court's rules. *“The objection was overruled as the Court held that the prayers in the motion and the affidavit in support left no doubt that the applicant sought orders under section 80”*.

They also submitted and relied on Article 159 of the Constitution of Kenya where the Court is supposed to do substantial justice without undue regard to procedural technicalities. The above was cited in support that failure to cite section 8 & 9 of the Law Reform in this merited application is not fatal.

RESPONDENT'S SUBMISSIONS

11. The Respondents filed their submissions on 7/11/2012 which they submit and concede to the consent order dated 8/12/2009 that the vehicle to be released upon payment into Court of Ksh. 78,120/- and with that they submit that the Notice of Motion ought to have been amended and that now the Court is being urged to issue orders in Vacuo. They urge the Court to dismiss the Application as the Respondent is not in possession of the vehicle.

12. The Respondent submits further that the Application ought to be dismissed for the following reasons.

a. That on 30/10/2009 the ex-parte Applicants driver unloaded/dropped passengers along Syokimau Road in Machakos town which is outside the designated park.

b. That was contrary to the Respondent's by law, the Local Government Act and the Traffic Act which aim at regulating the business of public service vehicles to avoid causing obstruction on roads, endangering members of the public and general disorder in the town.

c. As a consequent of the breach of the said laws and in particular breach of clause 6 read with clause 15 of the Respondent's parking places and Omni bus station by laws, 1996 gazetted vide Gazette notice No. 2873 of 10/5/1996 the Respondents agents impounded the motor vehicle amidst resistance from the driver and thus the driver was accordingly arrested and charged in Court.

d. That pursuant to the Respondent's gazette fees and charges under inter alia section 148 of the local Government Act vide Gazette Notice No. 12412 of 24/12/2008, (copy attached hereto) the impounded motor vehicle could be released only upon payment of impounding fees in the sum of Ksh. 1,000/- per day, enforcement charges being 50% of the impounding charges and release form Ksh. 120/- for the release form.

e. The ex-parte Applicant was aware of the said charges but chose not to pay the same and as such the Respondent lawfully continued to impound the motor vehicle.

f. That as at 18/12/2009 when the Counsel orders aforementioned were recorded in Court, the total charge on the impounded motor vehicle was Ksh. 78,120/- which the ex-parte applicant deposited into Court to secure the release of the motor vehicle.

g. It is clear from the afore-stated that the Respondents had lawfully impounded the motor vehicle had not acted Ultra vires its powers nor unreasonably and as such there are no basis upon which the application herein is based.

h. That the Notice of Motion ought to be dismissed with costs to the Respondents.

DETERMINATION

13. The main issue that is not contested is that the motor vehicle Reg. No. KAY 660N is not in the possession of the Respondent as the same was released after the filing of the consent order dated 18/12/2009 and that what is now in contention is whether the money should be released to the Respondent or returned to the Applicant. The first prayer of the motion is already spent and what comes up for determination are the two prayers therein.

14. The Respondent herein was produced gazette notice No. 2873 of 10th May 1996 which the Applicant avers that it had been altered so as to justify the charges that were being leveled against her. The court notes that it is true the gazette notice had alterations and that there is no way this Court with the documents produced by the parties can verify if that was the form it was approved by the minister. The Applicant herein could have provided that which they believe was the original or sought the services of a document specialist to confirm their claim.

15. Section 204 of the Local Government Act Cap 265 provided as follows;

204(1) after any by law has been made by a local authority under this Act it shall be submitted to the minister for his approval.

(2) Every by-law submitted for approval under sub-section (1) of this section shall be accompanied by:

(a)...

(b)...

(c)...

(3) Minister may approve with or without alteration or reject any such by-law

(4) No by-law made under this Act shall have the force of law until it has approved, whether with or without alteration, by the minister, and published, notice thereof published, in the manner provided for section 205 (1) or in the case of any by-law exempted under the Proviso to section 205 (1), until it has been communicated to the inhabitants to section 205 (3).

205 (1) Upon the signification of the approval of the minister of any by-law the clerk of the local authority which made such by law shall cause the by law or a notice stating that the by-law has been approved to be published in the gazette.

Provided that the minister may exempt any town Council, County Council or Council of a County division from compliance with the requirements of the foregoing provisions of this sub-section in respect of its by-laws generally or in respect of any class of by-laws or any particular by-laws.

16. By virtue of the above provisions, I find that it is not mandatory for all by-laws to be gazetted and that there are some by-laws that are exempt of which the court at this point cannot ascertain whether the by-laws contained in Gazette Notice 2873 of 10th May 1996 are covered by the exemption, although generally the law allows for exemptions. Where there are exemptions then gazettement would not be not a mandatory requirement and thus the Applicant's argument on gazettement must fail.

17. Having found as above, it follows that the second prayer of the application must also fail because the Respondent was acting within the law and the issue of *ultra vires* would not arise. In addition, when this impounding happened the applicant's servant John Chepkeny pleaded guilty to his charges in Machakos Municipal Council case No. 522 of 2009 thus confirming that the driver had offloaded at an area that is not designated.

18. The applicant did not demonstrate a basis for finding that the Gazette Notice No. 12412 of 24/12/2008 on the various the fines and penalties was unjustified and illegal.

Orders

19. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Applicant's judicial review application herein is dismissed.

2. Consequently, the money deposited into the court as security, the sum of Ksh.78,120/- be released to the Respondent.

3. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JANUARY 2019

G.V. ODUNGA

JUDGE

Appearances:-

M/S B.M. Musyoki & Co. Advocates for the Applicant.

M/S Mwangangi & Co. Advocates for the Respondent.