



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 282 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES ORDER 53

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, 2011

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL POLICE SERVICE.....1ST RESPONDENT

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

OCS CENTRAL POLICE STATION NAIROBI.....3RD RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

POLICE CONSTABLE EPHANTUS KANDUGU.....5TH RESPONDENT

OFFICER COMMANDING SPECIAL

CRIME PREVENTION UNIT.....6TH RESPONDENT

EX PARTE :

PAUL BEN NJOROGE

JUDGMENT

The Application

1. Paul Ben Njoroge is a Kenyan adult male and is the *ex parte* Applicant herein (hereinafter “the Applicant”). The National Police Service and the Inspector General of Police, which are established by Article 243 and 245 of the Constitution of Kenya respectively are the 1st and 2nd Respondents, while the 3rd, 4th, 5th and 6th Respondents are offices and officers of the National Police Service. The Applicant has moved this Court by way of a Notice of Motion application dated 18th July 2018 in which he is seeking the following orders:

a. An order of Mandamus directed at the 1st, 2nd, 3rd, 4th, 5th & 6th Respondents and/or their subordinate officers and any other person acting under or through them compelling them to release to the Applicant the Motor vehicle Registration No. KCC 900R Toyota Land Cruiser.

b. An order of Mandamus directed at the 1st, 2nd, 3rd, 4th, 5th & 6th Respondents and /or their subordinate officers and any other person acting under or through them to return the sum of Kshs 600,000(Six Hundred Thousand only) that had been kept by the Applicant in his motor vehicle Registration No. KCC 900R Toyota Land Cruiser.

c. An order of Prohibition directed at the 1st, 2nd, 3rd, 4th, 5th & 6th Respondent and or their subordinate officers and any other person acting under or through them to restrain them from interfering with the Applicant’s lawful use possession and /or interfering in any manner whatsoever with motor vehicle registrations number KCC 900 R.

d. Such other relief as the honourable court may deem just and expedient to grant.

e. That the costs of and incidental to the application be provided for.

2. The facts giving rise to the application are detailed in the Applicant’s statutory statement dated 16th July 2018, a verifying affidavit that he swore on the same date, and a further affidavit he swore on 11th March 2019. The Applicant contends that he is the registered owner of motor vehicle registration number KCC 900R, a Toyota Land Cruiser, and that on the 8th of June 2018 the 5th Respondent led a contingent of armed officers who raided his premises in Kitengele, claiming that he was being summoned by the 3rd Respondent for issuing bouncing cheques. That while he was responding to the said summons, the 5th Respondent and the contingent of officers forced his employees one Mary Mwikali to surrender the keys to motor vehicle registration number KCC 900R Toyota Land Cruiser, and drove away with the said motor vehicle. Further, that in the process the Applicant lost valuable items inclusive of Kshs 600,000/= which was in the said vehicle.

3. He was later on was informed by the Regional Criminal Investigating officer that the vehicle had been retrieved and was in the possession of the 4th Respondent in Industrial area. He claims the 4th Respondent has refused and neglected to return it, despite the fact, it is not subject to any criminal investigations. He termed this action as being illegal irregular and unreasonable and carried outside their jurisdiction. Further, that they have been involved in outright theft and breached his right to property.

4. The Applicant contends that as he is physically disabled, the actions of the Respondent have affected his day to day activities as he cannot freely move around, he has been forced to expend colossal sums of money in hiring a motor vehicle for his personal use, and the Respondents have failed to give any reason or validate their illegal action. He refuted the assertion that he issued bad cheques to the Meridian Acceptance Limited, and that what he had done was to issue post-dated cheques. Therefore, that the reports made against him were in bad faith and the police had no locus to indulge in the matter. The Applicant also maintained that his motor vehicle was taken by the police, who handed the said motor vehicle to Meridian Acceptances Ltd, an action that was in abuse of office.

5. Lastly, he asserted that he only got to know that there is another matter pending in Court in relation to ownership of the subject motor vehicle in **Milimani CMCC No. 6569 of 2018** in September 2018 after he had filed the instant application, and that in any event the police are still not warranted to custody of the said motor vehicle, and have involved themselves in a purely civil matter.

The Response

6. The Respondents opposed the application through a replying affidavit filed on their behalf by the 5th Respondent, Police Constable Ephantus Kandugu, which was sworn on the 22nd January 2015. The gist of the Respondent’s case is one James Ndwiga Muchungu and one Stephen Odhiambo, the Chief Executive Officer and Credit Controller respectively, of Meridian Acceptances Limited (hereinafter “the complainants”), to the effect that the Applicant had approached their organisation for a loan of Kshs 3,000,000/=, which was to be repaid in the sum of Kshs 4,730,000/= inclusive of interest. Further, that the Applicant gave his motor vehicle registration number KCC 900R, as a collateral for the loan.

7. Further, that the said complainants reported that the Applicant then issued bouncing cheques in repayment, and refused to pick up the complainants’ calls, and that on 20th May 2018 they discovered that the Applicant had not only placed a caveat on the vehicle, and also removed its tracking device. They stated that they then decided to report the matter to the Respondents at the Central Police Station as they were apprehensive they would lose their security. The Respondents annexed copies of the statements made by the said complainants at the Central Police Station, the security given by the Applicant for the loan agreement, and the bouncing cheques.

8. According to the Respondents, they left Kitengele with the Applicant in a convoy of three vehicles, and only after he requested and was availed the presence of his lawyer and medical doctor, as he was not feeling well. Further, that they arrived at Central Police Station at the same time with the Applicant and went to the office of the 3rd Respondent who directed the Applicant be granted cash bail, which he was. That it was while he was at the office of the 3rd Respondent that the Applicant received a phone call that his vehicle had been driven off, whereupon he then departed from the Central Police Station.

9. The Respondents refuted the Applicant’s allegations that the 5th Respondent is the one who took the subject motor vehicle, as by his own

statements he acknowledged to have been with the said Respondent at Central Police Station at the time the motor vehicle was taken, and alleged that the said motor vehicle was repossessed by auctioneers who were instructed by Meridian Acceptances Ltd. The Respondents annexed copies of the instruction letter written to Girmat Auctioneers Ltd by Meridian Acceptances Ltd; a statement by the said company's Chief Executive Officer, James Ndwiga, confirming the instructions; and a copy of the proclamation and notification of sale of the said motor vehicles by the said auctioneers. The Respondents also contended that there was no proof of Kshs 600,000/= being in the subject motor vehicle, and that if indeed there was money together with other valuables in the said vehicle, the person who is answerable would be the Chief Executive Officer of Meridian Acceptances Ltd who issued instructions to the auctioneers to take the vehicle.

10. Lastly, the Respondents asserted that the police acted within their mandate and had nothing to do with the subject motor vehicle. Further, that the Applicant is well aware that the vehicle cannot be released without a Court order, as it is subject of a civil suit in **Milimani CMCC NO 6569 of 2018-Meridian Acceptances Ltd vs Director of Criminal investigation Ltd and Two Others**, and questioned why the Applicant had not enjoined Meridian Acceptances Ltd in these proceedings yet the cause of action had emanated from them.

The Determination

11. The application was canvassed by way of written submissions. The Applicant's submissions dated 11th March 2019 were filed by his Advocates, Arwa & Change Advocates. Annette Nyakora, a Litigation Counsel in the Attorney General's Chambers filed submissions dated 29th January 2019 for the 1st to 6th Respondents.

12. The Applicant reiterated that the involvement of the police in a civil matter was illegal, unfair and amounted to abuse of public office, and the court should not allow them to stand as they are draconian and would lead to violation of Article 40 of the constitution. He termed the action of the Respondents as being *ultra vires* the powers set out in section 24 of the National Police Act No 11 A of 2011. Further, that no criminal action has been preferred against him in relation to the allegations by the Respondents, and relied on the case of **Republic v Inspector General of Police Ex parte Kennedy Ngeru Irungu (2016) eKLR** where similar actions of the Respondents were quashed. On whether the court should grant the orders sought, the Applicant submitted that it would be just to do so as the third party ought to have followed the correct channels if it claimed ownership of the subject motor vehicle as opposed to involving the police.

13. The Respondents on the other hand submitted that section 24 of the National Police Service Act No 11 A of 2011 sets out the functions of the Kenya police, and that the Applicant having reported that the subject motor vehicle had been stolen by the Police, the Director of Public Prosecutions instructed that the matter be investigated. That the police are therefore carrying out investigations, hence the vehicle cannot be released. The Respondents contended that the orders the Applicant are seeking are unconstitutional as they seek to prevent them from performing their mandate as required by law. Further, that it is not the duty of the Court to supervise how investigations are carried out, as long as they are not contravening the law. In addition, that there is another case that is on-going where Meridian Acceptances Limited are seeking orders that the vehicle be released to them based on the fact that they are joint owners of the vehicle, and it's only the court that can make a determination through a civil suit and not judicial review.

14. The Respondents relied on the decisions in the cases of **Rumba Kinuthia v Inspector General of Police & Another** where the Court dismissed an application that the vehicle be released, and the case of **Republic vs Inspector General of Police & another ex parte Solomon Kingora (2018) eKLR** for the position that the application for release should be by a normal civil suit. They also relied on the cases of **Kenya National Examinations Council vs Republic ex-parte Geoffrey Gathenji & Others, (1997) eKLR**, **Prabhul Gulabchand Shah vs Attorney General & Erastus Gathoni Miano, Civil Appeal No 24 of 1985**, and **Republic vs Inspector General of Police & Another ex-parte Solomon Kingora, (2018) eKLR** for the proposition that for the order of mandamus to go forth, the Applicant must satisfy the Court that the Respondents have a legal duty whether statutorily or at common law which the Applicant expects them to fulfil. Lastly, the Respondents submitted that whereas the Applicant is seeking the order of prohibition, it is discretionary and only available where the public body or official has acted in excess of its authority, which he has not demonstrated.

15. I have considered the pleadings and submission made by the Applicant and Respondents, and the two issues for determination are whether the Respondents have acted illegally or in breach of their duty with respect to the motor vehicle registration, and secondly, whether the. I must state at the outset that the facts relied upon by the Applicant are disputed by the Respondents, and this Court as a judicial review Court cannot make any finding on disputed facts, which can only be done through a trial process in normal civil proceedings.

16. In particular, the Respondents deny that they took the Applicant's motor vehicle registration number KCC 900R or the sum of Kshs 600,000/= from the said motor vehicle as alleged by the Applicant. In addition, they have produced evidence that the said motor vehicle was proclaimed and attached by Girmat Auctioneers Ltd in recovery of loan advanced to the Applicant by Meridian Acceptances Ltd. Neither the said auctioneers or Meridian Acceptances Ltd are parties to this suit and have not been heard on the said issue of release of the said motor vehicle. The Respondents have also demonstrated and provided evidence that they responded to complaints made to them by Meridian Acceptances Ltd as regards the motor vehicle registration number KCC 900R, and stated in this regard that they acted pursuant to their powers to investigate offences provided by section 24 of the National Police Act.

17. Therefore, the fact and circumstances of the removal of the motor vehicle registration number KCC 900R from the Applicant's premises, and of Kshs 600,000/= alleged to have been taken from the said vehicle, is one that can only be established by further evidence that is subjected to examination in a normal civil trial. Lastly, the Applicant does not dispute that there was an ongoing civil case in **CMCC NO 6569 of 2018-Meridian Acceptances Ltd vs Director of Criminal investigation Ltd and Two Others** where the release of the said motor vehicle is also in issue.

18. It is thus not evident to this Court at this stage that the Respondents have acted in breach of any laws, or that there was non-performance on their part of any public duty. It is also evident that the said motor vehicle is the subject of a private law dispute between the Applicant and third parties who have not participated in this suit, and on which this Court as a judicial review Court is not the appropriate forum to make a decision as to the release of the said motor vehicle or otherwise.

19. The Applicant is thus not entitled to the remedies of mandamus and prohibition that he seeks, as they were predicated on a finding that

the Respondent acted illegally which has not been demonstrated, and as the Applicant has not proved the existence of any duty on the part of the Respondent as regards the release of motor vehicle registration number KCC 900R or of Kshs 600,000/= purported to have been in the said motor vehicle. The Court of Appeal explained as follows in the case of **Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji and 9 Others (1997) eKLR** on the grant of the two remedies:

“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...

20. I therefore find that the Applicant’s Notice of Motion dated 18th July 2018 is not merited. The said Notice of Motion is hereby denied with no order as to costs, as the circumstances in which the subject motor vehicle was taken are yet to be established.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF APRIL 2019

P. NYAMWEYA

JUDGE