



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 294 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS FOR MANDAMUS AND PROHIBITION

IN THE NATURE OF JUDICIAL REVIEW

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS

ACT (CAP 26) AND ORDERS 53 RULE (1) AND (2) OF THE

CIVIL PROCEDURE RULES (2010) UNDER ORDER

53 OF THE CIVIL PROCEDURE RULES 2010

IN THE MATTER OF THE DECISION OF THE HIGH COURT OF

KENYA AT NAIROBI JUDICIAL REVIEW DIVISION MISC

CIVIL APPLICATION NO. 423 OF 2016 DATED 22/03/2017.

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

KAMAU KINGORA.....2ND RESPONDENT

- AND -

SOLOMON KINGORA.....EX-PARTE APPLICANT

JUDGEMENT

Introduction

1. Before the applicant herein, **Solomon Kingora**, commenced these proceedings, he had instituted proceedings in HCMA No. 423 of 2016 in which he sought the following orders::

1. THAT an Order of Certiorari do issue to remove to this Honourable Court, and to quash, the 1st Respondent's decision made on the 5th September, 2016 in *Chief Magistrate Miscellaneous Criminal Application No. 23 of 2016 Kamau Kingora v The Director of Public Prosecutions and 3 others* ordering the DCIO Nairobi Area (Traffic Headquarters) Police Station and the OCS Nairobi Area (Traffic Headquarters) Police Station to release motor vehicles registration number KCE 972E and KCF 213K to the 4th Respondent;

2. THAT an Order of Prohibition do issue to prohibit the Respondents from implementing, enforcing, or otherwise howsoever effecting the 1st Respondent's decision made on the 5th September, 2016 in *Chief Magistrate Miscellaneous Criminal Application No. 23 of 2016 Kamau Kingora v The Director of Public Prosecutions and 3 others* ordering the DCIO Nairobi Area (Traffic Headquarters) Police Station and the OCS Nairobi Area (Traffic Headquarters) Police Station to release motor vehicles registration number KCE 972E and KCF 213K to the 4th Respondent; and

3. THAT an Order of Prohibition do issue to prohibit the 1st Respondent from hearing and/or determining proceedings in *Chief Magistrate Miscellaneous Criminal Application No. 23 of 2016 Kamau Kingora v The Director of Public Prosecutions and 3 others*.

4. THAT costs of and incidental to the Application be provided for.

2. After hearing the said application, this Court on 22nd day of March, 2017 delivered a judgement therein in which it found that the 1st Respondent had no jurisdiction to embark on the hearing of the application and its decision was null and void and granted the prayed orders.

3. By this application the ex parte applicant in substance now seeks an order of mandamus directing the 1st Respondent to produce and release motor vehicles KCE 972E and KCF 213K (hereinafter referred to as "the said vehicles") to the ex parte applicant and compelling the 2nd Respondent to sign transfer forms of the same into the names of the ex parte applicant. In default thereof, it is sought that the Court grants an order of mandamus authorizing the Deputy Registrar to sign the same in order to effect the said transfer.

4. The grounds upon which the application was based were that this Court asserted itself in JR Misc. Appl. No. 423 of 2016 and delivered itself in favour of the ex parte applicant and that the DCIO Nairobi Area Traffic Headquarters and OCSPCU were served with the said orders but refused to release the said vehicles to the applicant and instead released them to the 2nd Respondent in contravention of the orders of this Court.

5. According to the ex parte applicant, he is a businessman engaged in importation and sale of motor vehicles formerly with the assistance of his nephew, the 2nd Respondent herein who is in the Republic of Taiwan. The applicant averred that he would send money to his said nephew who would purchase the vehicles in his behalf and would import the same in his name and forward all the relevant import documentation to the ex parte applicant.

6. It was averred that in or about the months of June, 2015 and October, 2015, the ex parte applicant sent to the 2nd Respondent funds in Taiwan for the purposes of importation of two Nisan Tida Motor Vehicles whereupon the 2nd Respondent purchased and shipped them to Kenya.

7. It was averred that this Court in JR Misc. Appl. No. 423 of 2016 quashed the decision of the Chief

Magistrate's Court at Nairobi of 5th September, 2016 but despite service of the said order on the DCIO Nairobi Area Traffic Headquarters and OCSPCU, the police refused to release the said vehicles without an express order directing them to do so from the Court.

8. The applicant disclosed that in the said earlier suit, he omitted to request the Court to transfer ownership of the said vehicles into his name and that he has legitimate claim of ownership to which he has proved beyond doubt hence the same ought to be released to him and registered in his name.

9. The application was however opposed by the 1st Respondent.

10. According to the 1st Respondent, the ex-parte Applicant's application herein is wholly misconceived, premature, mischievous, frivolous, scandalous, vexatious, an abuse of the Court process and should therefore be dismissed with costs to the 1st Respondent.

11. It was averred that there were no Court Orders issued on 22nd May, 2017 as alleged by the ex-parte applicant in the Notice of Motion dated 23rd August 2017.

12. To the said Respondent, common sense dictates that there is no way orders can be issued by Court on 22nd May 2017 and the said Orders allegedly served upon him on 5th April 2017 since orders cannot be issued in the future and served in the past. It was further contended that section 28(11) of the **Contempt of Court Act**, (No. 46 of 2016) does not exist and as such the 1st Respondent cannot be punished under a law which does not exist. As such this Order must fall.

13. The said Respondent's position was that the matters referred to in the supporting affidavit had already determined by quashing the proceedings in the Lower Court in totality because of lack of jurisdiction but that did not mean that ownership of the two vehicles had been determined to mean that the Ex-parte Applicant had full ownership of the two vehicles. That did not also mean that the Police could not release the vehicles to the rightful owner after thorough investigations had been conducted.

14. The said Respondent was further of the view that the Orders issued by the Court on 22nd March 2017 did not state that two the vehicles were to be released to the ex-parte Applicant, **Mr. Solomon King'ora**, and that if he needed the vehicles released to him, he needed a Court Order specifically ordering the release of the vehicles to him. In the absence of such Orders and with overwhelming evidence to prove that the vehicles belonged to the 2nd Respondent, the 1st Respondent had no choice but to release the vehicles to the 2nd Respondent who was the rightful owner. In the said Respondent's view, the police carried out their investigations before releasing the Vehicles to the 2nd Respondent. During the investigations, it was discovered that the 2nd Respondent was actually the real owner of the vehicles and a motor vehicle search at Kenya Revenue Authority also revealed that the vehicles were registered under the name of the 2nd Respondent. It was averred that the ex-parte Applicant was accorded an opportunity to prove that the vehicles belonged to him but he failed to prove ownership as he did not produce any evidence to prove ownership and as such, the vehicles could not continue to be detained while the real owner incurred losses each day the vehicles were held at the station.

Determination

15. I have considered the material placed before this Court.

16. In this Court's judgement in JR Misc. Appl. No. 423 of 2016, the Court did not determine the ownership of the said vehicles. The reason it did not do so and could not do so was because that was not the issue before the Court and in any case the issue of ownership of the said vehicles in the circumstances of this case was a merit oriented issue. The Court only dealt with the issue whether the Magistrate's Court had the jurisdiction to issue the orders it did. In this case the applicant's claim to ownership of the suit vehicles seems to be hinged upon some form of trust relationship between the applicant and the 2nd Respondent. That is not a matter that can be determined in judicial review proceedings without the benefit

of oral evidence in a normal civil trial.

17. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself *inter alia* as follows:

“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...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...”

18. In **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano**; Civil Appeal No.24 of 1985 where the Court of Appeal stated:-

“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”

19. It is therefore clear that for an order of *mandamus* to go forth the applicant must satisfy the Court that the Respondent has a legal duty whether statutorily or at common law which the applicant expects the Respondent to fulfil and the Respondent has failed to do so. In other words *mandamus* cannot issue against a person or authority for performance of a duty that the Respondent is not mandated or obliged to perform.

20. In this case the only ground, apart from the merits of the case that the applicant relies on, is this Court’s said earlier decision. As already stated this Court, in that decision did not impose any duty on the Respondents. It follows that the said decision cannot be the basis upon which the Court can issue the orders of *mandamus* sought herein.

21. If the applicant believes that the 2nd Respondent holds the suit motor vehicles in trust for him, he should file a normal civil suit seeking orders compelling the 2nd respondent to release the said vehicles and transfer the same to him.

22. In the result the instant application lacks merit and is hereby dismissed with no order as to costs.

23. It is so ordered.

Dated at Nairobi this 21st day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mukoya for the ex parte applicant

CA Ooko