



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU.

J.R. NO .5 OF 2017

(FORMERLY NANYUKI 120 OF 2017)

SMP CAPITAL LIMITED.....APPLICANT

VERSUS

INSPECTOR OF POLICE THROUGH DCIO NYAHURURU

POLICE STATIONRESPONDENT

JUDGMENT

The **Notice of Motion** dated 12/4/2017 is brought by the ex-parte applicant, **SMP Capital Ltd** seeking the following Judicial Review orders:-

- 1. That the honourable court be pleased to grant an order of prohibition directed at the Inspector General of Police and/or his subordinate officer or any other persons acting under or through him from continuing to hold, detain and/ or confiscate the motor vehicle registration number KCF 985J, Toyota Hiace without any lawful cause**
- 2. That this Honourable court be pleased to issue an Order of Mandamus directed towards the Inspector General of Police compelling him to forthwith release Motor Vehicle KCF 985J Toyota Hiace to the applicant.**

The application is premised on grounds found in the statement of facts which was filed with the Chamber Summons dated 15/3/2017 and the applicant's further affidavits dated 23/6/2017, 27/6/2017 and another on 15/8/2017 and 2/11/2017. The applicant also filed two sets of submissions. The application was opposed by the respondent and Zabron Karuri Muiruri, the interested party (I.P)

The applicant's case is that it is the beneficial owner of the subject motor vehicle having acquired it from a car dealer, Smart Auto's Ltd; that on 4/8/2016, the applicant hired out the vehicle to James Kimunyi Wanjuki on hire purchase terms but the said hirer defaulted on remittance of his monthly installments and the applicant repossessed the vehicle; that about 9/12/2016, the applicant entered into a sale agreement with one John Maina Kigundu (3rd party) and while the 3rd party was in possession, the vehicle was confiscated by the respondent and detained at Nyahururu Police Station. It emerged that a complaint had been made by the IP Zabron Muiruri, that he had bought the vehicle from the hirer, James Kimunyi. The applicant denied knowledge or dealing with the I.P and that efforts to have the vehicle released to him have borne no fruits yet the vehicle is depreciating and wasting away and subject of vandalism; that no explanation has been offered by the respondent why they detained the vehicle yet the applicant's rights under **Article 10 and 47** of the Constitution have been breached. The applicant exhibited the log book of the vehicle which shows that the vehicle was transferred to the applicant on 25/1/2017. The applicant therefore contends that the respondent's decision to detain the vehicle is unlawful and ultra vires; an abuse of police powers and an affront to the right to property; that the respondent's actions are unreasonable, illegal and a breach of the applicant's legitimate expectation that the respondent will adhere to the provisions of **Article 10, 47, 40** of the **Constitution and Administration of Justice Act**.

Inspector John Mugo, swore an affidavit on behalf of respondent. He is the investigating officer in the Criminal Case pending before the court Nyahururu CM No 2970 of 2016 **Republic Versus James Kimunyi Wanjuki**. He deposed that the I.P reported to the CID, Nyandarua North that the subject vehicle was at a particular garage, it was traced and driven to the police station; upon investigation, he established that James Kimunyi sold the vehicle to the I.P. on 4/8/2016 for which the I.P. paid Kshs 1,700,000/=; that the vehicle was released by SMART Auto Ltd and given to the I.P. and by then it was still registered in the names of Smart Auto Ltd; that the applicant showed up and claimed to have financed the purchase of the vehicle from SMART Autos Ltd and that they received Kshs.1 million from James Wanjuki but he defaulted in paying monthly installments; that the said hirer, James Wanjuki was arrested and charged for the offence of obtaining money by false pretences and thereafter the vehicle was transferred from SMART Autos to the ex parte applicant and it is therefore an exhibit in CRC. 2970/2016. According to the investigating officer, both the I.P. and applicant have an interest in the subject vehicle and hence the need to hold it till the criminal case is heard and determined.

The Interested Party (I.P.) filed a replying affidavit dated 12/7/2017, opposing the application. The I.P. claims to have bought the subject

vehicle from James Kimunyi on 4/8/2016. The vehicle was impounded by Beta Auctioneers who had been sent by the applicant, claiming that James Kimunyi was a hirer who had defaulted in payment; that at the time, the vehicle was registered in the name of SMART Autos Ltd and he reported to CID Nyandarua who impounded the vehicle on 10/12/2017 and James Kimunyi was charged in CRC 2970/2016 for obtaining money from the I.P. by false pretence; that the vehicle was transferred to the applicant's name after James Wanjuki had been charged; that the seller had the log book at the time of sale and promised to transfer it within 2 weeks. According to the I.P., there is no evidence that the applicant ever owned the vehicle and the sale to one John Maina Kigundu is suspect.

The applicant filed two sets of submissions dated 22/8/2017 and 3/11/2017. In brief, the applicants counsel, Mr. Mwangi, submitted that the applicant had demonstrated that it is the registered owner of the vehicle as per the log book; that the vehicle had been hired to a hirer who defaulted in the payments; that the hirer purported to sell the vehicle to the I.P. but a hirer has no property in the vehicle that he could pass to another; that the I.P. never dealt with the owner of the vehicle and any purported sale is void. For this proposal counsel relied on the case of **Patrick Kinyua Munyito Vs Francis Muriuki Muraguri HCC 281/2009 (2016 eKLR)**. Counsel also submitted that the charging of James Kimunyi with the criminal charge confirms that he was not the owner of the vehicle; that the respondent having come to the conclusion that James Kimunyi obtained the vehicle by false pretences, the vehicle should not be detained any longer but released because it is not an exhibit in the lower court in any event, the respondent can take photographs of the vehicle for use in the criminal case. Counsel urged the court to grant the order of prohibition whereby he relied on the decisions of **Republic Vrs County Government of Kiambu Ex P Robert Gakuru JR 434/2015** and **Republic Vs Kenya Revenue Authority ex parte Yaya Towers Ltd Misc Application 374/2006**.

The respondent did not file submissions but the I.P. did. Mr. Waichungo, counsel for the I.P. submitted that an order of prohibition cannot issue because the order lies to prohibit a public body from continuing with proceedings in excess of jurisdiction and that there are no proceedings in this case.

Counsel also urged that an order of mandamus cannot issue because the order lies to compel performance of a public duty imposed by statute but there is no duty imposed on the Inspector General of Police which he has refused/neglected to perform; that the I.P. has demonstrated that he has an interest in the subject motor vehicle and if released at this stage, he would be prejudiced as it may be transferred to a 3rd party; Counsel also argued that the transfer of the vehicle to the applicant after its impounding was to gain undue advantage over the I.P.

Having considered the pleadings, the oral submissions and authorities cited, this court has the duty to determine what the duties of the respondent are and whether they were properly exercised in the detention of the subject vehicle and lastly where judicial review orders are available to the applicant.

I must start by considering what the scope of Judicial Review orders is. The same has been re stated in various decisions including **Municipal Council of Mombasa Vrs Republic and Umoja Consultants Ltd CA 185/ 2001** where the court stated;

“Judicial review is concerned with the decision making process, not with the merits of the decision itself; the court would not concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself, such as whether there was or there was not sufficient evidence to support the decision.”

The purpose of Judicial Review orders is therefore to ensure that the individual is given fair treatment by the authority or public officer to which/whom he has been subjected. The court cannot substitute its opinion or decision for that of the body/public officer, seized with that authority.

The impugned decision challenges the detention of the subject motor vehicle by the respondent. **Section 24 of the Police Service Act No 11 of 2011** provides for the function of the Kenya Police as:-

- (a) Provision of assistance to the public when in need;**
- (b) Maintenance of law and order;**
- (c) Preservation of peace;**
- (d) Protection of life and property;**
- (e) Investigation of crimes;**
- (f) Collection of criminal intelligence;**
- (g) Prevention and detection of crime;**
- (h) Apprehension of offenders;**
- (i) Enforcement of all laws and regulations with which it is charged;**
- (j) Performance of any other duties that may be prescribed by the inspector General under this Act or any other written law from time to time.”**

The respondent has explained the circumstances under which he detained the subject vehicle after the I.P. reported to CID that his motor vehicle had been confiscated and was held at a certain yard. On carrying out investigation, he established that James Kimunyi of Mwandani Motors allegedly entered into an agreement with the I.P., for the sale of the said vehicle for which he paid kshs. 1,700,000/=. The respondent further learned that the ex parte applicant was claiming to be the owner of the vehicle having bought it from SMART Autos and hired to James Kimunyi who had defaulted in payment and so the applicant had repossessed the vehicle and sold to another but it was detained.

I have seen the documents exhibited by both the I.P. and the applicant. It is not in dispute that James Kimunyi who purportedly sold the vehicle to the I.P. has been charged with the offence of obtaining money by false pretences contrary to **Section 313 of the Penal Code** following the sale of the subject vehicle to the I.P.

The applicant claims to have bought the vehicle from SMART Autos Ltd as of 4/8/2016, on the same date when the I.P. bought it from Kimunyi but he did not display any sale agreement between the applicant and SMART Autos. Further to that, it is not until 25/1/2017 that the subject vehicle was transferred to the applicant. It means that when the IP party allegedly bought it. It was still registered in the names of SMART Autos Ltd. The question then is how did the applicant hire out the vehicle to James Kimunyi when it was still registered in the names of SMART Autos. James Kimunyi and SMART Autos are not parties to this Judicial Review proceedings and have not explained their roles in this matter.

Clearly, there are issues over the ownership of the subject vehicle. In the case of **Republic Vs National Transport and Safety Authority and 10 others ex parte James Maina Irungu 2015 KLR**, J. Odunga held as follows:-

“The rationale for this is that Judicial Review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings Judicial Review proceedings with a view to determine contested matters of fact and in effect determine the merits of the dispute, the court would not have jurisdiction in a Judicial Review proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil court or criminal courts.”

What the judge was saying is that Judicial Review is available where the facts are not contested as in the present case. The facts should be certain and uncontested and the court will only look at the process through which the decision was arrived at.

In **Mantrad Enterprises Vrs Kenya Forest Services Misc application 744/2008**, Justice Dulu held;

“Where a property is detained and it is contended that the same is a subject of the criminal proceedings, the right forum to raise the issue of the detention is the trial court in which the criminal proceedings are pending. However, where it is clear that the property detained has nothing to do with the charge preferred in the trial court, it would be unreasonable and an abuse of power and discretion to detain the property and this court would not hesitate to grant the appropriate relief”.

Having considered the underlying facts in this case, the question in the instant case is whether the respondent acted illegally, unreasonably exercised his power or ultra vires or was it an abuse of the respondent’s powers and hence a breach of the applicant’s legitimate expectation that the respondent would adhere to the **provisions of Article 10,47, 40 of the Constitution and provisions of Fair Administrative Action**. Lord Diplock in the case of **Council of Civil Service Unions Vs Minister for the Civil Service (1984) 3 ALL ER 935** summarised the three principles of Judicial Review as follows:

“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 administration action is subject to control by Judicial Review. The first ground I would call “illegality”; the second “irrationality” and the third “procedural impropriety”.

By “illegality” as a ground of 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 per 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.

By ‘irrationality’, I mean what can now be succinctly referred to as “Wednesbury unreasonableness” (Associated Picture Houses Ltd Vrs Wednesbury Corporation (1948 ILK 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. 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 the heads 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”. See also **Pastoli Vrs Kabale District Local Government Council and others (2008) 2 EA 300**.

Armed with the above principles, no doubt, the respondent took a decision after carrying out investigations which was within his mandate. The act of detaining the vehicle cannot be said to be illegal. Having myself considered the fact that the ownership of the vehicle is contested, the respondent’s decision cannot be held to be irrational or a breach of the rules of natural justice. There is a criminal case pending in court which will resolve the issue of ownership and the disputants have to wait till the matter is resolved by that court.

The applicant sought orders of prohibition and mandamus. The **Court of Appeal in Kenya National Examination Council Vrs Rep Ex**

parte Geoffrey Gathenji CA 266/1996 said this of an order of prohibition.

“What does an order of prohibition do and when will it issue? It is an order from the high court directed to an inferior tribunal or body which forbids the tribunal or body to continue proceeding 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.

In the present case, there are no proceedings that have been commenced by the respondent which can be stopped by an order of prohibition. The respondent made a decision to detain the subject vehicle and the only way to get rid of the decision is to have it quashed by an order of certiorari but not an order of prohibition. An order of prohibition would not serve any purpose even if it was deserved.

The scope of an order of Mandamus was defined in the above case as;

“An order of mandamus lies to compel the performance of a public duty which is imposed on a person or body of persons by statute and where that person or body of persons has failed to perform the duty to the detriment of a body who has legal right to expect the duty to be performed”

An order of Mandamus would not have been issued to the applicants because it was not demonstrated that the respondent had refused or failed to perform a public duty imposed on him by statute.

In the end, I find that the respondent’s action of detaining the vehicle was well within his jurisdiction/power and there is no evidence that the decision was tainted with illegality, irrationally or procedural impropriety. I have also found that the orders sought would not have been available to the applicant as they were not efficacious in the circumstances. It follows that the Notice of Motion dated 12/11/2017 is unmerited and is hereby dismissed with costs to the respondent and I.P.

Dated, Signed and delivered at Nyahururu this 27th day of June, 2018.

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R.V.P Wendoh

JUDGE

PRESENT:

Mr. Chege Holding Brief Mr. Kamau - For applicant

Soi - Court Assistant

Mr. Mutembei - Respondent

Mr. Waichungo - Interested party