REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

JUDICIAL REVIEW NO. 2 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT CRIMINAL INVESTIGATION OFFICER, KERICHO)

THE DIRECTOR OF CRIMINAL INVESTIGATIONS)

THE INSPECTOR GENERAL)

THE CHIEF MAGISTRATE'S COURT,

KERICHO LAW COURTS) .....RESPONDENTS

AND

KIPRONO A. CHUMO.....INTERESTED PARTY

EX-PARTE

DIRIRI MOHAMED DIRIRI

JUDGMENT

1. This judicial review application was precipitated by orders issued on 7th February 2018 and 13th March 2018 in **Kericho CMCR Misc. Application No. 20 of 2018**. The orders related to the arrest, seizure and detention of motor vehicle registration number **KBZ 193R Mitsubishi Fuso, FH** (the "motor vehicle"). The application dated 7th February 2018 had been made by the 1st respondent. It was premised on section 118 and 121 of the Criminal Procedure Code and section 180 of the Evidence Act. It was supported by an affidavit sworn by PC Patrick Omondi of Kericho Directorate of Criminal Investigations (DCI), who averred that he was undertaking investigations related to the offence of conspiracy to defraud contrary to section 317 of the Penal Code. The 4th respondent granted the orders of arrest issued in the said application, and the motor vehicle was arrested and detained on 27th February 2018.

2. Following the motor vehicle's arrest and detention, the *ex parte* applicant made an application dated 8th March 2018 seeking, *inter alia*, orders reinstating and or restoring the possession and use of the suit motor vehicle to him from the custody of the Directorate of Criminal Investigations Kericho Police Station. The Hon B. Limo (RM) declined to grant the orders sought and instead extended the orders dated 7th February 2018 which had permitted the DCI Kericho to detain the motor vehicle.

3. In the order extracted on 11th April 2018 which is attached to the affidavit of PC Omondi filed in court on 4th May 2018, it is indicated that the court disallowed the application for release of the motor vehicle, and that it directed that the motor vehicle would be retained by the DCI Kericho until the same is produced as an exhibit in court. I must observe from the outset that the contents of the order are somewhat strange. From the documents before the court, Hon. Limo gave his ruling on 13th March 2018. In his ruling, he extended the orders issued on 7th February 2018 but limited to a period of 21 days to enable the investigation team wind up its inquiry. He also directed the parties listed and subject to the inquiry to appear before the DCI to facilitate the inquiry.

4. Dissatisfied with the court's decision extending the order, the *ex-parte* applicant filed an application brought by way of Notice of Motion dated 3rd April 2018 pursuant to leave granted in this matter on 28th March 2018 seeking orders that:

1. The Application herein be heard on priority basis owing to the obtaining special and/or peculiar circumstances.

2. The Honourable Court be pleased to grant an order of Judicial Review in the nature of Certiorari to issue to remove to the High Court and quash the proceedings and the orders issued on 7th February 2018 and 13th March 2018, respectively in respect of /or pertaining to criminal proceedings vide Kericho CMCR Misc Application No. 20 of 2018, together with any consequential orders between Republic v National Bank Limited, Kericho Branch, more particularly, the portions relating to the seizure, arrest and detention of Motor Vehicle Registration Number KBZ 193R, Mitsubishi Fuso FH, belonging to and registered in the name of the ex-parte applicant.

3. The Honourable Court be pleased to grant an order of Judicial Review in the nature of Prohibition to issue prohibiting the 1st, 2nd and 3rd Respondents from continuing to detain and/or hold Motor Vehicle Registration Number KBZ 193R, Mitsubishi Fuso FH, belonging to and registered in the name of the ex-parte applicant, either on the basis of the orders issued vide Kericho CMCR Misc Application No. 20 of 2018, which did not touch and/or concern the Ex-parte Applicant herein.

4. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of Prohibition, to issue prohibiting the 4th Respondent from entering, further entertaining, proceeding with, deliberating upon, rendering any decision on and/or any other manner handling the Criminal Proceedings vide Kericho CMCR Misc Application No. 20 of 2018, together with any consequential orders between Republic v National Bank Limited, Kericho Branch, more particularly, the portions relating to the seizure, arrest and detention of Motor Vehicle Registration Number KBZ 193R, Mitsubishi Fuso FH, belonging to and registered in the name of the ex-parte applicant, who was never a party to the said proceedings , whatsoever and/or howsoever.

5. The Honourable Court be pleased to grant an order of Judicial Review in the nature of Mandamus to issue to compel the Respondents herein either jointly and/or severally to release Motor Vehicle Registration Number KBZ 193R, Mitsubishi Fuso FH, to the ex-parte Applicant, forthwith and without any restriction and/or fetters, whatsoever and/or howsoever.

6. Costs of the Application be borne by the Respondents and the Interested Party jointly and severally.

7. Such further and/or other Orders be made as the court may deem fit and expedient.

5. In his application before the Magistrate's Court in **CMCC Misc App No 20 of 2018** dated 8th March 2018, the *ex parte* applicant alleged that he was the owner of the suit motor vehicle. He alleged that he had purchased the said motor vehicle from one **Cornel Otieno Onyango** and had entered into a sale agreement with the seller dated 14th June 2017. Prior to entering into the sale agreement, he had confirmed the status of ownership of the vehicle with Rafiki Microfinance Bank Limited which had been registered as a co-owner of the said motor vehicle. He annexed to his application a copy of the logbook marked **DMD-1**.

6. The *ex-parte* applicant alleged that he made a total payment of Kshs 1,620,000/- to Rafiki Microfinance Bank Limited and Kshs. 1,125,000/- being the balance of the purchase price to Cornel Otieno Onyango. He had therefore paid a total of Kshs 2,745,000/- for the motor vehicle. After following the requisite procedure and making the necessary applications to the National Transport and Safety Authority, the motor vehicle had been transferred to his name

7. In its ruling pursuant to the application made by the 1st respondents in **CMCC Misc Appl. No. 20 of 2018,** the court issued an order dated 7th February 2018 to the effect that the suit motor vehicle be arrested and detained at Kericho Police Station and that the logbook of the said motor vehicle as well as chassis number be provided to one PC Patrick Omondi. I have already alluded to this application in which the 1st respondent sought a warrant of arrest and detention of the said motor vehicle on the basis that it was intended to be relied on as an exhibit.

8. In his affidavit in support of the said application, PC Omondi deposed that the suit motor vehicle is the subject of investigations relating to the offence of conspiracy to defraud contrary to section 317 of the Penal Code which was reported vide OB NO. 21/12/6/2017. The complaint had been made by one Kiprono Arap Chumo (the interested party) who alleged that he had entered into an agreement dated 27th February 2015 with one Cornel Otieno Onyango, the same person who had apparently entered into a sale agreement with the *ex parte* applicant, for the purchase of the motor vehicle. The said Kiprono Arap Chumo alleged to have made a payment of Ksh 1,000,000/- to Cornel Otieno Onyango and to have made monthly payments of Kshs 140,000/- to Rafiki Microfinance Bank Limited from the date of the alleged agreement.

9. It was further alleged that the suit motor vehicle was in the name of Kiprono Arap Chumo until it was repossessed by Cornel Otieno Onyango through 2 court orders dated 31st October 2016 but signed by two different magistrates. Preliminary investigations had shown that the two court orders might have been forgeries since one of the magistrates had disowned the signature on the order stating it is not hers and the other magistrate could not confirm the authenticity of the order as the original order could not be traced on the file.

10. In an affidavit sworn by Patrick Omondi and filed before this court on 4th May 2018, it is deposed on behalf of the respondents that the *ex parte* applicant Diriri Mohamed Diriri has refused to abide by the orders of the court to surrender the logbook of the motor vehicle as ordered by the court on 7th February 2018.

11. As indicated earlier in this judgment, the *ex parte* applicant had filed a Notice of Motion Application in **Kericho CMCR Misc. Application No. 20 of 2018** seeking release of the suit motor vehicle. In his ruling dated 13th March 2018, Hon. B. Limo ordered:

> (a) *"The orders issued on 7th February 2018 are hereby extended* ***but be limited for a period of 21 days from todays date*** *(sic) for the investigation team to conclusively wind up this subject of inquiry."* (Emphasis added)

12. The order that was extracted pursuant to the aforementioned ruling stated *inter alia* as follows:-

2.That the DCI-Kericho to retain the Lorry Reg. No KBZ 193R until the same is produced as an exhibit in Court.

13. It would appear that the order as extracted and issued on 11th April 2018 was not a correct reflection of the orders of the court issued on 13th March 2018. At any rate, it is this ruling of the court and the orders extracted therefrom that prompted the present judicial review proceedings.

The ex parte applicant's case

14. The applicant's case is set out in the application, the statement dated 27th March 2018 and the affidavit sworn on 27th March 2018 by Diriri Mohamed Diriri. The applicant also filed submissions dated 3rd May 2018.

15. The applicant deposes in his affidavit that on or about 14th June 2017, he and one Cornel Otieno Onyango entered into a sale agreement in respect of the motor vehicle. At the time, the vehicle was registered in the joint names of Mr. Onyango and Rafiki Microfinane Bank as co-owners. After he had made payment of the requisite purchase price and following due procedure, the suit motor vehicle was registered in his name by the National Transport and Safety Authority. The process culminated in his being issued with a log book in his favour, thereby denoting and confirming his ownership rights.

16. However, the 1st, 2nd and 3rd respondents obtained orders on 7th February 2018 in Kericho CMCR Misc App No. 20 of 2018 under whose authority they proceeded to seize the motor vehicle on 27th February 2018 from his driver, one Joseph Lule James. The motor vehicle has continued to be detained at Kericho Police Station since then on the basis that investigations by the 1st, 2nd and 3rd respondents of the offence of conspiracy to defraud are ongoing.

17. It is his averment that he had instructed an advocate to apply for variation or discharge of the said order. However, despite detailed explanation on his purchase of the motor vehicle, the lower court rendered a ruling on 13th March 2018 directing that the motor vehicle should continue being detained. Mr. Diriri deposes that the suit in respect of which the orders of 7th February 2018 were issued related to M/s National Bank Limited, Kericho Branch which had no claim in connection to the motor vehicle. It is his contention that the dispute between the interested party and the vendor can only be resolved through a civil case.

18. In his view, the criminal proceedings involving the motor vehicle have been mounted with a view to intimidating and harassing him, and have caused him undue suffering. The proceedings and investigations constitute an abuse of the due process of the court, and contravene Articles 2(2), 20(1), 27(1), 40 & 50(1) of the Constitution of Kenya 2010.

19. In his submissions on behalf of the applicant dated 3rd May 2018, Learned Counsel, Mr. Oguttu, submits, first, that the applicant is the lawful owner of the motor vehicle. He reiterates the applicant's averments that he had purchased the motor vehicle from one Cornel Otieno Onyango, that the requisite documents had been executed and the vehicle was transferred to him. Learned Counsel cites sections 14, 19 and 20 of the **Sale of Goods Act** Cap 31 of the Laws of Kenya to submit that after the acquisition of those rights, the motor vehicle could not be dealt with in a manner adverse to the rights and/or interests of the *ex-parte* applicant pursuant to Article 40 of the Constitution.

20. Counsel submitted further that the *ex parte* applicant was entitled to a hearing before orders of arrest and detention of the motor vehicle were issued as he was the registered owner of the vehicle. The manner in which the motor vehicle was dealt with violates the *ex parte* applicant's ownership rights, and is in breach of Article 47 of the Constitution.

21. The ex parte applicant argues, secondly, that the 4th respondent is the custodian of justice and is called upon to interrogate facts presented to it before granting orders. He contends that it was immaterial that the applicant before the court was the DCIO, and that if the court had read the contents of the affidavit sworn on 7th February 2018, it would have noted that the dispute was anchored on breach of contract between the interested party and one Cornel Otieno Onyango. Further, that if the 4th respondent had directed its mind to the issues, it would not have granted the amorphous and indefinite order without notice to or hearing of the ex-*parte* applicant. Counsel for the ex parte applicant termed the acts of the 4th respondent as irrational and alleges that the court failed to properly appreciate the law on issuance of orders of arrest and detention of chattels. He relied on the decision in **Republic v David Kimaiyo & Another [2014] eKLR** for the doctrine of irrationality and illegality of a decision maker.

22. It was the ex parte applicant's contention, thirdly, that it is common ground that the dispute that had been placed before the 4th respondent was one of breach of contract between the interested party and one Cornel Otieno Onyango, the vendor of the motor vehicle. He submitted that the motor vehicle was never transferred to the interested party, while the vendor and the financier had entered into a lawful sale agreement with the *ex parte* applicant and had later transferred the motor vehicle to him.

23. It was further submitted on behalf of the *ex parte* applicant that the mandate of the 1st, 2nd and 3rd respondents does not extend to interrogating civil disputes between parties with rivaling claims of ownership. Reliance was placed on the case of **Kuria & 3 Others vs Attorney General [2002] 2KLR** for the proposition that the machinery of the criminal justice system is not allowed to become a pawn in personal civil feuds and individual vendetta. He also cited **Republic vs Chief Magistrate's Court at Mombasa & Another [2002] 2 KLR** to submit that it is not the purpose of the criminal investigator to bring criminal charges or prosecution to help individuals in the advancement or frustrations of their civil cases. Counsel submitted that the involvement of the respondents and the continued detention of the suit motor vehicle constitutes and/or amounts to an abuse of the court process.

24. Finally, it was the contention of the *ex parte* applicant that he is vested with fundamental rights and freedoms which are sacrosanct and deserving of protection by the court. He submitted that this court has jurisdiction to ensure that excesses are tamed, citing in support the case of **Githunguri vs Republic [1986] KLR pg 1-22** and **Joram Mwenda Guantai vs the Chief Magistrate Nairobi, Court of Appeal, Civil**

Appeal No. 228 of 2003 (unreported).

25. The *ex parte* applicant submits that it is the duty of this court to secure his fundamental rights, including the right to own property under Article 40 of the Constitution. He urges the court to issue the orders sought in his application and protect him from unlawful persecution arising from the detention of the motor vehicle on the basis of orders issued in abuse of office by the 4th respondent.

The 1st, 2nd and 3rd Respondents' Case

26. The case for the respondents is set out in an undated replying affidavit sworn by No. 93647 PC Patrick Omondi and filed in court on 4th May 2018. PC Omondi deposes that he is the investigating officer in the matter relating to the offence of conspiracy to defraud contrary to section 317 of the Penal Code which was reported vide OB No. 31/12/6/2017. The complainant, one Kiprono Chumo, had reported that he acquired the subject motor vehicle from one Cornel Otieno Onyango pursuant to an agreement for sale dated 27th February 2015.

27. On 27th February 2018, the motor vehicle was arrested at Kisumu while in the possession of one Joseph Lule James and thereafter was detained at Kericho Police Station pending investigations and final determination of the case already before Kericho Chief Magistrate's Court No. 3. Mr. Omondi avers that the vehicle is a vital exhibit in court and that section 121(1) (2) and (3) of the Criminal Procedure Code clearly gives the investigating officer authority to detain any exhibit until the conclusion of a matter. He contends that the release of the motor vehicle may jeopardize the investigations since the logbook of the motor vehicle indicates that it is a cargo lorry yet physically it has been changed into a fuel tanker (utility) without due process of the law in accordance with the National Transport and Safety Authority Act No. 33 of 2012.

28. PC Omondi further deposes that the *ex parte* applicant has failed to demonstrate that the decision making process by the respondents is flawed, or how the respondents have acted in excess of powers conferred by law or infringed, violated, contravened or in any other manner failed to observe the provisions of the Constitution. It is averred on behalf of the respondents that the present application is a diversionary and tactic brought in bad faith and is an abuse of the court process as the *ex parte* applicant should have approached the court by way of appeal.

29. In submissions filed on behalf of the respondents by Prosecution Counsel, Mr. Ayodo, on 9th May 2018, it is argued that the present application lacks merit and should be dismissed. The respondents reiterate in their submissions the facts leading to the present dispute as set out in the affidavit of PC Omondi. Their case is that the dispute arises from an investigation of the offence of conspiracy to defraud contrary to section 317 of the Penal Code which involves the motor vehicle.

30. The interested party, who alleged that he had entered into a contract dated 27th February 2015 for the purchase of the motor vehicle had, pursuant to the said agreement, been liable to pay all the debts under an indemnity loan take over/transfer letter dated 3rd June 2015. The interested party had been making payments of Kshs. 140,000/- per month to Rafiki Microfinance Bank Limited and had made a total payment of Kshs. 4,700,0000/- until the vehicle was repossessed by Cornel Otieno Onyango on the basis of two court orders which preliminary investigations showed were fake.

31. According to the respondents, the vendor had then organised with the *ex parte* applicant to pay Rafiki Microfinance Bank the remaining balance of Kshs 1.6 Million and transferred the motor vehicle to him. Mr. Ayodo's submissions were that this is what had prompted the interested party to report the matter to the police, leading to the arrest and charging of Cornel Otieno Onyango with the offence of conspiracy to defraud contrary to section 317 of the Penal Code.

32. It was submitted further on behalf of the respondents that the arrest of the vehicle had prompted the *ex parte* applicant to move the court in Misc. Application No 20 of 2018 to have the motor vehicle restored to him, but the orders he sought were denied.

33. The respondents submit that their further investigations reveal that there might have been a conspiracy between Rafiki Microfinance Bank Limited employees or officials, Cornel Otieno Onyango and the *ex parte* applicant to defraud the interested party of the motor vehicle and that more arrests and charges are yet to be preferred.

34. The respondents take the position that the motor vehicle in dispute is a very crucial exhibit for the prosecution and releasing it to the applicant will render the case pending in court against Cornel Otieno Onyango useless and justice will not be served on the complainant, the interested party. Mr. Ayodo submitted that the vehicle should be held as an exhibit in Criminal Case No. 638 of 2018.

35. It was also the respondent's case that the present application is *res judicata.* This is on the basis that it had already been heard and determined by a court of competent jurisdiction. This court was faced with a similar application for the release of the motor vehicle as in Misc. Application No. 20 of 2018. If the *ex parte* applicant was aggrieved with the decision of the lower court, it should have filed an appeal and not a judicial review application. Counsel urged the court to find that the application was an abuse of the court process and dismiss it.

Submissions of the Interested Party

36. Mr. Ochieng, Learned Counsel for the interested party, associated himself with the submissions by Mr. Ayodo for the respondents. With regard to the question whether this application was appropriate for the issues in contention, it was his submission that judicial review does not deal with the merit of a case, but the process. In his view, the ex parte applicant had not shown that the decision making body had relied on irrelevant issues, and he urged the court to dismiss the application.

Submissions in response

37. In reply to the respondents' and interested party's submissions, Mr. Oguttu argued that no pronouncement had been made yet with regard to the contention that the motor vehicle had been repossessed from the interested party on the basis of fake court orders. He further submitted that an order to detain the vehicle pending the determination of the criminal case with respect to conspiracy to default cannot be issued in a judicial review application.

Analysis and Determination

38. I have considered the pleadings of the parties in this matter and their respective submissions. The core issue for determination is whether the process leading to the detention of the motor vehicle in dispute was flawed, and whether it should be released to the *ex parte* applicant as he prays.

39. In dealing with this issue, it is important to consider first the scope of judicial review. It is I think trite law that judicial review is concerned with the decision making process rather than the merits of the impugned decision. The *ex parte* applicant in this matter is aggrieved by the decision of the respondents, in particular the 4th respondent, to allow the detention of the motor vehicle in dispute.

40. In **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

> ***"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would 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."***

41. Similarly, in **Republic vs Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that*:*

> ***"…the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power."***

42. See also **Republic vs Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** and **Republic vs Chief Magistrate, Resident Magistrate's Court at Nairobi - Milimani Commercial Courts Ex-parte Safaricom Limited & 2 Others [2014] eKLR** in which the courts examined at length the scope of the judicial review jurisdiction.

43. It is thus undisputed that a court, in dealing with a judicial review application, must concern itself with the process, rather than the merits of the decision that is under challenge. The circumstances under which a court will enter into the merits of an impugned decision are limited. In **Republic vs Chief Magistrate Milimani Commercial Court & 2 Others Ex-Parte Violet Ndanu Mutinda & 5 Others [2014] eKLR**, it was stated that a court entertaining a judicial review application could only go into the merits of a decision in limited cases. The court expressed the following view:

> ***"It is, I believe, settled law that a court exercising judicial review jurisdiction is concerned with the procedural propriety of a decision, rather than with its merits. A court will consider the merits of a decision only in the circumstances set out in the case of Associated Provincial Picture Houses Ltd –versus- Wednesbury Corporation (supra), namely: where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it'."***

44. The *ex-parte* applicant alleges that the criminal proceedings in relation to the motor vehicle are induced by malice and driven by ulterior motives. That they have been mounted with a view to harassing him. That the 1st, 2nd, 3rd and 4th respondents acted in excess of jurisdiction and that their actions are arbitrary, vexatious, oppressive and *ultra vires.* He also submits that the 4th respondent was irrational and thereby failed to appreciate the law on issuance of arrest and detention of a chattel.

45. I will deal first with the actions of the 1st, 2nd and 3rd respondents. The application presented before the lower court on 7th February 2018 was premised on sections 118 and 121 of the Criminal Procedure Code, and section 180 of the Evidence Act. Section 118 of the CPC provide as follows:

> ***Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in thewarrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.***

46. Section 118A provides for detention of property seized. It provides that:

> ***(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.***
>
> ***(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.***

47. Section 180 of the Evidence Act allows for the inspection of accounts in bankers' books, so its relevance to the present matter is not clear.

48. What is clear, however, is that under section 118 and 121 of the Criminal Procedure Act, the 1st, 2nd and 3rd respondents have power to go before a magistrate's court to apply for detention of an item, such as the vehicle in the present case. The item may be detained until the conclusion of the case, or the conclusion of investigations. Thus, it appears to me that the 1st, 2nd and 3rd respondents had the statutory power to act as they did: to apply *ex parte* before the magistrate's court for orders to arrest and detain the motor vehicle which was suspected to be the subject of an offence.

49. The next question is whether the 4th respondent acted within its jurisdiction, and whether it acted reasonably in the circumstances.

50. The facts that were before the court, from the pleadings of the parties, were that the interested party had purchased the subject vehicle from one Cornel Otieno Onyango. The terms of the transaction was that he pays a certain amount, said to be Kshs 1,000,000 to the seller, and the balance to be paid by monthly instalments to the seller's financier, Rafiki Microfinance Bank. He had paid a substantial amount with respect to that purchase, said to be Kshs 4,700,000. .He had possession of the vehicle, but pursuant to two orders alleged to have been issued by two magistrates in Kisumu, whose authenticity was in doubt, the vehicle had been repossessed by the seller, who had then sold it on to the *ex parte* applicant.

51. The 1st, 2nd and 3rd respondents were investigating the interested party's claim, and had brought charges of conspiracy to defraud against one Cornel Otieno Onyango, from whom the *ex parte* applicant had purchased the vehicle. The 1st, 2nd and 3rd respondent had sought to detain the vehicle in order for it to be used as an exhibit in the criminal charges preferred against the seller of the vehicle.

52. In its ruling dated 7th February 2018, the Magistrate's Court considered the application by the 1st respondent and granted orders to arrest and detain the motor vehicle. The Court had jurisdiction to issue the orders it did on 7th February 2018, *ex parte*, in accordance with the provisions of section 118 and 121 of the Criminal Procedure Code.

53. The Court had then heard the ex parte applicant on his application dated 8th March 2018. In its ruling of 13th March 2018 which was in relation to the *ex parte* applicant's application of that date, the Magistrate's Court considered the pleadings and submissions by the *ex parte* applicant and the respondents. The applicant was given an opportunity to be heard, and he duly presented his case, before the court declined to allow his application to have the motor vehicle released. In the circumstances, it is not possible to discern procedural unfairness in the decision of the 4th respondent.

54. Which leaves the question of irrationality and unreasonableness on the part of the 4th respondent. Was the action or decision of the 4th respondent in extending the orders to detain the motor vehicle irrational or so unreasonable as to fall within the **Wednesbury** principles and therefore justify the intervention of this court?

55. The respondents had contended before the lower court that the subject of the suit had been altered as it was a cargo truck but had been used or converted into a fuel tanker. The applicant did not address itself to this contention by the respondents. On the basis of the material before it, the Magistrate found it necessary to protect the subject matter of the inquiry by the 1st, 2nd and 3rd respondents, pending investigations. It is noteworthy that the ruling of the court was that the orders it had issued would remain in force for 21 days.

56. Courts in this jurisdiction have considered what amounts to an irrational or unreasonable decision on the part of a decision maker to warrant the intervention of a court exercising judicial review powers. In **Republic vs Public Private Partnerships Petition Committee (The Petition Committee) &3 Others Ex Parte A P M Terminals [2015] eKLR** the court stated as follows:

> ***"The orders of certiorari, prohibition and mandamus are available where a body amenable to judicial review has acted illegally, irrationally or in contravention of the rules of natural justice – see Pastoli vs Kabale District Local Government Council and others [2008] 2 EA 300 and Council of Civil Service Unions vs Minister for the Civil Service [1984] 3 ALL ER 935.***
>
> ***For an applicant to succeed in an application for judicial review it is necessary to establish that the action or decision being challenged is tainted with illegality, irrationality or procedural impropriety. It is not enough for one to allege illegality, irregularity or procedural impropriety. The allegations must be proved for the orders to issue–see the decision of this Court in JR No. 92 of 2011 R vs The Public Procurement Administration Review Board & another ex parte Gibb Africa Ltd & Another."***

57. Where a body has the jurisdiction to make a decision, it can exercise that power to make the decision, and the decision can be deemed by the parties concerned to be right or wrong. However, a court exercising powers of judicial review is not concerned with the merits of the decision, whether it was right or wrong, but with the procedural propriety of the decision-see **Republic vs The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR where the court held that:**

> ***"...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision…I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs."***

58. In **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR, the Court of Appeal expressed the following view*:***

> ***"21) Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter."***

59. Given the facts that were before the 4th respondent, I take the view that the 4th respondent properly exercised its jurisdiction in granting the orders that it did, and extending the said orders. Its decision was not unreasonable or irrational, noting the definition of these terms. In **De Smith's Judicial Review** (sixth edition) at Page 559, it is stated that:

> ***"Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic…Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision. Mistake of material fact may also according to recent cases render a decision unlawful.***

60. In **Republic vs Chief Magistrates Court Nairobi Law Courts & 8 Others Ex- parte Simon Ngomonge & Another [2013] eKLR** the court, in considering the meaning of the term irrational stated as follows:-

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479. "***

61. In the circumstances, it is my finding that the orders sought in this matter are not merited. The applicant was duly heard by the court, and the decision was both procedural and rational and within the jurisdiction of the court. To issue the orders that the applicant seeks is to enter into a merit review of the decision of the 4th respondent, which this court cannot do in a judicial review application.

62. In closing, I observe that the 4th respondent had, in its ruling dated 13th March 2018, extended the orders for detention of the motor vehicle for a further 21 days. It appears that the order extracted on 11th April 2018, on the basis of which the ex parte applicant moved to this court, was extracted by error. The trial court had, quite reasonably in my view, granted a limited time within which the 1st -3rd respondents were to have carried out their investigations. The court had also directed all the parties to go before the DCI for purposes of the investigations. It appears that the present proceedings were brought without fully appreciating what the trial court had ordered. The 1st to 3rd respondents had been given 21 days to complete their investigations. They should long have done so, and either released the vehicle to the interested party or proceeded with their case against any party deemed to have committed an offence in connection with the vehicle.

63. In any event, I find that the application dated 28th March 2018 is without merit. It is hereby dismissed, but with no order as to costs.

Dated Delivered and Signed at Kericho this 28th day of November 2018.

MUMBI NGUGI

JUDGE