



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 423 OF 2016

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF SECTION 6 OF THE MAGISTRATES’ COURTS ACT, 2015, SECTIONS
26, 177 & 178 OF THE CRIMINAL PROCEDURE CODE, CAP 75 LAWS OF KENYA & IN THE
MATTER OF ARTICLES 23 & 165 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP. 26) AND
ORDER 53 RULE 1(1) AND (2) OF THE CIVIL PROCEDURE RULES (2010)**

AND

**IN THE MATTER OF THE DECISION OF THE CHIEF MAGISTRATE’S COURT AT
NAIROBI, MILIMANI OF 05/09/2016 TO HEAR AND DETERMINE AN APPLICATION FOR
REDRESS OF AN ALLEGED VIOLATION OR INFRINGEMENT OF A RIGHT OR
FUNDAMENTAL FREEDOM IN THE BILL OF RIGHTS**

BETWEEN

REPUBLICAPPLICANT

VERSUS

CHIEF MAGISTRATE’S COURT AT NAIROBI, MILIMANI....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

KAMAU KING’ORA4TH RESPONDENT

AND

EX-PARTE : SOLOMON KINGORA

JUDGEMENT

Introduction

1. The applicant herein, **Solomon Kingora**, commenced these judicial review proceedings by way of a Notice of Motion dated 23rd September, 2016 seeking 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.

Ex Parte Applicants' Case

2. According to the Applicant, sometimes in the month of March 2016, he made a report to the Kenya Police that the 4th Respondent had unlawfully caused two Nissan Tiida saloon motor vehicles registration number KCE 972E and KCF 213K belonging to the applicant to be registered in the 4th Respondent's name as proprietor and further that the 4th Respondent had converted them to his own use. Pursuant to that complaint, the Kenya Police managed to track the aforesaid motor vehicles at a car sale yard whereupon they took custody and detained them at the Nairobi Area (Traffic Headquarters) Police Station.

3. The applicant averred that as the 4th Respondent was, and to the best of his knowledge still is, in the Republic of Taiwan, the Kenya Police remained unable to complete their investigations and/or prefer charges against anyone. However, the 4th Respondent, whilst still in the Republic of Taiwan, commenced proceedings before the subordinate court, to wit, *Chief Magistrate Miscellaneous Criminal Application No. 23 of 2016 - Kamau Kingora vs. The Director of Public Prosecutions and 3 Others* by filing the Notice of Motion Application dated 4th August 2016. The said proceedings by the 4th Respondent, according to the applicant constituted an application for redress of alleged violation or infringement of a right or fundamental freedom in the Bill of Rights, and in sought to invoke the provisions of Article 40 (1) (a) and (b) and Article 50(1) in the Bill of Rights of the Constitution of Kenya, 2010. It was averred that on 5th September 2016, the 1st Respondent proceeded to hear the said Application and made orders directing 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.

4. It was the applicant's case that since the High Court has exclusive original jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or

fundamental freedom in the Bill of Rights, the subordinate court lacked any statutory or constitutional authority to hear and/or determine the said proceedings. It was further contended that the subordinate court's jurisdiction to order the release of property detained by the police in the course of criminal investigations is strictly limited to criminal proceedings where a person has been charged before the Court with an offence in relation to that property.

5. The applicant added that the subordinate Court, within the realm of criminal proceedings, only has the jurisdiction to pass sentences of imprisonment and/or fines, or to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya, or which according to law may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction.

6. It was therefore the applicant's contention that 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 was *ultra vires*.

7. It was submitted on behalf of the ex parte applicant that since under Article 165(6) of the Constitution of Kenya, 2010 "the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court" this Court has supervisory jurisdiction over the decisions and/or actions of the 1st Respondent and to that extent, this Court would be acting within the Court's powers to hear and determine the present judicial review Application.

8. It was reiterated that the application that led to the impugned order was made pursuant to the provisions of Article 40(1)(a) and (b) as well as Article 50(1) of the Constitution of Kenya, 2010 and essentially sought for redress of a perceived violation of the 4th Respondent's rights and fundamental freedoms under the Bill of Rights and in particular, the right to property and the right to a fair hearing. However according to the ex parte applicant, Article 23 of the Constitution of Kenya, 2010 grants jurisdiction in such matters to the High Court and the Magistrate's Court.

9. The applicant's view was that the effect of this is that the High Court is vested with unlimited jurisdiction to hear and determine applications for redress of a violation or infringement of a right or fundamental freedom in the Bill of Rights whereas subordinate courts have a limited jurisdiction in that regard as may be granted by statute. It was explained that admittedly there was a lacuna of sorts as until 2nd January 2016, Parliament was yet to enact the legislation contemplated by Article 23(2) of the Constitution of Kenya, 2010. Be that as it may, even in the presence of such a lacuna, any person aggrieved could nonetheless move the High Court for redress. In the present case, the **Magistrates' Courts Act, 2015** had been enacted and had come into force to give effect to the provisions of Article 23(2) of the Constitution of Kenya, 2010.

10. The effect of this provision, it was submitted was to limit the jurisdiction of the magistrate's court, and by extension the 1st Respondent, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom guaranteed under Article 25 (a) and (b) of the Constitution of Kenya, 2010.

11. Therefore, the powers conferred upon the 1st Respondent by statute and the Constitution of Kenya, 2010 was expressly limited to hearing and determination of applications for redress of a denial, violation or infringement of, or threat to freedom from torture and cruel, inhuman or degrading treatment or punishment and/or freedom from slavery or servitude. Therefore, according to the applicant, by hearing and determining the proceedings in **Chief Magistrate Miscellaneous Criminal Application No. 23 of 2016 Kamau Kingora vs. The Director of Public Prosecutions and 3 Others** made pursuant to the provisions of Article 40(1)(a) and (b) as well as Article 50(1) of the Constitution of Kenya, 2010 seeking redress of a perceived violation of the 4th Respondent's right to property and the right to a fair hearing,

the 1st Respondent acted *ultra vires* of powers conferred upon it by statute and the Constitution of Kenya, 2010. In the circumstances it is only just, mete and proper that the determination made by the 1st Respondent be quashed and the Respondents be prohibited from implementing, enforcing, or otherwise howsoever effecting the same and further, the 1st Respondent be prohibited from hearing and/or determining afresh those proceedings.

4th Respondent's Case

12. The 4th Respondent in opposition to the application averred that on 15th March, 2016 the ex parte applicant working in cohorts with officers from the DCI, Nairobi Area Traffic headquarters raided Astro Motors Limited and detained the said two vehicles without giving any reason therefor. As a result of the failure to divulge the same, the 4th Respondent filed the said Miscellaneous Application pursuant to Articles 40(1)(a) and (b) and 50(1) of the Constitution which applicant was never opposed by the respondents and orders were granted in conformity with the expected procedures of the Court. This was despite the applicant having appeared by counsel and having been ordered to respond thereto. Accordingly, there being no response, the 1st Respondent allowed the said application.

13. According to the 4th Respondent, the said order was issued pursuant to section 8(1) of the ***Magistrates Act, 2015*** under which the Magistrate's Courts have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In the 4th Respondent's view, Article 165(3)(b) of the Constitution does not take away the jurisdiction of the Chief Magistrates Court to enforce, hear and determine such matters.

14. It was the 4th Respondent's case that there was no specific claim against the 4th Respondent and that whereas the ex parte applicant claimed that the actions of the 1st Respondent are void, illegal, invalid, in bad faith, unreasonable and in breach of the rules of natural justice, the ex parte applicant conveniently failed to disclose to the court that he had leave from the 1st Respondent to raise the issue of the procedure followed and the allegations raised herein but failed to do so. Accordingly, it was contended that the grounds for the grant of judicial review orders were not satisfied and in this respect the 4th Respondent relied on **Republic vs. Chief Magistrate's Court, Nairobi & 4 Others [2013] eKLR.**

15. It was therefore the 4th Respondent's case that the ex parte applicant had failed to demonstrate any of the principles of irrationality, unreasonableness and proportionality and that the ruling of the 1st Respondent was not irrational as it was in enforcement of procedural requirement as expected under the ***Criminal Procedure Code.***

16. It was therefore the 4th Respondent's case that the ex parte applicant was merely challenging the merits of the decision by the 1st Respondent and relied *inter alia* on **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) eKLR** and **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

17. With respect to the order for certiorari, the 4th Respondent submitted that the same cannot be granted because the 1st Respondent's decision was arrived at in accordance with the legal provisions after lengthy exhaustive litigation and relied on ***Halsbury's Law of England 4TH Volume II Page 805 Paragraph 1508, R vs. Kenya National Commission on Human Rights Ex-Parte Uhuru Kenyatta (2010) eKLR*** and **Republic vs. The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 [2007] eKLR.** It was his submission that the Court should not interfere with the 1st Respondent's decision as a matter of public policy. He therefore urged the Court to dismiss the application with costs.

Determination

18. I have considered the material placed before this Court relevant to this ruling.

19. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

20. Similarly the Supreme Court in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR expressed itself as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

21. In Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 the Court of Appeal expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not

be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

22. It was argued that this Court ought not to interfere with the decision of the Respondent since the issue was never raised before the 1st Respondent and since the 1st Respondent’s impugned decision was arrived at after exhaustive hearing. The law is however clear that the mere fact that an issue of jurisdiction is not raised does not necessarily confer jurisdiction on the Court or Tribunal if it has none. Accordingly an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises.

23. According to Article 169(2) of the Constitution, Parliament is empowered to enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1) which clause establishes subordinate courts. Pursuant to the said Article Parliament enacted the *Magistrates Act, 2015* (hereinafter referred to as “the Act”) whose preamble provides that it is:

AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution; to confer jurisdiction, functions and powers on the magistrates’ courts; to provide for the procedure of the magistrates’ courts, and for connected purposes.

24. Accordingly, in order to determine whether the 1st Respondent had jurisdiction to entertain the application that gave rise to the impugned order, recourse must be had to the relevant provisions of the Constitution and the said Act.

25. Article 23(1) and (2) of the Constitution of Kenya, 2010 which provides for jurisdiction in matters dealing with applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights provides as hereunder:

1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

26. It is therefore clear that whereas the High Court’s jurisdiction in such matters is unlimited, the subordinate courts can only deal with appropriate cases seeking redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. From the said Article, it is Parliament that determines the parameters of the said appropriate cases since it was left to Parliament to enact the legislation conferring jurisdiction on the subordinate courts. This is exactly what Parliament did vide section 8 of the Act which provides as follows: -

1. Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

2. The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25(a) and (b) of the Constitution.

3. Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

4. The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's courts under this section.

27. It is therefore clear that the jurisdiction of the 1st Respondent is restricted to determination of applications seeking redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights as long as the claim falls within the ambit of Article 25(a) and (b) of the Constitution and nothing else. Article 25 (a) and (b) of the Constitution of Kenya, 2010 provide as follows: -

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude.

28. Therefore in the exercise of its powers pursuant to Article 23(2) of the Constitution as read with section 8 of the Act and Article 25(a) and (b) of the Constitution, the subordinate courts, and in this case, the 1st Respondent only has/had jurisdiction to entertain applications seeking redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights with respect to freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom from slavery or servitude.

29. In this case the application was expressed to be brought under Article 40(1)(a) and (b) as well as Article 50(1) of the Constitution of Kenya, 2010 which deal with redress of violation of the right to property and the right to a fair hearing. It is therefore clear that the 1st Respondent had no jurisdiction to entertain matters falling within the said provisions.

30. The 4th Respondent has contended that the applicant ought to have appealed against the said decision as the issue fell within a merit determination. However in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** the Court held that:

“...judicial review...has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”

31. It is therefore my view that a complaint revolving around want of jurisdiction based on constitutional restriction cannot be termed as a matter going to the merits since jurisdiction is a matter of law and in this case a constitutional issue.

32. The 4th Respondent further contended that this Court cannot interfere with the decision of the 1st Respondent as that decision was based on policy. In my view, contravention of the Constitution or a Statute cannot be justified on the plea of public interest or public policy as public interest or policy is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** where the Court expressed itself thus:-

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”

33. Having considered the issues raised in this application, I have no doubt in my mind that the 1st Respondent had no jurisdiction to embark on the hearing of the application and its decision must be null and void since as was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172** where an

act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.

Order

34. I the premises I grant the following orders:

- 1. An Order of Certiorari removing into this Court for the purposes of being quashed the 1st Respondent's decision made on the 5th September, 2016 in *Chief Magistrate Miscellaneous Criminal Application No. 23 of 2016 Kamau Kingora vs. 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 which decision is hereby quashed.**
- 2. An Order of Prohibition prohibiting 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. An Order of Prohibition prohibiting the 1st Respondent from hearing and/or determining proceedings in *Chief Magistrate Miscellaneous Criminal Application No. 23 of 2016 Kamau Kingora vs. The Director of Public Prosecutions and 3 Others*.**
- 4. The applicant will have the costs of these proceedings to be borne by the 4th Respondent.**

35. It is so ordered.

Dated at Nairobi this 22nd day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njagi for Mr Njoroge for the applicant

Mr Lovoni for Mr Kanyoko for the 4th Respondent

CA Mwangi