



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 59 of 2016

IN THE MATTER OF: AN APPLICATION BY PETER APUA EKALI

**FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF
CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF: THE STANDARD ACT CAP 496 AND KENYA REVENUE
AUTHORITY ACT**

AND

IN THE MATTER OF: THE CUSTOMS AND EXCISE ACT

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: AUCTION SALES OF MOTOR VEHICLE VOLKSWAGEN
PASSAT STDI 140 CHASSIS NO. WVWZZZ3CZ8P083681 ENGINE NO. BKP286901**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

KIOKO MUOKA.....INTERESTED PARTY

EX-PARTE: PETER APUA EKALI

RULING OF THE COURT

The Application

1. By way of a notice of motion dated 5th January 2017 and brought under Article 26, 29(c), (d) & (f) of the Constitution of Kenya, 2010; Section 1A & B, 3 & 3A of the Civil Procedure Act Cap 21, Laws of Kenya and Order 51 of the Civil Procedure Rules, 2010, the Interested Party/Applicant herein seeks the following orders:

a) **THAT** the Honorable Court be pleased to order refund of purchase price, storage costs and other expenses amounting to Kshs. 2,367,806/= clearance charges by the 1st Respondent payable to the Interested Party/Applicant.

b) **THAT** the 1st Respondent compensates the Interested Party/Applicant for bad reputation.

c) **THAT** the costs of this application be provided for.

The application is premised on the grounds on the face of the application and those in the supporting affidavit sworn by **KIOKO MUOKA** on 5th January 2017.

2. The Interested Party/Applicant alleges that on 21st June 2016, he lawfully purchased motor vehicle **VOLKWAGEN PASSAT STDI 140 CHASIS NO. WVWZZZ3CZ8P083681 ENGINE NO. BKP286901** from the 1st Respondent for Kshs. 1,100,000/= which sale was by way of an auction that had been announced vide a gazette notice dated 29th April 2016 by the 1st Respondent.

3. The Interested Party/Applicant alleges that he successfully bid for the aforementioned motor vehicle and paid consideration as follows:

a) Deposit for Kshs. 275,000/= made on 21st June, 2016 to the 1st Respondent. .

b) Deposit for Kshs. 275,000/= made on the 24th June, 2016 to the 1st Respondent. .

c) Transfer of Kshs. 825,000/= paid to the 1st Respondent.

4. The Interested Party/Applicant claims that he also paid Kshs. 25,000/= being storage fees to Consolbase Limited and Kshs. 456 to the 1st Respondent as storage fees. The Interested Party/Applicant alleges that the 1st Respondent cleared the motor vehicle for release into his custody on 27th June, 2016 and that he submitted the motor vehicle for inspection by the 2nd Respondent and paid Kshs. 25, 750/=.

5. The Interested Party/Applicant alleges that the motor vehicle has been in his possession but he has not been able to use it as he has been receiving threats from the 1st Respondent and the ex-parte Applicant herein and due to these threats he was forced to return the motor vehicle to the Interested Party/Applicant on 17th October 2016 vide Lot Number 192/16 at a cost of Kshs. 3,000/=

6. It is the Interested Party/Applicant's case that he wrote a demand letter to the 1st Respondent to release all his incurred expenses but the 1st Respondent has failed to do so and as a result the Interested Party/Applicant has suffered economic embarrassment.

7. It is also the Interested Party/Applicant's case that he has suffered further expenses being; Kshs. 600,000/= for car hiring services per day after returning the suit vehicle, Kshs. 2,600/= paid for inspection of the motor vehicle, Kshs. 25,750/= for further inspection of the motor vehicle by the Kenya Bureau of Standards and Kshs. 300,000/= being legal fees paid in defending this suit.

Response

8. The 1st Respondent opposed the application by way of grounds of opposition dated 24th February 2017 and a Replying affidavit sworn by **COLLINS BOSIRE** on 24th February 2017 while the 2nd Respondent

opposed the application by way of a Replying affidavit sworn by **PETER NDUNGU** on 27th February 2017. The ex-parte Applicant did not respond to the application.

9. The 1st Respondent as part of its grounds of opposition alleged that the application was fatally defective for want of compliance with Order 53 Rule 3, that the application was an abuse of court process and that the reliefs sought ought to be ventilated in the Commercial Division on merits and on *viva voce* evidence.

10. The 1st Respondent alleges that it was aware that the Interested Party had purchased the motor vehicle at Kshs. 1,100,000/= and the vehicle released to him. The 1st Respondent claimed that it was not aware that the Interested Party had not been refunded his application as no formal application was received from him.

11. The 1st Respondent denied issuing any threats to the Interested Party and stated that the Interested Party had returned the motor vehicle voluntarily without any demand or threats from the officers of the 1st Respondent.

12. The 1st Respondent denied receiving any demand letter from the Interested Party.

13. It is the 1st Respondent's case that this application is founded on a fundamental misapprehension of the jurisdiction of this court because:

a) Judicial Review is a special supervisory jurisdiction which is different from both ordinary (adversarial) litigation between private parties and an appeal (rehearing) on the merits.

b) The effect and import of this application is to have a matter that belongs to the Commercial Division of the High Court heard and determined in Judicial Review proceedings commenced by another party.

c) That no leave has been sought to commence judicial review proceedings by the Interested Party and no reliefs in the nature of mandamus, prohibition and certiorari are being sought to warrant grant of orders within these proceedings.

d) That in granting leave to commence this Judicial Review proceedings, prayers for refund of the purchase price, storage costs or other expenses amounting to Kshs. 2,367,806/= or compensation for bad reputation are not available.

e) That no relief has been sought in this application that is capable of being remedied by way of Judicial Review proceedings.

14. The 2nd Respondent alleges that it prepared and submitted a verification report for goods intended for auction to the 1st Respondent on 21st June 2016 which did not include the suit vehicle.

15. The 2nd Respondent further alleges that it inspected the suit vehicle and an inspection report for Imported Used Vehicles was issued by its Regional Mechanical Engineer indicating that the suit vehicle was rejected on the grounds that it did not comply with the requirements of KS 15151: 2000- Kenya Standard Code of Practice for Inspection of Road Vehicles.

Interested Party's Response to the 1st and 2nd Respondents Replying Affidavits

16. The Interested Party/Applicant reiterated that he did write a demand letter to the 1st Respondent demanding full refund but did not receive any response to the letter. The Interested Party also reiterated that he did receive threats from the 1st Respondent and the ex-parte Applicant and reported this to the Police and that it was on the basis of these threats that he decided to return the suit vehicle.

17. It is the Interested Party's case that he has suffered immensely as he has had to hire vehicles every day and repay a loan of Kshs. 350,000/= from Equity Bank Limited.

Hearing and Submissions

18. The application came up for hearing on 6th April 2017, where the parties agreed to canvass the application by way of written submissions. The 1st Respondent filed its submissions on 6th April 2017 while the 2nd Respondent filed its submissions on 15th May 2017 and the Interested Party on 29th May 2017. On 31st July 2017, the parties highlighted their submissions in open court.

19. Ms. Kipsang, learned Counsel for the Interested Party/Applicant submitted that the 1st Respondent has acknowledged that the Interested Party purchased the suit vehicle for Kshs. 1,100,000 and that the 1st Respondent has not disputed that the suit vehicle was returned due to threats directed at the Interested Party. Counsel submitted that it was in order for the 1st Respondent to refund the Interested Party the purchase price.

20. Ms. Kipsang submitted that the Interested Party has suffered immense losses from the point of purchase of the suit vehicle to date including legal expenses incurred in defending this suit. Counsel stated that the reputation of the Interested Party has been damaged due to the 1st Respondent's failure to ensure that the transaction was completed smoothly and further that the Interested Party has not been able to service a loan that was taken to facilitate the purchase of the vehicle.

21. Ms. Kipsang submitted that apart from the purchase price the Interested Party has also incurred car hire charges since he has had to hire a car every day after returning the suit vehicle.

22. Ms. Kipsang submitted that the actions of the 1st Respondent are against the Constitution and the Fair Administrative Action Act, 2015. Counsel further submitted that this application is not spent because the release of the suit vehicle to the ex-parte Applicant herein during the life of this case is unprocedural and unfair as the Interested Party was never given an opportunity to have the suit vehicle.

23. Mr. Ngayo, learned Counsel for the 2nd Interested Party submitted that the prayers sought in this application have the effect of compromising the entire suit by way of an interlocutory action without a benefit of hearing.

24. Mr. Ngayo further submitted that in relation to refund of charges against the 2nd Respondent the same were properly incurred hence cannot be refunded. Counsel also submitted that no specific orders in this application had been sought against the 2nd Respondent.

25. Mr. Olenji, learned counsel for the ex-parte Applicant submitted that the application herein has no bearing on the ex-parte Applicant and that the Judicial Review application has been spent and thus this application should be dismissed.

26. Mr. Chabala, learned Counsel for the 1st Respondent submitted that vide an application dated 2nd August 2016, the ex-parte Applicant sought and was granted conditional leave to commence Judicial Review proceedings which required that the Notice of Motion be filed and served within 10 days. Counsel submitted that the Notice of Motion was filed on 15th August, 12 days after leave was granted and served on 8th September which was 25 days outside the Judge's directions thus the ex-parte Applicant had not complied with the Judge's orders, with the implication being that the Judicial Review proceedings had ceased to exist. Counsel referred the court to the case of **Republic versus County Government of Machakos & another Ex-parte Benard Kiala [2015] eKLR**.

27. Mr. Chabala submitted that the Interested Party/Applicant is not seeking any orders contemplated under Section 8 of the Law Reform Act. Counsel cited the case of **Sanghani Investment Limited versus Officer in Charge Nairobi Remand and Allocation Prison [2007] 1EA 354** where the court held that:

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before declaring who the owner of the land is. Judicial Review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

28. Mr. Chabala submitted that the Interested Party/Applicant was attempting to invoke public law proceedings in order to enforce remedies which ought to be enforced by way of private proceedings. Counsel stated that the Interested Party was seeking a refund of the purchase price and compensation for bad reputation which should be done in a different forum and not through Judicial Review proceedings.

29. Mr. Chabala submitted that the 1st Respondent never demanded return of the suit vehicle and that the Interested Party returned it voluntarily. Counsel stated that the 1st Respondent only accepted return of the suit vehicle for safety and storage pending an agreement on the purchase price between the ex-parte Applicant and the Interested Party.

Determination

30. I have carefully analyzed the application and the submissions herein. The only issue I raise for determination is whether this court has the jurisdiction to issue the orders sought herein.

31. Section 8 of the Law Reform Act provides that:

“(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case in which the High Court in England is, by virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.”

In the case of **Cortec Mining Kenya Limited versus Cabinet Secretary, Attorney General & Another & 8 others [2015] eKLR**, the Court of Appeal stated that:

“Orders of mandamus, certiorari and prohibition, these are the only orders in judicial review that the High Court is enjoined to grant. By virtue of Article 165 (6) of the Constitution, the High Court is vested with supervisory judicial power over subordinate courts, and any person, body or authority exercising judicial or quasi-judicial function but not over a superior court. In conferring this constitutional mandate to the High Court, Parliament did not expand the amplitude of the reliefs under Section 8 of the Law Reform Act beyond the three orders and consequently the jurisdiction of the High Court in this regard remains confined to that set by Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom as stated in Section 8 (2)...”

32. The Interested Party/Applicant herein is seeking for a refund of the purchase price, storage costs and other expenses amounting to Kshs. 2,367,806/= plus compensation for bad reputation from the 1st Respondent. As stated above this Court exercises special jurisdiction and not civil or criminal jurisdiction in Judicial Review proceedings thus the only orders that this court can issue are orders of prohibition, mandamus and certiorari. The remedies sought by the Interested Party/Applicant do not fall within the ambit of Judicial Review proceedings.

33. Further, Judicial Review proceedings are concerned with the decision making process and not the merits of the case. In the case of **Republic vs. Attorney General & 4 others, ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014]**, the court held that:

“Judicial Review applications do not deal with merits of the case but only with the process. In other words judicial review only determines whether the decision-maker had 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”.

34. The Interested Party/Applicant herein wants a refund of the purchase price, storage costs and other expenses incurred in relation to purchase of the suit vehicle from the 1st Respondent alongside compensation for bad reputation. In order for such orders to be granted, this court would have to delve into the merits and demerits of the case involving the purchase of the suit vehicle, witnesses would be called and evidence adduced in order for this court to decide whether or not the Interested Party/Applicant is deserving of the orders sought. This Court would also have to consider whether the Interested Party/Applicant’s reputation has indeed been damaged as a result of the 1st Respondent’s actions. Again, this is not the reserve of Judicial Review proceedings. The 1st Respondent herein, with the approval of this court quoted the case of **Sanghani Investment Limited versus Officer in Charge Nairobi Remand and Allocation Prison [2007] 1EA 354** where the court held that:

“A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before declaring who the owner of land is. Judicial Review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

35. The Interested Party/Applicant was better placed to have sought the orders prayed for in a different forum. For the foregoing reasons, the Interested Party/Applicant’s application dated 5th January 2017 is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered in Mombasa this 17th day of October, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Chabala for 1st Respondent

Mr. Ngayo for 2nd Respondent

Mr. Kaunda Court Assistant