



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL, JUDICIAL REVIEW DIVISION

JR. MISC. CIVIL APPLICATION NO. 58 OF 2015

**IN THE MATTER OF: SECTIONS 1A & b,3, 3a OF THE CIVIL PROCEDURE ACT, ORDER
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**RULE 4(2), (3) & (4) OF THE CIVIL PROCEDURE RULES, SECTIONS 8 & 9 OF THE LAW
REFORM ACT, CAP 26 LAW AND ALL OTHER ENABLING PROVISIONS OF LAW**

AND

IN THE MATTER OF: APPLICATION BY:

**EVANS NYAKWARA MAKORI FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS, CERTIORARI, PROHIBITION AND QUO WARRANTO**

AND

**IN THE MATTER OF: RELEASE OF MOTOR VEHICLE REGISTRATION
NO. KBM 367D NISSAN MATATU LYING AT MAKUPA POLICE STATION**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE MINISTRY OF INTERNAL CO-ORDINATION

2. THE KENYA POLICE SERVICE

3. THE DEPARTMENT OF TRAFFIC AT MAKUPA POLICE

STATION, MOMBASA.....RESPONDENTS

EX PARTE APPLICANT: EVANS NYAKWARA MAKORI

RULING

1. In his Notice of Motion dated 7th January, 2016 and filed on 27th January, 2016, the ex parte Applicant Evans Nyakwara Makori seeks essentially an order for **mandamus**, though the Notice of Motion rolls the three Judicial Review orders mandamus, prohibition and certiorari into one. He seeks an order of **mandamus** to release to him, his motor vehicle, Registration No. KBM 362D, Nissan Matatu pending the hearing and determination (not of this application) but of undisclosed criminal proceedings, in Mombasa.

THE APPLICANT'S CASE

2. The Applicant's case as disclosed in the Statement of Facts and the Affidavit Verifying the Facts (not Supporting Affidavit) shows the Applicant as the beneficial owner of the motor vehicle aforesaid. He had purchased it as a public service vehicle commonly referred to as Matatu. He hired the services of a driver one Roy Baraka Kashama, who on the material day had control of the motor vehicle at Majengo Area of Mombasa, near **Masjid Musa Mosque**.

3. The officers from Makupa Police Station who were on patrol stopped the motor vehicle and allegedly "started harassing" the Applicant's driver who then decided to run away, abandoning the motor vehicle with the Police on patrol, and who allegedly "impounded" and drove the said motor vehicle to Makupa Police Station. The Applicant's claims that he has made every effort to find out from the Makupa Police why his motor vehicle was impounded, but has had no say by way of a response from the said Police. He has therefore come to court and seeks appropriate reliefs by way of judicial orders of mandamus, prohibition and certiorari.

4. In support of the Applicant's case, Mr. Nyamboye, learned counsel for the Applicant filed written submissions dated 8th June, 2016 and further submissions dated 13th July, 2011 filed on 14th July, 2016 together with the decision of the court in **REPUBLIC vs. JOHN NGANGA MBUGUA [2014] eKLR** in which the court in that case ordered for release of the motor vehicle held by Police pending the determination of criminal case involving the motor vehicle.

5. The Applicant also contended that though the driver of the motor vehicle disappeared, he has provided to the Police all the particulars relating to the driver so that they may charge him, (if they find him) but that pending any such charge, his motor vehicle should be released to him and urged the court to grant the orders sought.

THE RESPONDENT'S CASE

6. The Application was opposed through the Replying Affidavit of Inspector Isaiah Chepyator the Deputy OCS, Makupa Police Station and the Investigating Officer in the matter herein, sworn on 15th April, 2016, and filed on 22nd April, 2016.

7. This officer depones that his officers led by IP Bare Gabow and other officers, were on the material day, on patrol around Majengo area in Mombasa, when they came across one matatu, registration number KBM 367D, white in colour which was requested to stop, but which vehicle on seeing his officers, sped off towards Mwembe Tayari area of Mombasa.

8. This deponent avers that the action of speeding off prompted IP Bare Gabow and his team to give chase, and on reaching Bondeni area, the occupants of the vehicle abandoned it and escaped on foot. A search of the vehicle by his officers recovered seven (7) rolls of what they suspected was cannabis sativa and some tablets.

9. IP Barre Gabow subsequently called a breakdown vehicle to come and tow the vehicle to Makupa Police Station for further investigations and making of a necessary report.

10. The suspected cannabis sativa and tablets were submitted by IP Barre Gabow to the Government

Analyst to establish whether it was indeed cannabis sativa and the nature of the tablets. This deponent avers that the Government Analyst's report confirmed that the rolls of dry plant material were indeed cannabis sativa and the tablets were known as Flunitrazepam, (Rohypnol), both of which are included in the First Schedule of narcotic drugs, under the Narcotic Drugs and Psychotropic Substances Control Act, 1994 (No. 4 of 1994).

11. This deponent therefore contends that the Applicant is less than truthful by saying that he does not know why his motor vehicle is being detained, while he was fully informed of what had transpired and that his motor vehicle was being detained for trafficking in narcotic drugs contrary to Section 4 of the Narcotic Drugs and Psychotropic Substances Control Act 1994 and was even requested to assist in locating the whereabouts of his driver who was in charge of and driving the motor vehicle on the material day.

12. This Respondents also avers that the motor vehicle was detained pending the arrest of the driver and other occupants.

13. The Respondents concludes that they acted in terms of Section 51 of the National Police Service Act, which charges the Police Service with the duty to investigate crime, apprehend all persons whom they suspect of committing crime, and take all steps necessary to prevent crime.

14. In addition to the Replying Affidavit of Inspector Isaiah Chepyator, State Counsel Nimwaka Muema also filed on 21st June, 2016 written submissions dated 20th June, 2016, and further submissions dated and filed on 22nd June, 2016, and attached copies of the court's decisions in **GILBERT ATINO vs. REPUBLIC [2010]eKLR**, in which Musinga J as he then was, declined to release a motor vehicle involved in drug trafficking), **REPUBLIC vs. INSPECTOR GENERAL OF POLICE, ex parte Anthony Ngumo Muya**, in which Odunga J declined to grant an order of mandamus, holding that it was not the most efficacious remedy in the circumstances of the case) and **REPUBLIC vs. THE HON. THE ATTORNEY-GENERAL, THE COMMISSIONER-GENERAL OF KENYA REVENUE AUTHORITY, ex parte Maridadi Flowers Limited [2014] eKLR**, (in which Odunga J granted an order of mandamus against the Respondents to give reasons to the Applicant within 30 days of the order why his motor vehicle should not be released to him).

ANALYSIS

15. The facts in this application are not in dispute. The ex parte Applicant is the registered and beneficial owner of motor vehicle registration number KBM 367D. He had hired the services of one Roy Baraka Kashama as his driver. The driver on the material day decided to speed off when waved to stop by the police. When chased and cornered with a shot in the air, the driver stopped and with two of his companions in the motor vehicle stepped out of the motor vehicle and ran away on foot.

16. When the Police examined or searched the motor vehicle, they found seven (7) rolls of drug plant material which they suspected to be **cannabis sativa** and some tablets which they called "Bugizi" (a popular name). The dry plant material was later upon examination by the Government Analyst found to be **Cannabis Sativa**, and the tablets were **Flunitrazepam**. The envitable conclusion is that the motor vehicle was being used for trafficking narcotics, substances prohibited under the First Schedule to the Narcotic Drugs and Psychotropic Substances Control Act (the Act).

17. It is also not disputed that the Police have been unable to apprehend either the driver of the motor vehicle, the said Roy Baraka Kashama or any of his two companions. The Police therefore plead that the ex parte Applicant has been uncooperative, and unwilling to disclose the whereabouts of at least his driver, while the ex parte Applicant retorts that having given the Police all the particulars of the driver, there is no more he can do. He himself was not involved in drug trafficking and his motor vehicle should be released to him by order of mandamus.

18. The Respondents however plead that this argument cannot be correct. They rely on the provisions of section 20(1) of the Act, that any machinery, equipment or item used for the commission of any offence

under the Act shall be forfeited to the Government.

19. However, the provision to section 20(1) provides –

“Provided that where, on application made by the person who was the owner of the conveyance to the court in which any prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under part IV is pending, the court is satisfied beyond reasonable doubt that –

a. The person who was the owner of the conveyance; and

b. ...

When it was made use of for such conveyance, was not concerned in or privy to such use, the conveyance shall be restored to the owner by the court.”

20. There is no prosecution pending before any court because the suspected perpetrators of the offence of trafficking in narcotic drugs and psychotropic substances, are at large. There is however uncontroverted evidence that the dry plant material and tablets found in the motor vehicle were prohibited or drugs subject to control under the First Schedule to the Act. The law is clear that any machinery, equipment or item used for the commission of any offence prescribed under the Act shall be forfeited to the Government.

21. In my humble opinion, no prosecution is necessary for the forfeiture of any machinery, equipment or item used in the commission of an offence. There is no doubt that a motor vehicle is a piece of equipment – machinery and conveyance for trafficking of narcotic drugs. There has however to be proof that the dry plant material and tablets conveyed or found in the vehicle were narcotic drugs. The question however is, what happens when the culprit or suspect cannot be found and prosecuted? Could the State return the equipment, conveyance, or in this case the motor vehicle to the owner?

22. In my humble view again, the law, (Section 21 of the Act) envisages two stages, the prosecution of the suspect, and if found guilty, be convicted and sentenced. That is the first stage. The second stage is the forfeiture proceedings envisaged under the proviso to the Act, and provided for under Section 389 of the Criminal Procedure Code (Cap 75, Laws of Kenya). Forfeiture proceedings are, in my view independent of the prosecution of an accused or suspect for any offence under the Act.

23. In this case therefore, the Respondents cannot fold their arms and say we cannot find the suspect or suspects, and we must therefore detain the ex parte Applicant’s motor vehicle until we find the suspect and charge him. It would be great injustice if the Respondents failed to apprehend the suspect or suspects, and at the same time hold on to the Applicant’s motor vehicle.

24. The Respondents most probably have no evidence of involvement of the ex parte Applicant in the trafficking of the narcotic drugs. They however have proof that substances found in the vehicle were narcotic drugs, and can therefore mount proceedings for forfeiture of the motor vehicle to the government.

25. As clearly explained by the Court of Appeal in the case **KENYA NATIONAL EXAMINATIONS COUNCIL vs. REPUBLIC, ex parte Gathenji & others** (Civil Appeal No. 266 of 1966, -

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right;

and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...

These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done ... Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

DETERMINATION

26. In this case therefore an order of certiorari cannot issue because the Respondents and in particular the Kenya Police Service have a duty under Section 51 of the Kenya Police Service Act, to *inter alia* –

“Stop, search and detain any motor vehicle or vessel the Police has reasonable cause to suspect it being used in the commission of, or to facilitate the commission of an offence.”

27. The Respondents have demonstrated the circumstances under which the subject motor vehicle was detained by the Police and towed to Makupa Police Station. The Police acted lawfully and within the statutory mandate or jurisdiction. An order of certiorari will therefore not issue. The application for that relief therefore fails.

28. Likewise an application for prohibition will fail because an order of prohibition acts or falls in the future to prohibit any action or step that the Respondents make that is either without jurisdiction or in excess of their jurisdiction. It is the statutory duty of the Police to detect and deter the commission of crime, and in exercise of such power to stop and inspect or search motor vehicles reasonably suspected of commission of a crime.

29. The subject vehicle was detained and towed to Makupa Police Station in circumstances detailed in the Replying Affidavit of Inspector Isaiah Chepyator I have already referred to above.

30. The question which I have asked in paragraph 21 above and which still begs an answer is whether the Applicant’s motor vehicle should be released to him because he has supplied all the particulars to the Police whose duty is to follow up information given to them towards tracing and prosecuting the driver of the motor vehicle. Prosecution of an accused as I have stated, is only the **first** but not the **only stage** of forfeiture of a vehicle, or other equipment or vessel used in the commission of the crime. The **second** stage is forfeiture proceedings whose sole purpose is to establish whether the registered owner of the motor vehicle, equipment, pipe, utensil or other article used for the commission of any offence under the Act, or any narcotic drug or psychotropic substance, **was not concerned in or privy to such use**. If the presiding court is satisfied beyond reasonable doubt that the registered owner of the conveyance used for the commission of any offence under the Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under the Act, or any narcotic drug or psychotropic substance was not concerned or privy to such use then, and upon such satisfaction shall the conveyance and the machinery and the like enumerated as aforesaid, may be released to such owner. If the presiding court is not so satisfied, then the conveyance and all equipment machinery, and the like used

for the commission of an offence under the Act shall be forfeited to the Government.

31. It is the duty of the Respondents, through the Director of Public Prosecutions to initiate and carry out forfeiture proceedings in terms of the Act, and the Criminal Procedure Code.

32. Being of the above opinion, there shall issue an order of mandamus directed at the Respondents and the Director of Public Prosecutions whose mandate under the Constitution is to initiate, take over and terminate any prosecution, to commence within thirty (30) days, of the date hereof forfeiture proceedings in relation to motor vehicle Registration Number KBM 367D Nissan matatu which has been held and stored at Makupa Police Station since June, 2015.

33. This being litigation in the public interest, I direct that each party bears its own costs.

34. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 25th day of August, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Nyamboye for Applicant

Mrs. Mwema for Respondent

Mr. S. Kaunda Court Assistant