REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 42 OF 2016

IN THE MATTER OF AN APPLICATON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS & PROHIBITION AND

IN THE MATTER OF SECTIONS 55, 56 & 106 OF THE TRAFFIC ACT, CAP 403 AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

BETWEEN

WILSON NJUGUNA GAKURU……..…….....……..1ST APPLICANT

PAUL MAPENAI MATAMPASH…….....…….2ND APPLICANT

VERSUS

THE NATIONAL TRANSPORT & SAFETY AUTHORITY…..…….1ST RESPONDENT

THE DIRECTOR OF MOTOR VEHICLE INSPECTION UNIT…….2ND RESPONDENT

THE HON. ATTORNEY GENERAL…….…….....….3RD RESPONDENT

RULING

Introduction

1. By Chamber Summons dated 2nd February, 2016 the applicants herein sought the following orders:

> **1. That this application be certified urgent and be heard expeditiously owing to its demonstrated urgency.**
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> **2. That leave be granted to the ex parte applicants to seek by way of judicial review, that an order of prohibition do issue, prohibiting the respondents or any person acting under their behest from unlawfully removing, detaining and confiscating their Public Service Vehicles number plates duly licensed as such PSV.**
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> **3. That leave be granted to the ex parte applicants to seek by way of judicial review, that an order of certiorari do issue, to remove to this honourable court for purposes of being quashed, and to quash the 1st respondent's decisions to unlawfully remove and detain the ex parte applicants' vehicles' number plates and confiscate the drivers' licences:**

a. decision made on 30th December 2015 in respect of the 1st Ex parte applicant's KBY 089s to seize and detain the 1st Ex parte applicant's driving license, PSV Badge, Identity Card, and the vehicle's NTSA Road Service License;

b. decision made on 31st December 2015 in respect of the 2nd ex parte applicant's driver, Mr. John Ndungu Mwaura's Driving Licence, P.S.V. Badge, the vehicle's number plates, and the NTSA Road Service License;

3. That leave be granted to the exparte Applicants to seek by way of judicial review, that an order of mandamus do issue, compelling and directing the 1st respondent to forthwith release to the ex parte applicants;

a. the 1st ex parte applicant's driving license, P.S.V. Badge, Identity Card, and the KBY 089S vehicle's NTSA Road Service License thereto;

b. the 2nd ex parte applicant's driver's, (Mr. John Ndungu Mwaura's) Driving License, P.S.V. Badge, the KCB 587M vehicle's number plates, and the NTSA Road Service License thereto;

4. The costs of the application be to the ex parte applicants in any event.

2. The grounds for seeking leave to apply for the said orders were that the 1st Respondent purporting to be acting in conjunction with the 2nd Respondent removed and detained the number plates of the 2nd ex parte applicant's motor vehicle an action which the applicants contended was borne out of ill will and absolute malice and that the action was *ultra vires* and was in violation of the law.

3. On 3rd February, 2016 when the application came for hearing before **Korir, J**, the application was certified urgent and the learned Judge directed that the application be served for inter partes hearing on 5th February, 2016. When the matter came up on 5t February, 2016, **Mr Kinyanjui**, learned counsel for the applicant informed the Court that he had received a telephone call from an officer with the 1st Respondent, one Judy, who informed him that the 1st Respondent had made efforts to comply with the demands which are the subject of these proceedings. As a result, the matter was stood over to 8th February, 2016.

4. On 8th February, 2016, **Mr Kinyanjui**, learned counsel for the applicant and **Ms Sirai**, learned counsel for the 1st and 2nd Respondents recorded a consent by which this matter was marked as settled save for the issue of costs. As the parties were unable to agree on the issue of costs, it was agreed that the issue be left to this Court for determination.

Determination

5. I have considered the submissions made on behalf of the parties herein in respect of the only issue that falls for determination in this ruling i.e. what orders ought to be made with respect to the costs of these proceedings. As is clear from what is stated hereinabove, the matter was settled before the Court granted leave to commence judicial review proceedings proper.

6. The general rule as to costs is provided for in **section 27** of the ***Civil Procedure Act*** which provides as follows:

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit

shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

7. This provision has been the subject of several judicial pronouncements. In the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

> **"Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded".**

8. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

9. In **Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

> **"The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of *Nedbank Swaziland Ltd verses Sandile Dlamini No.(144/2010) [2013] SZHC30* (*2013)* Maphalala J. referred to the holding of *Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227*, who stated as follows:**
>
> ***"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at…In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."***

10. In determining the issue of costs, the Court is entitled to look at *inter alia* the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of the Constitution. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and ***Mulla (12th Edn)***

11. Order 53, rule 1(1) of the ***Civil Procedure Rules*** provides that an application for judicial review is to be made upon leave being granted.

12. The word "leave" is defined by ***Black's Law Dictionary***, 9th Edn. at page 974 as "*Judicial permission to follow a non-routine procedure*". "Leave" is clearly therefore a permission to take a particular judicial procedure and in this case it is permission to commence judicial review proceedings.

13. It is therefore clear that an application for judicial review is not made until after leave is granted. The Chamber Summons is therefore simply an application for leave or permission to commence judicial review proceedings and whereas on the filing of the Notice of Motion the Chamber Summons is subsumed or submerged in the Motion, it is the Motion that originates the judicial review application proper. I can do no better than quote the Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it expressed itself *inter alia* as follows:

> **"The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion."**

14. Similarly in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** it was held by a three Judge bench of this Court that it is consequent upon leave being granted that an application is brought. On the same note, **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996** held *inter alia* that the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

15. Therefore both on the letter of the law and on authorities, judicial review proceedings are commenced after leave therefor is sought and granted.

16. In this case, there is no material before me on the basis of which I can make a determination on what constituted the "event" for the purposes of these proceedings. The reasons that led to the marking of the matter as settled were however not agreed upon and going by the submissions filed herein which cannot constitute legally acceptable evidence, the circumstances that led to the marking of the matter as settled as far from being agreed upon.

17. In the circumstances of this case "the event" cannot be traced to any of the parties to the dispute in order to apportion the liability to the parties herein. In order for me to penalise the Respondents in costs, I would have to make a finding based on the submissions filed herein. However since the Motion was never heard, this Court cannot in deciding the issue of costs dissect the parties' submissions with a view to making a determination as to whether or not the issues raised in the application were justiciable. To do that would amount to making a determination based on inadmissible evidence. **Mwera, J** (as he then was) in **Nancy Wambui Gatheru vs. Peter W. Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself on the role of submissions as follows:

> **"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

18. In the premises of this case, taking into account the stage at which the proceedings were terminated coupled with the state of the record, there is no material upon which this Court can make a determination as to which party is the successful party for the purposes of awarding costs. My view is supported by the position adopted in **Rufus Njuguna Miringu & Another vs. Martha Muriithi & 2 Others [2012] KLR** where it was held that where parties have settled the matter by consent, the consent cannot be interpreted to mean that one or the other party has succeeded in a suit as the successful determination is attributable to both parties unless the consent also reveals where the fault lies.

19. In that event costs must fall where they lie and since they lie on a suit which has been compromised, it is my view and I so hold that each party ought to and will bear own costs.

20. Those shall be the orders of this Court.

Dated at Nairobi this 5th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwaura for Mr Kinyanjui for the applicant

Cc Mwangi