



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS JR APPLICATION NO. 244 OF 2012**

**IN THE MATTER OF MACHAKOS MAGISTRATES CRIMINAL CASE NO 1449 OF 2013**

**IN THE MATTER OF AN APPLICATION BY DANIEL NGUKU FOR ORDERS IN THE  
NATURE OF MANDAMUS, PROHIBITION AND CERTIORARI AND**

**IN THE MATTER OF THE INSPECTOR GENERAL OF NATIONAL POLICE AND THE  
PRINCIPAL MAGISTRATE'S COURT AT KITHIMANI**

**AND**

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

**BETWEEN** -

**DANIEL NGUKU..... APPLICANT**

**VERSUS**

**THE INSPECTOR GENERAL OF**

**NATIONAL POLICE .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE'S**

**COURT AT KITHIMANI .....3<sup>RD</sup> RESPONDENT**

**AND**

**THERESIA SYOKAU MUINDE .....1<sup>ST</sup> INTERESTED PARTY**

**WINFED MWIKALI MUTUNGA .....2<sup>ND</sup> INTERESTED PARTY**

**MOSES DAUDI .....3<sup>RD</sup> INTERESTED PARTY**

**THERESIA NZIVA KITONYI ..... 4<sup>TH</sup> INTERESTED PARTY**

MOSES KYENDE KIMUYU .....	5 <sup>TH</sup>	INTERESTED PARTY
LENNY KILONZO .....	6 <sup>TH</sup>	INTERESTED PARTY
BONIFACE KAVITA KIETI .....	7 <sup>TH</sup>	INTERESTED PARTY
CHARLES KITONYUI NZAU .....	8 <sup>TH</sup>	INTERESTED PARTY
MWIKALI PHILIP NDAMBUKI.....	9 <sup>TH</sup>	INTERESTED PARTY
MUNUVE KILONZI .....	10 <sup>TH</sup>	INTERESTED PARTY
MARY MBULA MULL .....	11 <sup>TH</sup>	INTERESTED PARTY
JANET KAVETE MUSYOKI .....	12 <sup>TH</sup>	INTERESTED PARTY
MUTUA DAUDI.....	13 <sup>TH</sup>	INTERESTED PARTY
MARSHPHRINE MUTUNGA .....	14 <sup>TH</sup>	INTERESTED PARTY

## JUDGMENT

### Introduction

The Applicant is the owner of motor vehicle registration number KBA 698 V, and on diverse dates between 9<sup>th</sup> February and 25<sup>th</sup> March 2011 he received demand notices from the Interested Parties who claim to have been passengers in the said motor vehicle, and to have been involved in an accident involving the motor vehicle on 11<sup>th</sup> December 2010. The Applicant stated that his driver was charged in traffic case Number 42 of 2011 at Kithimani Principal Magistrates Court with the offence of dangerous driving, convicted and sentenced. However, that no offence of carrying excess passengers was preferred against the driver as alleged in the police abstract, and the evidence adduced in Court was that there were 3 passengers in the said motor vehicle, and not 15 passengers as alleged in the said abstract.

### The Application

The Applicant then filed the instant application by way of a chamber summons dated 3<sup>rd</sup> October 2012, seeking leave to apply for judicial review orders, which prayers I shall hereafter reproduce verbatim for their full effect and understanding:

**“1. That the applicant Messrs DANIEL NGUKU be granted leave to apply for an order of:-**

**(i) Mandamus- Directing the Inspector General of National Police through the Traffic Base Commander based in Kithimani Police Station to carry out thorough investigation surrounding the circumstances giving rise to the accident involving motor vehicle registration number KBA 698V on the 11th December 2010 and in particular establish 'the following:-**

**a) How many passengers were involved in the said accident**

**b) How many were injured**

**c) How the claimants in civil suit numbers 80, 81, 82, 83, 84, 85, 85, 86, 95,96, 97, 112, 114, 115, 121 and 122 all of 2012 at Kithimani Police station obtained police abstracts**

**d) The glaring contradiction in Traffic Case number 42 of 21011 against the applicant in which he was charged and wherein the charge sheet indicated that there were only three passengers.**

**(ii) Prohibition- prohibiting the Police Commissioner from issuing any other Police Abstract and or P3 forms in respect of this accident pending proper investigation of the accident.**

**(iii) An order of Certiorari - to call for and to quash the civil proceedings filed in Kithimani Principal Magistrate to wit:**

- a) PMCC No. 112 of 2012- Theresia Syokau Muinde Vs Moses Mutuku & 2 others**
- b) PMCC No. 114 of 2012- Winfed M. Mutunga Vs Moses Mutuku & 2 others**
- c) PMCC No . 121 of 2012- Moses Daudi Vs Moses Mutuku & 2 others**
- d) PMCC No. 122 of 2012- Theresia Nziva Kitonyi Vs Moses Mutuku**
- e) PMCC No. 80 of 2012- Moses Kyende Kimuyu Vs Moses Mutuku**
- f) PMCC No. 81 of 2012- Lenny Kilonzo Vs Moses Mutuku & 2 others**
- g) PMCC No. 82 of 2012- Boniface Kavita Kieti Vs Moses Mutuku & 2 others**
- h) PMCC No. 83 of 2012- Charles Kitonyui Nzau Vs Moses Mutuku & 2 others**
- i) PMCC No. 84 of 2012- Mwikali Philip Ndambuki Vs Moses Mutuku & 2 others**
- j) PMCC No. 85 of 2012 - Munuve Kilonzi Vs Moses Mutuku & 2 others**
- k) PMCC No. 86 of 2012- Mary Mbula Muli Vs Moses Mutuku & 2 others**
- l) PMCC No . 95 of 2012- Janet Kavete Musyoki Vs Moses Mutuku & 2 others**
- m) PMCC No. 96 of 2012- Mutua Daudi Vs Moses Mutuku & 2 others**
- n) PMCC No. 97 of 2012- Marshphrine Mutunga Vs Moses Mutuku & 2 others**

**(iv) An order that the grant of leave do operate as a stay of the civil proceedings in Kithimani Principal Magistrate court to wit: -**

- a) PMCC No. 112 of 2012 Theresia Syokau Muinde Vs .Moses Mutuku & 2 others**
- b) PMCC No. 114 of 2012 -Winfed M. Mutunga Vs Moses Mutuku & 2 others**
- c) PMCC No . 121 of 2012- Moses Daudi Vs Moses Mutuku& 2 others**
- d) PMCC No . 122 of 2012- Theresia Nziva Kitonyi Vs Moses Mutuku & 2 others**
- e) PMCC No. 80 of 2012- Moses Kyende Kimuyu Vs Moses Mutuku & 2 others**
- f) PMCC No. 81 of 2012- Lenny Kilonzo Vs Moses Mutuku & 2 others**
- g) PMCC No. 82 of 2012- Boniface Kavita Kieti Vs Moses Mutuku & 2 others**

- h) PMCC No. 83 of 2012- Charles Kitonyui Nzau Vs Moses Mutuku & 2 others
  - i) PMCC No . 84 of 2012- Mwikali Philip Ndambuki Vs Moses Mutuku & 2 others
  - j) PMCC No. 85 of 2012 - Munuve Kilonzi Vs Moses Mutuku & 2 others
  - k) PMCC No . 86 of 2012- Mary Mbula Muli Vs Moses Mutuku & 2 others
  - l) PMCC No . 95 of 2012- Janet Kavete Musyoki Vs Moses Mutuku & 2 others
  - m) PMCC No. 96 of 2012- Mutua Daudi Vs Moses Mutuku & 2 others
  - n) PMCC No. 97 of 2012- Marshphrine Mutunga Vs Moses Mutuku & 2 others
- (v) It is in the interest of justice that the orders prayers for be granted.
- (vi) Cost of this application be in the cause.

The application is based on the following grounds: -

1. There is a strong evidence of fraud on the part of the claimants
2. The claim supporting documents are in respect of 15 claimants yet the carrying capacity of the motor vehicle is 14 passengers
3. No charge was preferred by the police for the offence of overloading.
4. The criminal case preferred against the applicant is in respect of careless driving causing harm to three passengers and not 15 passengers
5. The police are the same people who investigated and proceeded to charge the applicant and it is not conceivable how they indicated the vehicle had 3 passengers and they issued police abstract and P3 forms for 15 passengers.
6. There is need for a proper and thorough investigation to find out the truth of the matter.
7. The Traffic Base Commander in Kithimani has been reluctant or unwilling to respond to the applicant's request for thorough investigation.
8. There is a likelihood that the plaintiff will suffer tremendous financial loss in defending the 14 suits filed based on mysterious documents.”

The Applicant filed a statement of facts and verifying affidavit simultaneously with the Chamber summons. He stated therein that it is in the interests of justice that proper investigations be carried out to ascertain how many passengers were in the said motor vehicle.

In addition, the Applicant's learned counsel, Maina Njuguna & Company Associates, filed submissions in Court dated 15<sup>th</sup> June 2016. It was argued therein that the issues to be determined in the judicial review proceedings were whether there was fraud on the part of the claimants; whether the said motor vehicle was at the time of the accident carrying 15 passengers and why the police investigations indicated the motor vehicle had 3 passengers; and why the police preferred charges of careless driving against the Applicant and not overloading. The learned counsel detailed out the evidence on these issues in the submissions.

### **The Response**

The Respondents and Interested Parties filed Grounds of Opposition dated 29<sup>th</sup> October 2012 and 7<sup>th</sup> January 2015 respectively. In addition, L. Kenyani, the Litigation counsel at the Attorney General's chambers, filed submissions on behalf of the Respondents dated 29<sup>th</sup> October 2012, while the Advocates for the Interested Parties, Mutunga & Company Advocates, also filed submissions dated 6<sup>th</sup> May 2016.

The Respondents argued that the application does not raise issues that are amenable to judicial review, as the issues raised are those of fraud and can be determined competently and exhaustively by the 3<sup>rd</sup> Respondent. Further, that it is established law that where there is a clear and effectual remedy laid out in the substantive law, it is not open to a party to invoke Order 53 of the Civil Procedure Act, and that judicial review proceedings were not meant to be a substitute for civil proceedings.

It was also stated that the 3<sup>rd</sup> Respondent is acting within its mandate as envisioned by section 5 of the Magistrates Court Act, which provides that Resident Magistrate's Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed their pecuniary jurisdiction. Further, that the offences alleged to be committed fall under the jurisdiction of the Magistrate's Court and can competently be tried by the Principal Magistrates Court. Lastly, it was stated that the application does not comply with Order 53 Rule 7 of the Civil Procedure Rules, and is bad in law, incompetent and an abuse of the court process, as the Applicant has not lodged a copy of the various proceedings in Kithimani Principal Magistrate's Court that he wishes to have quashed.

The Interested Parties on their part argued that the application is frivolous, vexatious and an abuse of the court process, and has been overtaken by events as the Applicant's Insurers had already conducted and concluded investigations into this case, and filed an investigation report in the subordinate court at Kithimani together with a list of injured persons in which all the 3<sup>rd</sup> parties names appear as supplied by the Matuu Traffic Base Commander through the Applicant's lawyers, M/S Kinyanjui Njuguna & Company Advocates. Further, that the Applicant's insurer (Invesco Assurance Company Limited) has also settled all the matters listed in this application save for the one for the 6<sup>th</sup> interested party, which has been heard in court and is only pending judgment.

### **The Issues and Determination**

I have considered the pleadings and submissions made by the Applicant, Respondents and Interested Parties. The issue that requires to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to apply for the judicial review orders he seeks. The applicable law in this respect is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted.

The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised**

**judicially”.**

In the present application, the Applicants are seeking leave to institute judicial review proceedings so as to facilitate the conduct of comprehensive investigations into the accident that occurred on 11<sup>th</sup> December 2010 involving motor vehicle registration number KBA 498 V, and in particular to determine the number of passengers in the said motor vehicle at the time of the said accident.

This Court is in this regard mindful of the purpose of judicial review proceedings, which is to address defects in decision making processes by public bodies, and not to deal with the merits of a case. The nature and scope of judicial review was addressed in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** as follows:

**“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.”**

The purpose of the remedy of judicial review is therefore to ensure that the individual is given fair treatment by the authority to which he has been subjected during a decision making process, but not to substitute the opinion of a Court that is seized with judicial review proceedings for that of the authority constituted by law to decide the matter in question.

In addition, where an Applicant brings judicial review proceedings with a view to determining contested matters of facts, and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter. In my view, this is one such matter, as the Applicant is disputing his liability with respect to the Interested Parties herein arising from the accident that is the subject matter off the application.

The proper forum to determine the issues raised by the Applicant is therefore in the various civil proceedings filed in Kithimani Principal Magistrate that he seeks to prohibit and quash, and indeed any defences he may have to the said proceedings, is the court that is seized of the proceedings, which is the Principal Magistrate’s Court at Mavoko. I am in this regard persuaded by the holding by Warsame J (as he then was) in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others, Miscellaneous Application No.68 of 2011** as follows:

**"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. “**

It is my view that this holding equally applies to claims made in civil proceedings.

It is noteworthy in this regard that the law empowers magistrate’s courts to make the decisions that are sought to be quashed and prohibited. Sections 6 and 7 of the Magistrates Court Act in this regard provides as follows on the jurisdiction of magistrate’s courts:

**“ 6. A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by—**

**(a) the Criminal Procedure Code; or**

**(b) any other written law.**

**7. (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—**

**(a) twenty million shillings, where the court is presided over by a chief magistrate;**

**(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;**

**(c) ten million shillings, where the court is presided over by a principal magistrate;**

**(d) seven million shillings, where the court is presided over by a senior resident magistrate; or**

**(e) five million shillings, where the court is presided over by a resident magistrate.”**

In the premises, I find that the remedies of mandamus, certiorari and prohibition sought are unavailable for the foregoing reasons, and the Applicant's chamber summons dated 3<sup>rd</sup> October 2012 is accordingly dismissed with costs to the Interested Parties.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF NOVEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**