



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 353 OF 2013

IN THE MATTER OF AN APPLICATION BY ANTHONY NGUMO MUYA FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT 2011

THE REPUBLIC.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICERESPONDENT

ANTHONY NGUMO MUYA EX-PARTE

JUDGEMENT

1. By a Notice of Motion dated 14th October, 2013, the *ex parte* applicant herein, **Anthony Ngumo Muya**, seeks the following orders:
 1. **An order of mandamus compelling the Inspector General of Police to release the Applicant's motor vehicle registration number KBM 518N held at the Special Criminal Unit Nairobi Area Police Station.**
 2. **Costs.**

Ex Parte Applicant's Case

2. The said application is supported by a verifying affidavit sworn by the applicant on 9th October, 2013.
3. According to the applicant, on 14th August 2013, he was arrested at Buruburu while driving his motor vehicle KBN 518N and on 15th August 2013, he was charged in Kibera Law Court with *inter alia* possession of public stores contrary to Section 324 (3) of the **Penal Code** and the said vehicle detained at Special Crime Unit Nairobi Area Police Station.
4. According to him, since being charged in Kibera Criminal Case No. 2757 of 2013 **Republic – vs – Himself**, (hereinafter referred to as the said Criminal Case) his Advocate on record has severally applied for the release of the said motor vehicle but the investigation officer insists that they have already taken photographs of the said motor vehicle for purposes of evidence in the said Kibera Criminal Case but will not release the said motor vehicle because they are still undertaking investigations on its ownership.
5. According to the applicant, he is the owner of motor vehicle KBN 518N having bought the same from **Kelly Murunga** and that all the persons in the chain of purchase of the said motor vehicle testified on oath in regard to the said motor vehicle.
6. According to the applicant, the act of the Inspector General of Police through delegating to his officers at the Special Crimes Unit to detain his motor vehicle registration number KBN 518N at the Special Crimes Unit Nairobi Area is illegal, *ultra vires*, abuse of power, bad faith and against legitimate expectation.
7. There were further affidavits sworn by the applicant on 20th November, 2013 and 12th February, 2014 to which the proceedings in the criminal case were exhibited.

Respondent's Case

8. On behalf of the Respondent, a Replying Affidavit was filed sworn by **Patrick Kyule**, the Investigating Officer in the said criminal case on 2nd December, 2013 was filed.
9. According to the deponent, the applicant herein was arrested at Mutindwa area in Buruburu, Nairobi on 15th August 2013 ferrying 4 military bullet proof jackets, 5 protective places and 498 papers resembling Kenyan currency using the motor vehicle registration number KBM 518N and was charged in Kibera Law Courts with the offence of being in possession of public stores contrary to Section 324(3) of the **Penal Code**. The motor vehicle registration number KBN 518N make of Toyota saloon was impounded at their yard for production as in court as part of the exhibit.
10. He deposed that on 15th August 2013, he made an official search for the motor vehicle registration no. KBN 518N at the Kenya Revenue Authority which search established that the registered owner of the motor vehicle Reg. No. KBN 518N was **Al Husnain Motors Limited**. On further investigation, it was revealed that **Al Husnain Motors** had sold the vehicle in 2011 to one **Thomas Shimanyula**, in whose possession the Log Book was.
11. According to the deponent, at the time the applicant was arrested he said that he had bought the motor vehicle from a person in Eldoret but did not produce any documents in support thereof.
12. It was further averred that when the applicant made an application in the said criminal case for the release of the motor vehicle, summonses were issued to the chain of buyers and sellers (interested parties) of the motor vehicle and one **Asim Malik Mohammed** the director of **Al Husnain**

- Motors** testified in court and said he sold the motor vehicle to **Thomas Shinyayula** and the log book was given to him though it had not been transferred. Another person, one **Kelly Mathews** who bought the vehicle from **Thomas Shinyayula** also testified and stated that he sold the vehicle to the applicant and also produced a sale agreement but said he had not obtained the log book from **Thomas** and was willing to get the log book and surrender to the applicant.
13. In his evidence the deponent stated that the application for the release of the motor vehicle in Kibera Law Courts was declined by the trial magistrate. In his view, since the motor vehicle had the bullet proof jackets, investigation as to the source of the vests is still ongoing as they are used mainly by the military and the police and the applicant is not such officer.
 14. Towards this end on 3rd October 2013, they wrote to the British High Commissioner requesting them to establish whether the bullet proof jackets originated and/or if they are the property of the British Army and the reply was in the affirmative.
 15. According to him, the investigations are still ongoing and they are treating the motor vehicles as an exhibit, and depending on the investigations the charge sheet may be amended and more charges preferred against the applicant. According to him though the photographs of the motor vehicle have been taken, they are still waiting for the scenes of crimes officers to certify that the photographs are true copies.

Applicant's submissions

16. While submitting that the Respondents are public bodies amenable to judicial review remedies, it was submitted that the Respondents acted ultra vires by detaining and continuing to detain the applicant's vehicle with reasonable cause or justification. According to the applicant the vehicle does not form the subject of the criminal proceedings and the owner is the applicant who has reiterated his commitment to produce the same. According to him whereas the law gives the respondents reasonable discretion in detaining property it does not give them power to search and fetch reasons to detain personal property hence the respondent s' actions amount to acting beyond their powers . In support of these submissions the applicant relied on **Koinange Mbiu vs. R [1951] KLR 130.**
17. It was further submitted that the investigating officer has abused his powers by detaining the vehicle and reliance was placed on **Mayor of Westminster Corporation vs. London and North Western Railway Co. [1905] AC 426** and **Sharpe vs. Wakefield [1891] AC 173.**
18. It was further submitted that the respondents are exercising their discretion and power in bad faith by detaining the vehicle after completing their investigations and in supporting of this contention the applicants relied on **Carltona Ltd vs. Commissioner of Works and Others [1943] 2 All ER 560.** On the authority of **R vs. Judicial Commission of Inquiry into the Goldenberg Affair and Others ex parte Saitoti [2006] eKLR** it was submitted that the respondents' said actions are against legitimate expectation.

Respondent's Submissions

19. On behalf of the Respondent it was submitted that based on the provisions of the Constitution, the ***National Police Service Act*** and the ***Criminal Procedure Code***, the police acted within their mandate in detention of the motor vehicle and there is no dispute that the police have such powers.
20. Based on **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, **Cape Holdings Limited vs. AG & 2 Others Misc. Civil Application No. 240 of 2010**, **Mantrad Enterprises vs. Kenya Forest Services Misc. Application No. 744 of 2008** and **Cleophas Omondi Aboum vs. The OCPD Vihiga Misc. Appl. 50 of 2005**, it was submitted that the Motion is unmerited and the orders sought ought to be disallowed.

Determinations

21. In this application it is clear that the substantive order sought by the applicant is an order for

mandamus.

22. In Republic vs. Kenya National Examinations Council ex parte Gathenji & Others (supra) it was held *inter alia* as follows:

“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.”

23. That the police are empowered under section 57(2) of the *National Police Service Act* to “stop, search and detain any motor vehicle or vessel which the police officer has reasonable cause to suspect it being used in the commission of, or to facilitate the commission of an offence” is not in doubt. I therefore associate myself with the view taken by **Dulu, J** in Mantrad Enterprises vs. Kenya Forest Services (supra) that where a property is detained and it is contended that the same is a subject of the criminal proceedings, the right forum to raise the issue of the detention is the trial court in which the criminal proceedings are pending. However, where it is clear that the property detained has nothing to do with the charge preferred in the trial court, it would be unreasonable and abuse of power and discretion to detain the property and this Court would not hesitate to grant appropriate relief. As was held in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and 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. Where Parliament clearly vests the exercise of discretion on a person or authority it would be wrong in the Court’s view to intervene in the merits of the decision. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.

24. However in R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "

25. Therefore where there is an alternative remedy which is more convenient, beneficial and effectual the court in the exercise of its undoubted discretionary power would decline to grant an order of mandamus. Similarly, it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000** and **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209.**
26. In this case, the respondent's position is that investigations are still ongoing that more charges may be preferred against the applicant. Whereas that may or may not be so, a determination on the issue would require this court to dwell on the merits of that allegation. In the court's view that is an issue that is better dealt with by the trial Court. In fact it is deposed which deposition is not denied by the applicant that the applicant applied before the trial court for release of the subject motor vehicle which application was disallowed. To grant this application would amount to reversing the said decision through the backdoor when no appeal has been preferred and these proceedings do not challenge the said decision.
27. In the circumstances it is my view and I hold that there is a more convenient, beneficial and effectual remedy. Apart from that the remedy sought herein is not the most efficacious remedy in light of the decision made by the trial court.
28. It follows that that Notice of Motion dated 14th October, 2013 is unmerited and the same must fail. The same is accordingly dismissed with costs to the Respondent.

Dated at Nairobi this 8th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Thanji for Mr Ojienda for the applicant

Mr Ndege for Mr Ngetich for the respondent