



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 251 OF 2013

IN THE MATTER FOR AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND MANDAMUS BY SHEM OMOKE KERAKA

AND

IN THE MATTER OF THE TRANSPORT LICENCING ACT CAP 404 LAWS OF KENYA

AND

IN THE MATTER OF THE CONDUCT OF THE OLEKEJUADO TOWN COUNCIL TO BAR THE SUBJECT HEREIN FROM ACCESSING THE KITENGELA BUS TERMINUS

AND

IN THE MATTER OF ORDER 53 RULE 1 &3, SECTION 8&9 OF THE LAW REFORM ACT CAP 26, THE JUDICATURE ACT CAP 8, LAWS OF KENYA

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE OLKEJUADO COUNTY COUNCIL.....1ST RESPONDENT

THE ADMINISTRATOR IN-CHARGE

OLEJEKUADO COUNTY COUNCIL.....2ND RESPONDENT

OFFICER COMMANDING STATION

KITENGELA POLICE STATION.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

AND

REMBO TRANSPORTERS SACCO.....1ST INTERESTED PARTY

NASAMKI SACCO.....2ND INTERESTED PARTY

Ex-parte: SHEM OMOKE KERAKA

JUDGEMENT

Introduction

1. The applicant herein, **Shem Omoke Keraka**, by his Notice of Motion dated 18th October, 2013 seeks the following orders:
 1. **An order of prohibition directed to the 3rd and 4th Respondent barring the Kitengala Traffic Police from arbitrarily arrest of the ex-parte Applicant's three motor vehicles: KBS 462T, KBU 108V, KBU 109V**
 2. **An order of Mandamus directed to the Administrator in charge, Olekejuado County town council compelling him to accept the Ex-parte Applicant's remittance for parking fees and immediately issue him with a receipt/sticker in respect to Kitengela Bus terminus.**
 3. **An order of Mandamus directed to the Administrator in charge, Olekejuado County town Council compelling remittance for the parking fees, allot the Ex-parte Applicant parking area within the Kitengela Bus Terminus to enable him legally and conveniently pick passengers.**
 4. **A declaration that the Decision of the Respondents herein is malafide.**
 5. **A declaration that the Ex-parte Applicant has a right to earn a livelihood from a lawful transport service without unjustifiable interference from administrative agencies.**
 6. **Costs of this Application be provided for.**

Applicant's Case

2. The application is supported by an affidavit sworn by the applicant on 11th July, 2013.
3. According to the applicant, he is the owner of motor vehicles KBS 462T, KBU 108V & KBU 109V plying along the Nairobi/Kitengala route. In the year 2010, he had a Nissan Matatu which he registered in Nasamki Sacco (hereinafter referred to as the Sacco), but subsequently sold the same though he retained his Membership in the said Sacco. He later bought a Minibus, Isuzu Matatu , KBS 462T plying Nairobi/Kitengela Route and registered it with '**Rembo Transporters Ltd**' in August 2012 by paying Kshs. 70,000/= to which no receipt was issued despite numerous demands and empty promises by the management. He also bought two more minibuses: KBU 108V & KBU 109V and being displeased by the conduct of **Rembo Transporters Ltd**, he opted to register the said KBU 108V & KBU 109V with the said Sacco, Nasamki Sacco. Similarly, he registered KBS 462 T with Nasamki Sacco.
4. However, on 4th June 2013, when he went to the Olekejuado County Council Offices intending to pay the requisite parking fees, he was turned down and instead ordered to take off his vehicles from Kitengela/Nairobi route. Despite writing to the County Council, through the said Sacco, no response was forthcoming.
5. He deposed that whenever his vehicles arrived at Kitengela Bus Terminus, the Kitengela County Council *askari* impounded them and he was compelled to pay Kshs. 10,000/= before they were released. The said action, the applicant deposed forced his vehicles to pick passengers right outside the stage in Kitengela market but whenever he did this, the Kitengela Police would arrest his vehicles and charge them in court for obstruction. As a result, his motor vehicles have constantly impounded without justifiable reasons.
6. According to the applicant, the Respondents have colluded with **Rembo Transporters Ltd** touts to harass his employees manning the three buses and while at the stage, his vehicles' doors are maliciously closed to bar them from carrying willing passengers. As a result he has incurred massive losses from the illegitimate conduct of the Respondents since his vehicles are constantly being impounded in the morning only to be released in the evening and the management of **Rembo Transporters** have since issued verbal threats to his employees if they don't join them. To him, the touts of **Rembo Transporters** are determined to eject him from doing business unless he joins **Rembo Transporters Ltd** yet he has a vested Constitutional right to join a Sacco of choice.

7. On behalf of the applicant it was submitted while reiterating the contents of the verifying affidavit that as the 1st and 2nd Respondents have abdicated their legal duty by refusing to issue the applicant with a sticker and allotting the applicant a passenger picking space the only remedy available is that of mandamus. The 3rd and 4th Respondents' actions on the other hands are tainted with illegality and bias hence the prohibition sought.
8. In support of the submissions the applicant relied on **Republic vs. Kenya Power & Lighting Company Ltd & Another [2013] eKLR** and **Republic vs. Lake Victoria South Water Services & Another [2013] eKLR**.

1st Interested Party's Case

9. In response to the application the 1st interested party filed a replying affidavit sworn by its director **Bwire Kizito Kulohoma**, on 3rd October, 2013.
10. According to him, **Rembo Transporters Limited** operates on behalf of its members, bus line known as '*Rembo Shuttle*' and is based at Kitengela.
11. According to him, there are several Saccos and companies operating public transport business at Kitengela and each has been allocated a designate place (stage) to operate from and **Rembo Transporters Limited** has also an allocated designated stage, allocated by the Ole Kejuado County Council from where it operates fleets for buses for its registered members. The concept of registering Saccos and companies is a regulation by the Transport Licensing Board and that the Saccos and companies collect from members toll fees which are paid to the government and the Saccos and companies are generally responsible for their members' discipline.
12. He deposed that there are therefore, alternative terminus and alternative Saccos operating at Kitengela and that **Nasamki Sacco** has a separate parking lot from **Rembo Transporters Limited**. While Rembo Transporters Limited is willing to accommodate the Applicant, the applicant has to comply with the conditions of membership, which are generally applied to all members, namely payment of a registration fees of Kshs. 100,000.00, must demonstrate proof of ownership of his personal vehicle and must paint the vehicle with the designated **Rembo Transporters Limited** colours to ensure uniformity with other vehicles under **Rembo Transporters Limited**. He explained that **Rembo Transporters Limited** has an office at Kitengela Rimu House on 3rd floor, where all monies are paid and ETR receipts issued for any payments made and that **Rembo Transporters Limited** did not receive the sum of Kshs. 70,000.00 or at all as the Applicant claims, any payments would have a receipt.
13. According to the deponent, the rules of the Transport Licensing Board do not permit vehicles to operate singularly but they must be registered and or affiliated to a Sacco or Company hence the Applicant cannot operate without the said affiliation. To him if the applicant's vehicles have been impounded it is due to the fact that they have been parked at undesignated places, which is unlawful. He however denied any collusion between **Rembo Transporters Limited** and the Police against the Applicant whatsoever and averred there is no malice but asserted that since the Applicant has neglected to register under **Rembo Transporters Limited**, it would be grossly unfair to allow the Applicant to operate at the Interested Party's stage without compliance with regulations when everybody else has complied.
14. According to him, the application is drawn presently is misconceived and defective; the relief sought in the application cannot be granted; Mandamus cannot issue to compel a public authority act contrary to law; the court cannot issue declaration in Judicial Review; the court cannot grant damages in Judicial Review.
15. In the submissions filed on behalf of the 1st interested party the foregoing were reiterated.

2nd Interested Party's Case

16. The 2nd interested party, on the other hand opposed the application through a replying affidavit sworn by **Domnic Kyule Nthenge**, its chairman sworn on 3rd December, 2013.
17. According to him, the *Ex-parte* Applicant is indeed a registered member of Nasamki Sacco hence the *Ex-parte* Applicant is wrongly being vindicated by the 1st, 2nd, 3rd, 4th Respondents and the 1st

- Interested Party and that the animosity originates from a personal vendetta. He deposed that the 1st and 2nd Respondents have failed or neglected to allocate the *ex-parte* Applicant a designated passenger picking bay within the Kitengela bus terminus hence abdicated their duty of issuing *he Ex-parte* Applicant with a parking sticker and that they only did so after realizing the *Ex-parte* Applicant had moved the Court. However, they have not allocated him a designated spot to enable him pick passengers.
18. According to the deponent, in Kitengela Bus Terminus, each Motor Vehicle has a designated spot allocated by the 1st and 2nd Respondents for picking passengers and that without such space being allocated, the *Ex-parte* Applicant's motor vehicles have since been subjected to constant harassment from the 1st Interested Party's crew and the bus terminus Touts and that issuance of a passenger picking sticker without a designated picking spot frustrates the objective of the sticker.
19. According to the deponent, the payment of parking fees is done directly to the 1st and 2nd Respondents and not through Saccos as alleged by the 1st Interested Party's advocate. He added that the acts of the 3rd and 4th Respondents are equally *malafide* as they are aimed at frustrating the business of the *Ex-parte* Applicant since the *Ex-parte* Applicant has issues with the Respondents when his vehicles ply in Kitengela whereas the same vehicles smoothly ply when they are within the jurisdiction of the City Council of Nairobi hence this itself establishes the malice of the Respondents in collusion with the self Dominating 1st Interested party.

Determinations

20. Having considered the above matters this is the view I form of the matter.
21. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others (supra) in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... 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* compel 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

22.However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 the Court of Appeal held:

“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.”

23.In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60*.

24.It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

25.The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

26.In my view where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law.

27.As was held in Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:

“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 that 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.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce evidence* to be adduced on how the land was

acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. 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.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts.”

28. It follows that the reliefs sought in prayers 4 and 5 of the Notice of Motion herein cannot be properly granted in these proceedings the same are disallowed.

29. In the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. It was held while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

30. The applicant's case is that the 1st and 2nd Respondents are under a legal duty to issue him with stickers and allocate him with the stage or terminus from where to operate. The applicant has however failed to pinpoint which provision of the law or the legal duty which compels the said respondents to issue the said stickers and allocate him with the stage. However the 2nd interested party which has confirmed that the applicant is its member has disclosed that since the commencement of these proceedings, the applicant has been issued with the stickers and the only pending matter is the allocation of the stage. Without the applicant pointing to this Court the provision which imposes a duty on the 1st and 2nd Respondents to allocate the said stage, the Court can only conclude that it is the discretion of the said respondents to do so. In that event the Court cannot compel them to perform that duty in a particular manner. The farthest the Court can go is to compel them to consider the applicant's application for allocation of a stage and furnish the applicant with their decision as required under Article 47 of the Constitution.

31. With respect to the reliefs sought against the 3rd and 4th Respondents, if the applicant has not been allocated a stage, I do not see how the 3rd and 4th Respondents can be held liable for ensuring that law and order in the transport industry is maintained. That cannot be termed arbitrary arrest or harassment.

Order

32. Accordingly, the order which commends itself to me and which I hereby grant is an order of mandamus directed to the 1st and 2nd Respondents to consider the applicant's application in accordance with the relevant laws and regulations and notify the applicant of their decision within 30 days.

33. As the application has been partly disallowed there will be no order as to costs.

Dated at Nairobi this day 24th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Ng'ang'a for Mr Ong'uti for the Applicant