



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**Jr Miscellaneous Application No. 138 Of 2013**

**IN THE MATTER OF AN APPLICATION BY RAPHAEL MUNGAI GOKO NGINYA TO  
APPLY FOR JUDICIAL REVIEW FOR ORDER OF MANDAMUS AGAINST THE  
INSPECTOR GENERAL OF POLICE AND THE HON. ATTORNEY GENERAL**

**AND**

**IN THE MATTER OF A DECISIONS BY THE INSPECTOR GENERAL OF POLICE TO  
DETAIN THE MOTOR VEHICLE REGISTRATION NUMBER KBM 394 Z**

**AND IN THE MATTER OF ORDER OF THE CIVIL PROCEDURE RULES CAP 21, THE  
CONSTITUTION OF KENYA, THE POLICE ACT AND OTHER ENABLING PROVISIONS**

**THE HON. ATTORNEY GENERAL .....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**AND**

**NORBERT BENKER.....INTERESTED PARTY**

**EX PARTE:           RAPHAEL MUNGAI GOKO NGINYA**

**JUDGEMENT**

1. By a Notice of Motion dated 13<sup>th</sup> May, 2013, the *ex parte* applicant herein, **Raphael Mungai Goko Nginya**, seeks the following orders:

1. THAT an order of Mandamus directing the 2<sup>nd</sup> Respondent to release motor vehicle registration Number KBM 394 Z to the Applicant herein since it is being unlawfully detained by the police officers at Gigiri Police Station.
2. THAT costs of this application be provided for.

**Ex Parte Applicant's Case**

2. The said application is supported by a verifying affidavit sworn by the applicant on 29<sup>th</sup> April 2013.
3. According to the applicant, on or about the 11<sup>th</sup> day of February 2013 at 2.00pm he was arrested by some police officers from Gigiri Police Station who threatened to charge him with handling stolen motor vehicle registration number KBM 394 Z. He was thereafter detained for around six hours and released on paying a bond of Kshs 10,000/=.
4. The next day he availed himself at the police station and was told by the police officers that they would carry out investigations which would require travelling to Mombasa where he had purchased the motor vehicle. He made arrangements to travel to Mombasa and on 20<sup>th</sup> February 2012, three police officers namely; **Leish Holanda, James Somme** and **Julius Taalam** and himself went to Mombasa where they visited **Abdul Gaul Esmail's** offices, who was the car dealer who sold to him the said vehicle and the owner verified the transaction of how he acquired the said vehicle.
5. The applicant deposed that, according to the filed OB Number 14/17 January at Gigiri Police Station the alleged owner of the motor vehicle **Norbert Rainer Benker**, had sold the said motor vehicle to one **Joyce** who in turn issued a bad cheque that bounced on being banked. The said **Joyce** thereafter sold the said motor vehicle to **Abdul Gaul Sail** who in turn sold it to him. Despite those findings, the police still refused to release his vehicle.
6. There was a supplementary affidavit sworn by the applicant on 22<sup>nd</sup> November, 2013 in which he swore that the Magistrate's Court at Milimani issued an order pursuant to an application by the interested party herein directing the applicant to have possession of the motor vehicle but not to dispose of it pending the determination of that suit on condition that the log book was deposited in Court. However, the same could not be deposited as the interested party blocked its release to the applicant by the Registrar of Motor Vehicles.

### **Respondent's Case**

7. On behalf of the Respondent the following grounds of opposition were filed:

1. **THAT the Notice of Motion dated 16<sup>th</sup> July 2013 the replying affidavit sworn by one Nobert Benker on 5<sup>th</sup> September 2013, the supplementary affidavit sworn by Raphael Mungai Goko on 22<sup>nd</sup> November 2013 and supplementary affidavit sworn by Nobert Benker on 30<sup>th</sup> January 2014 all reveal that there are pending proceedings in the lower court to determine the ownership of the motor vehicle.**
2. **THAT the order as to whom the motor vehicle should be released to can only be made after determination of the ownership of the motor vehicle which is being done by the lower court.**
3. **THAT the lower court has jurisdiction to determine ownership of the motor vehicle and subsequently order the police to release it to the successful litigant.**
4. **THAT Judicial Review orders are limited and does not extend to the determination of ownership.**
5. **THAT Judicial Review remedies are remedies of last resort and that the Applicant must show that he has completed all the other remedies which in this case he has not since there is a pending issue on the same in the lower court.**
6. **THAT these proceedings are a complete abuse of court processes and should be dismissed.**

### **Interested Party's Case**

8. On behalf of the interested party, a Replying Affidavit was filed sworn by **Patrick Kyule**, the

Investigating Officer in the said criminal case on 2<sup>nd</sup> December, 2013 was filed.

### **Applicant's submissions**

9. In the submissions filed on behalf of the applicant, the contents of the verifying affidavit were reiterated.

### **Respondent's Submissions**

10. On the part of the respondents it was submitted that since the issue of ownership of the subject motor vehicle is the subject of a suit pending before the Magistrate's Court which has jurisdiction to determine the same, and which Court has ordered that the vehicle be detained at Gigiri police station which order has neither been quashed nor set aside, an order of mandamus cannot issue. To grant the orders sought herein in light of the orders of the magistrate, it was submitted, would lead to an absurdity.
11. In order to grant the order of mandamus sought, it was submitted this Court will have to determine the issue of ownership which requires the calling of witnesses and adducing of oral evidence which cannot be done in these proceedings.
12. Since judicial review remedies are remedies of last resort, it was submitted that alternative remedies ought to be exhausted before resort is made to judicial review and since the issue of ownership of the subject vehicle is pending determination before a Court of competent jurisdiction, the same ought to be dealt with first. The Court was therefore urged to dismiss the application with costs to the Respondents.

### **Interested Party's Submissions**

13. On behalf of the interested party it was submitted that the purported transfer of the vehicle into the name of the interested party was tainted with fraud, deceit and misrepresentation as the purchase was never paid hence the transfer based on the verbal agreement between the applicant and the people from who he purportedly bought the vehicle was void *ab initio*. It was submitted that the purported purchase from the onset was a deliberate and well-orchestrated scheme to defraud the interested party of the motor vehicle.
14. In light of the orders issued in the Chief Magistrate's Court directing that the vehicle be kept at Gigiri Diplomatic Police Station, it was submitted that the application has been overtaken by events since the collateral effect of an order of mandamus shall be to overturn those orders which beg the questions whether the present judicial review proceedings or this court for that matter is the correct forum to challenge the said orders. It was contended that the applicant cannot review, set aside or seek to appeal against the said order through the current proceedings but ought to have appealed against the said decision.
15. According to the interested party, the dispute regarding the custody, control and use of the suit vehicle pending determination of the complex issues regarding the fraudulent acquisition of the log book by the applicant ought not to be determined through a summary judicial review process but at a full hearing at the lower court.
16. Since the ex parte applicant has already submitted to the civil jurisdiction of the Court it was submitted that it is grossly prejudicial if he is permitted to proceed with these parallel proceedings in a manner that summarily seeks orders for release of the subject vehicle to him. In support of its submissions, the interested party relied on **Republic vs. Lands Disputes Tribunal Central Division ex parte Nzioka Misc. Appl. No. 1217 of 2003** and **R vs. Dunsheath ex parte Meredith [1950] 2 All ER 741.**

### **Determination**

17. I have considered the respective cases of the parties as advanced in their respective affidavits as well as the submissions of counsel and authorities cited.
18. Before dealing with the merits of the case, it is important to deal with the issue of intitlement of the application herein. In instant Motion the applicant and 1<sup>st</sup> Respondent are indicated as the

Hon. Attorney General. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned or the person against whom the orders are sought. See Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.

19. The rationale for this was given in Mohamed Ahmed vs. R [1957] EA 523 where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

20. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI”

21. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. However in Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

22. As the issue of wrong intitlement was not taken up I will say no more on the same.

23. In this case, it is clear that the issue of ownership of the subject vehicle is a highly contested matter. There are issues of fraud, deceit and misrepresentation in the manner in which the interested parted with possession and ownership of the subject vehicle. Those issues are the subject of the litigation pending in the Magistrate’s Court in Milimani. 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.....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.....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.”

24. In Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and 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 prerogative 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, the court would not grant the order sought even if merited. See Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.
25. In the normal civil proceedings the Court’s latitude is much wider and the parties are able to fully put forward their respective cases for determination by the Court. The evidence adduced by the parties are subject to cross-examination hence the merits arising from the strength of each parties’ cases can be examined and conclusive findings made thereon. In judicial review proceedings on the other hand the Court is more concerned with the process rather than the merits. The Court would therefore concern itself with such issues as 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. See Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.
26. The purpose of judicial review is therefore 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) 1 WLR 1155*.
27. In my view the issues of fraud, deceit and misrepresentation alleged herein may be effectually determined in the said suit since the orders sought herein will not have the effect of determining the thorny issues of ownership and fraud which are at the core of the dispute between the parties herein. In other words the orders sought herein will not in the circumstances of this case be efficacious. In Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury’s Law of England*, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89 thus:

*"The order of mandamus is of 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 and 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."*

28. That was the position in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741**, at 743, where 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."*

29. It must always be remembered that speed and promptness are the hallmarks of judicial review hence hardship to third parties should keep the court away. See **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707**.

30. In this case, the issue is not just between the ex parte applicant and the Respondents but involves the interests of a third party. Whereas it is not in all cases where a third party's interest is involved that the Court cannot grant judicial review orders, where to grant the orders in question may aversely prejudice the interest of third parties the Court may well be advised not to issue the orders sought but to leave the parties to ventilate their issues in the normal civil courts. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3<sup>rd</sup> parties or buyer for value without notice and without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. That was also the position in the English case of **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."*

31. In **Ex parte Waldron [1986] 1QB 824 at 825G-825H, Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. The issue of 3<sup>rd</sup> party buyers for value without notice was considered in **Birmingham City Council -v- Qasim [2009] EWCA Civ 1080; [2010] BGLR 253**.

32. Determination of the issues raised herein necessarily requires that oral and/or documentary evidence be adduced in the absence of which, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising judicial review powers under sections 8 and 9 of the ***Law Reform Act*** Cap 26 Laws of Kenya.

33. Where the determination of the dispute before the Court requires the Court to make a resolution on conflicting issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations of ownership yet declarations do not fall under the purview of judicial review for the same reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before the rights of the parties herein. 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. Here, there are serious factual issues which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings. See **Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995**.

34. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and 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 prerogative 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. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
35. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words in judicial review applications the Court's jurisdiction is to determine 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.
36. Apart from the foregoing the Magistrate's Court seems to have granted some conservatory orders in respect of the subject motor vehicle. The effect of granting the orders sought herein would be to disturb the said conservatory orders in a manner that 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.
37. Having considered all the issues raised in this application I am not satisfied that this is a proper case in which the Court should grant the judicial review orders sought. Whereas the availability of the avenue of an appeal is not necessarily a bar to the grant of judicial review remedies, one must, however, not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003.** for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort unless that other procedure is less convenient or otherwise less appropriate. It has not been contended that the judicial process before the Magistrate's Court would be less convenient or otherwise less appropriate. To the contrary it is my view that that process offers a more convenient, beneficial and effectual remedy.

## **Order**

38. I have said enough to show that the Notice of Motion dated 13<sup>th</sup> May, 2013 is unmerited and must fail. The same is accordingly dismissed with costs to the Respondents and interested party.

**Dated at Nairobi this 22<sup>nd</sup> day of July 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Waweru for Mr Kinga for the ex parte applicant***

***Cc Kevin***