



**REPUBLIC OF KENYA**

**JUDICIAL REVIEW, CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 373 OF 2013**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF MOTOR VEHICLES..... RESPONDENT**

**EX PARTE.....AMIRALI SADRUDIN KARMALI MOHAMED**

**JUDGEMENT**

1. The applicant herein, **Amirali Sadrudin Karmali Mohamed**, by his Notice of Motion dated 7<sup>th</sup> November, 2013 seeks a declaration that the decision of the respondent in the letter dated 10<sup>th</sup> October, 2013 is ultra vires and of no legal effect and an order of certiorari to remove and quash the same. He also seeks an order for provision for costs of the application.
2. The application was supported by an affidavit sworn by the Applicant on 23<sup>rd</sup> October, 2013.
3. According to the applicant, he is the registered owner of motor vehicle registration number KBW 200E. On 8<sup>th</sup> October, 2013, he received a telephone call from a person who identified himself as **Francis Meja** of Kenya Revenue Authority who demanded to know from him who was driving his said motor vehicle on 6<sup>th</sup> October, 2013. However the applicant informed him that he did not know since the car was not in his possession at the material time.
4. Despite that the said **Francis Meja** insisted that he takes the said driver to **Meja's** office otherwise he would face consequences. On 10<sup>th</sup> October, 2013 the applicant received another call from a lady informing him to collect a letter from the same **Francis Meja**. On collecting the same, the applicant discovered that he was required to urgently present the said driver pursuant to sections 110 and 111 of the Traffic Act on the ground that on the said date the said vehicle was being driven carelessly.
5. However, according to the applicant, the Registrar of Motor Vehicles has no power to demand that he presents the said driver under the aforesaid provisions thus he is exercising powers which he does not possess thereunder hence the said action is ultra vires and ought to be quashed.
6. In the applicant's view the said decision is actuated by some personal agenda against him.
7. In the submissions filed on behalf of the applicant, it was contended that none of the provisions cited empowers the respondent to require the applicant to present the driver. To the contrary the

- power given by section 110 is to a police officer and is for provision of information and not the driver.
8. Although duly served the Respondent did not respond to the application.
  9. I have considered the foregoing.
  10. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law. See **R vs. Barnet London Borough Council Ex Parte Nilish Shah [1983] 1 ALL ER 226 at 240.**
  11. Section 110 of the ***Traffic Act***, Cap 403 Laws of Kenya provides as follows:

***The owner of any vehicle and any other person who is able to provide such information shall, as soon as reasonably possible and in any case within seven days after having received a verbal or written request for such information, give such information as he may be required by a police officer to give as to the identity of the driver of such vehicle.***
  12. It is clear from the foregoing provision that the only person who can compel a person to provide information as to the identity of a driver of a motor vehicle is a police officer. It is also clear that what the section requires is information and not the physical production of the driver. To compel a private person to produce another person unless it is shown that the person being compelled has the person to be produced in his custody would in my view be irrational since such a person may not have the capacity to apprehend and produce the person sought. It is the police who have the capacity to apprehend persons suspected of having committed an offence and any person with information on how to apprehend such suspects would only be obliged to furnish the same.
  13. Section 111 of the same Act, on the other hand provides as follows:

***(1) Any person who employs any other person to drive a motor vehicle shall keep a written record of the name, address and driving licence number of such other person.***

***(2) Such record shall be preserved for a period of six months after the date when such person ceases to be employed as a driver, and shall be made available to any police officer on demand.***

***(3) Any person who fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding one thousand shillings.***
  14. Again this section only compels an employer of a driver to keep his records but does not oblige the employer to produce the driver.
  15. It follows that the directive by the Respondent to the Applicant to present his driver was clearly not within the powers conferred upon the Respondent. By usurping powers which did not belong to the Respondent the Respondent was clearly acting illegally. Similarly the said decision was so grossly unreasonable as to amount to irrationality.
  16. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **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** and held:

**“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....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.”**

17. In light of the foregoing I have no hesitation in finding that the Respondent's decision ought not to be allowed to stand.
18. The Applicant has however sought a declaration. It must however be emphasised that 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. 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 granting the declaratory orders sought. 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 and in opposition to the application. See **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**
19. Accordingly, the Notice of Motion dated 7<sup>th</sup> November, 2013 succeeds and the order which commends itself to me and which I hereby grant is an order of certiorari to remove into this Court for the purposes of being quashed the decision of the Respondent contained in the letter dated 10<sup>th</sup> October, 2013 which decision is hereby quashed.
20. As the application was not opposed the applicant will have half the costs of the application.

**Dated at Nairobi this day 29<sup>th</sup> day of September 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Kibanga for the ex parte applicant***

***Cc Patricia***