



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 284 OF 2012

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF POLICE1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE

ROMA AGENCY LIMITED

JUDGEMENT

By way of an amended notice of motion amended on 19th February, 2013 Roma Agency Limited, the ex-parte Applicant prays for orders that:-

- “1. A Judicial Review remedy by way of an Order of CERTIORARI directed at the POLICE COMMISSIONER be and is hereby issued QUASHING the Order/directive by the TRAFFIC COMMANDANT that Applicant’s digital LCD Screens installed in public service vehicles be removed and that the applicant to prohibited from advertising in those vehicles including motor vehicles registration numbers KBP 270K, KAW 022K, KBB 128M, KBA 351A, KBD 722W, KAW 730C, KAV 226X, KAT 122C, KBA 066N, KBD 190G, KBA 651G, KAV 919F, KAX 040U, KAY 102X AND KAY 527Q.**
- 2. A Judicial Review remedy by way of an Order of PROHIBITION be and is hereby issued directed at the POLICE COMMISSIONER PROHIBITING the Order/direction by the TRAFFIC COMMANDANT that the applicant’s digital LCD Screens installed in Public Service Vehicles be removed and that the applicant be prohibited from advertising in those public service vehicles including motor vehicles registration numbers: KBP 270K, KAW 022K, KBB 128M, KBA 351A, KBD 722W, KAW 730C, KAV 226X, KAT 122C, KBA 066N, KBD 190G, KBA 651G, KAV 919F, KAX 040U, KAY 102X AND KAY 527Q.**
- 3. An Order do and is hereby issued for the assessment of the losses suffered by the Applicant as a consequence of the TRAFFIC COMMANDANT’S Orders/Directions and a Judicial Review remedy by way of MANDAMUS be and is hereby issued directed at the POLICE COMMISSIONER COMPELLING him to compensate the Applicant on the damages and losses suffered by the applicant.**
- 4. The Respondents to bear the costs of the proceedings.”**

The Commissioner of Police and the Attorney General are the 1st Respondent and the 2nd Respondent respectively.

The Applicant's case as gleaned from the papers filed in Court is that it is a company incorporated and registered in Kenya to carry out the business of digital transit advertisement on LCD Screens installed in public service vehicles. In advancement of its business the Applicant installed LCD screens on motor vehicles registration numbers KBP 270K, KAW 022K, KBB 128M, KBA 351A, KBD 722W, KAW 730C, KAV 226X, KAT 122C, KBA 651G, KAV 919 F, KAX 040U, KAY 102X and KAY 527Q.

In July 2012 traffic police officers impounded the said motor vehicles and ordered the removal of the LCD screens. Subsequently some of the crew members of the public services vehicles were charged with traffic offences.

The Applicant therefore seeks the orders afore-stated on the ground that the 1st Respondent's decision offended Articles 33(1), 34(1), 35 and 40(1) of the Constitution. Further, that the decision has no legal basis and is an abuse of due process. The Applicant pointed out that the Minister of Local Government had through **Gazette Notice No. 15582 of 15th October, 2010** permitted the Applicant to carry out advertisements in public service vehicles.

The respondents opposed the application by way of a replying affidavit sworn on 10th October, 2012 by Chief Inspector David Mwangi Nderitu of Traffic Headquarters. The only way I can do justice to the respondents' case is to reproduce the said affidavit extensively. The said officer avers from paragraph 3 to 7 as follows:

“3. THAT I am advised by the state counsel on record which advise I verily believe to be sound that the decision of the Traffic Commandant being challenged in the instant Application was made pursuant legal authority conferred upon the Respondent under various Acts of Parliament including the Traffic Act, Cap. 403 Laws of Kenya and the Environmental Management and Co-ordination Act, No. 8 of 1999

4. THAT the directions to remove any offending articles from public service motor vehicles are issued periodically by the Respondent in order to regulate the matatu industry and to ensure that the public service vehicle owners operate their business within the confines of law.

5. THAT the directions whenever issued are general in nature and do not target any particular individual or company, and that the actions complained of by the Applicant did target (sic) the Applicant company in isolation but were in regard to Public Service Vehicles in general.

6 THAT the Applicant's digital LCD screens were affixed to the said motor vehicles in direct contravention to the provisions of the Traffic Act, Cap. 403 Laws of Kenya and the Environmental Management and Co-ordination Act, No. 8 of 1999.

7. THAT I am advised by the state counsel on record which advise I verily believe to be sound, that the decision of the Traffic Commandant being grounded in law is sound and can therefore not be assailed.”

The question is whether the decision of the 1st Respondent is backed by the law. It is the respondents' case that the decision was made pursuant to legal authority conferred upon the respondents by various Acts of Parliament including the Traffic Act, Cap 403 and the Environmental Management and Co-ordination Act No. 8 of 1999. At this stage it is important to pose and note that no particular provisions of these laws are cited.

The Applicant informed the Court that some of the arrested crew of the public service vehicles were charged with various traffic offences. The documents exhibited shows that they were charged with contravening sections 53(1), 103(1) or 403(1) of the Traffic Act, Cap. 403. Section 53(1) provides:

53. (1) No vehicle shall be allowed to remain in any position on any road so as to obstruct or to be likely to obstruct or cause inconvenience or danger to other traffic using the road, and, save where the contrary is expressly provided in this Act, every vehicle on a road, when not in motion, shall be drawn up as close to the side of the road as possible.

Section 103(1) states:

103. (1) No person shall, for the purpose of obtaining passengers for any public service vehicle, make any noise or sound any instrument, or do anything which causes or is likely to cause annoyance, inconvenience or danger to the public.

Section 403 (1) does not exist.

None of these offences has anything to do with advertisement using LCD screens. That may explain why the respondents were not in a position to specify the particular provisions of the law allegedly contravened by the crew or owners of the impounded public service vehicles. Police officers being law enforcers can only charge somebody with an offence that has been created through an Act of Parliament or subsidiary legislation. The use of LCD screens for advertisement is a recent development and the drafters of the Traffic Act, Cap. 403 could not have reasonably foreseen such a development. The solution is not to penalize innovators like the Applicant. The answer lies in crafting rules governing the use of LCD screens in public service vehicles.

The summary of it all is that the 1st Respondent abused his powers by impounding motor vehicles fitted with LCD screens yet no specific traffic offence had been committed.

The net result is that an order of certiorari is issued as prayed. As an order of certiorari has issued, an order of prohibition will not serve any useful purpose. The prayer for an order of prohibition is declined.

Damages are not available in judicial review proceedings. That being so, the prayer for an order for assessment of losses and an order of mandamus directing the 1st Respondent to compensate the Applicant fails and is dismissed.

The 1st Respondent had no basis for acting as he did. In the circumstances the Applicant's costs arising from these proceedings will be met by the 1st Respondent.

Dated, signed and delivered at Nairobi this 25th day of September, 2014

W. KORIR,

JUDGE OF THE HIGH COURT