



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 349 of 2012

ADASIM AGENCIES LIMITED PETITIONER

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

AND

KOJA MOTORS LIMITED 1ST INTERESTED PARTY

KOONS MOTORS LIMITED 2ND INTERESTED PARTY

JUDGMENT

Petitioner's Case

1. The petitioner's claim against the Kenya Revenue Authority ("KRA") is that it has arbitrarily and unlawfully placed caveats on its motor vehicles namely; KBN 386Y, KBP 664C, KBP 232J, KBP 645C, KBP 858J, KBP 183F, KBL 823E, KBL 289E, KBP 223J, KBP 234J, KBP 490D and KBP 548G.

2. The petitioner avers that KRA has ignored its letters requesting information on the caveats and has denied it the opportunity to contest the caveats and seek their removal and or lifting. It contends that KRA has refused to register the change of ownership of the petitioner's motor vehicles on account of the caveats without any just cause and that KRA has no authority under the *Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)*, the *Traffic Act (Chapter 403 of the Laws of Kenya)* or otherwise to place caveats on any motor vehicle and that even if such authority exists, it was exercised unjustly and in abuse of due process.

3. The petitioner avers that the caveats even if valid, are unlawful for they lack any limitation as to time and in effect amount to an *ex parte* perpetual injunction valid at the whims and pleasure of the respondent unilaterally; as a result the petitioner seeks the relief of this court.

4. The petitioner's case is set out in the petition dated 13th August 2012 and is supported by the affidavit of Imtiaz Kassam, a director of the petitioner sworn on 9th August 2012 and a further affidavit sworn on 12th November 2012. The petitioner seeks the following reliefs;

(a) *The Honourable Court does declare the caveats unlawful, strange and unknown in law for lack of a statutory underpinning.*

(b) *In the alternative to prayer 1) a declaration that the caveats were arbitrary, uprocedural*

and infringed on the petitioners right to own and dispose its property.

(c) *A mandatory injunction do issue against Kenya Revenue Authority to remove the unlawful and or arbitrary caveats placed on the motor vehicles herein.*

(d) *A declaration that the petitioner's right to access to information held by the respondents has been violated.*

(e) *The petitioner's be compensated for loss of business goodwill and reputation by virtue of the caveats.*

(f) *The respondents be condemned to pay costs of suit together with interest.*

(g) *Any other relief that the court may find just to grant.*

Respondent's Case

5. KRA opposes the petition based on the replying affidavit of Twahir Alwi Mohamed sworn on 19th December 2012. According to KRA the caveats were placed on the subject motor vehicles when it was served with the order issued on 27th July 2011 in ***Makadara Chief Magistrates Court Case Misc. Application No. 86 of 2011, Embakasi Division v James Omare Oino/Koja Motors and Koons Motors Limited***. When the petition herein was served, KRA then wrote to ***Ondabu and Company Advocates*** a letter dated 5th September 2012 in effect requesting the interested party to show cause why the caveat should not be removed. ***Ondabu & Co. Advocates*** then wrote to KRA a letter dated 14th September 2012 informing KRA that the investigations by the Embakasi DCIO had not been concluded and that the motor vehicles were still exhibits. It also drew KRA's attention to the fact that there were other cases pending in court in respect of the said vehicles.

6. KRA further contends that it was served with other orders from other cases namely; an order issued on 22nd July 2011 in ***Nairobi HCCC No. 268 of 2011, Tokiniro Kono, Koja Motors Limited, Koons Motors Limited v James Omare Oino and Fennith Mayaka Nyaboke*** restraining the defendants from, inter alia, interfering with the subject motor vehicles. A further order was also served on KRA being an order issued on 16th October 2012 in ***Nairobi HC Misc. Crim App. No. 497 of 2012, James Omare Oino v Republic***. The order was issued to preserve the subject vehicle pending appeal from the order of the subordinate court dismissing the application for orders to preserve the court.

7. KRA has not denied that it received demands from the petitioner to remove the caveat. Mr Twahir, counsel for the KRA, admitted that the caveat has not been formally lifted because of the orders issued by the High Court. In the circumstances, the respondent denies liability in the matter and avers that the caveats were issued in obedience to court orders.

Interested parties' case

8. The interested parties; Koja Motors Limited and Koons Motors Limited opposed the petition on the basis of the replying affidavit of James Omare Oina sworn on 25th October 2012. It was contended that there are two suits pending in Mombasa where the petitioner has sued interested parties for delivery of the logbooks of the subject motor vehicles. The cases are ***Mombasa No. 2009 of 2011, Adasim Agencies v Koons Motors Limited*** and ***Mombasa HCCC No. 2010 of 2011, Adasim Agencies Limited v Koja Motors Limited***. In addition to this case, there is pending before the ***High Court HC Criminal Appeal No. 86 of 2011*** which is dealing with the subject motor vehicles and which is an appeal from an order dismissing ***Makadara Chief Magistrates Court Case Misc. Application No. 86 of 2011***. According to the interested parties, this petition should await the hearing of the ***HC Criminal Appeal No. 162 of 2012***.

Determination

9. The petitioner has invoked the special procedure provided under **Article 22** to file this case to enforce specific fundamental rights and freedoms as against the respondent. It is trite that this procedure is for the specific purpose of enforcing fundamental rights and freedoms guaranteed under the Bill of Rights. It is not intended to be a procedure for determining parties' rights and obligations under the law nor should the Court proceed to determine issues not remotely related to the enforcement of fundamental rights and freedoms.

10. It is apparent from the pleading and depositions, the motor vehicles subject of this suit are the subject of disputes between the petitioner and the interested parties and indeed there are civil and criminal proceedings pending in other courts. In the circumstances, I shall exercise great circumspection in commenting on the matters that are for decision in other courts. I shall therefore limit my observation to strictly what is necessary for resolution of the case between the petitioner and KRA in so far as the issue of enforcement of fundamental rights and freedoms is concerned.

11. The petitioner's case against the respondent is straightforward and is based on the effect of the order issued by the subordinate court in *Makadara Chief Magistrates Court Case Misc. Application No. 86 of 2011*. The order given on 27th July 2011 stated in part, that, "All the exhibits recovered pursuant to the Warrant of Search issued on 20th May 2011 be preserved pending mention on 2nd September 2011. This (sic) exhibits are (a) A sum of Ksh.2,500,000/= (b) Motor vehicles registration numbers" [Emphasis mine]

12. I agree with the petitioner that the caveats placed on the subject motor vehicles have no basis in law or in fact. I have perused the order and I find that the order was not directed at KRA. The respondents in the matter were the interested parties herein and the matter was commenced when a search warrant was issued against the respondents. The motor vehicles recovered pursuant to the search warrant were the subject of the order. The order did not extend to directing KRA to do anything or refrain from doing anything and in this respect KRA had no legal basis to place a caveat on the subject motor vehicle when no order was directed to it.

13. My second concern is that the order was issued effective upto 2nd September 2011. Although the caveat was a means of enforcing the order, since the order lapsed on that date the caveat had to be removed from the vehicle register. There was no basis for keeping the caveat beyond the life of the order when the order was clear that it lapsed on a date certain.

14. I concur with the petitioner that its rights were infringed by the failure of KRA to adhere to the dictates of fair administrative action enshrined in **Article 47**. As I have stated in the past, the purpose of **Article 47** is to subject the administrative action to constitutional discipline. Administrative action must be, "*expeditious, efficient, lawful, reasonable and procedurally fair.*" (See *Jesse Waweru Wahome and Others v Kenya Engineers Registration Board, Nairobi Petition No. 149 & 207 of 2011 (Unreported) [2012] eKLR* at para. 98).

15. **Section 8** of the *Traffic Act* provides that the registered owner of the motor vehicle is the prima facie owner. Therefore where any action, which is prejudicial to the owner's proprietary interest is taken by the KRA, under whose superintendence the Registrar of Motor Vehicle falls, then the owner must at least be notified within a reasonable time of the adverse action.

16. KRA breached the petitioner's rights by issuing caveats in respect of an order that was not directed at it and maintaining the caveats despite the fact that the order on which they were based had lapsed. I also find it unreasonable that KRA did not take steps to ameliorate the petitioner's position despite being informed through demands by the petitioner. Its action to remove the caveats was prompted by the filing of this petition and upto now the caveats have not been lifted.

17. I have also considered the orders in *Nairobi HCCC No. 268 of 2011* and *HC Crim. Appl. No. 147 of 2012* and they are very specific. The former case is a civil suit that does not involve KRA or the motor vehicles and the order of injunction issued therein is between the parties to the suit. The latter case must be seen in the context of securing the actual motor vehicles as provided in the order issued in the

subordinate court. The orders are very clear on their effect and are not directed at the KRA and KRA cannot presume that the orders point to it, ordering it to do something or to refrain from doing a specific act which prejudices the rights of a third party. In the circumstances, I find and hold that KRA by imposing the caveat on the petitioner's motor vehicles is in breach of **Article 47**.

18. Having found a violation of the petitioner's right, I am called upon to provide a remedy for the petitioner. Apart from the necessary declarations which flow from the findings I have made, the petitioner seeks damages. Under **Article 23**, the court has wide discretion to frame an appropriate remedy to vindicate the petitioner's right. The remedy depends on the circumstances of the case. The petitioner has prayed for damages against the petitioner for loss of goodwill and reputation by virtue of the caveats.

19. I have considered the facts of the case and note that the motor vehicles are subject of pending civil cases and as I understand, there is serious dispute between the petitioner and the interested parties as to the ownership of the vehicles. It is therefore probable that even if the caveats were removed, the petitioner would not have had the vehicles which in any case are under covered by the orders issued by the High Court in the civil and criminal cases. Thus it cannot be said that, but for the caveats, the petitioner would have free access to the motor vehicles. In the circumstances, I do not think compensatory damages would be appropriate.

20. General damages are in the discretion of the court and since I have found a violation of the petitioner's right, I think a nominal award of Kshs. 50,000.00 would be adequate to recognise the infringement. In addition, this case was necessitated by the fact that KRA misconstrued the court orders and failed to respond to the petitioner entreaties to deal with the issues raised by the petitioner and remove the caveat based on an order that had lapsed. It shall therefore pay costs of the suit.

Disposition

21. In the circumstances, I hereby make the following orders;

(a) I declare that the caveats placed on motor vehicles KBN 386Y, KBP 664C, KBP 232J, KBP 645C, KBP 858J, KBP 183F, KBL 823E, KBL 289E, KBP 223J, KBP 234J, KBP 490D and KBP 548G are null and void and an infringement of the petitioner's right under **Article 47(1)** of the Constitution and I direct that the caveats be lifted forthwith.

(b) I award the petitioner the sum of Kshs. 50,000.00 as general damages for breach of its fundamental rights and freedoms under **Article 47(1)**.

(c) I award the petitioner costs of the petition which I assess at Kshs. 25,000.00.

DATED and DELIVERED at NAIROBI this 18th day of January 2013.

D.S. MAJANJA
JUDGE

Mr Odhiambo instructed by Cheptumo and Company Advocates for the Petitioner.

Mr Twahir, Advocate instructed by Kenya Revenue Authority.

Mr Ondabu instructed by Ondabu and Company Advocates for the interested parties.