REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO.187 OF 2013

IN THE MATTER OF AN APPLICATION BY RAHAB WANJIRU NJUGUNA FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF AN INFRINGEMENT OF CONSTITUTIONAL RIGHTS

BETWEEN

RAHAB WANJIRU NJUGUNA.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CID.....2ND RESPONDENT

JUDGEMENT

1. The applicant herein, **Rahab Wanjiru Njuguna**, by her Notice of Motion dated 23rd July 2013 seeks substantially an order restraining the Respondent from harassing or in any way detaining the applicant's motor vehicles registration numbers KBG 446K and KBH 445Y as well as the directions on the costs of the application.
2. The application is supported by an affidavit sworn by the applicant on 31st May 2013. According to the applicant, she is a proprietor in commercial motor vehicles owning the said vehicles and on diverse dates in the year 2013 the said vehicles have been harassed by police officers for no wrong done or flouting any traffic rules. It is the applicant's case that neither herself not her drivers have committed any traffic offences though the police have in the past detained her said vehicles for no good reason thereby necessitating the filing of this application. It is the applicant's case that it is not fair for the police to continue detaining her vehicles for no apparent reason. To her the harassment, intimidation and threats are an infringement to her constitutional rights and to those of her agents.
3. Despite being served the Respondent did not Respondent to the application with the result that the factual averments made in the affidavit remains wholly uncontroverted.
4. As appears from the title to this application, the applicant is indicated as **Rahab Wanjiriu Njuguna**. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

5. 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 intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

6. 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 intituled 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"

7. 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".

8. I however must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.
9. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal expressed itself as follows:

   "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…It is the duty of the decision maker to comply with the law in coming to its

decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

10. 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."

11. From the foregoing it is clear that where the authority whose decision is challenged displays 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 as where the decision is in defiance of logic and acceptable moral standards, the Court will interfere even if there is no illegality or procedural impropriety.
12. In this case it is alleged that the Respondents without any justifiable case have been harassing and intimidating the applicant's said motor vehicles. To do so in my view amounts to irrationality since it is in defiance of logic.
13. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit."

14. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

15. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of ***Donoghue vs. Stephenson*** in the last century.
16. Accordingly, I find merit in the Notice of Motion dated 23rd July 2013 and grant an order of prohibition prohibiting the respondents by themselves and or their agents from harassing, intimidating, threatening and arresting the applicant/her agents in relation to motor vehicle registration numbers KBG 446K and KBH 445Y unless they are involved in traffic offences.
17. As the application was not properly intituled there will be no order as to costs.

Dated at Nairobi this day 29th day of November 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties.