



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CIVIL CASE 642 OF 2005**

**IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: AN APPLICATION BY ALI MOHAMED BEREKI FOR LEAVE TO  
APPLY FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF:**

**ALI MOHAMED BEREKI.....APPLICANT**

**AND**

**ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

Ali Mohamed Bereki (hereinafter “the Ex-parte applicant”), is the owner of motor vehicle registration number KAG 675X (hereinafter “the motor vehicle”). On 11<sup>th</sup> August 2005, the said motor vehicle was involved in a minor accident along Mombasa/Malindi road near Takaungu in Kilifi District. Notwithstanding that the said motor vehicle could be driven, Traffic Officers of Kilifi engaged a private breakdown vehicle to tow the said motor vehicle to Kilifi without involving the Ex-parte applicant. As no offence had been committed, the ex-parte applicant requested the said traffic officers to release the said motor vehicle to him. The traffic officers demanded, of the ex-parte applicant, Kshs. 75,000/= as a condition for the release of the said motor vehicle which sum was alleged to be due to the breakdown vehicle owner as towing charges. The ex-parte applicant declined to pay the said charges as he was not privy to the agreement to tow the said vehicle. The Kilifi traffic officers continued to hold the ex-parte applicant’s vehicle thereby prompting him to apply by way of Chamber Summons for leave to apply for an order of mandamus compelling the Attorney General, through the officers in charge Kilifi Traffic Police to forthwith release, to the ex-parte applicant, the said motor vehicle.

On 26<sup>th</sup> August 2005, Maraga J, granted the said leave and on 5<sup>th</sup> September 2005 the ex-parte applicant filed this Notice of Motion seeking an order of mandamus to compel the Attorney General through the said Officer in-Charge Kilifi Traffic Police to forthwith release to the ex-parte applicant the said motor vehicle on the grounds that the said motor vehicle was being detained for no lawful cause and the release was made conditional upon the ex-parte applicant satisfying an unacknowledged debt owed to a private

enterprise which condition amounts to an illegality and/or abuse of authority. The Notice of Motion, in accordance with the Law, is supported by a statutory statement and a verifying affidavit which had supported the application for leave. The said statement and verifying affidavit give the background leading to the detention of the said motor vehicle by Kilifi Traffic Police. The ex-parte applicant has exhibited the log book of the said motor vehicle which shows that he is the registered proprietor thereof.

The Attorney General was served through his Mombasa Office but neither filed a replying affidavit nor any other response to the application. On various occasions when the Notice of Motion came up for hearing, a representative of the Attorney General attended and at one time settlement was mooted but nothing came out of that. When the Notice of Motion finally came up before me for hearing on 1<sup>st</sup> April 2009, no representative of the Attorney General attended despite a hearing notice having been previously served. The Notice of Motion therefore proceeded ex-parte.

I have considered the application, the Statutory Statement and the verifying affidavit. Having done so, I take the following view of the matter. The traffic police are mandated under the Law to enforce the provisions of the Traffic Act in addition to their other duties as police officers. If the ex-parte applicant committed a traffic offence or any other offence, he could have been charged before court. But he did not. The involvement of the traffic police should have come to an end and released the said motor vehicle to the ex-parte applicant. They did not do so on the ground that towing charges due to a private body be paid before the motor vehicle could be released. The traffic police at Kilifi, in insisting that towing charges be paid to a private body before they could release the said motor vehicle, were not enforcing any traffic rule or Section under the Traffic Act or any other provision of the Law. They were using their position as police officers for a collateral purpose to advance the private interests of the private body. Their conduct is a clear abuse of power. To borrow from Lord Scarman's quote in **Reg – v – Secretary of State for the Environment ex-parte Nottingham Shire County Council [1986] AC,**

**“A power which is abused should be treated as a power which has not been lawfully exercised.”**

The Kilifi Traffic Police have therefore in addition to having abused their power, acted illegally and this court can intervene as sought by the ex-parte applicant. It was held in **Maritime Electric Company Limited – v – General Dairies QB 27** as follows:

**“The crown.....can be estopped when it is not properly exercising its powers but is misusing them.....”**

In the premises, I find and hold that the ex-parte applicant is entitled to the relief sought in paragraph 1 of his Notice of Motion. The order sought shall issue forthwith as prayed.

The ex-parte applicant shall have the costs of this application.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 13<sup>TH</sup> DAY OF MAY 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Oloo holding brief for Maina.

**F. AZANGALALA**

**JUDGE**

13<sup>TH</sup> MAY 2009