REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS

Miscellaneous Application 294 of 2008

JOSEPH MAINA GOKO……APPLICANT

Versus

TRANSPORT LICENSING BOARD & OTHERS…..RESPONDENTS

JUDGEMENT

By the Notice of Motion dated 3rd July 2008, which is expressed to be brought under Order 53 Civil Procedure Rules and S 3A of the Civil Procedure Act, the ex parte Applicant Joseph Maina Goko seeks an order of certiorari to issue to remove into this court and to be quashed, the 1st Respondents acts of frustrating the Applicant's business; order of certiorari to quash the warrant No. 6444/08 issued on 5th May 2008 by the Chief Magistrate's Court Nairobi Law courts against the Applicant's motor vehicle; the order of prohibition to prohibit the 1st and 2nd Respondents from acting upon, taking any proceedings, issuing any directive, impounding the Applicant's motor vehicle or doing anything in any manner affecting the lawful business of the Applicant's motor vehicle Registration No. KAV 160L; An Order of mandamus do issue to compel the 1st Respondent to direct the 1st Interested Party to stop its officers from harassing, transferring and unnecessary impounding motor vehicle Reg No. KAV 160L and lastly an order to prohibit the Respondents, Interested Parties, from harassing frustrating or impounding motor vehicle Reg No. KAV 160L and costs of the Application. In support of the Notice of Motion, Ms Kwamboka, Counsel for the Applicant relied on the supporting affidavit dated 3rd July 2008 and filed with the Notice of Motion. The Application was opposed and Mr. Bitta relied on grounds of opposition in arguing the Application.

Briefly, Ms. Kwamboka submitted that the Applicant is the registered owner of Motor vehicle KAV 160L a public service vehicle. The police have constantly harassed and impounded his vehicle because he has not been giving them bribes. That it has been detained for the last 8 months and yet it is a public service vehicle. Mr. Bitta opposed the motion on the listed grounds.

Even before considering the Respondent's grounds, this court notes that the Application as filed is incompetent and is for striking out. This is because the Notice of Motion is brought in the name of the ex parte applicant. In Judicial Review it is the practice which has attained the force of law that Judicial Review motions are brought in the name of the Republic on behalf (ex parte Applicant) the aggrieved party. This is because of the history of prerogative orders which were issued in the name of the crown on behalf of the Applicant from the state. The prerogative orders were introduced by the crown to check the excesses of public bodies and public offices. The state would step in the shoes of the aggrieved party and file the motion on his behalf against the public office or body.

In the FARMERS BUS SERVICE V TRANSPORT LICENCING APPEALS TRIBUNAL (1959) EA 779 the court held that a Judicial Review application has to be brought in the name of the Republic (Crown) and should be properly intituled. Later in the case of JOTHAM MULATI WELAMONDI V CHAIRMAN ECK (2002) 1 KLR 486, Justice Ringera struck out a Notice of Motion that was not brought in the name of the Republic. There has been a host of other cases on that point. The Applicant has no capacity to bring a Judicial Review application in his own name and the Notice of Motion is incompetent and has to be struck out.

The Applicant relied on the affidavit dated 3rd July 2008 in support of the motion. This affidavit was filed with the Notice of Motion. Under Order 53 Rule (4 (1) the affidavit which is served with the Notice of Motion is that which was filed with the Chamber Summons Application for leave. Under Rules 4(2) if a party wishes to use another affidavit, the affidavit must be filed with the leave of the court. The affidavit dated 3rd July 2008 was not filed with the leave of the court and is therefore irregularly on record and must be struck out. Secondly, I have seen the affidavits that were filed with the Chamber Summons, both dated 21st March 2009. They are described as supporting affidavit and verifying affidavit. The verifying affidavit comprises 3 paragraphs while the affidavit in support a 9 paragraphed affidavit. Both refer to the statement of the facts and contain no evidence. In Judicial Review, the facts of the case shall be contained in the affidavit. In this case, however, all of the facts are contained in the statement. In SILVANO ONEMA OWAKI V COMMISSIONER GENERAL KRA COURT OF APPEAL 45/00 (KSM) the of Appeal held that the facts relied on are required by Order 53 rule 1(2) to be in the verifying affidavit but not in the statement. The court said "we would observe that it is the verifying- affidavit not the statement to be verified, which is of evidential value in an application for Judicial Review. That appears to be the meaning of Rule 1(2) of order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 VOL 1 at paragraph 53/1/7.

"The application for leave "By a Statement" The facts relied on should be stated in the affidavit (See R v Wandsworth JJ., ex parte Read (1942) 1 K.B. 387) "the Statement" should contain nothing more than the name and the description of the Applicant, the relief sought. It is not correct to lodge a statement of all the facts verified by an affidavit." The affidavit filed on 21st March 2009 are of no evidential value and the Notice of Motion is made without evidence to support it and it must be struck out.

I have seen the prayers sought. Prayer I is vague. It is too general and does not seek to quash any decision or acts of the Respondents. A Judicial Review prayer has to be specific for the court to be sure what decision is sought to be quashed.

I do agree with Mr. Bitta that no leave was obtained to seek prayer one of the Notice of Motion. This is because the prayers in the Notice of Notice should be in the statement of facts in terms of Order 53 Rule 1. That Rule requires the statement to contain the names of the Applicant, the relief sought and grounds to be relied upon. Similarly, no leave was obtained to seek prayer 5 for an order of prohibition. It cannot be granted.

I also agree with Mr. Bitta that no prayers were sought against the 3rd and 4th Respondents and the 3rd and 4th Interested Parties have no interest in the matter as they will not be affected by the court's orders if any. There has been misjoinder of the parties.

Order 53 R 7 requires that a party seeking to quash a decision must lodge the impugned decision with the court before hearing of the Notice of Motion and should be verified by an affidavit. Though the Applicant sought to have quashed a copy of the warrant 6444/08 issued on 5th May 2008, the same was not exhibited. The above rule further requires that if a party is unable to lodge the decision, he must give an explanation as to why he could not lodge it. The Respondent may as well have lodged it if they had known that the Applicant cannot get it. The applicant never offered any explanation as to why he could not lodge the said warrant. The court cannot be sure that there is anything to quash.

With all these anomalies, I find that this application cannot see the light of day. I do not need to go to the merits of the Notice of Motion. It is hereby struck out with costs to the Respondents.

Dated and delivered this 20th day of July 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Kipkogei for Respondent

Muturi: Court clerk