



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Misc Appli. 321 of 2006**

**REPUBLIC .....APPLICANT**

**Versus**

**THE SENIOR PRINCIPAL MAGISTRATE KISII .....1<sup>ST</sup> RESPONDENT**

**PETER OMUNDI MOKAYA.....2<sup>ND</sup> RESPONDENT**

**LINEAR COACH CO.....3<sup>RD</sup> RESPONDENT**

**BERNARD I. MUGO T/A IKINU AUCTIONEERS.....4<sup>TH</sup> RESPONDENT**

**DAN MARK NYAGAKA NDEGE.....5<sup>TH</sup>  
RESPONDENT**

**JUDGMENT**

The ex parte Applicant Rose Nyambura Mburu has brought this application under Part VI of the Law Reform Act, Cap 26, Order LIII Civil Procedure Rules and S.3 A Civil Procedure Act. The Respondents are the Senior Resident Magistrate Kisii, Peter Omondi Mokaya, Linear Coach company Ltd, Bernard L Mugo t/a Ikinu Auctioneers, and Danmark Nyagaka Ndege. The Applicant seeks the following Judicial Review orders against the Respondents;

1. an order of certiorari to remove to the High Court for purposes of it being quashed the proceedings and order of Mr. C. Mbogo, the Senior Principal Magistrate Kisii, in CMCC 324/06 given on 27<sup>th</sup> April 2006 for a mandatory injunction directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to bring motor vehicle Registration No. KAM 839 X within the limits of the jurisdiction of the Kisii Chief Magistrate’s court and to put the same in the company of Betico Auctioneers.
2. an order of prohibition to prohibit the said Mr. C. Mbogo, the Senior Principal Magistrate Kisii or any other magistrate from proceeding with and determining CMC 324/06. she also asks for costs of the motion.

In support of the application is the affidavit of the Applicant dated 15<sup>th</sup> June 2006, a further affidavit dated 27<sup>th</sup> July 2006, a statement of facts dated 14<sup>th</sup> June 2006 and skeleton arguments dated 24<sup>th</sup> August 2006. The motion was opposed. The 1<sup>st</sup> Respondent filed an affidavit sworn by Charles Gitonga, Senior Principal Magistrate Kisii dated 18<sup>th</sup> December 2007. The 3<sup>rd</sup> Respondent also opposed the motion and filed grounds of opposition on 13<sup>th</sup> July 2006 and skeleton arguments on 31<sup>st</sup> August 2006. The 4<sup>th</sup> Respondent also opposed the motion and relied on the 4<sup>th</sup> Respondent’s affidavit dated 18<sup>th</sup> August 2006 and skeleton arguments dated 10<sup>th</sup> April 2007.

A brief background of this case is that the Applicant bought the subject motor vehicle KAM 939X Isuzu Bus at a public auction on 9<sup>th</sup> February 2006, after she emerged the highest bidder with Kshs.400,000/= which she paid and the balance was to be paid once some conditions (as per para 6 of the affidavit) were met. She repaired the vehicle and started operating a public transport between Nairobi and Kisumu under the name of City Bus Service as from 1<sup>st</sup> April 2006. On 29<sup>th</sup> April 2006 when the bus was at Machakos Country Bus Station waiting for passengers to travel to Kisumu, it was impounded by police and upon protesting they served her with a court order and plaint in CMC 324/06 Kisii (RNM 4) she exhibited copies of the proceedings in that court (RNM 5). On perusal, she found the Plaintiff to be the 2<sup>nd</sup> Respondent who was aware of the sale. Meanwhile, the 1<sup>st</sup> Respondent in SPMC 178/03 which was filed in Kikuyu Court had filed an appeal to the High Court (NM 8).

The Applicant raised objection in the said suit on account of jurisdiction but the court overruled her on 18<sup>th</sup> May 2006. She contends that the Kisii court has no supervisory jurisdiction over the case before Kikuyu Court in 178/03, that the Plaintiffs remedy has an appeal. That the 2<sup>nd</sup> Respondent has filed this suit in Kisii Court in collusion with the other Defendants in order to deprive the Applicant of the motor vehicle. That the 2<sup>nd</sup> Respondent is the sole Director and main shareholder in Linear Coach Ltd., the 3<sup>rd</sup> Respondent and that is why the Applicant wants the case in CMC 324/06 to be quashed.

Mr. Gitonga the Senior Resident Magistrate Kisii deponed that on 27<sup>th</sup> April 2006, he presided over an application which was brought before him under certificate of urgency and he merely gave temporary orders to preserve the subject matter and that on 11<sup>th</sup> May 2006 the applicant herein was allowed to be enjoined in the proceedings in CMCC 324/06.

The 3<sup>rd</sup> Respondent in their grounds of objection filed on 31<sup>st</sup> July 2006 deponed that the Judicial Review application is an abuse of the court process and bad in law. Mr. Kiboi, Counsel for the 3<sup>rd</sup> Respondent submitted that the Applicant has no Locus standi in this matter as there was no sale of the vehicle on 9<sup>th</sup> July 2006, and that if there was any auction it is null and void as it did not comply with Rules 17 and 18 of Auctioneers Act 1997.

Mr. Mwangi, Counsel for the 4<sup>th</sup> Respondent did not oppose the application and relied on the Respondent's affidavit dated 18<sup>th</sup> August 2006 in which he set out the process he followed in handling the disputed vehicle upto the time the Chief Magistrate's Court made orders that are under challenge.

The 4<sup>th</sup> Respondent who is an auctioneer deponed that he was instructed to attach the 3<sup>rd</sup> Respondent's moveable goods in Kikuyu RMCC 178/03 on 14<sup>th</sup> October 2005 but a stay order was served on him on 21<sup>st</sup> October 2005, filed by Rani Motors Ltd. Vide letter of 10<sup>th</sup> November 2005, he was instructed to proceed with attachment but the warrants expired and he received fresh warrants on 17<sup>th</sup> November 2005. Another objection was filed by Victor Likolole who sought to set aside judgment but it was dismissed and on 23<sup>rd</sup> January 2006, he obtained fresh warrants but they were served with another stay order. By then he had advertised the vehicle for sale and sold the vehicle on 9<sup>th</sup> February 2006. He signed a certificate of sale on 16<sup>th</sup> March 2006 and sent it to the Registrar. He deponed that the said sale was lawful and legal and that the records at the Registrar's office indicated that the vehicle belonged to the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Respondent had not registered any interest with the Registrar of Motor Vehicles. That had he been the owner, he could not have filed the objection 6 months later. That the vehicle was impounded before according the ex parte Applicant a chance to be heard. That though he raised objection in the application before the Senior Resident Magistrate's Court, the magistrate went ahead to give final orders impounding the vehicle. The deponent contends that the order was incapable of execution and demonstrated an intention to deprive the Applicant of the vehicle. It was argued that the Kisii court had no jurisdiction in the matter and can only be corrected by an order of certiorari quashing the Lower Court's order.

The applicant seeks orders of certiorari and prohibition, which are Judicial Review orders. The court has been moved under part VI of the Law Reform Act Cap 26 and Order III of the Civil Procedure Rules and

S.3 A Civil Procedure Act. The substantive law relating to Judicial Review is found in Ss. 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya. The procedure relating to Judicial Review applications is found in Order 53 Civil Procedure Rules. This court's jurisdiction has not been invoked by the Applicant for issuance of the said orders. Judicial Review is a special jurisdiction under order 53 Civil Procedure Act and Section 8 and 9 of the Law Reform Act and the Civil Procedure Act and Rules made thereunder do not apply. The Court of Appeal held so in KUNSTE HOTEL LTD V THE COMMISSIONER OF LANDS CA 234/1995 and REP V KCA 175/00. Procedural Rules are put in place for maintenance of good order. They should be substantially complied with. In the instant case the court's jurisdiction having not been invoked under the set down rules the orders sought cannot lie.

The order under challenge dated 27<sup>th</sup> April 2006 was a temporary order pending hearing of the application inter partes on 11<sup>th</sup> May 2006. The court wonders why the Applicant did not seek to set that order aside or appeal. It was upto the Applicant to disclose to the court that although other remedies were available in this case, but Judicial Review would be the most efficacious in order for the court to grant leave. The Applicant has a duty to disclose and failure to do so disentitles her to Judicial Review remedies.

Judicial Review is a public law remedy. It does not lie against private individuals and so the orders sought cannot lie as against the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.

For the above reasons, I find that the application is incompetent and Judicial Review remedies which are discretionary are not the most efficacious in the circumstances of this case, and the Applicant should have pursued other avenues.

Accordingly this motion is dismissed with costs.

Dated and delivered this 16<sup>th</sup> day of October 2008.

R.P.V. WENDOH

JUDGE

**Present:**

Mr. Kiboi for 3<sup>rd</sup> Respondent

Mr. Maina Kirori for 1<sup>st</sup> Respondent

Daniel: Court Clerk