



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Misc Appli 195 of 2004

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER OF POLICE.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

JOHN BUNDI NGALA.....EXPARTE APPLICANT

R U L I N G

In this application dated 18th October, 2004, the Ex parte Applicant John Bundi Ngala, seeks the superior order of Mandamus to issue, directed at the Commissioner of Police of Kenya and the Director of Criminal Investigations of Kenya. The order is to direct them to release forthwith a motor vehicle Reg. No. KAM 315 E Isuzu FSR 3311 to the applicant.

The background facts of this case would indicate that the Ex parte Applicant bought the said motor vehicle from one Regal Hire Purchase through tendering. The said Regal Hire Purchase by a letter dated 13th September, 2002 and marked as exhibit JBN “11” had accepted the applicants tender at Kshs.1,640,000 and had requested for the payment of the sum by a bankers cheque. The applicant had then proceeded to pay the said sum on 23rd September, 2002 and had been given Regal Hire Purchase receipt No.12466 of the same date herein marked as exhibit JBN “111”. Thereafter the said Regal Hire Purchase had signed all the necessary transfer of the motor vehicle documents herein marked as JBN IV (a), (b) & (c). JBN, IV (a) is the official transfer of ownership of the motor vehicle. Then on 30th September, 2002, the transfer was registered by the Registrar of Motor Vehicles who then stamped the motor vehicle Log Book accordingly, showing that the owner was John Bundi Ngala. The Log Book is herein marked as exhibit JBN “2”.

The Ex parte Applicant further submitted that on 30th July, 2004 C.I.D officers from Nairobi entered his home at Kianjai Market, Meru and seized the above mentioned motor vehicle which they drove to CID Headquarters Nairobi. He followed it to Nairobi and sought that the motor vehicle be released but the same has never been released. The Ex parte applicant submitted that he genuinely bought the vehicle because it was advertised and believes that the C.I.D officers had no basis or lawful reason to seize the motor vehicle which seizure deprived him of the use and exposed it to waste and vandalism where it is parked. The applicant now believes that the Respondents intended to deprive him of the motor vehicle hence his reason to seek for help. He argues further that he has incurred great loss and damage due to the wrongful action of the Respondents.

The Ex parte Applicant then filed this motion in this court on 18th October, 2004. He submitted that he properly served the full motion upon the Respondents to give them a fair chance to explain why they wrongfully deprived the applicant of his motor vehicle. He states, however, that the Respondents not only ignored responding to this application but also ignored to make a court appearance to defend their position.

The Ex parte Applicant ended his submissions by stating that the impounding of the motor vehicle aforementioned was illegal and arbitrary. That it was in violation of his individual right, especially that of owning property enshrined in our constitution. That the seizure was without justification and beyond their powers as defined by our laws. That he has not committed any unlawful act in relation to owning of the said motor vehicle and has not to date been charged with any offence in any court. And for the above reasons the Ex parte Applicant seeks the order of Mandamus against both the Respondents who must have acted in concert in seizing and impounding the motor vehicle.

I have carefully considered the material placed before me in support of this application and the argument advanced in support thereof by Mr. Mokuu. This application is not opposed in any way as both Respondents neither filed any responses to the same nor appeared before court to defend. I therefore have no reason not to accept all the facts as presented by the Ex parte Applicant. That means I believe that C.I.D officers entered the Ex parte applicant's market compound at Kianjai on 30th July, 2004 and not only seized the motor vehicle Reg. No. KAM 315 E Isuzu FSR 3311 but also drove it away to Nairobi where they detained it and have refused to release it to the Ex parte Applicant who has constantly sought its release in vain. I also believe that the C.I.D officers who did so were doing so in the course of their employment. I am also persuaded that the said officers' conduct, aforementioned, was not within the ambit of the law and the constitution. As much I am ready to find and indeed do find that the continued detention of the said motor vehicle is unlawful and unwarranted. However, I have also got to be satisfied that the remedy of Mandamus is available in a case such as this.

Mandamus is a judicial superior order issued as a command usually by the High Court to an inferior court, tribunal, body or person ordering it or the person to perform a public or statutory duty. Mandamus is one of the three Superior Orders provided for under Order 53 of our Civil Procedure Rules, the other two being the Orders of Certiorari and Prohibition. While originally the three orders, otherwise known as Prerogative Orders or Review Orders, were intended to apply to correct a wrong or illegal performance or non-performance of inferior courts, they later became widely used to correct or supervisor inferior tribunals or quasi-judicial bodies. They now can be directed not only at the inferior courts tribunals or quasi-judicial bodies, but also public bodies and officers in the performance of public duties. Properly used the three superior orders are not only intended to bring out faster but also more effective results.

As stated by Lord Diplock in the case of **O'Reilly v Mackman [1982] 3 All ER, 1129**, at page 1131: -

“The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.”

It would appear however that the said superior orders are not available to every person who has been wronged at any time. In the case of **Kadamas v Municipality of Kisumu [1985] KLR, 954**, at page 978, Platt Ag. J.A. Stated, after considering other authorities

“The result is that if a matter of public law is directly involved then in general (subject to certain exceptions) the prerogative orders should be resorted.”

And then added at the bottom of the same page: -

“But if the matter is truly a private law matter, then a civil suit would be appropriate.”

I have carefully perused the **Kadamas case** aforementioned. I have also tried to understand the principles discussed in the several legal authorities in the above case. What I understand from them is that the

applicant of the orders of Certiorari, Mandamus or Prohibition, now in England renamed, the Quashing Order, Mandatory Order and Prohibiting Order, in that order, has to have a recognizable legal interest sufficient to entitle him to proceed in court through any of such orders. Such sufficient interest appears to be a mixed question of act and law, bearing in mind that a Judicial Review is only available as against public bodies in relation to their public functions. The orders are not available to enforce purely private rights against public bodies, hence the pronouncements made by Platt Ag. J.A above quoted.

Thus, if I understand the relevant principle properly, a claim to enforce a purely private law right, such as a contractual, right against a public body cannot be brought by way of a judicial review. Such also was the conclusion reached in the case of **R v East Berkshire Health Authority, ex parte Walsh** [1985] QB 152.

In the application before me, the applicant seeks an Order of Mandamus to command the respondents herein, The Commissioner of Police of Kenya and the Director of Criminal Investigations Department, to forthwith release to him, the Applicant's motor vehicle KAM 315E Isuzu FSR 3311 now in the custody and control of the Respondents. As earlier explained, the motor vehicle was impounded by the Respondents or the Respondents' authorized agents or servants. The applicant made several trips to Nairobi where the motor vehicle is stored, made requests and demand for its release, but the Respondents have ignored those requests and demands making the Applicant suffer loss and damage related or arising there from. I noted from the evidence that the Respondents did not even bother to reply or respond to the Applicant's inquiries. When the issue ended up in this court, and the Respondents were served with the claim papers in this application, they ignored them and did not file any defences. They also in the last resort totally failed to appear in court during the hearing of this application. On the face of it therefore, it can be safely said that the application goes unopposed in matters of facts and evidence. The court therefore fully accepts the facts asserted by the Applicant as true. The only question that remains to be decided is as to whether, by the facts asserted by Applicant herein and the principle of law discussed hereinabove, and fully accepted by the court, he is entitled to the relief of the order of Mandamus sought herein.

There is no doubt that the Respondents are public officers. It is my view and finding as well, that they are senior officers in the Police Force who have been empowered by the constitution and by statute to inter alia carry out various investigations to establish for example that every motor was lawfully obtained and owned. In that process I am of the view that they may seize the vehicle as they did in respect to the one in question from Meru to Nairobi for the purpose of those investigations. The investigations would be done in a fair and transparent manner until they would be completed. They would be done within a reasonable period taking into account all the circumstances of the case. The applicant who, by all the evidence on the record, was the registered owner of the motor vehicle was entitled to know the results of the investigation as his ownership of the motor vehicle in question was and is protected by the law and the constitution. There is no doubt in my mind therefore, that the Respondents in refusing to return the motor vehicle to the Applicant and in refusing or failing to explain satisfactorily why they continue to detain the Applicant's motor vehicle, knew or ought to know that they had breached the Applicant's proprietary rights.

I have however also considered the nature of the Applicant's rights which the Respondents have breached. There is no doubt from the records of this application that the Applicant is successfully asserting that the Respondent's conduct in question breached his rights to own the motor vehicle in question. He claimed that the Respondents as well committed a common tort in unlawfully impounding his said motor vehicle, and detaining it without a lawful right. Clearly then, the relief the Applicant wants as I see it, is an order commanding the Respondents to release the motor vehicle which is clearly a common private right. The Respondents are not under a specific statutory duty to return private properties, which they have seized and detained for the purpose of public or specific investigations. But they would be under a common law obligation to right a common law tort they may commit. It will be untenable therefore to state that the obligation to return the motor vehicle to the Applicant is more than a breach of a private right to the Applicant. It is my view that such breach can be righted by an ordinary suit. As there is no public law involved in it a review order of Mandamus is not required to right it. The Order of Mandamus cannot therefore be allowed to come to the Applicant's assistance.

For the above reasons this application cannot succeed. It is dismissed with costs with leave to the applicant to take alternative methods to recover his motor vehicle.

There is no order as to costs.

Dated and delivered at Meru this 13th day of April, 2005

D. A. ONYANCHA

JUDGE