



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

JUDICIAL REVIEW CASE NO. 231 OF 2018

REPUBLIC.....APPLICANT

-VERSUS-

DIRECTOR, NATIONAL TRANSPORT & SAFETY AUTHORITY....RESPONDENT

JUDGMENT

The application before court is the applicant's motion dated 25th of October 2019 seeking orders of mandamus against the respondent; the prayers for these orders have been framed as follows:

“1. An order of mandamus directing the Respondents whether by themselves and or though their agents or officers to forthwith register and or issue the Applicant with a registration number and log book to the unregistered bus chassis No. MC217KFR151110912.

2. An order of mandamus directing the respondents whether by themselves and or their agents or officers to forthwith confirm the duty payments to enable the unregistered bus to enable the registration of the bus and issuance of a logbook.”

Although only one respondent is sued, the prayers refer to 'respondents'; the record shows that Kenya Revenue Authority was initially one of the two respondents but its name was expunged from the proceedings at a certain stage. This might explain the use of the term 'respondents' rather than respondent.

The applicant's case is clear from the statutory statement and the affidavit sworn in its verification. It is simply this: sometimes in 2004, Daewoo Motors International Company Limited imported a bus whose particulars are indicated as Chassis No. MC217KFR151110912 and Engine No. E483ND4J109275. The importation was cleared apparently by the customs department as entry number 4505. The bus was subsequently transferred to the applicant before registration.

Customs duty of Kshs. 726,701/= was paid and the payment slip the clearance documents and such other documents that are necessary for the registration of the motor vehicle were presented to the customs department at Mombasa in October 2007, at the request of the Kenya Revenue Authority.

Despite numerous requests for registration of the motor vehicle, the respondent has adamantly declined to register the vehicle insisting that he cannot register the vehicle until he obtains an entry number from the customs and border control department from Kenya Revenue Authority.

Christopher Wanjau swore a replying affidavit on behalf of the respondent and stated that he is the director at the Respondent Authority and that he is in charge of Registration and Licensing.

He swore further that respondent is a State Corporation established under the National Transport and Safety Authority Act No. 33 of 2012 with the key mandates of, inter alia, planning, managing and regulating the road transport system, and implementing policies relating to road transport and safety.

The Authority also registers motor vehicles, conducts motor vehicle inspections and certifications, regulates public service vehicles, develops and implements road safety strategies, conducts research and audits of road safety among others.

Prior to 2012, the function of registration of motor vehicles was being handled by the Kenya Revenue Authority (KRA); it is after the establishment of the National Transport and Safety Authority (NTSA) that the latter took over this function.

The registration of vehicles is done online through Transport Integrated Management System (TIMS) and that registration process commences when the Applicant logs in the entry number provided by Kenya Revenue Authority. It is through the entry number that NTSA accesses such details of the vehicle as the engine number, chassis number, the capacity, the colour and also the information as to whether the duty has been paid.

Once KRA furnishes one with an entry number it is synchronized with TIMS; this synchronisation implies that the applicant has successfully paid duty and therefore the registration of the motor vehicle can proceed. The registration process is initiated by the owner of the vehicle when he opens a TIMS account and logs in the entry number from KRA. Once duty is paid, the information regarding the vehicle is automatically populated to the TIMS.

Without the entry number registration cannot be effected.

As far as the applicant's case is concerned, Wanjau swore that the respondent requested the applicant to collect the entry number from KRA and that the respondent has not only been always ready and willing to register his vehicle but that he is duty bound to do so.

According to Wanjau, it is KRA that ought to be compelled to release the applicant's entry number without which the applicant's motor vehicle cannot be registered.

In his submissions, the applicant reiterated the averments made in his statutory statement and the depositions made in the affidavits.

The applicant invoked Article 47 of the Constitution which guarantees every person's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In the same breath, he cited section 4(1) of the Fair Actions Act that essentially gives effect to Article 47 of the Constitution. That section states as follows:

4.(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

The Respondent's refusal to register the applicant's bus and consequently issue him with a registration number and a log book since 2007, a period in excess of 13 years, cannot reasonably be said to be an expeditious administrative action. In any case, the respondent has not given any written reasons why his vehicle cannot be registered and this in itself contravenes the applicant's constitutional rights under Article 35 of the Constitution which guarantees the right to access information.

The learned counsel for the applicant cited the decision in **Kenya Human Rights Commission & Another v Non-Governmental Organizations Co-ordination Board & Another [2018] eKLR**; in that case Mwita, J cited with the approval the Court of Appeal decision in **Judicial Service Commission v Mbalu Mutava & Another [2014] eKLR** where it was held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

The applicant submitted further that the Respondent has a statutory duty to register motor vehicles and in this regard he invoked Section 3 (1) of the Traffic Act, Cap 403 which states that:

(1) The Authority shall be responsible for the registration and licensing of motor vehicles and trailers and for the licensing of drivers, and for the keeping of such records in relation thereto as are required by this Act.

The applicant submitted that the respondent has failed in its statutory duty under this provision of the law. This failure, according to the applicant is manifestly illegal and is also unreasonable.

Counsel for the applicant also cited this court's decision in **Republic v Betting Control and Licensing Board & Another, Ex parte Outdoor Advertising Association of Kenya [2019] eKLR** where it was held as follows:

“a decision is illegal if it contravenes or fails to implement a public duty.”

On the same point, the applicant cited the decision of **Bitange Ndemo-Vs-Director of Public Prosecutions & 4 others 12016] eKLR** and **R Vs Commissioner of Cooperatives ex-parte Kirinyaga Tea Growers Cooperative Savings & Credit Society CA (1999) EALR 245**, where the Court of Appeal held that statutory powers can only be exercised validly if they are exercised reasonably and that no statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith.

Failure by the respondent to register the applicant's vehicle despite all the requisite documents having been availed by the Applicant is, in the applicant opinion, unreasonable and irrational.

Besides being irrational and unreasonable, the applicant urged that the respondent's refusal to register the applicant's motor vehicle was also fraught with procedural impropriety. In particular, he urged that he was not given the opportunity to be heard contrary to section 7 (2) (a) (v) of the Fair Administrative Action Act.

Again, the inaction by the Respondent to undertake its statutory duty, coupled with the refusal to furnish a written decision to the Applicant in its failure to register the motor vehicle are acts or omissions that are contrary to the rules of natural justice.

It was also the applicant's legitimate expectation that the respondent would comply with the law and undertake its statutory duty in the registration of the vehicle. He also legitimately expected that once he presented all the relevant documents, his motor vehicle would be registered. Counsel relied on the Supreme Court decision in **Communications Commission of Kenya & 5 others v Royal Media Services & 5 others, SC Petition Nos. 14, 14A, 14B & 14C of 2014** where it was held that:

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation”

Counsel urged that procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. Accordingly, once the applicant provided the requisite documentation to the Respondent the statutory duty imposed upon the Respondent required of the respondent to act in accordance with that expectation.

While relying on the decision in **Republic v Kenya National Examinations Council Ex parte Gathenji & 8 Others Civil Appeal No. 234 of 1996** counsel urged that the applicant's application merits grant of the order of mandamus.

In response to the applicant's submissions, the respondent urged that the respondent had not made any decision that would be a subject of a suit of the nature that the applicant has brought to court. In any event, so argued the respondent, it has not been demonstrated how the requirement of the entry number from the Kenya Revenue Authority would constitute illegality, irrationality or procedural impropriety.

Although the respondent argued that no decision had been made, still it was argued on its behalf that the simple test used to gauge whether a decision is irrational is whether a reasonable authority properly directing its mind to the law could reach such a decision; in the respondent's view the applicant had not measured to this test.

The respondent denied flouting section 4 of the Traffic Act or acting illegally in any other way. All it required of the plaintiff was an entry number.

In short the learned counsel for the respondent submitted that the applicant is not entitled to the order of mandamus because for the order it to issue, it must command no more than the party against whom it is made is legally bound to perform. Again, where a general duty is imposed, a mandamus cannot require it to be done at once. And where a statute, which imposes a duty and leaves discretion as to the mode of performing the duty in the hands of the party whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way. For this proposition counsel, cited the **Court of Appeal decision in Kenya Examination Council vs- Republic ex parte Geoffrey Gathenji Njoroge & 9 Others.** (supra).

Mandamus is a court order which commands a person or body to perform a public duty. It is a public law remedy. It enforces duties rather than powers though in certain cases a power may be coupled with a duty so that the donee of the power would be obliged to exercise it. **See Foulkes Administrative Law, 7th Edition at Page 368.**

Like the rest of judicial review remedies, the grant of mandamus is in the court's discretion. The availability of an equally convenient, beneficial and effectual remedy would influence the court not to grant it.

As to whether the applicant has the locus standi to apply for this order, the test is that of sufficient interest in the matter to which the application relates. **See IRC versus National Federation of Self-Employed and Small Business Ltd (1982) AC 617.** The way to proceed, according to the House of Lords in this case, is to examine the definition of the duty in question and inquire whether express or by implication the duty gives the applicant the right to complain of its breach or non-performance.

Turning to the applicant's application it is not in dispute that it is the duty of the respondent to register motor vehicles. Section 3(1) of the Traffic Act, makes this quite clear; that the National Transport and Safety Authority *“shall be responsible for the registration and licensing of motor vehicles and trailers and for the licensing of drivers, and for the keeping of such records in relation thereto as are required by this Act.”*

Thus, there is no doubt that the respondent has the legal duty to register vehicles including the applicant's vehicle.

As noted mandamus, is a discretionary remedy and one of the factors which the court will consider in granting or refusing to grant this remedy is the availability of an equally convenient, beneficial and effectual remedy; however, it has not been suggested that such an alternative remedy exists.

Has the applicant demonstrated any for the grounds for grant of this order? What I gather from the applicant is that he presented all the necessary documentation for his vehicle to KRA when it was still tasked with this duty. Somewhere along the line, more particularly in the year 2012, the registration regime changed and the NTSA took over the registration functions from KRA.

It would be irrational, in my humble view, for NTSA to task the applicant to obtain information from KRA for purposes of registration of the applicant's vehicle when the applicant has demonstrated that he complied with all the requirements that were necessary for registration of his vehicle and presented all the documents that were required for that purpose to KRA when the latter was still in charge of registration of motor vehicles. If, perhaps of its new regulations which may not have been applicable at the time KRA was in charge of this task, the respondent required any information that can only be in the custody of the KRA, then it is up to the respondent to obtain this information

from KRA. Such an obligation cannot be imposed upon the respondent.

Of course, the circumstances would be different if the registration process begun after the NTSA had taken over this statutory duty; in that event, the applicant would be enjoined to comply with the rules and regulations, including such rules or regulations that were previously not applicable prior to the establishment of the NTSA.

For this same reason, I would conclude that the respondent's failure to register the applicant's vehicle smacks of procedural impropriety. To refuse to register the applicant's vehicle when the information the respondent is seeking for the registration is within the custody of a public authority it succeeded in undertaking certain functions and which, because of this very fact, it could have easily obtained from its predecessor and instead burden the applicant with task of getting this information is unreasonable or, to be precise, procedurally improper.

One would suppose that KRA would have been a necessary and proper party to these proceedings, at the very least, to respond to the respondent's claim and generally state its position as far as the applicant's application for registration of his motor vehicle is concerned; indeed, the applicant had sued it but the record shows that it was 'discharged' from the proceedings on 25 September 2018.

Nevertheless, I would also agree with the applicant that once the NTSA took over the functions of registration of motor vehicles after he had lodged his application for such an application with KRA, it was his legitimate expectation that the vehicle would be registered in accordance with section 3(1) of the Traffic Act.

In the final analysis, I find the applicant's application to be meritorious and the applicant deserves the order of mandamus in terms of prayer (1) of his application. Accordingly, the order of mandamus is hereby made against the respondent compelling him to register the respondent's motor vehicle chassis number MC217KFR151110912 as prayed. The applicant shall also have costs of the suit. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 5TH MARCH 2021.

Ngaah Jairus

JUDGE