REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 127 OF 2019

REPUBLIC.....APPLICANT

AND

THE OCS, NAIROBI CENTRAL POLICE STATION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2NDRESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

SIXTUS GITONGA MUGO.....*EX PARTE* APPLICANT

JUDGMENT

The Parties

1. The applicant is a male adult Kenyan residing in Nairobi.

2. The first Respondent is the OCS, Nairobi Central Police Station, a police officer within the meaning of section **2** of the National Police Service Act.[1]

3. The second Respondent is the Inspector General of Police, an office established under Article **245 (1)** of the Constitution. Pursuant to Article **245(2)** of the Constitution, the Inspector-General— (a) is appointed by the President with the approval of Parliament; and (b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

4. The third Respondent is the Hon. Attorney General. Under Article **156(4)** of the Constitution, the Hon. Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President.

The grounds relied upon

5. The applicant states that he is the registered owner of motor vehicle **KBA 241H**, Toyota Station Wagon having purchased it from a one Mr. Benson Murigu Ngari for **Kshs. 600,000 /=** vide a sale agreement dated 11th September, 2017 and it was transferred to him. He states that he used it until 13th September, 2018, when police officers impounded it claiming that it was subject to investigations. He states that on 13th September, 2018, he presented the vehicle and himself to the Nairobi DCI Regional Headquarters and since then it has remained in police custody.

6. He states that the vehicle underwent tape-lifting searches twice, and that the first one done on 14th September, 2018 resulted in **MCU35-0024230** while the second one done on 14th January, 2019 resulted in **MCU10-303438** despite both procedures being done by the same officer. He also states that despite presenting himself and Mr. Benson Murigu Ngari who sold him the vehicle to the police on numerous occasions, no arrest or action has been taken, and, that, the motor vehicle has been in police custody for over six months which is an

unreasonable period for investigation.

7. He also states that the police detained the vehicle without a court order in contravention of sections **118** and **121** of the Criminal Procedure Act,[2] and that the arbitrary detention of the vehicle without any prosecution is intended to achieve an ulterior purpose in an abuse due process and a departure from the rules of natural justice. He states that he is apprehensive that the 1st and 2nd Respondents will maliciously arrest him or Mr. Benson Murigu Ngari on tramped up charges to justify the continued detention of the motor vehicle in an attempt to vex him to bribe them to secure the release of the vehicle. He states that the 1st and 2nd respondents have abused their power, and acted in bad faith, and maliciously. He also states that the impugned decision contravenes his legitimate expectation, his right to own property under Article **40** of the Constitution and his rights to a fair administrative action under Article **47**.

The reliefs sought

8. The applicant seeks the following orders:-

> ***a. THAT*** *an order of MANDAMUS do issue to compel the 1st and 2nd* Respondents to forthwith and unconditionally release motor vehicle registration number **KBA 241 H** which is unlawfully detained at Nairobi Central Police Station.
>
> **b. THAT** an order of PROHIBITION do issue to prohibit the Respondents from maliciously and without any reasonable cause as herein detaining, arresting, grounding and/or interfering with the Ex-Parte Applicant's ownership and/or possession of motor vehicle registration number **KBA 241H** without any justifiable cause.
>
> **c. THAT** *the costs of the suit be provided.*

First and second respondent's replying affidavit

9. Felix Kintosi, a police officer attached to DCI Central Nairobi, the investigating officer in the case swore the Replying affidavit dated 28th October 2019. He deposed that the applicant's application is pre-mature, misconceived and abuse of court process and that the applicant is economical with the truth on the circumstances which led to the detention of the vehicle.

10. He averred that on 28th September 2018, a one Peter Macharia Kamau, the CEO of Jijenge Credit made a report at the Central Police Station to the effect that a one John Weru took a loan from his company using his motor vehicle registration number **KBQ 611E** as security. He deposed that the said Mr. Weru defaulted in repayment alleging that his vehicle had been stolen. As a result, the said Peter Macharia Kamau sought help from the police to recover his money and or car that was used as security. He deposed that on 9th October 2018, the said Peter Macharia Kamau wrote a statement at the Nairobi Central Police Station stating that he had learnt that most of the information given by Mr. John Weru was untrue and that Mr.Weru had removed the tracking device installed in the car making it impossible to track the vehicle.

11. He averred that on 13th September 2018, police officers from the Flying Squad Nairobi while at Kayole intercepted a Motor Vehicle Toyota Harrier Registration number **KBA 231H** on suspicion of being stolen. He deposed that the registration number and the body did not match because the vehicle looked new while the number was for an older model. He deposed that the officers did an online search for the said vehicle which indicated that the vehicle had been imported by Anas Motors Limited and transferred to Vincent wa Kayanda, and upon calling Mr. wa Kayanda he confirmed that he bought the vehicle from Anas Motors Limited in 2008, but, they had since sold it to a one Mr. Mohamed Duba Galgalo. He averred that the said Galgalo confirmed having bought the vehicle but he had not transferred into his name because he intended to sell it.

12. He deposed that upon confirming the existence of two vehicles with similar registration numbers, he travelled to Mombasa to take photographs of the said vehicle and to do tape lifting and verification. He also recorded statements from Mr. Wa Kayanda and Mr. Galgalo. He averred that tape lifting confirmed that the chassis and engine numbers were original and had not been tempered with.

13. Mr. Kintosi averred that tape lifting on the vehicle allegedly belonging to the applicant established that the chassis and engine numbers did not conform to the manufacturers standards. He deposed that the chassis number had been re-stumped giving the current number, and, upon restoration, it was established that the original chassis number was **MCU35-0024230** which matched that of the stolen vehicle **KBQ 611 E.** Mr. Kintosi further averred that upon carrying out an online search, it was discovered that the chassis number **MCU35-0024230** belonged to John Weru Kunyua and Jijenge Credit Ltd, the same vehicle that had been reported stolen and was now in possession of the applicant.

14. He deposed that the vehicle history of chassis number **MCU10-0064629** indicates that it was first imported by Anas Motors Ltd then transferred to Vincent Wa Kayanda, then registered in the applicant's name and later transferred to Benson Ngari. He deposed that they established that there was no nexus between Mr. Vincent Wa Kayanda and the applicant or between Mohamed Duba Galgalo and the applicant. Mr. Kintosi averred that it is not known how the applicant became the owner of the vehicle yet he did not buy the vehicle from Vincent Wa Kayanda or Mohamed Duba. He averred that the applicant should provide information on who sold the vehicle to him. He deposed that despite requests the applicant has refused to avail the original log book for the vehicle.

15. He also averred that the genuine motor vehicle registration number **KBA 241H** is currently at Mombasa with its rightful owner. He averred that the vehicle held by the police bears the same registration number **KBA 241H**, hence, the applicant, together with the said John Weru and Benson Ngari are persons of interest and once investigations are over, necessary legal action will be taken against him. In the circumstances, he deposed that the vehicle cannot be released because investigations are still underway and in the event of charges being preferred against the said persons, the vehicle will be used as an exhibit.

Applicant's advocates submissions

16. Mr. Aguko, counsel for the applicant submitted that the first and second Respondents acted irrationally, illegally and or unreasonably and violated the principles of fair administrative action. He argued that Article **40** of the Constitution guarantees every person the right to own property of any description in any part of Kenya and argued that it has been demonstrated that the vehicle belongs to the *ex-parte* applicant. He argued that the arbitrary detention/ impounding of the vehicle is founded on malice and has no legal basis. He argued that since 4th September, 2018 no complaint has been shown to the applicant, no statements been recorded, no arrests have been made and no charges have been preferred against him.

17. He submitted that the continued detention of the motor vehicle offends the applicant's right to fair administrative action. He also argued that no reasons have been provided or an opportunity to defend himself, nor did the police obtain a court order allowing them to impound the motor vehicle. He argued that the police acted in excess of their statutory powers and cited *Republic v Inspector General of Police Exparte Kennedy Ngeru Irungu*[3] for the holding that the Police have no discretionary power to impound or detain a motor vehicle, hence the police are using the criminal process to intimidate the applicant to bribe them to get back his motor vehicle.

18. Mr. Aguko cited *Vincent Kibiego Saina v the Attorney-General*[4] in support of the proposition that the court intervenes and stops a prosecution when there is an illegal, unfair or oppressive exercise of power. He argued that the police acted *ultra vires* and in violation of the rules of natural justice. He submitted that the applicant has satisfied the tests set out in *Kenya National Examinations Council v Republic*[5] for the grant of the orders of *prohibition*, *certiorari* and *mandamus* which issue when a body has acts in excess of jurisdiction. He submitted that the applicant has demonstrated that the decision is unfair, irrational, illegal, *ultra-vires*, malicious and unreasonable, hence, the case meets the tests set out in *Council of Civil Unions v Minister for the Civil Service*[6] and *Re Application by Bukoba Gymkhana Club.*[7] He argued that the continued detention of the vehicle is unreasonable.

19. He argued that the vehicle was detained on 14th September, 2018, yet the report was made on 9th October, 2018, which shows malice and added that the arbitrary detention of his motor vehicle without a court order is unfair, unreasonable, un-procedural, discriminative and against his legitimate expectation that his property should not be taken away from him without a just cause and without due regard to the law. He cited section **7(2)** of the Fair Administrative Action Act[8] (herein after referred to as the FAA Act) and argued that an administrative decision can be reviewed if the decision was taken with an ulterior motive. He also cited *Republic v Public Procurement Administrative Review Board & another Ex-Parte SGS Kenya Limited* [9] for the proposition that judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. He argued that the applicant was denied the opportunity to demonstrate that he owns the vehicle in breach of Article **47** and section **7(2)(a) (v)** of the FAA Act. He relied on *Halsbury's Laws of England*[10] which states that the rule that no person is to be condemned without prior notice of the allegations against him and a fair opportunity to be heard is a fundamental principle of justice.

20. He also cited *Onyango Oloo v Attorney General*[11] which held that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and that there is a presumption in the interpretation of statutes that rules of natural justice will apply. He also relied on *Republic v Kenya Airports Authority Ex-Parte Seo & Sons Limited* [12] which held that provided that a party is <u>not</u> granted an opportunity to be heard prior to the making a decision, the decision would be quashed without looking into whether it was right or wrong. He argued that the Respondent ought at least to have recorded the applicant's statement and cited *Simon Gakuo v Kenyatta University & 2 Others*[13] which held that the right to be heard should not be construed to mean full hearing or anything close to a court room situation.

21. Mr. Aguko's submitted that detaining the vehicle for two years without recording the applicant's statement is unreasonable and cited *Republic v The Honourable the Chief Justice of Kenya & others Ex parte Moijo Ole Keiwua*[14] which held that the principle of natural justice applies where ordinary people would reasonably expect those making decisions that will affect others will act fairly and urged the court to review the decision.

22. Additionally, Mr. Aguko argued that the failure to act expeditiously is a violation of the applicant's right to legitimate expectation. He cited *Halsbury's Laws of England*[15] which states that "a person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice."

12. He relied on *Constitutional and Administrative Law: Text with material*[16] which states that:-

> "Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment."

24. He argued that the impugned decision offends section **7 (2) (m)** of the FAA Act and argued that this case meets the criteria set out in *Municipal Council of Mombasa v Republic &another*[17] because the applicant is challenging the decision making process, not with merits. He argued that the applicant has demonstrated that the decision is unjustified as it falls short of Article **47** of the Constitution as read together with Section **4** of the FAA Act and is therefore reviewable under Sections **7(2) (a) (v), (c), (e), (f), (h), (k), and (m) and (n)** of the FAA Act. He cited *Russel v Duke of Norfork*[18] for the proposition that the requirements of natural justice must depend on circumstances of the case, the

inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. He also relied on the tests laid down in *Council of Civil Unions v Minister for the Civil Service*[19] and *Re Application by Bukoba Gymkhana Club*[20] and *Kenya National Examinations Council v Republic.*[21] He also relied on *Mirugi Kariuki v Attorney General*[22] *Republic vs. National Transport & Safety Authority & 10 others Ex parte James Maina Mugo*[23] in support of his argument that the applicant has established that the Respondent acted in excess of jurisdiction. He relied on *Republic v Inspector General of Police Exparte Kennedy Ngeru Irungu* [24] to support his argument that the police have no discretionary power to impound or detain the vehicle.

25. On the question of costs, he cited section **27** of the Civil Procedure Act[25] and *Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others*[26] and *Republic v Communication Authority of Kenya and another ex – parte Legal Advice Centre aka Kituo Cha Sheria*[27] in support of the proposition that awarding of costs is not meant to penalize the losing party but is a means for the successful litigant to recoup the expenses he has been put in fighting an action and that the court is required to consider the circumstances which led to the filing of the case.

Respondent's Advocates submissions

26. Miss Nyakora cited the mandate of the police under section **24** of the National Police Service[28] and argued that the police acted within their mandate. She argued that the applicant was not able to explain or provide documentation to prove ownership of the vehicle and that the applicant has not been cooperating with the police. She argued that the applicant refused to provide the police with his original log book. Miss Nyakora argued that the orders sought are unconstitutional to the extent they seek to prevent the police from doing their work. She argued that the vehicle cannot be released to the applicant because the police are yet to complete their investigations. Additionally, she argued that the applicant ought to have filed a civil suit. She cited *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & others*[29] for the holding that if the complaint is that the duty has not been performed according to the law, then *mandamus* is the wrong remedy because like an order or *prohibition*, an order of *mandamus* cannot quash what has already been done.

27. She cited *Prabhul Gulbchand Shah v Attorney General & Erastus Gathoni Miano*[30] for the proposition that a person seeking *mandamus* must show that there resides in him a legal right to performance of a legal duty by a party against whom the *mandamus* is sought. She also cited *Republic v Inspector General of Police & another ex parte Solomon Kingora*[31] which held that for an order of *mandamus* to issue, the applicant must satisfy the court that the Respondent has a legal duty whether statutorily or at common law which he expects the Respondent to fulfil and the Respondent has failed to do so.

28. Additionally, counsel cited *Rumba Kinuthia v Inspector General of Police & another*[32] which emphasized that judicial review is concerned with the decision making process. She relied on *Republic v OCS Parklands Police Station & 2 others ex parte Miriam Wanjiru Kinyua*[33] where the court dismissed a similar application on grounds that the question of ownership of the vehicle touches on the merits of the case and it required the court to take oral evidence which is outside the province of judicial review. Lastly, Miss Nyakora argued that an order of prohibition is available where a body acts in excess of its powers.

Determination

29. First, I will address the question whether the first and second Respondents acted ultra *vires* their statutory mandate. The starting point is that public bodies may only do what the law empowers them to do. That is the essence of the principle of legality, which is enshrined in our constitution. The Respondents' actions must conform to the doctrine of legality which requires that power should have a source in law whenever it is exercised. Public power can be validly exercised only if it is clearly sourced in law.34

30. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. When exercising this power, the courts are enforcing the rule of law, by requiring public bodies to act within the ''four corners'' of their powers. They act as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. And where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.35One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. It follows that when the legality of a decision is challenged, a court first determines whether, through the application of all legitimate interpretive aids,36 the impugned decision is capable of being read in a manner that complies with the mandate conferred by the enabling statute.

31. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.37 The often quoted dissenting judgment of **Schreiner JA** eloquently articulates the importance of context in statutory interpretation:-

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."[38]

32. A contextual or purposive reading of a statute must remain faithful to the actual wording of the statute. Context is everything in law. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. The words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: - **(a)** that statutory provisions should always be interpreted purposively; **(b)** the relevant statutory provision must be properly contextualised; and **(c)** all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related

to the purposive approach referred to in **(a)**.39

33. The core issue is whether the impugned decision is *ultra vires*. It is useful to recall the classic judicial pronouncement on the doctrine of *ultra vires* in *Council of Civil Service Unions v. Minister for the Civil Service40* in which Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision *ultra vires*. These grounds are; *illegality*, *irrationality* and *procedural impropriety*.

34. Later judicial decisions incorporated a fourth ground to Lord Diplock's classification, i.e.; *proportionality*.41What Lord Diplock meant by *"Illegality"* was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it as *"unreasonableness"* in *Wednesbury* sense.42 By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

35. The role of the court in such cases was well stated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*43where it was held that once a Judicial Review court fails to sniff any *illegality*, *irrationality* or *procedural impropriety*, it should down its tools. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature. In such a case, a court will not interfere with the decision.

36. Illegality is divided into two categories. Those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

37. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

38. It is also important to mention that under Article **245 (4)** of the Constitution- no person may give direction to the Inspector General with respect to: - **(a)** the investigation of any offence or offences, and **(b)** the enforcement of the law against any particular person or persons These provisions are aimed at ensuring that investigations are undertaken independently.

39. This Article is to be read together with section **24** of the *National Police Service Act*[44] which provides:-

> 24. The functions of the Kenya Police Service shall be the— **(a) provision of assistance to the public when in need; (b) maintenance of law and order; (c) preservation of peace; (d) protection of life and property; (e) investigation of crimes; (f) collection of criminal intelligence; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged; and (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.**

40. Interestingly, none of the parties addressed his/her mind on the above provisions despite the fact that the core issue in this case is a direct invitation to this court to examine the mandate of the National Police Service. It is also an invitation to the court to restate the circumstances under which the High Court in exercise of its vast jurisdiction conferred upon it by the Constitution can halt, stop, prohibit or quash police investigation. It is common ground that the Inspector General of Police is a constitutional office which plays a vital role in the detection, prevention and investigation of crime and generally in the administration of justice in criminal matters. The Constitution vests the Inspector General with the sole authority, power and responsibility to investigate any offence or offences.

41. It is also true that individuals involved in a crime – the victim, the suspect, and the witnesses

> – as well as society as a whole have an interest in the decision whether to investigate offence and the outcome of the investigation. In short, the proper and effective administration of the criminal justice system is a matter of great public interest. A failure to investigate an offence once reported is itself an affront to the above constitutional and statutory duty.

42. There are general principles, which should underlie the approach to investigations. The police must at all times uphold the rule of law, the integrity of the criminal justice system and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

43. The primary duty of the police is to seek justice within the bounds of the law, not merely to seek prosecution. The police serve the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances. The police are required to protect the innocent and to seek prosecution of the culpable, and to consider the interests of victims and witnesses.

44. The decision to investigate is of great importance. It can have the most far-reaching consequences for an individual. A wrong decision to investigate or conversely, a wrong decision not to investigate, both tend to undermine the confidence of the community in the criminal justice system. For victims, a decision not to investigate can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the investigations receive careful consideration.

45. A failure by the police to investigate crime once reported is itself an affront to their statutory and constitutional mandate. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to stop an investigation if the court is of the opinion that to allow it to continue would amount to an abuse of the process or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the investigations that the court should not allow an investigator to proceed with the investigations. Whether an investigation is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case. This court can only intervene if there are cogent allegations of violation of constitutional rights; or threat to violation of the Rights; or in clear circumstances where it is evident that the suspect will not be afforded a fair treatment; or where the investigation is commenced without a factual basis.

46. The inherent jurisdiction of the court to stop an investigation to prevent an abuse of process is to be exercised only in exceptional circumstances. The essential focus of the doctrine is on preventing unfairness at the investigation stage through which the accused is prejudiced or where there is clear breach of fundamental rights. The high court will only prohibit or quash investigations in cases where it would be impossible to accord a suspect fair treatment.

47. A criminal investigation can be stopped if it was commenced in the absence of proper factual foundation. The enquiry is whether there has been an irregularity or an illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a police investigation to be initiated or conducted. Fairness entails the interests of the suspect, the complainant and of the society.

48. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *certiorari, prohibition* and *mandamus* are a device to advance justice and not to frustrate it. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that exercise of powers ought not to be permitted to degenerate into a weapon of harassment or persecution. The High Court's inherent powers to quash, stay or prohibit criminal investigations are wide as they imply the exoneration of the suspect even before the prosecution begins. Noting the amplitude of these powers and the consequences, which they carry, the Supreme Court of India45 revisited the law on the issue and held that *'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.'*

49. The initial consideration in the exercise of the discretion to investigate is whether the complaint is sufficient to justify the investigations. This is a decision constitutionally vested on the police. The police are mandated to evaluate the complaint, investigate and then forward the file to the DPP who evaluates the evidence and decides whether or not to prosecute. The police acted on a complaint and undertook investigations which led them to Mombasa among other places. What emerges is that the vehicle the subject of these proceedings has several unanswered questions revolving on the genuineness of its registration, Chassis and Engine numbers. Because the investigations are still ongoing, I am careful not to say more. It has been said that whereas the vehicle traced at Mombasa has a clear history right from its importation to its current owner, there is a missing link between the vehicle's original owners and the applicant. Valid questions have been raised on the genuineness of the registration, chassis and engine numbers. It has also been said that the applicant filed to avail his original log book. These missing dots are the subject of the ongoing investigations.

50. The *ex parte* applicant has not presented any material to demonstrate that there was no factual basis to justify the investigations. As stated earlier, it is not the function of this court to weigh the veracity of the complaint. The DPP will at the appropriate time make a decision whether or not to prefer the charges. In my view, police investigations should be commenced or continued if there is admissible, substantial and reliable complaint that a criminal offence known to the law has been committed by the suspect. It has not been established that the complaint presented to the police does not disclose an offence known to the law.

51. I find that there is nothing to show that the investigation is unfair or abuse of police powers. There is no material before me to demonstrate that the investigation has no proper factual foundation. It has not been demonstrated that the investigation will be conducted or is being undertaken without due regard to traditional considerations of candour, fairness, and justice, nor has it been shown that the investigations is being conducted or will be conducted in a manner different from what is prescribed under the law. It follows that the attack on the police investigations bases on *ultra vires* collapses.

52. I now transit to the next issue, namely, whether the applicant has established any grounds for the vehicle to be released to him. The Respondents' case is that investigations are ongoing and that once complete persons of interest including the applicant may be charged, hence, the vehicle will be used as an exhibit.

53. Evidence seized for use as exhibits in criminal proceedings is generally held by the police or prosecuting authority until the time when it is formally introduced into evidence during the trial of an accused person. Such evidence is then considered to be *custodia legis* or in custody of the court until the final disposition of the case either by the lower court or where an appeal is preferred by the final appellate court. It follows that the order seeking release of the vehicle is not available.

54. The applicants counsel also argued that the applicant's rights under Article **47** of the Constitution have been violated. In addition, he argued that the right to natural justice and the right to be heard contrary to the right to a fair administrative action were violated.

55. The question as I see it is whether the decision suffers from procedural impropriety. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

56. The term *procedural impropriety* was used by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*46 to explain that a public authority could be acting *ultra vires* if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.47

57. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.48 Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.49

58. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness," have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.50 That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it. A decision contrary to natural justice is where the decision maker, or the presiding Judge or Magistrate or Tribunal denies an affected person some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court, or where he refuses to allow a witness to be cross-examined, or cases of that kind.51

59. Section **4** of the FAA Act re-echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

60. Subsection **4** of the FAA Act further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. The right of a person to defend himself in the face of a decision potentially affecting his rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness.

61. Whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's *Judicial Review of Administrative Action*, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."52

62. However, the standards of fairness are not immutable. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.53 The courts look at all the circumstances of the case to determine how the demands of fairness should be met.54 The foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used

> "fairness" as an explanation of other grounds of review. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

63. In this regard, the Court of Appeal decision in *J.S.C. v Mbalu Mutava*55 may usefully be cited. It succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50(1) (2)**. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.56 It further held that fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.

64. Applying the above principles to the facts and circumstances of this case, it will be recalled that the nature of the decision is a police investigation. The applicant was notified the reasons why the vehicle was impounded. He is aware that the log book, the chassis number and engine number are under investigation as far as their genuineness is concerned. He has been asked to avail the original log book, and it has been said he refused. A police investigation is not a trial or disciplinary process which require allegations to be supplied. The outcome of the investigations determines whether or not the police will hand over the file to the DPP for further action. Clearly, cases are context sensitive. The applicant has deliberately misapplied the provisions of Article 47 and the FAA Act into the circumstances of this case.

65. Police investigations are not a court room trial nor are they disciplinary proceedings. The applicant should await the decision whether or not to prosecute him and tender his defence in court. The argument that the police have taken long to investigate is attractive. However, the period of police investigations depends on various factors among the nature of the case, the expansive areas and places to be covered by the investigators, the need for the suspect to cooperate only to mention but some. I do not think the six months is unreasonable considering the areas so far covered in the investigations which as the material before me shows has led investigators to as far as Mombasa and Meru and Nairobi.

66. Lastly, the applicant alleged violation of his right to legitimate expectation. In resolving this issue, I find it fit to explain that a procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First,* it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second,* if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

67. The first step in the analysis has both an objective and a subjective dimension. *First,* it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.57 Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

68. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.58 These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

69. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. The doctrine cannot operate against clear provisions of the law and that it must be devoid of relevant qualification.

70. I have already held that the impugned decision does not suffer from procedural impropriety. I also held that the alleged violation of section **4** of the FAA Act and Article **47** rights has not been proved. There is nothing to show the tests for legitimate expectation discussed above have been demonstrated. Accordingly, applying the tests discussed above to this case, I find and hold that the argument that the applicant's right to legitimate expectation has been violated collapses.

Conclusion

71. It's common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to

58. 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65. expect the duty to be performed.59 *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. The applicant is a suspect under police investigation. Investigation is a lawful process and the court cannot stop a lawful process.

72. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. It is in public interest that crime be investigated. It is also in public interest that the innocent should not be punished. This court cannot exercise its discretion and stop lawful investigations or order the release of exhibits before investigations are completed.

73. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as *Certiorari* are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash an investigation or criminal proceeding if it comes to the conclusion that allowing the investigations or criminal proceedings to continue would be an abuse of the court or that the ends of justice require that the investigations or criminal proceedings ought to be quashed. This test has not been satisfied. Similarly, *Mandamus* will only issue to compel clear performance of a legal duty where there is wilful refusal to perform such a duty.

74. The applicant also seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the first Respondents acted illegally or in excess of their powers.

75. I need not add that the Constitution establishes the office of the Inspector General and confers powers upon him to undertake investigations. This position is replicated in Section **24** of the National Police Service Act. Just like the constitutionally guaranteed independence of other bodies created by the Constitution, the above provisions are aimed at ensuring that investigations are undertaken independently. The powers of the police are expressly provided under section **24** of the National Police Service Act.60The impounding of the vehicle was done in a manner that is consistent with the law. A fair and effective police investigation is essential to a properly functioning criminal justice system and to the maintenance of law and order.

76. I have carefully analyzed the material presented before me. There is nothing to suggest that the first and second Respondents acted carelessly, maliciously or abused their powers. The applicant has not demonstrated that there was no factual basis to justify the seizure of the exhibits. There is nothing to show that the exhibits do not form part of the intended prosecution evidence. As stated earlier, it is not the

function of this court to weigh the veracity of the evidence or to assess which exhibits are relevant to the investigations. That would amount to this court descending into the arena of the trial court. An investigation should be commenced or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by a suspect. It has not been established that the facts presented in this case do not disclose an offence known to the law.

77. The Constitutional provision in Article **245 (4) (a) (b)** of the Constitution ensures that the inspector General of Police has complete independence while undertaking investigations. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the Inspector General of Police unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute. No evidence has been tendered to show that the first and second Respondents abused their discretion or powers under the Constitution or the enabling statute.

78. Applying the legal tests discussed herein above to the facts of this case, I find and hold that the applicant has failed to establish any grounds for the court to grant the judicial review orders of *mandamus* and *prohibition.* The conclusion becomes irresistible that the applicant's Notice of Motion dated **2nd** May 2019 lacks merits both in law and in substance. Accordingly, I hereby dismiss the applicant's Notice of Motion dated **2nd** May 2020 with costs to the first and second Respondents.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 8th day of April 2020

John M. Mativo

Judge

[1]Act No. 11A of 2011.

[2]Cap 75, Laws of Kenya.

[3]{2016} e KLR

[4] High Court Misc Civil Application No. 839 and 1038 of 1999.

[5]Court of Appeal at Nairobi, Civil Appeal No. 266 of 1996,

[6]{1985} AC 2.

[7]{1963} EA 478 at 479.

[8]Act No. 4 of 2015.

[9]{2017} e KLR

[10] 5th Edn. Vol. 61 page 539 at para 639. [11]{1986-1989} E A 456

[12]{2018} e KLR

[13]Miscellaneous Civil Application 34/2009

[14]Nairobi HCMA No 1298 of 2004.

[15]4th Edition, Vol. 1 (1) at page 151, paragraph 81

[16]Pollard, Parpworth and Hughes, 4th edition, at page 583.

[17]{2002} e KLR

[18]{1949} 1 ALL ER at 118

[19]{1985} A C 2.

[20]{1963} EA 478 at 479.

[21]Civil Appeal No. 266 of 1996.

[22]Court of Appeal at Nairobi, Civil Appeal No. 70 of 1991.

[23]{2015} e KLR.

[24]{2016} e KLR.

[25]Cap 21, Laws of Kenya.

[26]{2014} e KLR.

[27]{2015} e KLR

[28] Act No. 11A of 2011.

[29]{1997} e KLR.

[30]Civil Appeal No. 24 of 1985.

[31]{2018} e KLR.

[32]{2014} e KLR.

[33]{2019} e KLR.

[34]AAA Investments (Pty) Ltd v Micro Finance Regulatory Council {2006} ZACC 9; 2007 (1) SA 343 (CC).

[35]Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[36]*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[37]Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[38]University of Cape Town vs Cape Bar Council and Another 1986 (4) SA 903 (AD). See also Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662-3.

[39]*Cool Ideas 1186 CC vs Hubbard and Another* {2014} ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (Cool Ideas) at para 28.

[40]{1985} AC 374.

[41]See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[42]*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[43]{2015} eKLR.

[44]Act No. 11A of 2011.

[45]See *Maharashtra vs Arun Gulab Gawali*.

[46]*Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, *[1985]* 1 A.C. 374, House of Lords (UK).

[47]Ibid.

[48]Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: *Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.*

[49]Supra, note 18.

[50]David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[51](1897) 18 N.S.W.R. 282, 288 (S.C.).

[52] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[53]See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[54]See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[55]{2015}eKLR

[56]Ibid.

[57]Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

[58]2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA) at paragraph 65

[59]See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[60]Act No. 11A of 2011.