



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 213 OF 2018

In the matter of an Application by Miriam Wanjiru Kinyua for Judicial Review orders of *Mandamus*

and

In the matter of order 53 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act and the Constitution of the Republic of Kenya

and

In the matter of unlawful detention of Motor Vehicle Registration No. KCC 377 W at Parklands Police Station

BETWEEN

Republic.....Applicant

versus

The O.C.S, Parklands Police Station.....1st Respondent

The Inspector General of Police.....2nd Respondent

The Honourable Attorney General.....2nd Respondent

and

Miriam Wanjiru Kinyua.....*Ex parte* Applicant

JUDGMENT

Introduction.

1. Pursuant this court's leave granted on 28th May 2018, the *ex parte* applicant moved this court by way of Notice of Motion dated 6th June 2018 expressed under the provisions of Order 53 Rule 1 of the Civil Procedure Rules, 2010, seeking:-

- a. An order of *Mandamus* to compel the first and second Respondent to forthwith and unconditionally release motor vehicle registration number **KCC 377 W** which is unlawfully detained at Parklands Police Station.
- b. An order that the leave granted herein do operate as an injunction restraining the Respondents from removing motor vehicle registration number **KCC 377 W** from Parklands Police Station, alienating, disposing and/or in any manner dealing with motor vehicle in a manner likely to adversely affect the applicant's interest thereto.
- c. That the costs of this application be paid by the Respondents.

Grounds in support of the application.

2. The core grounds relied upon are that the applicant is the beneficial and registered owner of motor vehicle registration number **KCC 377 W**. She states that the vehicle is unlawfully detained at Parklands Police Station. Further, she avers that on or about **1st September 2017**, the vehicle was being used by her authorized driver, and, while parked at Sarit Centre in Nairobi it was unlawfully towed and or driven away to Parklands Police Station where it has been unlawfully detained to date. She also states that no one has ever been charged with a criminal offence in relation to the motor vehicle nor is it part of any ongoing investigations. Lastly, she states that the vehicle is not subject to any pending or concluded civil proceedings nor is there any existing court order allowing its detention.

The Respondents' Replying Affidavit.

3. In opposition to the application, **Maurice Chemesis**, a Criminal Investigations Officer at Parklands Police Station swore the Replying Affidavit dated **5th October 2018**. He described the application as misconceived, premature, mischievous, frivolous, scandalous, vexatious and an abuse of the court process. He averred that the *ex parte* applicant is being economical with the truth with regard to the circumstances that led to the detention of the vehicle. He averred that on **5th September 2017** at about **15.30** hours, the *ex parte* applicant came to Parklands Police Station and recorded a statement stating that on **31st August 2017**, she went for shopping at Sarit Centre accompanied by her husband, a one **Kevin Udo Sievers** and their son **Aiden Sievers** aged three years and nine months. He annexed a copy of her statement to his Affidavit. He averred that she stated that as they approached their car after doing the shopping, they found a vehicle parked behind their car and three men standing outside the vehicle. He averred that the men confronted her husband claiming that they were immigration officers and that they wanted him to accompany them to their offices to verify his immigration documents.

4. He averred that in the said statement she stated that the men bundled him into a Motor Vehicle Registration Number **KCL 275A** and forced her to accompany him but on reaching Spring Valley, the vehicle stopped and her husband was transferred into another vehicle, a white probbox leaving her with a female police officer and her male counterpart while the husband was whisked away to an unknown destination. He also averred that after being taken around various places, she was dropped near her home at lower Kabete at around **9.30pm** and the following day (**1st September 2017**) she reported the matter at the Spring Valley Police Station where she was referred to Parklands Police Station.

5. **Mr. Chemesis** further averred that she stated her numerous calls to her husband went unanswered, then her lawyer advised her to make a report of a missing person. He further averred that she stated in her statement that on her way to the Police Station, she saw her vehicle still parked at the Sarit Centre, and, that, she gave the information to Inspector Susan of Parklands Police Station. Further, she averred that on **5th October 2017**, the *ex parte* applicant brought the car's spare key and the vehicle was driven to Parklands Police Station where it was detained.

6. Additionally, he also averred that at the police station the *ex parte* applicant stated that the vehicle was registered in her name, but despite being asked to avail ownership documents she failed to do so. Further, he averred that a search conducted on **6th September 2017** revealed that the vehicle's registered owner was a one **Claudio Fuscolo**. Also, he averred that she emerged after a month with copy of records indicating that she was the owner of the vehicle, but, a search at KRA revealed that the log book was dated **21st September 2017** long after the vehicle's detention.

7. **Mr. Chemesis** also averred that his letters to the National Transport Authority to verify the ownership of the vehicle are yet to be replied, hence, the reason for vehicle's detention pending investigations. Further, he averred that the ownership of the vehicle is a contentious issue.

Issues for determination.

8. Upon analysing the opposing facts presented by the parties, I find that only one issue falls for determination, namely:- **(a) Whether the ex parte applicant has established any grounds for the court to grant the Judicial Review Order of Mandamus.**

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9. The *ex parte* applicant's counsel **M/s Apollot** adopted the grounds stated in the application, the supporting Affidavit and the statutory statement and submitted that the detention of the vehicle is unfair. She urged the court to grant the orders sought.

10. **Miss Nyakora**, the Respondent's counsel argued that Judicial Review deals with the legality of the process and not the decision. She submitted that Judicial Review considers the legality of a decision and whether the decision maker had the jurisdiction. To buttress her argument, she cited *Pastoli v Kabale District Local Council and Others*^[1] in which the court held that in order to succeed in Judicial Review, the applicant must demonstrate that the decision is tainted with illegality.

11. She further cited the Functions of the Police under the National Police Service Act^[2] which include powers to investigate crime including detaining the vehicle. Additionally, she argued that the issues raised in this case require oral evidence which is outside the purview of Judicial Review.

12. It is 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 expect the duty to be performed.^[3] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.^[4]

13. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**^[5]

14. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

15. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *Mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,^[6] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[7] The eight factors that must be present for the writ to issue are:-

- (i) *There must be a public legal duty to act;*
- (ii) *The duty must be owed to the Applicants;*
- (iii) *There must be a clear right to the performance of that duty, meaning that:*
 - a. *The Applicants have satisfied all conditions precedent; and*
 - b. *There must have been:*
 - I. *A prior demand for performance;*
 - II. *A reasonable time to comply with the demand, unless there was outright refusal; and*
 - III. *An express refusal, or an implied refusal through unreasonable delay;*
- (iv) *No other adequate remedy is available to the Applicants;*
- (v) *The Order sought must be of some practical value or effect;*
- (vi) *There is no equitable bar to the relief sought;*
- (vii) *On a balance of convenience, mandamus should lie.*

16. It is imperative that the above tests must be satisfied before an order of *mandamus* can issue. For *Mandamus* to issue, there must be a public legal duty to act and the duty must be owed to the Applicant. There must be a clear right to the performance of that duty, meaning that the Applicant has satisfied all conditions precedent. There must have been a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay.

17. The question that begs for an answer is whether the *ex parte* applicant has demonstrated the existence of the legal duty to act. The Respondent's counsel has invoked the provisions of the National Police Service Act^[8] and the mandate of the police under the law. Section 24 of the National Police Service Act^[9] provides for the functions of the Kenya Police Service. These include maintenance of law and order; preservation of peace; protection of life and property; investigation of crimes; collection of criminal intelligence; prevention and detection of crime; apprehension of offenders; enforcement of all laws and regulations with which it is charged; and 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.

18. The Respondent states ownership of the vehicle is under investigation. This falls within the functions of the police. In the circumstances I am unable to find that the *ex parte* applicant has demonstrated the existence of a legal duty to act.

19. Also relevant is the Respondent's position that this suit is pre-mature and/or the *ex parte* applicant's right is yet to accrue. This argument is anchored on the provisions of section 24 of the Act which permits the police to undertake investigations.

20. It is evident that one cannot talk of refusal to release the vehicle when investigations on ownership is ongoing. The investigations have not been shown to be without basis. It was a serious error for the *ex parte* applicant to ignore the above provisions and invoke Judicial Review jurisdiction, and, pray for orders or **Mandamus** without ensuring that the conditions for granting Judicial Review orders are satisfied.

21. The other test is "an express refusal, or an implied refusal through unreasonable delay." I am unable to conclude that there was an express or implied refusal in view of my above reasoning. Differently stated, none of the above conditions has been satisfied for *Mandamus* to issue. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has not satisfied any of the above conditions. It follows that there is no basis at all for the Court to grant the order of *Mandamus*.

22. More fundamental is the fact that the issue of ownership is the subject of investigation. It is uncontested that the *ex parte* applicant was asked to avail ownership documents, but failed to do so. The police did a search and they have exhibited a copy of records which shows a different person. It is uncontested that one month later the *ex parte* applicant came with a search obtained after the vehicle was impounded showing her name. She anchors her claim of this search.

23. Section 8 of the Traffic Act[10] only creates a rebuttable presumption and cannot in any manner be invoked to resolve this dispute. To my understanding a logbook or certificate of search is not conclusive proof of ownership of a motor vehicle though such document may purport to show the registered owner but may not be conclusive proof of actual ownership of a motor vehicle as the above section clearly points out or provides that the contrary can be proved. This is a clear recognition of a fact that often times, vehicles change hands but records are not adjusted to reflect the actual position. This position was appreciated by Hon. H. M. Okwengu, J (as she then was) when stated:-[11]

“It is true that a certificate of search from the Registrar of motor-vehicles would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicles. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time’s vehicles change hands but the records are not amended.”

24. Also, more fundamental is the fact that the question of ownership of the vehicle touches on the merits of the *ex parte* applicant's case and requires the court to take evidence before it can decide. This is outside the province of Judicial Review jurisdiction. For example whether or not the *ex parte* applicant lawfully owns the vehicle is an issue that requires the court to hear evidence from both parties. Determining the question of ownership will involve a merit review, a function which is outside the purview of Judicial Review jurisdiction. Additionally, by asking this court to release a vehicle under the above circumstances, is tantamount to asking the court to determine the question of ownership which is a merit review. Judicial Review only deals with legality of a decision and the procedural propriety and not with contested matters of evidence and facts.

25. It follows that the order(s) sought in this application amounts to inviting this court to enter judgment in a contested liquidated claim without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. It involves determining the question of ownership and make a finding to that effect. This case falls totally outside the province of Judicial Review. It is simply a misconceived shortcut designed to obtain a judgment in an otherwise civil dispute.

26. Judicial review is concerned with the decision making process and not merits. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*[12] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact. [13] The issues raised this case can only be determined in a forum where the litigating parties have an opportunity to present their evidence and also test the evidence of their opponents by way of cross examination.

27. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

28. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.* These two tests have not been established in this case. In my view, this is not a Judicial Review case but a civil dispute which ought to have been filed in the Commercial Division.

29. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for Judicial Review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

30. In this case, there is un contested evidence that the *ex parte* applicant lied that the car was impounded at Sarit Centre parking by the Police. Her allegations were discounted by her own statement to the police which is annexed to the Respondents Replying Affidavit. There is uncontested evidence that it is herself who went to report her husband's disappearance to the police station. It is her who availed a spare key to the police and the car was driven to the police station. The *ex parte* applicant lacks candour. It is not clear why she choose to misrepresent facts. On this ground alone, she is not entitled to an equitable relief. He who comes to equity must come with clean hands.

31. It is my view that compelling the Police to release a vehicle whose ownership is under police investigation would in my view amount to impeding its mandate or directing it to act illegally. Further, as stated above, the *ex parte* applicant had the option of proving ownership at the police station and if the police decline, file a civil suit instead of invoking Judicial Review jurisdiction of this Court.

32. In view of my analysis of the law and the determination of the questions raised herein above, the conclusion becomes irresistible that this is not a proper case for Judicial Review orders of Mandamus to issue. Accordingly, I find and hold that the *ex parte* Applicant's Application dated 6th June 2018 must fail. Consequently, I hereby dismiss the *ex parte* applicant's application dated 6th March 2017 with costs to the Respondents.

Orders accordingly

Signed, Dated at Nairobi this 1st day of February 2019.

John M. Mativo

Judge

[1] {2008}2 EA 300.

[2] Act No. 11A of 2011.

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

[4] W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[5] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[6] [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

[7] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

[8] Act No. 11A of 2011.

[9] Ibid.

[10] Supra

[11] In the case of *Samwel Mukunya Kamunge vs John Mwangi Kamuru*, Civil Application No.34 of 2002

[12] {2016}eKLR.

[13] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.