

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 457 OF 2018

IN THE MATTER OF AN APPLICATION BY COAST PRICE MOTORS LIMITED FOR ORDERS OF MANDAMUS AND PROHIBITION AGAINST THE DIVISIONAL CRIMINAL INVESTIGATION OFFICERS (DCIO), LANGATA POLICE STATION, THE DIRECTOR OF PUBLIC PROSECUTION AND THE HONOURABLE ATTORNEY GENERAL

AND

IN THE MATTER OF THE DETENTION OF MOTOR VEHICLE REGISTRATION NUMBER KCH 918 M CURRENTLY BEARING PLATE NUMBER KCG 970 J AND IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, THE CONSTITUTION OF KENYA, THE NATIONAL POLICE SERVICE ACT AND ALL ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIVISIONAL CRIMINAL

INVESTIGATION OFFICER (DCIO), LANGATA.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

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

AND

CRYIL GLOBAL INVESTMENT LIMITED...1ST INTERESTED PARTY

JOSEPH MBUGUA MUTURA.....2ND INTERESTED PARTY

SAMUEL MACUA.....3RD INTERESTED PARTY

REGINA WANJIRU MUNENE.....4TH INTERESTED PARTY

AND

COAST PRICE MOTOR LIMITED.....EX PARTE APPLICANT

JUDGMENT

THE APPLICATION

1. By a Notice of Motion dated 21st November 2018, the *ex parte* applicant seeks an order of *Mandamus* to compel the first Respondent and/or persons acting under his instructions to release its Motor Vehicle Registration Number KCH 918 whose number plate has been changed to KCG 970 J Toyota Van, Engine No. IKD-1902577, Chassis Number KDH 201-0038308.

2. The *ex parte* applicant also prays for an order of prohibition restraining the first Respondent or persons acting under their instructions from interfering with the *ex parte* applicant's quiet possession and enjoyment of the aforementioned vehicle Registration Number KCH 918 whose number plate has been changed to KCG 970J unless it is for traffic offences.

Grounds in support of the application.

3. The substance of the applicant's case is that it is the lawful owner of motor vehicle registration number KCH 918 M whose number plate it claims was fraudulently changed to KCG 970J. The applicant states that the police recovered the vehicle from the third Interested Party, who apparently had sold it to the fourth Interested Party. It states that the vehicle is held at Langata Police Station.

4. The applicant further states that the third Interested Party was charged with a Criminal case for being in possession of suspected stolen property but the case was subsequently withdrawn.

5. In addition, John Mwendwa, a director of the *ex parte* applicant in the affidavit supporting the application deposed that the *ex parte* applicant legally owns the vehicle. He deposed that on 8th June 2016, the *ex parte* applicant agreed to supply two vehicles to the first Interested Party at a total cost of Ksh. 5.2 Million. Further, he averred that the applicant imported two vehicles from Japan and paid the necessary taxes. He deposed that the vehicle the subject of this case was registered as KCH 918 M. Additionally, he averred that the applicant delivered two vehicles to the first Interested Party, that is, KCH 917M and KCH 918 M and invoiced him accordingly.

6. Mr. Mwendwa averred that the first Interested Party failed to pay the said sum and attempts to contact him over the phone were in vain prompting the *ex parte* applicant to report to the police. He added that the police recovered the motor vehicle KCH 918M from the fourth Interested Party, but its registration number had been changed to KCG 970 J.

7. He also deposed that the third Interested Party after being arrested and charged in court identified the second Interested Party as the person who sold the vehicle to him. Lastly, he averred that investigations revealed that the motor vehicle KCG 970J was the same as KCH 918 J and, that its chassis number had been tampered with.

The First and Second Respondents' Replying Affidavit.

8. **Dan O. Pampuh**, an investigator attached to the Directorate of Criminal Department, Langata, swore the Replying Affidavit dated 22nd February 2019. He averred that investigations revealed that KCH 970 J was registered in the name of Regina Wanjiru Munene, the fourth Interested Party, who produced the original logbook as proof of ownership. However, he averred that NTSA confirmed that the said logbook was not genuine.

9. He also averred that the third Interested Party was charged with the offence of handling suspected stolen property. In addition, he deposed that investigations revealed that the chassis number had been tampered with. Further, he deposed that Kenya Revenue Authority showed that the imported vehicle was a Honda Fit Saloon and not a Toyota Hiace Van, hence the entry KCG 970J Toyota Hiace Van was fraudulent and superimposed.

10. In addition, he averred that the vehicle has only one genuine mark, which is Engine No. 1KD-1902577, which according to KRA records was imported through import entry No. 2016MSA6052556, and registered as Reg. No. KCH 918 M in the name of Coast Price Motors Ltd. He averred that the second Interested Party was charged in court with the offence of stealing the said vehicles but he jumped bail, and, there is a warrant of arrest pending. He however, averred that the said case was withdrawn and efforts to trace the accused have been futile.

Third Interested Party's Notice of Preliminary Objection

11. The third Interested Party filed a Notice of Preliminary Objection dated 13th March 2019 stating *inter alia* that the suit contravenes the mandatory provisions of the law, that it is omnibus in nature, unconstitutional, incompetent and an abuse of court process. He also states that the suit is fatally defective and offends the provisions of section 7(2) and 12 of the Fair Administrative Action Act.[\[1\]](#)

12. The third Interested Party also swore the Replying Affidavit filed on 1th March 2019 in which he denied selling the vehicle to the fourth Interested Party, and, stated that he was discharged of the criminal charges.

The fourth Interested Party's Replying Affidavit

13. Regina Wanjiru Munene, the fourth Interested Party swore the Replying Affidavit dated 20th March 2019 stating that before purchasing the motor vehicle KCH 970J Toyota Hiace, from the third Interested Party, she did a search at the NTSA and confirmed the particulars of the vehicle. She stated that she paid him Ksh. 2,000,000/= for the vehicle, and, NTSA accepted her application for transfer. She averred that registration of a vehicle, unless the contrary is proved, is evidence of ownership. Lastly, she deposed that for the orders to issue, the applicant must establish the transfer to her fraudulent.

Determination

14. Upon carefully considering the opposing positions presented by the parties herein, I find that only two issues distil themselves for determination, namely:-

(a) *Whether this is a civil dispute disguised as a judicial review application; and,*

(b) *Whether the ex parte applicant qualifies for the judicial review orders sought.*

I will address both issues together.

15. The *ex parte* applicant's counsel cited *Republic v Nairobi City County ex parte Registered Trustees of Sir Ali Muslim Club*[\[2\]](#) and *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd*[\[3\]](#) in support of the proposition that judicial review is concerned with process only. She referred to section 9 of the Fair Administrative Action Act[\[4\]](#) which provides that a person who is aggrieved by an administrative decision may subject to subsection (2) thereof apply to court for an order of Judicial Review. She argued that the first Respondent acted *ultra vires* by refusing to release the vehicle and added that the writ of *Mandamus* lies to secure the performance of a

public duty.^[5] She placed reliance on *Kenya National Examinations Council v Republic ex parte Gathenji Njoroge & Others*.^[6]

16. The first and second Respondents' counsel supported the application and argued that the investigating officers have established that the applicant is the genuine owner of the vehicle as per records from the Kenya Revenue Authority.

17. The third Respondent's counsel cited *Republic v Alphonse Mbinda Musyoki & Another ex parte Party of National Unity*^[7] for the holding that judicial review is about the decision making process and not the decision itself. He also cited *Eunice Khalwali Miima v DPP & 2 Others*^[8] in support of the proposition that Judicial Review does not deal with merits. Counsel opined that this court cannot be called upon to determine ownership of the vehicle.

18. The crux of the fourth Interested Party's advocate's submission was that this dispute relates to ownership of a vehicle. He also argued that allegations of fraud must be proved.

19. The opposing facts presented by the parties herein disclose a fierce ownership dispute of the motor vehicle in question. That being the case, a pertinent question that warrants determination is whether the dispute discloses grounds for judicial review or whether it is simply a civil dispute. This question is an invitation to this court to delineate the province of judicial review as opposed to a civil dispute.

20. In his Replying Affidavit, Mr. Dan O. Pampah, an investigator attached to the Directorate of Criminal Investigation averred that the vehicle in question has only one genuine mark, which is Engine No. 1KD-1902577, which according to KRA records was imported through import entry No. 2016MSA6052556, and registered as Reg. No. KCH 918 M in the name of Coast Price Motors Ltd.

21. It is true the *ex parte* applicant holds a logbook as evidence of ownership. On the other hand, the fourth Interested Party also holds a logbook. However, it is stated on oath that her logbook was found not to be genuine after investigations. It is also stated that Kenya Revenue Authority records show that the vehicle purported to have been imported and registered as KCG 970J was a Honda and not a Toyota. Differently stated, both parties claim ownership, but the point of departure is who among the two holds genuine ownership documents. This court is now invited to grant judicial review orders and compel the police to release the vehicle to one party. Put differently, this court is being asked to determine which of the two logbooks is genuine.

22. It is an established position that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue, which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. Resolving the question of ownership would require direct evidence to be adduced and tested through cross-examination of witnesses before the court can determine which of the two logbooks is genuine. This exposition of the law was aptly stated in *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another*^[9] in the following words:-

“That determination necessarily requires that oral and/or documentary evidence be adduced ... In the absence of such evidence, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising judicial review jurisdiction under sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya. Where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before making the said declarations. Here, not only are there factual disagreements, which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings, but there is insufficient material upon which the applicant's case can be sustained.” (Emphasis added)

23. In *Sanghani Investment Limited v Officer in Charge Nairobi Remand & Allocation Prison*,^[10] the dispute involved ownership of land, which can easily compare with the ownership contest of the vehicle in these proceedings. The court rendered itself as follows:-

“Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In the case of REP V EX PARTE KARIA MISC APPLICATION 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in Judicial Review proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”(Emphasis added)

24. Further guidance can be obtained from *Republic vs District Land Registrar, Mombasa & 5 Others ex parte Nova Properties Limited*^[11] where the court citing authorities held that judicial Review is not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.^[12] It follows that where the resolution of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale is that judicial review jurisdiction is a special jurisdiction, which is neither civil nor criminal. Where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.^[13]

25. It is not enough to allege that the police investigations have found one logbook not to be genuine. Such an allegation suggests fraud. It is an established position of law that allegations of fraud must not only be specifically pleaded, but must be proved. Such a high standard of prove cannot be achieved by making averments in an affidavit as has happened in this case especially where the other party disputes the allegations. In *R v West Sussex County Council ex parte Wenman & Others*^[14] addressing a similar issue the court stated as follows:-

“This direct conflict of evidence illustrates vividly in my judgment how wholly unsuitable judicial review proceedings are in a case like this. Judicial review proceedings are a resort to the High Court in its supervisory jurisdiction in relation to decisions and actions taken by persons who have statutory responsibilities, and it is not appropriate for the kind of fact finding exercise on disputed facts that a court at first instance, or a statutory body with statutory responsibilities to investigate facts, is equipped to perform.”

26. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*^[15] 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.^[16] I need not repeat that fraud must be distinctly pleaded and strictly proved, and this can only be done in a forum where the litigating parties have an opportunity to present their evidence and test the evidence of their opponents by way of cross examination.^[17]

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.

28. 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. As stated above, this is not a Judicial Review case but a civil dispute, hence, the Judicial Review orders sought cannot issue.

29. In any event, the discretionary nature of the Judicial Review remedies 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, unreasonable, 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 or more important where the applicant lacks candor and has deliberately withheld information from the court.

30. It is imperative that the question of ownership and the genuineness or otherwise of either of the documents be resolved in a full trial as opposed to a judicial review application. Thus, even if the court were to find for the applicant, the reliefs sought, being discretionary in nature, the court would be perfectly inclined to decline exercising its discretion in his favour until the question of ownership is resolved.

31. Perhaps I should add that both parties confidently cite being in possession of a logbook. That may be so. However, section 8 of the Traffic Act^[18] only creates a rebuttable presumption. To my understanding, a logbook or certificate of search is not conclusive proof of ownership of a motor vehicle. Even though such a document may purport to show the registered owner, it may not be conclusive proof of actual ownership of a motor vehicle. The section clearly provides that the contrary can be proved. This is a clear recognition of the fact that vehicles change hands but records may not be up dated accordingly. This position was appreciated in *Samwel Mukunya Kamunge vs John Mwangi Kamuru* thus:^[19]

“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.”

32. Also, 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 that 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.

33. It follows that the order(s) sought in this application amounts to inviting this court to enter judgment in a contested claim touching on ownership dispute 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.

34. In view of my analysis of the law, the scope and jurisdiction of judicial review proceedings and the determination of the issues raised herein above, the conclusion becomes irresistible that this is not a proper case for Judicial Review orders of *Mandamus* and *Prohibition* to issue. Accordingly, I find and hold that the *ex parte* Applicant's Application must fail. Consequently, I dismiss the *ex parte* applicant's application dated 21st November 2018 with no orders as to costs.

Orders accordingly

SIGNED, DATED AT NAIROBI THIS 1ST DAY OF JULY 2019.

JOHN M. MATIVO

JUDGE

[1] Act No. 4 of 2015.

[2] {2017} e KLR.

[3] {2002} e KLR.

[4] Act No. 4 of 2015.

[5] Citing *Republic v Inspector General of police ex parte Kennedy Ngeru Irungu* {2016} e KLR and Halsbury's Laws of England, 4 Edition, Volume 1 Page 111 paragraphs 89 and 90.

[6] {1997} e KLR.

[7] {2018} e KLR.

[8] {2017} e KLR.

[9]{2014} eKLR.

[10] {2007} eKLR.

[11] {2016} eKLR.

[12] See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

[13] *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR

[14] {1993} ALR 145 also 24 HLR.

[15] {2016}eKLR.

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

[17] Counsel cited *Kinyanjui Kamu vs George Kamau Njoroge* {2015}eKLR and *Rose Ayuma Musawa vs Mathias Onyango Tabuche* {2016}eKLR

[18] Supra

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