



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HIGH COURT JUDICIAL REVIEW NO. 64 OF 2017

IN THE MATTER OF APPLICATION BY PHYLLIS MUTHONI NGURU AND ISAAC MWANGI KIMUNDU BY WAY OF JUDICIAL REVIEW FOR ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF FRAUDULENT SALE OF MOTOR VEHICLE

REGISTRATION NUMBER KBQ 911B OB NO. 58/18/7/16

BETWEEN

REPUBLIC

PHYLLIS MUTHONI NGURU

ISAAC MWANGI KIMUNDU.....APPLICANTS

VERSUS

THE COUNTY INVESTIGATING OFFICER

ATTORNEY GENERAL

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

AND

ANTHONY KANJA

PETER MBURU.....INTERESTED PARTY

JUDGEMENT

1. The Exparte Applicants filed an application dated 22/5/2017 pursuant to the provisions of Order 53 Rule 1 and 2 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act (Cap 26 L.O.K). It seeks for the following reliefs namely:

a) That prohibition do issue prohibiting the 1st Respondent or any other officer acting under him from releasing motor vehicle registration number KBQ 911B without conducting proper investigations as regards fraudulent sale of the said motor vehicle by the 1st interested party to the 2nd interest party.

b) That mandamus do issue to compel the 1st Respondent to conduct substantial and exhaustive investigations into the fraudulent sale of motor vehicle registration number KBQ 911B by the 1st interested party to the 2nd interested party as reported in OB No. 58/18/7/2016.

c) That the costs of the application be paid by the Respondents.

2. The application is supported by the affidavit of the 2nd Applicant on his own behalf and on behalf of the 1st Applicant as well as a statement indicating the reliefs sought and the grounds in support thereof. The 2nd Applicant has deposed inter alia; that they are the joint registered proprietors of the suit motor vehicle registration number KBQ 911B; that in July 2014 the Applicants informally agreed to grant the 1st Interested Party possession and custody of the said vehicle for use in the 1st Interested Party's car hire business; that the Interested Party in blatant disregard of the car hire informal agreement with the Applicants proceeded to sell the vehicle to the 2nd Interested Party in total disregard to the Applicants title thereto; that the Applicants lodged a complaint over the fraudulent sale at Machakos Police Station vide OB 58/18/7/2016; that the 1st Respondent has threatened to release the vehicle without conducting substantial and exhaustive investigations into the complaint lodged and without preferring any criminal charges against the Interested Parties; that 1st Respondent has demonstrated a blatant abuse of power and informed by failure to consider relevant matters in the course of his investigations; that the intended release of the vehicle shall be dangerous and detrimental to the Applicants.

3. The application was opposed by the Respondents. The 1st Respondent through its lead investigating officer Chief Inspector Isaiah Mwiranga swore a replying affidavit dated 30/10/2017 where he deposed inter alia; that 1st Interested party vide an agreement dated 8/12/2014 with the 2nd Applicant was allowed to sell the subject motor vehicle; that the 1st Interested Party advanced money to the 2nd Applicant amounting to Kshs. 493,700/-; that the 1st Interested Party subsequently sold the said vehicle to the 2nd Interested Party herein and the balance of the sale proceeds amounting to Kshs. 156,300/- was deposited into the Applicants joint bank account at Equity Bank; that investigations revealed that indeed the 1st Interested Party had been authorized to sell the vehicle on behalf of the Applicants; that the said investigations show that the 2nd Applicant had only authorized the 1st Interested Party to sell the vehicle and hence the Applicants claim that the vehicle was for car hire holds no water; that the Respondents should be left to finalize the investigations according to law; that the Applicants are just misusing this Honourable court's power to frustrate other innocent Kenyans.

4. Parties canvassed the application by way of written submissions. It was submitted for the Applicants that there was no agreement with the 1st Interested Party to sell the suit vehicle and that the purported sale to the 2nd Interested Party is fraudulent and for which the Respondents should swiftly take action in line with the complaint report already lodged with it. It was also submitted that the Respondents have dragged their feet for about two years without preferring charges against suspects and the delay continues to waste the vehicle already detained as an intended exhibit.

5. It was submitted by learned counsel for the Respondents that the Applicants have sought to have this court to determine matters of facts to which the court lacks jurisdiction and it is the duty of the parties to resort to the normal forums where those matters ought to be resolved. It was also submitted that this court should not usurp the constitutional and statutory mandate of the Respondents to investigate, undertake prosecution and make an impartial decision in the exercise of the discretion conferred upon them and therefore this court should not halt the criminal process.

It was further the submissions of the Respondents that the trial courts are better placed to consider the evidence and decide whether or not to release the vehicle to the Applicants or even place them on their defence or acquit them and in all the circumstances they shall be accorded a fair trial.

It was finally submitted for the Respondents that the Applicants have not demonstrated that the Respondents have not acted independently or have acted capriciously in bad faith or have abused the legal process in a manner to trigger the High Court's intervention. Counsel relied on the following authorities:

1) REPUBLIC VS COMMISSIONER OF POLICE & ANOTHER EX PARTE MICHAEL MONARI & ANOTHER [2012] eKLR

2) MUSYOKI KIMANTHI VS INSPECTOR GENERAL OF POLICE & 2 OTHERS [2014] eKLR

Determination

6. I have considered the Applicant's application, the rival affidavits and annexures as well as the written submissions of the parties herein. It is not in dispute that motor vehicle registration number KBQ 911B to which the Applicants now claim to its ownership has already been detained and kept by the 1st Respondent at Machakos Police Station yard pending investigations pursuant to a complaint lodged by the Applicants. It is also not in dispute that the said investigations are yet to be finalized. The issue for determination is whether the Applicants have presented sufficient reasons to warrant the grant of the Judicial Review Orders of Prohibition and Mandamus.

7. As the matter revolves around a criminal one, I find it is within the mandate of the Director of Public Prosecution as provided for under Article 157 of the constitution. The same provides in part as follows:

(4) The Director of Public Prosecutions shall have power to direct the inspector General of the National Police Service to investigate any information or allegations of criminal conduct and the Inspector General shall comply with any such directions

(6) The Director of Public Prosecution shall exercise state powers of prosecution and may-

a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed

(10) The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or

authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

8. The Applicants gravamen appear to be that the 1st Respondent should be prohibited from hastily releasing motor vehicle registration number KBQ 911B already detained at Machakos Police Station until exhaustive investigations have been conducted and further that the 1st Respondent be compelled to conduct substantial investigations into the Applicant's complaints already lodged. The replying affidavit filed by the lead investigating officer herein reveals that indeed investigations have been commenced and that the Applicants should give them the space to complete the same. As of now those investigations have not been finalized and a decision reached and therefore it would appear to me that the Applicant's application is premature. Indeed, the Applicants are seeking for an order to compel the Respondents to conduct substantial investigations. Ordinarily the role of investigations and the question of whether to prefer charges against any individual or persons solely rests with the Respondents and the High Court at that stage does not have jurisdiction to determine how the investigations are to be carried out and the persons to be charged. If there are contested matters of fact as alluded to in the rival affidavits, I find that the same should be left to the trial court to adjudicate upon once the criminal proceedings are commenced. The High Court at this stage should not usurp the constitutional and statutory mandate of the Respondents to investigate, undertake prosecutions in exercise of the discretion conferred upon them. In the case cited by the Respondents counsel namely **REPUBLIC VS COMMISSIONER OF POLICE & ANOTHER EXPARTE MICHAEL MONARI & ANOTHER [2012] eKLR** the court held as follows:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

Again in the case of **MUSYOKI KIMANTHI VS INSPECTOR GENERAL OF POLICE & 2 OTHERS [2014] eKLR** Majanja J held as follows:

“In light of the mandate conferred upon the DPP in Article 157 of the Constitution, the High Court therefore ought not interfere with the above mandate unless cogent reason are given thus; that the DPP has acted without due regard to the public interest, against the interest of the administration of Justice and has not taken account of the need to prevent and avoid abuse of court process”.

9. From the replying affidavit of the lead investigator herein, it is clear that investigations are about to be finalized and that there is an indication that the Applicants might be charged with an offence of giving false information to the police. It seems this realization has prompted the Applicants to rush to this court and they appear to suggest that the police should not cast their net in the Applicants direction but to proceed and charge the two Interested Parties as per the Applicant's complaint already lodged with the police. I find that it is not for the Applicants to direct the Respondents on how to conduct investigations and the persons to be charged since that mandate is solely upon Respondents to exercise. The applicants now appear to suggest that the subject motor vehicle should not be hurriedly released and further the police should not hurry to prefer charges without conducting substantial investigations. If indeed the police have already wound up investigations and have requested to be allowed to perform their obligations as directed by the Director of Public Prosecutions pursuant to Article 157 of the constitution, I find that this court should not hinder them. In any event the Applicants have failed to demonstrate that the Respondents have not acted independently or have acted capriciously in bad faith or without due regard to public interest or against the interest of the administration of justice. I find the Applicants to be apprehensive at the direction of the investigations and their application herein is meant to achieve two results namely to prevent the police from releasing the subject vehicle and for the investigations to be prolonged. This in my view appears to be an abuse of the court process. The Applicants therefore have filed the present application to forestall police investigations. This can be explained by the Applicants complaint that the vehicle is being wasted at the police yard and at the same time they are seeking for an order that the same vehicle should not be released. Further the Applicants appear to suggest that investigations be prolonged. I find the Applicants to be engaging in double speak and which only suggests that the application has not been filed in good faith.

10. In the result, it is the find of this court that the Application lodged by the Applicants lacks merit. The same is ordered dismissed with costs to the Respondents.

Dated and delivered at Machakos this 8th day of November, 2018.

D.K. KEMEI

JUDGE