



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISC.CIVIL APPLICATION NO. 329 OF 2015**

**IN THE MATTER OF AN APPLICATION BY KENNEDY NGERU IRUNGU FOR ORDERS OF  
MANDAMUS**

**AND**

**IN THE MATTER OF THE INSPECTOR GENERAL OF POLICE THROUGH THE ACTIONS  
OF THE OFFICER COMMANDING KIAMUMBI POLICE STATION KIAMBU COUNTY**

**AND**

**IN THE MATTER OF ILLEGAL IMPOUNDING OF PRIVATE MOTOR VEHICLE KAT  
165M AND EXERCISE OF FAIR ADMINISTRATIVE ACTION**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**INSPECTOR GENERAL OF POLICE .....RESPONDENT**

**EXPARTE**

**KENNEDY NGERU IRUNGU**

**JUDGMENT**

1. On 19<sup>th</sup> October 2015, Honourable Justice Weldon Korir granted to the Exparte applicant herein Kennedy Ngeru Irungu leave to apply for an order of Judicial Review remedy of Mandamus to issue to compel the respondent, the Inspector General of Police, to release motor vehicle registration No. KAT 165M registered in the names of the applicant, from the custody of the Officer Commanding Kiamumbi Police Station or wherever else it was being withheld.

2. The Learned Judge also ordered that costs of the chamber summons dated 1<sup>st</sup> October 2015 do abide by the outcome of the substantive motion which was to be filed within 21 days from 19<sup>th</sup> October 2015. The substantive motion was filed on 26<sup>th</sup> October 2015 within the stipulated 21 days, it was served upon the respondent Inspector General of Police, the Officer Commanding Police Station (OCPS) Kiamumbi Police Station and the Attorney General on 7<sup>th</sup> June 2016, the court also

granted leave to Everlyne Ayumah Oyale to file replying affidavit as an interested party in this matter and she did file her reply on 4<sup>th</sup> July 2016. The Attorney General fled grounds of opposition on 11<sup>th</sup> July 2016.

3. The parties had been directed to file submissions but as at the time of reserving this matter for judgment on 12<sup>th</sup> July 2016, only the exparte applicant had filed his skeletal submissions on 7<sup>th</sup> December 2015 dated 4<sup>th</sup> December 2016. The respondents filed their submissions on 15<sup>th</sup> July, 2016 while the interested party Evelyne Ayumah Oyale, after filing her replying affidavit on 4<sup>th</sup> July 2016 did not serve the other parties with the same and neither did she attend court on 12<sup>th</sup> July 2016 to argue her grounds. The court has nonetheless taken into account her opposition to the application by the exparte applicant.

4. I am now called upon to determine the merits of the Notice of Motion dated 23<sup>rd</sup> October 2015 filed on 26<sup>th</sup> October 2015 filed by the exparte applicant. The Notice of Motion which is s brought under the provisions of Order 53 Rules of the Civil Procedure Rules, Sections 7,11 of the Fair Administrative Actions Act and pursuant to the leave of court granted on 19<sup>th</sup> October 2015 to apply seeks for the following Judicial Review order of Mandamus to be issued and directed at the inspector General and OCPS Kiamumbi Police Station to release the motor vehicle registration No.KAT 165M registered in the Exparte applicant's names as detained by the OCPS Kiamumbi Police Station or wherever else that the vehicle is withheld; The exparte applicant also prays that the Inspector General of Police be directed and compelled to pay such costs as of loss of user as shall be assessed, by the parties or taxing master of the court, accruing to the applicant as losses s of non-user, since the date of impounding of the suit motor vehicle KAT 165M till its lawful release; and that costs of the Notice of Motion be met by the respondent.

5. The notice of motion is predicated upon the grounds that, on 2<sup>nd</sup> September 2015, the OCPS at Kiamumbi Police Station in Kiambu County impounded motor vehicle registration No. KAT 165M on false and unsubstantiated allegations that border on a non recorded and non factual claim by a third party: that the suit motor vehicle is a van used for matatu business on a daily basis and an economic engine of the exparte applicant; that the exparte applicant is bona fide registered owner of the suit motor vehicle having purchased it at a public auction advertised in the Daily Newspapers in 2012; That the police were irrational and unreasonable by criminalizing an otherwise civil dispute through hopeless claims by a third party thus occasioning business losses.

6. That the police had refused or otherwise were unable to conduct its own investigations expeditiously and had instead demanded of the exparte applicant to produce certain witnesses while the subject motor vehicle continues to waste away; that the Occurrence Book for Kiamumbi Police Station wherein the said motor vehicle was recorded went missing hence the exparte applicant could not peruse it; That the respondent's actions were purely unfair and punitive to the exparte applicant who has suffered financial losses for non-user of the motor vehicle; that no criminal charges were preferred on the exparte applicant who had visited the Kiamumbi police station tirelessly on almost a daily basis and that the exparte applicant had demonstrated proof of ownership of the motor vehicle though a genuine registration book and auction documents but that the police officers had remained adamant on holding onto the vehicle indefinitely contrary to the principles of legitimate expectation and fair administrative action.

7. The Notice of Motion was further supported by the affidavit sworn by Kennedy Ngeru Irungu and the statutory statement filed with the application for leave. In the statement filed under Order 53 Rule 4(1) of the Civil Procedure Rules, the Exparte applicant exposes the facts relied upon. In the said statutory statement, the exparte applicant avers that on 15<sup>th</sup> February 2013 he saw a newspaper advertisement in the Daily Star notifying the public of an intended public auction to be held on 23<sup>rd</sup> February 2013 pursuant to repossession of motor vehicle KAT 165M and that the sale was to be at the fall of the hammer as shown by copy of the said advert KN1 and repossession notice of 11<sup>th</sup> February 2013.

8. That the ex parte applicant developed interest in the motor vehicle and purchased it and a transfer of the ownership was effected in his favour as per annexure exhibit KN2 No K 663961 U issued on 10<sup>th</sup> October 2014. That to his dismay, the police were claiming that the previous owner of the said motor vehicle, one Mrs Everlyne Ayumah Oyale had reported a theft of the said motor vehicle leading to its impounding on 2<sup>nd</sup> September 2015; that the previous owner lost ownership of the said motor vehicle through repossession of her property occasioned by a debt she owed Opportunity Kenya Limited. He exhibited KN3(a) and (b) copies of loan recovery instructions letter to the auctioneer dated 11<sup>th</sup> February 2013 and auctioneer's letter dated 12<sup>th</sup> February 2013.

9. Further, that on 21<sup>st</sup> September 2015 the Auctioneers assured him of good title to the vehicle as per KN4 but that the police were still adamant on holding onto the subject motor vehicle without legal basis; That he had lost shs 3,000/- daily and shs 350/- on weekends; that the ex parte applicant was suffering losses due to the arbitrary excesses of the respondent who had been unwilling to surrender the logbook.

10. The verifying affidavit repeats the statements of facts and grounds.

11. In the replying affidavit sworn by the interested party Evelyne Ayumah Oyale on 27<sup>th</sup> June 2016 and filed in court on 4<sup>th</sup> July 2016, she contends that the applicant should have sued all parties involved in the matter in order for the court to hear and determine the matter expeditiously. That the applicant was aware of what had transpired between her and her group chairman one Mr Peter Waithaka of Opportunity Kenya Micro Loans who conspired with Peter M. Gathogo. That she had been advanced a loan of shs 566,854 which she repaid leaving a balance of shs 127,478.40 and that the process of selling her motor vehicle was not legally proper. That she never consented to her motor vehicle being sold to recover the balance of unpaid loan. That the advertisement was done in the Star Newspaper which is not convenient to the people as opposed to the Daily Newspaper and the Standard Newspaper hence it was done to ensure the applicant does not see it; that when the applicant herein was summoned to go to the police station to record a statement, he instead send his life. That even after selling the said motor vehicle, the auctioneer did not settle her outstanding loan and neither did he disclose to her the price for which her motor vehicle was sold yet the said balance continues to earn interest. That the applicant took long before filling this claim and after refusing to record a statement with the police.

12. The interested party contended that the application is defective because it never involved all parties hence it should be dismissed with costs. She annexed an undated note from Kiamumbi Police Station and a schedule of her loan repayment.

13. In the grounds of opposition dated 8<sup>th</sup> July and filed in court on 11<sup>th</sup> July 2016, the respondent through Ms Odhiambo a Leah Litigation Counsel of the Office of Attorney General contends that: The officers of Kiamumbi police station acted within the law without any irregularity, illegality and with fairness; That the officers had the authority to detain the said motor vehicle for further investigations to establish the truth of the matter with regard to the subject motor vehicle; that the granting of the orders sought would be interfering with the powers and authority of the respondents. That the applicant had not demonstrated sufficient cause for grounds upon which the court can grant the orders sought; the application has no legal basis hence the prayers by the respondent should be dismissed with costs; and that the application was abuse of court process and lacks merit, baseless, misconceived.

14. The applicant and respondent filed written submissions. In the skeletal submissions of the ex parte applicant filed on 7<sup>th</sup> December 2015 the ex parte applicant reiterated the grounds and facts upon the Judicial Review Orders of Mandamus was being sought.

15. On the other hand, the respondent filed submissions dated 14<sup>th</sup> July, 2016 reiterating the grounds of opposition as filed and reproduced in this judgment and maintaining that the applicant does not deserve the orders sought. She relied on the cases of R V Kenya Power and Lightning Co. Ltd & another [2013] EKLK wherein it was stated that:

***“It is not enough for the applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural Justice. The actual sins of Tribunal must be exhibited for judicial review remedies to be granted.”***

16. Further reliance was placed on *Pastoli v Kabale District Local Government Council and others* [2005]2 EA 300 on the requirements for judicial review remedies. Counsel further relied on *Anthony John Dickson and others v Municipal Council of Mombasa HCMA 96 OF 2000* where the court held that where there is delay then the court will not issue judicial review orders which are discretionary. And in ***Riachand Khimji and Co. v AG CA49 OF 1972[1972] EA 536*** where the East African Court of Appeal held that Judicial Review orders being discretionary would only issue in exceptional cases like where there was failure of justice or for want of good faith. The respondents urged the court to dismiss the application with costs.

### **Determination**

17. I have carefully considered the *ex parte* applicant’s Notice of Motion application seeking for Judicial Review Orders of Mandamus to issue, compelling the Inspector General of Police to release motor vehicle registration No. KAT 165M impounded and held by the OCPS Kiamumbi Police Station or held in any other place. I have also considered the grounds, affidavit, statement and exhibits annexed thereto. I have given equal consideration to the replying affidavit filed by the interested party Evelyne Ayumah Oyale and the grounds of opposition filed by the respondent and skeletal submissions filed by the *ex parte* applicant and the respondents’ submissions as well as the authorities elide on.

18. In my humble view, the issue for determination are:

- i. Whether the police, in impounding the suit motor vehicle acted irrationally, illegally and or unreasonably or whether the police actions violated the principles of fair administrative action.
- ii. What orders should this court make?
- iii. Who should bear the costs of these Judicial Review proceedings?

19. On the first issue, it is critical to appreciate what mandamus it and what is the purpose it serves. Mandamus is defined by the ***Black’s Law Dictionary Ninth Edition*** as:

***“ A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act.”***

20. The writ of Mandamus lies to secure the performance a public or statutory duty. Its origin is traceable from England where it was generally made available through the King’s Bench Division. The remedy was issued to enforce public duties of all kinds such as against inferior tribunals which refused to exercise their jurisdiction or against municipal corporations which failed to hold elections or meetings. At present mandamus is issued to enforce performance of statutory duties of public bodies and the court retains the power to withhold the remedy where it would not meet the interests of justice as was held in ***Binny Ltd & Another V Sadasivan & Others SC India CA 4839/2005***.

21. In ***Halsburys Laws of England 4<sup>th</sup> Edition Volume 1 page 111 paragraphs 89 and 90*** states that:

***“ The Order of Mandamus is of a most remedial nature, and is, in form, a command issuing from the High Court of justice directed to any person, corporation or inferior tribunal, requiring him or then to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right, and it may issue in cases where, although***

*there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than that the party against whom the application is made is legally bound to perform where a general duty is imposed, a mandamus cannot require it to be at once where a statute, which imposes a duty leaves a discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”*

22. The above principles were adopted in **Kenya National Examinations Council Vs the Republic Exparte Geoffrey Gathenji Njoroge & Others [1997] e KLR**. From the above, it is clear that to issue a mandamus order is a matter in the discretion of the court and that a party who seeks Judicial Review Orders of Mandamus must demonstrate existence of a legal right to the performance of a legal duty; that the legal duty must be of a public nature; that the party against whom a mandamus is sought must have failed, despite the demand, to perform the legal duty to the detriment of the party who has the legal right to expect the performance.

23. In **SI Syndicate V Union of India Air [1975] SC 460**, the Supreme Court of India stated that:

*“ As a general rule, the orders would not be granted unless the party complained of has known what it was required to do, so that he had the means of considering whether or no he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that the demand was met with refusal.”*

24. Thus, mandamus will not be granted where to do or not to do an act is left to the discretion of the authority. The duty must be imperative and should not be discretionary. Further, it is clear that mandamus will issue where there is a legal right and there is no specific legal remedy for enforcing it. Nonetheless, mandamus may issue in cases where there is an alternative legal remedy but that mode of redress is less convenient, less beneficial and less effective.

25. In the instant case, the exparte applicant is the legal and registered owner of motor vehicle registration No. KAT 165 Minibus matatu as shown by the title registration documents exhibited in court. He purchased it at public auction from Daystar Auctioneers who had repossessed it from the interested party herein Evelyne Ayumah Oyale who had defaulted to repay an SME loan owed to Opportunity Kenya Limited.

26. The instructions to confiscate the vehicle/property of Evelyne Ayumah Oyale were given to Daystar Auctioneers on 11<sup>th</sup> February 2013 by Opportunity Kenya (micro loans) for an outstanding sum of shs 370,000. The remarks on the loan recovery confiscation letter were that the Auctioneers should attach property/movable goods belonging to Mrs Oyale Evelyne Ayumah. The Opportunity Kenya Limited undertook to indemnify the Auctioneers against any complaint from the debtor who had a motor vehicle KAT 165M Nissan Matatu plying the Kahawa West route.

27. In the letter dated 12<sup>th</sup> February 2013 by Daystar Auctioneers to Opportunity Kenya Limited the Auctioneer states that upon receiving instructions to confiscate the property of Evelyne Oyale Ayumah, she voluntarily decided to give her motor vehicle KAT 165M instead of her household goods being attached which she claimed would affect her children. Further, that the debtor/interested party herein signed to that effect and gave the Auctioneers her National identity card copy, a motor vehicle transfer form, Pin Number and that she had promised to hand over the original log book later which she claimed was with her friend Serah Wambui.

28. Further, that the interested party had promised to pay the outstanding debt with opportunity Kenya Limited in three days failure to which the vehicle should be auctioned on 23<sup>th</sup> July 2015.

29. Annexure KNA(b) is the repossession/ attachment dated 11<sup>th</sup> February 2013 showing the list of items attached from the interested party's house for recovery of shs 370,000 and with a note that the

debtor had voluntarily given out her Motor vehicle KAT 165M as security to repay the loan and in default it should be sold on 23<sup>rd</sup> February 2013.

30. From February 2013, the vehicle was transferred to the exparte applicant on 10<sup>th</sup> October 2014 after a public auction as advertised in the Star Newspaper by Daystar Auctioneers on 15<sup>th</sup> February 2013 in the classified section.

31. The interested party Everyone Ayumah Oyale in her replying affidavit alleges that she never consented to the sale of her motor vehicle to recover the debt which debt she claims was less than the amount claimed; and that there was a conspiracy between the Chairman of Opportunity Kenya Ltd and the Auctioneers to dispose of her vehicle without her consent since the outstanding loan had not even been repaid and neither had the Auctioneer accounted to her the proceeds of sale.

32. The interested party annexed to her replying affidavit a note from Kiamumbi Police Station “**to whom it may concern**” to the effect that the bearer thereof had reported to the police station the theft of her motor vehicle KAT 165M white in colour in early 2013 but that she lost the OB Number which was still being looked for. Further, that she had spotted the said motor vehicle plying route Ruiru- Ruaka Route and that she had all the documents hence she should be assisted and the station informed for further action. The note is stamped and signed by officer in charge Kiamumbi Police Station. However, that note is undated.

33. The interested party also annexed a statement of account from 3<sup>rd</sup> January 2012 to 31<sup>st</sup> December 2014 for Somesha savings. The name of the bank or SME is not indicated but only the Eastlands Branch is indicated.

34. On the other hand, the respondent filed grounds of opposition stating that the police had acted within the law without any irregularity, illegality and with fairness. Further, that the officers had the authority to detain the said motor vehicle for further investigations to establish the truth of the matter with regard to the motor vehicle in question. In addition, the respondent contends that granting the orders sought would be in ordinary circumstances be interfering with the powers and authority of the respondent; that there is no sufficient cause for issuing the orders sought and that the application is baseless and lacks merit hence it should be dismissed.

35. From the above scenario, the question is whether the exparte applicant deserves the Judicial Review remedy of Mandamus to compel the Inspector General to release motor vehicle registration KAT 165M Nissan matatu.

36. On the facts of this case, I am satisfied that the exparte applicant has shown that he is the legally registered owner of the subject motor vehicle KAT 165M from 10<sup>th</sup> October 2014. I am equally satisfied that the said motor vehicle was advertised for sale at a public auction on 15<sup>th</sup> February 2013 in the Star Newspaper by Daystar Auctioneers. As to whether there was a conspiracy between the Auctioneers and the Opportunity Kenya Limited from whom the interested party Evelyne Ayumah Oyale obtained a loan and defaulted and as to whether or not the Auctioneers had not accounted to her of the sale price or even settled the outstanding loan is matter for determination is civil proceedings which Everlyne Ayumah Oyale is free to institute against the offending parties. Everlyne Ayumah Oyale is also free to file a complaint against the Auctioneers before the Auctioneers Licensing Board for appropriate action.

37. But to allege that the interested party had in early 2013 reported the theft of her motor vehicle to the police but that the same police who received her report could not take the Occurrence Book number is fallacious and dishonest of her. This court does not believe the interested party's version that since early 2013 despite her allegedly reporting to the police that her motor vehicle had been stolen, and in the absence of an Occurrence Book number, the police had never traced the said motor vehicle until 2015 when she saw it and reported back to the police to take action.

38. For the police to justify the impounding and or detaining of the subject motor vehicle, they must demonstrate that they had received and booked a report of the loss of the said motor vehicle and that they had been making efforts to track it without success from early 2013 to 2015 when they traced it. The police never swore any affidavit to justify their actions. They did not produce in evidence any Occurrence Book report of theft of the subject motor vehicle. The police, in my humble view, are not authorized to impound property and detain it without cause as they did in this case. The police are law enforcement officers and are charged with the duty of maintaining law and order and protection of life and property of all persons. They are not debt collectors and neither are they authorized to attach property but to provide security, where necessary, to enforce court orders or any statutory and enforcement process.

39. In the instant case, it is clear in the absence of any affidavit justifying impounding of the subject motor vehicle KAT 165M, I find that the actions by the police at Kiamumbi police station are not only illegal, irregular and irrational and without any fairness or at all. It was arbitrary and without justification.

40. Albeit the respondent's legal counsel the Attorney General in his statements on grounds of opposition and submissions claims that the police action was authorized in order to investigate to establish the truth of the matter regarding the matter with regard to the subject motor vehicle, there is no evidence by way of affidavit to show that the police were investigating the loss of the subject motor vehicle or at all from the time of the impoundment to the time of writing and delivery of this judgment.

41. The respondent's mere statements do not amount to evidence or justification to act the way they did. There is no absolute authority granted to the police to impound motor vehicles which are not even suspected of being stolen property and whose registered owners go about their ordinary course of business and detaining them indefinitely. In this case, there is even no evidence that the police were contemplating bringing any criminal charges against the exparte applicant for being in illegal possession of the suit motor vehicle.

42. The police, in my humble view, abused their power and authority in impounding the exparte applicant's motor vehicle which is registered in his name and detaining it without any justifiable reason. There is every evidence on record that the police were provided with documents of ownership of the subject motor vehicle and they have not bothered to investigate whether those documents are genuine or not yet they have continued for over one year, to detain the subject motor vehicle which as correctly submitted by the exparte applicant, must be wasting away as there is no guarantee that it is detained in an environment which is safe and or free from destruction due to prolonged immobility or even vandalisms.

43. Article 40 of the Constitution guarantees every person the right to own and have property of any description in any part of Kenya. The subject motor vehicle, it has been established, legally belonged to the exparte applicant. If for any other reason, the police believe that the said motor vehicle was illegally acquired by the exparte applicant, they are under a statutory duty to investigate and present evidence and recommendations to the Director of Public Prosecution to prefer criminal charges against the exparte applicant. To date, which is nearly one year, no such intention to charge the exparte applicant with any offence related to the suit motor vehicle has been demonstrated. There is also no evidence that the exparte applicant, being the legally registered owner of motor vehicle KAT 165M was ever given a hearing concerning ownership and or possession of the subject motor vehicle before it was impounded and detained by the police.

44. The police have no discretionary power to impound or detain or not to impound or detain or release an illegally impounded and or detained motor vehicle. The function of the court in Judicial Review proceedings is to ensure that lawful power and or authority is not abused by unfair treatment. The court has no power to usurp any power granted or conferred on another public entity or body.

45. In the present case, I find that the police had no powers or authority to impound and detain the

exparte applicant's motor vehicle KAT 165M. They therefore acted ultra vires and therefore acted illegally in violation of the rules of natural justice. I also find that the actions by the police, which they have not attempted to justify, were actuated by malice. They acted high handedly and unconstitutionally in depriving the applicant of his property in the suit motor vehicle without any lawful or justifiable excuse. The police must be stopped. The police had no power to resolve civil dispute as to ownership of motor vehicles. Where a public body or officer exceeds its mandate in law and operates outside its legal jurisdiction, as was done by the police in this case, then this court has the power to call forth the decision leading to such action and quash it. I find without hesitation that the decision to impound and detain the suit motor vehicle was and remains illegal. There is no reason put forth that can be called lawful for the continued detention of the suit motor vehicle.

46. Consequently, I find that the notice of motion is meritorious and I proceed to grant and issue Judicial Review Orders of Mandamus directed at the Inspector General of Police and his subordinates represented by the Officer Commanding Police Station, Kiamumbi Police Station to forthwith release to the exparte applicant Kennedy Ngeru Irungu motor vehicle registration No. KAT 165M from wherever it is detained or held without any conditions.

47. On the prayer for loss of user, no proper evidence was laid before the court in an appropriate manner for assessment of damages for loss user. Accordingly, I reject to make a finding on that prayer and direct the exparte applicant to file an appropriate claim before the court exercising civil jurisdiction if he so desires.

48. I award costs of the application for leave and this Notice of Motion to the exparte applicant to be paid by the office of Inspector General of Police.

Dated, signed and delivered in open court at Nairobi this 7<sup>th</sup> day of September 2016.

**R.E. ABURILI**

**JUDGE**