



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW NO. 16 OF 2013

PAUL MWITI M'RIMBERIAEXPARTE APPLICANT

-VERSUS-

OFFICER COMMANDING MERU POLICE STATION -... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

The exparte applicant through a Notice of Motion pursuant to Order 53 Rule 3(1) of the Civil Procedure Rules 2010 and under Section 8 and 9 of the Law Reform Act, (Cap 26) Laws of Kenya sought an order of mandamus be issued compelling the 1st Respondent/Applicant to unconditionally and forthwith, release to exparte applicant Motor Vehicle Registration number KBR 818 N, a Toyota Station Wagon white in colour together with its ignition key. That on 29th October, 2013 Mr. Mbaabu, Learned Advocate for the exparte applicant and Mr. Kieti, Learned State Counsel recorded and signed a consent to the following effect:-

“1. By consent the Notice of Motion dated 2nd July, 2013 be and is hereby allowed in terms of prayer No. 1.”

The consent by the Advocates was adopted as an order of this court.

That on 10th December, 2013 the Attorney General appearing for the Respondents/applicants filed this application seeking that there be stay of further proceedings in this matter pending the hearing and determination of their application and that the consent order dated 29th of October, 2013 be set aside. The application was brought pursuant to provisions of Section 1A, 1B and 3A of the Civil Procedure Act. The application is premised on the ground on the face of the application and affidavit in support. The grounds in support are that there was material non-disclosure by the respondent, misapprehension of existing state of affairs relating to suit motor vehicle as well as lack of sufficient material facts at the time of entering into the consent. The affidavit in support is made by No. 38875 PC John Kitheka who averred that he is investigating officer in the case of theft of Motor vehicle registration in KBR 818 N Toyota Probox. The deponent in support of the application has also annexed several annextures thereto.

The ex parte applicant is opposed to the application. He filed Replying Affidavit dated 11th December, 2013 challenging all averments made by the Respondents/applicants through affidavit of P.C. John Kitheka. He further alleged since the vehicle has been impounded it was more than 1 year and no action has been taken against him or anyone else be or vehicle released to him. He averred that all documents and signatures which facilitated effective transfer of the subject motor vehicle to him to be authentic, otherwise police would have taken action against him for forgery or any other offence since 30th November, 2012. He also averred that he believes that there is no inquiry No. 6 of 2013 as alleged else extracts therefrom would have been availed and appropriate action taken against him. He further averred that he had never been privy to the purported sale transactions between George Kabiru Muchai and Rabera Nyanchame insisting that he is entitled to have his rightly and lawfully acquired motor vehicle which he purported to have illegally been impounded over one year.

When the application dated 10th December 2013 came up for hearing Mr. Kiongo, learned State Counsel appeared for the Respondents/Applicants whereas Mr. C. Mbaabu learned Advocate appeared for the ex parte Applicant/Respondent. Mr. Kiongo, learned State Counsel relied on affidavit by P. C. John Kitheka and the grounds on the face of the application,averring that when the consent was entered into the State counsel did not have sufficient information, however now they have information showing the ex parte applicant transferred the subject motor vehicle using false identity card No. 22143 411 claiming it to be that of the seller Joseph Wanyoike Gacheru. He averred the same belonged to one Thomas Siro Ondieki. He averred that there was a forgery. He further submitted the said Joseph Wanyoike Gacheru stated he had not sold the vehicle to the ex parte applicant but to George Kabiru Muchai. That George Kabiru Muchai in turn sold the vehicle to Thomas Rabera Nyachama who issued a fake cheque No. 000012. That George Muchai swore an affidavit objecting to the transfer on 14th August, 2012, however the transfer was fraudulently carried out through misrepresentation.

Mr. C. Mbaabu submitted on his part that the consent order is valid and can only be set side upon the applicants fulfilling the conditions which would necessitate the rescinding of a contract. Mr. C. Mbaabu in support of his proposition referred the court to the case of **Flora W. Wasike v Destimo Wamboko (1982 – 88) IKAR 625** where the Court of Appeal stated as follows:

“It seems that the position is exactly the same in East Africa. It was set out by Windham J. as he then was, and approved by the Court of Appeal for East Africa in *Hirani v Kassam* (1952) 19 EACA 131 at 134 as follows:

The mode of paying the debt, then is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Section on judgments and Orders (7th edn). Vol 1. P 124 as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on these claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court ...: or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement “.

Mr. C. Mbaabu, learned Advocate submitted the transfer was clean and that the ex parte Applicant has a valid log Book. He submitted that the transfer ID/NO is 22143411 and he urged that there is no document to show that was not Wanyoike’s identity card number. He persuaded the court not to accept the document relied upon by the Respondents as it is not certified to be a true copy of the original by the relevant ministry. He urged that no fraud has been established. Mr. C. Mbaabu attacked the applicants’ application and submitted the same is fatally defective as it is supported by an affidavit of a stranger one P.C. Kitheka who is not a party to this application and who filed an affidavit without leave of the court.

Mr. C. Mbaabu in support of his proposition referred the court to the case of **Meru Succession Cause No. 373 of 2003 in the matter of estate of M'Ikiara M'Muthuri . Esther Kanja Francis -vs- Latif M'Ikiara and John Mwenda** in which W. Ouko, J, as the then was, expunged affidavits of three deponents who had filed affidavits in Succession Cause in which they were not parties to the cause and without courts leave.

Mr. C. Mbaabu father argued the affidavit by Mr. John Kitheka was against the provisions of Section 5 of the Oath and Statutory Declaration Act (Cap 15).

He further urged that the notice of motion is defective as it is based on Section 1A, 1B and 3A of Civil Procedure Act which is not applicable in matters under Judicial Review. Mr. Mbaabu on this point relied on **Meru HCMISC. APPL. No. 98 of 2009, NAIROBI HCMISC APPL. NO. 1170 OF 2005 and C.A. MISC. APPL. 22 OF 2001 at Nyeri.**

Lastly Mr. C. Mbaabu submitted that the affidavit in support of the Respondents/Applicants application should have been sworn by Mr. Kieti, State Counsel who signed the consent.

The issue for determination in this application is whether the Applicants/Respondents have fulfilled the conditions for which a consent order can be set aside and further whether the application is fatally defective.

In this case there is no dispute that a consent allowing the application for Judicial Review was made in presence of all parties' counsel, who dictated the consent, confirmed its contents and signed the same before it was adopted as an order of the court. The counsel who appeared for the Respondents/Applicants Mr. Kieti, learned state counsel did not swear any affidavit in support of the application. The affidavit in support of the application is sworn by P.C. John Kitheka who is not a party to this suit.

I am much aware and bearing in mind that the order in question was by consent and the principles on which it can be set aside are now well settled. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out. See the decision of **Flora Wasike V Destimo Wamboko (Supra).**

In the instant application the counsel who gave the consent on behalf of the Respondents/Applicants did not depone that he gave the consent without the consent and knowledge of the Respondent. He did not state that he entered into the consent without knowledge of material facts. The Respondents/Applicants have not bothered to secure his affidavit in support of the application. The allegation that there was non-disclosure of material facts or misapprehension of existing state of affairs relating to the suit vehicle or lack of sufficient material facts at time of entering into the consent should have been deposed by Mr. Kieti, learned state counsel otherwise the Respondents/Applicants have failed to set out conditions to justify setting aside the consent order entered into voluntarily by both counsel. I therefore find and hold the Respondents/Applicants have failed to fulfill the conditions for which a consent order can be set aside.

The application on the other hand is allegedly supported by an affidavit of P.C. Kitheka. John Kitheka's affidavit is supposedly deposed before a Chief Magistrate Nairobi. The Jurat part shows the same was made in December, 2013 but does not state where or before who. It does not bear the signature or name of the magistrate. I note this do not comply with Section 5 of the Oaths and Statutory declaration which states:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”

On the other hand P.C. John Kitheka is not a party in this suit. He did not seek court's leave to make the affidavit in support of the application.

Having considered all the above, it is ordered that the affidavit of P.C. John Kitheka be and is hereby expunged from the record. The Notice of Motion is therefore without affidavit in support and the suit remains a mere shell.

Further to the application herein being a Judicial Review should not have been brought pursuant to provisions of Section 1A, 1B and 3A of Civil Procedure Act as the same do not apply in applications for Judicial Review and cannot therefore stand. The Notice of Motion is therefore defective.

The upshot of the matter is that the Respondent's/Applicant's application is incompetent and is struck out with costs to the exparte applicant.

DATED AT MERU THIS 13TH DAY OF FEBRUARY, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:-

Mr. Kiongo for the Respondent/Applicant

Mr. Muriithi h/b for Mr. C. Mbaabu for the exparte applicant

J. A. MAKAU

JUDGE