



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 56 OF 2013

RUMBA KINUTHIA.....APPLICANT

AND

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

OFFICER INDECHE OF KIAMBU

POLICE STATION CID OFFICES.....2ND RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated the 28th of February, 2013 and pursuant to leave granted by the Court, the Applicant herein moved the court seeking an order of prohibition directed to the Respondents either by themselves, their agents, servants, employees and/or their proxies preventing them from impounding or otherwise interfering with the Ex-Parte Applicants quiet possession of his motor vehicle registration number KAM 954V Toyota Ceres (“hereinafter referred to as the vehicle”).

The Applicant’s Case

2. It was the Applicant’s case that the 2nd Respondent’s actions are arbitrary, oppressive, and draconian and in utmost bad faith because all relevant documents regarding the vehicle in question were produced yet the 2nd Respondent still proceeded to impound the vehicle.
3. The Applicant deposed that on the 11th of February, 2013 his friend, a **Mr. David Irungu Mukonya** was driving the vehicle in Kiambu town when the vehicle was impounded by a police officer known as **Indeche**, the 2nd respondent herein who was stationed at the Kiambu Police Station – CID offices. The Applicant alleged that he then spoke with the said Officer on the telephone and it was agreed that the vehicle would be released on condition that the Applicant availed the relevant documentation.
4. It was the Applicant’s case that on the 12th of February, 2013 he attended **Mr. Indeche’s** office wherein he presented the following documents:
 - a. Letter dated the 29th of May, 2009 from a **Mr. Saining’u** – Senior Assistant Commissioner at the

- Kenya Revenue Authority instructing the officer in charge to release the motor vehicle to the applicant as the relevant duty and penalties pertaining to the vehicle had been paid.
- b. A police abstract form issued at Kiamumbi Police Station and dated the 12th indicating that the Applicant had lost and/or misplaced the receipt issued to him after he had paid for a new number plate.
 - c. An Affidavit affirming the occurrence of a burglary in which the Applicant had lost amongst other items, his original log book.
5. The Applicant contended that even after explaining this situation to the 2nd Respondent, the 2nd Respondent was still adamant that he would impound the said motor vehicle for further investigations. The Applicant's case was that there is nothing further to investigate because the Kenya Revenue Authority had cleared the said motor vehicle. In his view, the court should find it just and equitable to review this matter and further prohibit the Respondents from interfering with his lawful and quiet possession of the motor vehicle.

The 2nd Respondent's Case

6. The 2nd Respondent avers that on the 11th of February, 2013 he and another Corporal by the name **Alton Nyambu** were on patrol within Kiambu town when they came across the vehicle which had been parked outside the Kiambu Land office. He deposed that the number plates on the vehicle were not the same as those prescribed and issued by the Kenya Revenue Authority. He then decided to make an enquiry from the owner of the vehicle and confirmed that the car was being driven by a **Mr. David Irungu** who informed them that the Applicant was the owner of the vehicle.
7. The 2nd Respondent stated that he wanted to verify whether the number plates issued were genuine and requested that the motor vehicle be driven to Kiambu police station. Instead the driver telephoned the Applicant who sought the indulgence of the 2nd Respondent not to impound the vehicle and promised to avail supportive documentation to the police station the following morning. The 2nd Respondent added that he believed the Applicant because he was an Advocate.
8. The following morning the Applicant attended the police station without the vehicle but with the following documentation:
 - a. A copy of a KRA application form for reflective number plates for motor vehicle registration KAM 954V dated 2nd April, 2009
 - b. A copy of a police abstract for the loss of number plates Reg. No KAM 954V dated 2nd April, 2009 from Central Police Station Nairobi.
 - c. A copy of KRA payment receipt whose date was not visible and being payment of Kshs. 500 on account of search for records.
9. A copy of KRA application form for registration of motor vehicle Toyota Ceres Chassis No. AE 101-5109583 and Engine Number 4AK-123221 dated 1st July, 2009.
10. It was the contention of the 2nd Respondent that the aforesaid documentation did not bear the stamp of KRA and as such there was no proof that the same had been submitted to KRA. He asserted that these documents were not sufficient proof of ownership or of legal licensing of a motor vehicle because the only legally recognizable document in law is the original log book and registered number plates in the prescribed manner, design and colour as provided for in Section 12 of the **Traffic Act** Cap 403.
11. The 2nd Respondent states that he carried out a search on the ownership of the vehicle and found that as at 26th February, 2013 the vehicle registration number KAM 954V was a Nissan Body type N/D/S/S white in colour and registered in the name of Abdul Hakim Mohamed Salim and CMC Motors Group Ltd. It was his view that section 8 of the **Traffic Act** is clear that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.
12. To the 2nd Respondent, the Applicant presented to him an affidavit dated the 10th of March 2009

- in which it was stated that the Applicant lost the original log book of the vehicle on the 7th of March, 2009 yet the search from the office of the Registrar of Motor Vehicles confirmed that as at 26th of February, 2013 the Applicant was not the bona fide owner of the vehicle hence the 2nd Respondent urged this court to allow them to impound the vehicle and carry out further investigations.
13. The 2nd Respondent stated that the only police abstract availed to him by the Applicant was from Central Police Station and not Kiamumbi Police Station as alleged by the Applicant. He contended that the Applicant had not even relied on the police abstract from Central Police Station. To him, whereas the police abstracts were issued due to loss of number plates of the vehicle, the Affidavit dated 10th March 2009 did not depose to any loss of number plates. The 2nd Respondent also took issue with the fact that the incident occurred in Kiamumbi area yet the police abstract is from Central Police station yet police protocol demands that the area police station issues the abstracts.
14. The 2nd Respondent expressed surprised that the police abstract which stated that the applicant lost the KRA receipt for payment of number plates was dated the 12th of February, 2013 a day after he encountered the vehicle with **Mr. David Irungu** and added that the Applicant relied on a letter of clearance from KRA dated the 29th of May 2009 yet he first encountered the vehicle on the 11th of February, 2013. To him, the said letter of clearance conflicts with the search information obtained from KRA as at the 26th of February, 2013 and therefore the Toyota Ceres that the Applicant claims ownership of is neither registered nor licensed with KRA as required by Section 6 and 15 of the **Traffic Act**.
15. It was the position of the 2nd Respondent that in requiring the Applicant to produce the subject vehicle together with its registration documents for inspection and further investigations, the 2nd Respondent was carrying out its obligations and powers in accordance with Section 24 of the **National Police Service Act** Cap 11A of 2011 which includes inter alia the enforcement of laws and regulations and as such its actions are not ultra vires. In his view, the Respondents followed due process and as such there was no procedural impropriety on their part.
16. He denied that his actions are not arbitrary, oppressive, and draconian and instead insisted that the Applicant lacks good faith and comes off as a citizen who is not law abiding. To him, it is in public interest and in compliance with the law that all vehicles be registered and licensed hence this matter lacks merit and should be dismissed and the Applicant compelled to produce the vehicle for inspection and verification of its registration documents and status.

Applicant's Submissions

17. The Applicant submitted that the order of prohibition is available to him given the circumstances of the Application as it will forestall an illegality from being committed by the Respondents. He further submitted that this court is clothed with the powers to ensure public bodies or public officers undertake their statutory limits without acting in excess of the said powers to the detriment of the individual law abiding citizen.
18. He submitted that this court should take judicial notice of the fact that despite being aptly served the Respondents have not deemed it prudent to file any response in opposition of the matter before this court and added that this is a clear manifestation of the fact that the intended actions of the Respondents are unlawful and out of tune with statutory powers defining their operatives.
19. The Applicant relied on the decision in **Republic vs. Disciplinary Committee Law Society of Kenya Ex Parte Wanja G Wambugu Civil Appeal No. 698 of 2009** as well as on **Republic vs. Judicial Service Commission Ex- Parte Pareno (2004) 1 KLR** and **Chief Constable Wales vs. Evan (1983)** where the Honourable Court held that judicial review proceedings is a review of the manner in which the decision is made.

Respondent's Submissions

20. On the part of the Respondents it was submitted that the Applicant had failed to demonstrate how the Respondents harassed him by requesting him to report to the police station with the vehicle which is the subject of investigations. They added that the prayers sought by the Applicant are

- unconstitutional because they seek to prevent the Respondent from exercising their mandate as per the law.
21. To the Respondents the order of prohibition is discretionary and is only tenable where a public body or official acted in excess of their powers and as such the order requires the public body to cease from performing a certain act. In support of their submissions, the Respondents relied on **High Court Case Miscellaneous Civil Application No. 179 of 2012 Republic vs. the Chief Magistrate Milimani and 2 Others Ex parte Tusker Mattresses Ltd and 3 Others** where the court held that in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
 22. Further reliance was placed on **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** which set out the scope of an order of prohibition to the effect that it is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings which are in excess of its jurisdiction or in contravention of the laws of the land. The Respondents submitted that it is not the obligation of the court to supervise how investigations are conducted so long as the same are not in contravention of the law and added that the Applicant has failed to demonstrate any illegality, irrationality or procedural impropriety in the decision of the Respondent to require the subject vehicle for further investigations.
 23. The Respondents asserted that they are mandated by law to investigate crimes and apprehend offenders and they are therefore operating within the confines of the law. To them this Application is based on non-disclosure of material facts made with latent intent to mislead the Honourable Court and to scuttle the investigations of the Respondents.

Determination

24. Before proceeding with the merits of the application I wish to remind the parties of the decision of **Ringera, J** (as he then was) in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** where he expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA.RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI”

25. It is clear from the title of the proceedings herein that the Motion herein is not an epitome of impeccable, elegant or paragon drafting. However in **Republic Ex parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney

General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

26. I must nevertheless remind the parties that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

27. The scope of the judicial review remedy of Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....”

28. In the same case the Court of Appeal pronounced itself thus:

“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”

29. To the foregoing can be added the decision of the same Court in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** to the effect that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

30. Section 24 of the ***National Police Service Act No 11 A of 2011*** sets out functions of the Kenya Police Service as being the—

- (a) Provision of assistance to the public when in need;**
- (b) Maintenance of law and order;**
- (c) Preservation of peace;**
- (d) Protection of life and property;**
- (e) Investigation of crimes;**

(f) Collection of criminal intelligence;

(g) Prevention and detection of crime;

(h) Apprehension of offenders;

(i) Enforcement of all laws and regulations with which it is charged; and

(j) 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.

31. The word “investigate” is defined in the *Black’s Law Dictionary 9th Edition* as: **“To inquire into a matter systematically; to make an official inquiry.”**

32. In order to perform its said functions section 57 of the said Act provides that:

“A police officer may stop, search and detain any vehicle or vessel which the police officer has reasonable cause to suspect is being used in the commission of, or to facilitate the commission of, an offence.”

33. It is therefore clear that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to detain any vehicle or vessel which is reasonably suspected is being used in the commission of or to facilitate the offence. The 2nd Respondent has enumerated the facts which led him to believe that an offence may have been committed. It is not the mandate of this Court in these proceedings to make a finding as to the merit of the decision. However, it is a requirement that the suspicion must be based on reasonable grounds. This, in my view, is in tandem with Article 47(1) of the Constitution which states that **“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

34. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

35. From the foregoing legal provisions, it comes out clear that the action of detaining the applicant’s vehicle was clearly within the Respondent’s jurisdiction. The issues that this Court would then be called upon to deal with are whether the said action was irrational or tainted with procedural impropriety. Having considered the facts contained in the rivaling affidavits I am unable to find that the Respondent’s action was irrational. In order for me to make a determination as to who between the applicant and the respondent is right would require this court to dwell on the merits of

the decision by making a finding as to whether the applicant's case is merited or not and that is not the mandate of a judicial review Court as opposed to a trial court. This Court ought not, under the guise of preventing abuse of power, be itself guilty of usurping power. As was held in **Civil Appeal No. 234 of 1995, The Commissioner of Lands vs. Kunste Hotel Ltd:**

“...it must be remembered that judicial review is concerned not 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.”

36. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

37. With respect to the issue of procedural impropriety, it is the Court's view that the process of investigation involves the consideration of both sides and that the rules of natural justice will necessarily require the applicant's version to be taken into account. However the Court cannot at this stage of the proceedings find that the applicant's right to be heard will be infringed. If and when that happens the applicant will be entitled to move this court for appropriate orders. I therefore associate myself with the view taken by **Dulu, J** in **Mantrad Enterprises vs. Kenya Forest Services Misc. Application No. 744 of 2008** that where a property is detained and it is contended that the same is a subject of the criminal proceedings, the right forum to raise the issue of the detention is the trial court in which the criminal proceedings are pending. However, where it is clear that the property detained has nothing to do with the charge preferred in the trial court, it would be unreasonable and abuse of power and discretion to detain the property and this Court would not hesitate to grant appropriate relief.

38. Having considered the Motion herein, the respective affidavits and the submissions filed, it is my view that the material presented before this Court does not meet the standard expected in judicial review proceedings. In other words the grounds adduced by the applicant do not justify the grant of the orders of prohibition sought in this application.

Order

39. It follows that that Notice of Motion dated 28th February, 2013 is unmerited and must fail. The same is accordingly dismissed with costs to the Respondents.

Dated at Nairobi this 9th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Matwere for the Applicant.

Cc Kevin: