



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**J. R. MISC. APPLICATION NUMBER 150 OF 2012**  
**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**  
**AND**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA OF 2010**  
**AND**  
**IN THE MATTER OF THE CUSTOMS AND EXCISE ACT, CAP 475 LAWS OF KENYA**  
**AND**  
**BETWEEN**  
**REPUBLIC ..... APPLICANT**  
**AND**  
**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**THE COMMISSIONER GENERAL KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**  
**MARIDADI FLOWERS LIMITED.....EX PARTE APPLICANT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 8<sup>th</sup> May, 2012, the *ex parte* applicant herein, **Maridadi Flowers Limited**, seeks the following orders:

**1. An order of mandamus be and is hereby issued to remove and bring into the High Court for purposes of directing the 2<sup>nd</sup> Respondent to immediately release the Applicant's unlawful seized motor vehicle Toyota Land Cruiser Registration Number KAX 227P.**

**2. In the alternative to (1) above, an order of mandamus be and is hereby issued to remove**

**and bring into the High Court for purpose of compelling the 2<sup>nd</sup> Respondent to give written substantive reasons for the unlawful seizure of the Applicant's motor vehicle Toyota Land Cruiser Registration Number KAX 227P within 7 days.**

**3. Costs of this application be in the cause.**

### **Ex Parte Applicant's Case**

2. The same application is based on a Statement filed on 11<sup>th</sup> April, 2012 and the verifying affidavit sworn by **Jacobus J P Kneppers**, the applicant's Managing Director on 3<sup>rd</sup> April, 2012.

3. According to the deponent, applicant herein purchased **Toyota Land Cruiser Registration Number KAX 227P** (hereinafter referred to as the said vehicle) from one **Isaac Rodrot** on 13<sup>th</sup> April, 2006 for a sum of Kshs.4,800,000.00 which sum was inclusive of all the lawful applicable duties. Thereafter, on an application by the Applicant, the 2<sup>nd</sup> Respondent registered the said vehicle in the name of the Applicant and issued it a logbook to that effect. Since then, the Applicant has enjoyed the use of the subject Motor Vehicle until or around **June 2011** when the same was impounded by the officers of the Customs and Excise and deposited at St. Austin's Service Station Limited.

4. On or about 29<sup>th</sup> June, 2011, the Applicant wrote to the Commissioner of Investigations and Enforcement seeking advice on the manner of reclaiming the subject motor vehicle but there has been no response. Following the failure of the 2<sup>nd</sup> Respondent to reply to the said letter, the applicant instructed its advocate now on record, **M/s Mohammed Muigai Advocates** to demand the release of the vehicle and or give written reasons for the withholding/impounding of the subject motor vehicle. In their letter dated 13<sup>th</sup> February, 2012, the 2<sup>nd</sup> Respondent's Senior Deputy Commissioner wrote to the Applicant's advocate intimating that its letter had been forwarded to the designated commissioner and that the Applicant's advocate were to withhold legal action until substantively addressed. The Applicant's advocate then sought from the Senior Deputy Commissioner Legal Services, Kenya Revenue Authority a substantive response as had been intimated but the 2<sup>nd</sup> Respondent through its officers declined to respond to the Applicant's advocates' letter.

5. It was therefore the Applicant's case that the 2<sup>nd</sup> Respondent has unlawfully withheld/impounded the Applicant's said vehicle irrationally and without any justifiable cause. In impounding the said vehicle without affording a hearing to the Applicant, the Applicant contended that the 2<sup>nd</sup> Respondent has acted in utter disregard of the rules of natural justice and has acted unreasonably/irrationally by failing to give written reasons for the seizure of the said vehicle hence justice will be served if this application is allowed.

### **1<sup>st</sup> Respondent's Case**

6. In reply to the application, the 1<sup>st</sup> Respondent filed a replying affidavit sworn by **CPL Samson Too**, a police officer under the Criminal Investigation Department seconded to the 2<sup>nd</sup> Respondent on 26<sup>th</sup> November, 2013.

7. According to him, he is part of the investigating team together with **Judith Kinara** in the case involving the said vehicle. He deposed that he is a gazetted Scenes of Crime Officer appointed by the Attorney General vide Kenya Gazette No.10284 dated 15<sup>th</sup> December, 2006.

8. According to him, on or about the 15<sup>th</sup> June, 2011 they received information from the Motor Vehicle Investigation Section in KRA concerning three motor vehicles registration Nos. KAM 211J, KAP 037Z and KAX 277P sharing the same chassis number HDJ 101 – 0007316. On the 21<sup>st</sup> June, 2011 under the instructions of **Mr. Sainingu**, an Assistant Commissioner at the Motor Vehicle Investigation Section, he went to St. Austin's Garage situated along Ngong road in the company of another KRA officer by the

names **Daniel Syengo** from the Motor Vehicle Investigation section and conducted a restoration of the chassis number of motor vehicle registration No.KAX 277P and upon inspecting the said vehicle, the physical chassis number appearing on it was HDJ 101 – 0007316 and the chassis number area appeared to have been interfered.

9. Thereupon, the deponent, he undertook a full process of restoration by applying restoration chemicals on the chassis number surface area and was able to restore the original chassis number which is HDJ 101 – 0015887. Upon detecting this anomaly, it was decided by the KRA Motor Vehicle Investigations Officers that the said vehicle be deposited at the said garage (St Austin). Thereafter on 23<sup>rd</sup> June (sic), **Jacobus N. Kneppers** visited their offices and recorded his statement concerning the said vehicle and was informed about the interference with the chassis number.

10. The deponent averred that he informed by **Ms Kinara** that she did forward a report on the restored chassis number to Interpol (a section under CID) to confirm if the vehicle was among the list of stolen motor vehicles and that subsequently it was confirmed that the said vehicle. According to him, the matter has since been under investigations pending a final report on this theft from Interpol which was yet to be received and the said vehicle is still deposited at St. Austin's Garage along Ngong Road as plans are underway to have it moved to KRA Forodha Warehouse. He deposed that the vehicle having been confirmed to be stolen cannot therefore be released to *ex-parte* Applicant as it is a stolen property and that upon gathering sufficient evidence as on how it was stolen from Japan through Interpol, the applicant may among other people be charged for a Criminal Offence. To him, investigations are ongoing and there are many parties involved in this case which include getting reports from Japan a reason that has contributed to this delay hence the reason for withholding the motor vehicle is within the law and one which abides to the legal principles of law in Kenya. On the other hand, the *ex-parte* Applicant has neither shown nor exhibited evidence by way of tracing as to how he got the motor vehicle and how the ownership of the motor vehicle passed to him nor exhibited an order or import documents to prove proper importation.

## 2<sup>nd</sup> Respondent's Case

11. On the part of the 2<sup>nd</sup> Respondent, a replying affidavit was filed sworn by **Sylvester Okello Ogello**, an officer appointed under and in accordance with section 13 of the **Kenya Revenue Authority Act**, Cap 469 Laws of Kenya.

12. According to the deponent, in the course of normal work in the 2<sup>nd</sup> Respondent's mandate it was discovered through a motor vehicle Registration system that there were three motor vehicles, KAP 037Z, KAX 277P and KAM 211J, sharing the same Chassis Number. An investigation was then set in through the Revenue Protection Services (RPS) a section of Criminal Investigation. Officers seconded to the 2<sup>nd</sup> Respondent from the Criminal Investigation Department (CID) Department were tasked to crack and investigate cases of this nature together with a revenue officer namely **Chief Inspector Kinara, Samson Too**, and **Daniel Syengo** and in course of investigations, a statement was recorded from **Mr. Isaac Rodrot** who sold the subject motor vehicle to **Jacobus J.P. Kneppers** and according to him, **Mr. Kneppers** agreed to buy the car despite being informed that import documents which included the shipping documents were not ready. Equally a statement was taken from **Jacobus J. P. Kneppers** and in his statement he also stated that he had previously been informed by a **Mr. Kirigoti** that there was another vehicle bearing registration No.KAP 037Z with the same Chassis Number as the subject motor vehicle. It was therefore his position that the request by **Mr. Kneppers** to have the motor vehicle released could not be granted because two other motor vehicles were involved and the nature of the investigation was such that the Interpol had to be involved as the investigation had to be extended to Japan and Singapore where the motor vehicles originated from.

13. The investigation, however, revealed that the subject motor vehicle's Chassis Number had been tampered with to conceal the original Chassis Number. Forensic and Chemical examination by the CID on the Chassis Number area revealed that the Manufacturer's identification No. J101 00073 16 and that the Bill of Lading No. YKM 016 -126 purporting to have been used to import the motor vehicle was disowned by **Emarat Shipping Company Limited** who were purported to have issued it through their

letter dated 4<sup>th</sup> November, 2011. The restored chassis after the chemical examination was forwarded to the Interpol office at the CID Headquarters and a report from Interpol revealed that the subject motor vehicle was reported stolen in Japan on 2<sup>nd</sup> September, 2005. The vehicle having been confirmed to be stolen cannot therefore be released to the *ex-parte* Applicant as the same is lawfully in the hands of Interpol to conclude their investigation as per the complaint received and the particulars established deal with accordance with the law.

14. It was further deposed that the 2<sup>nd</sup> Respondent after establishing the nature of the complaint and pending further investigation proceeded to issue a Notice of Goods deposited with Customs pending further investigation as stated above and that the 2<sup>nd</sup> Res is mandated in law to ensure that goods including motor vehicles are properly imported into Kenya and within the relevant laws of the country. However, the *ex-parte* Applicant was in hurry and rash to get motor vehicle released and yet from the investigation it is quite clear that the *ex-parte* Applicant did not import the motor vehicle but was sold to him through a 3<sup>rd</sup> Party who he has not been joined with the proceedings hereto. To the deponent, it has been demonstrated that the reason for depositing the motor vehicle is within the law and one which abides to the legal principles of law Kenya. Further, the *ex-parte* Applicant has not shown or exhibited evidence by way of tracing as to how he got the motor vehicle and how the property of the motor vehicle passed to him. Neither has he exhibited the order or import documents to prove proper importation.

### **Applicant's Submissions**

15. On behalf of the applicant the contents of the supporting affidavits were reiterated and it was submitted that it is a legal duty of public authority to act reasonably and procedurally fair as provided in Article 47 of the Constitution. This duty it was submitted based on **Cullen vs. Chief Constable of Royal Ulster Constabulary [2003] UKHL 39** is also protected under common law to the effect that the importance of the right to give reasons for an adverse decision should not be underestimated, since in their absence the person affected may be unable to judge whether to challenge it.

16. It was further submitted based on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] 1 KB 22**, that there may be something so absurd that no sensible person could ever dream that it lay within the [powers of the authority. Based on **Ridge vs. Baldwin [1964] AC 40**, it was submitted that the essential requirements of natural justice include the fact that before someone is condemned he ought to be afforded an opportunity of defending himself. It was submitted that despite the Applicant having written more than once seeking the release of the vehicle no reasons for deprivation thereof has been given save for asking the Applicant to withhold legal action.

17. It was submitted that it is unreasonable to allow a person the use of a vehicle for 6 years before impounding the same without giving reasons thereof. It was contended that the Applicant ought to have been afforded an opportunity of being heard before the vehicle was impounded hence the decision was arbitrary and unfair and the application should be allowed.

### **1<sup>st</sup> Respondent's Submissions**

18. On behalf of the 1<sup>st</sup> Respondent, it was submitted that the impounding of the said vehicle was well within the 2<sup>nd</sup> Respondent's powers having established that three vehicles had been registered with the same chassis. Investigations, it was submitted have evolved into a criminal nature hence the vehicle is subject of ongoing criminal investigations.

19. It was submitted that the Applicant has all along been aware of the said investigations and was invited to record a statement hence the impounding of the vehicle is warranted.

### **Determinations**

20. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivaling submissions, this is the view I form of the matter.

21. The parameters of judicial review were set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 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..... The order of *mandamus* is of a most extensive 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 them 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, in all cases where there is a specific legal right or no specific legal 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 the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves 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..... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

22. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

**“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.”**

23. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose

to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.

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

25. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and 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.”**

26. Order 53 rule 4(1) of the *Civil Procedure Rules* provides as follows:

***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

27. In this case the Applicant, in the statement expressly stated that the application was grounded on the following:

- a. The 2<sup>nd</sup> Respondent has unlawfully withheld/impounded the Applicant's Motor Vehicle irrationally without any justifiable cause;**
- b. In so doing, the 2<sup>nd</sup> Respondent has acted in utter disregard of the rules of natural justice by impounding the Applicant's motor vehicle registration number KAX 227P without affording it an opportunity to be heard;**
- c. The 2<sup>nd</sup> Respondent has acted unreasonably/irrationally and contrary to the provisions of Article 47(2) of the Constitution of Kenya, 2010 by failing to give written reasons for the seizure of the Applicant's Motor Vehicle registration number KAX 227P .**
- d. It is just and fair that the matter be heard urgently.**

28. It is clear from the foregoing that the Applicant's application was based substantially on the ground that the Applicant was never afforded an opportunity of being heard before the Respondents impounded the said vehicle. However, the Respondents have exhibited a statement recorded from the deponent of the affidavit in support of the application in which he admitted that on 18<sup>th</sup> June, 2011 police officers from KRA police unit went to his work place and informed him that they wanted to check the chassis number of his car and on informing them that the car was at St. Austin, they went there and later informed him that the car had some problems with the chassis after which they called him to their offices to record his statement.

29. It is clear from the foregoing that the applicant through its Managing Director was given an opportunity to record its statement. Therefore it cannot be said that the Applicant has never been afforded an opportunity of being heard. Whereas it is true that the Respondents have prevented the Applicant from accessing the said vehicle for a long period of time, the Applicant's case based on the grounds contained in the statement is not that the Respondents had no jurisdiction to do what they did. Further it is not alleged that the Respondent's action of impounding the said vehicle falls within the Wednesbury unreasonableness. In other words the statement does not allege, apart from the issue of breach of the rules of natural justice, that the Respondent's action was otherwise illegal, irrational or tainted with procedural impropriety.

30. The Respondents have offered an explanation why the said vehicle has not been released to the Applicant. Whereas the reasons may not be merited, it is not the function of this Court in judicial review proceedings to investigate the merits of the complaints made by the Applicant. This Court in these kind of proceedings is concerned with the decision making process rather than its merits.

31. In this case the Applicant was no doubt afforded an opportunity of being heard and whether the Respondent believed the Applicant's version or otherwise is another issue altogether.

32. Whereas, the delay in making a determination by the authorities concerned if unexplained may well be deemed to be irrational and unreasonable, that is not the ground relied upon by the Applicant herein in the statement. Accordingly under Order 53 rule 4(1) that cannot be the basis upon which this Court can grant the judicial review orders sought herein.

33. Having considered this application, I am not satisfied that the only ground which the Applicant relied on in this Application, that it has never been afforded an opportunity of being heard, has been proved. In the result the prayer for certiorari fails.

34. With respect to the prayer for mandamus, Article 47(2) of the Constitution provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. That the Applicant's rights to use the suit motor vehicle are likely to be adversely affected by the Respondents' action cannot be doubted. The Applicant is no doubt entitled to use its vehicle pursuant to Article 40 of the Constitution and if its interest therein is to be restricted, it is entitled to written reasons for the said denial. Accordingly, an order of mandamus is hereby issued compelling the Respondents to furnish the Applicant with written reasons for their actions within 30 days from the date hereof.

35. In the circumstances of this case each party will bear own costs.

**Dated at Nairobi this 3<sup>rd</sup> day of June 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Otweka for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents***

***Cc Kevin***