IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISCELLANEOUS APPLICATION NO. 183 OF 2014

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEURE RULES, 2010

AND

IN THE MATTER OF THE TRAFFIC ACT, CAP 403 OF THE LAW OF KENYA

AND

IN THE MATTTER OF THE TRAFFIC RULES, 1953

BETWEEN

REPUBLIC……..... APPLICANT

AND

THE INSPECTOR GENERAL OF POLICE

DAVID KIMAIYO…….....RESPONDENT

AKITCH OKOLA..…….EX PARTE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 24th May, 2014, the ex parte applicant herein, **Akitch Okola**, who describes himself as a citizen of Kenya and an owner of a vehicle with tinted windows, sought an order of certiorari to remove in this Court for the purposes of being quashed the respondent's directive ordering private vehicles with tinted windows be impounded with immediate effect and an order prohibiting the said respondent or persons acting under him from impounding such vehicles. He also sought an order for costs.

2. The grounds upon which the application is based were that on 13th May, 2014, the Respondent issued a directive to the effect that all vehicles with tinted windows be impounded with immediate effect.
3. It was the applicant's contention that whereas the law exclusively prohibits the use of tinted windows with regard to public service vehicles, the respondent in issuing the impugned directive acted ultra vires by applying the same to all vehicles. In the applicant's view, the Respondent has no power to amend subsidiary legislation. It was further contended that the Respondent acted irrationally and unreasonably in the said directive which directive was outside his scope and jurisdiction. In the applicant's view, the said directive amounted to an infringement of his constitutional right to *inter alia* own property.
4. In the submissions filed on behalf of the applicant, it was the applicant's case that the Respondent's directive though well intentioned in light of a spate of incidents of insecurity which have plagued the country in the recent past, was however, ultra vires, unreasonable and irrational, and based on gross error of law and fundamental error of fact. The same therefore amounted to an abuse of power in as much as the Respondent purported to act outside the scope of his jurisdiction.
5. While relying on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, it was submitted that the Respondent's directive is tainted with illegality, irrationality and procedural impropriety and therefore ought to be quashed.
6. It was submitted that the Respondent's office which is established by Article 245 of the Constitution as read with section 10 of the ***National Police Service Act***, 2011, is not empowered to amend or enact regulations. Rule 54A of the ***Traffic Rules*** enacted under the ***Traffic Act***, Cap 403, it was submitted only prohibits the use of tinted windows to public service vehicles and not to privately owned ones and therefore by purporting to extend the same to the latter, the Respondent acted ultra vires the ***Traffic Rules***. The powers to make or amend the said Rules, it was submitted are donated to the Minister pursuant to section 120 of the ***Traffic Act*** hence it is only the Cabinet Secretary for Transport who can make or alter the same. In support of this submission the Applicant relied on **Anisminic Limited vs. Foreign Compensation Commission [1969] 2 AC 147** and **In Re Hebulla Properties Ltd [1979] KLR 96**.
7. It was further submitted that the Respondent's decision was also irrational in that in reaching his decision the Respondent committed a gross error of fact and fundamental error of law. On the same basis it was submitted the same decision was also irrational based on **Associated Provincial Pictures Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223**. According to the Applicant, by failing to adhere to the procedure for amendment of the said Rules, the Respondent's said decision was also tainted with procedural irregularity.
8. It is noteworthy that the application was not opposed by the Respondent.
9. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

   "Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.....By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it .....By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it .....I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

10. Rule 54A(1) of the ***Traffic Rules*** provides as follows:

A person shall not drive or operate a public service vehicle that is fitted with tinted windows or tinted windscreen. [Underlining mine].

11. It is clear from the above rule only public service vehicles are prohibited from being driven or operated when fitted with tinted windows or tinted windscreen. It is here however alleged that the Respondent in his impugned directive purported to prohibit all vehicles from being driven or operated when so fitted with tinted windows. The Respondent has not denied that this was in fact the effect of his directive. This Court has not been referred to any provision of the law which extended the prohibition under rule 54A(1) aforesaid to private vehicles. Without any such legal authority, the Respondent would no doubt have given directives without any legal basis.
12. This Court is no doubt aware of the rise in a spate of insecurity in this country in recent past and those may have been the circumstances which drove the Respondent to issue the impugned directive. That this is a serious matter was appreciated by **Lenaola, J** in **Modern Coach Express Limited vs. Attorney General & 3 Others [2012] eKLR**, a matter which is bears marked resemblance to the instant case, when he pronounced himself as follows:

"Safety is a prime consideration for any public vehicle owner and both the Minister and other organs of State have a general obligation to ensure the safety of passengers and if tinting of windows compromises that security, then promulgation of Law to restrict it cannot either be ultra vires Section 119 of the Act or any other Law. It is a matter of common notoriety that with terrorist threats abounding, public service vehicles are an attractive target and Rule 3 aforesaid was enacted to ensure that Law enforcers can see through public service vehicle windows and the minor inconvenience complained by the Petitioner cannot override the Law and the wider interests of public safety and security. Further, it is my understanding that the Traffic Act was enacted to ensure the general safety of the populace and that is why for example, regarding how windows should be designed and constructed,

Rule 30 of the Traffic Rules provide that the design of windows should be such that the driver has a full view of the road and traffic ahead; that his view is not impeded and material with reflective properties should be avoided – see *David Gichuki Kariuki vs Commissioner of Police (2008) eKLR*. The reason for the enactment is obvious as is the reason for denying public service motor-vehicle owners the comfort of tinted windows on their motor-vehicles."

13. Whereas this Court appreciates the obligation placed on the executive to protect the lives and properties of the citizens and residents of Kenya, that obligation must be undertaken in accordance with the law and any attempt to exercise extra-legal powers under the guise of performance of Constitutional obligation will come to nought as the Court will not hesitate to thwart such attempts. Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through executive craft or innovation. The courts would be no rubber stamp of the executive and if Parliament gives great powers to the executive, the courts must allow them to it: but, at the same time, they must be vigilant to see that the executive exercises them in accordance with the law. The executive must act within its lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The executive must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090, Padfield vs. Minister of Agriculture, Fisheries and Food [1968] AC 997; Secretary of State for Employment vs. Associated Society of Locomotive Engineers and Firemen (No 2) [1972] 2 QB 455, Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council [1977] AC 1014.**
14. By directing that those vehicles with tainted windows be impounded, the Respondent was in effect imposing penal sanctions on those who would violate his directive. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See **London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15;**

Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

15. A strict reading of Rule 54A of the ***Traffic Rules*** clearly shows that private vehicles were not brought within the ambit of the rule. To purport to bring the said vehicles within the ambit of the rule without amending the same was obviously the wrong route to follow in an attempt to secure the country. The legislative delay together with its uncertainty may have tempted the Respondent to short circuit the procedure by issuing the said directive. However such remedies may sometimes turn out to be worse than the disease as on occasions they may be fatal and it is the duty of the Court to take remedial measures to ensure that the surgeon does not resort to a hacksaw in place of a scalpel.
16. The expressions of this Court in **International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013**, bears repetition. There the Court pronounced itself as follows:

    "Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like on Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."

17. Article 245(2)(b) of the Constitution empowers the Respondent to exercise command over the National Police Service and to perform any other functions prescribed by national legislation. The national legislation in question is no doubt the ***National Police Service Act***, 2011. Section 10(1) of the said Act prescribes the functions of the Respondent and none of them expressly empower him to amend or vary the ***Traffic Rules***.
18. In issuing the directive that all vehicles with tinted windows be impounded without making a distinction between public service vehicles and private ones, the Respondent obviously purported to exercise powers he did not have. The effect of such directive, I agree with the applicant was to amend the ***Traffic Rules*** in particular Rule 54A and expand the ambit and application of the said Rule. The Respondent had no such power under the law. In **Koinange Mbiu vs. Rex [1951] LRK 130**, it was held that Rules and byelaws made under statutory powers must not be unreasonable, nor in excess of statutory power nor repugnant to that statute nor to the general principles of law. In that case whereas section 4 of the ***Crop Production Ordinance*** Cap. 205 enabled the Governor in Council by subsidiary legislation to fix by name area or areas to which the rules for controlling and improving crop production and marketing were to be applicable, the Governor made rules relating to race and class in the community. The Court had no hesitation in declaring the same *ultra vires.*
19. In the result I have no hesitation in issuing which I hereby do an order of certiorari removing into this Court for the purposes of being quashed the Respondent's directive ordering private motor vehicles with tinted windows be impounded with immediate effect which directive is hereby quashed. I further prohibit the respondent whether by himself, his agents or persons acting under him from impounding private motor vehicles with tinted windows pursuant to the said directive or in any way effecting the same. The applicant is awarded the costs of this application.
20. It is so ordered.

Dated at Nairobi this 11th day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Change for the Applicant

Cc Kevin