



Bhavin Motors Limited v Republic; Mungai & 3 others (Accused) (Criminal Revision 10 of 2023) [2024] KEHC 9120 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION 10 OF 2023
DR KAVEDZA, J
JULY 30, 2024**

BETWEEN

BHAVIN MOTORS LIMITED APPLICANT

AND

REPUBLIC RESPONDENT

AND

MARTIN WACERA MUNGAI ACCUSED

HENRY SHAKIRA MUSEE ACCUSED

FATUMA MOHAMMED BARAGU ACCUSED

PAUL THOROJO WACERA ACCUSED

RULING

1. The applicant filed the notice of motion dated 23rd June 2023, seeking orders to revise the ruling delivered 29th March 2022 by the Chief Magistrate's Court sitting at JKIA criminal case no E018 of 2020. The applicant also sought the release of motor vehicle registration number KCZ 695L Volkswagen Golf Variant.
2. The application is supported by grounds on the face thereof and an affidavit sworn by the applicant's Director Blupendra Narandas Govindji Rathod. The averments made are that the applicant is the registered owner of motor vehicle registration number KCZ 695LVolkswagen Golf Variant. The applicant is in the business of buying and selling motor vehicles. On 10th August 2020, the motor vehicle was sold to Brian Muiruri Mwanzia for a sum of Kshs 1,400,000. The purchaser only paid Kshs 975,000 and was to pay the balance in monthly installments as per the terms of the sale agreement annexed. However, the applicant defaulted and the applicant started tracking the motor vehicle to repossess it.



3. In September 2020, through a tracking device, the applicant discovered that the vehicle was in police custody. The purchaser had allegedly been arrested for trafficking narcotic drugs. The Director of Bhavin Motors Limited, in his capacity, filed an application for the release of the vehicle under JKIA Misc. Criminal Application No 51 of 2020. The prosecution conceded to the application. However, the trial court noted that since the Director was not the registered owner (Bhavin Motors Limited) the application had to be made by the registered owner, in accordance with section 20 of the [Narcotics and Psychotropic Substances \(Control\) Act](#), No 4 of 1994. Consequently, the application was struck out on 14th December, 2022.
4. Subsequently, the applicant (Bhavin Motors Limited) filed an application dated 16th January 2023, seeking the release of the said motor vehicle. The application was opposed through an affidavit sworn by PC Fred Makokha dated 23rd February 2023. The response was that the motor vehicle was subject to forfeiture pursuant to section 36 of the [Narcotics and Psychotropic Substances \(Control\) Act](#), No 4 of 1994. In a ruling delivered on 29th March 2023, the trial court found the application to be *res judicata* and was struck out.
5. Being dissatisfied, the applicant has now sought a revision of the orders issued by the trial court. In response to the application vide replying affidavit dated 19th July 2023, PC Fred Makokha contends that the motor vehicle in issue is an exhibit in the criminal case and is subject to forfeiture. He urged the court to dismiss the application.
6. In a supplementary affidavit dated 28th July, 2023, it was stated that neither the purchaser of the motor vehicle, Brian Muiruri Mwanzia, nor Bhavin Motors Limited were accused persons in the trial court case. Furthermore, forfeiture notices should have been issued to the owner or the person in charge of the vehicle at the time of seizure, which was not done. Additionally, Bhavin Motors Limited has not participated in any application for the vehicle's release other than the one struck out for being *res judicata*. The vehicle continues to be detained and is subject to wear and tear in its current state. There is no justification for its continued detention.
7. The application was canvassed by way of written submissions which have been duly considered and there is no need to rehash them. The issue for determination is whether the orders of the trial court warrant a revision.
8. The revisionary jurisdiction of this court is donated by Section 362 of the [Criminal Procedure Code](#) which provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court.”
10. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it is satisfied that the decision, order, or finding is tainted with illegality, errors of law, or impropriety or that there was an irregularity in the proceedings that gave rise to the impugned order, finding or decision.
11. The first issue is whether the application struck out was *res judicata*. The substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between



parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

12. The *Black's Law Dictionary* 10th Edition defines "*res judicata*" as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
13. The Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR stated as follows on the doctrine of *res judicata*:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”
14. In the *Maina Kiai case* (*supra*), the Court quoted with approval the Indian Supreme Court in the case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 where it was stated;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving the determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”
15. A cardinal ingredient to the doctrine is that the issues in dispute ought to have been heard and finally determined in the former suit and it matters not whether the dispute was based on the same cause of action or between the same parties litigating under the same title or that a competent court had rendered a decision, in so far as a matter is not heard and determined on its merits, the doctrine on res-judicata cannot apply. It therefore follows that a court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.
16. Applying the foregoing to the present case, I note that the gist of the application dated 16th January 2023 revolves around the question of the release of a motor vehicle. Can it then be said that the matter in the application was already heard and determined by a court of competent jurisdiction?
17. The trial court had previously rendered a ruling dated 14th December 2022 striking out an earlier application for release of the subject motor vehicle on the ground that the application was not made by the registered owner of the vehicle pursuant to section 20 of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No 4 of 1994.



18. From the record of the trial court, the first application for the release of the subject motor vehicle was filed by Blupendra Narandas Govindji Rathod a director of Bhavin Motors Limited. The said application was struck out pursuant to section 20 of the Act. The second application was filed by Bhavin Motors Limited and was struck out for being *res judicata*. In my view, section 7 of the [Civil Procedure Act](#) applies to cases where the issue in dispute is similar to an issue that was previously in dispute between the same parties when they were litigating under the same title and which was conclusively determined on merit by a court of competent jurisdiction.
19. In this case, although the issues the parties were litigating were similar, the parties in dispute were not the same and they were not litigating under the same title. In addition, the issue for the release of the subject motor vehicle was never conclusively determined on merit. Therefore, if for instance a matter is dismissed preliminarily on questions of jurisdiction just as the present application, that cannot operate as *res judicata* for the merits of the claim. The applicant in such a case is not barred from properly invoking the jurisdiction of the court in a subsequent claim.
20. Furthermore, in the ruling delivered on 14th December 2022, the application for release of the motor vehicle was ‘struck out’ and not ‘dismissed’. The words “dismissed” and struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts. It is true, as argued by the applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out. As already stated, by striking out the application, the issues raised were not conclusively determined on merits and therefore the parties could still return to the court for determination of the same issues plus others.
21. Gathering support from the cited judicial precedent, I find that the application dated 16th January 2023 was not *res judicata* as erroneously held by the trial court in its ruling delivered on 29th March 2023.
22. The second issue is whether the subject motor vehicle should be released to the applicant. From the averments made and the trial court record, it is common ground that the motor vehicle was found in the compound where the accused persons were arrested and recoveries made. The applicant contends that at the time, he was in the process of repossessing the vehicle since the purchaser had defaulted on the payment terms as per the terms of their agreement. The said purchaser is not an accused person in these proceedings. It was deponed in the replying affidavit of the respondents that notice of seizure was issued for the said motor vehicle to the 1st accused Martin Mungai Wacera pursuant to section 77 of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#). The vehicle was not claimed within the stipulated period. Section 20 of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#), also alluded to by the prosecution provides as follows:

“(1) Any machinery, equipment, implement, pipe utensil, or other article used for the commission of any offence under this Act shall be forfeited to the government.

(2) Every conveyance used for the commission of any offence under this Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under this Act or any narcotic drug or psychotropic substance, shall be forfeited to the government.

Provided that on an application made by the person who was the owner of the conveyance to the Court in which the prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and



condemnation of any conveyance, not being a proceeding under Part IV is pending the Court is satisfied beyond any reasonable doubt that: -

- (a) The person who was the owner of the conveyance, and
- (b) In the case of an aircraft or ship, every person who was a responsible officer thereof when it was made use of for such conveyance was not concerned or privy to such use, the conveyance shall be restored to the owner by that Court.”

23. From the evidence on record, it was not alluded that the motor vehicle was used pursuant to section 20(1) of the Act. It is also not covered under section 36 or 74 of the said Act which allows seizure and forfeiture of goods found in conveyance of narcotics. The list of exhibits on record does not list the subject motor vehicle as an exhibit and there is therefore no indication that it was intended as such. In addition, motor vehicle registration number KCY 841P Mazda Demio which was impounded together with the subject motor vehicle has since been released to its owner vide a ruling delivered by the trial court on 9th February 2022.
24. With all these factors combined, it is clear that the issue to determine is whether the release of the motor vehicle will jeopardize the subordinate court criminal case number E018 of 2020. This should be balanced with other rights of the parties to the trial.
25. I note from the proceedings the applicant produced a log book as *prima facie* evidence of legal ownership of the vehicle. Indeed, under article 40 (1) of the Constitution of Kenya, 2010, the applicant has the right, to acquire and own property, of any description and in any part of Kenya. However, sub article (6) states that; the rights under Article (40) (1) do not extend to any property that has been found to have been unlawfully acquired. In this case, the applicant's directors are not accused persons before the trial court and the subject motor vehicle is not subject to forfeiture.
26. The vehicle has been detained for the last three years and the applicant has been deprived of its use. In addition, there is a need to save it from wear and tear due to the immobilization of the engine. The criminal case is however still pending, in the event that the prosecution still intends to use it as an exhibit, the motor vehicle can always be availed. I hereby make the following orders:
- i. The Motor vehicle registration number KCZ 695L Volkswagen Golf Variant be released to Bhavin Motors Limited or its appointed agent.
 - ii. The applicant is directed not to transfer the ownership of the motor vehicle pending the hearing and determination of JKI Chief Magistrate's Court criminal case No E018 of 2020.
 - iii. The investigating officer is at liberty to take photographs of the motor vehicle which shall be used as prosecution exhibits before it is released to the applicant.
 - iv. The applicant is directed to produce the motor vehicle as and when required to do so by the trial court, in the event the motor vehicle is required.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY 2024

D. KAVEDZA

JUDGE



In the presence of:

Ms. Wanjala for the Applicant

Mr. Mong'are for the Respondent

Nelson Court Assistant.

