



Ndirangu v OCS Athi River Police Station & another (Miscellaneous Application E044 of 2024) [2024] KEHC 13613 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E044 OF 2024
MW MUIGAI, J
OCTOBER 31, 2024**

BETWEEN

GEORGE KIRIENYE NDIRANGU APPLICANT

AND

THE OCS ATHI RIVER POLICE STATION 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

RULING

Notice Of Motion

1. Vide an Applicant dated 22nd April 2024 seeking the following orders, that;
 - a. Spent
 - b. This Court to recall the file No. Miscellaneous Application No E007 of 2024 George Kirienye Ndirangu -vs- the OCS Athi River Police Station and the Director of Public Prosecution for revision.
 - c. This Court to vacate and or set aside the orders issued by Hon B.A. Ojoo- SPM on 9th April 2024 dismissing the Application for the release of Motor Vehicle KBG 850L to the Applicant.
 - d. This Court to order the OCS Athi River police station to release the motor vehicle registration number KBG 850K to the applicant and/or his advocate on record Fredrick Kamuiru forthwith.
2. The application is supported by the affidavit of George Kirienye Ndirangu who stated that he is the registered owner of Motor Vehicle registration KBG 850K which was seized on 19.09.2023 when his authorized driver was in possession. He sought to have it released through Misc. Application E007 of 2024 on 18.01.2024 but it was dismissed on 09.04.2024. He questioned the manner in which the



matter was handled, that the prosecution at the hearing in the 1st instance asked for 14 days to file a response and later stated that it was not served, that the Trial Court erred in finding that it did not have power to address the issue of the motor vehicle as it was under investigations whereas the Criminal Procedure Code allows the court to make necessary orders for the ends of justice to be met.

3. Further, that it failed to consider that the OCS did not present a charge sheet or a copy of the occurrence book extract to show that there was a complaint or even an offence being investigated. That the application was opposed and ought to have been considered as such. The Applicant stated that he was apprehensive that his motor vehicle was at risk of being vandalized and wasted due to the elements of weather at the police station as the security is not guaranteed.
4. The Court was told that the motor vehicle was seized while transporting a cargo of perishable foodstuff bound for United Nations and since it was seized, the Applicant has not been able to service the loan that financed the purchase of the motor vehicle. He contended that he stands to lose Kshs 5,000,000 if the motor vehicle continues to waste away at the police station.

Replying Affidavit

5. PC Erick Sanya a Police Officer currently stationed at Athi River Police Station filed an affidavit dated 23rd May 2024 in which he stated as follows;
 - a. The motor vehicles KBG 850K and KBG 850L are not and have never been detained at Athi River Police station for any reason.
 - b. The motor vehicle bearing registration KBG 850K belonging to the Applicant is held in lawful police custody in connection to the aforementioned offences.
 - c. On the 14th day of July,2023 the complainant received an order for 270 pieces of guardrails valued at Kshs.2.97 million from a prospective client via mobile number 0743378927.
 - d. Subsequently, the complainant confirmed the receipt of the agreed amount, which was duly reflected in the company's bank account after the prospective client informed them that payment had been made.
 - e. The lorry KBG 850K driven by an individual identified as Charles Mwangi, contacted via mobile number 0783718620 arrived at the company premises, loaded the guardrails as per the attached document marked "ES – 6" and departed to an undisclosed destination.
 - f. The driver of the said lorry Charles Mwangi was summoned to the Police Station for questioning which proved unsuccessful as he evaded the summons and switched off his mobile phone.
 - g. After utilizing information from NTSA the registration details of the motor vehicle revealed the owner to be the Applicant herein contactable via mobile No. 0723943534.
 - h. The Applicant herein is the sole owner of the motor vehicle registration Number KBG 850K as per NTSA records as evidenced by the attached document marked "ES-2".
 - i. Summons were issued for the Applicant to appear at the police station for statement recording and to produce Charles Mwangi (the driver) yet these summonses were disregarded and his cooperation with the police was not forthcoming.
 - j. After engaging the IC3 (Integrated Communication Command and Control) platform to facilitate the blacklisting of the motor vehicle involved, ultimately resulting in its apprehension



at Suswa on 19/10/2023 enroute to Nairobi as evidenced by document marked “ES-3” attached.

- k. The motor vehicle did not have any cargo or consignment at the time of detention.
- l. The impounded motor vehicle is presently held at Athi River police station under lawful police custody as an exhibit, while endeavors to apprehend the perpetrators involved in the theft remain ongoing.

Supplementary Affidavit

- 6. The Applicant filed Supplementary Affidavit and stated that the application is a revision of the ruling delivered by Hon B.A. Ojoo dated 9.04.2024 which was based on an application that was not opposed. That all allegation raised in the application were an afterthought as they were not provided at the Trial Court. Further, that there was no justification for holding the motor vehicle for one and a half years yet photo graphs would suffice. He alleged that it was being held for monetary gain, abuse of power and using intimidation.
- 7. He stated that his driver Charles Mwangi drove the motor vehicle to the police station and gave the keys to P.C. Swanya and he called to ask for Kshs 500,000 which he did not have so as to release the motor vehicle.
- 8. The application was disposed off by written submissions.

Submissions

2Nd Respondent Submissions dated 31/07/2024

- 9. The 2nd Respondent filed submissions stating that the efforts to have the Applicant and his employee to present themselves at the police station have been futile and that the present application is a by way by the Applicant to circumvent justice yet the investigations are still ongoing.
- 10. In addition to the Investigating Officer has set out in his affidavit that the motor vehicle registration No. KBG 805 K was used in the commission of an offence and is currently the only link between the perpetrators of the offence that may include the Applicant and the offence, therefore there is need for the vehicle to remain in police custody.
- 11. Reliance is made in the case of Commissioner of Police & the Director of Criminal Investigations Department and another vs Kenya Commercial Bank Limited & 4 others [2013].
- 12. It was submitted that the issue of Kshs 500,000 as a bribe to the investigating officer was not supported by evidence and only came up after the investigating officer swore an affidavit filed in Court.
- 13. Secondly, it was submitted that there was no unreasonable delay in investigating the matter, that despite summons, the Applicant and his driver have failed to present themselves to the police station thus the investigating officer cannot conclude his investigations. Reliance was placed on the case of Thuita Mwangi & 2 others vs Ethics and Anti-Corruption Commission & 3 others [2013] eKLR.
- 14. See also the case of Isaac Tumunu Njunge vs Director of Public Prosecutions & 2 other [2016] with regard to the power of the police to investigate the Court held that;

“It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not



only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

15. It is finally submitted that the Applicant in this matter has not come to this Court with clean hands, for not only has he directly caused a delay in investigating this matter but he is now trying to benefit from a situation he has created and this Court should not allow this to happen.

Determination

16. I have considered the application, the various affidavits on record and the submissions of the parties and find that the issues for determination are;

- a. Whether file no. Miscellaneous Application no E007 OF 2024 George Kirienye Ndirangu vs the OCS Athi River Police station and the Director of Public Prosecution should be recalled for revision.
- b. Whether the orders issued by Hon B.A. Ojoo- SPM on 9th April 2024 dismissing the Application for the release of Motor Vehicle KBG 850L to the Applicant should be set aside.
- c. Whether an order directing the OCS Athi River police station to release the motor vehicle registration number 805K to the applicant and/or his advocate on record Fredrick Kamuiru should issue.

17. On the first issue, the High Court has supervisory powers under Article 165 (6) of *the Constitution* of Kenya which provides as follows;

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.

18. This application has been brought under Section 362 of the Criminal Procedure Code which provides as follows:

“Revision

362. Power of High Court to call for records

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.”

19. The revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of Joseph Nduvi Mbuvi vs Republic [2019] eKLR as follows:

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings



in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

20. The principles that should guide a Court in exercising its revisionary jurisdiction were outlined in the case of *Prosecutor vs Stephen Lesinko* [2018] eKLR as follows;
 - a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 - d. Where the material evidence on the parties is not considered; and
 - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
21. At this juncture, the Court has read the impugned proceedings culminating to Ruling of 9/04/2024.
22. The impugned Ruling of 9/04/2024 now availed for the Court to consider and exercise revisionary jurisdiction.
23. The Trial Court indicated the application was considered but the matter is under investigations.
24. Prosecution on 9/04/2024 stated;

OCS Athi River stated that from PC Sanya investigating officer the lorry is held at station and on several occasions called for the owner/driver to avail themselves to no avail.
25. Investigation is legal mandate of Police as provided by Article 243 – 245 CoK and as per Section 21 & 34 Criminal Procedure Code. The Appellant/Applicant has not adduced evidence that he attended police station on being summoned nor that he produced his driver. There is a complaint of theft and monies paid from station cheques stopped and reported. The detailed Affidavit by the Investigating officer has not been controverted that he is subverting the law in the conduct of investigations.
26. The matter can only be canvassed in Court after investigations.
27. The Applicant may visit the police station with his advocate.
28. The application for revision is dismissed.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 31/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

