



REPUBLIC OF KENYA



**Madegwa v Republic & 4 others (Criminal Miscellaneous Application  
E005 of 2022) [2023] KEHC 18163 (KLR) (Crim) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18163 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL MISCELLANEOUS APPLICATION E005 OF 2022**

**LN MUTENDE, J**

**MAY 24, 2023**

**BETWEEN**

**NICHOLAS KHAMUYA MADEGWA ..... APPELLANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**HENRY MWIRIGI KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS MAINA ..... 3<sup>RD</sup> RESPONDENT**

**TWALIB EBRAHIM HAZARA ..... 4<sup>TH</sup> RESPONDENT**

**OCS) KILIMANI ..... 5<sup>TH</sup> RESPONDENT**

*(Application for revision, review and setting aside of the Ruling by Hon. Ann Mwangi in Criminal Case No. E1458 of 2020 dated December 16, 2021.)*

**RULING**

1. Nicholas Khamuya Madegwa, the applicant, approached this court through a Notice of Motion dated January 10, 2020 seeking revision, review and setting aside of the Ruling by Hon Ann Mwangi in criminal Case No E1458 of 2020 dated December 16, 2021, on retention of Motor-vehicle Registration No KAZ 361 G (subject Motor-vehicle) at Kilimani Police Station so that it is released to the applicant. In this respect that an order compelling the OCS Kilimani Police Station do issue to release the subject motor-vehicle.
2. The substratum of the application is that the applicant being the beneficial owner of motor-vehicle registration number KAZ 361G has undertaken to attend court and give evidence touching on the



- criminal matter No E1458/2020 involving the said motor-vehicle and incase the motor-vehicle will be required following investigations; the applicant will be ready to release it to the Police.
3. The application is supported by an affidavit sworn by the applicant who depones that he is the complainant in Criminal Case No E1458, Kibera Chief Magistrate's Court, having purchased the subject motor-vehicle from Twalib Ebrahim Hazara in the year 2015; and, having paid insurance premium for the said vehicle for five years until he lost it to a fraudulent purchaser who issued a bad cheque.
  4. That he reported the matter to the police who circulated the motor-vehicle and a search carried out resulted into the vehicle being recovered around Grogan area in possession of the 2<sup>nd</sup> Respondent (Henry Mwangi Kimani) and, the 3<sup>rd</sup> Respondent (Francis Maina) who were taken into custody as the vehicle was taken to Kamukunji Police Station. Subsequently the subject motor-vehicle was moved to Kilimani Police Station and the two (2) suspects were charged.
  5. That the applicant made an application for release of the subject motor vehicle to his possession through Criminal Application No E096 of 2021 and pursuant to orders of Hon CK Mwaniki the vehicle was released on conditions that were complied with. However, the orders were reverted with directions that the subject motor-vehicle be returned to the Police Station pending hearing of the case.
  6. That the applicant has suffered irreparable damage as he cannot service the loan he took to purchase the vehicle, his only source of income, and, that the vehicle has depreciated.
  7. The 2<sup>nd</sup> Respondent filed a replying affidavit dated March 7, 2022, opposing the application. He depones that the impugned orders were made after an application for release of the motor-vehicle to him being a bonafide purchaser. That his application was premised on restitution of the property found on him and that the complainant was not the registered owner.
  8. That he got possession after purchasing the vehicle from the showroom of the 3<sup>rd</sup> Respondent, having done a search at NTSA Portal, ascertained the name in the portal which was in consonance with the logbook, called the registered owner, Twalib Ebrahim Hazara the 4<sup>th</sup> Respondent who confirmed that he would transfer the ownership of the vehicle upon purchase.
  9. That the applicant has not demonstrated the reason the vehicle has not been registered in his name despite having had it for five (5) years. That the applicant voluntarily parted ways with the vehicle after he sold it to Vincent Munene on March 3, 2020 per the sale agreement.
  10. Further, that the applicant reported a case of issuing a bad cheque but not loss of the vehicle. That despite ongoing criminal proceedings in Kibera Criminal Case No E1458 of 2020, the applicant proceeded to another court in Kibera Criminal Case No E096 of 2021 where the Prosecution and the applicant entered into a consent to have the vehicle released in the absence of the accused persons. That the court was impartial for giving audience to the complainant in absence of the accused persons which is against the principles of fair hearing. That the stated orders were set aside by the trial magistrate Hon Gandani on September 30, 2021 but the applicant refused to comply with the orders of the court. That despite being summoned by the court, the applicant continues to use the vehicle which is actually in his possession.
  11. The 3<sup>rd</sup> Respondent, Francis Maina depones that the court lacks jurisdiction to entertain the application as the application should have been made before the court that issued orders to be reviewed. That the subject motor-vehicle being Registration No 3619 ought to have been an exhibit, but, the applicant through backdoor applied for release and obtained a consent where he was not a party. That the applicant failed to disclose existence of Criminal Case No E1458 of 2020 where the vehicle was an



exhibit therefore the orders were unlawful and irregular. That the orders to be revised were issued by the presiding magistrate after realizing their irregularity in obtaining the same. That the subject motor-vehicle is subject to litigation and the lawful owner is not known.

12. The 4<sup>th</sup> Respondent, Twalib Ebrahim Hazara filed an affidavit in reply where he averred that he sold the subject motor-vehicle to Fahim A. Malik in 2015 who subsequently sold the vehicle to the applicant on December 9, 2015. That in the year 2020 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who were found in possession of the vehicle tried to have him effect transfer of the motor vehicle to them but when he asked them to let Fahim ask him to transfer they did not respond.
13. The application was disposed through written submissions. The applicant submits that he is a victim of a crime who was robbed of his legally acquired property. That a criminal court cannot determine ownership of property for lack of jurisdiction, but, once the legal owner is established from records held at NTSA the vehicle would not be held by the 5<sup>th</sup> Respondent (OCS Kilimani Police Station)
14. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, suspects of crime of theft have not shown what prejudice they will suffer upon release of the vehicle. That if they are innocent purchasers, their action should be against the person who sold them stolen property and not the applicant.
15. That detaining the vehicle is a violation of the right to enjoy property. That the applicant has been confirmed to be the owner and has acquired the vehicle lawfully and he has been deprived of means to earn income to support his family as a result of theft. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are prevented by Article 40 of the *Constitution* from enjoying the right over property as they acquired stolen property. In this regard they relied on the case of *Martin Thiong'o Nyamwathi v Divisional Criminal Investigation Officer Kabete and 2 others* (2018) eKLR where the court stated that:

“The right to own property and its protection thereof is sacrosanct and a constitutional imperative under Article 40 of the *Constitution*. The applicant has lost income for over one month and should not continue incurring losses in his transport business indefinitely. It is only fair that the motor vehicle be released to him to continue using it to earn his livelihood pending further investigations. In all fairness, it suffices to say that the motor vehicle should be photographed by the police as part of the evidence and the log book deposited with the DCI Kabete as security pending completion of investigations. ”
16. The 1<sup>st</sup> and 5<sup>th</sup> Respondent through Mr. Kiragu Prosecuting Counsel submitted orally that the motor-vehicle having been released to the applicant, the application was spent.
17. In his submissions, the 4<sup>th</sup> Respondent supported the application. He urged that it is uncontested that he is the registered owner of the vehicle while the applicant is the beneficial owner, therefore the court has jurisdiction to review the order of the trial court.
18. That the court has the discretion to revise the Ruling dated December 16, 2021 and release the vehicle to the applicant. And, since a criminal case is pending the court could impose conditions that the applicant avails it to court when required and the Police could also take photographs that could be used as exhibits.
19. The 2<sup>nd</sup> respondent submits that the trial court in Criminal Case No E1458 of 2020 reviewed orders issued in Misc. Application No E096 of 2021 for reasons that an order of restitution ought not to be made without giving any possible claimant an opportunity to be heard. That restitution of property could only occur after exhibits are produced. In this regard he relied on the case of *Petroleum Institute of East Africa v Republic & 3 others* (2021) eKLR where the court set aside orders releasing a motor-vehicle to the owner pending hearing and determination of a criminal case.



20. That the orders issued should not be set aside because the appellant has failed to comply with earlier orders of the court. That the vehicle should be released to the 2<sup>nd</sup> Respondent who bought it for value. In this regard he relied on the case of *Caliph Properties Limited v Barbel Shama & another* (2015) eKLR.
21. That the applicant who claims a vehicle registered in the name of the 4<sup>th</sup> Respondent, concedes to have sold the car to a fraudulent purchaser, therefore, the 4<sup>th</sup> Respondent admits selling the vehicle close to 7 years ago. That according to Section 7 of the *Traffic Act*, he had 14 days to transfer the vehicle to a new owner. That the vehicle changed hands four (4) times but the 2<sup>nd</sup> Respondent has an honest claim being an innocent purchaser and equity aids the vigilant and not indolent as found in the case of *DCIO Chuka v Ashfard Munene Njagi* (2015) eKLR.
22. I have considered rival arguments. The High Court is seized of power to call for records of subordinate courts and to rectify errors or omissions apparent so as to amend irregularities or improprieties committed by the subordinate court. Section 362 of the *Criminal Procedure Code* (CPC) provides thus:

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.
23. The jurisdiction to alter or reverse an irregular or improper order is provided for by Section 364(1) of the *CPC* which enacts as follows:

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

  - (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - (b) In the case of any other order other than an order of acquittal, alter or reverse the order.
24. It therefore behooves a party moving the court in its revisionary capacity to clearly show the existence or truth of the allegation. The party must give evidence of the irregularity, impropriety, incorrectness or illegality. This power that is limited may not interrogate the subordinate court's discretion.
25. The disputed order emanates from the decision of the court to have the subject motor-vehicle detained at Kilimani Police Station. Looking at the background of the case, as well set out, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents face a charge of stealing the subject motor-vehicle. In the alternative, the 2<sup>nd</sup> Respondent is stated to have handled the subject motor-vehicle knowing it to be stolen; the applicant being the complainant.
26. The complainant herein obtained a court order that enabled him to have custody of the vehicle, an outcome that has aggrieved the 2<sup>nd</sup> Respondent who equally claims ownership. This however is not the proper forum to determine who the rightful owner was at the time of the offence and during the trial. This means at this point in time none of the parties can claim a right over the subject motor-vehicle.



27. A perusal of the record of the subordinate court availed shows that the 2<sup>nd</sup> Respondent filed Misc. Application No E163 of 2020 seeking release of the subject motor-vehicle, an application that was not successful.
28. What is apparent is that the applicant's application that was successful was not issued by the trial court. The court that issued the impugned order was not the one seized of the matter. The order was issued in the absence of the accused persons, which means that the motor-vehicle was released to the complainant without the knowledge of the trial magistrate and the accused persons who similarly lay a claim on the same.
29. To determine whether there was an illegality, this court must interrogate how the orders were obtained. Section 177 of the *Criminal Procedure Code* provides that:
- Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order—
- a. That the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or
  - b. That the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.
30. The order restoring the subject motor-vehicle was made before the court established who was entitled to it. The prosecution failed to advise the judicial officer who granted the order of the existence of the criminal case. What happened was an abuse of court process.
31. Both the Prosecutor and the complainant's hands were tainted. These two entered into a consent despite the Investigating Officer pointing out in a replying affidavit that the subject motor-vehicle was subject to charges where two (2) suspects had been apprehended.
32. In the case of *Everline Wamuyu Ngumo* (2016) eKLR it was held that:
- “I find that the trial court was not entitled to direct that the motor vehicle be released to the respondent/accused in order as the court put it,
- “to save it from wear and tear due to immobilization of the engine. The reason for this is that the motor vehicle has not been produced as an exhibit. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.” (Emphasis mine.)
33. The decision is persuasive. What therefore transpired was an irregularity. The court granted release of a motor vehicle, an exhibit that was to be preserved prior to being produced in evidence. The court did not have power to release an exhibit it was not in control/possession of.
34. For these reasons the consent between the Prosecutor and the complainant in criminal case No E098 of 2021 was marred by an illegality and against the court process.
35. This therefore means that the order granted by Hon Ann Mwangi on December 16, 2021 was within the law. There having been no irregularity, there would be nothing to revise and or set aside. The parties would therefore be expected to comply with the order issued by the trial court.



36. The upshot of the above is that the application lacks merit. Orders Accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT  
NAIROBI, THIS 24<sup>TH</sup> DAY OF MAY, 2023.**

**L. N. MUTENDE**

**JUDGE**

**In The Presence Of:**

Applicant

2<sup>nd</sup> & 3<sup>rd</sup> Respondents

Mr. Onkangi for Applicant

Mr. Kiragu for 1<sup>st</sup> & 5<sup>th</sup> Respondents

Mr. Odhiambo for the 2<sup>nd</sup> Respondent

Mr. Odhiambo holding brief for Mr. Mwai for 3<sup>rd</sup> Respondent

Court Assistant - Mutai

