



Moriasi v Director of Criminal Investigations & another (Miscellaneous Criminal Application E210 of 2023) [2023] KEHC 21437 (KLR) (Crim) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E210 OF 2023
DR KAVEDZA, J
JULY 28, 2023**

BETWEEN

ISAIAH MAYEGA MORIASI APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

RULING

1. The applicant filed a notice motion dated June 6, 2023 pursuant to Articles 49 & 50 of the [Constitution](#) of Kenya. The applicant prayed for an order to compel the 1st respondent to release motor vehicle registration number KCK 7xxH Nissan Wingroad. He also prayed that this court compels the 1st respondent to remove a caveat at NTSA with respect to the said motor vehicle. The application is supported by grounds on the face thereof and reiterated in the undated supporting affidavit sworn by the applicant.
2. The averments made were that: The applicant is the registered owner of KCK 7xxH Nissan Wingroad. He is a resident of the USA and UAE. While he was away, he untrusted the motor vehicle to one Adam Seth Onsongo to find a purchaser. However, he could not find a buyer for the motor vehicle in good time and directed him to deliver it to his sister-in-law. Onsongo failed to deliver the motor vehicle as directed. He later informed him that he had sold the motor vehicle to Evans Inyange Omundi for a consideration of Kshs 370,000. He reported the matter at Langata police station and the vehicle was impounded but later released to him. He maintains that the vehicle was sold without his consent and he never received any payment from the sale.
3. He stated that the police conducted their investigations and Adam Seth Onsongo was charged with the offence of obtaining money by false pretenses from Evans Inyange Omundi contrary to section 313



of the [Penal Code](#) at Kibera Chief Magistrate's Court criminal case no E1694 of 2022. In May 2023, the 1st respondent requested him to return the vehicle for processing but retained it. He contended that he filed an application for the release of the motor vehicle before the trial court but the court failed to make a determination on the same. He maintained that the vehicle is not subject to forfeiture. He urged the court the grant the orders sought.

4. In response, No 748XXX S SGT Joseph Wagucha an investigator at DCI Langata swore a replying affidavit dated June 19, 2023. He averred that a report was made by one Evans Inyange Omundi, the complainant who had allegedly purchased the subject motor vehicle but the seller (Adam Seth Onsongo) had refused to effect the transfer. The vehicle was impounded but irregularly released to the applicant herein. Adam Seth Onsongo, the accused therein was arrested and charged accordingly. On January 9, 2023, the case before the trial court could not proceed as the subject motor vehicle was not in court to be produced as an exhibit. The case was adjourned and the 2nd respondent directed the motor vehicle be detained for purposes of production in court. The applicant and the complainant have both filed applications for the release of the motor vehicle to them before the trial court. Any such release to the applicant or the said complainant would be detrimental to the prosecution's case. He maintained that the application is premature.
5. The 2nd respondent filed grounds of opposition dated June 15, 2023. The grounds raised were that the applicant has not demonstrated that the trial court is in breach of his fundamental rights. The application is premature as the motor vehicle is a likely exhibit that is yet to be produced and no witness has testified in the case. This court lacks jurisdiction to deal with the motor vehicle until it is produced. The application lacks merit and should be dismissed.
6. In rejoinder through a further affidavit dated June 20, 2023, the applicant averred that there is no dispute over the ownership of the motor vehicle. He is a witness in the criminal case at Kibera. He further stated that photographs taken by the investigating officer were evidence in their case. The complainant in the trial court has a right to seek civil remedy and pursue the money he paid to the accused.

Applicant's written submissions.

7. The applicant submitted that the purpose of detention as indicated by the investigating officer is to determine the ownership of the motor vehicle. However, the trial court is only vested with jurisdiction to determine the guilt or innocence of the accused on the charge. He maintained that photographs of the motor vehicle were already taken which can be used at the trial. He submitted that the court should examine the trial court record and find that it's a violation of the applicant's right to hold the motor vehicle when he is not an accused in the case.

2nd Respondent Submissions.

8. The 2nd respondent submitted that the applicant has not demonstrated substantial loss which merits the release of the motor vehicle. Section 24 of the Police Act and section 177 of the [Criminal Procedure Code](#) which provides that restitution of property can only occur when exhibits have been produced before the trial court. It was argued that there is a need to preserve the motor vehicle pending production in court.

Issues for determination.

9. Having considered the application, the responses, and the applicable law, the issue for determination is whether the applicant should be granted the orders sought.



Analysis and Determination.

10. The applicant submitted that the accused in Kibera criminal case no E1694 of 2022, irregularly sold his vehicle and pocketed the proceeds thereof. He maintained that he is the owner of the vehicle and produced a copy of the logbook and a search from NTSA. From the record of the trial court, the applicant is a state witness in the case against the accused. It is the responsibility of the prosecution to show that the applicant was an accomplice in the commission of the offence as he who alleges must prove. The prosecution having failed to do so, the subject motor vehicle ought to be restored to the applicant who is the person entitled thereto.
11. However, the 2nd respondent submitted that restitution of property under Section 177 of the Criminal Procedure Code can only occur when the exhibit has been produced before the court, and in this case, the motor vehicle is yet to be produced. A contrary position to the above was held in the case of Republic vs John Nganga Mbugua [2014] eKLR that:-

“It does not make any sense to keep the vehicle of the applicant which is an income generating asset in police custody until the pending criminal case is finalized. The prosecution have not attempted to demonstrate to this court why the vehicle should continue to be detained at the police station while the applicant is ready and willing to produce it during hearings.”
12. Further, in the case of Jeremiah Kobia Munoro vs Republic [2021] eKLR, the court held that:-

“... a motor vehicle parked in an open yard and unprotected from the hazards of the weather is prone to serious damage and depreciation.”

"It will not serve the interest of justice to, eventually release a "shell" to the rightful owner at the end of trial. It may even expose the state to litigation if at the end of the trial, there is no proof of that the motor vehicle was bought with proceeds of crime or no value is given to the complainant, if it is found to have been bought as such and yet it has completely depreciated in value."
13. The applicant submitted that the subject motor vehicle is for personal use and sought that the photographs already taken be used as exhibits. From the arguments advanced, it is clear that the issue to be determined is whether the release of the motor vehicle will jeopardize the subordinate court's criminal case (E1694 of 2022).
14. I note from the proceedings in the miscellaneous application in the subordinate court, that 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, he 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 is not an accused, and the motor vehicle in issue is not subject to forfeiture.
15. The vehicle has been detained for the last three months and the applicant has been deprived of its use. The criminal case is still pending with the motor vehicle being held as an exhibit. However, from the record, the matter is coming up for hearing on August 3, 2023. I therefore direct that if the matter is not heard and determined on the said date, the following orders shall abide.
 - i. The investigating officer shall take photographs of the motor vehicle in the presence of the applicant and/or his advocate.



- ii. The applicant shall avail to the trial court a certified copy of the logbook together with the original for verification of the chasis and engine number.
- iii. The investigating officer shall retain the certified copy of the logbook to be relied on in evidence.
- iv. The original logbook shall be returned to the applicant for safe custody.
- v. The motor vehicle shall be released to the applicant once orders I, ii, iii and iv above have been complied with.
- vi. The applicant shall not transfer ownership of the motor vehicle without the permission of the trial court.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Chege for the State.

Mr. Nyachoti for the applicant.

Joy C/A

It is further ordered that the file to be returned to the lower court today, 28/7/2023, for hearing of the main suit slated for **3/8/2023** and compliance of the ruling of the court.

