



REPUBLIC OF KENYA



**KENYA LAW**  
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**Birech v Prosecution & another (Miscellaneous Criminal Application  
E001 of 2021) [2022] KEHC 467 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 467 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2021**

**EKO OGOLA, J**

**MAY 30, 2022**

**BETWEEN**

**CHARLES KIBET BIRECH ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**OCS KAPSABET POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By way of a Notice of Motion application dated 19<sup>th</sup> May 2021, the applicant seeks the following orders;
  - a. Spent
  - b. That pending the hearing of this application, this honourable court be pleased to stay execution of orders issued on 2<sup>nd</sup> December 2020 by Hon. J. Orwa together with all consequential orders.
  - c. That pending the hearing of this appeal, this honourable court be pleased to stay execution of orders issued on 2<sup>nd</sup> December 2020 by Hon. J. Orwa together with all consequential orders.
2. The application is based on the grounds contained therein and in the affidavit in support of said application.
3. The brief facts underlying the application are that sometime in 2018, a tractor registration number KWU 073 disappeared. The applicant claimed he was the registered owner of the said tractor having purchased it from Isaac Birech in 2008. The police later traced and recovered the tractor which was then taken to Kapsabet police station. On 20<sup>th</sup> December 2020 the court issued orders allowing the respondents to sell the tractor. The applicant proceeded to file an application in Cr. Miscellaneous Application E021 of 2020 seeking orders to have the tractor released to him. The court dismissed his application on 1<sup>st</sup> April 2021 resulting in the present appeal challenging that ruling.



4. The application is opposed by way of a replying affidavit filed by PC Samuel Kanyi. He deposed that the OCS Kapsabet police station obtained a court order for purposes of selling unclaimed property that was lying at Kapsabet Police Station. Further, that the applicant's application to have the tractor released to him was dismissed as a result of the logbook the applicant produced being that of a different tractor than the one that was at the police station. It was his view that the appeal as a waste of time.
5. Upon considering the application and the pleadings, I have identified the following issues for determination;
  - a. Whether the appellant has an arguable appeal.
  - b. Whether the orders sought should be granted.

#### **Whether The Appellant has an Arguable Appeal**

6. An arguable case is not necessarily one that will succeed at appeal. In this matter, the trial Court, in its ruling of 1<sup>st</sup> April 2020, found that the applicant failed to prove his ownership of the tractor registration no. KWU 073 as there was a variance in the chassis number of the tractor and the details in the logbook that was presented in court. The same was as a result of assessing the expert evidence and testimony that was given by CI Onyapedi who conducted a forensic examination on the documents. It is my view that the appellant does not post a seriously arguable appeal.

#### **Whether The Orders Sought Should be Granted**

7. I have perused the court proceedings in the trial court and the evidence that was produced. The tractor on the ground was model 6600 yet the one in the logbook was 6610. The forensic examination confirmed the difference in the chassis numbers and the same could not be explained by the applicant. To then release the tractor to the applicant yet the issue of ownership was conclusively determined would be a miscarriage of justice. In any event once the tractor is sold, the value thereof will have been determined in the sale. If the appeal is successful, the appellant would be entitled to the value of the tractor, which will be the money value. So the orders sought herein of stay are not merited. The appeal is dismissed with no orders as to costs.
8. I find that the application is without merit and is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED T ELDOR ET THIS 30<sup>TH</sup> OF MAY 2022.**

**E. K. OGOLA**

**JUDGE**

