



**Mohamud v Energy and Petroleum Regulatory Authority & another (Miscellaneous Criminal Application E0122 of 2022) [2022] KEHC 12277 (KLR) (Crim) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12277 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E0122 OF 2022  
JM BWONWONG'A, J  
JULY 26, 2022**

**BETWEEN**

**ABDIRAHAM MOHAMED MOHAMUD ..... APPLICANT**

**AND**

**ENERGY AND PETROLEUM REGULATORY AUTHORITY 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

- 1 The applicant under certificate of urgency filed an application through his notice of motion seeking the following orders pursuant to articles 40 and 47 of the [2010 Constitution of Kenya](#).
  1. Spent
  2. The court to issue an order directed at the 1<sup>st</sup> respondent to release motor vehicle registration No KDG 571S.
  3. An order directed at the 1<sup>st</sup> respondent to give it leeway to take photographs of the said motor vehicle or retain a copy of the ownership document to be used in any future proceedings.
  4. An order to provide for costs to be costs in cause.
- 2 The application is supported by 11 grounds that are set out on the face of the notice of motion dated April 25, 2022, with the major grounds being the following. The applicant is the registered owner of the subject vehicle. On March 31, 2022 the applicant's driver, John Mukhwana, was hired by a customer to ferry goods from Buruburu Phase V to Industrial Area in Nairobi using the said vehicle.
- 3 The applicant was informed that his said vehicle had been impounded by the 1<sup>st</sup> respondent's officers while loading some gas cylinders and the driver fled away from the scene. The officers drove away the



- said vehicle to their yard for storage pending investigations. The applicant has made several efforts to address the issues raised by the 1<sup>st</sup> respondent including the necessary help they require from him to conclude their investigations. The applicant has requested for the release of the said vehicle but the 1st respondent has failed to release it.
- 4 No action has been taken against the owner of the gas cylinders.
  - 5 The continued detention of the subject vehicle not only violates the applicant's constitutional rights as protected by article 40 of the Constitution but continues to cause immense economic waste, mental distress and emotional anguish.
  - 6 The applicant now seeks the assistance of this court to have the vehicle released to him.
  - 7 In addition to the foregoing, the applicant's application is supported by a 22 paragraphs supporting affidavit; whose major averments are as follows. The applicant has averred that he is the owner of the subject motor vehicle, in respect of which he attached the certificate of ownership marked as annexure AM-1. While on his usual business the applicant was informed by police officers from Jogoo Police station that his vehicle had been impounded in an operation by officers from Energy and Petroleum Regulatory Authority (EPRA), while loading some gas cylinders and the driver ran away.
  - 8 The vehicle was driven away to the offices of EPRA for storage pending investigations. Sometimes in April 2022 the applicant went to the offices of EPRA to have his vehicle released, since the 2<sup>nd</sup> respondent had not preferred any charges against him. The vehicle had been detained for more than three weeks which amounts to arbitrary deprivation and unreasonable delay and a denial of his rights to acquire, own and meaningfully use the said vehicle.
  - 9 The vehicle has not been released to the applicant despite several requests to the 1<sup>st</sup> respondent. The vehicle is under a loan scheme and is wasting whereas the prosecution is not making any attempt to apprehend the driver despite that fact that the applicant is willing to give them details of the driver.
  - 10 The applicant has deposed that the 1<sup>st</sup> respondent has a legal authority to investigate offences committed in relation to liquefied petroleum gas and detain a vehicle in the exercise of their powers in an administrative action, but this should be done in a manner that is expeditious, efficient and procedurally fair.
  - 11 The applicant has further deposed that it is in the interests of justice that the vehicle be released to him as the illegal detention of his vehicle has halted his business, which has denied him the income and repayment of its loan.
  - 12 The applicant fears that the exposure of the vehicle to natural elements might accelerate its wear and tear and finally deprive him his source of income.
  - 13 The applicant has averred that the respondents have failed to act diligently and responsibly and have thus violated his right to the quiet, peaceful and unrestricted use of his property.
  - 14 The applicant has also deposed that:

.....I am not opposed to the motor vehicle being used as an exhibit in any criminal matter but photographic evidence and certified copy of the Motor Vehicle Sale Agreement would suffice so as to secure my socio-economic rights and my right to property and to reduce further damage of the motor vehicle.”
  - 15 The applicant has also deposed that he willing to co-operate with investigating officer and avail the said vehicle whenever required to do so.



### **The submissions of the applicant.**

- 16 Counsel for the applicant, (Messrs Mayogi Nyaribo & Company Advocates), has submitted that the Director of Public Prosecutions (DPP) has no locus standi under article 157 of the [Constitution of Kenya](#), since the file has not been forwarded to DPP. Counsel has further submitted that it is not clear as to who is responding to the present application; since the applicant has not received any responses from the respondents. Counsel has also submitted that the said vehicle rightfully belongs to the applicant having purchased it from Al Raheem Motors Limited, although the applicant continues to pay the purchase price through instalments.
- 17 Counsel further submitted that the subject vehicle was detained by the 1<sup>st</sup> respondent allegedly at an LPG refilling station namely Fast Gas Limited, while loading gas cylinders having been hired to transport them. Counsel has questioned as to why no one has been taken to court for operating without a licence.
- 18 Counsel has also submitted that the actions of the 1<sup>st</sup> respondent are not anchored in the [Constitution](#) and the [Energy Act, 2019](#). Under the latter act, the powers of the 1<sup>st</sup> respondent do not include impounding and detaining the vehicle arbitrarily. This he submits is clear from sections 9 and 10 of the [Energy Act](#). Counsel has cited the well-known English case of [John Entick, Clerk, Werszis Nathan Carrington and Three Others](#), 1 (1765) 19 Howell's State Trials 1029, in which the court observed that state officers are only permitted to do only what the law has allowed them to do. He has therefore concluded that the actions of the 1<sup>st</sup> respondent were unconstitutional.
- 19 Counsel also cited [Republic v Director of Civil Registration Services & Another, ex parte Simon John Gathienya](#) (2018) e-KLR, in which that court held that in the absence of express legislation, a legislative provision will not be interpreted as authorizing an interference with the constitutional rights of a person.
- 20 In addition to the foregoing, counsel also cited [Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others](#) (2010) e-KLR, in which the court observed that state organs and individuals are obliged to ensure that human rights are respected and observed. Counsel also cited article 40 of the [Constitution](#), which prohibits the limitation of enjoyment of any right on the basis of any grounds specified in article 27 (4) of the [Constitution](#).

### **The case for the 1<sup>st</sup> respondent.**

- 21 The 1<sup>st</sup> respondent filed a 12 paragraphs a replying affidavit sworn by Winny Cheptoo, in opposition to the application, whose major averments are as follows.
- 22 The deponent is a surveillance and enforcement officer in the employ of the 1<sup>st</sup> respondent. She is versed with the facts of this application.
- 23 The 1<sup>st</sup> respondent is responsible for the economic and technical regulation of the electric power and renewable energy in the petroleum sub-sectors. In relation to this application, the 1<sup>st</sup> respondent is mandated to licence all liquefied petroleum gas dealers and transporters.
- 24 On March 31, 2022, officers from EPRA and the police conducted an enforcement activity at Fast Gas Limited, a Liquefied Petroleum Gas (LPG) storage and filling facility, upon receiving intelligence reports of unauthorized refilling of LPG cylinders.
- 25 The team found the applicant's subject motor vehicle (KDG 571S) on site loaded with forty (40) assorted filled LBG cylinders belonging to Hash Gas and Sea cylinders, which had been illegally refilled



without the brand owner's consent/authorization contrary to section 99 (1) (m) of the [Petroleum Act, 2019](#).

- 26 It was established that the subject vehicle was not licenced to transport LPG in cylinders. It was also established that the driver of subject vehicle escaped upon arrival of the enforcement officers.
- 27 As a result, the subject vehicle and the offending cylinders were impounded and taken to the yard of the 1<sup>st</sup> respondent for safe custody to enable further investigations.
- 28 The case against the applicant and other suspect at large is still under active investigations and is pending perusal by the DPP and filing of charges against the suspects. The vehicle and the offending cylinders are exhibits to be relied upon by the prosecution and should not be released.

#### **The submissions of the 1<sup>st</sup> respondent.**

- 29 Counsel for the 1<sup>st</sup> respondent (Ms Winny Rop) has submitted that the investigations have been completed and the file has been forwarded to the office of the DPP for purpose of filing charges.
- 30 She has also submitted that section 11 (m) of the [Energy Act 2019](#), gives the 1<sup>st</sup> respondent powers to enter, inspect and search any premises where any undertaking relating to petroleum operations is carried out or where an offence has been committed or suspected to have been committed. Additionally, the 1<sup>st</sup> respondent conducts compliance inspections of energy and petroleum facilities based on powers conferred by the [Energy Act, 2019](#) and the [Petroleum Act 2019](#).
- 31 Furthermore, she has submitted based on [Diana Ketbi Kilonzo v IEBC & 2 Others](#), in which the court observed that the [Constitution](#) has allocated certain functions to certain tribunals and other bodies to discharge the mandate bestowed upon them and the courts should cross over to areas which are specifically allocated to them.
- 32 Furthermore, the 1<sup>st</sup> and 2<sup>nd</sup> respondent acted within their mandates as required by the [Constitution](#). The 2<sup>nd</sup> respondent is charged with prosecutorial powers and cannot be expunged from the record as contended by the applicant. It is the applicant who sued the 2<sup>nd</sup> respondent and cannot now turn around and urge the court to him expunged from the record.
- 33 Counsel also cited [DPP V Marias Pakine Tenkewa t/a Naresbo Bar and Restaurant](#) (2017) e-KLR, in which the court held that there is no dispute that the preservation and the safety of exhibits is an integral part of securing justice and fair play and interference with them may prejudice or cause a mistrial.

#### **The submissions of the 2<sup>nd</sup> respondent**

- 34 Counsel for the prosecution (Ms Edna Ntabo) submitted that a sale agreement is not proof of ownership but is an executory document. She therefore submitted that there is no nexus between the applicant and the ownership of the subject vehicle. She further submitted that the right to own and enjoy property is a constitutional right, but the applicant is not the registered owner of the subject vehicle.
- 35 The registered owner of the subject vehicle is not a party to these proceedings and therefore the court should not order the release of the subject vehicle as the court runs the risk of dispossessing the registered owner of the vehicle.

#### **Issues for determination**

- 36 I have considered the affidavits of the applicant and the 1<sup>st</sup> respondent and the applicable law.



As a result, I find that the following are the issues for determination.

## 1. Whether the 1<sup>st</sup> respondent acted within its mandate to detain the subject vehicle and the offending cylinders.

### Issue 1

- 37 It is not in dispute that the subject vehicle and the cylinders were seized and detained by the 1<sup>st</sup> respondent. The contention by the applicant is that the seizure is unreasonable and arbitrary and amounts to depriving the applicant the right to enjoy and own those properties.
- 38 I find that the applicant has a beneficial interest in the subject vehicle by virtue of the sale agreement between him and Al Raheem Motors Limited. I further find that the contention by the DPP that the applicant is not the owner of the subject motor vehicle, since he is not registered as the owner of the motor vehicle is without merit and I reject it. The applicant is a beneficial owner by virtue of the sale agreement. The *Constitution* protects the enjoyment of his beneficial interest in that property; but the enjoyment is not absolute. The enjoyment is subject to lawful enforcement as set out in the *Energy Act* and *Petroleum Act*.
- 39 In the current application the seizure and detention of subject vehicle and the offending cylinders for investigation purposes is a justified exercise, since the applicant is suspected to have committed a criminal offence. The subject vehicle and the offending cylinders were seized as exhibits in the on-going investigations. To order for their release might jeopardize the on-going investigations.
- 40 Additionally, I find that the taking of photographs of the motor vehicle to be used as an exhibit in any criminal matter together with a certified copy of the motor vehicle sale agreement as a condition of releasing the vehicle will interfere with the investigation process. In this regard, I find as persuasive the decision of the court in *DPP v Marias Pakine Tenkewa t/a Naresho Bar and Restaurant*, supra, that the preservation and the safety of exhibits is an integral part of securing justice and fair play and interference with them may prejudice or cause a mistrial. A court of law should not be called upon to micro-manage the investigation process, which function is allocated to investigatory agencies. However, a court of law may intervene where an agency is abusing its lawful functions to the detriment of a property owner; which is not the case in the instant application.
- 41 I also find that in the current application, the 1<sup>st</sup> respondent acted within its mandate in terms of section 11 (m) of the *Energy Act 2019*, which gives the 1<sup>st</sup> respondent powers to enter, inspect and search any premises where any undertaking relating to petroleum operations is carried out or where an offence has been committed or suspected to have been committed. The 1<sup>st</sup> respondent has not abused its powers and has not acted arbitrarily and unreasonably.
- 42 Furthermore, I find that the DPP was joined as a necessary party in these proceedings for the following reasons. First, in terms of article 157 (4) of the *Constitution of Kenya* the DPP, may direct the police to conduct investigations in any matter of a criminal nature, which includes directing the police to conduct further investigations. Secondly, in terms of article 157 (6) of the *Constitution of Kenya* the DPP is authorized to institute criminal charges against suspects. The functions of the DPP and the police were set out in the case of *Okiya Omtatah v The DPP & 3 others*, Nairobi High Court Constitutional Pet No E266 of 2020, in which the court restated the primacy of the DPP's decision to charge over the recommendation of the investigative bodies. In part that court pronounced itself as follows:

... The institution of criminal proceedings starts with the filing of a charge sheet or information sheet. It therefore follows that the prosecutor takes over once the investigator



has formed the opinion that a particular person has committed a disclosed offence and ought to be prosecuted. The Prosecutor is the one who determines the charge, drafts the charge or information and decides on the witnesses to be called.....”

43 In the criminal justice system, the investigator is the collector of evidence and the prosecutor is the one granted power to determine whether the evidence is sufficient to mount a prosecution.”

44 In the circumstances, I find that the application fails and is hereby dismissed with no order as to costs.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE ON THIS 26<sup>TH</sup> DAY OF JULY 2022.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

Mr. Kinyua: Court Assistant

Mr. Brian Mayogi Nyaribo for the applicant

Mr. Mutuma for the Republic/respondents

