



Handa v Republic & another; Mwagona (Interested Party) (Criminal Revision 400 of 2021) [2022] KEHC 15710 (KLR) (Crim) (28 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION 400 OF 2021
JM BWONWONG'A, J
NOVEMBER 28, 2022**

BETWEEN

STEPHEN HANDA APPLICANT

AND

REPUBLIC 1ST RESPONDENT

CONFRED NDUNGE NZAU 2ND RESPONDENT

AND

EMMANUEL MWAGAMBO MWAGONA INTERESTED PARTY

(Being an application for revision of the orders issued by Hon. C. Mwaniki SRM, delivered on 17th November 2021 in Kibera Chief Magistrate's Court in Miscellaneous Criminal Application No. E637 of 2021 Confred Ndunge Nzau vs the Commissioner of Police and 3 others)

RULING

1. The applicant has brought this application dated 17th November 2021 seeking the revision of the orders of Hon. C. Mwaniki (SRM) in the Chief Magistrate's Court sitting in Kibera, directing the 1st respondent to release motor vehicle KCX 569B to the 2nd respondent. The applicant also sought an order directing that the subject motor vehicle be released to the investigating officer pending, the hearing and determination of the case.
2. The application is based on the grounds on the face thereof and supported by an affidavit sworn by the applicant dated 17th November 2021. The averments are that the applicant is a complainant in the case of a stolen motor vehicle registration number KCX 569B. He reported the theft to Capitol Hill Police Station, Nairobi and the police commenced investigations. The said motor vehicle was traced to the 2nd



respondent and one Emmanuel Mugambo and the police proceeded to impound the vehicle. While the vehicle was in the custody of the police, the 2nd respondent moved Kibera Chief Magistrate's Court in Miscellaneous Application No. E637 of 2021, seeking the release of the subject motor vehicle. On 17th November 2021 the court ordered the release of the motor vehicle to the 2nd respondent without proof of any ownership documents.

3. In addition, although he was named as the 4th respondent, he was never given an opportunity to be heard leading up to adverse orders being made against him. He claims to have imminent fear that the motor vehicle may be disposed of, rendering the investigations nugatory. That he stands to suffer extreme risk or loss and remains heavily prejudiced by the 2nd respondent gaining possession of the subject vehicle. No prejudice will be suffered if the motor vehicle is released to the applicant and/or to the investigating officer.
4. The 2nd respondent filed a notice of preliminary objection dated 29th November 2021. The grounds raised were that the application contravenes the mandatory provisions of section 364 (5) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The matter relates to a contract and should be adjudicated in a civil suit and the High court lacks the jurisdiction to entertain it.
5. The interested party filed a replying affidavit dated 29th November 2021. He avers that he is the husband to the 2nd respondent and was a witness to her purchase of the subject motor vehicle, having purchased it from Patrick Aswani on 21st November 2019. Upon purchase, she took possession of the vehicle but it was not transferred to her. The said Patrick Aswani is a business partner to the applicant with whom they had some differences, which led to his refusal to sign the transfer documents. Unfortunately, Patrick Aswani died in August 2021 before the transfer could be completed. On 27th October 2021, he received a call that the vehicle had been impounded by the police in a case of a stolen motor vehicle.
6. He avers that he visited the police station with his wife and they recorded statement narrating how the said vehicle was acquired. That to date, neither himself nor his wife have been charged with the offence of stealing the vehicle. The dispute over the vehicle is one of the ownership and not a case of stealing as he paid the full purchase price to the applicant's partner. The continued detention of the vehicle by the police is without any legal basis or evidence of criminality and is therefore unlawful. He urged the court to dismiss the application.

The applicant's written submissions.

7. Mr. Asembo, learned counsel for the applicant submitted that the applicant is the registered owner of the motor vehicle but got deprived of it by the Patrick Aswani (deceased) in a criminal enterprise. The applicant has therefore sought the protection of the law by reporting the loss to the police for tracing and investigations.
8. Further, the High Court is mandated under Article 165 (6) and 165 (7) of the Constitution of Kenya with supervisory jurisdiction over subordinate courts. The Constitution of Kenya also guarantees the right to a fair hearing and the applicant has the right to have a dispute determined in a fair and public hearing. Learned counsel urged the court to allow the application as prayed.

The written submissions of the 2nd respondent and the interested party.

9. Mr. Mwagambo, learned counsel for the 2nd respondent and the interested party submitted that 2nd respondent and the interested party have not been charged with any criminal offence over their ownership of the motor vehicle. Further, there was no objection to the proceedings leading up to the



issuance of the impugned orders of the court. That the proceedings were regular and the court took into consideration the documents filed in the matter.

10. Learned counsel further submitted that the orders directing the release of the motor vehicle to the 2nd respondent was proper as the acquisition process was proved. Further, the allegations of impropriety by the applicant are baseless. Further, the applicant failed to disclose all material facts being a dispute over its ownership and his remedy lies in a civil suit.

Issues for determination.

11. I have considered the application, the responses thereto, the written submissions and the applicable law.
12. The issue for consideration is whether the lower court had jurisdiction to order for the release of the subject motor vehicle to the 2nd respondent.

Analysis and determination.

13. The power of this court in its revisionary jurisdiction is founded under section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya which provides that:

“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.”

14. Furthermore, article 165 (6) of the Constitution Kenya provides that:

“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.”

15. The jurisdiction of this court is not in doubt in view of the above provisions. On the merits of the application, the applicant seeks a revision of the orders releasing motor vehicle registration KCX 569B to the 2nd respondent. The grounds raised are that he was not given an opportunity to be heard and yet he was named as the 4th respondent in the application in the lower court. Further, he is the registered owner of the vehicle and any adverse order made against him greatly prejudiced him. In response, the interested party contended that the applicant should argue his case in a civil suit as the vehicle was acquired lawfully
16. There are documents to prove the same. He has urged the court to dismiss the application.
17. I have carefully perused and considered the record of the lower court in Kibera Chief Magistrates Court Miscellaneous Criminal Application No. E637 of 2021. That application was filed by the 2nd respondent against the following:
 1. provincial criminal investigations officer, Nairobi area.
 2. the Director special crimes unit, Nairobi area.
 3. the Office of the Director of Public Prosecutions and,
 4. Stephen Handa.



18. The applicant sought the release of the motor vehicle registration number KCX 569B. On 17th November 2021 the subordinate court granted interim orders for the release of the motor vehicle to the 2nd respondent pending the hearing and determination of her application. The applicant in this matter was represented in court by an advocate (Mr. Asembo).
19. I find that the lower court (Hon. C. Mwaniki, SRM) did not have jurisdiction to order the release of the subject motor vehicle registration No. KCX 569B to the 2nd respondent, because the police had detained it for investigations in respect of a report of it having been stolen. I further find that the subject motor vehicle was lawfully in the custody of the police for investigation purposes.
20. Additionally, I find that the order of the lower court amounted to interfering with police investigations, which is legally and constitutionally impermissible. The lower court had no business to entertain and determine the application by issuing an order releasing the subject motor vehicle to the 2nd respondent.
21. For avoidance of doubt, I find that this court has unlimited jurisdiction in both civil and criminal matters to entertain and determine this application by virtue of article 165 (3) of the Constitution of Kenya and by virtue of article 165 (6) (7) and section 362 and section 364 of the Criminal Procedure Code (Cap 75) laws of Kenya.
22. The upshot of the foregoing analysis is that the application succeeds with the result the order of the lower Court is set aside. Consequently, I hereby direct that the subject motor vehicle will remain in police custody to enable them to complete their investigations.
23. The other issues raised by the parties are now moot/academic and they do not fall for consideration.
24. There will be order as to costs.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH NOVEMBER, 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Asembo for the applicant.

Mr. Kiragu for the respondent.

