



**Kiplagat v Republic (Criminal Revision E014 of 2022)
[2022] KEHC 16708 (KLR) (Crim) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E014 OF 2022
CW GITHUA, J
DECEMBER 19, 2022**

BETWEEN

JAMES KIPLAGAT APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Mr. James Kiplagat seeks revision of the orders made by Hon. J. Gandani (CM) in Kibera Chief Magistrate's Court Criminal Case No. E954 of 2021 in a ruling delivered on August 19, 2021.

In the ruling, the learned trial magistrate dismissed the applicant's application to have motor vehicle Registration No. KDC 698B (subject Vehicle) which was being held at Capitol Hill Police Station released to him.
2. In the grounds anchoring the revision application filed by way of a Notice of Motion dated February 1, 2022 and in the supporting and further affidavits sworn in support of the motion, the applicant in the main contends that the learned trial magistrate erred in dismissing his application because she failed to appreciate that the subject vehicle was registered in his name and not the accused persons; that the applicant was not an accused person in the criminal case pending trial before the trial court nor was he under any investigations.
3. The applicant further averred that in declining to release the vehicle to him and holding that it can only be released after conclusion of the criminal case, the trial court failed to exercise its discretion judiciously by failing to give due weight to his explanation that he was not privy to the fraudulent sale of the vehicle to a 3rd party and that even if the vehicle was to be used as an exhibit, photographic evidence of the same was sufficient to prove the prosecution case; that the vehicle's continued detention at the



police station yard was subjecting it to wear and tear which would cause it to depreciate in value besides exposing it to the risk of vandalism and damage.

4. Regarding the circumstances under which the subject vehicle was impounded and detained by the police, the applicant deposed that sometimes in April 2021, he entered into an agreement with the owner of Hill Lane Auto shop to the effect that together with his agents, he would assist him sell the subject vehicle; that unknown to him, the accused persons in the criminal case pending before the trial court posing as his authorized agents fraudulently sold the vehicle to the complainant. The complainant is the interested party in the instant application. The matter was reported to the police and in the investigations that ensued, the vehicle was driven to the police station for the purpose of it being photographed but instead it was detained.
5. The application is contested by both the respondent and the interested party. On behalf of the respondent, the investigating officer, IP Jacob Nduda swore a replying affidavit on March 24, 2022 in which he reproduced the offences preferred against the accused persons in the lower court. It is noteworthy that the applicant is not listed as one of the accused persons in the criminal case. The deponent stated that since the interested party parted with Kshs. 950,000 in the fraudulent sale of the vehicle, releasing it before conclusion of the case would jeopardize the prosecution case and the complainant's interest since one of the issues for determination in the trial was whether the vehicle was legally purchased by the complainant.
6. On her part, the interested party opposed the motion primarily on grounds that having bought the vehicle for Kshs. 950,000, releasing it from police custody before it was produced as an exhibit and before conclusion of the trial would amount to prejudging the issues for determination in the trial including the issue of who between the applicant and the interested party was the lawful owner of the vehicle; that this would be prejudicial as it would interfere with her right to own property. She averred that the order of the learned trial magistrate should be upheld since the trial court did not have jurisdiction to release the vehicle in any event.
7. The application was prosecuted by way of written submissions which all the parties duly filed. In the submissions filed on his behalf by the firm of Matundura & Wamalwa Advocates, the applicant re-iterated the grounds set out in his application and the depositions in his supporting and further affidavits. In addition, he asserted that the impugned ruling violated his right to own property guaranteed under article 40 of the Constitution. He maintained that he was still the registered owner of the vehicle and the interested party's claim over it was misplaced and baseless since no interest could have been passed to her vide a fraudulent transaction.
8. Relying on the persuasive authority of Titus Mathenge Nguyo v Republic & Stephen Mwema Mule Criminal Revision No. E151 of 2021, the applicant urged the court to allow the application and direct that photographs of the vehicle be taken to be used as exhibits in the criminal trial. He pledged not to sell the vehicle before conclusion of the trial.

The applicant further submitted that the conditions under which the vehicle was being detained at the police station exposed the vehicle to great danger of vandalism and wastage as well as wear and tear which will cause him financial loss in terms of repair costs which would be avoided if the vehicle was released to him at this juncture.

9. Learned prosecuting counsel Ms. Kibathi in her submissions persuaded me to find that there was nothing illegal or improper about detaining a motor vehicle until a case was heard and determined.

She placed reliance on two persuasive authorities, namely, Republic v Everlyne Wamuyu Ngumo [2016] eKLR and Republic v Cap Van International Ltd & another [2004] eKLR in which Bwonwong'a and



Kimaru J respectively held that a magistrate's court does not have jurisdiction to restore property to a proved owner until the goods or property in question had been produced in court as an exhibit. Counsel urged me to find that there was no incorrectness, impropriety or illegality in the impugned ruling that would warrant invocation of this court's revisional jurisdiction.

10. The interested party presented her submissions through her advocates Ms. Mayende & Busiega Advocates and reiterated the averments made in her replying affidavit. She emphasized that the applicant's application before the trial court was properly dismissed as it was premature since the court did not have power to release exhibits it had not taken into its custody. For this proposition, she relied on the persuasive authority of *Proto Energy Limited & another v Republic & 8 other* [2021] eKLR.
11. I have carefully considered the application, the affidavits sworn by the parties in support and in opposition thereto as well as the rival written submissions filed on behalf of the parties. I have also read the record of the trial court. Having done so, I find that the application invokes the revisional jurisdiction of this court which is donated by section 362 as read with section 364 of the *Criminal Procedure Code* (CPC) which empowers this court to call for and examine the record of criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order made or passed by the trial court and where appropriate, to reverse or alter the impugned order, finding or sentence.
12. From the material placed before me, I find that it is not disputed that the applicant is the registered owner of the subject vehicle. He annexed to his supporting affidavit a registration certificate issued under the *Traffic Act* confirming that fact. None of the other parties have questioned or disputed the authenticity of the said registration certificate.
13. The main thrust of the respondent's and interested parties opposition to the application is that release of the motor vehicle before it was produced as an exhibit would prejudice the prosecution case and the interested party's interest in the vehicle having expended Ksh. 950,000 in its purchase in what turned out to be a fraudulent transaction.

It is however interesting to note from the trial court's record that the prosecution did not oppose the applicant's application before the trial court. The argument that releasing the vehicle before it was produced as an exhibit would prejudice the prosecution case was being made for the first time in the instant application.

The prosecution did not attempt to advance any reason for the change in its position in the application before the trial court and before this court.

14. Be that as it may, in dismissing the applicant's motion, the learned trial magistrate held that the complainant (interested party) had a valid interest in the subject motor vehicle and although the said interest was yet to be proved, it had to be protected by the court through continued detention of the vehicle by the police.
15. In my view, in making the above finding, the learned trial magistrate erred in failing to appreciate that the applicant had adduced conclusive evidence which was not disputed that he was the registered owner of the subject vehicle and there was no evidence or allegation that he was involved in its alleged fraudulent sale.
16. The learned trial magistrate erred by prioritizing the alleged interest of the interested party in the vehicle which was yet to be proved over the applicant's constitutional right to own and enjoy the use of his property enshrined in article 40 of the *Constitution* of Kenya 2010 which had already crystalized. Given that the applicant had proved that he was the lawful owner of the vehicle, It is my finding that the interests of justice in this case would have required release of the vehicle to him on conditions which



guaranteed preservation of the vehicle so that the vehicle and or its photographs would be available for use by the prosecution as exhibits in support of its case during the trial. The prosecution and the interested party did not demonstrate how or in which way the use of photographic evidence would adversely affect their case.

17. I agree with Muchemi J when she held in [Republic v John Nganga Mbugua](#) [2014] eKLR that:

“It is the practice in criminal cases that photographs will be taken by the scene of crime personnel of exhibits and scenes of crime which will be produced in evidence during the hearing. It is possible to avail the exhibit itself, the photographs may also be produced. If the vehicle is released after its photographs are taken, no miscarriage of justice will be occasioned during the trial. It is not the duty of the complainant to take photographs of his vehicle and submit them to the police. Instead, it is the duty of the investigating officer to have exhibits photographed and ensure the photographs are processed in the manner authorized by the relevant regulations. It does not make any sense to keep the vehicle of the applicant which is an income generating asset in police custody until pending criminal case is finalized.”

18. Similarly in this case, I do not find any justification for requiring the continued detention of the subject vehicle in an open yard where it is exposed to depreciation, vandalism and damage due to vagaries of the weather until the case was concluded yet it is impossible to foretell how long the trial would take to be concluded. I am clear in my mind that it would be most unjust and a travesty of justice to release the vehicle to its registered owner when it had completely depreciated in value due to the above factors. This is more so when it is considered that the interested party’s claim lay only in respect of the monies expended in the alleged fraudulent purchase of the vehicle which monies can be recovered in a conventional civil suit.

19. I now turn to a consideration of the respondent’s and interested party’s submission that the order of the trial court was lawful since the learned trial magistrate was not mandated by the law to release property or goods which had not been produced as exhibits during the trial.

20. At the outset, I wish to observe that there are conflicting decisions from the High Court regarding whether courts have jurisdiction to order release of properties which had not been identified by the owners and produced in court as exhibits.

The authorities relied on by the respondent and the interested party, namely [Republic v Everlyne Wamuyu Nguno](#) (2016) eKLR; [Republic v Cape Van International Ltd & another](#) (2004) eKLR all propagate the view that magistrates do not have jurisdiction to order release of property which has not been produced in court as exhibit.

I am however of a different view. Section 177 (a) of the [Criminal Procedure Code](#) which provides for restitution of property recovered in the course of investigations into commission of a crime states as follows;

“Where, upon apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order 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.”

21. A plain reading of this provision shows clearly that there is no requirement that a court seized of a criminal trial can only order release of property recovered from an accused person after the same had been produced as exhibit. The provision leaves no doubt that such property can be released by the court to a person who proves ownership of the same at any time in the course of the trial.



22. The above position was also espoused by Gitari J when interpreting Section 177(a) of *Criminal Procedure Code* in *Muigai Mucheru v Kenya Forest Service & another* [2012] eKLR when she stated as follows,:

“Clearly, therefore, there is no requirement in that section, that the court before which the person is charged must have received the property as an exhibit before the court can give orders in relation thereto. Provided that some property was taken from the accused when he was apprehended, (whether such recovery was made before, at the time of, or after the actual arrest), the court before which he is charged can issue orders relating to the property.”

23. In view of all the foregoing, I am persuaded to find that the applicant has demonstrated that his application is merited. However, to avoid any possibility of prejudice being occasioned to the prosecution case during the trial, I will allow the application subject to the following conditions;

- 1) The investigating Officer shall cause the subject vehicle to be photographed by the scenes of crime personnel within ten (10) working days of today’s date.
 - i. The applicant shall deposit the original logbook of the vehicle with the trial court.
 - ii. The investigating officer shall register a caveat with the Principal Registrar of Motor Vehicles to prevent any sale or change of ownership of the vehicle during the pendency of the criminal case.
 - iii. Upon proof of compliance with condition No. (ii) above, the investigating officer in conjunction with the officer in charge of Capital Hill Police station shall release the subject vehicle to the applicant after expiry of the ten days within which the vehicle is to be photographed.
 - iv. Upon release of the vehicle to the applicant, the applicant shall physically produce it in court if and when required to do so by the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF DECEMBER 2022.

C.W. GITHUA

JUDGE

In the presence of:

Ms. Kurgat for the Applicant

Ms. Adhiambo for the State

Mr. Omenta holding brief for Mr. Busiega

for the interested party

Ms. Karwitha Court Assistant

