



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC CRIMINAL APPLICATION NO. E134 OF 2020**

**JOSEPH NGENE GOTO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By an application dated 11<sup>th</sup> May 2020, the applicant has moved the court under the provisions of: Article 159(1) of the Constitution 2010, Section 177 of the Criminal Procedure Code and all other enabling provisions of the law, seeking for orders:

*a) That the motor vehicle registration number KAM 893R Toyota Corolla be immediately released to the applicant, together with the Logbook; and*

*b) That, costs of the application be provided for.*

2. The application is based on the grounds thereto, and an affidavit of the even date sworn by the applicant. He avers in a nutshell that, he is the registered owner of motor vehicle and has produced a log book marked “JGG 2” in proof thereof. That, he bought the vehicle from one; James Wairire Kuria, as per the sale agreement annexed to the affidavit.

3. He conceded that, the vehicle was previously owned by TOBS Limited, company owned by deceased Mr Cohen and the accused Sarah Cohen. But avers that he was summoned at the headquarters of; Directorate of Criminal Investigations Office; Nairobi. He recorded a statement on how he came into possession of the motor vehicle and so did the seller.

4. That, he is ready and willing to produce the motor vehicle as and when required to do so and/or photos thereof be taken and the motor vehicle released.

5. However, the Respondent opposed the application vide a replying affidavit dated 29<sup>th</sup> July, sworn by; No. 235730 Inspector Maxwell Otieno, an Investigating Officer in High Court Criminal 60 of 2019.

He averred that, the motor vehicle is an exhibit in the criminal case number 60 of 2019, a fact which is the applicant is aware of.

6. That, by 5<sup>th</sup> July 2019; the motor vehicle was registered in the name of; TOBS Limited, whose directors are the accused in that criminal case and the deceased husband. That, the directorship of TOB limited, is in issue in the criminal case.

7. Further, when the applicant entered into the agreement with one James Kuria to purchase it, the motor vehicle was still under the registration of; TOBS Limited. Therefore, payment to a non-owner makes the sale transaction irregular/fraudulent therefore the applicant is not bona-fide purchaser

8. In addition, when the sale agreement between TOBS Limited and the said James Kuria, if at all, took place, investigations concerning disappearance of deceased was on-going. That, the accused in criminal case; 60 of 2019 sought for transfer of motor vehicle on; 22<sup>nd</sup> August 2019, one month into investigations of the disappearance of; Mr Cohen which was heavily publicized by media, therefore, applicant had knowledge thereof. Therefore, the transfer of the vehicle without knowledge or consent of deceased renders it fraudulent.

9. That, the prosecution has witnesses who will prove that, the motor vehicle was sold secretly. The release of motor vehicle before production will prejudice the criminal case.

10. The application was disposed of through oral address to court by the respective parties on 10<sup>th</sup> May 2021. The applicant's submissions were tendered by the learned counsel, Ms Behailu while the Respondent was represented by the learned state counsel Ms Ndombi. The parties generally reiterated the averments in their respective affidavits; save for the applicant's observation that, the motor vehicle has been in custody of the Respondents and/or detained for over one (1) year.

11. I have considered the arguments advanced by the respective parties herein in support and opposition to the application and I find that, the key issues that have arisen are as follows;

*a) Whether the motor vehicle was lawfully transferred to the applicant; and*

*b) Whether it is to be used as an exhibit in criminal case 60 of 2019.*

12. From the arguments advanced, it is clear that, the issue to determine is whether the release of the motor vehicle will jeopardize the High court criminal case number 60 of 2019. This issue can only be determined in the subject proceedings by the trial court, in the light of the evidence therein.

13. Therefore if the court were to release the motor vehicle herein oblivious of the evidence in the criminal case, it may prejudice the fair hearing of that case. It's not clear why the applicant opted to file an independent application. It would have been better if this application was filed in that particular matter.

14. The upshot of the aforesaid is that, I decline to grant the orders sought.

It is so ordered.

**DATED, DELIVERED VIRTUALLY AND SIGNED THIS 31<sup>ST</sup> DAY OF MAY 2021**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr Behailu for the applicant

Ms Kimani for Ms Gichuhi for Respondent

Edwin – Court Assistant