



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. E002 OF 2020**

**MARY JERUBET KERICH ..... 1<sup>ST</sup> APPLICANT**

**RICHARD KERICH ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**OFFICE OF THE DIRECTOR OF**

**PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**BURUBURU POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicants, *Mary Jerubet Kerich* and *Richard Kerich* are husband and wife. They are aggrieved by the ruling of the learned trial magistrate in Makadara Chief Magistrates Criminal Application No. 201 of 2020 dated 17<sup>th</sup> July 2020. In that ruling, the lower court dismissed the applicants' application seeking to have motor vehicle registration number KBQ 265K Toyota NZE (the subject vehicle) which had been impounded by the police released to them pending completion of investigations into its alleged theft.

2. Being dissatisfied with the ruling, the applicants lodged a petition of appeal which was apparently filed online through the court's e-filing portal and was retrieved and placed in the court file without it being stamped as duly filed. I have however come across an electronically generated receipt evidencing payment of filing fees for the appeal dated 24<sup>th</sup> July 2021. In the premises, I can only conclude that failure to endorse the petition with the court filing stamp was an oversight by the court registry and in the interest of dispensing substantive justice, I will deem the petition of appeal dated 23<sup>rd</sup> July 2020 as duly and properly filed.

3. It is apparent from the court record that the petition of appeal was filed contemporaneously with a Notice of Motion of even date under a certificate of urgency. In the motion, the appellants (hereinafter the applicants) sought three substantive orders which are reproduced below:

***i. That pending hearing and determination of the appeal, this honourable court be pleased to issue an interim order directing the respondents to release to the applicants the motor Vehicle Reg. No. KBQ 265K Toyota NZE to avoid inconveniences, losses, irreparable damages and vandalism.***

***ii. That this honourable court be pleased to issue an interim order directing the respondents to release to the applicants the motor vehicle pending intended institution and hearing the criminal case, subject to the condition that the applicants shall avail the vehicle on the hearing date when the criminal case against Titus Mutui Mulungye is instituted to avoid inconveniences, losses and vandalism.***

***iii. That upon being used as exhibit in the criminal case, the said motor vehicle be released immediately and unconditionally to the applicants.***

4. The above application is the subject of this ruling. It is premised on grounds stated on its face which are replicated in the depositions made by the 1<sup>st</sup> applicant in her supporting affidavit sworn on 23<sup>rd</sup> July 2020. In the affidavit, the 1<sup>st</sup> applicant deposed that her husband, the 2<sup>nd</sup> appellant bought the subject vehicle in good faith and for value in a public auction lawfully conducted by the 2<sup>nd</sup> respondent and then had it registered in her name; that subsequently, they received a request to surrender the vehicle to the police on grounds that it was required to be used as an exhibit in a criminal case against one *Titus Mutui Mulungye* which request they acceded to by surrendering the vehicle to *Cpl Raphael Rhoba* of DCI Divisional Headquarters, Buruburu.

5. The 1<sup>st</sup> applicant further averred that at the time of purchasing the vehicle, there was no pending criminal case against anyone and none had been instituted by the time of filing the application in the lower court seeking release of the vehicle; that they were using the vehicle to

run their family business and to assist the 2<sup>nd</sup> applicant access medical facilities as he was allegedly in poor health.

6. It was also the applicants' case that the trial court erred in declining to release the vehicle to them despite their pledge that they will produce it in court if and when required and that its continued detention in the 2<sup>nd</sup> respondent's premises was exposing it to vandalism and possible financial losses on their part for which they may not be adequately compensated by the respondents; that it was in the interest of justice that the vehicle be released to them pending institution of the contemplated criminal case against the suspect or pending disposal of the appeal.

7. The application is contested by the state through a replying affidavit sworn by *PC Emmanuel Kipkogei*. *PC Kipkogei* averred that the subject motor vehicle is owned by one *Margaret Ndunge Koki* who reported to the police on an undisclosed date that the vehicle had been stolen; that the vehicle was subsequently recovered in the possession of one *Titus Mutui Mulungye* who was supposed to be charged with its theft but by the time the decision to prosecute him was made, the vehicle had erroneously been sold through a public auction. He confirmed that the vehicle was in the custody of the 2<sup>nd</sup> respondent and claimed that it was being held as an exhibit and should not be released to any person until the suspect was prosecuted and the resultant criminal case determined.

8. The application was prosecuted by way of written submissions which were briefly highlighted before me on 22<sup>nd</sup> April 2021 by learned counsel *Mr. Kimutai* for the applicants and learned prosecuting counsel *Ms Ndombi* for the respondents.

The court record shows that following directions issued by this court (*Wakiaga J*) on 23<sup>rd</sup> September 2020, the initial owner of the subject vehicle one *Margaret Koki Ndunge* was served with the application and mention notice but did not file any response nor did she participate in the proceedings.

9. In his written and oral submissions, *Mr. Kimutai* reiterated the depositions made by the 1<sup>st</sup> applicant and further added that in continuing to detain the vehicle while taking no action to prosecute the suspect since year 2017, the respondents were denying the applicants the exercise of their constitutional right to property guaranteed under *Article 40* of the *Constitution* which this court should not countenance; that release of the vehicle will not inhibit investigations into its alleged theft nor will it prejudice the respondents since the applicants have pledged to avail the vehicle to any court if required and are ready to abide by any conditions the court may impose.

10. On her part, *Ms Ndombi* submitted that there was good justification for the vehicle's continued detention by the police for two main reasons:

First, the sale of the vehicle by public auction was unlawful since it was not supposed to be included in the list of unclaimed assets considering that at the time of the auction, its alleged theft was still under investigations.

Secondly, releasing the vehicle would cause an injustice to its initial owner who would be deprived of her right to property. Counsel urged me to find that the interests of justice required that the vehicle be detained by the police until the suspect was charged and trial court gave directions on how the exhibit would be handled.

11. I have carefully considered the application and the parties' rival written and oral submissions and all the authorities cited. Having done so, I find that though what is before me is an application seeking interim orders pending hearing and disposal of the applicants' appeal or prosecution of the suspect in the alleged theft of the subject vehicle, both parties in their submissions appear to have been under the mistaken belief that what was before the court was either the appeal or an independent application seeking final orders for release of the subject vehicle to the applicants. Most of the arguments made by the parties go to the merits or otherwise of the appeal which I cannot consider at this preliminary stage for fear of prejudicing the fair hearing of the pending appeal.

12. In my view, the only issue for my determination is whether the applicants have demonstrated that there is sufficient cause to warrant the exercise of this court's discretion in their favour by ordering release of the subject vehicle to them pending disposal of their appeal. I say so because the other prayer inviting the court to release the subject vehicle pending prosecution of the named suspect is based on the assumption that the 1<sup>st</sup> respondent will at some time in future prosecute the suspect which falls squarely in the realm of speculation which this court refuses to be drawn into.

13. Turning to the issue I have distilled for my determination, I find that it is not disputed that though the police received a report of the alleged theft of the vehicle in the year 2017, the suspect has to date not been arrested and no criminal charges have been preferred against any person in connection with the alleged theft. It is also not disputed that the subject vehicle was impounded and or surrendered to the police on 26<sup>th</sup> February 2020 and has since been in the 2<sup>nd</sup> respondent's custody. It is also not disputed that the vehicle was in the list of unclaimed assets that were sold through public auction by the 2<sup>nd</sup> respondent in accordance with the provisions of *Section 63* of the *National Police Service Act*. The fact that the vehicle is currently registered in the name of the 1<sup>st</sup> applicant is also not contested.

14. Whether or not the 2<sup>nd</sup> respondent had capacity to pass title or proprietary interest in the vehicle to the 1<sup>st</sup> applicant and whether the sale of the vehicle was lawful or unlawful are substantive issues which should be ventilated and determined in the hearing of the main appeal. As matters now stand, there is evidence to prove, *prima facie*, that the 1<sup>st</sup> applicant is the registered owner of the subject vehicle which is being detained by the 2<sup>nd</sup> respondent on grounds that it is an exhibit in a criminal case which is yet to be instituted in any court.

15. As correctly submitted by the applicants, the right to own and to enjoy the use of property without any unlawful interference is a constitutional right which is protected under *Article 40* of the *Constitution of Kenya 2010*.

For the 1<sup>st</sup> applicant to be denied the right to the use and enjoyment of the subject vehicle by reason of its continued detention by the respondents, the respondents must demonstrate to the satisfaction of this court that they have good and valid reasons to justify their detention

of the vehicle.

16. The explanation given by the respondents that the vehicle is being detained as an exhibit runs hollow and is devoid of substance since in their own admission, the suspect is yet to be apprehended and there is no pending criminal case in any court relating to the alleged theft of the vehicle. It is thus my finding that the respondents have failed to establish that they have any legal justification to continue detaining the subject vehicle.

17. The applicants have through the 1<sup>st</sup> applicant and through their counsel expressed willingness to avail the vehicle to any court should the intended prosecution materialize and they have also undertaken to abide by any condition that this court may impose if their application was allowed.

18. It is not lost on this court that the state has expressed its desire to prosecute one *Titus Mutui Mulungye* for the offence of theft of the subject vehicle. Being a custodian of justice, it is imperative for this court to ensure that should the intended prosecution take place, the evidence required to support it is preserved and will be available to the prosecution during the trial.

19. Having weighed the competing rights and interests of the parties involved in the application and having taken into account all relevant factors, I am persuaded to find that the scales of justice tilts more towards allowing the interim order sought in prayer 3 than in denying it. In the circumstances, I exercise my discretion and allow prayer 3 of the motion on the following conditions:

*i. That the 2<sup>nd</sup> respondent takes photographs of the vehicle within the next three days.*

*ii. That the applicants' deposit in this court the original logbook of the subject vehicle.*

*iii. That the respondents to release the subject vehicle to the applicants once they are served with proof of compliance with condition (ii) above.*

*iv. That the applicants shall avail the subject vehicle to this court or to any other court whenever required to do so.*

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2021.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Kimutai for the applicants

Mr. Kiragu for the state/respondents

Mr. Ichuloi: Court Assistant