



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. E151 OF 2021

JOSPHAT MUGORO NDUNG'U.....APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

1. The applicant has filed the subject notice of motion application herein; dated the 28th April, 2021, supported by his own affidavit of even date, seeking the following orders; -

- a) *That the 1st respondent releases motor vehicle; KAM 964C white Isuzu Canter to the applicant;*
- b) *That the 1st and 2nd respondents be granted leeway to take photographs of the motor vehicle or further evidence to be used in any future proceedings;*
- c) *The court makes any other orders it may deem expedient in the interest of justice.*

2. He deposes that, a complaint has been lodged against him, by one Lawrence Wanjohi, who is well known to him; at the Nairobi Regional Police Headquarters over an alleged offence of; stealing a motor vehicle. That, he was working for the complainant, since the year 2002 and sometime in June 2018, the complainant sold the subject motor vehicle to him at a consideration of; Kshs. 400,000. That sum was to be deducted from payment of scrap metal which he delivered to the complainant's Imara Steel Factory.

3. Further, after delivering the scrap metal in excess of the consideration; the complainant surrendered the vehicle to him and effected the transfer into his name. That all along, he has been using the vehicle for transport business; which is his sole source of income.

4. That subsequently, the vehicle was detained at; Kayole Police Station allegedly for investigations. Subsequently, the complainant was summoned by the OCS Kayole Police Station but he did not honor the summons, as such the vehicle was returned to him on 8th April 2021.

5. However, in a turn of events the vehicle was impounded at Dandora Filling station by the 1st Respondent and detained in a place unknown to him. That, he was summoned by a Police Officer on the 27th April 2021, and obliged and was informed of the alleged offense, but he did not see the vehicle at the Police Station.

6. He avers that, he has incurred losses as a result of the continued detention of the vehicle, as his transport business has been halted and he is apprehensive, that he will suffer great harm if the vehicle continues to be detained.

7. However, the application was opposed by the Respondents vide a replying affidavit, dated 11th May 2021, sworn by No. 234262 C. I. Isaack Tenai. He avers that, on the 26th March, 2021, a report was received at the 1st Respondent's office, from one Lawrence Wanjohi, complaining of; theft of a motor vehicle, being an offence, contrary to; section 278A of the Penal Code and obtaining registration by false pretenses contrary to; section 320 of the Penal Code.

8. That, the complainant reported that he had given the motor vehicle to the Applicant, who was his former driver, to supply scrap metal to his business. That, Applicant was unable to supply scrap metal as expected, and in June 2018, after failing to deliver the goods, he requested the complainant to sell to him, the motor vehicle at a cost of Kshs. 400,000. The parties agreed and drafted an agreement which was to be

executed upon full payment of the purchase price.

9. That, prior to honoring the agreement, the Applicant silently went ahead and transferred the motor vehicle into his names, without the knowledge of the complainant. That it is suspected that, the stolen the original documents.

10. The Respondents further aver that, the Applicant secured a loan from Equity Bank Limited, using the vehicle which, but he was unable to pay, wherein the complainant was informed that, the vehicle was about to be auctioned, and he approached the bank and agreed with the Applicant that the complainant would pay off the loan.

11. That, after the complainant cleared the loan, the Applicant disappeared and ignored the complainant's calls forcing the complainant to report the matter to the Police Station and the Applicant was summoned by the 1st Respondent for investigations, but he refused to appear, until when the vehicle was detained at Buru Buru police station, a fact the Applicant is aware of.

12. Further, in the course of investigations, a letter was written to the National Transport and Safety Authority (NTSA) to provide records of the last two transfers, but "nothing was attached to the system" as is supposed to be. That, the complainant had bought the subject motor vehicle from Vincent Simba but the vehicle had not been transferred into his names.

13. However, on 18th May, 2021, the Applicant filed a further affidavit in response to the replying affidavit. He deposed that, the vehicle was grounded and could not move and that he carried out repairs there on, to a useful state, at his own costs. That, he always supplied scrap metal and surpassed the target of; Kshs. 400,000, but still he has not been paid for the surplus of deliveries made. The Applicant produced delivery notes from Imara Steel Factory, in support of his claim. He further stated that, the loan was set off by the complainant's wife Lucy Nduta as part payment of accrued debts owed to him.

14. That, he has always cooperated with the investigation authorities and there is no evidence to show that he absconded or failed to honour the summons. Further, no charges have been brought against him.

15. He argued that, the continued detention of the motor vehicle is a tactic employed to delay the course of justice and deny him his right to property, as the vehicle in question, is his sole source of livelihood.

16. The Applicant relied on the materials filed in Court but the Respondent in addition to the replying affidavit, filed submissions, and submitted that, a caveat has been placed on the vehicle pending the production of transfer documents and conclusion of the investigations. In the meantime, the original log book currently in the Applicant's name, has been forwarded to the investigative agencies at NTSA for investigations.

17. The Respondent referred to the provisions of; Sections 107,108 and 109 of the Evidence Act which state that, he who alleges proves the allegations.

18. I have considered the application, the prayers therein and the arguments by the respective parties and I find that, the main issue is whether, the motor vehicle is lawfully detained and/or whether the orders sought should be granted.

19. It suffices to note that, Article 40 (1) of the Constitution of Kenya 2010, provides that: -

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

20. These provisions mirror the provisions under; [Article 17 of the Universal Declaration of Human Rights](#), which states that; everyone has the right to own property alone as well as in association with others.

21. Moreover, the African Charter on Human and People's Rights, Article 14, states that;

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.

22. Its therefore clear from these provisions that, a right to own property is a constitutional right and/or a human right. However, a question arises as to whether it is an absolute right or it has any limitation. In that regard, it is noteworthy that; Article 40(6) of the Constitution of Kenya, 2010 states that, the right to own property under that Article, does not extend to any property that has been found to have been unlawfully acquired.

23. From the averments disposed to by the parties, it is clear, the issue of ownership of the subject matter herein; the motor vehicle, is in dispute, as each party is laying on it. The Applicant has produced a certificate of registration of the motor vehicle, showing previous owners as; Equity Bank (K) Limited and Josphat Mugoro Ndungu. He has also produced a copy of a “draft notes for a formal agreement to be drafted” and copies of delivery notes of scrap metal.

24. The Respondent has on its part, produced a letter dated 26th March 2021, from one Lawrence Wanjohi, seeking for investigation of the

fraudulent transfer of the motor vehicle. However, the copy of the Log book produced is illegible in terms of who the registered owner is. The PIN and ID produced, are in the names of; Simba Vincent Nyagoya, a letter from the Applicant dated 7th December, stating that; Lucy Nduta will clear of the loan outstanding at Equity Bank (K) Limited, further, letters from the Police to NTSA, requesting that a caveat be placed on the vehicle and ownership and transfer documents in relation with the subject motor vehicle be provided, finally, a statement under inquiry recorded by Joseph Mugoro Ndung'u.

25. Therefore, it is clear that the issue of ownership, has to be determined. Respondent has relied on the provisions of; section 107 to 109 of the Evidence Act, (cap) 80 Laws of Kenya, to argue that the burden of proof lies on the Applicant. I agree but the issue of ownership will be canvassed before the trial court.

26. Be that as it were, the question is; are the Police Officers allowed to detain the motor vehicle? The functions of the National Police Service are set down under; section 24 of the National Police Service Act No. 11 A of 2011, which state that these functions shall be: —

(a) *Provision of assistance to the public when in need;*

(b) *Maintenance of law and order;*

(c) *Preservation of peace;*

(d) *Protection of life and property;*

(e) *Investigation of crimes;*

(f) *Collection of criminal intelligence;*

(g) *Prevention and detection of crime;*

(h) *Apprehension of offenders;*

(i) *Enforcement of all laws and regulations with which it is charged; and*

(j) *Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.*

27. Similarly, section 26 (1) (c) of the Criminal Procedure Code provides that;

“(1) A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain—

a) any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or

(b) any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or

(c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

(2) No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention under this section of an aircraft, vessel or vehicle”.

28. The Respondents' main reason for detaining the motor vehicle is that, it is under investigation on alleged theft thereof. That, falls within its mandate. However, the question is; for how long can the Police detain the vehicle without releasing it to the lawful owner? But even more, do the Police have the legal mandate to determine the issue of ownership?

29. From the averments herein; the complaint over the vehicle was lodged with the Respondents on the 26th March, 2021. The Application herein was filed on 28th April, 2021. Request to NTSA was made on 1st and 8th April, 2021. This is a rather simple straight forward matter whose investigations should not take as long as it has taken of over one month.

30. The Provisions of Articles 48, 50 and 159(2) (d) require that, matter under investigation and/or trial should be dealt with expeditiously. In particular, Article 47(1) of the Constitution of Kenya states that, *“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and Article 159 stated; justice should be administered without undue delay.*

31. *It is against this background and recognition of the fact that, ultimately the decision of ownership of the vehicle shall be determined by the courts, that I order as follows: -*

a) *The Respondents shall conclude investigations (if not concluded) within three (3) days of the date of this order;*

b) *If the Respondents intends to charge the Applicant after investigation, the Applicant should then be arraigned in court within twenty-four (24) hours of conclusion of the investigation, pursuant to timelines under (a) above;*

c) *If the decision is made not to charge him, the subject motor vehicle should be released forthwith;*

d) *Once the matter is before court, the trial court shall deal with the issue of how the motor vehicle will be dealt with. In which case, the Applicant is at liberty to apply.*

e) *If the respondent fails to obey the orders given above, they shall be in contempt of court orders and liable to punishment in accordance with the applicable law.*

32. *It is so ordered.*

Dated, delivered virtually, and signed on this 24th day of May 2021.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr Cashmir for the Applicant

Mr Kiragu for the Respondents

Edwin - Court Assistant