



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CRIMINAL DIVISION AT NAIROBI**

**MISCELLANEOUS CRIMINAL APPLICATION NO. E154 OF 2021**

**HUMPHREY OTIENO OTIENO.....APPLICANT**

**VERSUS**

**DPP & ANOTHER .....RESPONDENT**

**RULING**

1. The subject of this ruling is a notice of motion application dated; 4<sup>th</sup> May 2021, brought under the provisions of; Articles 40, 49 and 50 of the Constitution of Kenya 2010 and all enabling provisions of the law.

2. The applicant is seeking for orders as here below reproduced:

*a) That, the honourable court be pleased to issue orders directing the DCIO Kilimani to take photographs of motor vehicle registration number; KBJ 938F Make: volkswagen golf, if they intend to use them in any proceedings;*

*b) That, the honourable court does issue orders directing the DCIO Kilimani to release motor vehicle registration number KBJ 938F Make: volkswagen golf, to the applicant;*

*c) That, the honourable court may grant any further orders it may deem expedient in the interest of justice.*

*d) That, the costs of the suit be in the cause.*

3. The application is supported by the grounds thereto and the affidavit sworn by the applicant of the even date. He avers that, following a sale agreement executed on or about 1<sup>st</sup> July 2018, between him and one, Kevin Johnson Juma, he purchased a motor vehicle registration number KBJ 938F, volkswagen golf at a price of Kshs 350,000, which he fully paid. That, the seller assured him that, he would assist in the transfer of the subject motor vehicle into his name.

4. However, on or about 19<sup>th</sup> April 2021, he was stopped by police officers on allegation that, the motor vehicle had been stolen in the month of; January 2021. He was arrested and detained at Central Police Station together with the motor vehicle. That efforts to secure his release or be furnished with more information on the alleged theft, did not yield fruits. On 20<sup>th</sup> April 2021, he was transferred to Kilimani Police Station.

5. That, while at Kilimani Police Station, he met one John Wanyoike Karanja, who was identified as the owner of the motor vehicle.

The vehicle was alleged to have been stolen from a car yard over five (5) years ago. He denied knowledge of the theft and sought to be released but the police and the complainant put pressure on him to enter into an agreement with the complainant and admit to pay him Kshs300,000 as damages and for repair of the motor vehicle.

6. That he was to pay that amount in instalments. He paid part of the money. Subsequently, he visited the Police Station for release of the motor vehicle but he was denied access due to the non-payment of the full sum. However, he has since learnt that, it is alleged the vehicle was released to the complainant.

7. He avers that, no criminal charges have been preferred against him on the alleged report of theft of motor vehicle. Therefore, the continued detention of the motor vehicle is a violation of his constitutional rights to property. Further, he is suffering irreparable damage or loss, as the motor vehicle is depreciating and/or wasting away. That, if the motor vehicle is released, he undertakes to preserve it.

8. However, on 20<sup>th</sup> May 2021, the Respondent opposed the application by filing a replying affidavit dated 18<sup>th</sup> May 2021, sworn by No. 75447 PC Andrew Maina attached to crime office at Kilimani police Station. He deposed that, on 26<sup>th</sup> January 2021, one John Wanyoike Karanja reported a case of theft of motor vehicle KBJ 938F volkswagen golf, and recorded a statement to that effect.

9. That, according to that statement, Mr Karanja bought the motor vehicle from Timotheo Waweru, who is the registered owner. He then agreed to sell the motor vehicle to; Fulgence Kimario at Kshs 780,000, who requested for a road test and went away with the motor vehicle without paying. A year thereafter, he came across him and he took him to Kevin Johnson Juma, who signed a sale agreement to buy the motor-vehicle at Kshs 780,000. That, Kevin promised to pay Kshs 100,000, on 1<sup>st</sup> March 2019. He did not pay, but went away with the motor vehicle.

10. On 19<sup>th</sup> April 2021, the complainant saw the motor vehicle along Uhuru Highway and caused the Police Officers on traffic duty to arrest the driver and detain the motor vehicle. Subsequently, the applicant and the complainant entered into a sale agreement as stated herein. However, later the complainant told the deponent that, he no longer wanted to pursue the matter since he would recover damages and took possession of the motor vehicle, with the knowledge of the applicant.

11. However, the applicant filed a supplementary affidavit dated 24<sup>th</sup> May 2021, and denied knowledge of ownership of the motor vehicle prior to his purchase thereof. He reiterated that, he was forced to sign the agreement with the complainant. That, the motor vehicle was released to the complainant without his knowledge.

12. The application was disposed of through oral submissions by the respective parties, which are considered herein. The applicant submitted that, the Respondent has not produced evidence of the statement recorded by the complainant and/or the investigation report. Further, there is no report of the occurrence book or report that the motor vehicle was booked as stolen, nor evidence that, the motor vehicle was released to the complainant.

13. However, the Respondent reiterated the averments in the replying affidavit and maintained that the applicant consented to the motor vehicle being given to the complainant. The allegations of coercion were denied.

14. I have considered the arguments advanced, the submissions and I find that, as per the copy of the log book, duplicate number 20093560221, annexed to the applicant's affidavit in support of the application, the subject motor vehicle herein belongs to one, Timotheo Waweru. A log book is the prima facie evidence of ownership of a motor vehicle. No other evidence can override the evidence on records in the log book. As such, neither the applicant and/nor the alleged complainant has established a prima facie case over the ownership of the vehicle or proved being legally registered owners thereof.

15. In addition, although both the complainant and the applicant allege that, the motor vehicle was sold to them vide various sale agreements, I find that, the sale agreement evidencing the transfer of the motor vehicle from; Timotheo Waweru shows that, the buyer is one Bugatti Traders Experts and not the alleged, John Wanyoike Karanja. There is no evidence adduced to show the relationship between Mr. Karanja and the Bugatti Traders Experts. Therefore, the *locus standi* of; Mr Karanja to claim ownership of the motor vehicle is in issue.

16. Similarly, although the applicant avers that, one Kelvin Johnson Juma sold the vehicle to him, that evidence is subject to proof. The alleged Kevin has not sworn any affidavit in support thereof.

Therefore, again, the *locus standi* of the applicant to claim ownership of the motor vehicle is subject to proof.

17. Furthermore, the deponent of the replying affidavit alleges that, the vehicle was stolen long time ago. Where is the evidence of the report thereof to the police? Additionally, it is alleged that, a year thereafter, the complainant met Fulgence who had disappeared with his vehicle, and let him go scot free. Why didn't he cause his arrest and detention of the vehicle?

18. It is further averred he traced it with Kelvin Juma, and he also signed a sale agreement to pay the complainant and renegaded on it since 2019. Why didn't he also cause his arrest, as he has done with the applicant? There is definitely more to this matter than catches the eye.

19. Furthermore, once the parties negotiated this matter for amicable settlement as alleged, the criminal element was compromised.

The police lost control over the matter. If there was no compliance with the terms of the agreement for sale, and in particular non-payment of the purchase, the legal recourse available to the complainant lay in civil litigation in court.

20. As such, the Investigating officer had no legal mandate to descent into the arena of dispute resolution by deciding who to release the motor vehicle to. Indeed, I have gone through all the annexures the Investigating Officer has annexed to his affidavit and I cannot find a copy of the agreement relied on to prove that, the complainant and applicant entered into any agreement at all.

21. At this point, it suffices to note that, most of the issues the Investigating Officer has deposed to are not in his own knowledge. They are matters within the knowledge of the complainant. Why the alleged complainant did not depose to these matters is only within the knowledge of the Respondent.

22. Be that as it were, the said agreement was produced by the applicant. I have gone through it and I find that, it does not state that if the payment therein is not made, the motor vehicle will be released to the complainant. Further, the last payment instalment by the applicant was allegedly made end of June 2021. How then, did the Investigating Officer release the motor vehicle earlier than that date. The way the entire matter was handled by Investigating Officer has a lot to be desired.

23. Further, it is also noteworthy that, there is no evidence herein that, indeed the complainant ever reported in any police station, the theft of his vehicle and/or recorded a statement to that effect to warrant the arrest and/or detention of the motor vehicle. But even then, assuming indeed the agreement was breached and the complainant did not want to pursue the agreement, why was the applicant not charged and/or refunded the sum paid.

24. The upshot of the aforesaid is that; I find, the Investigating Officer had no lawful authority to release the vehicle and in the given circumstances, I make the following orders:

- a) The Investigating Officer to forthwith, repossess and return the subject motor vehicle to the Police Station;*
- b) The Officer Commanding the Police Station at Kilimani to assign the matter for investigation to a different Investigating Officer;*
- c) If indeed, there is a report of theft of the motor vehicle, the due process of law should be followed; the matter should be investigated and the appropriate decision made;*
- d) The matter of ownership of the motor vehicle be decided through the legal and/or lawful due process of law;*
- e) The orders should be extracted and served upon the Officer Commanding the Police Station at Kilimani forthwith and in any case within twenty-four (24) hours, or two days of the order of this court, and be complied with, with immediate effect and not more than five (5) days of the date of this order;*
- f) The none compliance with the orders above, will act as automatic leave for the applicant to seek for further orders from court for appropriate action.*

It is so ordered.

Dated, delivered virtually and signed on this 23<sup>rd</sup> day of June 2021.

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Swaka for the applicant

Mr Mutuma for the Respondent

Edwin Ombuna – Court Assistant