



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. E171 OF 2021

DIRECTOR OF PUBLIC

PROSECUTIONSAPPLICANT

VERSUS

VICTOR ODUOR OPIYO1ST RESPONDENT

KEVIN NGOIMA KANGETHE2ND RESPONDENT

EDWIN NJOROGE GACHUGUMA3RD RESPONDENT

HARDIK KUMAR PAREKH4TH RESPONDENT

ROSALIND WAMBUI KABARI.....INTERESTED PARTY

RULING

1. Through a Notice of Motion dated 17th May, 2021, the applicant seeks **Orders that:**

*(a) The court issues conservatory orders temporarily suspending the orders of the **Senior Principal Magistrate E. Boke** issued on 29th April, 2021 releasing Motor Vehicle Registration Number KBD 063N (Subject Motor vehicle) to the Interested Party.*

(b) That there be forfeiture hearing to determine whether the subject matter should have been forfeited or not in the circumstances of the case.

2. The application is premised on the grounds that the impugned orders were made without due process of law; The trial court failed to conduct forfeiture hearing under the **Narcotic Drugs and Psychotropic Substances (Control) Act (Narcotics Act)**; The accused signed the forfeiture notice and was therefore aware that the vehicle would be forfeited pursuant to **Section 77** of the Narcotics Act; failure to hold forfeiture hearing defeated the tenets and principles of forfeiture under the Narcotics Act such that if the order is allowed to stand, it will lead to an abnormality which will enable the Interested Party to benefit from the error of the court.

3. The application is supported by an affidavit deposed by **No. 94595 P.C Abdi Malicha**, the Investigating Officer, who deposes that the motor vehicle was held as an exhibit having been impounded and detained. That the 2nd Respondent, the son of the Interested Party was charged with the offence of trafficking in Narcotic Drugs contrary to **Section 4(a)** of the Narcotics Act using the Subject Motor Vehicle.

4. That the Interested Party sought release of the motor vehicle, an order that was granted, and the motor vehicle was released to the 2nd Respondent and the Interested Party, his mother; And the motor vehicle is likely to be interfered with hence jeopardizing the Criminal Case.

5. The Interested Party filed a response to the application where she averred that she is the registered owner of the motor vehicle and only permitted the 2nd Respondent to use it. That she handed over the original Log Book and submitted all personal documents in compliance with the impugned order. That she visited the Station to collect the motor vehicle and was taken around in circles without plausible explanation. That the Investigation Officer undertook to release the motor vehicle but did not, therefore he is in contempt of court orders. That the motor vehicle continues to waste away within the station. That the issue of the motor vehicle being used as a proceed of crime does not arise as she is not an accused person. That she undertook not to sell the motor vehicle therefore it can be availed at any time when required.

6. That the seizure notice signed by the 2nd Respondent was inconsequential since the 2nd Respondent was not the owner of the motor vehicle.

7. The application was canvassed through written submissions. The applicant urged that pursuant to the provisions of **Section 121** of the Criminal Procedure Code (CPC) it was lawful for the Subject Motor Vehicle to be detained pending hearing of the criminal case against the accused persons. That a reading of **Section 20(1)(2)** of the Narcotics Act shows that the stated subject motor vehicle was a conveyance used in furtherance of the offence which is subject to forfeiture unless the owner of the motor vehicle demonstrates that they were not privy to such use as conveyance which they have to do beyond reasonable doubt.

8. That the court released the motor vehicle to the Interested Party on conditions that defeat the intention of the Narcotics Act. That the court ought to have considered the effect of its orders defeating the objective of the forfeiture provision in the Narcotic Case and to be alive to tricks used by traffickers in defeating the forfeiture by 3rd Party Motor vehicles. That the law provides for forfeiture proceedings pursuant to **Section 389A** of the CPC, and, **Section 41** and **42** of the Narcotics Act; and the 2nd Respondent and Interested Party being related as a mother and son, the question of conveyance is brought closer and the subject motor vehicle being a likely subject of forfeiture.

9. It is conceded by the Interested Party that the Narcotics Act provides for seizure and forfeiture of items/equipment within certain frameworks, but, the same Act gives an exception where the court can release a conveyance to the owner where there is proof of ownership and non-involvement in the crime in question, and it is on that premises that the Interested Party moved the court to release the motor vehicle.

10. That the application was not contested through a formal response by the DCI Kilimani and ODPP. That if they wanted a forfeiture hearing they should have advanced it before the subordinate court. And it is not right for the argument to be raised in this court as should have been done in the lower court.

That the subordinate court acted under **Section 177** of the Criminal Procedure Code (CPC) following uncontroverted evidence that the Interested Party was the owner of the motor vehicle and not involved in the crime. That taking into consideration principles of proportionality, the best remedy is to uphold the order of the subordinate court.

11. The revisional jurisdiction of this court that is limited to rectifying irregularities, illegalities and impropriety on record is donated by **Section 362** of the Criminal Procedure Code that provides:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

12. The application to release the subject motor vehicle by the subordinate court was made pursuant to the general provisions of Article 159 of the Constitution which grants courts authority to exercise judicial authority that is derived from the people. The accused persons in the matter are alleged to have contravened the law and the statute provides for seizure, forfeiture and/or release of equipment used in conveyance of the substance in issue. The provisions of Section 20 of the Narcotic Drugs & Psychotropic substances Control Act enact that:

(1) Any machinery, equipment, implement, pipe utensil or other article used for the commission of any offence under this Act shall be forfeited to the government.

(2) Every conveyance used for the commission of any offence under this Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under this Act or any narcotic drug or psychotropic substance, shall be forfeited to the government.

Provided that on an application made by the person who was the owner of the conveyance to the Court in which the prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under Part IV is pending the Court is satisfied beyond any reasonable doubt that:-

(a) The person who was the owner of the conveyance,

and

(b) In the case of an aircraft or ship, every person who was a responsible officer thereof when it was made use of for such conveyance was not concerned or privy to such use, the conveyance shall be restored to the owner by that Court.

13. **Section 177** of the Criminal Procedure Code provides that:

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

(a) 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; or

(b) That the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by

the person charged.

14. The subject motor vehicle is stated to have been used during the commission of the offence per the particulars of the charge sheet. Therefore, it is also an exhibit in the prosecution's case following the alleged involvement in the crime. Unless it is proved beyond reasonable doubt that it should be restored to the owner, the effect of **Section 20** of the Narcotics Act is that the vehicle should be forfeited to the State upon conclusion of the case as the provision of the law is couched in mandatory terms.

15. The accused persons were arraigned in court on 6th April, 2021. They were alleged to have been trafficking in cocaine and cannabis using the motor vehicle as a means of conveyance. This meant that during investigations and prior to its production as an exhibit, the property seized during arrest ought to have been held by the police. The application for release of the subject motor vehicle was made on 19th April, 2021, twelve days later, before the trial process commenced.

16. In the case of **Proto Energy Ltd –Vs- R (2020) EKLR**, the court held that the court cannot summarily release the exhibits that are not produced unless the State makes the application. The court delivered itself thus:

“I hold that a trial court cannot make an order releasing exhibits which have not been produced in evidence. Secondly, the court cannot release summarily exhibits which have not been produced by the State unless the application is by the State. The exhibits were cited in the particulars of the charge, making it clear that to be able to successfully prosecute the case they had to be produced in court as evidence.”

17. In the case of **R-Vs- Everlyne Wamuyu Ngumo (2016) eKLR**, the court declined to release a motor vehicle prior to it being adduced in evidence as an exhibit. The excuse of it being subject to wear and tear due to immobility of the engine was inconsequential. The court stated thus:

“I find that the trial court was not entitled to direct that the motor vehicle be released to the Respondent/ accused in order as that court put it “to save it from the wear and tear due to immobilization of the engine.” The reason for this is that the motor vehicle had not been produced as an exhibit in court. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.”

18. A reading of the proviso to **Section 20 (2)** of the Narcotics Act shows that it must be established that indeed the equipment is a conveyance. This can only be done after the equipment is adduced in evidence or after consideration of the case in totality. And upon the application being made for release of the exhibit, the court is obligated to be satisfied beyond reasonable doubt that the equipment belongs to the applicant and that it should be restored. Looking at the impugned order of the court, it directed the Investigating Officer to place a restriction with NTSA to ensure that the motor vehicle would not be sold or transferred until the conclusion of the case. This meant that at the point of making the order the court had not reached a conclusion as required by the law.

19. Forfeiture occurs at the end of trial after an accused person is convicted of the offence. The issue for determination during trial and conviction would be whether the accused had any legitimate claim, use or ownership of the vehicle. This includes beneficial ownership. The Interested Party's submission that the vehicle does not form part of the exhibits in the case is ill-advised which makes this court query the actual intention of wanting the vehicle released prior to it being produced as an exhibit. The court must be satisfied beyond doubt that the owner was not involved in the crime.

20. What transpired before the trial court was a procedural impropriety that calls for revision. I therefore set aside orders of the trial court issued on 29th April, 2021 and direct the court to expedite the hearing so as to conduct forfeiture hearing for purposes of compliance with **Section 20** of the Narcotic Drugs and Psychotropic Substances (Control) Act **No. 4 of 1994**.

21. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY,

THIS 20TH DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Ms. Ndombi for Applicant (ODPP)

No appearance for Respondents