



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

MISCELLANEOUS CRIMINAL APPLICATION NO 11 OF 2020.

REPUBLICPROSECUTOR

KENYA REVENUE AUTHORITY.....APPLICANT

VERSES

TOM ODHIAMBO MBOYA.....1ST ACCUSED

TITUS KIPLANGAT KOECH.....2ND ACCUSED

JOHN CHERUIYOT KORIR.....3RD ACCUSED

RULING

1. By its application dated 27th July 2020, brought under certificate of urgency, the Applicant prays for the orders that;

(a) There be stay of the order dated 24th July 2020 delivered by the lower court in criminal case number Kapenguria 508 of 2020 pending the determination of this application.

(b) This court be pleased to allow the applicants counsel to file a response to the application dated 23rd July 2020.

(c) This court be pleased to order that the Applicant detains Motor Vehicle Registration number KBT 270L Isuzu Lorry pending the determination of the Criminal case No.508 of 2020.

2. The application is based on the grounds on the face of it and the supporting affidavit of **CLP ALICE BINGEI** sworn on the same date. The said application is premised on the fact that the accused persons were arrested with goods which were suspected of being untaxed. The Applicant did file criminal case No. 508 of 2020 which had several counts.

3. The matter went on plea and the accused persons denied the charges. The owner of the lorry which was ferrying the assorted alcoholic items one **JONATHAN MAWIA KISILA** did an application dated 23rd July 2020 seeking that the lorry be released. The lower court on the same date ordered the police to release the said lorry and to deliver to the court as and when it is required as part of the exhibits in the criminal case.

4. The Applicant was unhappy and sought the intervention of this court. The deponent stated that the application was done ex - parte and they were never served with the application which they would in any even have vigorously opposed. They said that the lorry was critical as a piece of evidence during trial. They therefore urged the court to overturn the trials court decision, have the matter heard inter parties and the lorry to be detained pending the finalisation of the main criminal case.

5. The 1st Accused person **TOM ODHIAMBO MBOYA** swore an affidavit in response dated 4th July 2020 and stated that the application dated 23rd of July 2020 had not been opposed when it came up for hearing and that it was only proper that the prosecution takes the vehicles photographs which would be essential during trial.

6. One **CPL NORAH EKODIR** swore an affidavit in response dated 7th August 2020 justifying the reasons why the attachment of the lorry was in accordance with the law and the police had every right to have the vehicle till the matter is finalised. She said that it may be very difficult to have the lorry availed to the court during substantive hearing.

7. The court ordered parties to file written submissions. The court has perused the same as well as the preliminary objection by the Respondent.

8. This court is alive to the fact that the matter is still very active and would not want to stray into areas that may compromise both parties at the trial. What is essential is whether the Applicant was given opportunity by the trial court before it gave the orders it did. It is essential as a matter of natural justice to hear both sides.

9. Looking at the proceedings of that day, as per the annexures to the application, it is evident that the orders were given Exparte. The application was done by the registered owner of the lorry and not the accused persons. In fact in the supporting affidavit he said in paragraph 9 that ***"I do not know which activities the vehicle was being used for at Kapenguria nor was I involved"***.

10. This was not rebutted by the applicant. The court went ahead to release the vehicle to him albeit conditionally.

11. Clearly, and without venturing into the merits of the application this court is of the considered opinion that the trial court ought to have allowed the applicant to have a right of reply within a specific period as the orders it gave were in a sense impacting on the exhibits they were likely to rely on during the trial.

12. The other issues including the preliminary objection by the Respondent's counsel and other issues raised by the parties in their lengthy submissions are not germane for now and delving into them as earlier stated may jeopardised the criminal trial.

13. This court would not wish to state much save that the orders dated 23rd July 2020 in criminal case number 508 of 2020 at Kapenguria are hereby set aside. The Applicant is hereby granted an opportunity to respond to the same. The lorry in the meantime and pending the determination of the said application shall be detained at the police station where it has been.

14. The said criminal matter be mentioned at the lower court as a matter of priority.

Dated, Signed and delivered at Kitale this 28th day of October 2020.

H. K. CHEMITEI

JUDGE

28/10/2020