



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 119 OF 2018.**

**IN THE MATTER OF SUPERVISORY JURISDICTION OF THE HIGH COURT OVER SUBORDINATE COURTS AND OTHER AUTHORITIES EXERCISING JUDICIAL AND/OR QUASI JUDICIAL FUNCTION UNDER ARTICLE 165(6) AND (7) OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF THE BILL OF RIGHTS SPECIFICALLY ARTICLES; 40 ON THE RIGHT TO PROPERTY, ARTICLE 47 ON FAIR ADMINSTRATIVE ACTION, 48 ON ACCESS TO JUSTICE AND 50 ON FAIR HEARING, OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF ARTICLE 159(2)(d) OF THE CONSTITUTION OF KENYA, THE MAGISTRATES COURTS ACT, THE CRIMINAL PROCEDURE CODE, THE PRINCIPLES OF NATURAL JUSTICE AND THE RULE OF LAW.**

**AND**

**IN THE MATTER OF CRIMINAL CASE NO. 250 OF 2018 IN THE CHIEF MAGISTRATE’S COURT AT MILIMANI: REPUBLIC versus COLLINS BOOTSY MURAYA AND MORE SPECIFICALLY IN THE MATTER OF THE ORAL APPLICATION MADE ON 12<sup>TH</sup> MARCH 2018 FOR THE RELEASE OF MOTOR VEHICLE REGISTRATION NO. KCE 154B AND THE SUBSEQUENT CONDITIONAL RELEASE ORDER ISSUED ON THE SAME DAY.**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE APPLICANT HEREIN FOR THE REVIEW OF THE SAID IRDER FOR THE RELEASE OF MOTOR VEHICLE REGISTRATION NO. KCE 154B.**

**BETWEEN**

**IAN JAMES KHAEMBA.....APPLICANT/1<sup>ST</sup> INTERESTED PARTY**

**VERSUS**

**MPINDA GATHAMBI RWITO.....1<sup>ST</sup> RESPONDENT/2<sup>ND</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Ian James Khaemba, hereafter the Applicant, filed the present application by way of Notice of Motion under a Certificate of Urgency dated 13<sup>th</sup> March, 2018. The main orders sought were (i) that the order issued and dated 12<sup>th</sup> March, 2018 by Hon. Andayi in Criminal Case No. 450 of 2018 at Milimani Law Courts be removed and brought to the High Court for purposes of reviewing it pending the hearing and determination of this application, (ii) upon the full hearing and determination of this application a mandatory injunction do issue compelling and directing the Commanding Officer-Flying Squad Nairobi Area and/or the 1<sup>st</sup> Respondent as the case may be to release and deliver to the Applicant motor vehicle registration No. KCE 154B.

2. The application was based on the grounds, inter alia, that on 12<sup>th</sup> March, 2018 one Collins Bootsy Muraya was arraigned for plea taking in Criminal Case 450 of 2018 before Hon. Andayi at the Milimani Chief Magistrate's court. That consequently, the 1<sup>st</sup> Respondent made an application for a release order of motor vehicle registration No. KCE 154B and a conditional order was issued by the honorable magistrate. That in making the application the 1<sup>st</sup> Respondent concealed or misrepresented material facts from the honorable magistrate as the motor vehicle is the property of the Applicant as a bona fide buyer for value without notice on 6<sup>th</sup> December, 2016 from Collins Bootsy Muraya who at the time was acting as an agent for the registered proprietor, Mombo Investment Limited. That since 6<sup>th</sup> December, 2016 the Applicant had been in exclusive possession of the vehicle and only delivered it to the custody of the commanding Officer- Flying Squad Nairobi Area on 10<sup>th</sup> January, 2018. Further, that on 15<sup>th</sup> September, 2017 the aforementioned Mombo Investment Limited which was aware that the vehicle had been sold by its agent entered into a sale agreement in bad faith with the 1<sup>st</sup> Respondent resulting in the sale of the vehicle in December, 2017. That the dispute about the ownership of the vehicle is civil in nature and should accordingly be heard and determined while in the meantime and in the interest of justice the status quo *ante* be restored as the Applicant stands to suffer irreparable and irredeemable loss and damage if the orders prayed for are not granted.

3. The application is supported by an affidavit sworn by the Applicant on 13<sup>th</sup> March, 2018. He deposed that on 6<sup>th</sup> December, 2016 he walked into Mucona Car Bazaar owned and/or managed by Collins Muraya, the accused in **Criminal Case 450 of 2018**, and one Peter Ndungu. He was interested in buying a Volkswagen Jetta car registration number **KCE 154B**. An official search revealed that it was jointly owned by Chase Bank and Mombo Investment Ltd. He searched the company registry and found that one Peter Mombo was a director of Mombo Investment Ltd. He made further inquiries at the bazaar and Collins Muraya and Peter Ndungu informed him that they were the appointed agents for the sale of the motor vehicle. He made an offer to purchase the vehicle at Kshs. 900,000/- which was accepted. Under the sale agreement he was to pay Kshs. 300,000/- as cash deposit, which he did, and trade in his motor vehicle registration number KCH 497G whose value was to be assessed and offset the balance of Kshs. 600,000/-. It was a term of the agreement that the logbook to the vehicle registration No. KCE 154E was to be transferred to him once the motor vehicle registration No. KCH 497G was sold and the proceeds applied towards payment of a loan with Chase Bank for which the vehicle was registered as security. He deposed that he was given possession of the vehicle and has since had exclusive possession.

4. He swore that vehicle registration number KCH 497G was eventually valued at Kshs. 850,000/- which meant he was owed a refund by the sellers, Collins Muraya and Peter Ndungu, which they did to the tune of Kshs. 150,000/-. He went on to state that on 10<sup>th</sup> January, 2018 he was called by the Police who directed him to deliver the motor vehicle registration number KCE 154B to the commanding officer Flying Squad, Nairobi Area pending criminal investigations into its ownership. That he complied with the directive. He was informed by the police that Mombo Investment Ltd had entered into a sale agreement with one Mpinda Gathambi Rwito who had complained to the police on 15<sup>th</sup> September, 2017. The vehicle's registration was transferred to her name in December, 2017. The investigating officer in the matter, PC William Bushen confirmed that Peter Mombo, in his statement to the police, had given Collins Muraya the vehicle to sell but that Collins had failed to remit the proceeds therefrom. He deposed that he believed that the 1<sup>st</sup> Respondent had actual or constructive notice of his ownership and claim to the vehicle. Further, that the 1<sup>st</sup> Respondent had not produced any documents to indicate that she had made payments for the vehicle. That if Collins Muraya never remitted the proceeds of the sale to Peter Mombo, as he claimed, the proper course for him would be to institute civil action to recover the proceeds or to report him to the police for theft by an agent. It was his plea then that the vehicle should be restored to by the Commanding Officer-Flying Squad, Nairobi Area. He concluded by stating that the release order made on 12<sup>th</sup> March, 2018 was bad in law and ought to be set aside as the Applicant stood to suffer great loss and prejudice. He annexed a search certificate, acceptance of offer, sale agreement and M-Pesa Statements to buttress his submission.

5. Mpinda Kathambi Rwito, the 1<sup>st</sup> Respondent, filed a Replying Affidavit on 6<sup>th</sup> April, 2018 by which she opposed the application. Her case was that she was the registered owner of motor vehicle registration number KCE 154E. That the application sought to interfere with her lawful proceedings currently before a court of competent jurisdiction and to hold the same up pending the conclusion of some unspecified civil proceedings between unspecified parties was misconceived and bad in law. She stated that the Applicant was guilty of forum shopping as he deliberately failed and/or neglected to appear before a court of first instance to ventilate the application. Further, that by failing to appear before the trial court to make representations on the matter the Applicant had failed to exhaust all mechanisms available to him in law and the court therefore lacks the requisite jurisdiction to hear the matter. It was thus argued that the application was premature.

6. She deposed that it was clear from the Applicant's averments that he was neither the accused, nor the complainant nor the prosecutor in the matter before the court which meant that he lacked the requisite *locus standi* to file the application. Further that the conditions under which the orders were issued meant that they served no other purpose other than to ensure that the subject motor vehicle is preserved under lawful custody of the trial court. Thus, it was incumbent upon the Applicant to adequately demonstrate the nature of the prejudice or otherwise if the orders remained in force. That there is a clear misunderstanding on the part of the Applicant as to the nature of the criminal proceedings currently pending before the trial court as the issue of ownership of the vehicle is not a subject in those proceedings. Further, that the Applicant was not disputing the ownership of the vehicle nor claiming to be the registered owner of the same. As such, he had failed to lay a basis on which the court should give the orders for delivery of the vehicle to him.

7. A replying affidavit was also filed on 3<sup>rd</sup> May, 2018 by **PC William Bushien** who was investigating the case. He swore that on 20<sup>th</sup> December, 2017 the 1<sup>st</sup> Respondent made a report to Nairobi Area Flying Squad unit that she bought a motor vehicle registration number KCE 154B from Peter Mumbo on 15<sup>th</sup> September, 2017 and she was handed the log book but the vendor had refused to give her possession of the motor vehicle. She informed them that she had seen the vehicle in possession of the Applicant. She gave the Applicant's contact details. The vehicle was tracked and detained for further investigations. On 1<sup>st</sup> March, 2018 he applied for a copy of the record of the motor vehicle from NTSA and established that the same was registered to the 1<sup>st</sup> Respondent. He interrogated the Applicant who claimed he had purchased the vehicle from Collins Bootsy Muraya on 6<sup>th</sup> December, 2016 but the car was yet to be transferred to him. He also interrogated Collins Bootsy Muraya who confirmed that he had sold the vehicle to the Applicant. Mr. Muraya was then an agent of Peter Mombo but was unable to transfer the same as it was a security for a loan at Chase Bank. He interviewed Peter Mombo who confirmed that he had given the motor vehicle to Collins Bootsy to sell for him but he later on cancelled the instruction. Peter thereafter stopped picking his calls. That he concluded his investigations and charged Collins on 12<sup>th</sup> March, 2018 with the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. That on the same day the advocate for the 1<sup>st</sup> Respondent made an application for the release of the motor vehicle and was granted the orders. That subsequent to the order he released the vehicle to the 1<sup>st</sup> Respondent.

## Submissions

8. The application was canvassed before me on 13<sup>th</sup> May, 2018. Mr. Magaya acted for the Applicant, Mr. Muyundo for the 1<sup>st</sup> Respondent and Ms. Atina for the 2<sup>nd</sup> Respondent. No new issues arose from the oral submissions apart from what was canvassed in the parties' application, the supporting affidavit and the respective Replying Affidavits of the Respondents. In the interest of not repeating myself, I shall not duplicate the submissions but will make reference to them in the determination where need be. I do however underscore the fact that the 2<sup>nd</sup> Respondent did not oppose the application. Miss Atina submitted that the vehicle was sold to the 1<sup>st</sup> Respondent when it was in the possession of the Applicant. She submitted that the orders before the lower court affected the Applicant as a victim under the Victims Protection Act. She accordingly prayed that the application be allowed.

9. In reply, Mr. Muyundo disagreed with Miss Atina that the application should be allowed on account that the Applicant was a victim merely because of the sum of Ksh. 950,000/ he had paid. His view was that the actual victim was the 1<sup>st</sup> Respondent as he owned the vehicle. Secondly, that the Applicant as a victim had chosen to stay away from the proceedings in the trial court. That the 1<sup>st</sup> Respondent was properly preserving the vehicle and the same could not be kept in abeyance pending the civil proceedings.

10. In rejoinder, Mr. Magaya, reiterated that there was clearly a blatant abuse of the criminal law process as the Applicant did not report that he had been swindled any money and in any case, he received the motor vehicle that he purchased. It was urged that the court notes that the orders by the trial court were not meant to preserve the vehicle as the Applicant had been disposed of his right of ownership. It was further argued that the accused in the trial did not make any representations with regards to the release of the vehicle to the 1<sup>st</sup> Respondent. As such, the trial court had to transfer its ownership to the 1<sup>st</sup> Respondent. He concluded by stating that the Applicant had the immediate right of ownership.

## Determination.

11. The Application at hand calls on this court to revise the order made by Hon. Andayi on 12<sup>th</sup> March, 2018. The order in question read:

***“THAT the Motor Vehicle Registration Number KCE 154B Volkswagen Getta black in colour be released to the owner Kathambi Rwito through the Investigating Officer and not be disposed of or the owner to part possession of it before conclusion of this case or further orders.”***

12. The Applicant raised a number of issues which he deemed were of such nature as to activate this court's supervisory jurisdiction as set out at Article 165(6) of the Constitution and Section 362 of the Criminal Procedure Code. Before dealing with them it is paramount to first deal with the question raised by the 1<sup>st</sup> Respondent that this court had no jurisdiction to entertain the matter and that the Applicant lacked the *locus standi* to file the application. In her Replying Reffidavit the 1<sup>st</sup> Respondent submitted that the Applicant had not exhausted mechanisms available to him including his ability to apply to the trial court before filing the present application thus this court lacked jurisdiction. Further, that the application sought to oust the jurisdiction of the trial court to hear all matters pending before it. With regards to *locus standi* it was argued that the Applicant was neither the accused person nor the complainant nor the prosecutor and thus lacked an interest in the matter.

13. On the latter issue, the Applicant is the complainant in Criminal Case No. 450 of 2018 at the Milimani Law Courts which renders him competent to file the revision application under the Victims Protection Act. With regards to jurisdiction, while it is clear from the trial record that the Applicant did not seek to apply to the trial court to review its order. However, nothing stops him from approaching this court for the orders. In choosing to seek the revision of the order before this court he simply chose one of two options available to him which cannot be deemed to be forum shopping or an attempt to oust the jurisdiction of the trial court. These assertions are therefore rendered moot.

14. One issue that was particularly contentious in the application involves the ownership of the vehicle. It is clear that the trial court granted the order of release to the registered owner of the vehicle, the 1<sup>st</sup> Respondent. The Applicant herein disputes this ownership and has submitted documents to support his claim that he purchased the vehicle on 6<sup>th</sup> December, 2016 and took possession of the same. The 1<sup>st</sup> Respondent in reply did not depose as to how she came to own the vehicle although a sale agreement between her and Mombo Investment Limited entered into on 15<sup>th</sup> September, 2017 and copies of the log book were adduced as evidence of her ownership. Her ownership of the vehicle as per the registration documents was confirmed by the investigating officer, PC Bushien. The 1<sup>st</sup> Respondent's ownership of the vehicle however appears to be merely on the registration documents as the averments by the Applicant that he had been in exclusive possession of the vehicle since 6<sup>th</sup> December, 2016 were never questioned. This was also confirmed by the investigating officer who swore that the 1<sup>st</sup> Respondent was not in possession of the vehicle which prompted her to make a complaint to the police. It is therefore clear and not refuted that the vehicle was in the exclusive possession of the Applicant from 6<sup>th</sup> December, 2016 till 10<sup>th</sup> January, 2018 when it was detained by the police pending investigations into the complaint lodged.

15. The complaint lodged to the police was, I quote from the Investigating Officer's affidavit, ***“that she had bought a motor vehicle registration Number KCE 154B Volkswagen Getta Black In Colour from Peter Mumbo on 15<sup>th</sup> September, 2017 and that she was handed over a log book but the vendor had refused to give possession of the motor vehicle”***. From the complaint the investigating officer started tracking the motor vehicle. He did not interrogate the aforementioned Peter Mombo to find out why he had not delivered possession of the vehicle, instead roping in the Applicant, whose number they obtained from the 1<sup>st</sup> Respondent, into the matter at hand by impounding the vehicle. After the Applicant explained his possession of the vehicle through Collins Muraya, who sold the vehicle to him, he and Peter Mombo were interrogated and they disclosed facts which corroborated the Applicant's version of how he obtained the vehicle. Nevertheless, the Investigating Officer still went ahead to charge Collins Muraya who was the agent mandated by Peter Mombo to sell the vehicle.

16. There is no doubt in my mind that in the circumstances Peter Mombo failed to transfer the vehicle to the 1<sup>st</sup> Respondent because he knew it had been sold by his agent, Collins Muraya. This is further buttressed by the fact that he only asserted that he cancelled his instructions to Muraya to sell the vehicle without providing evidence. And even if this were the case, he did so after selling the vehicle to the

1<sup>st</sup> Respondent. It is instructive to note that Peter Mombo admitted to knowing that the vehicle had been sold to the Applicant by the time he resold it to 1<sup>st</sup> Respondent. His explanation of doing it to the police was that Muraya had not remitted the sale proceeds to him. His action therefore of reselling the vehicle was actuated by both greed and malice as he intended to punish the Applicant who was an innocent buyer. He ought to have taken action, civil or criminal against Muraya but not engage in unscrupulous act of reselling the vehicle. The mess the parties find themselves in can all be traced to him. The Applicant must not suffer from it. Clearly in an attempt to clean his hands he advised the 1<sup>st</sup> Respondent to register the above complaint.

17. Whimsically, the aforementioned Muraya is charged with obtaining money by false pretences with the Applicant as the complainant. A simple perusal of the affidavit by the investigating officer is absurd especially when it is clear that upon the completion of the transaction between the Applicant and Collins he was granted exclusive possession of the vehicle and had not lodged a complaint against Collins. This all point to impropriety in the charging of Collins Muraya in Criminal Case 450 of 2018 and further to the case being before the court for reasons other than the pursuit of justice. It leads this court to find and align itself with the Applicant's submission that the case as filed is an affront to the just process of the court.

18. I would however hesitate to further delve into whether the criminal case ought to be terminated as such a prayer was never sought. But for purposes of doing justice I would urge the Applicant based on this ruling to seek the intervention of the DPP to rethink the purpose of the criminal case as filed with a view probably to filing fresh charges against the right culprit. Otherwise, it is clear the charge as filed is intended to defeat justice; it is a process that is entirely unfair to the Applicant and inconsistent with the recognized purposes of the administration of criminal justice.

19. It follows that there exists incorrectness and impropriety with the orders issued by the learned trial magistrate ordering the release of the motor vehicle to the 1<sup>st</sup> Respondent. I accordingly, in exercise of the revisionary powers conferred on this court set them aside. I substitute them with an order that the motor vehicle registration No. KCE 154B be forthwith released to the Applicant through the investigating officer, PC Bushien, by 31<sup>st</sup> July, 2018. The Applicant can thereafter pursue civil redress for the registration into his name. Each party shall bear its own costs. The trial court file shall forthwith be remitted back to the court.

**DATED and DELIVERED this 26<sup>th</sup> day of July, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Endo for the Applicant/1<sup>st</sup> Interested Party.
2. Miss Menjo for the 1<sup>st</sup> Respondent/2<sup>nd</sup> Interested Party.
3. Mr. Momanyi for the 2<sup>nd</sup> Respondent