



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 40 OF 2018

SIMON MBURU.....APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

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

THE OFFICER COMMANDING KITUI POLICE STATION.....3RD RESPONDENT

R U L I N G

1. The Applicant, **Simon Mburu** by way of Notice of Motion brought pursuant to **Section 356(1)** of the **Criminal Procedure Code** seeks orders thus:

- a. That this Honourable Court be pleased to stay execution of the orders of the learned Chief Magistrate in her Judgment and sentence delivered on **23rd April, 2018** pending the hearing and determination of this application.
- b. That this Honourable Court be pleased to order the 1st Respondent to release motor-vehicle Registration Number **KCC 554A (Toyota Townace)** to the Applicants appointed agent pending the hearing and determination of this application.
- c. That this Honourable Court be pleased to order the 3rd Respondent to personally release motor-vehicle Registration Number **KCC 554A (Toyota Townace)** to the Applicants appointed agent pending the hearing and determination of this application.

2. The application is premised on grounds that execution of the order to detain motor-vehicle Registration Number **KCC554A** at Kitui Police Station will result into failure by the Applicant to service his loan facility thus the motor-vehicle shall be repossessed by the bank; the Applicant is the sole bread winner of the family, and/or the Applicants family depends on the motor-vehicle as its only source of income and the motor-vehicle is wasting away at Kitui Police Station and risks vandalism.

3. In an affidavit in support of the application the Applicant deposed an affidavit where he averred that he was arrested and charged with the offence of ferrying charcoal in the Kitui County without a permit and he admitted the charge whereby he was convicted in **Criminal Case No. 496 of 2018** and sentenced. Consequently the motor-vehicle was detained at Kitui Police Station.

4. That the order was made despite the fact that the motor-vehicle was a subject of joint ownership due to a loan facility that he is servicing. Detaining the vehicle will result into the Applicant suffering prejudice as it is his only source of income.

5. The State did not respond to the application. When the application came up for hearing the Applicant had retained **Mr. Kilonzi Advocate**. He submitted that the Applicant was seeking stay of execution of orders issued by the trial Court and in the meantime the motor-vehicle be released for safe custody pending **Criminal Appeal No. 65 of 2018**. The reason being that if the motor-vehicle that was to be forfeited and auctioned or disposed of there was a likelihood of the Appeal being rendered nugatory.

6. That the Appeal raises strong and viable points that are likely to succeed. That since the motor-vehicle is likely to waste, the best option would be for the motor-vehicle to be released on condition that the Court will deem fit. That the motor-vehicle could be valued and the valuation report deposited in Court and if the Appeal fails he could pay the monetary sum.

7. Further he submitted that the Appeal has a high chance of succeeding since there are options after convictions, therefore forfeiture should have been the last resort and the Court ought to have given reasons why it opted to forfeit. That the Court acted as if the general law was that forfeiture is automatic. That the Court did not read the Act in conjunction with other laws like **Section 29(1)** of the **Penal Code** and **Section 389A** of the **Criminal Procedure Code**.

8. The State through learned State Counsel **Mr. Mamba** did not object to the application for release of the motor-vehicle but added that whether the Appeal was to succeed will be at the discretion of the Court.

9. I have considered the application filed herein and submissions of Counsel for the Applicant and State.

10. This is a matter where the application was filed in person but Counsel having been retained to represent him was expected to peruse the file and seek leave to have the application amended where there was a defect.

11. I do note that it is trite that a party is bound by what he avers. A matter arose in the course of hearing that was fully canvassed by the Advocates that I should have considered in the interest of substantial justice. It was argued that the order was being sought pending hearing and determination of the Appeal given as **Criminal Appeal No. 65 of 2018** which was not availed. Therefore it was not demonstrated that an Appeal had been filed by the Applicant.

12. It is worth noting that the Applicant seeks stay of execution and release of motor-vehicle pending hearing and determination of the application (emphasis mine) which was heard and determined. Therefore the prayer was spent. In the case of **Adetoon Oladeji (NIG) Limited vs. Nigeria Breweries, PLC SC 91/2002 Adereji, JSC** stated that:

“..... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..... In fact parties are not allowed to depart from that pleading, is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”

13. There was no mention of orders being sought pending hearing and determination of the Appeal therefore the Court cannot grant what was not sought.

14. In the premises the application lacks merit. Accordingly, it is dismissed with costs to the Respondents.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 29th day of August, 2018.

L. N. MUTENDE

JUDGE