



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL REVISION NO.279 OF 2012

(From Oyugis SRM's Court Criminal Case No.1 of 2010

KENAKE KANJILI JOSEPH APPLICANT

VERSUS

STATE RESPONDENT

RULING

Introduction

1. On the 30th July 2012, this matter was placed before me on the strength of a letter dated 26th June 2012, from Bana & Company Advocates for the applicant herein, Kanake Kanjili Joseph. On the said date I made orders directing the Deputy Registrar of this court to call for the original file in Oyugis PMCR Case No.1 of 2010. The Deputy Registrar duly complied and the lower court record was placed before me together with this file on 21st December 2012.
2. On the 21st December 2012, I made the following order:-

“I hereby reverse the trial court’s order dated 18th May 2012 forfeiting M/V

Reg. No. KAU 303 R Make Toyota Saloon to the Government and direct that the said motor vehicle should be an exhibit in Nairobi Criminal Case No.11 of 2010 in which David Owuor Obor is facing trial for theft of the said motor vehicle.”

Application dated 8th May 2013

3. On the 9th May 2013, the applicant filed the notice of motion dated 8th May 2013. The application which was filed under certificate of urgency was brought under **Article 165 (3) and (7) of the Constitution** and **Section 177 (a) of the Criminal Procedure Code, Cap 75 of the Laws of Kenya** seeking the following ORDERS:-
 1. ***THAT*** the orders issued by this Honourable Court on 21st December, 2012 be reviewed in part and instead release m/v Reg. No. KAU 303 R Toyota Saloon to the beneficial owner **KANAKE KANJILI JOSEPH**.
 2. ***THAT*** the Officer Commanding Oyugis Police Station be ordered to release M/V Reg. No. KAU 303 R to the beneficial owner **KANAKE KANJILI JOSEPH**.
 3. ***THAT*** the costs of the application be in the cause.
4. The application was supported by grounds set out on its face and also in the supporting affidavit

sworn by the applicant on 8th May 2013. The main grounds are that the above stated M/V will not be required as an exhibit in criminal case Number 11 of 2010 – Republic –vs- David Owuor and Samwel Oketch Gunga as the said case was concluded on 17th August 2012. Secondly, that the said motor vehicle was facing vagaries of the weather and vandalism while at Oyugis Police station. The applicant also avers that the continued stay of the said motor vehicle at Oyugis police station was denying him his only means of livelihood from vehicle which was being used for car hire business. The applicant also alleges that the continued detention of the M/V was depriving him of his constitutional right to own property.

5. Though duly served, the Respondent did not file any replying papers.

Submissions by the Parties

6. The application was canvassed before me on 4th July 2013. Counsel for the applicant reiterated the averments on the face of the application and in the affidavit in support of the application. He informed the court that the applicant would be willing to give an undertaking to avail the M/V to be used as an exhibit should the criminal case No.11 of 2010 be revived upon arrest of the suspect David Owuor against whom the criminal case was withdrawn under the provisions of **section 87 (a) of the Criminal Procedure Code** after the said David Owuor Abor absconded from custody. Counsel also submitted that the 2nd accused in the said case, Samwel Oketch Gunga was acquitted of the case under **section 215 of the Criminal Procedure Code**.
7. The application was conceded. Counsel appearing for the Respondent only asked the court to order the applicant to give an undertaking to avail the M/V if and when required as an exhibit in Nairobi Criminal Case No.11 of 2010. Counsel for the applicant was agreeable to the applicant giving an undertaking to avail the subject motor vehicle as and when required by the police.

Findings and Conclusions

8. I have now carefully considered the application as filed and the submissions made by both parties in this matter. The only issue that arises for determination is whether the applicant is entitled to the orders sought. It is my humble view that there is no reason why the orders sought should not be granted. The only reason why the motor vehicle has been retained after 21st December 2012, is that the vehicle was to be used as an exhibit in Nairobi Criminal Case No.11 of 2010. It has come to the attention of the court that Nairobi Criminal Case No.11 of 2010 was concluded on 17th August 2012. If the court had been aware of that position, it would not have made the order of 21st December 2012. I am therefore satisfied that the prosecuting counsel has rightly conceded this application.
9. In the premises I allow the notice of motion dated 8th May 2013 and filed in court on 9th May 2013 in terms of prayers 1 and 2 thereof, namely that:-
 1. *The orders of this honourable court issued on 21st December 2012 be and are hereby reviewed in part so that instead of retaining the motor vehicle KAU 303 R at Oyugis Police Station for use as an exhibit in Nairobi Criminal Case No. 11 of 2010, the motor vehicle be and is hereby released to its beneficial owner Kanake Kanjili Joseph.*
 2. *The Officer Commanding Oyugis Police station be and is hereby ordered to release motor vehicle Registration No. KAU 303 R to the beneficial owner Kanake Kanjili Joseph or to his duly authorized nominee.*
 3. *The beneficial owner herein, Kanake Kanjili Joseph be and is hereby ordered to give his irrevocable written undertaking, executed before a Commissioner for oaths and to be filed within three (3) days of the date of this order committing himself to avail the above stated motor vehicle to the police for use as an exhibit in **Nairobi Criminal Case Number 11 of 2010 – Republic –vs- David Owuor Abor and Samwel Oketch Gunga** if and when David Owuor Abor is re-arrested and arraigned before court in respect of the said criminal case.*
 4. *Costs of this application shall be in the cause.*

10.Orders accordingly.

Dated and delivered at Kisii this 11th day of July 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Moracha for Mr. Murage (present) for Applicant

Mr. Majale (present) for Respondent

Mr. Bibu - Court Clerk