



IN ACCORDANCE WITH ORDER LIII RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE POLICE ACT CAP. 84 LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION BY FAZIL HAMMED FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW BY WAY OF AN ORDER OF MANDAMUS**

BETWEEN

REPUBLIC.....APPLICANT

AND

THE COMMISSIONER OF POLICE.....RESPONDENT

EX-PARTE

FAZIL HAMMED.....APPLICANT

AND

JAMES W. KNIGHT.....INTERESTED PARTY

RULING

By Notice of Motion Application dated 27th October 2010 brought under Order L Rule 1; of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act the Interested Party prays for the following orders:-

- 2. That the Court order issued on the 29.9.20010 directing the release of the motor vehicle Mercedes Benz ML Chassis No. WDC1641862A220668 (colour Black) be vacated or uplifted.**
- 3. That the motor vehicle Mercedes Benz ML Chassis No. WDC1641862A220668 (colour Black) be released to the Interested Party for purposes of re-shipment to the United Kingdom.**
- 4. That the costs of this application be provided for.**

There is an affidavit in support of the Application sworn by James W. Knight dated 26th October 2010. He states that he has been authorized by Barry Hancock of BR International Ltd vide Power of Attorney.

That the Motor vehicle motor vehicle Mercedes Benz ML Chassis No. WDC1641862A220668 (colour Black) is subject of Criminal Investigations by the Interpol. That the said vehicle was reported stolen on the 8.9.2009 at Essex (United Kingdom) to Wickford Police Crime Ref. No. B125A/19235/09. He prays the court varies the orders dated 29.9.2010 in favour of the ex-parte applicant. He also prays that the he be allowed to be enjoined in these proceedings to enable the court reach a just determination. He further prays that he be allowed to access the vehicle to facilitate it re-shipment to United Kingdom to its rightful owners.

When this application come before the Court ex-parte on the 27th October 2010 this court issued an order staying and suspending the execution and enforcement of the Judgment and orders of this Court given on the 29th September 2010. The court further ordered that the 2 vehicles subject matter of the suit shall continue to be held at the Kenya Revenue Authority and Kenya Police pending further orders of this court.

There is an affidavit in support of the application also filed by one CPL Fredrick Oduor Ochido dated 16th March 2011. He states that he works with the Criminal Investigations Department and is the investigating officer of the subject matter of the application. He confirms that the motor vehicle Mercedes Benz ML Chassis No. WDC1641862A220668 was stolen in the United Kingdom and was being traced by the Interpol. That it was previously owned by Lee Byard who was compensated for the loss by his insurance Liverpool Victoria Insurance Company. The said insurance Company appointed Barry Hacock of BR International who subsequently appointed James W. Knight of Mombasa (the Interested Party) to assist in the re-shipment of the motor vehicle. He exhibited documents in support of these allegations.

The application is opposed by the Ex-parte application. He has filed a Replying Affidavit and a Supplementary Affidavit dated 16th November 2010 and 29th March 2011 respectively. He states that the applicant has no claim over the motor vehicle Mercedes Benz. That the alleged theft has not been verified by Interpol. That he has the original logbook in the name of the seller. The ex-parte applicant further states that he is the owner of the motor vehicle. That there is no one claiming the other vehicle Ranger Rover Chasiss No. SALLSAA 137A997608 and the same should be released to him. He states that the averments of CPL Fredrick Oduor Ochido are hearsay and do not confirm that any offence was committed.

The counsels for the parties made oral submissions before me on the 13.4.2011. Learned counsel for the Interested Party prayed that the Interested Party be enjoined in the proceedings. He also prayed that the orders of the Court of the 29th September 2010 be discharged. He stated that the motor vehicle was stuffed in a container and the shipper did not declare the motor vehicle. The shipper stated the contents of the consignment as Generator, clothes and other personal effects. That the vehicle is the subject matter of investigations and there was an attempt to forge documents. That the applicant did not know the proceedings until they saw the court order. That the applicant has a claim over the motor vehicle.

Learned counsel further submitted that there was an attempt to change the manifest to conceal the criminal act. He prays the vehicle to be re-shipped.

Counsel for the Respondent Mr. Mureithi submitted that the motor vehicle was fraudulently brought in to the country. In support he referred the bill of lading which he says does not disclose the motor vehicle. He also referred to the exhibits in the affidavit of CPL Fredrick Oduor Ochido. He states that both vehicles must be taken back.

Counsel for the Ex-parte Applicant states that the motor vehicles were in transit. That the Attorney General was given more than 5 times to file a reply. He states that this is just but a scheme as no one was charged in the U.K or any other country. Counsel states that there was no non-disclosure and that they disclosed about the police investigations. That the decision of the Court was not ex-parte as the Respondent was in court.

I have considered the application and the submissions of the parties.

I am convinced that the applicant, the Interested Party herein has sufficient interest to take part in the proceedings of this case. There is evidence that the Interested Party has been given power of Attorney by Barry Hacock of BR International. It is submitted that the motor vehicle in dispute was originally owned by Lee Byard who was compensated for the loss by his insurance Liverpool Victoria Insurance Company. The said insurance Company appointed Barry Hacock of BR International who gave the power of Attorney to the Interested Party.

I therefore allow the application to enjoin the Interested Party.

The court made orders on the 29th September 2010 when it did not have opportunity to consider all the material before it. When this application came before the Court ex-parte on the 27th October 2010 this court issued an order staying and suspending the execution and enforcement of the Judgment and orders of this Court given on the 29th September 2010. The court further ordered that the 2 vehicles subject matter of the suit shall continue to be held at the Kenya Revenue Authority and Kenya Police pending further orders of this court.

Having made a determination that the Interested Party be enjoined it is only prudent to allow the Interested Party to fully pursue its rights in the suit. This can only be done if the judgment and orders of the 29th September are set aside and vacated.

The issues raised in the application and the affidavits are of a weighty in nature and cannot be ignored. At the same time the court cannot make a final determination of what to do with the motor vehicles in dispute.

I therefore make the following orders:

1. That the judgment and order of the Court dated 29.9.2010 directing the release of the Mercedes Benz ML Chassis No. WDC1641862A220668 and Ranger Rover Chassis No. SALLSAA 137A997608 is hereby set aside and vacated.
2. That the 2 vehicles above shall continue to be detained by the Port police and the Kenya Revenue Authority pending the final determination of this suit and thereafter abide by the decision of the Court.
3. That the Interested Party shall file his Replying Affidavit to the Notice of Motion dated 19th May 2010 and thereafter the matter fixed for interpartes hearing.
4. The costs of this application shall be in the cause.

Dated AND Signed At Nairobi ON THIS 14TH Day Of AUGUST 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered at Mombasa on this 31ST day of AUGUST 2012.

J.W MWERA
JUDGE

Delivered in the presence of: