



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION NO.11 OF 2011

**IN THE MATTER OF AN APPLICATION UNDER SECTIONS 20, 22, 23, 40 & 159 OF THE
CONSTITUTION OF KENYA**

BETWEEN

MARTIN MWAURA

WAINAINA.....APPLICANT

AND

**THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER, (D.C.I.O.) KAKAMEGA.....1ST
RESPONDENT**

**THE ATTORNEY-GENERAL.....2ND
RESPONDENT**

R U L I N G

“1. The Notice of Motion dated 21st February 2011 is premised on no known procedure of law but Sections 20, 22, 23, 40 and 159 of the Constitution are invoked and it seeks the following orders:

2. Pending inter parties hearing, there issues an Interim Order directed at the 1st Respondent, D.C.I.O. Kakamega compelling the said D.C.I.O. to produce motor vehicle Reg. no.KAL 482 L Toyota Saloon at this court and the same motor vehicle to remain in the court premises and in the custody of the court until the final hearing and determination of the application.

3. In the alternative the subject motor vehicle being Reg. No.KAL 482 L Toyota Saloon be released to the applicant or his counsel in a moving condition upon such conditions as the court shall determine and remain in the applicant’s custody pending final hearing and or determination of this application.

4. This court makes a finding that the conduct of the 1st Respondent in seizing and detaining the subject motor vehicle was punitive, wrongful, unlawful and [a] violation of the applicant’s constitutional right to enjoyment of private property and so declare.

5. The Honourable Court do order that the motor vehicle Reg. No.KAL 482 L Toyota Saloon be

unconditionally released to the applicant.

6. The loss and or costs occasioned by the seizure and detention of the motor vehicle be met by the respondents and the applicant be compensated for the same by the respondents.”

7. The Honourable Court do make such other order as will guarantee the applicant’s right to the subject motor vehicle or as may meet the ends of justice”.

2. The grounds in support are that:

a) The subject matter of the proceedings hereof being motor vehicle Reg. No. KAL 482 L Toyota Saloon is the sole property of the applicant.

b) The motor vehicle was forcefully seized by or under the command of the 1st Respondent at Nairobi on the 12th February, 2011 and brought to Kakamega Provincial Police Yard where it was initially held before it vanished and its whereabouts remain unknown.

c) The conduct of the 1st Respondent in seizing , detaining and hiding the motor vehicle without explanation nor when the said motor vehicle is not connected to any Criminal Investigations renders the conduct of the D.C.I.O. unlawful and impunitive.

d) The applicant has been unfairly deprived of the use and enjoyment of his property through the unlawful and unconstitutional conduct of the D.C.I.O. which persists.

e) Since the whereabouts of the motor vehicle remains unknown to the applicant it is only fair and just that the respondents be as a matter of urgency compelled to produce for the view of the court the subject matter before further proceedings.

f) The 1st Respondent has ignored the plea of the applicant and his counsel for the release of the motor vehicle and can only release it when so ordered by the court.

g) By secretly moving the vehicle when counsel for the applicant was seeking its release, the Respondent cannot be trusted with the safety of the motor vehicle.

h) The 1st Respondent despite having been served with copies of documents of ownership proving the motor vehicle genuinely belong to the applicant, has arrogantly continued to detain the same.

i) Being a state officer whose conduct is governed by and is subject to the Constitutional Provisions on the Bill of Rights, D.C.I.O.’s conduct in the circumstances is unbecoming.

3. In his Supporting Affidavit sworn on 21st February 2011, the Applicant, Martin Mwaura Wainaina depones that he is the registered owner of motor vehicle Registration number KAL 482 L, Toyota Saloon and annexures “MMW 1, 2 and 3” thereof are copies of the Logbook, Sale Agreement and his National

identity Card. That on 12th February 2011, police officers led by one, Corporal Otieno, seized the said motor vehicle and drove it to Kakamega Provincial Police Headquarters and later it was removed from there and taken to an unknown destination. Attempts at obtaining an explanation have not been successful and that forced him to seek the intervention of this court.

4. When served, the Respondents through a statement filed on 2nd March 2011 by one, Corporal Collins Otieno Otieno, stated that he was the Investigating Officer in a complaint by one Charles Ochieng Ogolla that one, Alex Musinya Mwakha had obtained money from him on the false pretence that he was going to sell to him a Toyota Hilux motor vehicle. Instead the said person purchased for himself a Toyota Saloon Car, Registration number KAL 482 L with the money that he had received to purchase the Toyota Hilux.

5. According to Corporal Otieno, when he discovered that the said motor vehicle was being used as a taxi in Langa'ta, Nairobi, he took custody of it and had it driven to Kakamega Police Station. That the driver of the motor vehicle, one Philip Amwayi Misigo, informed him that the owner of the motor vehicle was Alex Musinya Mwakha and never mentioned the applicant, Martin Mwaura Wainaina as having any interest in it at all. Further, that since the motor vehicle was needed in the on-going investigation, it ought to be retained in police custody until the investigations are over.

6. I have taken into account the submissions by Mr. Musiega and Mr. Oringa Learned Counsel for the parties and I wish to opine as follows:

Firstly, the Logbook for motor vehicle Registration number KAL 482 L indicates that it belongs to the Applicant and the Respondents have made no attempts to show otherwise. Further, the Sale Agreement dated 10th August 2007 indicates that he purchased the motor vehicle from Allfix Services limited at a purchase price of Kshs.285,000/-(Two Hundred and Eighty Five Thousand shillings). That transaction has also not been denied by the Respondents.

7. Secondly, the respondents have argued that the motor vehicle was needed in an investigation relating to monies allegedly obtained by false pretences from one, Charles Ochieng Ogolla and the suspect in that regard was Alex Mwakha. No evidence at all, save the bare statements of Corporal Otieno was tabled to create a nexus between that investigation and the Applicant's ownership of the disputed motor vehicle. If indeed Alex Mwakha purchased motor vehicle KAL 482 L, where is the evidence that he did so and when? The Applicant has denied that he knew anything about that transaction and there being no reason to doubt him, his claims of illegal seizure of private property are justifiable.

8. Thirdly, Article 40(3) of the Constitution provides as follows:

(1) ...

(2) ...

(3) "The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of parliament and-

- (i) requires prompt payment in full, of just compensation to the person; and
- (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”

9. It is clear to me that the purported seizure of motor vehicle Registration KAL 482 L was unconstitutional and was done without any lawful reason whatsoever and I say so for reasons that I have elsewhere enumerated above.

In the event, I will rule as follows:

1. This court makes a finding that the conduct of the 1st Respondent in seizing and detaining the subject motor vehicle was punitive, wrongful, unlawful and is a violation of the applicant’s constitutional right to enjoyment of private property and I so declare.
2. The Honourable Court do order that the motor vehicle Reg. No.KAL 482 L Toyota Saloon be unconditionally released to the applicant.
3. Prayer 6 contains matters to be determined by a Civil Court and on evidence to be tendered before it. That prayer is dismissed as are prayers 2 and 3 which have been spent.

The application dated 21st February 2011 is determined in those terms.

Orders accordingly.

I. LENAOLA

JUDGE

DELIVERED AND SIGNED BY L. KIMARU JUDGE AT KAKAMEGA THIS 13TH DAY OF JUNE, 2011

L. KIMARU

JUDGE