



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

MISCELLANEOUS CRIMINAL APPLICATION 11 OF 2008

BRAMWEL B. D. KIMUNGUI.....ACCUSED/APPLICANT

~VRS~

1. PATRICK M. MUGO

The PCIO western Province Kakamega

2. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

This is a ruling on an application brought by the Applicant dated 8th April, 2008 and filed in court on 24th July, 2008 seeking for the following prayers:

- a) *The 1st Respondent Patrick M. Mugo,, provincial CID officer Western Province be ordered to release motor vehicle reg. No.KAB 970 P 505 Peugeot Station Wagon and/or appears in court to show cause why he should not answer contempt proceedings.*
- b) *That the police expert invited by the prosecution to testify in Bungoma CM Cr. Case No.540 of 2006 be restrained from giving evidence and producing documents relating to CM CC No.503 of 2005.*
- c) *That criminal case No. 540 of 2006 be transferred to an independent court.*

The application is supported by the affidavit of the Applicant, Bramwel B. D. Kimungui plus other ground on the phase of the application. The Applicant alleges that on 5/12/2007 an order was made in Bungoma Cr. No.540 of 2006 that motor vehicle Reg. No. KAB 972 Station Wagon be recovered from the complainant and be placed in a neutral ground at D.C.I.O.'s office, Bungoma to be preserved until the final orders of the court. The 1st Respondent has failed to comply with the said order. The vehicle was seized by police on 30/8/2005 from the Applicant who alleges that he bought the same from one Ruth Victo Manyara on 6/8/2005 and paid a deposit of Ksh.90,000/= leaving a balance of Ksh.70,000/=. The Applicant took possession of the vehicle and used it for a short while before it was seized by the police. The Applicant was subsequently arrested on 1/3/2006 and arraigned in court on 7/3/2006 for stealing of the said vehicle and forgery of ownership documents. The Applicant filed a Civil Case No.503 of 2005 where he sued the said Ruth Victo Manyara, the Commissioner of Police and the Attorney General claiming damages for humiliation, harassment and defamation. The 1st defendant Ruth Victo Manyara filed a written statement of defence and denied the claim. The Applicant contends that it was wrong for 1st Respondent to realize the said motor vehicle contrary to the court order and before the disposal of the

criminal case.

A further supporting affidavit was filed by the Applicant on 21/7/2008 in which he alleges that the Chief Magistrate, Bungoma who is hearing the criminal case appears to be biased against him due to the delay occasioned in the said case. The Applicant further states that his constitutional rights under section 72 (3) and section 77 (1) of the Constitution were violated by the prosecution because he was remanded in police custody for 6 days and in Bungoma G. K. Prison for 14 days. The Applicant further alleges that the Chief Magistrate proceeded with the Criminal case on 25/6/2008 despite the fact that he was informed that the Applicant had filled this application. The court also put the Applicant on his defence in the said criminal case.

The application was opposed by the Respondents relying on the replying affidavit of the 1st Respondent Patrick M. Mugo. He depones that some time in the month of June 2006, a widow by the name Ruth Victo Manyara of Angurai Sublocation in Teso District launched a complainant in his office that her vehicle Reg. No.KAP 970 P 505 Peugeot was stolen and had been recovered and kept at Moding Police Base. The complainant showed him a log book which had her names as the registered owner. She complained that the vehicle had been vandalized at the police yard and she feared that the vehicle would be left as a shell before the determination of the case.

He therefore inquired about the matter from the D.C.I.O, Teso who confirmed that he was holding the said vehicle. He therefore sent the lady to D.C.I.O, Teso for assistance. It is later that he learnt the vehicle had been released to the owner. He depones that he was never served with any court order and refused to comply. It is therefore the D.C.I.O, Teso and the complainant who may be in a better position to explain the whereabouts of the vehicle.

Upon hearing both parties in this application, I find that there is a criminal case pending before Chief Magistrate in which the applicant herein is charged with stealing the motor vehicle in question. There is a civil case pending in Bungoma Court filed by the Applicant claiming damages.

The 2nd prayer in this application seeks to restrain the police expert from testifying and producing exhibits in the criminal case No.540 of 2006. In the applicant's further affidavit sworn on the 24th of July, 2008, he avers that the police expert testified in court before the Chief Magistrate on the 25/06/2008, the said prayer has been overtaken by events. This court will therefore not belabour on the facts relating on that prayer.

In regard to the 1st prayer, the 1st Respondent explains that he was not the one holding the motor vehicle at the material time and neither did he give any instructions to the D.C.I.O., Teso to release the vehicle. He received the complaint of the owner of the vehicle and referred her to the D.C.I.O., Teso. He denies that he directed the D.C.I.O. to release the said vehicle. From the facts presented to this court, it is not disputed that the complainant in a criminal case Ruth Victo Manyara is the registered owner of the said motor vehicle. The original log book which she showed to the 1st Respondent bears her name. The Applicant in this case alleges that he bought the said vehicle from the complainant an allegation which is denied by the complainant in her written statement of defence in the civil case. It is surprising therefore, that the Applicant did not claim ownership of the vehicle or refund of his money in the civil case number 503 of 2005. Assuming that he has a right of ownership over the said vehicle it will be reasonably be expected that he would diligently defend his rights in the civil suit which he has failed to do. In the said civil case, the applicant has claimed damages against the Defendant. He has not adduced any evidence to show that he is pursuing his rights of ownership if any, or refund of the deposit paid in the alleged sale agreement. The applicant is required to show a prima facie case and that he is likely to suffer irreparable loss if the orders sought are not granted. The facts presented before this court do not favour the Applicant in that regard. No attempt has been made by the Applicant to show a prima facie case. Even if the court was in doubt, as to ownership of the vehicle, the balance of convenience does not tilt towards him. Any loss or damage which may be caused should the prayer sought be denied, is capable of being compensated in the way of damages.

No evidence was adduced before this court to show that the Respondents were directly or indirectly concerned with the release of the motor vehicle. This court has not been satisfied that the 1st respondent was ever personally served with the said court order. Even assuming that the 1st Respondent was served with such court order, the right court to summon him to show cause for contempt would be the court that issued the said order.

On the alleged bias by the Chief Magistrate in the criminal case, the Applicant alleges that his case has been delayed and that he was overruled by the court when he raised an objection against the police expert testifying in that court before this application was heard and determined. In my considered opinion, the reason given does not disclose any bias by the lower court. The Applicant cannot allege that his case has been delayed and at the same time obstruct the court from proceeding with the same. I am therefore not satisfied that the Chief Magistrate is biased in any way in the criminal case so as to deny justice to the Applicant. The issue of bias raised in the Applicant's further affidavit is not relevant to the prayers sought in this application.

The Applicant alleges violation of his constitutional rights which matter is again irrelevant in this application. In any case, the Applicant has a legal right to sue for violation of his rights under the constitution.

It is my finding therefore that, this application lacks merit and is therefore dismissed with costs.

Dated, Delivered and Signed at Bungoma this 24th day of June 2009 in the presence of the state counsel Mr. Onderi and Mr. Kakai for Atunga for applicant.

F. N. MUCHEMI

JUDGE