



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISII**

**Petition 48 of 2009**

**IN THE MATTER OF SECTION 71(2) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF AN ALLEGED CONRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER SECTION 71(2) OF THE CONSTITUTION.**

**BETWEEN**

**ZAKIA MOGERE ARUNGA.....APPLICANT**

**-VERSUS-**

**STATE.....RESPONDENT**

**RULING**

There is a tractor registration number KAG 970T Make Massey Ferguson which is registered in the names of the applicant. On 31/3/2005 the applicant's husband Charles Arunga Mogere was arrested and subsequently charged in Kisii CM. Criminal case No. 464 of 2005 with two counts of forgery contrary to section 349 of the Penal Code and one count of obtaining by false pretences contrary to section 313 of the Penal Code. He had allegedly forged log books purporting them to have been issued by the Registrar of Motor Vehicles. He was charged jointly with three other people. In the course of the case Charles applied to the court to have the tractor released to him. His contention was that this was his tractor on which he depended for his subsistence. The prosecution's response was that the tractor was being held by the District Criminal Investigations Officer as evidence in the case. They observed that investigations had revealed that the registration number the tractor was holding belonged to a Peugeot pick-up; that the tractor's actual number was KAB 068M. It could therefore not be released until the case was concluded. The trial court did not order the release of the tractor.

The proceedings before the trial Court indicate that charges were withdrawn under *section 87(a) of CPC* because 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused jumped bail. On the discharge of the accused, Charles (who was 1<sup>st</sup> accused) sought release of the tractor. The request was declined. It is notable that the case in respect of which the accused had been charged had not been heard and the tractor produced in evidence. The court was not seized with jurisdiction to release of the property that had not been produced before it.

The present petition by the applicant is under section 71(2) of the Constitution of Kenya (Supervisory

Jurisdiction and the Protection of Fundamental Rights and Freedoms of the Individual) High court Practice and Procedure Rules 2006. The applicant is saying her right to private property (the tractor) under section 75 of the Constitution has been infringed. She seeks declaration that her right to property has been infringed and wants the tractor released. She further seeks an order that she is entitled to a claim for damages for the infringement. She was represented by Mr. Minda from whom the court received submissions. There was no response from the Honourable the Attorney General.

There is no dispute that the applicant has right to private property as conferred by section 75 of the Constitution. She has produced logbook to show she is the registered owner of the tractor. However, the material available and on which the applicant is relying for this application, shows the C.I.D questioned this registration which they were saying was forged and that the registration number on the tractor actually belonged to a Peugeot pick up. This matter was subjected to investigation that led to the charging of the applicant's husband, along with other people. The case could not proceed as some of these charged absconded. The case against the applicant's husband was withdrawn under *section 87(a) of CPC*. It means that the accused persons may be re-arrested and re-charged on account of same facts.

Police have not released the tractor. They were served with this application but, even after prompting by the Senior Principal State Counsel Mr. Kemo, did not want to respond. They may very well be holding the tractor because they are looking for the abscondee so that they can re-arrest and re-charge them. It may be against public policy to release a tractor into our roads with suspect registration documents. It may be that the police have lost interest in the case and are purely flexing their powers by detaining the tractor. This is why it was important for the State to offer response and explanation why police should be allowed to hold onto the tractor after the accused above were discharged. In view of this silence, I determine, based on the evidence by the applicant, that her constitutional right to the tractor has been violated. I direct that it be released forthwith to her. It is also ordered that she is entitled to claim for damages for the infringement of her fundamental right to the tractor.

Dated, signed and delivered at Kisii this 10<sup>th</sup> Day of November, 2009.

**A.O.MUCHELULE**

**JUDGE**

**10/11/2009**

Before A.O.Muchelle-J

Monagare court clerk

Mr. Masese for Mr. Minda for petitioner

Mr. Kemo for State

**COURT:** ruling in open court.

**A.O.MUCHELULE**

**JUDGE**

**10/11/2009**

