



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Petition 359 of 2008

JOSEPH MBAABU MUGAMBI..... PETITIONER

AND

- 1. THE COMMISSIONER OF POLICE**
- 2. THE HON. ATTORNEY-GENERAL.....RESPONDENTS**

RULING

This is a Chamber Summons dated 16th June, 2008 filed by M/s E.K. Mutua & Co. advocates on behalf of the Petitioner named as JOSEPH MBAABU MUGAMBI. This application was filed following the filing of a petition also dated 16th June, 2008 under Section 84 (1) of the Constitution. The respondents in both the Petition and the Chamber Summons are named as THE COMMISSIONER OF POLICE and THE HON. THE ATTORNEY GENERAL.

The Chamber Summons was filed on 17th June, 2008 and was brought under Rule 20 and 21 of the Constitution of Kenya (*Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual*) High Court Practice and Procedure Rules 2006.

The substantive order sought is that-

“Pending the hearing and determination of the Petition herein and in order to conserve the subject matter (for it not to go to waste or depreciate in value) the respondents do release the motor vehicle Registration Number KAY 271X to the Petitioner.”

The application was served. The Attorney-General through Mr. Maina Kirori a Principal Litigation Counsel, filed grounds of opposition on behalf of the respondents. The grounds of opposition are that-

- 1. The application is misconceived, bad in law and an abuse of the court process.*
- 2. The application is incompetent and incurably defective.*
- 3. The applicant has alternative remedy.*
- 4. The application does not disclose any constitutional infringements and should be dismissed with costs.*

On the hearing date both Mr. Mutua for the petitioner, and Mr. Kirori for the respondents addressed me.

Mr. Mutua submitted that the petitioner was the *bona fide* purchaser of the subject motor-vehicle, which, he purchased pursuant to a decree in PMCC No. 2949 of 2006. However, on the instigation of a 3rd party, the police had seized the said motor vehicle. Counsel contended that no good reason had been given by the police for detaining the motor vehicle, which the petitioner considers to be a contravention of section 84 of the Constitution. Counsel also submitted that the petition and application were competent according to the law and the rules.

Mr. Kirori for the respondents relied on the grounds of opposition. Counsel argued that the application was defective, bad in law and incompetent. Counsel also argued that the applicant had an alternative remedy. Counsel sought to rely on the case of KENYA BUS SERVICES LTD -VS- ATTORNEY-GENERAL HC Misc. Application No. 413 of 2005, as well as the case of RODGERS MWEMA NZIOKA –VS- ATTORNEY-GENERAL – Petition No. 613 of 2006. Counsel contended that where there is an alternative remedy, it was wrong to come to court through a constitutional application.

I have considered the application, submissions made before me, as well as the authorities cited. In my view, the arguments put in opposition to the application go to the merits of the petition. The petitioner is merely asking for conservancy orders at this time. This court can grant such orders. The respondents have not bothered to respond to the request for conservancy orders, and give reasons why same should not be granted. They do not challenge alleged purchase. They do not for example give a reason why they need to detain the subject motor vehicle. In those circumstances, I have no alternative but to allow the application and grant the conservancy orders sought.

Consequently, I order as follows-

1. *Pending the hearing and determination of the Petition herein and in order to conserve the subject matter (for it not to waste or depreciate in value) the Respondents be and are hereby ordered to release the motor vehicle Registration Number KAY 271X to the Petitioner, who will not dispose of the same until the hearing and determination of the Petition herein.*
- (2) *If there will be any criminal proceedings in court, the petitioner is bound to produce the motor vehicle in court as an exhibit.*
- (3) Costs in the cause.

Dated and delivered at Nairobi this 25th day of September, 2008.

GEORGE DULU

JUDGE.

In the presence of-

Mr. Mutua for applicant/petitioner.

Mr. Kirori for the respondents.