



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

Petition 1044 of 2007

**IN THE MATTER OF SECTIONS 84(1) OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 75(1) OF THE CONSTITUTION OF KENYA**

BETWEEN

**PAUL T. KABAI T/A SUPERVIEW MOTORS
PETITIONER**

AND

THE POLICE COMMISSIONER

THE OFFICER IN CHARGE, FLYING SQUAD AT PANGANI POLICE STATION

THE ATTORNEY GENERAL

IBRAHIM MACHARIA

KIBUTU.....RESPONDENTS

AND

**SIMON MUCHIRI MATHENGE INTERESTED
PARTY**

RULING

The application dated 25th September, 2007 is based on a Petition dated 17th September, 2007. It is brought under s 84(1) of the Constitution and Rule 20 of LN/6/2006 and seeks the release of motor vehicle registration Number KAT 672L forthwith from the custody of the 2nd respondent – the officer in charge of Flying Squad at Pangani Police Station. The other respondents are the Police Commissioner and one Ibrahim Macharia Kibutu and a Mr Simon Muchiri Mathenge as an Interested Party (“IP”). The fourth respondent has not appeared at all or taken part in these proceedings.

It is alleged that the vehicle in question was impounded in the first week of August 2007 arbitrarily and unlawfully and without reasonable cause as the applicant had furnished the 2nd respondent with proof of

ownership of the motor vehicle.

In other words the Petitioner claims to be the owner of the vehicle.

However the police have sworn an affidavit which avers:

- (a) That on 22nd August 2007 the motor vehicle was registered in the name of Simon Muchiri Mathenge.
- (b) That the said Simon Muchiri Mathenge has executed yet to be registered transfer in the name of the Petitioner.
- (c) That the transfer which was exhibited as MM3 dated 2nd July, 2007 purportedly signed by Ibrahim Macharia Kibutu in favour of the said Simon Muchiri Mathenge is a forgery as the same was not executed by the said Ibrahim Macharia.
- (d) And that the Petitioner has been requested to make a statement to assist ongoing investigation and instead he decided to bring a Constitutional Petition and a chamber application for conservatory order.

On a prima facie basis I have considered the affidavits filed in support of the application including the applicants written submissions filed in Court on 5th October, 2007. I have equally considered the 2nd respondent's affidavit in reply filed on 9th October, 2007 and written submissions filed on 11th October, 2007.

In view of the pending Petition I have deliberately decided to say as little as can, so as not to prejudice any of the points raised in the petition. My findings should therefore be regarded as tentative.

My tentative findings are:-

- (1) The applicant does not fall under s 75 of the Constitution for the reasons.
 - (a) there is no taking of possession or acquisition in terms of s 75. Instead the vehicle is held to assist in police investigations. In addition, and on a prima facie basis, the vehicle is not registered in his name yet. He only holds a signed transfer. He inherits a challengeable title to the vehicle in the event of forgery or theft being established. On the other hand the rights or interests contemplated under s 75 must clearly be vested in an applicant at the time of seeking constitutional relief.
- (2) S75(6) viii states:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection 1 or 2 to the extent the law in question makes provision for the taking of possession or acquisition of property for so long only as may be necessary for the purposes of an examination investigation trial of inquiry ...”

It follows, any impounding or detention under the Criminal Procedure Code, the Penal Code or any other written law is outside any contravention of the section, and constitutes a valid limitation under S 75.

The Police are therefore perfectly entitled to take possession of the vehicle by impounding the same for a reasonable period to enable them to carry out the necessary investigations.

Prima facie the issue of the ownership of the vehicle is a matter principally of commercial law and in particular the Sale of Goods Act and also certain aspects of the transaction touch on the law of tort, as the advocate for the respondents have attempted to argue in this case and in view of the number of people involved in the transaction and who are not parties to the Petition the matter will prima facie perhaps be better handled in the realm of private law and criminal courts and not a Constitutional Court. On balance, the rights of the four parties inter se are likely to be beneficially unravelled elsewhere, instead of being

articulated in a Constitutional Court.

The upshot is that I decline to give the order of release. The application is dismissed. Costs to abide the outcome of the Petition.

DATED and delivered in Nairobi this 23rd day of November, 2007.

J G NYAMU

JUDGE

ADVOCATES

Mr Gitonga of Kibunja & Associates Advocates for the Applicant.

Omondi for the three Respondents.