



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Misc Civ Appli 11 of 2006

TABITHA MAWIA.....

APPLICANT

V E R S U S

POLICE COMMISSIONER.....1<sup>ST</sup>

RESPONDENT

O.C.S. MERU POLICE STATION.....2<sup>ND</sup>

RESPONDENT

D.C.I.O MERU.....3<sup>RD</sup>

RESPONDENT

ATTORNEY GENERAL.....4<sup>TH</sup>

RESPONDENT

JERRY CITY GENERAL.....5<sup>TH</sup>

RESPONDENT

JULIUS NGA'NGA KINUTHIA.....6<sup>TH</sup>

RESPONDENT

R U L I N G

1. There are two Applications before me for determination. One is dated 30/1/2006 and in it the Applicant, Tabitha Mawia invoking s.3 and s.3A of the Civil Procedure Act and Order XXXIX Rules 1 and 2 of the Civil Procedure Rules seeks and order that:-

**“The Respondent be ordered to keep motor vehicle KAR 477C at Meru Police Station until the summons herein are heard and determined.”**

2. The second application dated 3.2.2006 is under section 3A of the Civil Procedure Act and is filed by the 6<sup>th</sup> Respondent seeking that **“motor vehicle registration number KAR 477C be released [to him] forthwith”**.

3. As both Applications seek the same orders (conversely) I ordered that they should be heard together. Before I come to issues raised in those Applications, I should start by saying something about the Originating Summons that is the basis for the two interlocutory Applications.
4. The Originating Summons was filed on 30.1.2006 under s.84(6) of the Constitution and the Rules made vide L.N.133/2001. In it the Applicant claims that her fundamental rights of protection from deprivation of property is being violated by the taking of her motor vehicle registration number KAR 477C which she bought by way of public auction and which right ought to be protected. She seeks that the court determines only one question which is:-

**“Whether having bought the motor vehicle by way of public auction, the same can be taken from her without due process of the law and/or without being heard and/or compensated under s.75 of the Constitution.”**

5. It is pending the determination of the above question that she seeks that the motor vehicle should not be released to herself or to any other person that she makes her Application of 30.1.2006.
6. What triggered the proceedings? Apparently one William Maingi Karanja had sued the 5<sup>th</sup> Respondent in CMCC NO.3731/2005 (Milimani) seeking inter-alia a sum of US dollars 4200, interest thereon and damages for conversion in a dispute which is of no interest to this court. He obtained judgment as he had sought and I note that the sum awarded was Ksh.337,878/- plus costs amounting to Ksh.48,350/-. He proceeded to execute the decree arising from the judgment and motor vehicle registration number KAR 477C was attached in consequence. The 6<sup>th</sup> Respondent herein took out objector proceedings saying that the motor-vehicle did not belong to the 5<sup>th</sup> Respondent which was the Judgment-debtor but to him. A temporary stay of execution was granted on 1.12.2005 and on the 5.1.2006 the judgment was set aside and the plaintiff in that suit awarded Ksh.10,000/- thrown away costs. The other order made was that an Application dated 17.6.2005 be set down for hearing. It is unclear what that Application was all about but it certainly re-opened the proceedings in CMCC No.373/2005.
7. I note from annexure “**JNK3**” attached to the affidavit of the 6<sup>th</sup> Respondent sworn on 3.2.2006 that the advocates for the plaintiff in that suit wrote to the auctioneers, Metropolitan Auctioneers, on 9.1.2006 and informed them that the judgment had been set aside and “**in the premises, kindly release and restore the motor vehicles under the usual terms.**” I note curiously however that the same Auctioneers had written to the said Advocates on 22.12.2005 and informed them that the motor vehicle had been sold on 22.12.2005 at a public auction and that Mrs Tabitha Mawia of P.O. Box 44 Malindi had put up the highest bid of Ksh.300,000/=. It must be remembered nonetheless that as at that date there was in force a temporary order of stay of execution issued on 1.12.2005 and later confirmed when the judgment was set aside on 5.1.2006.
8. In any event, on 26.1.2006, the 2<sup>nd</sup> Respondent took possession of the motor vehicle from the Applicant and detained it at Meru Police Station with the intention of returning it to the 6<sup>th</sup> Respondent as instructed by the 3<sup>rd</sup> Respondent.
9. The Applicant denies knowledge of any order of stay of execution prior to the sale and purchase of the motor-vehicle and also states that the 6<sup>th</sup> Respondent is connected to the 5<sup>th</sup> Respondent as a Director of the latter and the execution is proper.
10. The 6<sup>th</sup> Respondent’s case is that the motor vehicle is still registered in his name, the log book thereof is still in his possession and the sale to the Applicant has been set aside in any event.
11. The matter before me is really simple; should I order continued detention of motor vehicle registration number KAR 477C or should I order its release to the 6<sup>th</sup> Respondent?

12. The Applicant says that if I do the latter, the Originating Summons will be rendered nugatory. However it must be borne in mind that the order of release of the motor vehicle already exists vide the Ruling in CMCC 3731/2005 and the filing of the originating summons cannot by itself be a bar to that order being effected. Nonetheless I must state that the sale of the motor vehicle to the Applicant while there was a valid order of stay of execution was an illegal action and the Applicant cannot now expect this court to countenance that illegal action. Further, it is clear from where I sit that the motor vehicle subject of the proceedings has not been transferred to the Applicant. If it had, then where is the log book in her name and copy of the records to indicate the change? What I see on record are the log book and copy of the record in the name of the 6<sup>th</sup> Respondent. Prima facie, and I am conscious that I am not determining the Originating Summons, there is no clear evidence at this stage of the proceedings to say that the Applicant has a claim to which the orders sought in her Application can be attached. Conversely the 6<sup>th</sup> Respondent has established that on the strength of the order of 5.1.2006 he has been entitled to the motor vehicle since that date and that order has not been varied. I do not see how this court without the matter coming to it by way of an Appeal can vary it or set it aside. Granted, the parties have invoked s.3A of the Civil Procedure Act but even then, the ends of justice and the requirement that no party should abuse the process of court would necessitate that this court looks towards the 6<sup>th</sup> Respondent favourably and frowns at the manner in which the Applicant obtained the motor vehicle. It would be otherwise a travesty of justice to order that a party deserving of its property by a valid order of court should have that property detained at a police station indefinitely as sought by the applicant. Let the parties first comply with the order in CMCC 3731/2005, which still stands.

13. I will only say in conclusion that whatever the effect of the orders I shall shortly make the Applicant has more than one known remedy to enforce its claim to the motor vehicle without having it detained at the Meru Police Station.

14. I shall for these reasons, grant prayer 3 of the Application dated 3.2.2006 and dismiss the Application dated 30.1.2006 with costs of both Applications to the 6<sup>th</sup> Respondent only.

15. Orders accordingly.

**Dated, signed and delivered in open court at Meru this 4<sup>th</sup> day of April 2006**

**ISAAC LENAOLA**

JUDGE