



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Misc Civ Appli 50 of 2005**

**IN THE MATTER OF AN APPLICATION BY CLEOPHAS OMONDI ABUOM FOR AN  
ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF THE TRAFFIC ACT CAP 403 LAWS OF KENYA**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE OFFICER COMMANDING POLICE DIVISION  
VIHIGA.....RESPONDENT**

**AND**

**CLEOPHAS OMONDI ABUOM .....INTERESTED PARTY/APPLICANT**

**RULING**

Pursuant to the provisions of Order LIII rule 3 of the Civil Procedure Rules, Cleophas Omondi Aboum, the interested party applied for an order of Mandamus to compel the O.C.P.D., Vihiga police Division to release motor vehicle registration number KAS 446 U make Toyota Hiace. He also prayed for costs of the motion and those he incurred on the application for leave. When the motion was served the O.C.P.D, through the provincial state counsel, Western province filed a replying affidavit in opposition.

When the parties appeared before this court for interpartes hearing of the motion, the interested party’s advocate abandoned the prayer for mandamus because by that time the subject matter of the proceedings, Motor vehicle registration number KAS 446 U had been released to the to the applicant. Consequently, the parties only argued the remaining ground as to who should pay cost of the proceedings.

The brief history of the dispute before this court may be summarised as follows:- By a sale agreement dated 22<sup>nd</sup> September 2004, the interested party acquired motor vehicle registration number KAS 446 U hereinafter referred to as the suit motor vehicle. The interested party placed the suit motor vehicle to operate as a public service vehicle. On 3<sup>rd</sup> February 2005, the suit motor vihiga was operating matatu business along majengo – Lwanda road when traffic policemen attached to vehicle police Division intercepted it. The driver failed to stop when flagged down. He and the occupants ran away and abandoned the suit motor vehicle.

The police approached the motor vehicle and upon carrying out a search they discovered the same had 420 litres of chang'aa, a prohibited drink under the provisions of the Chang'aa Prohibition Act, Cap 70 Laws of Kenya. Since the motor vehicle was left unattended it was impounded and detained at Vihiga Police station, pending investigations. Its detention appears to have been noted in the police occurrence book.

The next day, that is on 4<sup>th</sup> February 2005, One Everlyn Songo Olando presented herself as a representative the owner of the suit motor vehicle. She was arrested and placed in the cells as a suspect. She was however released the next day on a police cash bail of Ksh.10,000/- and on a promise that she would assist the police to trace and take to the police the driver and the conductor. It would appear she did not fulfill the promises she undertook to perform in the police station hence the station continued to detain the suit motor vehicle. It is not clear when the interested party was arrested. The record shows he surrendered himself upon which he was charged under the provisions of section 3 and 4 of Cap 70 Laws of Kenya on a charge of conveying and transporting Chang'aa in Vihiga S.R.M'S Criminal case No. 342 of 2005. The same court made an order releasing the suit motor vehicle to the interested party on the 3<sup>rd</sup> day of March 2005.

The interested party now seeks from this court an order condemning the O.C.P.D, Vihiga police Division to personally pay costs of this motion and that incurred when obtaining leave. The O.C.P.D. has been accused of abusing his powers and for being malicious. The interested party claims that the O.C.P.D. had no lawful justification in detaining the suit motor vehicle. I was urged to infer that malice was manifested by the period taken in detaining the motor vehicle. The interested party also cried foul of the decision by the O.C.P.D. to prefer criminal charges against him. He saw the decision as that which was actuated by malice which in his view amounted to an abuse of office.

On his part, Stephen N. Kariuki, the O.C.P.D., Vihiga Police Division swore a replying affidavit to deny the allegations. He averred that it took time to carry out investigations to establish the actual owner of the suit motor vehicle. He also pointed out that the actual owner went hiding only for him to surrender when the Vihiga S.R.M's court issued a warrant of arrest in criminal case No. 342 of 2005. He denied malice on his part. He averred that he was carrying out his duties according to law.

The interested party's advocate took issue with the competency of the O.C.P.D.'S replying affidavit. It was pointed out that the same was not numbered as required under Order XVIII rule 5 of the Civil Procedure rules. On her part Mrs. Kithaka the learned Principal state counsel conceded the defect but added that the same is not fatal. She prayed for the affidavit to be accepted pursuant to the provisions of order XVIII rule 7 of the Civil Procedure rules.

I think it is important to start with the last issue touching on the competency of the replying affidavit deposed by Stephen Kariuki. The provisions of Order XVIII rule 5 clearly defines the manner in which affidavits should be drawn. The O.C.P.D's affidavit is in paragraphs but it is not numbered. This is a defect in respect of form, which according to me is not fatal. I say so because one can easily distinguish the contents of each paragraph from the other. The law under Order XVIII rule 7 of the Civil Procedure rules gives this court a wide discretion to accept such affidavits despite having such defects. I will excuse the defect and proceed to accept the affidavit sworn by Stephen Kariuki.

The remaining issue here is whether or not the O.C.P.D, Vihiga Police Division should be condemned to pay costs personally. It was incumbent upon the interested party to prove that the respondent acted in excess of jurisdiction or maliciously. The interested party has urged this court to infer malice that manifested was by the O.C.P.D'S delay to release the suit motor vehicle. It was also alleged that the O.C.P.D. detained the suit motor vehicle without a justifiable cause.

The provisions of Section 26 of the criminal procedure code authorized the police to detain *inter alia* motor vehicles which they suspect were used in the commission or to facilitate the commission

of an offence. In this case, the O.C.P.D. clearly pointed out that the motor vehicle was suspected to have been used to convey and transport chang'aa which is an offence pursuant to provisions of prohibition Act Cap 70 Laws of Kenya.

The provision of Sections 106 and 107 of the Traffic Act Cap 403 Laws of Kenya also authorize the police detain motor vehicles in the circumstances the suit motor vehicle was found. It was incumbent upon the interested to show that he acted expeditiously in the matter to assist the police who were performing their statutory duties. It is clear from the submissions of both the provincial state counsel and Mrs. Mumalasi that the interested party surrendered himself to the court when a warrant of arrest was issued. It is also abundantly clear that the dispute is still pending in court as a criminal complaint by the state. The merits and demerits of the police action is yet to be tested in the criminal trial. I am convinced that the police acted in this matter cautiously. The interested party opted to dilly dally thus making the police to delay in the matter. I find that no malice has been established on the part of the police. I think the police acted within the law. There is nothing to make me infer malice on the part of the O.C.P.D. I could have ruled that malice manifested itself in view of the period it took them to release the suit motor vehicle, but the interested party is a culprit who chose to go underground only to appear too late in the scene. This reason has made me rule otherwise.

I wish also to point out that the law protects the police from being sued for compensation for loss or damage suffered in respect of such detention of a motor vehicle under Section 26 (2) of the Criminal Procedure Code.

The upshot therefore is the interested party's application must fail. Consequently he is not entitled to any costs.

The motion is dismissed with no order as to costs.

DATED AND DELIVERED THIS 15<sup>th</sup> DAY OF April 2005.

J.K. SERGON

JUDGE