



DPP v Mogo Auto Ltd & another (Criminal Revision E373 of 2024) [2025] KEHC 835 (KLR) (3 February 2025) (Ruling)

Neutral citation: [2025] KEHC 835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E373 OF 2024
SM MOHOCHI, J
FEBRUARY 3, 2025**

BETWEEN

DPP APPLICANT

AND

MOGO AUTO LTD 1ST RESPONDENT

MOSES WANJALA BARAZA 2ND RESPONDENT

RULING

1. The Applicant, the Directorate of Public Prosecution moved this Court under certificate of urgency invoking Articles 50 and 159, 165 (6) and (7) of *the Constitution* of Kenya 2010, and Sections 81 and 348 of the Criminal Procedure Code, Cap 75 Laws of Kenya and all other enabling provisions of the Law by way of Notice of Motion, supported by the sworn affidavit of Chief Inspector Samson Lengopito all evenly dated 22nd July 2024.
2. The Applicant in its certification by Chinga Angeline Prosecution Counsel, urges that the matter be urgently placed before the judge for reason that, the Respondents had obtained an Order in Misc App No E251 of 2023 by Hon. Dr. Prisca Nyota directing the OCS Kaptembwa Police Station to release motor vehicle registration number KBN 299S to the 1st Respondent whereas the subject motor vehicle is subject matter in Magistrate’s Court Criminal Case Number E2043 of 2023 being heard by Hon Ndege where one Geoffrey Waithera is the complainant and has all ownership documents in proof.
3. The Applicant seeks the following final reliefs:
 - a. That this Court be pleased to issue Orders staying the Order of the Chief Magistrates Court at Nakuru (Prisca Nyota, SRM) dated June 10, 2024 releasing the Motor Vehicle Registration Number KBN 2995 to the 1st Respondent pending the hearing and determination of this Application.



- b. That the Court be pleased to issue any other order that the ends of justice demand.
4. The Application is premised on two grounds that, the release of the motor vehicle KBN 2998 by the learned trial magistrate when there is an ongoing case before Hon. Ndege Court No. 5 MCCRE 2043 of 2023 R vs. Moses Wanjala Barasa would be prejudicial to the prosecution case and that, the release of the motor vehicle KBN 299S by the learned trial magistrate to the 1st Respondent while there is an established owner is still prejudicial to the prosecution case.
 5. Ex-Parte Directions were issued on the 31st July, 2024 Allowing a temporary stay of proceedings in Nakuru Chief Magistrate's Court MCCR No E251 of 2023 Pending the application to be heard and disposed-off by way of written submissions and parties were to file their respective submissions.
 6. However, it was not until the 2nd October 2024 when both Applicant and 1st Respondent appeared confirming service and the Applicant sought leave to serve the 2nd Respondent and file a return of service, the 2nd Respondent protested this but were overruled by the Court and the Applicant was once more allowed to serve the motion and file the return.
 7. On the 9th October 2024 All parties appeared before Court with the 2nd Respondent appearing in person. The Court allowed the Respondents seven (7) days to file any Responses, the Applicant was to file written submissions in fourteen (14) days, the Respondents were to file written submissions within twenty-one (21) days and the Court reserved the ruling for the 2nd December 2024 which ruling has delayed owing to work exigency.

Applicants Case

8. The Applicant has not filed any written submission but from its sworn supporting affidavit dated 22nd July 2024 by No. 238138 Chief Inspector Samson Lengoptio attached at DCI Nakuru West, he depones that he is the investigating officer the matter MCCR E2043 of 2023 before Chief Magistrates Court number 5. in Nakuru, whereby the 2nd Respondent is charged with the following offences:
 - i. Obtaining registration by false pretences c/s 320 of the penal code
 - ii. Obtaining credit by false pretenses c/s 361(a) of the penal code
 - iii. Uttering false document c/s 353 of the penal code.
9. That, the subject motor vehicle in this application KBN 299S was reported stolen by one Gatimu Waithira and investigations were launched into the alleged theft.
10. That upon conclusion of investigations, it was established that the 2nd Respondent had forged the log book of the motor vehicle KBN 299s and used it to obtain a loan from the 1st Respondent.
11. That Gatimu Waithira is in possession of the original log book bearing the names Anthony Njau who is the original owner of the motor vehicle KBN 299s.
12. The upon verification of the two logbooks. NTSA confirmed that the log book that was used to obtain the loan by the 2nd Respondent from the 1st Respondent was a forgery. It is the same log book that was used in the application for release of motor vehicle before the Trial Court presided upon by Hon. Prisca Nyota.
13. That he opposed the release of the motor vehicle through an affidavit dated and sworn on 25th October, 2023.



14. That the release of the motor vehicle is prejudicial to the prosecutions case and the owner who has never interacted with the Respondents.

Respondents Case

15. The Application is opposed by a replying Affidavit by Brian Okemwa Omari 1st Respondent's Legal Officer dated 1st October 2024.
16. The Second Respondent elected not to participate, having been served and appeared in person.
17. The 1st Respondent depones that the application is devoid of merit, frivolous, vexatious, brought in bad faith and as such the application must fail with costs to the 1st Respondent.
18. That the application now before this Court is unfounded, an afterthought and should not be allowed for want of merit.
19. That, vide an exhibited copy of order dated 8th May 2024 the Court ordered the release of motor vehicle registration number KBN 299S to the 1st Respondent.
20. That, the order was issued upon going through the requisite hearing process of Nakuru Misc. App No. E251 of 2023 culminating in issuance of the said order.
21. That, the Applicant never opposed or filed a response to the application despite being properly served with the application. Return of service exhibited as filed at the trial Court.
22. That, the Applicant was given ample and sufficient time to respond to the application but blatantly and unjustifiably failed to do so.
23. That, the Application is an afterthought solely brought with a view of barring the 1st Respondent from executing the said orders and safeguarding the subject motor vehicle.
24. That, the Applicant cannot purport to contest the said orders when it had the chance to do so and failed.
25. The 1st Respondent avers that it is not aware of any fraudulent activities allegedly levelled against the 2nd Respondent and is a stranger to the said charges in the said criminal case.
26. That, the Applicant herein has not demonstrated any prejudice and/or any likelihood of irreparable harm that may be occasioned to him if the said proceedings continue during the pendency of this application.
27. The 1st Respondent in its filed written submissions dated 6th November 2024 contends that the following issue arise for determination;
 - (a) Whether the Applicant has established a case for the orders sought?
 - (b) Who should bear the costs of this application?As to whether the Applicant has established a case for the orders sought?
28. The 1st Respondent submits that the Applicant seeks a revision of the orders granted by the Trial Court in Nakuru Miscellaneous Application No. E251 of 2023 which the Applicant has not met the threshold to warrant the said orders.



29. That, this Court's revisionary powers emanate from Section 362 of the Criminal Procedure Code as read with Section 364 of the same. Section 362 provides as follows:
- “The High Court may call for and examine the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court”.
30. That, further, Section 364 of the Criminal Procedure Code state as follows: In the case of a proceeding in a Subordinate Court, the record of which has been called for or which has been reported for orders, or which otherwise come its knowledge, the High Court may - in the case of any other order than an order of acquittal, alter, or reverse the order.
31. That this position was further emphasized by the Court in the case of *Munene vs Republic (Criminal Revision E012 of 2024) 2024 (2024) KEHC 12920 KLR* which highlighted the holding of Odunga J (as he then was) in *Joseph Nduvi Mbuvi v Republic (2019) eKLR*:
- “...the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate Court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower Court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate Court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate Court as well.”
32. It is submitted that High Court's revisionary powers revolves around the correctness, legality or propriety of a finding by the Court.
33. It is submitted on behalf of the 1st Respondent that none of this circumstance is manifest in this case to warrant this Honorable Court's intervention with the Trial Court's order.
34. That the Trial Court, after hearing both parties ruled that it was prudent and in the interests of justice that the subject motor vehicle registration number KBN 299s be released to the 1st Respondent.
35. It is submitted that, the Trial Court after analyzing the circumstances of the case arrived at the correct, legal and just finding the present matter.
36. That this is the reason, that the 1st Respondent is a joint registered owner of the motor vehicle and therefore entitled to enjoy its proprietary and ownership rights.
37. It is submitted that as rightly decided by the Trial Court, it is in the interests of justice that the subject motor vehicle be released to the 1st Respondent.
38. That, the reason is that the motor vehicle remains parked outside and continues to waste away and deteriorate in state being exposed in an open yard and to adverse weather conditions.
39. That further, its value will without a doubt go down and the 1st Respondent may never recover the money it has advanced to the 2nd Respondent as the security, being the subject motor vehicle will be unworthy of being redeemed.



40. It is submitted that, the Applicant has not demonstrated the detriment that it will suffer if the subject motor vehicle is released to the 1st Respondent.
41. That the Applicant does not need to have physical possession of the motor vehicle to be able to prosecute its case, the Applicant can be granted leeway to take photographs of the subject motor vehicle which can be produced as evidence in Court as the motor vehicle remains in the custody of the 1st Respondent during the pendency of the suit.
42. That the 1st Respondent reiterates that, its interest lies with ensuring the safeguarding and safekeeping of the motor vehicle pending the hearing and determination of the suit due to the stake it has in the motor vehicle.
43. It is the 1st Respondent's submission that, the Applicant cannot delve into matters of authenticity of logbooks as the same is still a subject of the Court's determination in the criminal case.
44. That, the Applicant cannot therefore purport to conclude that the logbook used to obtain the loan by the 2nd Respondent was a forgery yet the same has not been determined by a competent Court of law.
45. The 1st Respondent contends that, it would be prudent and in the interests of justice for the subject motor vehicle to be released to the 1st Respondent.
46. That the Applicant has not demonstrated why this Honorable Court should vary the orders of the Trial Court and the application lacks merit, is meant to delay and/or obstruct justice and is an abuse of Court process and ought to be dismissed.
47. The 1st Respondent thus prays that the Application be dismissed with costs.

Analysis and Determination

48. The High Court is vested with Revisionary powers under [the Constitution](#) and Section 362 to 366 of the Criminal Procedure Code Cap 75. More particularly, Article 165 of [the Constitution](#) provides as follows: -
 - (6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
49. The Criminal Procedure Code, Cap 75 under Section 362 states as follows: -

“Power of the High Court to Call for Records:

The High Court may call for and examine the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court.”
50. Section 364 further outlines the manner in which the revision jurisdiction should be exercised. It states as follows: -

“Powers of the High Court on Revision



- (1) In the case of a proceeding in a subordinate Court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –
- (b) In the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defense:

Provided that this subsection shall not apply to an order made where a subordinate Court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

51. In the case of Republic vs. Samuel Gathuo Kamau [2016] eKLR, the Court discussed the supervisory jurisdiction of the High Court at length and observed as follows;

“Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc... it does not include any perceived power to make a decision on behalf of a subordinate Court... In the case of appeals, the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings see Article 165 (7) of *the Constitution* and sections 362 and 364 of Cap 75...”

52. In the case of Republic vs James Kiarie Mutungei [2017] eKLR Nyakundi J. held thus;

“the rationale of the High Court as a revisionary authority can be initiated by an aggrieved party or suo moto made by the Court itself, to call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, propriety or correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high Court to rehear the case and evaluate the evidence in totality by the lower Court to come with a decision on the merits.”

53. The threshold for determining whether a decision is correct, proper and legal is found in Constitutional and statutory provisions. The Oxford English Dictionary Vol. VIII defines the word propriety to mean fitness, appropriateness suitability, conformity with requirements, rule of principle rightness, accuracy, correctness, justness. The depth of revisional jurisdiction of the high Court was set out by the Court of appeal in which cited the case of Sriraja Lakshmi Dyeing Works vs. Pangaswamy Chettair [1980] 4SCC 259 where the Supreme Court of India elucidated the principles as follows: -

“The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellate or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words ‘to satisfy itself’ under section 25 read (which has similar provisions with Kenya’s section 362 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya) is



essentially a power of superintendence. The scope of the revisional powers of the high Court where the high Court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, is quite obviously a much wider jurisdiction. That jurisdiction enables the Court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional Court is not a second Court of appeal (emphasis supplied).”

54. I now consider the grounds set out in the Application within the parameters of Section 362 of the Criminal Procedure Code for incorrectness, illegality or impropriety.
55. This Court must be reluctant to interfere in the exercise of judicial discretion in a Lower Court unless it is convinced that doing so would be in furtherance of the administration of justice. This principle was clearly stated by the Court of appeal in *Mbogo v. Shah* (1968) EA 93 thus: -

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”
56. Judicial discretion is exercised judiciously and to subject an impugned order to review then the Applicant is expected to demonstrate either the impugned order is incorrect, it is a wrong decision, illegal or the trial magistrate misdirected herself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the magistrate was clearly wrong in the exercise of her discretion and that as a result there has been misjustice.
57. In this case, the Applicant has not advanced any good reason as to why the criminal proceedings should be stayed. It has also, not demonstrated how it is going to be prejudiced if the motor vehicle registration number KBN 299S is released to the 1st Respondent pending the outcome of the trial. From the above case law, it is clear that a ruling of a case to release a motor vehicle upon demonstration of ownership does not mean the Court has settled any ownership dispute that may arise in relation to this case and it will cause no harm to state if the matter is heard to conclusion.
58. In any case no basis has been laid why electronic evidence cannot be the mode to present the evidence of factual existence of the motor vehicle in question.
59. Owing to the scanty presentation by the Applicant, the Court is not convinced that, the Applicant will suffer grave injustice if the Trial Court proceeds.
60. The Court has avoided lengthy discussions and arguments of ownership advanced by the Applicant without a single shred of evidence to augment the same. No ownership registration is exhibited, the motor vehicle make remains a mystery, allegations of forgery have established standard of proof that are absent in the Applicant’s assertions.
61. The Applicant has equally failed to offer plausible explanation as to why the impugned order was issued without their participation having been properly served.
62. This Court equally appreciate that, it cannot either on appeal or in exercises its supervisory review jurisdiction interfere with case management in the Subordinate Court by issuing case management-oriented orders and may only interfere where the Trial Court has not exercised its discretionary power judiciously.
63. This Court has examined and reviewed the impugned Trial Court Order and owing to the foregoing reasons the Applicant Notice of Motion dated 22nd July 2024 has not laid any basis to interfere with the



exercise of discretion by the trial magistrate, and that the Impugned Ruling lawfulness and propriety has not been impeached or dented in any manner.

64. This Court declines to award costs as sought by the 1st Respondent in this criminal revision, owing to the reason the law is that the award of costs is at the discretion of the Trial Court as provided for by Section 27 of the *Civil Procedure Act*. The provision further states that costs should follow the event unless the Court shall for good reason otherwise order.

65. In the case of *Katuwa Munyao Versus Edward Jacob (1982) eKLR*, the Hon. Justice Chesoni, (as he then was, considered the issue of costs under section 32 of the penal code. the section reads;

“Subject to limitations imposed by section 171 of the criminal procedure code, a Court may order any person convicted of an offence to pay the costs of and the incidental to the prosecution or any part thereof.”

66. Section 171(1) of the Criminal Procedure Code directs that, a Court may order a person convicted of an offence to pay to the public or private prosecutor, such reasonable costs in addition to the penalty imposed. And at sub-section (2) in case of an acquittal, the Court may order the private prosecutor to pay the acquitted accused person such reasonable costs. The proviso to these 2 scenarios is that, such costs would not exceed Kshs.20,000/=.

67. In dealing with this issue, the Hon. Justice Chesoni (as he then was), dismissed the plea for costs on the basis that the convicting Court did not specifically state the sum awarded thus;

“The requirement to specify the sum awarded being statutorily mandatory, failure to specify such a sum in the conviction or order is fatal to the award as it renders the award null and void and of no effect”.

68. The Court proceeded to nullify the award of the Deputy Registrar after a successful private prosecution.

69. It is worth noting at this stage that both the Penal Code (Section 32) and the Criminal Procedure Code (Section 171) only give mention to costs upon successful conviction or acquittal. In our present, the prosecution has not achieved any conviction or acquittal.

70. In the more recent case of *Republic Versus AKK (2021) eKLR*, the Honourable (Rtd). Justice J. M. Bw’onwon’ga sitting at the High Court of Kabarnet, dealing with a situation such as herein, held;

“It is equally important to point out that where a prosecution is brought by either a public or private prosecutor, the proceedings are in fact brought on behalf of the Crown (now the Republic), and the common law principle is applicable that no costs should be allowed unless in exceptional circumstances are shown.”

The Honourable Judge went on to castigate the “borrowing of the practice that is followed in civil trials into criminal trials which is not authorized in law”

71. The same Judge in *Robert Kariuki Njagi Versus John Njagi Kiragu (2018) eKLR*, Embu again held;

“In very exceptional circumstances that an order for payment of costs made in criminal matters The same is not based on any statutory law.”

72. This Court has not been shown any statutory provision on award of costs in criminal cases in the manner in which the 1st Respondent has pleaded. The Court has also not been convinced on the



existence of any extra ordinary circumstances in this case that would warrant grant of any costs to the 1st Respondent. To this extent, I stand guided by the decisions of the learned Judges in the cases above.

73. The Applicant is directed to resume trial before the Trial Court in Nakuru Chief Magistrate Court Case No. E2043 of 2023.
74. The Application dated July 22, 2024, is accordingly found to be without merit and the same is dismissed.

It is so ordered.

READ, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF FEBRUARY, 2025

MOHOCHI. S. M.

JUDGE

