



**Kiragu v Republic (Miscellaneous Criminal Application E242 of 2023)
[2024] KEHC 3564 (KLR) (Crim) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E242 OF 2023**

LN MUTENDE, J

APRIL 11, 2024

BETWEEN

JOHN KAMAU KIRAGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. John Kamau Kiragu, the Applicant through an application dated 21st day of August, 2023 seeks release of Motor Vehicle Registration No. KCG 130V Isuzu on condition that the applicant avails it to the court whenever required if the suspects are arrested and charged; and, that the applicant should not dispose it during pendency of the criminal suit and the vehicle should not be used to commit other crimes.
2. The application is premised on grounds that following the court order that the application be served and heard inter-parties when it came up for hearing on 16th October, 2023 the respondent who had not filed a response sought time to do so and when ultimately P.C. Guyo the Investigating Officer filed a response he deposed interalia that the vehicle was photographed and documented by the Crime Scene Support Service and should the court be inclined and order release of the same it should be released on special conditions namely:- That the applicant do avail it if required should the suspects be arrested; that the applicant be barred from disposing it by way of sale, transfer or any other way that would affect the proceedings; and, it should not be used in commission of any other offence pending hearing and determination of the matter herein after arrest of the suspect and subsequent charging.
3. That the continued detention of the vehicle has adversely affected the applicant and exposed him to financial hardship.



4. The respondents through No. 90130 P.C Guyo Tacho filed a replying affidavit where he deposed that the subject motor vehicle was intercepted on 9th April, 2023 carrying suspected sandalwood. That the occupants of the lorry fled the scene into the bushes/shrubs. The lorry was booked at Isiolo Police Station on 10th April, 2023 by Serious Crime Unit Officers. A search carried out at the National Transport and Safety Authority (NTSA) indicated the registered owner of the vehicle as John Kamau Kiragu and Benji Holding Limited and the applicant was summoned to record a statement and he gave out the driver's details.
5. On the 18th April, 2023, samples of the suspected sandalwood were forwarded to the Kenya Forest Research Institute for identification. On 20th April, 2023 the Kenya National Highway Authority weighed the exhibits and the suspected sandalwood was found to be 10:450 kilograms. That the investigators requested for the call data records and the case is still under investigations pending arrest of the suspect who fled. That should the court be inclined to release the vehicle then special conditions be imposed as stated by the Applicant.
6. The application was disposed through written submissions. It is submitted by the applicant that pursuant to Article 40 (1) of *the Constitution* and Article 17 of the Universal Declaration of Human Rights, to own property is a constitutional right and/or human right. That such a right does not extend to any property that has been unlawfully acquired as spelled in Article 40(6) of *the Constitution*.
7. That from the averments of the Applicant the issue of ownership of the vehicle is not disputed. It is hence the responsibility of the prosecution to show that the applicant was an accomplice in the commission of the offence. That the Investigating Officer did not oppose release of the vehicle but proposed conditions to be set. That the reason for detaining the vehicle is because the matter is under investigations on alleged transportation of Sandalwood, a protected species, however, investigations should be dealt with expeditiously.
8. In response thereto, the respondent seeks dismissal of the application on the basis that investigations being carried out are in respect of endangered wildlife species as provided by Section 92(2) of the *Wildlife Conservation Act*, 2023 and in case of conviction, in addition the court may order forfeiture of motor vehicle used in the commission of the crime. That the owner of the subject vehicle is also still under investigations and release of the vehicle may prejudice the State.
9. I have considered rival arguments, the application, affidavits in support and opposition. The application is brought pursuant to Article 40(1) (a); 10; 25;159(2) and 165(3) (6) (7) of *the Constitution*; the Court Administrative Act; *High Court Practice and Procedure Rules*; and, the *Judicature Act*.
10. Article 165(6) and (7) of *the Constitution* provide that:
 - (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.
11. There is no doubt that the respondent exercised a quasi –judicial and administrative functions on the decision to detain vessels pending investigations. The respondent has power and discretion to detain or release any property after it has been searched or taken to the Police Station, such decisions are expected to be within the confines of the law, and, the powers are subject to supervision by this court.



12. It is also notable that the applicant has the right to own and enjoy his property; rights that are however not absolute and may be limited depending on the circumstances. Article 24 of *the Constitution* provides thus:
- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right or fundamental freedom;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
13. Where a vessel is deemed to have been involved in crime, the police are seized of the mandate to detain it. Section 26(1) (a) (b) of the *Criminal Procedure Code* provides:
- (1) A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain—
 - (a) Any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or
 - (b) Any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or
14. From affidavit evidence presented, it is not in doubt that the subject vehicle was involved in transportation of sandalwood an endangered species; the occupants having fled the police acted within the law by intercepting and subsequently detaining it. The position taken by the Investigation Officer is that it would not be prejudicial for the vehicle to be released as long as some conditions are met. The Investigation Officer has however not demonstrated which charges are likely to be brought or whether the applicant could as well be a suspect or whether there is evidence of the person who was employed as the driver of the vehicle.
15. It is trite that anybody citing administrative capacity must be seen to comply with rules of fair administration where interests have to be balanced. Article 47 of *the Constitution* on the Fair administrative action provides that:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is *Constitution of Kenya, 2010* 33 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—



- (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- (b) Promote efficient administration.

16. Section 4(1) of the Fair Administrative Action Act provides that:

- 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

17. When a vessel is detained it would call upon the investigators to endeavor to act expeditiously and conclude investigations whatever the repercussion. However, in the instant matter the Investigation Officer calls upon this court to release the subject vehicle with conditions attached. It seeks directions that the vehicle be availed in court after the arrest of the suspects and subsequent arraignment in court and the owner to be barred from disposing the vehicle and the vehicle not to be used in commission of any other crime.

18. Clearly orders sought by the respondent are speculative in nature seeking grant of such conditions is demonstration that the respondent believes in the innocence of the applicant herein. If that is the case the respondent is seized of powers to release the vehicle. It defeats justice to seek orders that cannot be supervised by the court. This court cannot issue orders in a vacuum that cannot be supervised. Such void orders may defeat the purpose of section 105 of the Wildlife Conservation Management Act, 2013 which comes into play when an individual is charged.

19. The upshot of the above is that the respondent shall follow the law to the letter and/or release the vehicle pursuant to powers bestowed upon it.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 11TH DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE

In the presence of:

Mr. Ngugi for Applicant

Ms. Arunga for Respondent

Court Assistant – Gladys

