



Meoly v OCS Capital Hill Police Station & another (Miscellaneous Criminal Application E091 of 2022) [2023] KEHC 2806 (KLR) (Judicial Review) (13 February 2023) (Ruling)

Neutral citation: [2023] KEHC 2806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CRIMINAL APPLICATION E091 OF 2022
JM BWONWONG'A, J
FEBRUARY 13, 2023**

BETWEEN

ROY SANKAN MEOLY APPLICANT

AND

OCS CAPITAL HILL POLICE STATION 1ST RESPONDENT

REPUBLIC 2ND RESPONDENT

RULING

1. The applicant filed the present application dated March 16, 2022 seeking the release of motor vehicle registration number KCE 614R Toyota Land Cruiser Prado to himself from the custody of the 1st respondent.
2. The application is supported by grounds that are set out on the face of the notice of motion and reiterated in his affidavit in support of a similar date.
3. In his affidavit, the applicant has averred as follows. The applicant has averred that he is the registered owner of motor vehicle KCE 614R Toyota Land Cruiser Prado. On August 18, 2018, he was approached by one Mohammed Muzahim, who posed as a car dealer and would assist him in selling the vehicle. He handed over possession to him for purposes of the sale. In 2020, he got concerned as he was unable to reach the said individual on phone. Due to travel restrictions in 2020, he was only able to travel to Nairobi in December 2020, from his residence in Lodwar. He reported the matter to the 1st respondent who was able to trace and recover the motor vehicle. However, the 1st respondent has since refused to release the motor vehicle to him. He has maintained that the continued holding of the motor vehicle by the 1st respondent is causing him psychological torture and mental anguish.
4. He urged the court to release the motor vehicle to himself as the registered owner.



5. In response, No. 87877 PC Simon Imera swore a replying affidavit dated May 24, 2022. He has averred as follows. He has averred that the applicant made a complaint over his vehicle KCE 641R, which had been handed over to Safari World Limited. However, Safari World Limited through their agents Mohammed Moahim and Zeituni Maimuna did not pay the applicant, despite selling the vehicle to Samson Monda. When the said Samson Monda realized that the vehicle he had purchased was being claimed by the applicant and the transfer to his name had not been effected, he reported the incident to the police station. Zeituni Maimuna was arrested and charged with the offence of obtaining money by false pretences. Mr. Samson Monda is the complainant and the applicant is a witness in the case. She was however released on cash bail but when the matter came before the court on November 10, 2021, the accused failed to appear and a warrant of arrest was issued.
6. He maintained that both the applicant and Samson Monda are demanding the motor vehicle to be released to them. Mr. Samson Monda claims to have fully paid for the vehicle, while the applicant claims he is the registered owner and as such has not sold the vehicle and has not received any proceeds from the sale.
7. He has urged the court to dismiss the application for the release of the motor vehicle until the criminal case is heard and determined.

The applicant's written submission

8. Mr. Miunduko learned counsel for the applicant questions how the 3rd party claiming ownership of the vehicle was in possession of the vehicle for 2 years without a logbook. He submitted that the vehicle should not be tied to a criminal matter that has never been seized by any court.
9. Counsel maintained that the applicant is willing to abide by the conditions the court may impose. Further, the respondent has not contested the release. He urged the court to order the police to take photographs of the motor vehicle if the motor vehicle is intended to be used as an exhibit and have it released to himself.

The respondent's written submissions

10. Mr. Kiragu learned Prosecution Counsel submitted that the applicant should have enjoined Mr. Samson Monda as an interested party in his application. Secondly, the motor vehicle in issue is yet to be produced as an exhibit in court. He contended that the application is premature and is lacking in merit.

Issues for determination

11. I have considered the application and the arguments of the parties. As a result, I find that the following are the issues for determination.
 1. Whether the motor vehicle is lawfully detained.
 2. Whether the applicant has made out a case for the grant of the orders sought.

Analysis and determination

12. It suffices to note that article 40 (1) of the [*Constitution of Kenya 2010*](#), provides that: -
 - (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and



(b) in any part of Kenya.

13. A right to own property is a constitutional right and/or a human right. However, a question arises as to whether it is an absolute right or it has any limitations. In that regard, it is noteworthy that article 40 (6) of the *Constitution of Kenya, 2010* states that the right to own property does not extend to any property that has been found to have been unlawfully acquired.
14. From the averments deposed to by the parties, it is clear the issue of ownership of the motor vehicle, is in dispute, as each party is laying claim upon it. The applicant has produced a certificate of registration of the motor vehicle, showing he is the registered owner. On the record there is a sale agreement between Mr. Samson Monda and Safari World Limited, who allegedly sold the motor vehicle on behalf of the applicant. There are also bank transfers to the tune of K 2,350,000/= allegedly paid by Mr. Samson Monda as the purchase price.
15. The question therefore that arises is whether the police officers are allowed to detain the motor vehicle. The functions of the National Police Service are set out under section 24 of the *National Police Service Act* sets No. 11 A of 2011. These functions are as follows.
 - (a) Provision of assistance to the public when in need;
 - (b) Maintenance of law and order;
 - (c) Preservation of peace;
 - (d) Protection of life and property;
 - (e) Investigation of crimes;
 - (f) Collection of criminal intelligence;
 - (g) Prevention and detection of crime;
 - (h) Apprehension of offenders;
 - (i) Enforcement of all laws and regulations with which it is charged; and
 - (j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
- 16.. Similarly, section 26 (1) (c) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that:
 - (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
 - (c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.
 - (2) No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention under this section of an aircraft, vessel, or vehicle.



17. The respondents' main reason for detaining the motor vehicle is that the ownership is being claimed by two individuals and it is also an exhibit in the criminal case in court.
18. However, the question is for how long can the police detain the vehicle without releasing it to the lawful owner?
19. The police are entitled to retain the subject motor vehicle, since it is an exhibit in the pending criminal case in the magistrate's court. Its release to either party before the completion of the criminal trial will prejudice the trial of the pending criminal case.
20. The question of ownership may only be determined by a court exercising civil jurisdiction after the conclusion and determination of the pending criminal case in the lower court.
21. The motor vehicle registration number KCE 614R Toyota Land Cruiser Prado shall be in the custody of the police pending the hearing and determination of the case in the lower court.
22. The application dated March 16, 2022 is premature and is dismissed.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Muinduko for the applicant

Ms Joy Adhiambo for the respondent

