



**Meshki & another v Inspector General of Police & 5 others; Fahari Cars Limited (Interested Party)
(Criminal Revision E060 of 2020) [2023] KEHC 626 (KLR) (Crim) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E060 OF 2020
JM BWONWONG'A, J
FEBRUARY 8, 2023**

BETWEEN

SHAHABALDIN MESHKI 1ST APPLICANT

ARSALAN LALOUI 2ND APPLICANT

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

OCS, NAIROBI AREA POLICE STATION 3RD RESPONDENT

DCI, NAIROBI AREA POLICE STATION 4TH RESPONDENT

SPECIAL SERVICES UNIT, KENYA POLICE 5TH RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY 6TH RESPONDENT

AND

FAHARI CARS LIMITED INTERESTED PARTY

(Being an application for revision of the ruling delivered by Hon. B. Ochoi (S.P.M) on 1st March 2022 in Milimani Chief Magistrate's court miscellaneous criminal case no. E4356 of 2021)

RULING

1. The applicants filed the present application seeking a revision of the decision of Honourable B. Ochoi (S.P.M) court in Milimani Chief Magistrate's Court in Miscellaneous Criminal Case Number E4356 of 2021. The application is supported by the grounds set out on the face of the notice of motion and a supporting the affidavit of the 2nd applicant dated 30th March 2022.



2. The grounds raised are as follows. The 1st applicant is the registered owner of the motor vehicle registration number KBL xxxB Toyota Land Cruiser, which was stolen on 21st December 2015 from the 2nd applicant. On 23rd December 2015 the 2nd applicant reported the incident at Gigiri police station. The motor vehicle was recovered on 6th October 2017 and taken to the yard at the police Traffic Headquarters in Nairobi. That despite the applicants presenting all ownership documents, the 1st to 5th respondents have refused to release the vehicle.
3. On 17th December 2021 the applicants filed an application before the lower court seeking its release and re-registration. The interested party was enjoined in the suit. In a ruling delivered on 1st March 2022, the lower court denied the application. The court ruled that the motor vehicle should neither be released to the applicants nor to the interested.
4. That the court failed to appreciate the salient principles of law regarding ownership and legitimate transfer of property. The motor vehicle is currently wasting away. It was urged that the 6th respondent should be compelled to register the subject motor vehicle in the name of the 1st applicant.
5. He urged the court to grant the revisionary orders sought and order the release of the motor vehicle to the applicants.

The case for the interested party

6. In response, Imaran Muhamad filed a replying affidavit dated 29th June 2022. He deponed that he is a director of the interested party with the authority to respond. He deposed that he purchased the subject motor vehicle on 28th December 2015 from one Joseph Kimani Njoroge for valuable consideration. That the application before the lower court was heard and determined on merit. The trial court correctly analysed the facts and law before arriving at a justified outcome. The determination was that the interested party is a purchaser for value without notice of any defects. It was contended that the application is fatally defective and that it offends the provisions of the law that governs revision. Further, the applicants have not demonstrated any irregularity committed by the trial court to warrant a revision.
7. He urged the court to dismiss the application with costs.

The case for the respondents

8. No. 87870 PC Paul Mwangi attached to the Special Service Unit at the Directorate of Criminal Investigations also filed a replying affidavit dated 3rd August 2022. He deposed to the following averments. He deposed that on 23rd December 2015 a report of theft of a motor vehicle and issuance of a bad cheque was made by the 2nd applicant. He undertook investigations and learned that the 2nd applicant intended to sell the motor vehicle on behalf of the 1st applicant. He received a call from an individual who identified himself as Paul Macharia Ndirangu. The two (Paul Macharia Ndirangu and the 2nd applicant) executed a sale agreement and the 2nd applicant was issued with three cheques payable by one Mr. Mehrzad Ehsani. However, the cheques were returned unpaid on account that they had been stolen and the signatures forged. Unfortunately, the vehicle had already been released to him together with the logbook and duly completed transfer forms.
9. Meanwhile, the 2nd applicant lodged a caveat at NTSA. The vehicle was impounded and detained while in possession of Martha Achieng Okello. She claimed to have purchased the vehicle from the interested party. The interested party also claimed to have purchased the vehicle from Joseph Kimani Njoroge. Subsequently, the Paul Ndirangu Njoroge was arrested. He claimed that his identification documents, which had been used to defraud the applicants had been stolen.



10. The interested party also filed a preliminary objection dated 29th June 2022. The basis of the preliminary objection is that the applicant's notice of motion is incurably defective, bad in law, is incompetent and ought to be struck out.

The applicants' submissions on the preliminary objection and the revision application

11. Mr. Ngaira, learned counsel for the applicants submitted that the preliminary objection is specific on the provisions of the law alleged to have been offended by the applicants. He submitted that this court is clothed with original and supervisory jurisdiction to hear and determine the application in accordance with article 165 (6) and (7) of *the Constitution* of Kenya. Further, the High court has power to entertain the matter under the provisions of section 362 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
12. On the merits of the application, counsel submitted that the trial court failed to consider that the person with a registrable interest is Joseph Kimani Njoroge and not the interested party. Further, the court failed and/or refused to consider the applicants' submissions. In addition, the court failed to interrogate how the interested party acquired the motor vehicle.
13. Learned counsel further submitted that the trial court misdirected itself in finding that the subject vehicle should neither be released to the applicants nor to the interested party. That the same was in utter disregard of the principles of *nemo dat quod non habet* and legitimate transfer of property. He contended that the person who transferred the vehicle to the interested party lacked good title to transfer the same. That the applicants have demonstrated beyond the required standard to warrant the grant of the orders sought.

The respondents written submissions on the preliminary objection and notice of motion

14. Ms. Ntabo learned prosecution counsel submitted that the court should dismiss the preliminary objection. She argued that it was raised on the basis that the applicant had cited the wrong provisions of the law, a fact which is not fatally defective. She cited the case of *Esther Londenyi Adori v Sabatia District Alcoholic Drinks Regulation Committee & 2 others* [2014] eKLR. In that case, Dulu J held that merely citing a non-existent or a wrong section of the law is not fatal to an application.
15. On whether the court should grant the revisionary orders sought, counsel urged the court to make a final determination pending release of the vehicle. She urged the court to proceed with caution despite the fact that right to ownership of property was a constitutional right.

The submissions of the interested party

16. The interested party did not file any submissions.

Issues for determination.

17. I have considered the application, the preliminary objection and the responses thereto and the rival submissions. I find that the issues raised for determination are as follows.
 - i. Whether the preliminary objections is merited.
 - ii. If not, whether the applicants have made out a case for the grant of the revision orders sought.



Analysis and determination.

18. I have considered the preliminary objection together with the parties written submissions and the oral arguments by counsel in this matter. The first issue for determination is whether the Preliminary Objection is merited. The case *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696 defines what a preliminary objection is made up of as follows:

... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

19. The preliminary objection filed by the interested party raises a single issue. The issue is that the application is defective, bad in law and incompetent. The interested party however failed to clearly point out how the application is defective in specific terms. I have perused the application. The interested party has submitted that the applicants cited the wrong provisions of the law namely section 361 (1) of the [Criminal Procedure Code](#) instead of section 362 of the same code.

20. Section 362 empowers the High Court to call for records of the lower court to satisfy itself of the legality, correctness or propriety of any finding, sentence or order recorded or passed. Furthermore, section 364 empowers the High Court to make necessary orders in the interests of justice after setting aside the orders that are found to be illegal and irregular.

21. I find that the defects in the application are not fatal.

22. I therefore find that the application is proper.

23. In the circumstances, the preliminary objection fails and is hereby dismissed.

Issue

24. The High Court is empowered by section 362 of the [Criminal Procedure Code](#) call for records of the lower court for revisional purposes, which provisions provide as follows:

362. 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."

25. Section 364 (1) of the [Criminal Procedure Code](#) empowers the High Court to make necessary orders including setting aside illegal or improper orders.

26. In the light of the foregoing provisions of the law, I have carefully perused and considered the decision of the lower court in Milimani Chief Magistrate's Court in Miscellaneous Criminal Application No. E4356 of 2022. The application was filed by the applicants herein against the respondents for the release of motor vehicle registration number KBL 580B Toyota Land cruiser.

27. The interested party applied for joinder and was duly enjoined in the application.

28. Consequently, he participated in the proceedings. Thus, in his ruling delivered on 1st March 2022, the learned trial magistrate made a finding that the vehicle seemed to have changed hands. He urged the parties claiming to have ownership rights in the subject motor vehicle to make an application in a civil court for hearing and determination.



29. The lower court dismissed the applicants' application for release of the motor vehicle. The key issue for determination is whether the proceedings of the lower court and the ruling can be faulted in terms of correctness, legality or propriety. It is manifest from the foregoing that the learned magistrate reached his decision after giving due consideration to the respective positions taken by the parties before him.
30. It is therefore incorrect for the applicants herein to say that their submissions were not considered. They were given an opportunity to articulate their case before the ruling was delivered
31. Further, the learned magistrate did not purport to make a final determination as to the ownership of the subject motor vehicle. Indeed, the impugned order included a direction that any party claiming ownership to file a claim before the civil court for hearing and determination.
32. The learned magistrate was within his remit to direct the parties to pursue their rival claims in a court exercising civil jurisdiction.
33. I find nothing in the record of the lower court to show an illegality, irregularity or impropriety to warrant revision of the orders made.
34. In the result, I find the application for revision is completely devoid of merit.
35. The application fails and the same is hereby dismissed with no order as to costs.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

the presence of-

Mr.Kinyua: Court Assistant

Ms Ngina and Mr. Ngaira for the applicants.

Ms. Chege for the respondents

Ms. Mulongo holding brief for Mr. Gakuo for the Interested Party.

