



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION 149 OF 2019

ANDREW KEGODE NMBAIZA.....APPLLCANT

VERSUS

OCS EMBAKASI POLICE STATION.....1ST RESPONDENT

OCS NYAYO POLICE STATION.....2ND RESPONDENT

THE DPP.....3RD RESPONDENT

RULING

This matter now comes up for the application of interested party, **TITO KITAGA**, dated 6.11.2020. The said application, brought both under the Civil Procedure Rules and Articles 22, 23, 50(1) and 159(2)(d) of the Constitution, principally seeks that this court be pleased to revise and or set aside the orders issued herein dated 23.10.2020. It is supported by the affidavit of Elvis Begi Nyachieo Advocate sworn on 6.11.2020 and a supplementary affidavit of the applicant, sworn on 17.5.2021.

Interested party/applicant's case:

Dr. Miyana, Advocate for the interested party/applicant, submitted that the motor vehicle in question, KBH 511W belongs to the interested party and that the Hon. Justice Ngenye had in a ruling delivered on 27.5.2019 granted custody of the said vehicle to the interested party.

Counsel submitted further, that the vehicle is registered in the name of the interested party who was not a party in the proceedings at the time the order of 27.5.2019 was made by the Hon. Justice Ngenye. That the applicant willfully concealed this material fact and is guilty of willful non-disclosure of a material fact i.e that the Hon. Justice Ngenye had ordered that the vehicle be given to the interested party and that the same is registered in the name of the interested party who is also in possession of the same.

Lastly, that the Hon. Justice Ngenye even noted a likelihood of collusion between the applicant and his sister who was in charge of the auction. That the rights of the interested party are superior to the rights acquired out of collusion.

State's response:

Ms. Kimaru, appearing for the state supported this application for revision and noted that not all material facts were brought to the court's attention.

Applicant/Respondent's case:

In opposing this application, Mr. Amuttala for the application/Respondent submitted that the application dated 25.6.2019 leading to the orders of 23.10.2020 was not opposed by the state, not by the interested party who was not a party to the same. That the applicant is the registered owner of the vehicle having bought the same in an auction and he has the log book. He denied that there were any fraud and misrepresentation. In his submission's this cause lies in a civil court.

Determination:

I have considered the application before the court and the pleadings filed and the annexures attached to the affidavits of the parties. I have also considered the submissions made in court by the 3 learned counsel appearing for the parties. This is an application seeking that this court do review its orders issued on 23.10.2020 directing that the subject motor vehicle Reg. No. KBH 511W be released to the

applicant/Respondent, Andrew Kegode Mmbaiza. The main ground raised in this application is that the said applicant/Respondent concealed and was guilty of non-disclosure of material facts which had he disclosed, the court would not have issued the said orders aggrieved of. The said material facts were:-

i) THAT the Interested Party/applicant is the owner of the said motor vehicle and the one in physical possession of the same.

ii) THAT by an order of the Hon. Justice Ngenye, issued on 27.5.2019, the motor vehicle had been ordered to be released to its owner, the interested party/applicant.

In order to make a fair determination of this application, it is important that we look back at the history behind this case. It all begun by the applicant, filing an application dated 20.3.2019. The Respondents were the same as in the present application. In the application, the applicant prayed for release of the motor vehicle No. KBH 511W to him. In the ruling delivered by the court, by the Hon. G. W. Ngenye-Macharia, the application of the applicant was dismissed. The Honourable Judge ordered that the vehicle be restored to its original owner.

In dismissing the application, the court considered the submissions of the applicant that he was a bona fide purchaser, which submissions were dismissed. The court found, amongst others;

“In my candid view this is a case of utter collusion between the police and mechanic on the hand and the purchaser of the vehicle of the other with a clear mission of dispossessing the rightful owner of his legal property.... Ultimately, the current title of the vehicle was passed to the applicant through a fraudulent process. If the court were to grant the orders sought, it would be rubberstamping this illegality.”

It is apparent that the applicant was dissatisfied with the finding of the court. He moved on and filed a Notice of Appeal on 11.6.2019. There is no indication on whether he filed the intended appeal.

Then come 25.6.2019 the applicant filed the application dated even date, asking at prayer 3 that an order be granted directing the O.C.S Nyayo Stadium police post to release the motor vehicle KBH 511W to the applicant Andrew Kegode Mmbaiza.

This is the same motor vehicle that the court had ruled on and ordered to be released to its original owner. The applicant in effect came back to court with exactly the same application the court had ruled on, on 27.5.2019. When the 2nd application came up in court, on 13.10.2020, Mr. Kanyoko, appearing for the applicant, merely submitted that he would rely on the affidavit in support of the application. The applicant did not by any didn't mention the considered observations that the court had made in dismissing his earlier application. Specifically, these were possible fraud, collusion and illegality. And even though the applicant was well aware that the court had ordered that the said vehicle be released to its original owner, he did not disclose this to this court. He did not even disclose to the court that the motor vehicle was now in possession of its original owner, the interested party. And even though he was well aware of the interest of the interested party, he nonetheless proceeded on with his application without serving or enjoining the interested party.

These are material factors which go to the very basis of the application of the applicant dated 25.6.2019. By keeping these facts away from the court, the applicant denied this court the opportunity to critically considered the issues raised by his application and thereby reach at a decision that does justice to all parties. The non-disclosures of these material facts was subte just as it was intentional. This court would obviously not have issued the orders of 13.10.2020 had these material facts been brought to its attention.

I am in the circumstances persuaded by the submissions of the interested party/applicant, that the orders issued by this court on 13.10.2020 are erroneous to the extent that same were issued in favour of the applicant who failed to disclose material facts to this court.

I therefore find merit in the application of the interested party dated 6.11.2020 and accordingly set aside the orders of this court issued on 23.10.2020 as prayed.

D. O. OGEMBO

JUDGE

2.6.2021.

Court:

Ruling read out in the presence of Dr. Miyawa for applicant, Mr. Amutallah for Respondent and Mr. Okeyo for 1st/2nd/3rd respondent.

D. O. OGEMBO

JUDGE

2.6.2021.