



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E007 OF 2020

HUSSEIN JUMA MASHA.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Appellant, Ndegwa Kabiego – PW 2 in Mombasa Chief Magistrate Court CR. Case No. 286 of 2017 brought application dated 11th March 2021 concurrently with the appellants appeal pursuant to Articles 40 and 159(2)(d) of the Constitution of Kenya 2010, Section 121 of the Criminal Procedure Code Cap 75 Laws of Kenya and other enabling provisions of the law seeking leave to participate in this appeal as an applicant and prosecute the application and file any responses and submissions regarding the applicants motor vehicle Range Rover Reg KBL 111H Chassis No. SALLSAA 136A 944 704.
2. He also sought that stay orders be issued against orders made by the trial Magistrate on 13th November 2020 forfeiting his motor-vehicle Registration KBL 111H pending hearing and determination of application and appeal herein. The applicant sought for unconditional release of the subject motor vehicle to him upon hearing and determination of the application.
3. He also sought that the court issues an order directing the state, DPP and any of the state agencies not to sale, transfer, waste dispose of or otherwise deal with the subject motor-vehicle pending hearing and determination of the application with parties. He also prayed that his application be heard on priority basis alongside the appellants appeal.
4. He also prayed that in the alternative or in addition to the prayers sought he should be granted leave to file an appeal out of time respecting the question of ownership of the motor-vehicle in question and orders forfeiting the vehicle to the state.
5. The application was based on grounds on the face of the application and affidavit by the applicants advocate shown on 11th March 2021. The application was opposed by the grounds of opposition dated 22nd March 2021.
6. In the Respondents submissions they conceded to grounds 7 & 8 of the application but objected to the rest on the ground that the trial court acted within the law section 210 of the EACCMA in making an order of forfeiture of the subject motor vehicle. The Respondents argued that the prayers in application ought to be considered in the main appeal as it is a substantive issue in the appeal.
7. The applicants counsel made oral submissions to the effect that the trial court made an order of forfeiture before investigations were done to establish how subject motor-vehicle was two in one. It was argued that the order of forfeiture was made without notice or reference to the applicant.
8. It was further submitted that themselves no caveat at KRA records to show motorvehicle in question had incorrect declarations of chassis and that forfeiture should not be automatic. It was argued that the court ought to have considered section 389(9) of Criminal Procedure Code and Article 40 of the constitution and should have proceeded by way of inquiry and more so where a 3rd party was involved. The applicant relied on the holding in **Embankment Investment Ltd vs ODPP [2018] eKLR** and **Gituana Kaumbi Kwoga vs KRA & Another [2020] eKLR** to support the position that the applicant relied on Records from Registrar of motor-vehicle's and should not be punished for purchasing a motor vehicle based on information given by the state.
9. In consideration of the application and the grounds and supporting affidavit as well as the written submissions by the Respondent and the oral submissions by the applicants counsel, it is noted that applicant's prayers are issues that arise out of the finding of the trial court in which the appellant was convicted and sentenced.
10. The applicant does not seem to have a problem with the said finding but pleads that he was innocent buyer without notice. The

complication that appears to arise is if as the trial Magistrate put it the subject motor-vehicle in counts 3 & 4 – Registration No. KBL 111H Range Rover has a chassis that doesn't exist in the counting of origin and the said motor-vehicle was a hybrid of 2 motor vehicles combined together to look like one motor vehicle then this court cannot order for release at this stage unless and until the appeal herein is heard and determined as release may affect outcome of appeal, I do find that applicant not having been an accused at trial cannot be joined in the appeal herein as the court is to determine whether grounds raised by the appellant are satisfactory to enable the appeal to succeed.

11. This appeal was filed on 4th December 2020 and new evidence will not be taken. The court will rely on the evidence on record to determine the merits or otherwise of the appeal. I will however allow prayer 5 presentation of subject motor vehicle pending hearing and determination of appeal.

12. The applicant's options lie in a civil suit to claim from the appellant the purchase price as motor vehicle that was sold to him turned out to have incorrect declaration and therefore not being genuine.

13. The application succeeds to the extent that prayer 5 is allowed. The other prayers fail.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 22ND DAY OF JULY, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Respondent - Ms. Karanja

Applicant – Mr. Wamotsa Advocate

Hon. Lady Justice A. Ong'injo J

22/07/2021