



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC CRIMINAL APPLICATION NO. E264 OF 2021

ANTHONY KOGI MUCHAI.....APPLICANT

-VERSUS-

DIRECTOR OF CRIMINAL INVESTIGATIONS

NAIROBI REGIONAL POLICE HEADQUARTERS.....1ST RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

1. **Anthony Kogi Muchai**, the Applicant, approached this court by way of Notice of Motion pursuant to the provisions of **Article 40, 47, 48 and 159** of the Constitution of Kenya seeking orders as follows:

- a. *This application be certified as extremely urgent and be heard ex-parte in the first instance;*
- b. *The 1st Respondent releases the motor vehicle registration number **KBZ 020G Black Toyota Saloon** (hereinafter referred as '**the vehicle**') to the Applicant.*
- c. *The 1st and 2nd Respondents be granted leeway to take any photographs of the vehicle or further evidence to be used in any future proceedings.*
- d. *The Court makes any other orders it may deem expedient in the interest of justice.*

2. The application is premised on grounds that: The applicant is the bonafide owner of the subject motor-vehicle owned by his family and the sole source of his livelihood; That the applicant engages in businesses around the country and he uses the subject vehicle to co-ordinate them; and, that following the detention of the motor -vehicle he has incurred losses, he is apprehensive that the vehicle will be damaged and he will co-operate with any investigative authority relating to the vehicle.

3. The application is supported by an affidavit deposed by the applicant who avers that a complaint was lodged against him on an alleged offence of obtaining money by false pretences. He was arrested on 26th July 2021 and the subject motor-vehicle (KBZ 020G Black Toyota saloon) impounded as he was remanded at Buruburu Police Station until 1700 hours; he was transferred to Industrial Area Police Station where he was remanded up to 27th July at 1500 hours when he was released but the motor-vehicle was not released. As at 4th of August 2021 he was still reporting to the police station as directed.

4. Further, the applicant annexed a copy of registration certificate for the subject motor-vehicle in the name of Ali Dzumbembe Hatibu and a sale of agreement dated 31st May, 2021 bearing his name as a buyer and that of Ali Hatibu Dzumbembe as the seller.

5. An affidavit was filed in reply, deposed by No. 64790 P.C. James Kariuki who deposed that he has been investigating a case of obtaining money by false pretences contrary to **Section 313** of the Penal Code, where Phelgona Akumu Atiego lodged a complaint against one Ali Hatibu Dzumbembe who obtained Kshs.1,200,000/- from her pretending that he would sell to her an unregistered motor-vehicle.

6. That investigations established that the suspect Ali Hatibu Dzumbembe had acquired a motor-vehicle registration number KBZ 020G, Toyota Saloon Black in colour around the same period which was suspected to be proceeds of crime.

7. On the 19th May, 2021 the suspect was arrested and charged in Kibera Law Courts pending recovery of the previously circulated motor-vehicle which was to be treated as proceeds of crime and on the 20th July, 2021 motor-vehicle registration number KBZ 020G Toyota Saloon owned by the suspect in the case of obtaining money by false pretences purchased around the period that he received money from the complainant was captured by IC3 cameras and found being driven by the applicant and it was later detained.
 8. That the allegation by the applicant of having purchased the motor-vehicle from Ali Dzumbembe Hatibu when the sale agreement was purportedly made at a time when the suspect was still at Industrial Area Prison called for further investigation of the agreement, whether it is forgery or genuine.
 9. That releasing the motor vehicle may result into the complainant in the criminal case Phelgona Akumu Atiego suffering losses if the motor-vehicle is disposed before the determination of the matter.
 10. The applicant swore a further affidavit where he urged that the respondent was misleading the court since the subject motor-vehicle was acquired and registered on 6th June, 2014; six (6) years before a complaint was made by Phelgona Akumu Atiego. That the process of registering the motor-vehicle in his name was ongoing.
 11. That he instructed his wife Franciscah Kaluki Kitheka to pay the seller which she did through M-pesa.
 12. The application was disposed of through written submissions.
- It was urged that the motor-vehicle was registered six (6) years before the alleged complaint made by Phelgona Akumu Atiego who purportedly made a transaction with him in the year 2020; therefore, it cannot be said to be proceeds of crime and if indeed the suspect is in remand, how come he has not been arraigned in court? That the suspect is an innocent buyer and the motor-vehicle goes on to lose its economic value and has been vandalized at Industrial Area.
13. That an individual has the right to own property as provided by **Article 40(1)** of the Constitution and **Article 17** of the Universal Declaration of Human Rights though the right does not extend to property unlawfully acquired and with the instant case the property was lawfully acquired, as shown by records at NTSA. That the sale agreement is not a forgery and assertions made by the respondent have not been proved as required by **Section 107 (1) and (2)** of the Evidence Act.
 14. That although the police have powers to detain the motor-vehicle as provided by **Section 24** of the Police Act and **Section 26 (1) (c)** of the Criminal Procedure Code (CPC), the question would be for how long it can be detained without being released to the owner. That **Articles 48, 50 and 159 (2)(d)** of the Constitution require investigations to be dealt with expeditiously and that the 1st Respondent should photograph the subject motor-vehicle and return the logbook so as to use them in evidence instead of letting the vehicle go to waste.
 15. The respondent submitted that the sale agreement availed was an executory document and not proof of ownership. That the applicant did not create a nexus between the applicant's ownership of the subject vehicle, the witness, Bakari and Franciscah Kitheka.
 16. Further, that the right to own property is a constitutional right, but the applicant is not the registered owner of the subject motor-vehicle he seeks to be released to him. And the registered owner is not a party to these proceedings and in so doing the court should not issue orders that may be adverse to the rightful owner.
 17. I have considered the application, affidavits in support and opposition and rival submissions of both parties.
 18. As correctly submitted, the right to own property is a constitutional right, which should be protected as long as the property is lawfully acquired (See **Article 40 of the Constitution**)
 19. It has been averred that the applicant was summoned and remanded in custody following a claim of obtaining money by false pretences. Subsequently he was arrested but the subject motor-vehicle was impounded. In seizing the motor-vehicle the respondents acted within the law, pursuant to the power to detain the motor-vehicle derived from **Section 26 (1)** of the Criminal Procedure Code (CPC).
 20. It is argued by the applicant that investigations being undertaken by the respondents have delayed. He has been summoned twice, and a further date has not been set which is in breach of **Article 159** of the Constitution.
 21. In as much as this court cannot interfere with the investigations being undertaken, the police must be seen to be acting in good faith by expediting the investigations. I do note that the motor-vehicle was impounded in July 2021, and the applicant moved to court in August 2021 and to date there seems to be no action taken.
 22. The applicant argues that he has acquired beneficial ownership of the subject motor-vehicle which should be released to him. Evidence adduced however establishes that the registered owner of the stated motor-vehicle is Ali Dzumbembe Hatibu. **Section 8** of the Traffic Act provides that:

If the licensing officer has reason to believe that a motor vehicle or trailer in respect of which registration has been applied for is or may be of a type not previously registered under this Part, or is of a type so registered but constructed according to different specifications, he may refuse to register the vehicle or trailer until plans or specifications thereof have been submitted to and approved by the Authority.

However in the case of ***Ignatius Makau Mutisya -vs-Rueben Musyoki Muia*** it was stated that:

“Section 8 of the Traffic Act has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership.” The court cited the case of : *OSAPIL -vs- KADDY (2000) 1 EALA 187* where the Court of Appeal of Uganda held that:

“Registration card or logbook was only prima facie evidence of title to a motor-vehicle. The person to whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.”

23. Therefore, some other proof would establish beneficial ownership. The applicant adduced in evidence a sale agreement purportedly entered into between him as the buyer and the seller. However, the authenticity and admissibility of the stated sale agreement has been questioned. The alleged sale agreement is signed by a witness Mohamed Bakari but it is not signed by either the seller or the buyer. In order for an agreement to be binding there must be some consideration.

There is nothing in the agreement to suggest that the seller received any consideration. The allegation that Franciscah Kaluki Kitheka paid the consideration to Mohamed Bakari is not proof of payment for the motor vehicle. Affidavit evidence of the seller was necessary to prove the allegations. There is absolutely no evidence to prove ownership of the motor-vehicle on the part of the applicant.

24. Had this application been made by the owner of the motor- vehicle then the court would have considered it depending on prevailing circumstances.

25. It is urged that the motor-vehicle is an exhibit in a criminal case. Although this court finds that continued detention of the motor-vehicle may be unjust, it behooves the actual owner to make an appropriate application.

26. For the reasons given, the application before the court fails and is accordingly dismissed.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY,

THIS 3RD DAY OF NOVEMBER 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Casmir for the applicant

Mr. Mutuma for ODPP