



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CRIMINAL APPLICATION E272 OF 2021

HANNAH NJERI MESOPOTAMIA.....APPLICANT

VERSUS

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTORAT OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

RULING

1. On the 12th day of August 2021, the applicant herein, filed a notice of motion application dated 11th August 2021, seeking for orders that; the motor vehicle registration number KCQ 006B, Station Wagon, Toyota Harrier, black in color be released to her.
2. The application is anchored on the provisions of; articles 165(6), 40 and 65(50) of the Constitution of Kenya, 2010 (herein" the Constitution), and all other enabling provisions of the law. It is supported by the grounds thereto and an affidavit of the even date sworn by the applicant. The applicant avers in a nutshell that, she is the legal and registered owner of the subject motor-vehicle. That in the month of July 2021, she was stopped along Thika Road, while driving the motor vehicle. She learnt that those people were Police Officers from Kasarani Police Station.
3. The officers took away the motor vehicle to their station and later transferred it to Directorate of Criminal Investigation (DCI) Headquarters. That she has not been given back the motor vehicle to date. A visit to the Headquarters revealed that, the motor vehicle is stored away from the vicinity of the Police Officers. As such, it is bound to be vandalized. Further, it is wasting away.
4. The applicant avers that, she uses the motor-vehicle to take her children to school, thus, the continued detention of the motor vehicle has affected their transportation. That, the Police Officers are at liberty to take the photographs of the motor vehicle (if necessary) and release the motor-vehicle to her as there is no criminal case filed against her.
5. However, the application was opposed by the Respondent vide an undated replying affidavit sworn by; number 102130 PC Jacob Kapelpus attached to DCI Headquarters - Serious Crime Unit. He avers that, he is the Investigating Officer attached to the said department and seized of the facts in this matter. That on 22nd June 2020, one Jacinta Wambui Kimani made a report at the DCI Headquarters, vide OB report number CID/C/GEN/COMP/6/11/2020/615, of alleged fraud of Kshs41,998,000 by one Dickson Kimani Kamau
6. That, Jacinta had been sub-contracted by the said Kamau to supply metal bars, to be used for construction of a lift at Construction site at parklands. That, there was another complainant, Joseph Muthuri Meme, whom Kamau had approached over tenders in Embu County. Both complainants were later introduced by Kamau into trading in treasury bills, forex exchange business secured by Kamau. That Jacinta gave Kamau a total sum of Kshs 41,998,000 both in cash and bank transfer, whereas Joseph gave him a total sum of Kshs 49,500,000.
7. That the motor vehicle registration number KCQ 006B, was detained after it was circulated as having been used in the commission of the offence. It was found in possession of one Paul Njiiru Nyaga, who upon interrogation stated that, he had bought it from the applicant and produced a sale agreement to that effect. That, the applicant has never been to DCI Headquarters since the motor-vehicle was detained. Furthermore, she has not come out clearly on her relationship with the suspect Kamau, who, based on preliminary information is her son.
8. Further, the subject is being sought under a warrant of arrest to take plea, and that, the motor vehicle is safely parked at the DCI Headquarters, and it is intended to be used as an exhibit.
9. However, before the application was determined, the two complainants referred to herein, applied vide a notice of motion dated 26th August 2021, to be enjoined in the matter as interested parties. It was supported by an affidavit sworn by Jacinta Wambui, the 1st interested party. There was no objection to the same by the applicant and the Respondent, and the application was allowed. The position held by these

interested parties is that, the applicant herein has deliberately and intentionally or blatantly withheld material facts from the court to enable it make a fair and just decision.

10. The interested parties deposed that, they are complainants in Kiambu MCCR NO 1023 of 2020, where one Dickson Kimani Kamau, son of the applicant is the accused. He is accused of defrauding them a total sum of Kshs 60,000,000. That, the suspect obtained orders on an application of anticipatory bail, and upon being granted the same, to expire on the date of plea, being 11th December 2020. However, the suspect never showed on plea taking date and has absconded to date. A warrant is in force against him.

11. That, the relatives of the suspect including the applicant have been least cooperative in tracking him. The lawyer representing the applicant herein is also representing the accused in Kiambu matter and has even presented fake documents alleging he is unwell. Furthermore, there is evidence from the National transport and safety Authority (NTSA) that, the motor vehicle herein was registered under the applicant's name during the period the suspect defrauded the victims, therefore, it is a subject of proceeds of crime. That, the accused would use the money defrauded from the public to purchase property and register in the names of family members.

12. The application was disposed of vide filing of submissions which I have considered herein. The applicant submitted that article 23 of the Constitution of Kenya gives the Court the authority to uphold and enforce the Bill of Rights, whereas, article 165 thereof, empowers the court to hear an application for enforcement of Bill of Rights. That article 40 of the Constitution provides that, an individual has a right to own property. Therefore, detention of the motor vehicle without reason is unlawful, illegal and against the Constitution of Kenya.

13. The Respondent did not file any submissions and fully relied on the replying affidavit. The interested parties filed submissions and reiterated that, the subject motor-vehicle was purchased with proceedings of crime. That the mere fact that, the applicant is the legal and/or registered owner of the subject motor vehicle is not adequate to prove ownership where there are serious allegations of fraud raised. The interested parties relied on the finding of this court in the case of Kobia Muhoro Vs Republic (2021) eKLR,

14. I have considered the subject application herein in the light of the materials before the Court and I find that, the applicant is indeed guilty of non-disclosure of material facts within her knowledge. It is deposed to by the Respondent and the interested parties that, the applicant herein is the mother of the accused in the Criminal Case at Kiambu. Further, the Counsel representing the applicant herein, is also representing the accused in that matter. These facts have not been rebutted. Therefore, the applicant was well aware of these material facts, but did not disclose the same in the affidavit in support of her application. She definitely had an indication as to why the motor vehicle was detained, therefore to aver that she has no reason thereof, is being less than candid. In the same vein, the applicant did not disclose and has not rebutted the averments by the Respondents that, she has indeed disposed of the motor vehicle as evidenced by the alleged sale agreement.

15. It is noteworthy that, the principles of Equity state inter alia that; "*he who goes to equity must go with clean hands*" thus it is settled principle that a party must come to court with clean hands and no material facts should be concealed. The maxim is not a rule of law. It is a statement of public policy applied by the Courts. It means that a party, in particular, the claimant or applicant will be denied or deprived of all "equitable" remedies sought. Sometimes, the entire case will be struck out or similarly dismissed. However, the maxim will not apply unless "the depravity, the dirt in question on the one hand has an immediate and necessary relation to the equity sued for". The unclean hands might relate to giving untruthful evidence to the Court. It may be used of deplorable means to achieve an objective. In that case, adverse orders will be made, when the party acts with serious immorality or deliberate misconduct beyond pale; (as they say). The courts will however, consider whether the party has since the misconduct "washed the hands". Finally, the court will consider whether the misconduct has caused hardship or prejudice to any of the other parties.

16. It follows from the aforesaid that, the applicant by concealing the material facts that her son is the suspect in the matter at Kiambu Law Court, and that, the motor vehicle was detained allegedly for being an exhibit in that matter, is guilty of having "unclean hands"

17. Be that as it were, to revert back to the matter herein, the applicant has demonstrated by the production of the log book that, she is the legal and registered owner of the subject motor vehicle. Prima facie, she has the legal and equitable right of ownership thereof. This is constitutional right granted to her under article 40 of the Constitution of Kenya. That right can only be taken away in accordance with the law. The allegation herein by the Respondent and the interested parties is that, the motor-vehicle is a subject of proceeds of crime. The law is settled that, *he who alleges proves*. Section 107 of the Evidence Act (Cap 80) Laws of Kenya, states that; "whoever desires any court to give judgment as to why any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist". Thus the Respondent and interested party must prove the same. These are matters of evidence as argued by the interested parties.

18. However, there is a process in law of; seizure preservation and/or detention of assets and/or property in deprivation of owner's legal rightful possession or ownership. It is evidence herein that, the motor-vehicle is not in the name of the accused, it is not so far a subject of any order from the trial court for seizure or detention, and neither is there any Court Order obtained by the Assets Recovery Limit or by the interested party through a civil process to deny the applicant, the Lawful ownership and/or use of the motor vehicle. The question is: for how long will the motor vehicle be kept at the DCI Headquarters? What if at the end of the trial (after whatever period) it is established the vehicle was not a proceeds of crime? How will the applicant's rights have been protected?

19. It is against the backdrop of the aforesaid that I make the following orders:

a) If the Respondents intend to continue keeping or detaining the subject motor herein, they must obtain a court order to that effect, within thirty (30) days of the date of this order. To allow the Respondent to merely seize assets of a 3rd party on suspicion of being a proceed of crime, without court order, and/or without presenting it to court at the earliest, will be a dangerous precedent to set, as that authority may be abused and/or used to violate an individual's right to own a property.

b) In the same vein the interested parties have a lawful avenue in the lower Court matter and indeed through a civil matter to get an order form detention of the motor vehicle. These proceedings cannot be used to advance all the rights of the parties, especially when no primary evidence can be adduced herein.

c) The position taken by this court in orders (a) and (b) above, is based on the fact that, the powers of the Court under article 165 of the Constitution of Kenya must be properly invoked. A cursory look at the provision relied on by the applicant, indicates the matter herein is a constitutional nature than a criminal per se. There are no provisions of the criminal procedure code cited. If the applicant is thus challenging the violation of her constitutional rights, then a petition filed in the Constitution and Human Rights Division would have been more appropriate.

The upshot of the aforesaid is that, the application is dismissed with no orders as to costs.

It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 7TH DAY OF DECEMBER 2021.

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant present in person

Ms Akunja for the Respondent

Edwin Ombuna – Court Assistant