



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

MISC. CRIMINAL NO.E004 OF 2020

JOHN NDIINGURI KAMUIRIA.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

R U L I N G

1. Before this court is a Notice of Motion dated 22nd September 2020 lodged by **John Ndinguri Kamuria**, the **Applicant** herein seeking the following prayers namely:

(i) *Spent*

(ii) *That this Court be pleased to invoke its Supervisory Jurisdiction over the Subordinate Court in KITUI CM'S CRIMINAL CASE NO.763 OF 2020 and review, vary and/or set aside the decision of Hon.F.Nekesa issued on 14th April 2020 dismissing the Applicant's application for the release of motor vehicle Registration No.KCJ 479W.*

(iii) *That this Hon.Court be pleased to order for the immediate release of motor vehicle registration No.KCJ 479W Toyota Hiace held at Kitui Central Police Station to the Applicant or his authorized agent after the Investigating Officer has taken photographs of the said motor vehicle.*

2. The Applicant has listed the following grounds as the basis for the reliefs sought above:-

a. *That the Applicant, an innocent purchaser for value, is the registered owner of motor vehicles registration KCJ 479 W which has been detained at Kitui Central Police stating pending production as an exhibit in court vide KITUI CHIEF MAGISTRATE'S CRIMINAL CASE NO.763 of 2018.*

b. *That the Applicant is not a party to any unlawful activities carried out by the accused namely Simon Mbuthia Mwanthi, the person who sold the motor vehicle to him.*

c. *That the Applicant is innocent in any offence in connection with the accused in the said Criminal Case and he neither knew or had any reason to believe the motor vehicle was being used in connection with the offence with which the accused has been charged with.*

d. *That the Investigating Officer can produce the said motor vehicle as an exhibit immediately so that the same can be released to the Applicant pending trial to avoid further wastage and tear while lying at the police station.*

e. *That it is in the interest of justice for the order dismissing the Applicant's application for release of the subject motor vehicle pending trial be reviewed, varied and set aside so that the said motor vehicle can be released to the Applicant.*

3. This application is supported by the **Applicant's Affidavit** sworn on 22nd September 2020 where he has deposed that he is the owner of the subject motor vehicle having purchased it at agreed price of ksh.1,480,000 (One million four hundred eighty thousand only)/ He has exhibited the copy of the agreement as proof of the same.

4. The Applicant further states that before the purchase he conducted a search at the National Transport & Safety Authority (N.T.S.A) out of due diligence and records indicated that **Simon Mwanthi Mbithuka** was the owner. He has exhibits the copy of the motor vehicle copy of Records from the N.T.S.A.

5. The **Applicant** avers that he was surprised to learn that the subject motor vehicle had been attached and detained by the police in

connection with an offence of stealing by directors contrary to the law.

6. The **Applicant** contends that he is an innocent purchaser for value and has asked this court to call for the record of the Subordinate Court in **Criminal Case No.763 of 2018** and examine it with a view to satisfying itself of the correctness, legality, propriety and regularity of the proceedings and subsequent decision issued on 14th April, 2020 by Hon.F.Nekesa (SRM)

7. In his submissions vide Counsel, the **Applicant** submitted that he was not recorded a fair chance to be heard adding that the Criminal Case at the Subordinate Court has not started since it was presented to court.

8. He further submits that because the Criminal Case has not taken off chances of the lorry remaining at the police station for a long period is high which would be prejudicial to his interests. He cites the decision in **R -VS- JOHN NGANGA MBUGUA [2014] eKlr** to support this application.

9. The office of the Director Public Prosecutor (DPP) through Vincent Mamba has filed a Replying Affidavit and written submission expressing that the state has no opposition to the application because of the fact that the Applicant is an innocent purchaser for value and the subject matter is wasting away making the Applicant suffer loss and damage.

10. I have considered this application and the grounds raised thereof. The Applicant has invoked supervisory jurisdiction under **Article 165 (3) (6) and 7** of the **Constitution of Kenya**. He has also invoked revisionary powers under **Section 362 and 364** of the Criminal Procedure Code in seeking revision of the lower court's decision delivered in **KITUI CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 763 of 2020** on 14th April, 2020.

11. It is true that this court has supervisory jurisdiction over the lower court or any person or body exercising judicial or quasi-judicial function. The purpose for the supervisory is given under **Sub Article (7)** which states that this court in the exercise of supervisory jurisdiction under **Sub Article (6)** may call for the record of any proceedings before any Subordinate Court and may make orders it considers appropriate to ensure the fair administration of justice. A party invoking the supervisory jurisdiction of this court must show the basis or reasons why intervention of this court is necessary. I have looked at the grounds listed in this application and I am not persuaded that the Applicant has disclosed any ground for invoking the supervisory jurisdiction of this court.

12. The **Applicant's** Counsel when pressed to explain why he was invoking the supervisory jurisdiction of this court, stated that the **Applicant** was not granted a fair chance to be heard. However, the record of proceedings from the lower court indicates the contrary. The **Applicant** filed an application by way of Notice of Motion dated 1st April 2020 substantially seeking for the release of motor vehicle registration No. KCJ 479 held at Kitui Central Police Station. He also sought for the orders that the Investigating Officer be ordered to take photograph of the subject motor vehicle before releasing it to him or his authorized agent.

13. The record of proceedings from the subordinate court further indicates that the Applicant's Counsel appeared before that court on 8th April, 2020 and requested for time to put in a further affidavit a request that was readily given by the trial court. On 14th April 2020, the application was fully heard after parties had put in written submissions, with the Applicant having filed Applicant written submissions dated 13th April 2020 together with an authority which has also been cited here in this application. The state on its part opposed the application vehemently and relied on the decision of **DPP -vs- MARIA PALAIRE TENKEWA [2017] eKlr**. The trial court upon hearing the parties tendered its' ruling and dismissed the application holding that the subject motor vehicle being an exhibit could not be released because the court lacked the jurisdiction and it would be interfering with the prosecution's case.

14. The ground advanced by the **Applicant** that he was not given a fair chance to be heard given the record of the lower court is clearly misleading. I find no procedural defect or any other deficiency that justifies intervention of this court exercising its supervisory powers. The Applicant has not pointed out any step taken by court that occasioned him grave injustice or put in a corner where he can state categorically that there is no window or opportunity to address his dissatisfaction on the decision rendered by the Subordinate Court.

15. Secondly, the **Applicant** has invoked Revisionary Powers of this court Under Section 362 of the **Criminal Procedure Code**. Under **Section 362 of Criminal Procedure Code** this court is granted powers to call for any criminal matter pending at the lower court. The section reads:

“The High Court may call for and examine the record of any criminal proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding sentence or order recorded and as to the regularity of any proceedings of any such subordinate court.”

My reading of the above sections shows that a party can invoke revisionary powers of this court when challenging the legality or propriety of any decision made in the lower court. This means that an **Applicant** must show that the decision is either illegal or improper in the face of it or show some irregularity in the proceedings or order made.

16. In this application the **Applicant** is not challenging the lower court's decision on the legality or correctness. He has not demonstrated any irregularity in the proceedings. I have as observed above gone through the proceedings of the lower court and I must say I have noted none of the grounds justifying this court to invoke its revisionary powers.

17. The **Applicant** have of course demonstrated his dissatisfaction with the decision made by the lower court and the attendant unpleasant consequences. Such grievances however can only be raised properly before this court through an appeal. The **Provisions of Section 364(5)** are clear: it states

“When an appeal lies from a finding, sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the insistence of party who would have appealed.”

In the light of the above I find that it is not only inappropriate for this court to revise a decision based on grounds which the **Applicant** could have raised through an appeal after a similar application was heard and disallowed by the trial court. The merits of the dismissal can only be challenged through an appeal and so notwithstanding the fact that the state has not opposed this application I find that this court's hands are tied and it will be setting a bad precedent if it was to allow this application when the grounds raised are clearly wanting for the reasons aforesaid. I have of course looked at the decision in **REPUBLIC-VS- JOHN NGANGA MBUGUA** and my take is that the court's reason's for review was hinged on the fact that the lower court had failed to render itself on the question of the release of the motor vehicle, which also happened to be an exhibit in the criminal trial. In the present instance, however the situation is different because the trial court fully rendered itself on an application placed before it. The Applicant is challenging that decision and has expressed what appears to be good grounds. Sadly this Applicant has chosen a wrong route to challenge the said decision and this court is unable to come to his aid for the reasons already advanced.

In the end this court finds no merit in the application dated 22nd September, 2020. The same is disallowed. The Applicant is duly represented by an able Counsel who clearly knows the proper avenues for redress.

Dated, Signed and Delivered at Kitui this 6th day of October, 2020.

R. K. LIMO

JUDGE