

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.173 OF 2019

REPUBLICAPPLICANT

VERSUS

ELSIE WANJIKU NJANG.....1ST RESPONDENT

ISABELLA GITONGA WANJIKU.....2NDRESPONDENT

AND

BRITAM GENERAL INSURANCE COMPANY LIMITED.....INTERESTED PARTY

RULING

The Director of Public Prosecutions was aggrieved by the decision rendered on 27th March 2019 by the Chief Magistrate's Court at Milimani in **Nairobi CM's Court Criminal Case No.1935 of 2018** (Hon. K. Cheruiyot – SPM). In the verdict, the court allowed the Respondents' application to have two motor vehicles Registration Nos.KCN 294H and KCM 898X currently detained by the police, unconditionally released to them. In the application, the Applicant seeks to have the decision revised because he avers that investigations had established that the two motor vehicles were purchased from proceeds of crime specifically the subject matter of the charges facing the Respondents before the Chief Magistrate's Court. It is the Applicant's contention that should the two motor vehicles be released to the Respondents, then the Interested Party would be denied the opportunity to recover some of the monies that were stolen from it should the trial court find the Respondents guilty as charged. The application is opposed. The 2nd Respondent swore a Replying Affidavit in opposition to the application. Essentially the 2nd Respondent states that her right to property as guaranteed by the **Constitution** was being infringed before a court of law had determined her criminal culpability. It was the Respondents' case that the Applicant was preempting the court's decision by seeking to deny the Respondents their rights to own property before the court makes a pronouncement in regard to the charges that have been laid against them.

On its part, the Interested Party through its Chief Finance Officer, Angella Tusaba swore a lengthy affidavit giving a narration of how the 2nd Respondent with her accomplices manipulated the electronic payment system of the Interested Party so as to enable transfers to be made in their favour to the sum of Kshs.23,571,954/-. It is from these illegal transfers that the Respondents purchased the suit motor vehicles. It was the Interested Party's contention that the two motor vehicles were purchased from proceeds of crime and therefore they should not be released to the Respondents during the pendency of the criminal case before the Chief Magistrate's Court.

During the hearing of the application, this court heard oral rival submission made by Ms. Nyauncho and Ms. Sigei for the State, Mr. Swaka and Mr. Okach for the Respondents and by Mr. Ndung'u for the Interested Party. This court has carefully considered the said submission. It has also had the benefit of reading the pleadings filed by the parties herein in support of their respective opposing positions. It was clear to this court that, prima facie, the Applicant and the Interested Party established that indeed they have an interest in the two motor vehicles that are currently being detained by the police. The Interested Party persuaded this court that there is a likelihood that the motor vehicles were purchased for monies that were allegedly stolen from its bank account. The case to determine whether indeed the Respondents stole the said sums from the Interested Party is pending trial before the Chief Magistrate's Court. This court cannot therefore make a comment in regard to whether or not the Interested Party established before this court that the Respondents purchased the two motor vehicles from the proceeds of crime, namely theft. However, this court holds that the Interested Party will be prejudiced if the two motor vehicles are released to the Respondents because if the prosecution is able to establish that the Respondents stole money from the Interested Party and used the same to purchase the said motor vehicles, then the Interested Party would be entitled to attach the said motor vehicles to recover part of the money that was stolen from it. The prejudice that the Respondents would suffer by temporarily being deprived of possession of the said motor vehicles is not comparable to the irreparable loss that the Interested Party will suffer if it is permanently deprived of the chance of making a recovery of its stolen funds were the motor vehicles to be released to the Respondents before the determination of the case.

In the premises therefore, this court will grant the application sought by the Applicant. The order issued by the Chief Magistrate's court on 27th March 2019 releasing the two motor vehicles to the Respondents is hereby revised and set aside. It is substituted by an order of this court directing that the two motor vehicles Registration Nos.KCN 294H and KCM 898X shall be detained by the police pending the conclusion of the trial. The police shall ensure that the said motor vehicles are kept at a safe place where their condition shall not deteriorate or where the motor vehicles may be vandalized as the parties to this application await the verdict by the Chief Magistrate's court. Should the parties to the application require the assistance of this court to secure the safe custody of the two motor vehicles, they shall be at liberty to apply. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MAY 2019

L. KIMARU

JUDGE