



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**MISC.CR.APP.NO.16 OF 2018**

**CHARLES KABATI MWANGI.....APPLICANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**BENARD MAWA WANJAU.....INTERESTED PARTY**

**R U L I N G**

The Notice of Motion dated 30/7/2018 is brought under Section 362(2) of the Criminal Procedure Code.

The applicant, **Charles Kabati Mwangi** seeks the *following prayers*:

1. ....

2. *That the Hon. Court be pleased to grant an interim conservatory order staying the proceedings, ruling and orders in Nyahururu C.M.'s Court, in Criminal Case No.1443/2016 pending hearing and determination of this revision.*

3. *That this Hon. Court be pleased to review/revise and or set aside the proceedings, rulings and orders of the Hon. O. Momanyi issued on 12/7/2018 and order that the subject motor vehicle KBY 887N be stored in the Court Yard of this Hon. Court until the issue of ownership is settled.*

The applicant **Charles Kabati** is the accused person in Cr.1443/2016 where the subject matter is theft of motor vehicle KBY 887N from the Interested Party Benard Maina Wanjau. Both the applicant and the interested party **Benard Maina Wanjau** lay claim to the said vehicle.

The applicant contends that he is the bona fide purchaser of the said vehicle having purchased it from one **Stephen Mutuma Kaaria** for Kshs.450,000/=; that the vehicle was seized at Kerugoya Town and detained on 30/11/2015; that though the interested party claims to be the beneficial owner of the vehicle, he has not produced any documentary evidence that would warrant the court to release the vehicle to him. It is the applicant's case that the criminal case is yet to be determined and it is in the best interest of the parties that the vehicle should be preserved; that the only reason why the vehicle was released was because it was being vandalized and the court did not consider the applicant's objection to the release of the vehicle; that the application for release was made at the close of the prosecution case and that the vehicle having been released to the interested party is subject to depreciation.

Ms. Nyangati, counsel for the applicant added that the interested party is a beneficial owner since the documents before court show that the vehicle is registered in the names of T/A Motors. Counsel further urged there are two other suspects who are not yet arrested and therefore, the vehicle should not have been released to the interested party.

Ms. Rugut appearing for the State opposed the application and especially the grant of prayer 2 on staying of court proceedings pending the determination of this application. Counsel contended that the application is brought in bad faith because the matter has proceeded upto the close of the prosecution case and had been set down for defence hearing when this application was filed and it is a delaying tactic; that the motor vehicle was produced as an exhibit and hence left the control of the prosecution and is in the hands of the court. She urged that the court should allow the hearing in the criminal case to proceed to its conclusion.

The interested party filed an affidavit opposing the application.

Ms. Wangeci, counsel for the interested party argued that the application lacks merit and cited the case of **Republic v Stephen Lesinko Cr.Re.9/2018 (Kajiado)** where the court considered when the court can order a revision. In that case, the court observed that the court has

power to order a revision where *inter alia* the decision is grossly erroneous; where the court has failed to comply with provisions of the law, where the decision is not based on evidence, where material evidence is not considered and where judicial discretion has been exercised arbitrarily.

I have now considered the application, the rival arguments of counsel. The case before the trial magistrate is still on going. The applicant herein had been placed on his defence when this application was made.

It is true that the motor vehicle in question is now an exhibit of the court and it is the court which has the discretion to determine where it should be stored pending the determination of the case. As argued by Ms. Rugut, the prosecution has really no say in the matter.

The question is whether the proceedings before the court should be stayed just because the court ordered the release of the vehicle to the complainant pending the determination of the case. The final determination has not been made in this matter, and so the court has not decided to whom the vehicle. The only issue here is therefore where the exhibit should be stored.

I understand the applicant's apprehension over the court's order releasing the vehicle to the complainant. The problem would arise if anything adverse happened to the said vehicle during the pendency of the criminal case when the evidence is in the custody of the complainant and yet no determination has been made regarding ownership of the vehicle.

The issue being the custody of the exhibit, I find no reason why the proceedings before the trial court should be stayed. If anything the proceedings should be expedited so that the parties involved can know the fate of the vehicle as soon as possible.

It is the applicant's contention that they were not given an opportunity to object to the application made by the respondent. However, this court cannot be able to determine that issue because the applicant did not call for the lower court file or attach the typed copies of the proceedings before the lower court for this court to appreciate what was in the court record. All that there is before this court is the ruling of the lower court.

It is the applicant's contention that the vehicle should have been stored in the court yard, but that is not possible because this court has no yard in which such a vehicle can be stored. This court is pressed for space for storing of exhibits.

The application to release the vehicle to the Interested Party was made because the vehicle was being vandalized at the police station. The vehicle had been lying at the police station since 2015, for about 3 years ago. It is appreciated that the police station is not the best place to store a vehicle.

As pointed out earlier, I do appreciate, that the applicant maybe apprehensive that the court's order is sending a message to him because of the timing of the application, having been placed on his defence. Maybe, the court should have called on the parties to agree on a neutral and safe place to store the vehicle and if necessary, be called upon to pay storage charges, in order to allay such fears. However, the court having released the vehicle to the complainant with conditions which include an order barring transfer of the vehicle, deposit of the logbook in court and presentation to court during the subsequent hearings, this court is reluctant to interfere with the said order because the case is about to be concluded. The court should try and expedite the trial and bring it to a conclusion at the earliest time possible by 15/12/2018.

In the end, I find no merit in the application and it is hereby dismissed.

Mention before the trial court on 19/11/2018 for directions on the further hearing.

**Dated and Signed at NYAHURURU this 9<sup>th</sup> day of November, 2018.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Nyagah for applicant

Ms. Wanjiru holding brief for Wangeci for Interested Party

Mwaura – Court Assistant