

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.496 OF 2018

LYSTRA MOTORS LTD.....APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

ATTORNEY GENERAL.....2NDRESPONDENT

RULING

The Applicant, Lystra Motors Limited petitioned this court seeking a declaration *inter alia*, that the detention of motor vehicles Registration Nos. KCH 598M and KCP 921P (hereinafter referred to as the suit motor vehicles) by the police contravenes the right to own and enjoy property and further contravene third parties' rights to possession and ownership of the said motor vehicles. Contemporaneous with filing the petition, the Applicant filed an application pursuant to the provisions of **Articles 21, 22, 27, 40, 47 and 159(2)** of the **Constitution** seeking orders of this court to compel the Respondents, particularly the 1st Respondent, to release the suit motor vehicles to the custody of the third party James Koroma from whom the motor vehicles were impounded. The application is supported by the annexed affidavit of Timothy Wako Baye and the grounds stated on the face of the application. The application is opposed. The 1st Respondent, through PC George Mwangi, the investigating officer, filed a replying affidavit in opposition to the application. The 2nd Respondent filed grounds in opposition to the application. In essence, the 2nd Respondent states that it has been wrongly enjoined in the suit as it had nothing to do with the detention of the suit motor vehicles. The 2nd Respondent urged the court to dismiss the suit against it.

During the hearing of the application, this court heard oral rival submission made by Mr. Okatch for the Applicant and by Ms. Nyauncho for the State. Mr. Okatch submitted that the 1st Respondent impounded the suit motor vehicles in April 2018. Since then, the motor vehicles have been in their custody. The Applicant filed suit before the Commercial Division of the High Court and obtained a decision against the person who had lodged complaint with the police. Learned counsel stated that there is a pending civil dispute between the Applicant and the person who lodged the complaint with the police. There was no reason for the police to impound the vehicles taking into consideration that the suit motor vehicles had already been transferred to third parties. The Applicant was of the view that the criminal complaint was made to frustrate the order issued by the Commercial Court to have the suit motor vehicles released to the owners. Learned counsel submitted that there was no basis for the 1st Respondent to continue holding the suit motor vehicles and therefore the court should compel them to release the same. He urged the court to allow the application.

Ms. Nyauncho for the State opposed the application. She relied on the replying affidavit filed by the investigating officer in opposition to the application. She submitted that a criminal complaint was lodged with the 1st Respondent. After investigations, charges have been laid against the concerned accused for the offence of stealing by servant. The suit motor vehicles were exhibits in the criminal case. She submitted that whereas the Applicant alleges that third parties had bought the suit motor vehicles, there was no evidence to support such allegation that payment were made for the purchase of the suit motor vehicles. She stated that the order issued by the Commercial Court did not bar the 1st Respondent from investigating the case. In any event, investigations had been completed and there are accused persons facing trial. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. It has also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the Applicant made a case for this court to grant it the orders sought in the application. According to the Applicant, there was no legal basis for the 1st Respondent to impound the suit motor vehicles because the same had been sold to third parties. A further ground that the Applicant relied on in support of its application is the decision that was rendered by the Commercial Court. In that decision (**Nairobi HCCC (Commercial & Admiralty Division) Civil Suit No. EO 32 of 2018 Lystra Motors Ltd & Another –vs- Tarek Miznazi**), the court (Tuiyot J) held thus:

“15. As earlier observed, the evidence put forward by the Plaintiffs has not been refuted or rebutted. The nine (9) vehicles are now with 3rd Parties who have bought them. Repossession of the vehicles affects the 3rd Parties. It has not been alleged or proved that the surrender of the vehicles to the 3rd Parties is stage-managed to place the vehicles beyond the reach of the Defendants. It being so, it would be patently unjust to allow the Defendant to repossess the vehicles to the detriment of the purchasers.

16. The need to protect the 3rd Parties sways this Court towards granting the order of injunction sought. The Plaintiffs have made out a prima facie case with a probability of success and it would be unjust to inconvenience 3rd Parties who would appear to be bona fide purchasers for value.”

On the other hand, it is the 1st Respondent's contention that the suit motor vehicles were exhibits which the 1st Respondent intends to have produced in court to establish the charges that were brought against the accused in the pending criminal case.

This court takes the following view of the matter: a court of law, which has competent jurisdiction, has already pronounced itself in regard to how the suit motor vehicles, among others should be dealt with. The Learned Judge's observation that the suit motor vehicles were transferred to third parties and therefore not the subject of the dispute between the Applicant and the complainant in the criminal case is valid. For the defendant in the civil suit to lodge a complaint with the police, to achieve the same objective similar to that which the court with jurisdiction had addressed, is to say the least, troubling. The defendant in the civil suit who is the complainant in the criminal case has, as far as this court can surmise, not appealed against the decision of the Commercial Court. In the circumstances therefore, the order issued by the Commercial Court is valid and cannot be defeated by the mere fact that a criminal case has been lodged before the magistrate's court. In any event, there is validity in the Applicant's complaint to the effect that it has been treated in a discriminatory manner in the sense that the 1st Respondent has insisted on retaining possession of two suit motor vehicles out of the possible nine that were subject to the dispute. It is only fair that the Applicant be placed in the same position as the other third parties who are enjoying possession of the motor vehicles that are the subject of the civil suit.

In the premises therefore, this court finds merit with the Applicant's application. It is allowed on the following terms: Motor vehicles Registration Nos. KCH 598M and KCP 921P that are currently detained by the 1st Respondent are hereby ordered released, within seven (7) days, to the Applicant so that he can release the same to James Koroma who had purchased the same. The 1st Respondent shall take photographs of the said motor vehicles which may be produced as exhibits before the trial court. The said James Koroma shall be required to produce the said motor vehicles in court when so directed by the trial court. In that regard, he shall execute a bond of Kshs.2,000,000/- (two million) to ensure compliance with the orders of this court. Either party shall be at liberty to apply. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2018

L. KIMARU

JUDGE