



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 69 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS -

JOHN NGANGA MBUGUA.....ACCUSED

RULING

The applicant John Nganga Mbugua in his application dated 5th March 2014 brought by way of notice of motion against Muimi Muinde and the Republic of Kenya seeks for the following order:

“That motor vehicle registration no. KBK 749 L Toyota Fielder be released to the applicant together with the log book.”

The applicant’s case is that he is the bonafide owner of the motor vehicle registration number KBK 749L Toyota Fielder. He operates a car hire business using the said motor vehicle and uses the proceeds to support his family. The applicant’s vehicle was seized by police and has been detained on orders of the Director of Criminal Investigations (DCIO) Central Police Station. The applicant is the complainant in Chief Magistrate Criminal case no.5 of 2014 where the 2nd respondent herein is the accused person. The applicant says he hired out his motor vehicle to the 2nd respondent who later unlawfully sold the vehicle to a 3rd party. The 1st respondent recovered the motor vehicle whose ownership is not contested but the 1st respondent continues to detain the vehicle causing financial loss and damage to the applicant.

Mr. Githinji for the applicant submits that photographic evidence is sufficient in the case before the chief magistrate and that the applicant is willing to provide photographs of the vehicle. The applicant also undertakes to produce the vehicle in court during the hearing of the case if his application is granted.

The 1st respondent did not put in a replying affidavit. However, the State Counsel Ms. Ndombi orally opposed the application on grounds that the said vehicle is held as an exhibit in Chief Magistrate Criminal case no. 5 of 2014 and it is appropriate that it be produced in evidence during the hearing. The counsel said the police recovered a fake logbook for the vehicle and that it is important that the exhibit continues to be detained until the pending criminal case is disposed of.

The applicant made a similar application before the trial magistrate seeking for release of motor vehicle. In his ruling delivered on 21st April 2014, the magistrate did not determine the issue in question. He referred the applicant to seek remedy from another court based on the argument that the vehicle had not been produced before that court. Although this application does not challenge the ruling of the magistrate, it was the responsibility of the trial court to deal with the application for release of the

vehicle. The fact that the vehicle was yet to be produced before the court does not bar the trial court from dealing with issues of exhibits still in the hands of the investigator provided that the State confirms that the item in question will be produced as an exhibit. In this case the State confirmed in writing that the vehicle KBK 749L was an exhibit in the pending trial and the State had no objection to release of the vehicle. This was confirmed by the office of Director of Public Prosecutions through their letter dated 28th April 2014 signed by the prosecuting counsel Leah Mati. Now that the magistrate washed his hands of the matter, I find it inappropriate to direct that the application be made before him again. This would amount to a back and forth game which is likely to cause delay of justice. This court will therefore take the responsibility.

The Director of Public Prosecution did not file a replying affidavit. Ms. Ndombi made very brief oral submissions that there is a fake log book which the police have recovered, it would be prudent to keep the vehicle in the custody of the police station until it is produced in court. The position taken by Ms Ndombi contradicts the letter of her employer the Director of Public Prosecutions which instructs the DCIO Central Police Station to release the vehicle to the applicant because the ownership is not contested. The letter also confirms that photographic evidence would be sufficient in the criminal case.

I come to a conclusion that the State does not oppose this application. If it wanted to do so, the investigating officer ought to have sworn an affidavit in response to the application setting out grounds why the vehicle should not be released. The accused faces a charge of theft of a motor vehicle and is not claiming ownership. The applicant has produced the log book which he says has been confirmed as genuine by Kenya Revenue Authority. This information was not disputed by the prosecution. In the circumstances, the ownership of the vehicle cannot be said to be contested. The position taken by the Director of Public Prosecution (DPP) through the prosecuting counsel in the criminal proceedings is correct since the ownership is not contested. The DCIO and the investigating officer work under the prosecuting counsel. The officers are bound by the directions of the Director of Public Prosecution. It is a breach of lawful instructions for the DCIO not to comply with the directions of the DPP.

It is the practice in criminal cases that photographs will be taken by the scene of crime personnel of exhibits and scenes of crime which will be produced in evidence during the hearing. If it is possible to avail the exhibit itself, the photographs may also be produced. If the vehicle is released after its photographs are taken, no miscarriage of justice will be occasioned during the trial. It is not the duty of the complainant to take photographs of his vehicle and submit them to the police. Instead, it is the duty of the investigating officer to have exhibits photographed and ensure the photographs are processed in the manner authorized by the relevant regulations.

It does not make any sense to keep the vehicle of the applicant which is an income generating asset in police custody until the pending criminal case is finalized. The prosecution have not attempted to demonstrate to this court why the vehicle should continue to be detained at the police station while the applicant is ready and willing to produce it during hearings.

I find this application merited and I allow it on the following terms:-

- a. That the 1st respondent in conjunction with the officer Commanding Police Division in which Central Police Station is situated do release the applicant's vehicle registration no. KBK 749 L Toyota fielder to the applicant within three (3) days from the date of this ruling;
- b. That the 1st respondent arranges for prompt photographing of the vehicle within three (3) days;
- c. That the applicant gives a written undertaking to the 1st respondent that he will produce the vehicle during hearings or as directed by the trial court;
- d. That the original log book be held by the 1st respondent or the investigating officer pending disposal of the case;
- e. That there is no order as to costs.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the **7th** day of **May, 2014** in the presence of Ms. Magoma for the State.

F. N. MUCHEMI

JUDGE