



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 130 OF 2012

GERALD MAINA GACAU. PLAINTIFF

VERSUS

COMMISSIONER OF POLICE. 1ST DEFENDANT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS. 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

R U L I N G

The application before the court is the Notice of Motion dated 9th July, 2012. It seeks, mainly, that this court do review the ruling and/or orders of this court dated the 29th June, 2012. In the said ruling and orders, Khaminwa, J ordered the 1st Defendant, herein the Applicant to release to the Plaintiff herein Respondent, a motor vehicle registration Number KBQ 288Q which was being detained By the Kenya Police, CID Department, Nairobi.

The Respondent, Gerald Maina Gacau, who is the registered owner of the motor vehicle, had sought the release of the same pending the hearing and final determination of this suit in which the main relief sought therein, was a declaration that the continued detention of the vehicle by the Police was a violation of his fundamental and inviolable constitutional right to freely own property. When the application came up for hearing on 29th June, 2012 the court had found that the Respondent, upon the material before the court, was entitled to the immediate possession and use of the motor vehicle until when the suit would be determined.

The court, upon the material before it had further noted that the Police could have been exercising official powers in an abusive way and for ulterior motives, contrary to law and the constitution. The court accordingly had felt that the best way to correct the situation and disabuse the police misconduct in relation to the detention of the vehicle, was to order for the release of the motor vehicle forthwith, although it at the same time noted that the Respondent may have recently been charged with a crime related to the process of the purchase of the motor vehicle.

Ten days afterwards, however, the Applicants filed this application seeking a review of the orders to release the motor vehicle. The application was brought under Order 45 Rule 1 and 2 and Section 3A of the Civil Procedure Rules and Act, respectively. The Applicants asserted that they based the application on newly discovered material facts which were not discovered until after they had filed their replying affidavit to the application by the Respondent for the release of the Motor Vehicle. They further argued that the Respondent had without their knowledge been charged with a serious criminal offence related to the funds used to purchase the relevant motor vehicle which information would have dissuaded the court

from releasing the vehicle had it reached their or court's attention. They argued further that an attempt to bring the said information through a further affidavit, failed because the court did not allow the same into evidence. Finally, the applicants asserted that even if the court should not accept the information in the rejected affidavit as new and important, nevertheless, the same will form other sufficient reason under the law, for the reviewing the courts order to release the motor vehicle.

On the other hand, and in response, the Respondent argues that the conditions for reviewing the order of 29th June, 2012 of this court do not exist and have not been demonstrated. That no new evidence has been discovered and demonstrated by the applicants, which evidence was not available to them when the court made the release order. The Respondents also asserted that there is no error or mistake apparent on the face of the record of court. That with adequate diligence, the applicants could have produced in court the evidence they are now producing in support of this application.

I have carefully perused the application, the material in support and opposition to it, and all the submissions from both parties.

There is no doubt that the motor vehicle registration No. KBP 288Q is registered in and prima facie belongs to the Respondent. The issue in the case for detaining it is that the Respondent in his societal status had no financial capacity to purchase it. The Applicants were in the process of investigating a crime probably committed by others when they allegedly stumbled on information suggesting that the funds that purchased the motor vehicle, were obtained through fraud and impersonation. The Respondent as the affidavit evidence shows, immediately sought to introduce the newly discovered evidence into the application to inform and persuade the court not to release the relevant motor vehicle KBP 288Q to the Respondent herein who was the applicant therein. However, for the reasons given in the said Ruling, the supplementary affidavit was not admitted and was kept out and with it the important and the allegedly newly discovered information. The after effect was that the new information was kept out of the proceedings and eventually out of the Ruling.

There is no indication presently what the reaction of that court could have been if the evidence that the relevant motor vehicle was bought by fraudulently obtained funds was admitted by the court. All this court can say is that there is a likelihood that the court could have not made the order to release the vehicle to the Respondent in total disregard of the above information merely because he was and is the registered owner.

Furthermore, had the evidence in the rejected further or supplementary affidavit been admitted, properly read and appreciated by Khaminwa, J's court, it is likely that she could not have released the motor vehicle in question. As things stand before this court consequently the evidence in the rejected affidavit was not part of the ruling now applied to be reviewed. It is in all relevant aspects, evidence which could not be effectively produced by the present applicants to that court. The applicants have now properly brought it to the full attention of this court. Should this court ignore it, having unlike the first court, realized its importance and import to the whole case scenario?

Indeed it cannot be denied that the probable case behind the acquisition of the motor vehicle in question, extends beyond the simple issue of whether or not the motor vehicle Registration Number KBP 288Q is registered in the name of the Respondent herein. The detention of the motor vehicle is indicated to be for the purpose of unfolding the source of the funds that purchased the motor vehicle. The assertion in the rejected affidavit to the effect that certain persons by fraud sold land that did not belong to them and hid the funds obtained in the purchase of the said motor vehicle by registering the same in the name of the Respondent, made the detention at that time, prima facie, relevant to the whole investigation. All these information accordingly, amounted to important evidence which ought to have effectively been placed before the court to assist it to make the impugned Ruling. Since the court did not admit the supplementary affidavit, it missed to appreciate its importance and failed to take the evidence in it into account.

On the other hand, can it be said that the Applicant herein, using due diligence, did not have in hand, the information later carried in the further affidavits? Was it not the Applicants who charged other third parties with criminal offences allegedly related to obtaining money by false pretences or by fraud before

they filed their replying affidavit to the application to release the motor vehicle to the registered owner? Furthermore, was it not the police who are the Applicants herein, who were investigating the fraud crime and who also charged the Respondent as well as earlier charged the other third parties of fraud?

Put differently, the Applicant herein all along, had the information which they later put in the further replying affidavit with which they tried to ambush the Khaminwa, J's court. It is the same evidence which they are trying to introduce presently as newly discovered evidence and yet they had it all the relevant time.

Finally, what happens later if the fraud charges against the third parties fail to be proven? The police will have detained the Respondent's motor vehicle in question for long and unfairly and denied him of its use to make profits. Most probably that is why Khaminwa, J's court could not countenance a clearly open abuse of police power against a probably innocent citizen's constitutional rights.

The court notes also that the Applicants were economical in disclosure of relevant information touching on the criminal investigations from which these proceedings arose. From the affidavits it can be gleaned that the investigations started sometimes in the year 2010. What happened to the prosecution of the so called fraudsters? Who is responsible for the delay in the completion of the said criminal cases, if delay there is? Is it the accused persons or the police who on the other hand are prima facie, unlawfully detaining the relevant motor vehicle? Answers to these questions are clearly pertinent to the question as to whether this court's discretion should be exercised in favour of the Applicants herein.

This court has also considered the issue as whether there are other reasonable grounds or cause upon which this court could grant a review of the earlier Ruling by Khaminwa, J. I have come to the conclusion that reasons that are presented by the Applicants, are those tailored to cover up the continued unreasonable detention of the Respondent's motor vehicle. The same were found by Khaminwa, J to be amounting to an abuse of due process entailed in the power of the police to investigate crime. The abuse of police investigatory power should cease forthwith.

The end result is that this application for review, is a further abuse of court process and has no merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of July, 2013.

.....

D A ONYANCHA

JUDGE