



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**JUDICIAL REVIEW NO. 20 OF 2011**

**REPUBLIC ..... APPLICANT**

**versus**

**ATTORNEY GENERAL .....1ST RESPONDENT**

**CHIEF MAGISTRATE'S COURT NYERI.....2ND RESPONDENT**

**EXPARTE.....PETER MURIITHI MAHIANYU**

**RULING**

1. By a Notice of Motion dated 29th April 2011 the exparte applicant moved the court under Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules for ORDER:

2. **1.THAT the honourable court do issue orders of certiorari to quash the ruling and orders made on 2nd February 2011 in Nyeri Chief Magistrate's Court Criminal Case No. 827 of 2009 in respect of motor vehicle registration number KAS 058E.**

3. **2.THAT the honourable court do issue orders of prohibition to prohibit the respondents from executing the said order of 2nd February 2011.**

4. **3. THAT costs be awarded.**

5. The application was supported by the statement of facts dated 11th April 2011 and a verifying affidavit sworn by the exparte applicant on the same date.

6. The brief facts are that the exparte applicant is and was at all material time the registered proprietor of Motor vehicle Reg. No. KAS 058E which was an exhibit in Nyeri Chief Magistrate's Court Criminal Case No. 827 of 2009 wherein the exparte applicant was a witness for the prosecution.

7. The Said Criminal Case was concluded and judgment delivered by M. Nyakundi then S.R.M. And on 16th December 2010 the exparte applicant made an application for the release of the said motor vehicle which application was disallowed with the magistrate ordering that it be forfeited to the state.

8. In support of the application the exparte applicant deponed that he bought the said motor vehicle in 2009 through a loan from M/S Equity Bank Ltd for purpose of a tax business and employed one ANTONY MWAI NYAWIRA as the driver.

9. that the said motor vehicle was seized by the police as it was said to have been used in a robbery offence wherein the said Antony Mwai Nyawira was one of the accused and was subsequently convicted.

10. In her ruling the Hon. Magistrate had this to say.

11. ***“the motor vehicle which is the subject matter of this application was involved in a robbery. The applicant has not shown this court any reason as to why the said motor vehicle should not be forfeited to the state since it was the one that the driver used in ferrying the robbers to the scene of crime and a robbery was committed. I find the application as it is even if the owner testified before court on cross examination the court read some misdemeanor on his part.”***

12. In opposition to the said application Monica Nyakundi swore an affidavit where she deponed that the exparte applicant presented two applications during the course of the criminal proceedings seeking the release of the said motor vehicle and that she dismissed the said application on the basis that the ownership documents presented by the exparte applicant indicated that the registered owner was one Abdenur Ibrahim and or Nesrai Jemal but had been sold to the exparte applicant only by Abdenur Ibrahim and that the applicant failed to establish any ground why the said motor vehicle ought not to be forfeited to the state yet such grounds were required because the prosecutions evidence established that the motor vehicle was used in the robbery.

### **13. SUBMISSIONS**

14. At the hearing herein Mr. Wamahu for the exparte applicant submitted that the said motor vehicle was registered in the name of the applicant and was an exhibit during the trial where the applicant was a witness and that the applicant was not an accused before the trial court.

15. It was submitted that the order of the magistrate in respect of forfeiture was made in excess of jurisdiction since there is no provision for forfeiture under the provision where the accused was charged and that it did not fall under section 29, 118 and 190 of the Penal Code

16. It was submitted that the said order was ultra vires and should be quashed since it was not made at the point of judgment. It was further submitted that the order was made in bad faith.

17. Miss Gathagu for the state submitted that under section 26 of CPC police officer is authorised to seize and detain a motor vehicle suspected to have been used in facilitating a commission of offence.

18. It was submitted that during the trial the applicant was given an opportunity to be heard and the applicant did not appeal against the order of dismissal.

### **19. ISSUES FOR DETERMINATION**

20. From the submissions and pleadings stated herein there is only one issue for determination and that is whether the trial court was right in ordering the forfeiture of the applicant's motor vehicle herein.

21. It is not in dispute that the accused persons before the trial court were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code and it is also not in dispute that there is no provision for forfeiture under the said provision of the Penal Code.

22. It is also clear from the reading of section 26 of CPC that the same does not apply to the application before the court herein since this motor vehicle was not detained by the police but was used as an exhibit before the trial court.

23. From the proceedings it is also clear that the trial court did not invoke the provision of section 389A of CPC and in particular section 389(2) thereof.

24. It is also clear that it was not for the exparte applicant to prove to court why the said motor vehicle should not be forfeited to the state as that burden to my mind was and is with the prosecution which did not make any application before the said court.

25. I therefore agree with the submission by Mr. Wamahu for the applicant that the trial court exceeded her jurisdiction thereby bringing her decision with the scope of judicial review by this court.

26. In the final analysis I allow the application herein and quash the decision of the trial court made on 2nd February 2011 in CM. CR. No. 827 of 2009 in respect of motor vehicle registration number KAS 085E and further prohibit the respondent from executing the said order with no order as to cost taking into account that the mistake was made by a judicial officer in exercise of her judicial function.

**Dated at Nyeri this 4th day of July 2013.**

**J. WAKIAGA**

**JUDGE**

**Ruling read in open court in the presence of Mr. Wamahu for the applicant and in the absence of the advocate for the respondent.**

**Delivered at Nyeri this 19th day of July 2013.**

**J. WAKIAGA**

**JUDGE**