



**Katwai v Republic (Miscellaneous Criminal Application 305 of 2023)  
[2024] KEHC 4021 (KLR) (Crim) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION 305 OF 2023**

**LN MUTENDE, J**

**APRIL 22, 2024**

**BETWEEN**

**PATRICK MUENDO KATWAI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Patrick Muendo Katwai, the applicant, approached the court through an application dated 1<sup>st</sup> August 2023 seeking an order that the motor vehicle registration number KDL xxxK be released to him with further conditions that:  
  
The respondent takes photographs of the vehicle to be used as exhibits in case the driver is arrested and charged.  
  
That the applicant avails the vehicle before court when required.
2. The application is premised on the grounds that the applicant is the beneficial owner of the subject motor vehicle having purchased it from Ali Cars Ltd.
3. That the vehicle was hired out to Douglas Itila for three days but the said person did not return it on 16<sup>th</sup> May 2023 as agreed. The applicant later traced his vehicle at Archers Police Post in Samburu area where the vehicle had been impounded for transporting sandal wood and that the driver fled.
4. The application is supported by an affidavit sworn by the applicant where he depones that he had hired out the vehicle to one Douglas Itila who went missing with the vehicle which was at Archers Police Post within Samburu area having been confiscated by multi-agency officers on 15<sup>th</sup> May 2023 and the driver disappeared upon the vehicle being stopped.



5. That the offence of transporting sandalwood was committed by Douglas Itila who is at large and he believes that the offence allegedly committed does not include forfeiture of the vehicle. That the vehicle was moved to DCI Headquarters and he recorded a statement on 3/6/2023 regarding how he hired out the motor vehicle.
6. That ownership is not disputed and there is no justification for continued detention. That photographs can be taken and used as an exhibit if the driver is arrested.
7. That the applicant had been paying monthly instalments of Ksh 42,377/= to Ali Car Motors Ltd to liquidate the outstanding balance of Ksh 635,500/=. That the money was payable from 4/4/2023 to 4/6/2024 but he has not been able to pay after the car hire business stalled.
8. That the vendor was also contacted by the police and it was confirmed that he was still paying instalments and the log book has been retained by the company.
9. That the detention is a gross violation of his constitutional right to own property under Article 40 (1) and no public interest is served.
10. The application is opposed by the respondent. Through an affidavit deposed by No. 237xxx Chief Inspector Josphine Korir of the Serious Crime Unit DCI Headquarters the Investigation Officer, the respondent urges that the motor vehicle registration Number KDL xxxK was intercepted by the multi-agency officers within Isiolo having been loaded with sandal wood, an endangered wildlife species protected by the [Wildlife Conservation and Management Act](#) and the occupants fled to the bushes and shrubs during the interception.
11. That an inventory was recorded and signed at Archers Police Post and the subject motor vehicle, sandal wood and others items have been kept as exhibits.
12. That following investigations conducted per the records at the National Transport and Safety Authority the registered owner of the vehicle is Ali Car Motors Ltd and the director of the company was interrogated. It was confirmed that the applicant traded in motor vehicle Registration No. KDE xxx M with vehicle KDL xxx K Toyota Probox white in colour ( subject matter of this application) at a purchase price of Ksh 1,250,000/= .
13. That the applicant paid Ksh 695,000/= and the balance was to be paid in monthly installments of Ksh 42,362 for 15 months.
14. That the applicant had hired the vehicle to Douglas Itila in Busia town at the time of interception. So far call data records have been obtained and efforts to trace the person who hired the vehicle have not been fruitful .That the vehicle has been photographed and documented. That respondent reiterates that the agreement is only an executory document and it does not confer ownership to the applicant.
15. That release of the vehicle might result to 3rd party proceedings against the state by the registered owner. That the vehicle would also be subject to forfeiture under Section 105 of the [Wildlife Conservation and Management Act](#) and, that the applicant might dispose, sale, transfer or deal with the vehicle in a manner that would affect the proceedings and the state stands to suffer prejudice if the application is allowed.
16. The application was disposed through written submissions. The applicant submits that ownership passed by sale and delivery and since sale is not being contested, the fact of ownership should also not be contested. Reliance in this respect is placed on the case of [Joel Muthuri -vs- Julius Guchuru Guantai](#) (1996) eKLR and [Osumo Apima Nyaundi -vs- Isaboke Onyancha Kibondori & 3 others](#) (1996) eKLR. He further argues that a registered owner is deemed prima facie the owner, it is open for the real owner



to prove the contrary. That under Section 20 of the *Sale of Goods Act* property of a vehicle passes to the buyer when the contract is made.

17. That the applicant is the undisputed beneficial owner and the registered owner's interest is full payment of the purchase price.
18. On whether the prosecution would be prejudiced, the applicant submits that detaining the vehicle where the suspect is not arrested would be a great miscarriage of justice, it is used to repay the car loan and to maintain the vehicle.
19. That tracing and arresting the suspect may take long while the vehicle would be deteriorating and losing value and also exposed to depreciation despite being fairly new.
20. That the applicant is willing to produce the vehicle as and when required and that the vehicle cannot be treated as a vessel of crime until a competent court finds so. That even if the suspect is apprehended and charged the suspect remains innocent until proven guilty.
21. That the court would need to issue a notice to show cause to the owners of the vehicle before it is forfeited, this would be the appropriate time to detain the vehicle.
22. Finally the applicant submits that the car hire agreement was produced before the court as evidence that he had hired the vehicle to Douglas Itila and that the applicant and the registered owner are not suspects in the commission of crime.
23. They have also recorded statements and have assisted the police in the investigations. That the respondent has admitted that the vehicle has been photographed and documented and that they are just waiting for suspect to be arrested.
24. That the respondent's fear that the vehicle may be sold can be avoided by an order or restriction directing the registrar not to transfer the subject vehicle until the case is heard and determined.
25. The respondent on its part submits that the investigations are at advanced stages and that what is pending is the arrest of suspects which would lead to subsequent arraignment. That the vehicle is an important exhibit at this point and it needs to be preserved. That the registered owner has a major interest in the vehicle under Article 60 of the *Constitution*, but, the owner has not been enjoined in the case and has not been made aware of the current proceedings. That the registered owner might repossess the vehicle if the agreement is not honoured.
26. I have duly considered the application, affidavits in support and opposition and rival arguments. The application in brought pursuant to the provisions of Article 40 (1) (a), 10, 25(c) 159(2) 165(3)(a) (6) (7) & 232 of the *Constitution*. These refer to the applicant's right to move the High court pursuant to its power to determine the question of the right to fair trial; national values and principles of governance and protection of the right to property.
27. The gist of the applicant case is that he is the beneficial owner of the subject motor-vehicle that was intercepted and detained by police officers and has not been released as investigations are being conducted in respect of an offence stated to have been committed by the then occupants who fled.
28. Police officers have power to detain any property used or suspected to be involved in the crime. Section 26 (1) (c) of the *Criminal Procedure Code*(CPC) provides that:

A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain—



any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.

29. The seizure is further to the provisions of Section 24(e) and (g) of the *National Police Service Act* (Cap 84) where the police mandate is to inter alia conduct investigations and collect intelligence.

30. The detention under the above section and indeed under any provision of the law including Section 121 of the *CPC* where the court is enjoined to facilitate seizure and detention is not meant to be for an indefinite period but only for purpose of investigations.

31. Section 121 of the *CPC* (Cap 75) provides that:

121

(1). When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

32. Additionally, the actions taken by the police in its mandate must be compliant with the law. In the case of *Brown Field Developers Limited vs Banking Fraud Investigations Unit & 4 others* [2016] eKLR Onguto J held that:

“While Section 24(e) and (g) of the *National Police Service Act* (Cap 84) grants to the 1st and 2nd Respondents the power to investigate, detect and prevent crime, the Respondents are only to conduct such mandate or exercise such powers within the confines of the law generally and of the *Constitution* in particular. “

33. Article 40 (1)(a) which is in respect of protection of right to property provides as follows:

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - a. of any description.

34. The applicant averred that he made part payment of the purchase price of the subject-vehicle and subsequently hired it to Douglas Itila. The document annexed to the supporting affidavit endeavours to establish that the applicant hired out the vehicle for a duration of three days to Douglas Itila.

35. Investigations carried by the respondent establish the fact of the applicant being a beneficial owner of the subject vehicle which means he has the right of enjoying ownership unless the stated right limited by the law.

36. Section 92 of the *Wildlife Conservation and Management Act*, 2013 (Act) provides that:

Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment.

37. Section 105 of the *Act* provides that:



1. The court before which a person is charged for an offence under this Act or any regulations made there-under may, in addition to any other order –
  - (a) upon the conviction of the accused; or
  - (b) If it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the wildlife trophy, motor vehicle, equipment and appliance, livestock or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the Service and be disposed of as the court may direct.
38. It is admitted that the person(s) who were in control of the vehicle committed the offence in respect of an endangered species namely sandalwood. A finding that an offence was committed would result into the vehicle being forfeited to the Service. The court would have to interrogate what role the applicant herein played.
39. This being the case the question is whether the motor vehicle should be released at this stage or preserved pending investigations. The respondent has demonstrated that the law was contravened and investigations are being conducted. Releasing the vehicle would have an adverse impact on the investigations being conducted.
40. There is the wider public interest requiring that crimes should be investigated efficiently without frustration, then there is the need to uphold constitutional and human rights of other persons involved.
41. In the case of *Director of Public Prosecution vs Ibrahim Asala Mahangwa & 2 others* [2022] eKLR, the High Court held described this duty as -

“A balance of the prosecution’s interest in the effective prosecution of crime by enabling proof of offences and the remanding or forfeiture as a deterrent on the one hand and the proprietary interest of the accused or the owner of the motor vehicle and the inter-locking interest of both in securing the value of the motor vehicle must be sought.

  14. I consider such balance to exist in an order for the release of the motor vehicle, bearing in mind the principle of presumption of innocence of the accused, and of course, the non- involvement on the evidence, if that were so, of the Applicant owner of the motor vehicle, with a counter measure from the protection of prosecution’s ability to prosecute effectively through an order that the prosecution is allowed to present such evidence relevant to the motor vehicle before the order for release is affected.”
42. On one hand , there is no doubt that the subject motor vehicle is a potential exhibit. This calls for strict preservatory and restraining orders preventing exclusive access and use formerly enjoyed by the applicant taking into account the fact that the law provides for forfeiture unless a plausible explanation is rendered. The applicant availed an agreement purportedly entered into between him and the person who hired the subject vehicle. It is alleged the person has switched off his cellphone yet there were persons alleged to be witnesses. Other than there having been no evidence of the applicant engaging in the alleged business, the respondent has not divulged the reason why the applicant and witnesses have not assisted in the investigations. It is also not disclosed why the respondent has not used the available machinery to find the alleged person even if the phone has switched off per the allegations.
43. It is not the duty of the court to interfere with investigations. The motor-vehicle in question has not been produced in court to enable it make appropriate orders that it can supervise.



44. However, what is intriguing is the time taken to conclude investigations. Seemingly, the last action was taken in June, 2023. Although it is rightly so argued that releasing the vehicle will be prejudicial to the respondent as the applicant might dispose off the vehicle, the continued detention would be prejudicial to the applicant as it is also unjustified to detain the vehicle for an unknown period.
45. For that reason, the respondent is hereby directed to act by concluding investigations within a month hereof and cause those concerned to be arraigned in court. In default they will be required to release the vehicle to the beneficial owner herein.
46. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 22<sup>ND</sup> DAY OF APRIL, 2024.**

**L. N. MUTENDE**

**JUDGE**

