



Case Number:	Miscellaneous Application 31 of 2018
Date Delivered:	19 Dec 2018
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	John Nyabuto Onyiego
Citation:	Phylis Njeri Ngirita & 2 others v Director of Public Prosecutions & 2 others ; Asset Recovery Agency (Interested Party) [2018] eKLR
Advocates:	Mr. Muthama instructed by Kago and Muthama Advocates for the Applicants M/s Kimiri for the State
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI**

**MISCELLANEOUS APPLICATION NO. 31 OF 2018**

**PHYLIS NJERI NGIRITA .....1<sup>ST</sup> APPLICANT**

**LUCY WAMBUI NGIRITA .....2<sup>ND</sup> APPLICANT**

**JEREMIAH GICHINI NGIRITA .....3<sup>RD</sup> APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING STATION**

**NAIVASHA POLICE STATION..... 3<sup>RD</sup> RESPONDENT**

**ASSET RECOVERY AGENCY..... INTERESTED PARTY**

**RULING**

1. The applicants herein have been jointly charged in various corruption related cases before Milimani Anti-Corruption Chief Magistrate's court being Cr. Cases No 8 to 17 of 2018.
2. Upon their arrest, three of their motor vehicles allegedly connected with proceeds of crime in relation to the pending criminal charges were impounded. The impounded motor vehicles are listed as KCH 753U registered in the name of the 1<sup>st</sup> applicant, KCH 600H registered in the joint names of the 2<sup>nd</sup> applicant and Platinum Credit Ltd and KCH 889M registered in the name of the 3<sup>rd</sup> applicant jointly with Platinum Credit Ltd. They averred that their rights have been infringed by the continued detention of the motor vehicles which are not mentioned or required as exhibits.
3. Pursuant to Article 40, 47, 48 and 159 of the Constitution, the applicants moved this court through a notice of motion dated 13<sup>th</sup> August 2018 and filed on 16<sup>th</sup> August 2018 seeking orders compelling the respondents to unconditionally release the said motor vehicles. The application is premised upon grounds on the face of it and an affidavit in support deposed on the 13<sup>th</sup> August, 2018 by the 1<sup>st</sup> applicant with authority from the 2<sup>nd</sup> and 3<sup>rd</sup> applicants.
4. They averred that the impounded motor vehicles now held at Naivasha Police Station were purchased through a loan facility which continues to accrue interest. That from the prosecution documents supplied by the 1<sup>st</sup> respondent during pre-trial conference there is no mention anywhere that the motor vehicles were detained or held as exhibits.
5. Upon service of the said application, the respondents filed a replying affidavit sworn on 18<sup>th</sup> September, 2018 by IP Paul Waweru confirming that indeed the said motor vehicles were impounded and detained as they were a subject of investigation which is complex. IP Waweru averred that the applicant's movable and immovable properties are also targeted by the Asset Recovery Agency who are also pursuing the credit facilities as a conduit through which money fraudulently obtained from NYS was

processed.

6. At paragraph six, IP Waweru said that the motor vehicles are detained pending completion of investigations which will then determine whether or not to charge the applicants with the offence of money laundering in relation to the subject motor vehicles. He further stated that, until the applicants take plea, the motor vehicles should be kept as exhibits.

7. Before the matter could proceed for hearing, the Asset Recovery Agency moved the court vide a notice of motion dated 17<sup>th</sup> September 2018 and filed the same day seeking to be enjoined as an interested party. They claimed that they were engaged in investigations of proceeds of crime involving the applicants in relation to the criminal charges facing them. That under Section 53 and 55 of the Proceeds of Crime and Anti- Money Laundering Act, they are under obligation to identify, trace, seize and confiscate such proceeds or assets of crime.

8. Upon service of the application, parties recorded a consent on 26<sup>th</sup> September 2018 allowing the interested party's application dated 17<sup>th</sup> September 2018. Consequently, the interested party was granted 14 days to file a replying affidavit to the applicants' application. Equally, the applicants were granted corresponding leave to file further affidavits.

9. The interested party filed their replying affidavit sworn by Sgt Fredrick Musyoki. The said officer averred that the Asset Recovery Agency was conducting investigations geared towards recovery of assets and generally Proceeds of Crime associated with the applicants in NYS scandal where the public lost colossal sums of money through corrupt activities.

10. The interested party contended that through Misc. Criminal Applications Nos. 1837, 1998 and 2107/2018 Milimani Magistrate's court, they obtained search warrants to investigate the applicants personal and business related accounts which revealed a sum of 72,051,077.60 in their various accounts. It is Sgt. Musyoki's averment that the motor vehicles in question are subject of recovery and forfeiture and that they were not jointly owned with Platinum Credit facility but instead they were deposited as securities in advancement of credit facility.

11. He further stated that Platinum only advanced Kshs.900,000/= for the purchase of motor vehicle KCH 753U Toyota V8 against the purchase price of 1,950,000/=, Kshs.2,000,000/= for the purchase of motor vehicle KCH 600H V8 bought at Kshs14,400,000 and Kshs.1,295,000/= for KCH 889M Toyota Hilux against the purchase price of 2,720,000.

12. When the matter came up for hearing on 7<sup>th</sup> November 2018, parties agreed to dispose of the same by way of written submissions. However, only the applicants filed submissions on 25<sup>th</sup> October 2018. The respondents and the interested party did not file any submissions despite being given a second chance to do so.

13. In their submissions, Mr. Muthama from the firm of Kago and Muthama Advocates appearing for the applicants merely reiterated the grounds and averments contained in the affidavit in support. He urged the court to find that the motor vehicles are illegally held at Naivasha Police Station as they are not exhibits.

14. Mr. Muthama asserted that the Asset Recovery Agency did not have a preservation order from the court directing seizure of the motor vehicles pursuant to Section 82 of the proceeds of Crime and Anti-Money Laundering Act.

15. I have considered the application herein, affidavit in support, respondents' reply and interested party's replying affidavit. I have also considered the applicants' written submission. However, when the matter was mentioned on 5<sup>th</sup> December 2018 for delivery of ruling, the respondents informed the court that the interested party has secured freezing and seizure orders in HC Civil Appeal 55/18.

16. The application herein is filed under Articles 40, 47, 48 and 159 of the Constitution. It is not clear whether the applicant intended to file a constitutional reference, judicial review or merely an application for revision.

17. There is no dispute that the three motor vehicles are owned by the applicants. It is not in dispute that the motor vehicles were impounded as a consequence of Anti-Corruption cases spending before Chief Magistrate's court.

18. Article 40 of the Constitution underscores the right for every person to either individually or in association with others, to acquire and own property of any description in any part of Kenya and that nobody should be deprived off his property, interest in, or right over any property.

19. The right to own property is a constitutional imperative and any mode of dispossession other than within legal means is a violation of one's fundamental rights. At Paragraph 6 and 8 of the respondent's replying affidavit IP Waweru averred that the motor vehicles are held not as exhibits of the pending cases but for anticipated criminal charges yet to be preferred against the applicants on account of money laundering.

20. It is inconceivable that private property can be impounded and detained awaiting charges yet to be decided or preferred. Principally, the respondents have not discharged their mandate as required of them. An accused person has a right to own property. The fact that one is charged of a criminal offence yet to be proved should not be the basis to impounding everything he or she owns merely on suspicion that it is likely to be associated with speculative or contemplated charges.

21. It is incumbent upon the respondents to demonstrate that they are holding the motor vehicles for purposes of production as exhibits. In the absence of any satisfactory explanation, this court cannot sanction further detention of the three motor vehicles on account of anticipatory or speculative charges. Therefore, there is no good reason given to justify the continued and further detention of the motor vehicles by the respondents. Where no plausible explanation to warrant impoundment and detention of somebody's property in this case motor vehicles, the police have no duty to continue holding them. **See Rvs Inspector General of police Exparte Applicant Kennedy Ngeru Irungu(2016)eklr** where the court held that the police are not authorized to impound property and detain it without reasonable cause

22. Regarding the interested party's application, they merely stated that they were investigating financial transactions relating to the purchase of the motor vehicles and that they were in the process of applying for the seizure and preservation orders in respect of the motor vehicles. Under Section 82 of the Proceeds of Crime and Anti-Money Laundering Act, the Asset Recovery Agency can obtain a preservation order from the court. Subsequent to securing the said order, a police officer can then seize the property pursuant to Section 85 of the said Act.

23. None of these orders have been obtained. Although M/s Kimiri informed the court of the existence of those orders, the order was not formally introduced to the court. It was therefore evidence from the far.

24. For the above reasons stated, it is my finding that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent have no good reason to continue detaining the applicants' motor vehicles unless otherwise served with a lawful order preserving them. Accordingly, the application herein is hereby allowed with orders that:

**i. The OCS Naivasha Police station be and is hereby directed to release motor vehicles KCH 753U, KCH 600H and KCA 889M to the applicants or if in custody to the close relatives as they may authorize with immediate effect.**

**ii. That the said motor vehicles shall be detained by the OCS Naivasha Police Station or any other police officer or station only if there is a court order directing detention or preservation of the same.**

Order accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF DECEMBER, 2018.**

**J.N. ONYIEGO**

**JUDGE**



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