

THE UNITED REPUBLIC OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM
ECONOMIC APPLICATION NO. 6 OF 2023
(Originating from the Economic Case No. 21 of 2021 at High Court CECD-
Dar es Salaam)

DIRECTOR OF PUBLIC PROSECUTIONS

Versus

ABRAHAM ELIMRINGI MACHA

R U L I N G

02.06.2023 & 04.08.2023

G.N. ISAYA, J.:

There is an application before this Court pursuant to section 49A (1) of the Drugs Control and Enforcement Act, (the DCEA), [Cap 95 R.E 2019] in which the applicant is seeking orders that this Court be pleased to confiscate a motor vehicle with registration No. T 202 DNS Toyota IST to the Government of the United Republic of Tanzania and any other orders the court may deem fit to grant. The application is supported by an affidavit sworn by Ms. Laura Kimaro a State Attorney. The respondent lodged the counter affidavit sworn by the respondent himself Abraham Elimring Macha whereby he strongly resisted the application at hand.

The arguments were made by way of written submissions, and both parties adhered to the scheduled order for submissions. The applicant was

represented by Ms. Gloria Eliachim Simpasa, State Attorney while the respondent enjoyed the service of Mr. Tumaini Mgonja, Advocate.

Basically, the Applicant in her submission is asking the court to issue an order of confiscation of the Motor vehicle in question No. T 202 DNS Toyota IST because it was an instrumentality of crime subject to **the Economic case No. 21 of 2021, Republic versus Bakari Ramadhani and Eustice Helbert**. She submitted that the first and the second accused persons were charged with the offence of Trafficking in narcotic drugs and the said motor vehicle was tendered before the court and admitted as Exhibit P6. The applicant went on to state that after the completion of the said trial, both accused persons were found not guilty and acquitted of the offence, hence the application at hand. She supported her argument by citing section 49A (1) of the DCEA and the case of **Director of Public Prosecutions versus Julieth Simon Peleka** (The Administratrix of the Estate of the late Gebu Ichoma Sayi), Criminal Appeal No. 94 of 2019, CAT (Unreported)

The applicant further stated that the judgment of the said Economic case No. 21 of 2021 was delivered on June 2022 and the said motor vehicle remained at the court premises to the time of filing this application. She attacked the defence raised in the counter affidavit by the respondent

that he was not aware of the case and whereabouts of his property for more than a year to be rather absurd and an act of irresponsible on his part.

On the other hand, the respondent through his Advocate Tumaini Mgonja, prayed to adopt the contents of the respondent's counter-affidavit and further submitted that the respondent being the owner of the motor vehicle made follow-up of the motor vehicle through the office of deputy registrar of this court and the office of NPS at Pwani. He went on to state that the respondent never allowed the motor vehicle in question to be used in crime. That the respondent after buying the said motor vehicle from one Andrew Kakwaya Manda on 1st July 2019, he entered into a contract with one Eustice Helbert, the second accused in the case of **Bakari Ramadhani** (Supra). He contended that he had no knowledge of the involvement of the said vehicle in other dealings other than the intended one. He submitted that he is an innocent owner. To substantiate his argument, he referred this court to the case of **The Attorney General versus Mugesli Anthony and Two Others**, Criminal Appeal No. 220 of 2011, CAT (Unreported).

He went on to submit that the motor vehicle in question is neither tainted property nor an instrumentality in the commission of the offence

since the property was not intended to be used by the respondent in the commission of offence rather it is incidental to the commission of offence. He tasked the applicant to be bound to disprove this fact. He submitted further that the applicant failed to connect the vehicle in question as the instrumentality of offence that led to the trial Judge in the case of **Bakari Ramadhani** (Supra) making no order regarding the vehicle in question. The Learned Advocate for respondent cited the cases of **Muges Anthony** (Supra); **The Director of Public Prosecution versus Francise Izayas Makaka @ Francis and Another**, criminal Application No 84 of 2020 (Unreported) and sections 3 (1) and 43 (3) of **the Proceeds of Crime Act**, [Cap 256 R.E 2019] (POCA)

Having considered the submissions for and against the application, I really find three issues for determination; **firstly**, whether the motor vehicle T 202 DNS Toyota IST is the instrumentality of crime; **secondly**, whether the respondent is the owner of the motor vehicle subject matter of application; **thirdly**, whether the motor vehicle T 202 DNS Toyota IST can be confiscated.

Starting with the first issue, it is common knowledge that the application at hand comes into play upon completion of **the Economic case No. 21 of 2021, Republic versus Bakari Ramadhani and**

Eustice Helbert; whereby the two were acquitted by this court via the decision of the said case as they were alleged to have been arrested while trafficking in narcotic drugs namely cannabis sativa weighing 86.36 kilograms. Again, I wish to find and make my observation that, though the respondent has defended that the vehicle in question is not a tainted property, I think the same should not be newsworthy in this matter because the applicant's reason in the application and affidavit is that the same was used as an instrumentality in the commission of the crime. As rightly defined under section 3 (1) (a) and (b) of the POCA, tainted property means any property that has been used in or in connection with the commission of a serious offence or that constitutes proceeds of a serious offence. It is again true that POCA covers both types of properties, namely, proceeds and instrumentalities. But in our case, Motor Vehicle No. T 202 DNS make Toyota, IST has been alleged by the Applicant to be an instrumentality. The case of Bakari Ramadhani echoes the same theme. Further, the enabling provision cited section 49A (1) of the DCEA has the aspect of instrumentality rather than aspect of tainted property.

In any way, the aspect of a tainted property becomes not a deal in this matter or something uncalled for and irrelevant under the circumstance since is too general. The Black's Law Dictionary, 9th Edition,

defines the word instrumentality to mean "a thing used to achieve an end or purpose..." In other words, it is a means through which one is able to execute or carry out his intended activity. The applicant has asserted that the vehicle in question ought to be confiscated because it is an instrumentality of crime. The respondent, through his counter affidavit and submission has vigorously resisted that the same is not an instrumentality property since it was not intended to be used by the respondent in the commission of offence rather it is incidental to the commission of offence. The provision of section 49A (1) of the **Drugs Control and Enforcement Act**, (the DCEA), [Cap 95 R.E 2019]

'Where the accused is convicted, acquitted, or discharged of offences under Part III, the court shall order confiscation of any article seized or property used for purposes of committing or facilitating the commission of the offence or otherwise involved in the commission of the offence.'

The import of the above provision is that in drug cases confiscation or forfeiture order does not depend upon conviction of the accused person. The court can order confiscation even if the accused is acquitted. The present application involves drug-related case; therefore, the aforesaid orders can be obtained even when the accused was acquitted. In this regard, there is no dispute that Toyota IST with registration number T 202 was used in or in connection with the commission of offence

which led to this application. The mere fact that the accused persons in the said case were acquitted does not mean that the offence was not committed. At the moment the court rules that the accused persons had a case to answer it implied that the offence was committed. Yes, there can be faults in proving the case to the required standard but the same cannot negate the fact that the offence was committed and the vehicle in question was an instrumentality in the commission of the offence. Since there is no dispute that the said vehicle was used in the commission of the crime, it is my considered view that the motor Vehicle in question is the instrumentality of crime.

Coming to the second issue, it is the argument of the respondent that he is the owner of the motor vehicle in question that he bought on 1st July 2019 through the contract of sale between him and one Andrew Kakwaya Manda. To prove this, he attached copies of the motor vehicle registration card and sale agreement "contract" on the respondent's counter affidavit. In determining the second issue, I have it in my mind that all agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. {**See** section 10 of the Law of Contract Act, Cap. 345 R.E. 2019 (the LCA)}.

However, in a very careful and close glance at the two documents, one will realize one or two shortcomings; firstly, the authenticity of the aforesaid two documents is questionable since they are not original or at least certified copies. Secondly, they were not witnessed by a third competent person, and thirdly, both lack stamp duty from the Tanzania Revenue Authority. But again, from 01st July 2019 up to 24th June 2020 is a period of almost twelve months of the existence of documents. why the respondent did not give effect on the transfer of the said motor vehicle since then? There is a lot to be desired in this situation. Should again observe and find that the cited case of **Mugesi Anthony** (Supra) is distinguishable as the same ownership was not tainted with doubts.

It is common knowledge that, ownership of a motor vehicle can be proved by title in this context, the car registration card. Apart from the card, one who intends to prove without title documents are receipt from when and where you purchased the said motor vehicle, an affidavit of repossession, and a legally executed and duly attested contract of sale. All these are not available in this matter and the one which is available is an uncertified copy of a car registration card with the name of Andrew Makwaya Manda. Sincerely, I am not inclined to agree with the

respondent that he is the owner of the vehicle. This issue ought to be answered negatively, and I so do.

Now reverting to the third issue, the motor vehicle in question being an instrumentality of crime, in suo moto, the court could proceed to make an order for confiscation only if the accused persons in the case of **Bakari Ramadhani** (Supra) were the owners. Section 49 A (2) and (3) of the DCEA provide for that;

(2) Where the accused is not the owner of the article or property that is liable for confiscation and the owner's whereabouts are not known or cannot be found the confiscation order shall not be issued unless the conditions in subsection (3) are satisfied.

(3) An order for confiscation of an article or property shall not be made until- (a) a thirty days' notice of intention to confiscate the property has been issued; and (b) the notice has expired without the owner entering appearance.

As rightly answered in the second issue above, the respondent herein is not the owner of the motor vehicle in question, and the motor vehicle in question being an instrument of crime is liable to be confiscated. However, the law above provides how to go about with the Exhibit in which owners were nowhere to be found. Unfortunately, it does not provide for how to go about if the purported owner fails to furnish the

proof of ownership to the court or where there are fraudulent actions on the part of the purported owner. That being the case the benefit of the doubt shall be given to the applicant, thus the requirements under section 49A (2) and (3) of the DCEA will dispense with having regard that the main case (Bakari Ramadhani (Supra) was completed a year ago, and the application at hand has been filed more than 50 days ago.

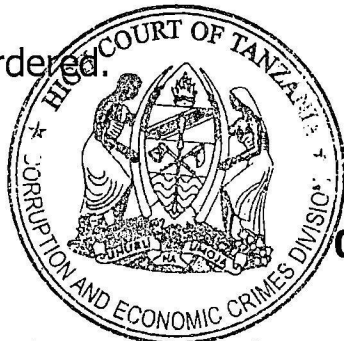
Before concluding the issue at hand, assuming that the respondent herein is the owner of the motor vehicle in question, the document relied upon by the respondent in proving that he handed over the vehicle to the second accused person for business purposes is very doubtful because apart from the failure to be witnessed by the third party, the same is uncertified copy and without stamp duty. Indeed, the same becomes unreliable. On the circumstances above the whole weight of the defence of the innocent owner as rightly referred to in section 43 (3) of the POCA and in the **Muges Anthony** (Supra) lacks legs to stand and ought to fail.

Also, there is the argument by the applicant that the respondent is irresponsible of his property since the case of Bakari Ramadhani (supra) was completed a year ago and the respondent did not make any effort to know the whereabouts of his property. On the other hand, the respondent stated that he made follow-ups with a Deputy Registrar and the State Attorney In charge of Coastal Region (Pwani) since October 2022. I think

this issue should not waste much of our time since there is no tangible evidence that substantiates the argument of the respondent on this. If the respondent wished to substantiate or reinforce his point, he could have filed affidavits of the said officers to the effect. This court is in agreement with the argument of the applicant that the motor vehicle in question was abandoned for such a long time without any effort made to retrieve possession of it. Having said that it is my considered view that, the third issue is answered affirmatively.

Consequently, the motor vehicle with registration number T 202 DNS Toyota IST is hereby confiscated to the United Republic of Tanzania.

It is so ordered.



**G.N ISAYA
JUDGE
04/08/2023**

Court: Ruling delivered in open court this 04th August, 2023 in the presence of Glory Simpasa, State Attorney who represent the Applicant and Mr. Mbwana Advocate for respondent, Ms Saida B/ Clerk and Hon. Chikawe JLA.



**G.N ISAYA
JUDGE
04/08/2023**