

**IN THE HIGH COURT FOR ZAMBIA
AT THE CRIMINAL REGISTRY
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

HPR/05/2014

BETWEEN:

MUHAMED ABUBAKAR PATEL

AND

THE PEOPLE

YUSUF VALLI AKUBAT & 14 OTHERS

**SIAKAMWI CHIKUBA AND
FELIX CHISAMBO as Joint Liquidators
of ARMCOR SECURITY LIMITED (In
Liquidation)**



APPELLANT

RESPONDENT

CLAIMANTS

INTERESTED PARTY

**Before The Honourable Mr. Justice I. C. T. Chali in Chambers at
Lusaka, the 23rd day of December, 2014.**

For the Appellant:	Mr. Linyama of Messrs. Eric Silwamba, Jalasi & Linyama Legal Practitioners
For the Respondent:	Mrs. C. L. Phiri, Ag Chief State Advocate
For the Claimants:	Mr. N. Makayi of Messrs. N. Makayi & Co.
For the Interested Party:	Mr. M. Katolo of Messrs. Milner Katolo & Associates

R U L I N G

Cases referred to:

1. *Commissioner Customs Uganda Revenue Authority v. Kayumba Emile Ogane (Civil Application No. 62 of 2014).*

2. *Kirpal Singh & Another v. Republic (Criminal Appeal No. 237 of 2002).*

Statutes referred to:

1. *Criminal Procedure Code, Chapter 88 of the Laws of Zambia.*

On 26th June 2014 the Appellant filed into Court summons for an order for attachment of property pending appeal. The application was made pursuant to Section 355 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia. It was supported by an affidavit sworn by the Appellant in which he gave the facts leading to and the reasons for the application.

The Appellant was arrested and charged with 77 counts of the offences of theft by Director, contrary to Section 279 of the Penal Code, Chapter 87 of the Laws of Zambia. After trial before the Chief Resident Magistrate, the Appellant was on 20th June 2014 acquitted of three of those counts and was found guilty and convicted of the other 74 charges and was ordered to undergo a custodial sentence of 28 months with hard labour. The trial Court also ordered that the 20 motor vehicles which were tendered as exhibits during the trial be released to the Complainant. And soon thereafter the motor vehicles were released to the Police. However, the Appellant, being dissatisfied with the judgment of the lower court, filed notice of appeal against the said judgment. And fearing that the motor vehicles may be hastily disposed of before the determination of his appeal, applied before this Court for their preservation. He deposed that the disposal of the motor vehicles before the appeal is heard is likely

to prejudice him in the prosecution of his appeal and might partially render that appeal nugatory. He said there are third party beneficiaries of the motor vehicles who will also be prejudiced. On the other hand, he said the State will not be prejudiced if the said exhibits are preserved.

The state filed an affidavit in purported opposition to the application. However, on a reading of that affidavit which was sworn by Mr. Simon Tembo, a State Advocate, it appeared to me that the State supports the application for the preservation of the property. I shall return to the State's position in the matter later in this ruling.

After hearing Counsel for the Appellant and for the State on 18th July 2014, and while awaiting my ruling thereon which was scheduled for 30th July 2014, the Claimants filed an application on 28th July 2014 to be joined to the proceedings and for an order for the release of those motor vehicles to themselves. Further, on 29th July 2014, the Interested Party also applied to join the proceedings and to arrest the ruling that had been scheduled for the following day and for an order for the restitution of those motor vehicles to it.

The applications by the Claimants was supported by an affidavit sworn by Mr. Yusuf Valli Akubat filed on 28th July 2014. Apart from claiming absolute ownership of one of the motor vehicles, and producing proof of ownership by way of a registration certificate in his name, he also stated that another eleven motor vehicles belonged to eleven different persons.

He also produced registration certificates showing that those vehicles belonged to other persons as absolute owners also. He stated that all the Claimants bought the motor vehicles from the Interested Party and paid for them in full. The total number of vehicles in this category were twelve.

Mr. Akubat further listed another four Claimants who had purchased the remaining eight motor vehicles from the Interested Party and fully paid for them. However, he said, as a result of the commencement of the criminal proceedings against the Appellant, seizure notices were issued in respect of those vehicles also before change of ownership could be effected by the Interested Party in favour of the purchasers.

He said that during the investigation of the cases against the Appellant, the investigating officers had informed the Claimants that the matter being investigated related to misappropriation of company funds and that the motor vehicles were merely required to be produced as evidence as they were not the subject of any criminal investigations. And resulting from those investigations seizure notices were issued for some of the vehicles and served on the affected Claimants, thereby allowing the Police to secure the motor vehicles as exhibits in the case against the Appellant, who was a Director in the Interested Party, who was alleged to have stolen the money paid by the Claimants to the Interested Party for the purchase of their respected motor vehicles.

Mr. Akubat exhibited the charge sheet in the Appellant's case in the Court below which contains the 77 counts, all of which show the offence of theft by Director. He said that the Claimants were called in turns to give testimony with respect to the purchase of the said vehicles and proceeded to identify the exhibits which were then produced to form part of the proceedings. He said the judgment of the lower Court which found the Appellant guilty of the majority of the counts did not make any pronouncement of the illegality of the Claimants' ownership of those motor vehicles but related to the allegations of stolen funds for which the Appellant was charged.

He further deposed that the learned trial Magistrate's order for the release of the motor vehicles to the Interested Party as complainant in the case was made on the Court's own motion devoid of any application by the prosecution or defence and in total disregard of the Claimants' interests in the exhibits. However, soon after the said order, the Police hastily released the motor vehicles to the Interested Party which parked them at some secret location until they were retrieved and parked at this Court's premises following my order dated 26th June 2014 which was made *ex parte* on application by the Appellant.

Finally, Mr. Akubat deposed that since the motor vehicles did not form part of the offences for which the Appellant was charged and were only used as exhibits to enable the State prove its case of theft of funds, then the motor vehicles ought to be disposed of by this Court by releasing them to each of the Claimants upon proof of interest and/or ownership.

In reply to some statement in the affidavit in support of the claim by the Interested Party, Mr. Akubat in his affidavit in reply filed into Court on 25th August 2014 reiterated that the motor vehicles in issue were sold to the Claimants and most of them were and are still registered in the names of the Claimants. He said the conviction of the Appellant was not in connection with the Interested Party being deprived of any motor vehicle but was solely in connection with the theft of funds belonging to it.

Mr. Akubat also referred the Court to an action between the Appellant and the Interested Party, under Cause No. 2011/HP/02 in which the Interested Party has counterclaimed the sum of K5,363,915-50 from the Appellant being the total value of 21 vehicles the Appellant allegedly sold to various persons. 20 of the said vehicles are the same ones which are the subject of the applications before this Court. In respect of the counter claim under Cause No. 2011/HP/02, the Interested Party pleaded thus:

“The (Appellant) did on divers dates purchase vehicles from Toyota (Zambia) Ltd using the (Interested Party’s) monies which vehicles he later sold without authority to individuals, received monies and did not remit the funds to the (Interested Party.....)”

The Interested Party in that counterclaim listed those vehicles, 20 of which are exactly those which are the subject of the applications before me. In that action, Mr. Akubat said, the Interested Party has not claimed ownership of the motor vehicles in issue here but is claiming the refund of money allegedly misappropriated by the Appellant and belonging to the Interested Party which was used to purchase the vehicles. He said the Claimants were not privy to the internal management systems and relationship of the Interested Party and the Appellant at the time the Claimants purchased the vehicles. Therefore, he said, the Claimants are bona fide purchasers of their vehicles. He also reiterated that the vehicles were seized by the Police from the Claimants and not from the Appellant and not as property that the Appellant stole from the Interested Party.

The position of the Interested Party as expounded in the two affidavits in support of its claim filed on 29th July and 25th August 2014, sworn by Mr. Gray Wadey its Chief Executive Officer is that it is the bona fide owner of the 20 motor vehicles in issue in this case, having paid for them at Toyota Zambia. He exhibited tax invoices from the said supplier as well as payment vouchers generated by his company. He deposed that the company had earlier obtained a loan from a Commercial Bank to finance the purchase and acquisition of the motor vehicles and it has an obligation to liquidated that loan together with interest. He said that for

the past three years, his company has been deprived of the use of those vehicles, a situation which has adversely affected the operations of the company whereby it has had to lay off 500 employees and that there are prospects of laying off another 1,000 or more employees out of a 6,000 strong work force if the situation does not improve with the restoration to it of the motor vehicles in issue. He said that his company stands to suffer more prejudice if the vehicles are not released to it than would be suffered by the Appellant, who has not even claimed ownership of the vehicles.

In his second affidavit, Mr. Wadey went to great lengths in questioning how the Claimants acquired the vehicles. He even alleged fraud against some of the Claimants. He said that none of them dealt with his company and none of them paid any money to the company and demanded that the Claimants produce proof of such payment to the company. He said that it was his belief that the registration certificates exhibited to the affidavit of Mr. Akubat were fraudulently procured because there was no resolution by the Board of the company authorising the sale of any motor vehicle to any of the Claimants. He said that at the trial of the Appellant on the criminal charges in the Court below, the Claimants had testified that they had dealt with the Appellant and that they had paid cash to him directly and not to the company. He deposed that the order to release the vehicles to the company, which was made on the Court's own motion, demonstrated that the Court below had made a determination on the true owner of the

vehicles as being the Company and not the Claimants. In the circumstances, Mr. Wadey said, the Claimants ought to direct their claims against the Appellant. Lastly, Mr. Wadey deposed that he believed that the Claimants' application is being advanced by the Appellant who appears to have an interest in three of the said vehicles.

Before the hearing of the submissions by Counsel on the applications, it came to light that the Interested Party had been placed under liquidation in October 2014 by this Court at the instance of some creditors under Section 272(1) (c) of the Companies Act, Chapter 388 of the Laws of Zambia, namely, that the company is unable to pay its debts. At the request of Mr. Katolo, Counsel for the Interested Party prior to the commencement of the liquidation process, I granted an adjournment to enable him obtain instructions from the Liquidators on the applications before me. On resumption of the hearing of Counsel's submissions, Mr. Katolo informed the Court that he had been duly instructed by the Joint Liquidators to proceed with the matter and to join them to the proceedings, which application was granted, there being no objection from the other parties.

In support of his client's case, Mr. Linyama submitted that the motor vehicles, which were exhibits in the Appellant's case in the Court below, form part of the record of appeal and the Appellant may wish to refer to

them at the hearing of his appeal. On the need to preserve the exhibits, Counsel cited in aid of his submission the Ugandan Court of Appeal case of COMMISSIONER CUSTOMS UGANDA REVENUE AUTHORITY v. KAYUMBA EMILE OGANE (Civil Application No. 62 of 2014) in which that Court considered whether or not to grant an application to stay execution of a lower Court's Order for the release of a consignment of ivory to the Respondent pending an appeal by the Revenue Authority against the lower Court's decision. The Court of Appeal found that there existed special circumstances for grant of stay of execution in that case because the subject matter, the consignment of ivory, was said to have been impounded while in transit. And if released to the Respondent in compliance with the lower Court's order, it would render the appeal nugatory as the ivory was likely to be moved outside the jurisdiction of the Courts. The Court of Appeal also considered that the same consignment was the subject of criminal proceedings before another division of the lower Court where the ivory would be required as an exhibit. If a stay were not granted those criminal proceedings would be jeopardised because the exhibits would be removed from the jurisdiction of that Court. The Court of Appeal accordingly granted a stay.

Mr. Linyama further argued that whereas in the affidavits of Mr. Akubat the Claimants appear to support the principle of preservation of the exhibits, the application by the Interested Party is bent on restitution of the property to itself. Further, he submitted, in the light of the recent

development whereby the Interested Party is under liquidation, it would mean the motor vehicles being sold by the Liquidators in the winding-up process. That would deprive both the Appellant and Claimants their respective claims to access the exhibits on appeal and to ownership thereof.

In her submission on behalf of the State, Ms. Phiri supported the idea of preservation of the motor vehicles pending appeal.

I cannot therefore accept Mr. Tembo's affidavit as one in opposition to the Appellant's application. That is why Mr. Linyama even expressed his indebtedness to the State for the position they had taken in the matter.

As for Mr. Makayi, Counsel for the Claimants, he was in agreement with the submission of Mr. Linyama and of the State for the preservation of the property, except to emphasise that these be released to the Claimants pending appeal.

On behalf of the Interested Party, Mr. Katolo submitted for his Client's case for restitution of the motor vehicles as true owner thereof based on the documentary evidence exhibited to the affidavits of Mr. Wadey. Those documents, he said, do not show that any of the Claimants or Appellant bought their vehicles from Toyota Zambia. He said Section 355(3) does not make any reference to preservation of the exhibits. He submitted that that Section spoke of restitution and that in the circumstances of this case, it is only just and equitable that the vehicles should be restored to the Interested Party. In support of his client's

application, Mr. Katolo cited the decision of the Kenyan High Court in the case of KIRPAL SINGH & ANOTHER v. REPUBLIC (Criminal Appeal No. 237 of 2002). In that case, an application was made by a person who was not a party to criminal proceedings to have an exhibit in those proceedings to be released to him as the owner of it. That Court was considering legal provisions similar to our Section 355(3) which I shall refer to more fully later in this ruling. That Court found that **“as regards locus standi, in normal criminal cases, there are only two parties to the case, i.e. the accused and the prosecution represented by the State. It is only these two parties who can file an appeal to the High Court if they are aggrieved by a decision of a Subordinate Court..... There is however an exception to this general rule which is provided for by Section 177(a) of the Criminal Procedure Code which grants jurisdiction to a Court which heard a criminal case to make an order of restitution of the property which was the subject matter of the Criminal Case to a person who it appears to the Court to be entitled to the said property. Such a person may not necessarily be an accused person or the State. It could be the complainant or a witness in the criminal case or a different person altogether.”**

In the KIRPAL SINGH case the Subordinate Court considered the exhibits that were produced by the witness and reached a determination that the

exhibit in issue in the application belonged to the Complainant, the applicant. The Applicant in that case had produced documentary evidence that the exhibit belonged to him as the one who had imported it and had been using it for a long time. In his ruling upholding the lower Court's decision in that case the Hon. Kimaru, J said:

“It would be the height of injustice if the applicant is prevented from taking possession of a property which he has established to be his pending an appeal which the appellant in this case appears not to be anxious to have it heard and determined.”

As Mr. Linyama said in reply to Mr. Katolo's submission, the KIRPAL SINGH case is distinguishable from the present in the sense that the Appellant in the case before me cannot be said to be taking too long to prosecute his appeal and in that way to be prejudicing other persons in their claims to the motor vehicles.

I have considered the submissions by Counsel for the parties and have taken them into account when arriving at my decision.

The starting point appears to be the legal provision on how exhibits are to be treated after a trial in a criminal matter. In this regard, I think the applicable legal provision is to be found in Section 355 (3) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia, the relevant part of which reads thus:

“355 (3)..... the Court may, if it is satisfied that it would be just and equitable so to do, order that anything tendered or put in evidence in criminal proceedings before it should be returned at any stage of the proceedings or at any time after the final disposal of such proceedings to the person who appears to be entitled thereto, subject to such conditions as the Court may see fit to impose.”

It is clear that in principle the learned trial Magistrate had the power to make an order for the disposal of the motor vehicles. However, he does not appear to have considered the needs or interests of other parties apart from those of the prosecution who appeared to favour the Interested Party. It will be recalled that the learned trial Magistrate is said to have made the order of disposal on his own motion without any application and without hearing any person interested therein. He could not therefore have fairly determined the person who appeared to be entitled thereto. On that account that order is therefore set aside.

The Appellant's application, although brought pursuant to Section 355 of the Criminal Procedure Code, is for the preservation of the motor vehicles so that they may be used in his appeal. He claims that the vehicles will be required to be examined on appeal. However, he does not appear to be supported by the evidence before me. The charges alleged theft of cash in the form of United States Dollars and not of motor vehicles.

Further, in his grounds of appeal attached to his affidavit, the Appellant does not disclose how the motor vehicles could possibly be used to prop his appeal or how they could possibly be used to support his defence to the charges he was facing. In other words, the Appellant has not demonstrated what prejudice he could possibly suffer if the motor vehicles are not preserved pending his appeal.

On the other hand it has been shown in the affidavit evidence of Mr. Wadey that the Appellant is among the Claimants because of the Appellant's apparent interest in three of those vehicles. However, the vehicles pointed to by Mr. Wadey are linked to other Claimants in the affidavit of Mr. Akubat.

So that on the face of all the evidence before me, the Appellant does not appear to have any interest in the motor vehicles, the subject of the applications before me. Neither do I find any basis to support his claim that they may be required during the hearing of his appeal. His application cannot therefore be sustained on that ground alone. I shall however, return to his worries in due course.

As for the Interested Party's claim to the motor vehicles, Mr. Wadey exhibited several invoices from Toyota Zambia as well as payment vouchers showing amounts his company was paying for the motor vehicles in issue. However, virtually all those documents do not negative the claim to ownership by the Claimants based on the registration certificates and other documents in their possession. Whether or not the

Appellant pocketed the money paid by the Claimants for the motor vehicles is not the issue before me. The question is about who has demonstrated that he/it appears to be entitled to the motor vehicles. As the Claimants have rightly pointed out, they were not privy to the internal arrangements in the Company as to the proper procedures to be followed when buying motor vehicle from the Company, or how the purchase money was applied. The Interested Party's interests appear to lie in the cash alleged to have been stolen by the Appellant.

My opinion in this regard is reinforced by the Interested Party's counter claim against the Appellant in Cause No. 2011/HP/02 which I have already referred to in this ruling. Again, as the Claimants have rightly contended, the Interested Party did not counter claim ownership or restitution of the motor vehicles in that action; nor did it complain of theft or conversion of the vehicles. There is the further anxiety by both the Appellant and the Claimants that in the light of the Interested Party now being in liquidation, there is a real danger that the motor vehicles would be disposed of to their detriment. I entirely agree with that argument. The application by the Interested Party is therefore dismissed.

On the totality of the evidence before me, I am satisfied that the Claimants have sufficiently proved their respective interests in the 20 motor vehicles the subject of their application. The application by the Claimants is therefore granted.

R17

I order that the motor vehicles be released to the Claimants as tabulated under paragraphs 4, 5 and 9 of the affidavit of Mr. Akubat filed into court on 28th July 2014 forthwith. However, in order to address the Appellant's worries, and in particular his perceived need to use the vehicles at his appeal, I order that the Claimants shall not dispose of the said motor vehicles in any manner whatsoever until the final determination of the Appellant's appeal.

Leave to appeal is granted.

Delivered in Chambers, the 23rd day of December, 2014.


I. C. T. Chali
JUDGE