



REPUBLIC OF KENYA



**Watu Credit Limited v Republic (Through ODPP Rumuruti) (Criminal
Revision E011 of 2023) [2024] KEHC 10452 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL REVISION E011 OF 2023
AK NDUNG’U, J
AUGUST 21, 2024**

BETWEEN

WATU CREDIT LIMITED APPLICANT

AND

REPUBLIC (THROUGH ODPP RUMURUTI) RESPONDENT

RULING

1. This ruling revolves the Notice of Motion dated 27th September, 2023 and brought under Article 165(6) and (7) of the [Constitution of Kenya](#), 2010, Section 352, 364 and 389A of the [Criminal Procedure Code](#) seeking the following orders-
 - i. Spent.
 - ii. Spent.
 - iii. That this Honourable Court be pleased to call for and examine the record of the trial court in Rumuruti Principal Magistrate’s Court Criminal Case No.E105 of 2022 – *Republic v Peter Kimani Karanja* for purposes of satisfying itself as to the correctness, legality and/or propriety of the order of forfeiture of motorcycle registration number KMFY 402K made on 4th January, 2023 and as to the regularity of the proceedings culminating in the said order.
 - iv. That the order of forfeiture of motorcycle registration number KMFY 402K made on 4th January, 2023 in Rumuruti Principal Magistrate’s Court Criminal Case No.E105/22 – *Republic v Peter Kimani Karanja* be reversed.
 - v. That the Honourable Court be pleased to order that motorcycle registration number KMFY 402K be released to the Applicant.
 - vi. That the Honourable Court do make any other or further order it deems fit to grant in the interest of justice.



- vii. That costs of the application be awarded to the Applicant.
2. The application is premised on the grounds on the face of the application and the annexed affidavit sworn by Paul Kekuda. In a nutshell, the Applicant's case is that through its agent, Watu Nominees Company Ltd the Applicant owns motorcycle registration number KMFY 402K "the subject motorcycle". His interest in the subject motorcycle is that it was accrued by virtue of a loan agreement between the Applicant and one John Ndirangu Karanja wherein the applicant fully purchased the subject motor cycle for the said person in exchange for settlement of the purchase price (loan) with interest on the agreed terms.
 3. It is the Applicant's averment that the court presiding over Rumuruti Principal Magistrate's Court Criminal Case Noo.E105/22 – *Republic v Peter Kimani Karanja*, upon convicting and sentencing the Accused Person therein, heard from John Ndirangu Karanja before the intended forfeiture. The said John Ndirangu Karanja testified that he was the beneficial owner of the subject motorcycle and that he had allowed the Accused Person to use the motor cycle to ferry charcoal. With that information, the trial court ordered the forfeiture of the subject motorcycle and it is that order that the Applicant is challenging here.
 4. The application was opposed by the Respondent's counsel, who filed grounds of opposition filed in court on 31st October, 2023. The Respondent's position is that the Applicant's application does not meet the legal requisite threshold for the grant of the orders sought since the Learned Magistrate followed all the required procedures before ordering for the forfeiture of the motorcycle to the Kenya Forest Service. Further the provisions of section 364(5) of the [Criminal Procedure Code](#) bars the Applicant from filing this revision application.
 5. The application was canvassed by way of written submissions. In his submission, the Applicant submitted that his interest in the subject motor cycle accrues by virtue of a loan agreement between the Applicant and one John Ndirangu Karanja wherein the Applicant fully purchased the subject motorcycle for him in exchange for settlement of the purchase price with interest on the agreed terms. He further raised the following issues for determination by this court -
 - i. Whether the application is properly before the court.
 - ii. Whether the Applicant has made out a case for revision of the order of forfeiture of the subject motorcycle.
 6. The Respondent's Counsel submitted that the application does not meet the threshold for revision under section 362 of the [Criminal Procedure Code](#). The counsel further submitted that the Accused was charged and convicted on his own plea of guilt for the offence of Movement of Charcoal without Authority Contrary to Section 14(10) as read with Rule 14(6) and 20 of the Forest charcoal Rules 2009 and Section 64(2) of the [Forest Conservation and Management Act](#) of 2006. The [Act](#) provides at section 68(1c) that the court may order the forfeiture of any vessels, vehicles, tools or implements used in the commission of the offence to be forfeited to the service
 7. On whether the order of forfeiture was proper or correct, the counsel for the Respondent submitted that the trial court invoked section 38A of the [Criminal Procedure Code](#) and issued a notice to the person (John Ndirangu Karanja) believed to be the owner of the motorcycle before forfeiting it to the Kenya Forest Services. It is submitted that the said John Ndirangu did not demonstrate that he made any efforts to establish whether the charcoal was being transported legally or illegally and therefore cannot be excused from the omission



8. Counsel further submitted that while addressing a similar application in *Letiyia Ole Maine v. Republic* (2021)eKLR, Gikonyo J declined to reverse forfeiture orders when it was shown that the procedure in issuing a Show Cause Letter had been followed and urges the court to persuasively consider the courts persuasively consider the court’s sentiments in the said case in addition Respondent’s Counsel noted that in *Parliamentary Service Commission V. Martin Nyaga Wambora & Another* (2018) eKLR, the Supreme Court of Kenya (Maraga, Mwilu, Ibrahim, Ojwang & Ndungu – Supreme Court Justices) enunciated the principles to guide a higher court in reviewing the exercise of discretion by a Lower Court and noted that it is trite that a Superior Court, when considering an application for revision or challenging a discretion order, ought not to interfere unless it is shown that the discretion was exercised injudiciously.
9. I have carefully considered the application, the supporting affidavit, the grounds of opposition and the applicable law. Of determination is whether the application before court is properly before court as a revision application and if in the affirmative, whether the orders sought are merited.

The jurisdiction of this court to make orders on revision is under Section 362 of the *Criminal Procedure Code* which provides:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

7. The court is supposed to satisfy itself on the correctness, legality or propriety of any finding, sentence or order.
8. The court while exercising that jurisdiction, is not supposed to deal with matters which should otherwise be dealt with on appeal. Section 364(5) of the *Criminal Procedure Code* provides:-

“

“(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

In my considered view the application squarely falls within the ambit of the revisionary powers of this court.

10. In *Letiyia Ole Maine Vs Republic* (2021) eKLR, it was held:-

“According to section 24(f) of the *Penal Code*, forfeiture is one of the punishments that a court may inflict. Of greater significance, is that, forfeiture divests a person’s property without compensation, hence, need to ensure the process leading to forfeiture adheres to the requirements of due process to avert constitutional defences of violation of right to property, right to privacy, right to fair administrative action, and right to fair trial guaranteed in article 40, 31, 47 and 50 of the *Constitution*, respectively. The person who will lose the property must be afforded due process; the person may be a third party or the accused person”.

11. Some of due process protections before forfeiture order is made include notice- replete with essential details and information inter alia on the time and place of, forfeiture proceeding and property to be forfeited- to the person who will be affected by the forfeiture to attend forfeiture hearing and determination. The trial court must conduct an inquiry or hearing for forfeiture. The person who will



be affected by the forfeiture order is allowed to participate in the forfeiture proceedings and tender evidence to show cause why the property should not be forfeited. He may also appear through legal counsel or in person. The trial court then considers all relevant evidence tendered in the trial and the forfeiture proceeding in making its determination.

12. I further associate myself with the finding of Nyakundi J. in the case of [Peter Igiria Nyambura V DPP](#) where he stated;

“The National Police Service and other similar agencies have a right to seize property associated with certain crimes. As the agency takes possession one would expect administrative action be taken to establish ownership. If the appropriate agency has probable cause to apply to the court for forfeiture, the law requires notice to be served to the owner.

The trial court must hold an inquiry where the prosecution must satisfy and demonstrate that the chattel, vessel or motor vehicle ought to be forfeited to the state. It is at that stage the owner is allowed an opportunity to raise a defence to the forfeiture. This procedure in most cases is overlooked by trial magistrates and the consequence of it has been to burden the High Court with review applications.

13. The law on forfeiture is contained in Section 389A of the [Criminal Procedure Code](#) which provides:-

“Where, by or under any written law (other than section 29 of the *Penal Code*), any goods or things may be (but are not obliged to be) forfeited by a court, and that law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the court that the goods or things should be forfeited, it shall cause to be served on the person believed to be their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown; and at that time and place or on any adjournment, the court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things:

14. Provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner (if any) as the court thinks fit.”
15. In the instant case, the court appears to have followed the law since, despite the fact that I have not seen a copy of notice to an owner during the forfeiture proceedings, one John Ndirangu Karanja appeared before court and claimed to be an owner and produced a receipt and a loan form which showed that the motor cycle had been financed by the applicant.
16. In the view of the trial court, he did not demonstrate that he did not know that the vessel was being used for illegal purposes, a fact that is supported by the record, and the court to that extent correctly made an order for forfeiture save for one great omission.
17. Upon receipt of the documents of ownership, it was obvious without a laborious inquiry that, prima facie, the applicant had considerable ownership interest in the vessel. The loan form and guarantee documents were clear testimony of that interest.
18. Thus the legal procedural step that the court ought to have taken was to issue a notice to the applicant to appear in forfeiture proceedings and show cause why forfeiture should not be ordered.
19. No such notice was issued leaving the applicant heavily prejudiced by the forfeiture order issued.



20. In view of the above, the forfeiture proceedings in the trial court were vitiated by procedural flaws leading to an illegal order. This court has therefore been rightfully called upon to remedy this illegality through a review of the orders made.
21. The upshot is that the application before court has merit and succeeds. I allow the same, quash the order of forfeiture therein and order that the motor cycle registration no. KMFY 402K be released to the applicant forthwith.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF AUGUST 2024

A.K. NDUNG’U

JUDGE

