



**Multi Energy Limited v Wango & 2 others (Criminal Miscellaneous Application E055 of 2022) [2023] KEHC 195 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL MISCELLANEOUS APPLICATION E055 OF 2022**

**JN KAMAU, J  
JANUARY 23, 2023**

**BETWEEN**

**MULTI ENERGY LIMITED ..... APPLICANT**

**AND**

**JEREMIAH NJAU WANGO ..... 1<sup>ST</sup> RESPONDENT**

**IAN LIVANDA NZIRA ..... 2<sup>ND</sup> RESPONDENT**

**OCS AWASI POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. In its Notice of Motion dated May 5, 2022 and filed on May 6, 2022, the applicant herein sought for orders that the court do stay and revoke the order by Hon R K Sang (PM) that was made on April 21, 2022 releasing motor vehicle registration number KCM 269 A (hereinafter referred to as “the subject motor vehicle”) and cylinders which were under the custody of the 3<sup>rd</sup> respondent herein.
2. Stanley Oduor Okati, the applicant’s managing director swore an Affidavit in support of the said application on May 5, 2022. The applicant averred that on March 11, 2021, it received communication from the 3<sup>rd</sup> respondent requesting it to identify some cylinders bearing its trade name ‘Mengas’ that had been found with some suspects.
3. It confirmed that the cylinders belonged to it but had been illegally refilled by someone else and being passed off as its cylinders hence it recorded a statement with the 3<sup>rd</sup> respondent as a complainant and witness in the case. It added that at the time, the 2<sup>nd</sup> respondent had been arrested and released on police bond to appear in Nyando Law Court to take plea on March 19, 2022 which he failed to do. It pointed out that warrants of arrest were issued against the 2<sup>nd</sup> defendant and that the same still remained in force as his whereabouts remained unknown.



4. It was its contention that it had just learned of order by the trial court after being notified of the same by the 3<sup>rd</sup> respondent herein. It was apprehensive that in the event the aforesaid exhibits were released, its application would be rendered nugatory and weaken the prosecution's case. It was its averment that the trial court failed to consider the circumstances at hand prior to directing their release. It therefore urged this court to revise the ruling that was made by the learned trial magistrate.
5. In opposition to the said application, on May 23, 2022, the 1<sup>st</sup> respondent swore a Replying Affidavit. The same was filed on May 24, 2022.
6. He said that the averments that were contained in the applicant's Supporting Affidavit were in conflict with facts contained in the Replying Affidavit that was sworn by the applicant's operations manager on February 16, 2016 (sic). He added that the charges relating to Criminal Case no E239 of 2021 were withdrawn by the prosecution on February 22, 2022.
7. He stated that upon withdrawal of the said charges, he applied for release of the subject motor vehicle in Criminal Misc Application no E006 of 2022 as his subject motor vehicle, which was his tool of trade, had continued to waste away at Awasi Police Station to his detriment having been impounded on March 11, 2021.
8. He stated that the prosecution filed a Replying Affidavit dated February 22, 2022 that was sworn by George Obonyo, the investigating officer. He pointed out that when the application came up for hearing, the applicant's operations manager, Abdi Khalid Warsame filed and served a Replying Affidavit dated February 16, 2022 without leave of the court and despite his advocate's having protested, the trial court allowed the applicant to participate in the proceedings.
9. He pointed out that on various dates, some people claiming to be the applicant's agents approached him demanding for kshs 300,000/= so as to have the subject motor vehicle released, which offer he rejected. He averred that it was clear that the application was an abuse of the court process and a calculated move aimed at delaying the release of the subject motor vehicle for no apparent reason other than settling personal vendetta, which was causing him to suffer irreparable loss in his finances and business.
10. He contended that the applicant failed to exercise its right of appeal which was convenient in the circumstances but instead opted to file a revision with the sole intention of concealing material facts from the court. He further stated that the applicant had substituted one Abdi Khalid Warsame with Stanley Oduor Okati as its deponent with the sole intention of aiding and abetting the offence of perjury.
11. He further stated that the applicant would not suffer any damages should the application herein be dismissed because it had an option of filing a civil suit to recover damages instead of using the 3<sup>rd</sup> respondent and the court process to unfairly frustrate him. He thus urged this court to dismiss the applicant's application and to order the 3<sup>rd</sup> respondent to comply with the trial court directions as per the court order dated April 22, 2022.
12. The applicant's written submissions were dated June 16, 2022 and filed on July 18, 2022. The 1<sup>st</sup> respondent's written submissions and List and Bundle of Authorities were both dated and filed on June 30, 2022. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in the proceedings herein. This ruling is therefore based on the said Written submissions which parties relied upon in their entirety.



## Legal analysis

13. The applicant invoked section 362 of the *Criminal Procedure Code* and submitted that a reading of the impugned ruling showed that the trial court relied on irrelevant issues to order for the release of the subject motor vehicle. It asserted that the issues raised by the 1<sup>st</sup> respondent touched on ownership of the said subject motor vehicle which was premature as the criminal proceedings were yet to commence. It pointed out that for now, the court was only enjoined to consider the legality or otherwise of the said order which compelled the 3<sup>rd</sup> respondent to release an intended exhibit that was yet to be produced in court.
14. He submitted that it was only when an exhibit had been produced in court that the court was seized with the jurisdiction to order for its disposal as was held in the case of *Republic vs Everlyn Wamuyu Ngumo* [2016] eKLR.
15. It argued that the fact that the case had been withdrawn under section 87(a) of the *Criminal Procedure Code* did not bar the prosecution from re-arresting the 2<sup>nd</sup> respondent in future once he was found to face the same offence. It added that the said withdrawal did not also whitewash the fact that a crime was committed and one of the penalties of the offences as herein once convicted, was the forfeiture of the motor vehicle and exhibits to the State, having been proceeds of crime.
16. On his part, the 1<sup>st</sup> respondent submitted that the trial court conducted a fair trial and in its determination, it took account of the totality of the evidence before it and the applicable law. He pointed out that the trial court exercised its discretion judiciously and proceeded to release the exhibits to the owners including the applicant as precaution and in preservation of evidence for future use.
17. He also relied on section 362 of the Criminal Procedure Code and the case of *Hillary Eting'a Barasa vs Republic* [2021] eKLR where it was held that revisional jurisdiction of the court can only be exercised to correct a mistake, illegality or impropriety in any finding, sentence or order recorded or passed by the lower court or any irregularity in the proceedings leading to the impugned finding, order or sentence.
18. It was his argument that the applicant had not demonstrated any mistake, illegality or impropriety in any finding of the trial court to warrant this court exercise revisionary powers as such the application lacked merit and should be dismissed with costs.
19. He further submitted that there was no active case before any court to warrant the preserving of the exhibits and that the prosecution had not shown signs of re-opening the case any time in the future. He added that the court had ordered that photographs of the exhibits be taken and preserved for future use in the event that there would be need to open the charges.
20. It was his case that the prosecution would not be prejudiced since there was no pending case. He asserted that the investigating officer approved the withdrawal of the case and had not indicated whether there was ongoing investigations in relation to the exhibits and as such opposing the application was baseless and merely driven by ulterior motives to deny him access and enjoyment of his property for reasons well known to him.
21. He pointed out that in the event the prosecution would find it necessary to prefer charges based on the same facts, photographs would be sufficient to prove whatever charges may be brought forth. In that regard, he placed reliance on the case of *Republic vs John Nganga Mbugua* [2014] eKLR where it was held that if the vehicle is released after its photographs are taken no miscarriage of justice will be occasioned during trial.



22. He further submitted that the accused person in the impugned trial court case, together with others who were not parties to the said criminal case, were involved in infringement of intellectual property which was purely a civil matter in nature. He therefore argued that the applicant had its remedy in civil proceedings for infringement of intellectual property against relevant parties and should not be allowed to bend the law by using a withdrawn criminal case to punish an innocent person for no apparent reason by detaining his Motor Vehicle which was a tool of trade.
23. He argued that the applicant ought to have known that the present application was an exercise in futility and a mere waste of its time and judicial time. He added that the applicant had caused him irreparable loss which justified demands that he should be compensated by award of damages. It was his contention therefore that costs follow events.
24. He relied on the case of *John Oduor Ojera vs Republic* [2009] eKLR where it was held that criminal proceedings to recover a civil debt amounted to abuse of the court process.
25. The High Court’s power of revision is set out in article 165 (6) and (7) of the *Constitution* of Kenya, 2010 which provides:-
  6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
26. Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) further provides:-
 

“The High Court may call 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.”
27. In addition, Section 364(1) of the *Criminal Procedure Code* stipulates that:-
  1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may-
    - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
    - b. In the case of any other order other than an order of acquittal alter or reverse the order.
  2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”
28. Having said so, a reading of the trial court’s proceedings indicated that the case was withdrawn on January 26, 2022 under section 87(a) of the Criminal Procedure Code. The said section provides that:-
 

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney- General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal -



- a. if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;...”
29. Notably, the only reason why the subject motor vehicle and the cylinders had been detained was that they were to be used as exhibits in Nyando Criminal Case no E239 of 2021. The aforesaid case was withdrawn on January 26, 2022.
  30. The trial court observed correctly that the subject motor vehicle and the cylinders had been at Awasi police station for over a year and that the vagaries of weather would have an effect on them. It directed that photographs be taken to capture the salient features.
  31. It was also risky for gas cylinders, which were at risk of fires as they were highly flammable and dangerous, to be kept in a police station that was frequented by hundreds of people.
  32. The trial court had correctly released the said Motor Vehicle and the cylinders as it would not be prudent to hold them in abeyance when it was not clear as and when the prosecution would prefer charges against the 2<sup>nd</sup> respondent herein as his whereabouts were unknown.
  33. Going further, article 157 (6) of the Constitution of Kenya provides as follows:-
    - The Director of Public Prosecutions shall exercise State powers of prosecution and may—
    - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
    - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
    - c. subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
  34. It did appear to this court that the applicant had abrogated to itself, the role of the Office of Director of Public Prosecutions (ODPP) in demanding that the exhibits be detained at Awasi police station. In his Replying Affidavit that he swore on February 22, 2022 in Nyando Criminal Miscellaneous no E006 of 2022, No 90372 CPL George Obonyo objected to the release of the subject motor vehicle which the trial court rejected. If the ODPP was aggrieved by the decision, it ought to have appealed against the same. It was not the place for the applicant to have appealed the decision of the trial court as it was a witness.
  35. This court was thus not persuaded that the applicant had demonstrated the condition for grant of the revision orders sought. It found its prayers to be misplaced and had no legal basis.

### **Disposition**

36. For the foregoing reasons, the upshot of this court’s decision was that the applicant’s Notice of Motion application dated May 5, 2022 and filed on May 6, 2022 was not merited and the same be and is hereby dismissed. The applicant will bear the 1<sup>st</sup> respondent’s costs of this application.
37. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JANUARY 2023**



**J KAMAU**  
**JUDGE**

