



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority & another v Malagala (Criminal Revision
E001 of 2023) [2023] KEHC 19252 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL REVISION E001 OF 2023
WM MUSYOKA, J
JUNE 30, 2023**

BETWEEN

KENYA REVENUE AUTHORITY 1ST APPLICANT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS BUSIA

COUNTY 2ND APPLICANT

AND

ALVIN ALEX MALAGALA RESPONDENT

(Revision arising from the proceedings in Busia CMCR Misc. Appli. No. E131 of 2022, Alvin Alex Malagala vs. Kenya Revenue Authority and another, by Hon. PA Olengo, Senior Principal Magistrate, SPM, on 3rd January 2023)

RULING

1. The proceedings herein were initiated by way of a letter dated January 13, 2023, and lodged herein on January 17, 2023. The letter is addressed to the judge, and the applicants ask the court to stay an order made in Busia CMC CR Misc Appli No E131 of 2022 on January 3, 2023, and to exercise revisionary power to revise, review or set aside the orders of January 3, 2023, for release of goods detained on account of non-payment of customs duties. They urge that the trial court is *functus officio*, having handled the matter in previous proceedings in Busia CMC CR Misc App No E075 of 2022, and the applicants had not exercised their right of appeal or revision to the High Court, the respondent was yet to show the source of the goods or payment of customs duties, a tax demand raised by the tax authorities was yet to be reviewed or appealed or set aside, and that the release of the goods would remove them from the reach of the tax authorities.
2. The applicants subsequently filed a motion at the primary court, dated February 1, 2023, seeking stay of execution orders and the setting aside of warrants of arrest issued on January 31, 2023. The motion was placed before Karanjah J on February 1, 2023, who granted stay orders.



3. When the matter was mentioned on May 29, 2023, some of the parties asked me to rule on the matter, while the others asked to file written submissions. In the end, only the applicants filed written submissions. It is submitted that the trial court is *functus officio* as it had already made final orders in Busia CMC CR Appli No E075 of 2022, and the orders made in Busia CMC CR Misc Appli No E131 of 2022 had the effect of revising the orders in Busia CMC CR Appli No E075 of 2022, powers only reserved for the High Court. It is further submitted that the EACCMA dispute resolution mechanism had not been exhausted, for a tax demand had been made for Kshs 671, 994.00, and if the respondent was not satisfied with that demand, he should have sought review section 229 of [EACCMA](#). It is submitted that the order for release of the timber, undermined and usurped the authority of the 1st applicant. It is further submitted that the respondent had not proved the source of the timber, payment of duty, lawful importation and conveyance.
4. The proceedings in Busia CMC CR Misc Appli No E131 of 2022 was initiated, on November 1, 2022, after the file in Busia CMC CR Appli No E075 of 2022 disappeared, ostensibly to have the file in that cause reconstructed. The application for reconstruction of the file was allowed on November 3, 2022, whereupon the respondent fixed an application, dated October 24, 2022, filed in Busia CMC CR Appli No E075 of 2022, for hearing in this cause, for release of the timber. The applicants raised an objection, that this matter, arguing that the court was *functus officio*, in view of the proceedings in Busia CMC CR Appli No E075 of 2022. The parties made oral submissions, and ruling was fixed for November 16, 2022. The said ruling was delivered on January 3, 2023, allowing the application dated October 24, 2022, for release of the timber to the respondent.
5. My understanding of these proceedings is that this cause, Busia CMC CR Misc Appli No E131 of 2022, was initiated for the sole purpose of getting an order for the reconstruction of the file in Busia CMC CR Appli No E075 of 2022 of 2022. The order, to reconstruct the file in Busia CMC CR Appli No E075 of 2022, was made on November 3, 2022, and that should have brought this cause to an end, for it was initiated for the sole purpose of reconstructing the lost file. No other proceedings could be mounted in this cause and file, after the order of November 3, 2022 was made, for the purpose for which it had been initiated was met.
6. What I have stated above would mean that the subsequent order made on November 3, 2022, for the application dated October 3, 2022, be served, for inter partes hearing on November 6, 2022, was made in error. The application dated October 24, 2022 was not filed in Busia CMC CR Misc Appli No E131 of 2022, and it could not have been filed in that cause since the said cause did not exist as at October 24, 2022, for the cause and the file herein was opened on November 1, 2022. Indeed, the record indicates that that application, dated October 24, 2022, was filed in Busia CMC CR Appli No E075 of 2022, on even date, October 24, 2022. The application, dated October 24, 2022, could only be argued, heard and determined within the cause where it was filed, and that is in Busia CMC CR Appli No E075 of 2022. Proceedings meant for Busia CMC CR Appli No E075 of 2022 cannot be conducted in Busia CMC CR Misc Appli No E131 of 2022, which was meant only for ordering reconstruction of the file in Busia CMC CR Appli No E075 of 2022, and once that was done, the cause in Busia CMC CR Misc Appli No E131 of 2022 became spent.
7. Perhaps it should be clarified that Busia CMC CR Misc Appli No E131 of 2022 should not have been initiated at all. What the court registry should have done was to open a duplicate or skeleton file of the cause in Busia CMC CR Appli No E075 of 2022, to accommodate the application for reconstruction of the file in that cause. It is duplicitous to initiate a new cause for the purpose of asking for orders for reconstruction of a lost file. The application for reconstruction should be filed in the cause where the file is lost, but not in a new cause, and once the reconstruction order is made, and the file reconstructed, the proceedings should be conducted in that cause.



8. I believe I have said enough to demonstrate that the order for conduct of proceedings in this cause, meant for Busia CMC CR Appli No E075 of 2022, is irregular and improper. The court file should have closed once the reconstruction order was made. The directions for the hearing of the application dated October 24, 2022 should have been made in the reconstructed file in Busia CMC CR Appli No E075 of 2022, and the determination of that application should have been made in that cause. I agree that the court became functus officio in Busia CMC CR Misc Appli No E131 of 2022 after it ordered the reconstruction of the file in Busia CMC CR Appli No E075 of 2022, as no other orders could be made thereafter. Conducting proceedings, in Busia CMC CR Misc Appli No E131 of 2022, which ought to have been conducted in Busia CMC CR Appli No E075 of 2022, amounted to abuse of process.
9. I, accordingly, revise the order made on November 3, 2022, on the hearing of the application dated October 24, 2022, by vacating or setting it aside, with the consequence that the orders made in the ruling on that application, delivered on January 3, 2023, are hereby vacated or set aside. The cause in Busia CMC CR Misc Appli No E131 of 2022 was spent, after the reconstruction order was made, on November 3, 2022. The file in Busia CMC CR Misc Appli No E131 of 2022, shall be closed, as a consequence. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 30TH DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Mayaba, instructed by the Director of Public prosecutions, for the applicants.

Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the respondent.

