



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Mohamed; Director of Public Prosecutions
& 2 others (Interested Parties) (Miscellaneous Criminal Application
E075 of 2023) [2023] KEHC 20927 (KLR) (Crim) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E075 OF 2023**

**DR KAVEDZA, J
JULY 28, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

NUUH MOHAMED RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

KENYA BUREAU OF STANDARDS INTERESTED PARTY

KENYA DAIRY BOARD INTERESTED PARTY

(Being an application for revision of the order by Hon. B. Ochoi (SPM) delivered on 6th October 2022 and 20th February 2023 in Misc. Criminal Application No. E2576 of 2022)

RULING

1. The applicant filed a notice of motion dated 6th March 2023 pursuant to Articles 46, 50, 159 (2)(d), 165 (6) & (7) of the Constitution of Kenya, Sections 362 and 364 of the Criminal Procedure Code, and sections 210, 211, 212, 213, 214 & 217 of the East Africa Community Customs Management Act, 2004. In the main, the applicant sought orders for revision of the orders of release of 79 cartons of unaccustomed Hilwa milk powder on 6th October 2022 in Nairobi Magistrate's Misc. Criminal Application No. E2576 of 2022. The applicant also prayed that the summons issued to the Commissioner of Investigations and Enforcement Department by the learned magistrate in the matter be vacated.



2. The application is premised on the grounds in the face thereof which are reiterated in the supporting affidavit of a similar date sworn by Dennis Kibara an Investigating officer of the applicant. The averments made are that on 28th May 2022, motor vehicle registration number KCH 796Z was intercepted in Nairobi by KRA officers while conveying 79 cartons of customs and restricted Hilwa Milk Powder. The goods were seized and detained at their Likoni warehouse. After investigations, the respondent who is the owner of the goods, and the investigation file forwarded to the 1st interested party to decide on whether to charge him or not. The file is still pending before the office of the Director of Public Prosecution.
3. The respondent filed an application dated 1st September 2022 before the Magistrate's court sitting at Milimani vide Misc. Criminal Application No. E2576 of 2022, seeking the release of the goods. The applicant opposed the application. On 6th October 2022, the subordinate court ordered the release of the goods to the respondent herein. Subsequently, the respondent filed an application for contempt against the Commissioner of Investigations and Enforcement Department for failing to release the goods. On 20th February 2023, in its ruling, the court cited the commissioner for contempt and issued summons for his appearance in court.
4. The applicant avers that the orders issued are detrimental to the execution of its mandate. That the respondent failed to demonstrate that it was in possession of a valid licence from the Kenya Dairy Board for dealing in dairy products. The seized cartons of Hilwa Milk Powder do not bear the standardization marks of the Kenya Bureau of Standards thereby raising safety concerns to the public. He is apprehensive that the Commissioner of Investigations and Enforcement Department will be committed to civil jail.
5. In opposition, the respondent filed a replying affidavit dated 14th March 2023. He averred that his goods were seized on 28th May 2022, and detained by the applicant for three months. During this period, they neither preferred charges against him nor issued demand notices. Pursuant to the order of release of the goods issued on 3rd October 2022, the applicant neither filed an appeal nor a revision application. However, they refused to release the goods to him. His application for contempt of court was therefore necessary. On 23rd November 2022, he was served with a demand notice for tax which was challenged. However, the said application was never canvassed by the applicant. He maintained that the applicant has refused to comply with court orders issued.

Applicant's submissions.

6. The applicant submitted that releasing the 79 cartons of Hilwa Milk Powder was tantamount to the advancement of an illegality since the milk is unaccustomed. This is because it is not deemed to have been procedurally entered for home consumption the duty of Kshs. 677,948 was not paid and no entry was lodged by the applicant. It was further submitted that the seized goods did not bear the standardization marks to authenticate their quality, strength, purity, composition, and quality, among other characteristics. It was argued that the applicant's role is not only to collect duty but to ensure prohibited and restricted goods do not enter the country. It was further submitted that the applicant has not willfully defied a court order and was within its mandate to protect the public from unaccustomed goods.

Issues for determination.

7. I have considered the application, the response, the written submissions, and the applicable law. The issue for determination is whether the applicant should be granted the revisionary orders sought.



Analysis and determination.

8. The power of this court in its revisionary jurisdiction is founded under Section 362 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.

9. Article 165(6) of the [Constitution](#) provides that:

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.

10. Consequently, this court has jurisdiction to entertain the application before me. In the instant application, the applicant sought review of a variation of the orders of the trial court. Before the trial court the respondent filed an application for release of goods that had been seized by the applicant. The application was opposed by the applicant. I have considered the application, and submissions by the parties thereto. I have also perused the impugned ruling of the trial court delivered on 6th October 2022. The trial court allowed the applicant's (now respondent) prayer for the release of the seized goods. Similarly, the respondent filed contempt proceedings before the same court. In a ruling delivered on 20th February 2023, the court cited the Commissioner Investigations and Enforcement Department and for contempt and issued a summons for his appearance in court.
11. In the premises, the key issue for consideration is the question whether the proceedings of the lower court and the ruling can be faulted in terms of correctness, legality, or propriety.
12. From the record, the trial court considered the application, the response thereto and the submissions of their advocates. It is manifest from the foregoing that the learned magistrate reached his decision after giving due consideration to the respective positions taken by the parties before him. The applicant was therefore given an opportunity to articulate its case before the ruling was delivered.
13. The applicant has attempted to challenge the application on the merits of the decision arrived at by the learned trial magistrate. Firstly, that the trial court erred in ordering the release of the 79 cartons of unaccustomed Hilwa Milk Powder. Secondly, that it was within its mandate to seize the unaccustomed goods. Additionally, that the summons to the Commissioner of Investigations and Enforcement Department should not have been issued.
14. My considered view however is that, when it comes to perceived errors in the appreciation of the facts of a particular case and the application of the law to those facts, the trial magistrate's decision can only be competently challenged on appeal.
15. The upshot is that I find nothing in the record of the subordinate court that shows an illegality, irregularity, or impropriety of the orders made by the subordinate court. The end result therefore, I find the application for revision dated 6th March 2023 is completely devoid of merit. The same is hereby dismissed.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023.



D. KAVEDZA

JUDGE

In the presence of:

Ms. Chege for the State.

Ms. Njuguna for the applicant.

Mr. Amutalla for the respondent.

Joy C/A

