



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CRIMINAL APPLICATION NO. E160 OF 2021**

KENYA REVENUE AUTHORITY.....1<sup>ST</sup> APPLICANT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> APPLICANT

OCS ELDORET POLICE STATION.....3<sup>RD</sup> APPLICANT

CCIO UASIN GISHU COUNTY.....4<sup>TH</sup> APPLICANT

**VERSUS**

KENNEDY MUSILL.....1<sup>ST</sup> RESPONDENT

LOIS CHEMITEI.....2<sup>ND</sup> RESPONDENT

**RULING**

[1] By the Notice of Motion dated **9<sup>th</sup> August 2021**, the applicants moved the Court pursuant to the provisions of **Articles 159(2)(d) and 165(6) and (7) of the Constitution of Kenya, 2010; Sections 362 and 364 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya**; as well as **Sections 16(1), 211(1) and 217(1) of the East African Community Customs Management Act, 2017** for the following orders:

[a] Spent

[b] That the Court be pleased to issue stay of execution in respect of the orders of Hon. Wairimu, Senior Principal Magistrate, issued on **6<sup>th</sup> August 2021** in **Eldoret Chief Magistrates Miscellaneous Criminal Application No. E431 of 2021** pending the hearing and determination of the application.

[c] That the Court be pleased to review and set aside or discharge the orders of Hon. Wairimu, Senior Principal Magistrate, issued on **6<sup>th</sup> August 2021** in **Eldoret Chief Magistrates Miscellaneous Criminal Application No. E431 of 2021**.

[d] That the Court be pleased to make or grant any other relief as it may deem just and fair to meet the ends of justice.

[e] That costs of the application be borne by the respondents.

[2] The application was premised on the grounds that, on the **6<sup>th</sup> August 2021**, Hon. Wairimu, SPM, erroneously made an order in **Eldoret Chief Magistrate's Misc. Application No. E431 of 2021** for the release of motor vehicles Registration Numbers KBV 427N and KDC 493J and the crops aboard motor vehicle Registration No. KDC 493J without regard to the provisions of **Section 214 of the East Africa Community Customs Management Act, 2017** (hereinafter, **EACCMA**). According to the applicants, the said provisions empower the 1<sup>st</sup> applicant to detain the goods and the vessels pending the conclusion of the customs procedures as set out in the **EACCMA**.

[3] The application was supported by the affidavit annexed thereto, sworn by **Cpl Norah Rael Ekodir**, in which it was deposed that, on the **25<sup>th</sup> July 2021**, police officers intercepted motor vehicles **Registration Numbers KBV 427N and KDC 493J** on receiving information that they were conveying uncustomed goods. They invited the concerned officers at Kenya Revenue Authority (the 1<sup>st</sup> applicant) as well as officers from the Directorate of Criminal Investigations to conduct further investigations into the allegations. **Cpl Ekodir** further averred that, on the **26<sup>th</sup> July 2021**, a verification exercise was conducted by the joint team; and that the preliminary findings indicated that the lorry **KDC 493J** was loaded with 173 bags of coffee which was suspected to have been stolen or diverted from the transit route, in contravention

of the **EACCMA**.

[4] It was thus the contention of the applicants that, while the investigations were ongoing, they were served with an order dated **6<sup>th</sup> August 2021**, issued by **Hon. Wairimu, SPM**, ordering the release of the two motor vehicles together with the crops on board. They complained that they were not given notice of the application pursuant to which the impugned order was made; and that in any event the two motor vehicles were lawfully detained by the applicants under **Section 213** of the **EACCMA**. It was therefore their contention that the order was irregular, granted that the applicants were yet to exhaust the customs procedures set out in **Section 216** of the **EACCMA**; and that the order is prejudicial to the administrative powers of the applicants.

[5] The respondents opposed the application vide the Replying Affidavit sworn by the 1<sup>st</sup> respondent on **16<sup>th</sup> August 2021**. He conceded that on **25<sup>th</sup> July 2021** he was drying coffee beans at Jua Kali area within Uasin Gishu County; and that, when he finished reloading the beans back into the truck **Registration No. KDC 493J** that he had hired from the 2<sup>nd</sup> respondent for the purpose of transporting the coffee beans, he was approached by persons who identified themselves as police officers. The truck was then impounded and driven to Eldoret Police Station pending further investigations. He denied the allegations that he was conveying uncustomed goods. His assertion was that he is a small scale businessman, engaged in the business of buying and selling of agricultural produce, including coffee and cereals; and that he had sourced the subject crop from small scale farmers in Mount Elgon Area.

[6] The 1<sup>st</sup> respondent further averred that he had rented the truck from the 2<sup>nd</sup> respondent at **Kshs. 5,000/=** per day; and that because no information was forthcoming from the police regarding the lorry, he instructed his lawyers to seek release orders, noting that it contained perishable produce. He attached copies of the orders issued by the lower court in **Misc. Criminal Application No. E 341 of 2021** and **E431 of 2021** as **Annexures KM 1 and KM 2** to his Supporting Affidavit, along with photographs of the impounded truck.

[7] Thereafter, on the **24<sup>th</sup> August 2021**, the two respondents filed the Notice of Motion dated **23<sup>rd</sup> August 2021** seeking that the Court be pleased to order that the crop presently loaded on motor vehicle Registration No. KDC 493J be released for processing and roasting at the Eldoret Coffee Mills on such terms as the Court may deem fit, pending the hearing and determination of the application. They further prayed for the release of Motor Vehicle Registration No. KBV 427N which was also impounded alongside the truck. The application was premised on the ground that the coffee crop aboard Motor Vehicle KDC 493J was perishable and risked being destroyed altogether if kept for an indeterminate period of time.

[8] The 2<sup>nd</sup> application was likewise opposed by the applicants. A Replying Affidavit sworn by **IP Joseph Impwi Macharia**, was filed herein on **7<sup>th</sup> September 2021**, in essence reiterating the averments set out in the Supporting Affidavit filed with the 1<sup>st</sup> application. The applicants added that the investigation is complex in nature as it involves auditing of the Integrated Customs Management System; and therefore that the goods and the motor vehicles were lawfully detained in accordance with the provisions of **Section 213** of the **EACCMA**.

[9] In the course of time, most of the prayers set out in the two applications were granted by consent. For instance, on **1<sup>st</sup> September 2021**, Prayer 2 of the Notice of Motion dated **23<sup>rd</sup> August 2021** was granted, thereby paving the way for the release of the coffee impounded alongside Motor Vehicle Registration No. KDC 493J. Thereafter, on **8<sup>th</sup> September 2021**, an order was made, again with the concurrence of counsel for the parties, for the release of Motor Vehicle Registration No. KBV 427N, a Toyota Prado that evidently had nothing to do with the alleged offence of conveying uncustomed goods. Hence, **Mr. Mutai**, learned counsel for the respondents intimated that, with the release of the coffee, their application dated **23<sup>rd</sup> August 2021** was spent.

[10] Lastly, an application was made by **Mr. Mutai** on **23<sup>rd</sup> September 2021** for the release of the truck. He pointed out that it had been purchased by the 2<sup>nd</sup> respondent under an asset finance loan arrangement and that its continued detention was not beneficial to either the applicants or the respondents. Both **Mr. Chelashaw** and **Mr. Mugun** for the applicants opposed the application but were agreeable to a conditional release. Accordingly, an order was made for the release of the Motor Vehicle Registration No. KDC 493J, Isuzu Truck, on condition, *inter alia*, that it be availed before the lower court as and when required.

[11] In the light of the foregoing, the only issue pending consideration is Prayer (c) in the applicants' Notice of Motion dated **9<sup>th</sup> August 2021**; namely, whether sufficient cause has been shown for the review and setting aside of the order issued on **6<sup>th</sup> August 2021** by Hon. Wairimu, SPM, in **Eldoret Chief Magistrate's Misc. Criminal Application No. E431 of 2021**. It is with that in mind that I have given careful consideration to the application, the averments in the parties' respective affidavits, as well as the submissions made before me by learned counsel. I note that, in his submissions dated **20<sup>th</sup> September 2021**, **Mr. Chelashaw** proposed the following issues for determination:

[a] Whether KRA had power to detain the motor vehicles;

[b] Whether the Hon. Magistrate had the powers to release the respondents' motor vehicles;

[c] Whether the custom procedures were adhered to.

[12] The thrust of **Mr. Chelashaw's** argument was that, under the **EACCMA**, the 1<sup>st</sup> applicant was bestowed with the duty and mandate to detain any aircraft, vessel, vehicle or goods, if in its opinion, there existed reasonable suspicion that the goods being conveyed therein are uncustomed. He relied on **Sections 213, 210, 211(1) and 214** of **EACCMA** as well as the cases of **Elijah Nyakebondo Onsongo vs. Republic** [2017] eKLR and **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd** [1989] KLR 1 in support of his arguments; particularly the argument that the learned magistrate had no jurisdiction to grant the orders she made on **6<sup>th</sup> August 2021**.

[13] On his part, counsel for the respondents was of the posturing that the proposal to indefinitely detain the crops and goods until the

conclusion of investigations amounts to a violation of the right to property and an abuse of the criminal justice system. He cited **Articles 40 and 47** of the **Constitution** as well as the cases of **Martin Thiong'o Nyamwathi vs. Divisional Investigation Officer, Kabete & 2 Others** [2018] eKLR and **Judicial Service Commission vs. Mbalu Mutava & Another** [2015] eKLR.

[14] It is significant that the application was hinged on **Article 165(6) and (7)** of the **Constitution** which provide thus:

**(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 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.**

[15] Thus, for purposes of revision, **Section 362** of the **Criminal Procedure Code** provides that:

**“The High court may call for and examine the records 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.**

[16] Likewise, **Section 364(1)(b)** of the **Criminal Procedure Code**, stipulates that:

**"In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal alter or reverse the order."**

[17] Looking at the manner in which the application dated **9<sup>th</sup> August 2021** was crafted, it does not have the distinctive ring of an application for revision. That explains why it was not registered as such. I note too that the lower court record was not called for as would be expected in an application for revision. Nevertheless, I have given attention to the impugned order, a copy whereof was attached to the Supporting Affidavit. It reads thus in part:

**“1. THAT: The respondents be and are hereby ordered to take photographs of motor vehicles No. KBV 427N and KDC 493J and the crops therein and thereafter release the said motor vehicles together with the crops aboard motor vehicle registration No. KDC 493J.**

**2. THAT: The motor vehicles be availed whenever needed.”**

[18] Since **Section 6** of the **Magistrates Courts Act, No. 26 of 2015** gives a magistrate's court jurisdiction and powers in proceedings of a criminal nature as conferred on it by law, it was incumbent for the applicants to demonstrate in what exact manner **Hon. Wairimu** acted without jurisdiction in making the impugned orders. It is noteworthy that the grounds raised by the applicants appear to pitch for an appeal instead; for they contended thus at Grounds II to VI:

[a] The Senior Principal Magistrate erred in law by issuing illegal and irregular orders releasing motor vehicles that were not before the court and are pending investigations;

[b] The Senior Principal Magistrate erred in law in failing to appreciate the provisions of **Section 214** of the **East Africa Community Customs Management Act, 2004** which empowers the 1<sup>st</sup> applicant to detain goods and vessels pending the conclusion of customs procedure as per the **East Africa Community Customs Management Act, 2004**;

[c] The Learned Senior Magistrate erred in law in failing to appreciate the powers of the 3<sup>rd</sup> and 4<sup>th</sup> applicants granted by law to detain any goods or items pending the conclusion of investigations of a criminal case.

[d] The learned Senior Magistrate erred in ordering the release of the crops and the motor vehicles devoid of jurisdiction to grant such orders;

[e] That the Senior Principal Magistrate erred in law and fact by failing to ensure that all the parties were served nor did the Magistrate give the parties adequate time to respond.

[19] I am therefore unable to fault the trial magistrate in terms of **correctness, legality or the propriety** of the order dated **6<sup>th</sup> August 2021**. Indeed, the Court of Appeal had occasion to consider the scope of the Court's supervisory role in **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 Others** [2014] eKLR, and made it plain that:

**In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role, the High Court is to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision.”**

[20] In any event, the same orders complained of have since been issued by this Court with the concurrence of the parties. Consequently, it is

my finding that the application for revision dated **9<sup>th</sup> August 2021** is not only unwarranted but is completely devoid of merit. The same is hereby dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF JANUARY 2022.**

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**OLGA SEWE**

**JUDGE**