



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

MISC. CRIMINAL APPLICATION NO.E059 OF 2021

1. KENYA REVENUE AUTHORITY

2. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS....APPLICANT

VERSUS

BENJAMIN IRUNGU MUIRURIRESPONDENT

R U L I N G

[1] The genesis of the present application dated 8th December 2021 is the Criminal Miscellaneous Case No.E160 of 2021 filed on the 29th November 2021 at the Magistrate’s Court in Busia pitting the respondent herein, **Benjamin Irungu Muiruri**, against the Republic of Kenya which is herein apparently represented by the first applicant, **Kenya Revenue Authority** and the second applicant, the **Director of Public Prosecutions (DPP)**, who were strictly not parties to the matter even though the subject matter of the case or cause of action touched on their respective mandates.

[2] Be that as it may, in the accruing notice of motion filed on 29th November 2021, the applicant sought orders for conditional release of m/v reg **No.KCE 757P** Isuzu to himself.

The grounds for the application are set out in the notice of motion and fortified by the averments contained in the applicant’s supporting affidavit dated 27th November 2021.

On the 6th December 2021, the application was placed before the lower court after the applicant filed a certificate of urgency on the same day. The court swiftly certified the matter urgent and ordered that the same be served for interparties hearing at 2.30p.m on the same 6th December 2021. However, without any documentary evidence of service upon the respondent/republic though its actual legal representative the honourable the Attorney General of the Republic of Kenya, the application was placed for hearing at 3.10p.m with learned counsel **Mr. Ashioya** appearing for the applicant while learned counsel, **Mr. Maina** appearing for Kenya Revenue Authority and learned prosecution counsel, **Mr. Namasake** appearing for the DPP.

[3] Apparently, service if any, was effected upon the office of the DPP which in turn forwarded the same to Kenya Revenue Authority (**KRA**). This explains why they filed the present application after being aggrieved with the ruling made by the lower court on 6th December 2021 to the effect that the subject motor vehicle be released to the applicant provided the same does not leave the court’s jurisdiction. The “**respondent**” was given the liberty to reply to the applicant’s application which was fixed for hearing on 15th December 2021. The parties were notified of their right to appeal.

Instead of appealing the ruling and orders of the lower court the applicants herein moved this court vide the notice of motion dated 8th December 2021, for exercise of this court’s power of revision with a view to having the impugned ruling and/or orders made on 6th December 2021 by the lower court revised, varied, set aside and/or discharged.

[4] Under s.362 of the **Criminal Procedure Code**, the power of the High Court to call for records is granted in the following terms:-

“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.”

The powers of the High Court on revision are set out under s.364 of the **CPC** and under s.365 no party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision, provided that the court may, when exercising

those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section **364 (2)**.

[5] Most significant, under **s.364 (5) CPC**, 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 a party who could have appealed. It is therefore ironic that the applicants herein are seeking this court's discretion to revise the impugned ruling/order of the lower court yet an appeal lies from such ruling and/or order. Indeed, the lower court notified the parties of their right to appeal.

[6] It is also ironic that the parties herein have conceived a consent to the effect that the present application for revision of the impugned lower court ruling/order be heard by this court by way of affidavit evidence and written submissions, yet no party has a right to be heard before this court when exercising its powers of revision. In any event, such power cannot herein be exercised by dint of **s.364 (5)** of the **CPC**.

For all the foregoing reasons, this court declines to approve the consent arrived at by the parties, but in the interest of justice prompted by the fact that the applicants were not given adequate opportunity to be heard before the lower court made its impugned orders on 6th December 2021 and that they may have been served wrongly as parties to the respondent's application in the lower court and further without venturing on the merits or demerits of the impugned ruling/order or the manner in which it was arrived at by the lower court, it is hereby declared that the proceedings of the lower court on 6th December 2021 which led to the impugned ruling/orders amounted to a mistrial and/or an irregularity and are hereby set aside together with all consequential orders with an order that the application in the lower court dated 27th November 2021 and filed on 29th November 2021 be heard afresh before a different magistrate of competent jurisdiction.

Ordered accordingly.

J.R. KARANJAH

J U D G E

26/1/2022

[READ & SIGNED THIS 26TH DAY OF JANUARY 2022]