



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**MISC CRIMINAL APPLICATION NO. E208 OF 2021**

**KENYA REVENUE AUTHORITY.....APPLICANT**

**VERSUS**

**JOSEPHAT KAMAU.....1<sup>ST</sup> RESPONDENT**

**MOSES MURITHI WAWERU ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF**

**PUBLIC PROSECUTIONS .....INTERESTED PARTY**

**RULING**

**INTRODUCTION**

1. By a Notice of Motion Application dated 21<sup>st</sup> September 2021, the Applicant has inter alia sought orders that;

a) Spent.

b) **This application be heard in priority to any other application relating to the motor vehicles the subject matter of this application.**

c) Spent.

d) **This Honourable Court be pleased to Review and/ or set aside the orders of 3<sup>rd</sup> September, 2021 issued by Honourable L. Kassan Chief Magistrate Eldoret Law Courts issued on the 3<sup>rd</sup> day of September 2021 directing release of Motor Vehicles Registration Nos. KCQ 156B and KBY 556E in Eldoret Chief Magistrate Court Criminal Case No. 3368 of 2019 Republic Vs. Josphat Kamau and Moses Murithi Waweru.**

2. The application is premised on grounds set out therein and is supported by affidavits sworn by PC No. 83189 Chrispine Otieno on 21<sup>st</sup> September, 2021.

**APPLICANT'S CASE**

3. The Applicant's case is that on 26<sup>th</sup> October, 2019 Kenya Revenue Authority officers acting on intelligence intercepted motor vehicle KCQ 156B which was being driven by Moses Muriithi near Turbo Town while the motor vehicle KBY 556E hauling trailer was found parked and abandoned at Maili Nne area along Eldoret-Bungoma Highway.

4. The Applicant upon conducting verification of said motor vehicles found that each was carrying 10000 sticks of 'Super Match Cigarettes' which did not have any importation documents and were suspected to have been smuggled from the Republic of Uganda.

5. The said motor vehicles were then escorted to Eldoret Police Station where they were deposited under notice to deposit goods in a customs warehouse (F89) No 4831 dated 27<sup>th</sup> October, 2019 for motor vehicle KCQ156 B and No. 48317 dated 30<sup>th</sup> October, 2019 for motor vehicle KBY 556E/ZC 5883.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein being drivers of the said motor vehicles were both arrested and charged in *Eldoret CMCCR No. 33368 of 2019* jointly and severally with six counts under the East Africa Community Customs Management Act, 2004 for smuggling restricted

goods.

7. The 1<sup>st</sup> Respondent filed an application dated 28<sup>th</sup> May, 2020 seeking the release of the said motor vehicles pending the determination of criminal case *Eldoret CMCCR No. 3368 of 2019* but the same was dismissed. Consequently, the 1<sup>st</sup> Respondent filed a similar application dated 11<sup>th</sup> May, 2020 seeking the release of the said motor vehicles and Hon. L. Kassan granted the order of release of the said motor vehicles on 3<sup>rd</sup> September, 2021.

8. The Applicant stated that the said motor vehicles are vessels for conveyance of restricted good and therefore are subject to forfeiture under Section 211 as read together with section 215 of the East Africa Community Customs Management Act, 2004.

9. The Applicant contends that the Honourable Chief Magistrate failed to consider the provisions of Section 27 (1) of the East Africa Community Customs Management Act, 2004 which provides that condemnation of anything liable to forfeiture shall not be affected by the fact that the owner was in no way concerned with the act which rendered the thing liable to forfeiture.

10. The Applicant further contends that the Honourable Chief Magistrate also failed to consider section 214 of the East Africa Community Customs Management Act, 2004 which provides that where there is prosecution the thing detained shall not be released until the determination of such prosecution and be dealt with according to Section 215 of the said Act.

11. The Applicant argues that unless the orders that were issued on 3<sup>rd</sup> September, 2021 are reviewed the Applicant will greatly be prejudiced as releasing the said motor vehicles will affect the prosecution of the criminal case and render the subsequent process of forfeiture under the East Africa Community Customs Management Act, 2004 nugatory. The Applicant further contends that the order issued by Hon. Chief Magistrate will prejudice the Applicant's mandate of enforcing tax laws in order to enhance revenue collection by deterring tax evaders.

### **RESPONDENTS' CASE**

12. The application is opposed by way of a replying affidavit sworn by Josphat Kamau on 1<sup>st</sup> November, 2021. He averred that the Applicant's application is frivolous, mischievous, lacking in merit, incompetent and that the same is an abuse of court process and ought to be dismissed. He further deponed that the Applicant herein had filed a similar application being **Misc Criminal Application No. 203 of 2021** which was withdrawn after the High Court declined to issue the orders sought.

13. He averred that he co-owns motor vehicles registration numbers KCQ 156B and KBY 556E with Equity Bank.

14. The 1<sup>st</sup> Respondent's case is that Kenya Revenue Authority was not a party to the suit in the trial court and therefore does not have the capacity to apply for revision. He deponed that the office of the Director of Public Prosecutions has been in conduct of the matter and was the Respondent in the application made in the lower court and thus the proper party to make this application.

15. It was the 1<sup>st</sup> Respondent's case that though their application seeking the release of the said motor vehicles had been previously dismissed by the trial court, the dismissal was as a result of failing to produce the said motor vehicles as exhibits in court and that court had not visited the scene where the motor vehicles were kept.

16. It was the 1<sup>st</sup> Respondent's contention that the trial court gave reasons as to why it granted the orders of release of the said motor vehicles and that key among them was that the vehicles had since been produced in court and further that the court had visited the scene where the motor vehicles are kept.

17. It was also the 1<sup>st</sup> Respondent's case that forfeiture of the said motor vehicles is subject to civil proceedings upon successful application by the Assets Recovery Agency and not available in criminal proceedings.

18. On those grounds the 1<sup>st</sup> Respondent prayed that the application be dismissed with costs.

19. The Applicant filed its written submissions on 15<sup>th</sup> November, 2021 whereas the Respondents did not file any.

### **DETERMINATION**

20. I have considered the application and the averments in the affidavits and all the submissions. The issue which arises for determination is revision. The Constitution gives the High Court Supervisory Jurisdiction over **Subordinate Courts. Article 165 (6) & (7)** the Constitution 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.”***

21. These powers are also provided under the **Criminal Procedure Code**. The powers of Revision are provided under **Section 362 & 364 of**

the Criminal Procedure Code as follows:

**“362. Power of High Court to call for records**

*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.*

363. ....

**364. Powers of High Court on revision**

*(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 its 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 sections 354, 357 and 358, and may enhance the sentence;”*

*Clearly, the court has jurisdiction under the Constitution and statute to revise the order before the Sub-ordinate court. The only question is whether the court will, exercise that jurisdiction. That discretion is to be exercised judicially in the light of the settled principles of the court with regard to the nature of order sought to be revised. The High Court has discretion and whether the decision is “a finding, sentence or order which is manifestly incorrect.”*

22. It is trite that, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts of omissions but should not be employed as a substitute for an appeal.

23. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. This was the holding by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin MohdJani and Another [1996] 4 LRC 728 at 734, 735:**

**“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.**

24. However, the 1<sup>st</sup> Respondent herein has argued that the Applicant lacks the *locus standi* to file this present application as the Office of the Director of Public Prosecutions has been the one in conduct of the matter and thus the proper person to make this application.

25. In the Constitution of Kenya particularly **Article 157 (6)** the Director of Public Prosecution (DPP) is empowered to exercise the state power of criminal prosecution. That power of the DPP to prosecute includes the power to apply for revision as sought by Kenya Revenue Authority. Kenya Revenue Authority is not a party in the criminal trial of Josephat Kamau and Moses Murithi Waweru but rather is a complainant whose interest are solely represented by DPP as provided under **Article 157(6)**. The DPP’S power as provided under the constitution is not subject to anybody consent or direction. The power of the office of the Director of Public Prosecution was the subject of discussion in (*See the case Director of Public Prosecution vs Nairobi Chief Magistrate’s Court & Another (2016) eKLR*)

26. The 1<sup>st</sup> Respondent was right to submit that Kenya Revenue Authority has no *locus standi* to file this instant application.

27. In my view there is nothing stopping the DPP from applying for revisionary orders as sought by the Applicant herein. This will ensure that the Applicant’s interest justice will be protected.

28. In view of the findings made above the Notice of Motion dated 21<sup>st</sup> September, 2021 is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF JANUARY 2022.**

**E. O. OGOLA**

**JUDGE**