Kenya Revenue Authority v Mfinanga & another (Criminal Revision E154 of 2021) [2022] KEHC 12948 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEHC 12948 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL REVISION E154 OF 2021

JM MATIVO, J

SEPTEMBER 21, 2022

BETWEEN

KENYA REVENUE AUTHORITY ..... APPLICANT

AND

TEGEMEA MARTIN MFINANGA ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

RULING

1. The Kenya Revenue Authority (the applicant), vide the application dated 11th August 2021 expressed under Articles 47, 159 (2) (d), 165 (6) & (7) of *the Constitution*, Sections 121, 362 and 364 of the Criminal Procedure Code[1](the CPC) and sections 211, 214 (3), 215 and 250 of the East African Customs Management Act, 2004 (EACCMA) seeks orders for revision/varying and or setting aside the orders issued by Hon. B. S. Khapoya, Principal Magistrate's court , Taveta in MCC MSC/E002/2021, Tengemea Martin Mfinanga v Republic on 23rd July 2021 directing the applicant's Customs Manager at Taveta, to release two trucks registration number T610DNL and T380DHP to the applicant in accordance with the order of the court issued on 25th January 2021.

2. It also seeks this court to review, vary and or set aside the orders issued by Hon. B. S, Khaoya in the said case on 23rd July 2021 directing that the applicant's Customs Manager at Taveta to release the consignment to allow compliance with Kenya Bureau of Standards. Additionally, it prays that this court issues any other order or relief it may deem just and fair to meet the ends of justice. Lastly, it prays for the costs of the application. Prayers (1), (2) and (3) are spent.

3. The application cites a raft of grounds, namely: - (i) that the orders were issued despite its pending application dated 14th July 2021 urging that the prosecution in criminal case number E122 of 2020 had been concluded and sentence passed; (ii) that the said orders were issued in its absence nor was it a party

[1] Cap 75, Laws of Kenya.

to the proceedings; (iii) that the orders were obtained through misrepresentation and non-disclosure of material facts by the 1st Respondent; (iv) that the trucks and goods are subject to criminal case where a one Joseph Wakagwi Ndingi alias Kiganjo owned up and stated that he was the owner of the goods and he was arrested and charged in Taveta Criminal Case No. E122 of 2020 on 30th November 2020 with the offences of importing restricted goods contrary to section 200 (a) (ii) of EACCMA and importing concealed goods contrary to section 202 (a) of EACCMA; (v) that the said Joseph Wakagwi Ndungi alia Kignjo having been convicted on 5th May 2021 on his own plea of guilty, the trucks are subject to forfeiture under section 215 of EACCMA; and (vi) that the said orders offend sections 211 (1) and 215 of EACCMA.

4. In opposition to the application, the 1st Respondent filed the Replying affidavit dated 1st November 2021. Its key highlights are:- (i) that he is a director of Arusha United Cargo Carriers Limited which undertakes transport business within East and Central Africa; (ii) that the said company it is the registered owner of the goods; (iii) that on or around 10th August 2020 his company entered into a transportation contract with Dreamakers Company Ltd for transportation of goods from Dar es Salam to Nairobi and under the agreement, the company was to incur all costs with regard to clearing, import duty and other levies; (iv) that on 27th September 2020 the owner of the consignment a one David Jirech Mugenya entered into an agency agreement with a one Joseph Wakagwi Ndungi, the accused in the criminal case for the purposes of clearing the consignment at a cost of Kshs. 740,000/=. (v) that the said trucks were impounded for importing restricted goods and the said agent was convicted and fined Kshs. 500,000/= in default to serve 3 years imprisonment; (vii) that the orders under challenge were issued on 25th January 2021, so the learned Magistrate was not functus officio; (viii) that he was not involved in the agent's criminal activities; (ix) that section 216 (4) (b) and 218 of EACCMA provides for restoration of seized goods upon satisfaction of the court, and, that the applicant will not suffer prejudice if the goods are released.

5. The 2nd Respondent did not file any response to the application, nor did it participate in the proceedings.

6. In his written submissions, the applicant's counsel cited Article 165 (6) & (7) of *the Constitution* and section 362 of the CPC and argued that the impugned ruling was improper. She urged this court to exercise its revision powers. She cited section 211(1) of EACCMA which provides for forfeiture of a vehicle used in carriage of goods. She cited section 215(1) of EACCMA which provides that conviction has the effect of condemnation of the things. She argued that following the accused person's conviction, the vehicles used to ferry the goods are subject to forfeiture under section 215 of EACCMA and cited of Republic v Commissioner Customs & Excise ex parte Abdi Gulet Olus[2] which upheld the constitutional validity of section 215 of the Act. She faulted the impugned decision describing it as illegal and improper. She also argued that the learned Magistrate by making further orders of release the goods exceeded her powers. She argued that the orders were issued in absence of the applicant in breach of its right to be heard and cited DPP V Jackson Cherono[3]which underscored the rights of the victim of crime.

7. The 1st Respondent's counsel cited Kenya Revenue Authority v Joseph Namwai Lotiki & others[4]in support of the holding that there is no specific procedure under EACCMA for governing forfeiture proceedings, so the fallback provision is section 389A of the CPC.

2 [2014] e KLR.

3 [2019] e KLR.

4 [2020] e KLR.

8. I start this determination by mentioning that the trial courts records were not availed to this court. However, from the parties' pleadings, the factual matrix which triggered the instant application is essentially common ground or uncontroverted. For example, it is undisputed that a one Joseph Wakagwi Ndungu alia Kiganjo was chaged with the offence of importing restricted goods contrary to section 200(a) (ii) of EACCMA, 2004 and importing concealed goods contrary to section 202 (a) of EACCMA in Criminal case No. E122 of 2020. It is uncontested that the 1st applicant filed MISC CR Application No. E005 of 2021, Tengemea Martin Mfinanga v Republic and on 25th January 2021, the learned Magistrate ordered: -

> Trucks registration number T 610DNL and T380DHP be released to applicant upon being photographed by the scene of crime officer and deposit of a copy a copy of logbooks.

9. Notably, the above order as issued in a different file during the pendency of Criminal case Nom E122 of 2020. There is no mention of the criminal file even though the items to be released were the subject of criminal case. There is no explanation why the application was not made in the criminal file which was still active in court. I will address this glaring omission later. For now, it will suffice to mention that the accused in the criminal case a one, Joseph Wakagwi Ndungi aklias Kiganjo was convicted and fined Kshs. 500,000/= in default to serve 3 years imprisonment on 5th May 2021. The conviction brings into focus the provisions of section 215 of EACCMA which provides:

215.

(1) Where any person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.

10. The reverse of a conviction is an acquittal. In this regard, section 215 (2) of the Act provides:

(2) Where any person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of such offence, then, on the acquittal of such person, the court may order the thing either— (a) to be released to the person from whom it was seized or to the owner thereof; or (b) to be condemned.

11. Also relevant is section 211(1) of EACCMA which provides: -

> A vessel of less than two hundred- and fifty-tons register, and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture

12. On 19th July 2021, the court in MCC MSC E002 of 2021, evidently a different file, issued the following order(s): -

1. That the Kenya Revenue Authority Customs Manager (KRA) at Taveta be and is hereby ordered to release two trucks registration numbers T610DNL and T380DHP to the applicant in accordance with the order of this court issued on 25th January 2021.

2. That Kenya Revenue Authority (KRA) customs Mnager at Taveta be and is hereby ordered to release the consignment of Mitumba in the trucks back to the country of origin to allow for compliance of the KEBS conformity protocols.

13. It is the above order which the applicant beseeches this court to invoke its supervisory powers and its powers of revision to review and or set it aside. Granted, section 362 of the CPC vests this court with power to call for the record or proceedings of the subordinate courts and satisfy itself as to the legality or propriety of any order, judgement or proceedings passed. In exercising the said powers, this court enjoys the same powers as when hearing an appeal. Also, this court may hear and determine a revision without hearing the parties except when the orders issued may affect the accused person, then he must be heard. The orders being sought to be reviewed were issued not in the criminal file, but in the above two cited files.

14. Perhaps, it is important to explain the nature of this court's supervisory jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Though supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs.[5]

15. Parliament in its wisdom provided for a mechanism of examining the propriety or legality of orders/judgments/proceedings issued by subordinate courts in criminal cases as a safeguard to ensure that criminal processes are undertaken fairly and in a manner that protects the rights of suspected persons until proven guilty through a fair trial process. This provision enjoys a constitutional underpinning courtesy of Article 165(7) of *the Constitution* which provides: -

> 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.

16. This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. v Sukumar Mukherjee[6] is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with an unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there is a grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere.[7]

17. Courts derive their power from *the Constitution* and the statutes that regulate them. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Useful guidance can be obtained from Freedman C J M, citing I H

5 Gallagher v. Gallagher, 212 So. 2d 281, 283 (La. Ct. App. 1968).

6 AIR 1951 Cal. 193.

7 *See D. N. Banerji v. P. R. Mukherjee 1953 SC 58.*

Jacob Current Legal Problems who adopted the following definition of 'inherent jurisdiction'[8] though writing in the context of civil cases: -

> " . . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them..."

18. Jerold Taitz, in his book, The Inherent Jurisdiction of the Supreme Court[9] succinctly describes the inherent jurisdiction of the high court as follows: -

> " . . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."

19. I.H. Jacob in "The Inherent Jurisdiction of the Court' [10] quoted by Jerold Taitz (supra) states:

> " [it] exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."

20. Talking about propriety and legality of the impugned orders, several disturbing questions come to mind. First, the orders issued on 25th January 2021 were issued in a totally different file, which is No. E005 of 2021, Tengemea Martin Mfinanga v Republic. Second, even though the applicant in the said file is not the accused in the criminal file, he was claiming the items the subject of the criminal trial, so, the orders sought had the potential of affecting the said case. Third, the said application was made, and the said order was granted during the pendency of the criminal proceedings. This was done not withstanding that the fact that the items sought to be released were actually exhibits in the pending criminal case. Fourth, this application had the potential of affecting exhibits in a pending criminal trial, yet the issue was not brought to the attention of the court or at least request for the court file in respect of the criminal case to be placed before the magistrate so as to avoid conflicting orders or even weigh the effect if any the release would have on the pending criminal trial.

21. Fifth, it is basic law that evidence seized for use as exhibits in criminal proceedings is generally held by the police or prosecuting authority until the time when it is formally introduced into evidence during

[8] Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51.

[9] Jerold Taitz, University of Cape Town, Juta, 1985.

[10] (1970) 23 Current Legal Problems 23 at pp. 51-52.

the trial of an accused person. Such evidence is then considered to be custodia legis or in custody of the court until the final disposition of the case either by the lower court or where an appeal is preferred by the final appellate court.

22. Sixth, the police/prosecution are vested with powers to keep and protect exhibits to be produced in court. As was held in Simon Okoth Odhiambo v Republic,[11] exhibits should never be released by the court until it is satisfied that in the case of conviction, no appeal has been preferred and if the appeal has been filed, such exhibits should only be released once the appeal has been heard and determined. Seventh, and even more important, the law provides for forfeiture of goods and the vehicle in the event of conviction. With such a clear statutory edict, one wonders why the court easily yielded to such an application yet the case was pending before it. Eight, by requiring photographs of the trucks to be taken and the logbook to be deposited, one wonders whether photographs could serve the purpose of the law which requires forfeiture in the event of s conviction. Ninth, the said order, coming as it did prior to conviction effectively flies on the face of section 214 of EACCMA which requires issuance of a Notice of forfeiture and section 216(1) of EACCM which provides for procedure after forfeiture.

23. EACCMA has very clear provisions which require the seized vehicle/vessel/goods to be forfeited in the event of s conviction. One wonders on what basis the application was made during the pendency of the case and in total disregard of the clear provisions of EACCMA. The court's jurisdiction to entertain such an application at this stage is lacking. Jurisdiction flows from the law. Its unclear why the trial court properly directing itself to the provisions of EACCMA and more so the existence of a pending criminal trial easily yielded to such a mischievous application which was meant to evade the wrath of the forfeiture provisions.

24. The suggestion by the Respondent's counsel that the law does not prescribe a procedure for release is equally legally frail. The procedure for release in such cases follows after conviction. After conviction, sections 214 and 216 of the Act come into play. Unfortunately, the attempt to have the goods released began in earnest long before the conviction and the making of the forfeiture order, which was aimed at evading or rendering any forfeiture orders otiose in the event of a conviction.

25. The above being the position, the orders made on 19th July 2021 seeking to enforce the orders made on 25th January 2021 are equally legally frail. First, the said order seeks to enforce an improperly procured order. Second, after the conviction, the applicant ought to have waited for the forfeiture notice and follow the procedure provided under section 216 of the Act.Third, equally disturbing is the fact that in both applications, i.e MISCR No E005 of 2021 and MCC MSC /E002 of 2021 the Kenya Revenue Authority was not a party, yet, it was the complainant in the criminal trial. Worse still, the orders dated 19th July 2021 are directed against the Kenya Revenue Authority Customs Manager. The applicant is required to obey a court order issued in a matter it was not a party.

26. I fail to understand how the 1st Respondent intended to enforce such an order. This is because the Kenya Revenue Authority was not a party to the said proceedings. Such a scenario poses a danger of granting orders affecting a person without giving him the benefit of a hearing a position decried by the Supreme Court of India in Prabodh Verma v State of U.P.[12] and Tridip Kumar Dingal v State of W.B.[13] The principle that comes out from the above cases is that a person or a body becomes a necessary party if he/it is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal

11 {2005} e KLR.

12 {1984} 4 SCC 251.

13 {2009} 1 SCC 768.

forum, for there would be violation of natural justice. The principle of audi alteram partem has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail.

27. The applicability of the principles of natural justice has to be adjudged with regard to the effect and impact of the order and the person who may be affected; and that is where the concept of necessary party becomes significant. I may profitably cite the Supreme Court of India in Canara Bank v Debasis Das[14] which stated: -

> "Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

And again: -

> "Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."

28. The concept and doctrine of Principles of Natural Justice and its application in justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision-making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

29. Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of *the Constitution* encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body.

30. Importantly, *the Constitution* recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to

[14] {2003} 4 SCC 557.

be given an opportunity of replying to it.[15] Courts world over have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[16]

31. By way of summation, no order should be passed behind the back of a person who is to be adversely affected by the order, a position aptly stated by the Supreme Court of India in J.S. Yadav v State of U.P. & Anr[17] thus: -

> "No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure, ...provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff...More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post..."

32. Court pronouncements are graphically clear that a person likely to be affected by a court order is a necessary party to the proceedings. So, one of the several defects in the orders under challenge is that of non-joinder of a necessary party, i.e., the Kenya Revenue Authority.[18] A court ought not to decide a case without the persons who would be vitally affected by its judgment/order being before it as respondents.

33. By now it is manifestly clear that the legality and propriety of the orders issued on 25th January 2021 and 19th July 2021 is in doubt. I have in the earlier analysis enumerated several reasons which render the said order indefensible in law. The orders not only offend the law, but they also fly on the face of what I call the court's sense of justice and fairness. Such orders cannot be allowed to stand. Pursuant to the provisions of section 362 of the CPC as read with section 364 of the CPC, I find and hold that this is a proper case for this court in exercise of its powers under the said provisions and its supervisory jurisdiction under Article 165 (6) & (7) of *the Constitution*, to set them orders aside. Allowing such orders to stand is a direct affront to the elementary principles of justice, fairness and the principle of legality which requires that all decisions must find their source on the law.

15 Kioa v West (1985), Mason J

16 See Onyango v. Attorney General, Nyarangi, JA asserted at page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly." At page 460 the learned judge added:-"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in Mbaki & others v. Macharia & Another, at page 210, the Court stated as follows:- "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

17 {2011} 6 SCC 570

18 See decision by a three-judge Bench in Prabodh Verma and Others v. State of Uttar Pradesh and Others {1984} 4 SCC 251

34. Accordingly, I allow the applicant's application dated 11th August 2021. I hereby set aside the orders made on 25th January 2021 and 19th July 2021 in their entirety. The 1st Respondent is ordered to pay the costs of this application to the applicant.

SIGNED AND DATED 19TH DAY OF SEPTEMBER, 2022

John M. Mativo

Judge

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2022

OLGA SEWE

JUDGE