



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION NO E001 OF 2021**  
**IN THE MATTER OF CRIMINAL REVISION**  
**BETWEEN**  
**PETROLEUM INSTITUTE OF EAST AFRICA.....APPLICANT**

**AND**

**REPUBLIC.....1<sup>ST</sup> RESPONDENT**  
**ROYAL GAS & ENERGY LIMITED.....2<sup>ND</sup> RESPONDENT**  
**ABDI WAABU MOHAMED.....3<sup>RD</sup> RESPONDENT**  
**HUSEIN ABDI BALAK.....4<sup>TH</sup> RESPONDENT**  
**JOSEPH KURIA MIRIGI.....5<sup>TH</sup> RESPONDENT**  
**EVANS OGUNDA AYOO.....6<sup>TH</sup> RESPONDENT**

(Being an Application for Revision of the Record, Proceedings  
and Order of the Honourable Z. Abdul (SRM) in E3929 of 2020  
at Chief Magistrates Court Milimani on 3<sup>rd</sup> December 2020)

**RULING**

1. Petroleum Institute of East Africa, the Applicant, approached this court by way of Notice of Motion dated 4<sup>th</sup> January, 2021, seeking orders as follows:

- a. .... (Spent)
- b. .... (Spent)

c. THAT the Honourable court be pleased to certify this application against the orders of the Honourable Z. Abdul (SRM) in Chief Magistrates Court at Milimani Criminal Case No. E3929 dated 3<sup>rd</sup> December 2020, (to the effect that the exhibit namely motor vehicle registration no. KBX 854H (TOYOTA PROBOX), KBX 648R (Town Ace), and KCS 874B (Town Ace), and the suit premises were to be unsealed and or to be released) as urgent and an urgent date be set for the hearing of this application inter-parties.

d. THAT this Honourable court be pleased to stay the execution of the order of the Honourable Z. Abdul (SRM) in Chief Magistrates Court at Milimani Criminal Case No. E3929 of 2020 dated 3<sup>rd</sup> December 2020, (to the effect that the exhibit namely motor vehicle

registration no. KBX 854H (TOYOTA PROBOX), KBX 648R (Town Ace), and KCS 874B (Town Ace), and the suit premises were to be unsealed and or to be released) as urgent and an urgent date be set for the hearing of this application inter-parties.

e. THAT this honorable Court be pleased to call for and examine the Record, proceedings and Orders of the Honorable Z. Abdul (SRM) in Chief Magistrates Court at Milimani Criminal Case No. E3929 of 2020 dated 3rd December 2020, (to the effect that the exhibit namely motor vehicle registration no. KBX 854H (TOYOTA PROBOX), KBX 648R (Town Ace), and KCS 874B (Town Ace), and the suit premises were to be unsealed and or to be released) for the purpose of satisfying itself as to the correctness legality, regularity and or propriety of the said record proceedings and order.

f. THAT this honorable Court be pleased to Order the detention and preservation of all physical and documentary evidence in Chief Magistrates Court at Milimani Criminal Case No. E3929 of 2020 (including the exhibits namely gas cylinders and motor vehicle registration no. KBX 854H (TOYOTA PROBOX), KBX 648R (Town Ace), and KCS 874B (Town Ace), until the conclusion of the said case.

g. THAT the applicant be at liberty to apply for such further or other orders and or directions as this Honorable Court may deem fit and just to grant and that the Honorable Court make such further or other orders it deems appropriate.

2. The application is premised on grounds that: The Applicant is a trade association whose members are victims and complainants in the criminal case before the lower court; and it holds specific power of attorney to commence legal proceedings and regulatory enforcement actions against persons who infringe its members intellectual rights and trademarks.

3. That the 2<sup>nd</sup> Respondent (Royal Gas & Energy Ltd) applied and obtained orders releasing exhibits, motor vehicle registration No's KBX 854H, Toyota Probox, KBX 648R, Toyota Ace, KCS 874, Toyota Ace, despite not being the registered owner.

4. That the suit premises were sealed by officers from Energy and Petroleum Regulatory Authority and Anti-Counterfeit of the Directorate of Criminal Investigation of the National Police Service to preserve integrity of the suit premises during trial, which the trial court ordered to be unsealed in violation of the Applicant's constitutional and statutory rights as a victim of the alleged crimes as they were not informed hence did not participate in the proceedings.

5. That the release of exhibits will break the evidential chain of custody and negate the exhibit's probative value and prejudice the fair hearing of the case.

6. Clive Cetewayo Mutiso, the Chief Investigation Officer of the Applicant herein swore an affidavit in support of the application where he reiterated what was stated in the body of the application and emphasized that it was in the best interest of justice for the abuse of the court process to be stopped.

7. The 1<sup>st</sup> Respondent did not file a response to the application. The 2<sup>nd</sup> - 6<sup>th</sup> Respondent opposed the application arguing that the orders were conditional and merited.

8. The application was canvassed by way of written submissions. The Applicant urged that the 2<sup>nd</sup> Respondent faces legal jeopardy as an employer of the 3<sup>rd</sup> - 6<sup>th</sup> Respondents as well as the peril of having the afore stated motor vehicles forfeited to the State. That the 2<sup>nd</sup> Respondent having denied a basic fact of the motor vehicles having been seized while transporting liquified petroleum gas cylinders, the court erred in placing the prosecution case in the hands of a party who is adverse to such a case. That the 2<sup>nd</sup> Respondent is not the registered owner of the motor-vehicles and the views of the 3<sup>rd</sup> and 6<sup>th</sup> Respondents were neither sought nor obtained and that the court lacked jurisdiction to release exhibits held by the prosecution.

9. In response, the 2<sup>nd</sup> - 6<sup>th</sup> Respondents urged that the 3<sup>rd</sup> - 6<sup>th</sup> respondents through the 2<sup>nd</sup> Respondent sought for unsealing of the plant and release of their motor-vehicles. That the court ordered conditional release of the motor-vehicles and unsealing of the 2<sup>nd</sup> Respondent's plant, but the cylinders were not released. That the order of the court having been complied with, the application has been overtaken by events. That the applicant was represented and the court made the order on the basis that there was no provision in laws requiring sealing of the licensed plant. That the fact of the law providing for a possible forfeiture does not necessarily mean that motor vehicles will automatically be forfeited.

10. I have considered the application, response thereto, rival submissions of parties herein and authorities cited. This court has been moved to exercise its revisionary powers to correct a miscarriage of justice alleged to have been committed by the lower court. Supervisory jurisdiction is conferred upon the High Court by **Article 165(6)(7)** of the Constitution that provides 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 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.***

11. The power of High Court to call for records for purposes of regularizing orders that may be irregular is enshrined in Section 362 of the Criminal Procedure Code that provides as follows:

**“...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....”**

12. This court called for the lower court record after the impugned order was brought to its attention by an aggrieved party whose members are victims and complainants in the lower court and the deponent of the affidavit in support of the application being the key witness of the complainant.

13. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents, respectively were arraigned in court following accusations of having contravened various provisions of the **Petroleum Act, 2019**, including undertaking illegal refilling of LPG cylinders, transporting LPG cylinders without a valid licence from the Energy and Petroleum Regulatory Authority( EPRA), and being in possession of LPG seals belonging to other brands without the brand owners authority, offences that were denied on the 6<sup>th</sup> day of November,2020. They were granted bail and the matter fixed for hearing on the 20<sup>th</sup> January, 2021. However, on the 17<sup>th</sup> November, 2020, six (6) days later, the 2<sup>nd</sup> Respondent filed an application seeking release of motor- vehicles that were impounded following the act, and unsealing of its plant so that they could resume operations.

14. The application was vehemently opposed by the 1<sup>st</sup> Respondent. The argument raised was that the court was not seized of jurisdiction to issue an order against a regulator that had acted within its statutory mandate. And if the Accused persons were to be found guilty for the offences charged, it was mandatory for the equipment used, motor vehicles inclusive to be forfeited to the government, which meant that release of the motor vehicle would break the chain of custody of the materials.

15. Having considered the application, the trial court ordered the investigation officer to release the motor vehicles, which would be availed when required. It also allowed unsealing of the gas refilling plant stated to belong to the 2<sup>nd</sup> Respondent that was in the result allowed to operate in strict adherence with the terms and conditions of the licence.

The issue to be determined is therefore, whether the learned magistrate jurisdiction to make the orders?

16. Per what has been stated, the question begging is whether at the stage of the matter, the trial court had the power to grant orders sought in administration of justice. Did the order satisfy a standard of fairness expected by a court of law? Was it lawful for the court to interfere with exhibits that were in custody of the complainant prior to ascertaining that indeed they existed and enquiring into the merit of the case?

17. **Section 207(3)** of the CPC provides thus:

**“...If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.”**

18. **Section 208(1)** of the Civil Procedure Code states as follows:

**“...If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any)....”**

19. It was argued by the 2<sup>nd</sup> – 6<sup>th</sup> Respondents that considering circumstances, as held in the case of **Hassan Elmi and 4 others vs Anti-Counterfeit Agency, Civil Case No.50 of 2015**, motor vehicles could be released. In the instant case the accused persons having denied the charges the complainant was expected to present its case so as to identify exhibits prior to having them adduced in evidence. And even after being produced, whether or not they could be released to the owner would depend on evidence tendered. According to section 121 of the CPC when an item is seized and brought before court, it may be detained until the conclusion of the case.

20. Under the Petroleum Act, 2019, **Section 120**, it is stated that:

**“Where a person is convicted of an offence of *under this Act, in addition to any other penalty imposed, an order shall be made-***

(a) For the forfeiture of any vehicle, aircraft, vessel ***or equipment used in the commission of the offence;***

(b) For the forfeiture of petroleum recovered in the course of the commission of the offence;”

21. Therefore, it is clear that prior to release of the exhibits they were supposed to be presented before court which could only make orders concerning them after having them in its custody. **Lessit J in Proto Energy Limited vs Republic & 7 others (2020)eklr**, when confronted by such a case had this to state: “

**“...17. The accused persons were charged of violating section 99 (1) (l) of the Act. Section 120 of the Act provides that anyone convicted of an offence under the Act shall have an order of forfeiture of any vehicle or equipment used in the commission of the offence as well as any petroleum recovered in the course of the commission of the offence. The offences the accused persons faced in the trial court were subject to the provisions of this section of the Act. The case was yet to be heard. The exhibits, as listed in the charge were yet to be identified in court and produced as evidence. Any order of release was clearly premature.”**

22. It is basic knowledge that for any exhibit to be released or any order to be made in respect of any evidence it must have been presented before court. It was erroneous for the trial court to make orders regarding exhibits whose existence had not been established.

23. As stated in section 120 of the Petroleum Act, 2019, where a person is convicted of the offence, in addition to the penalty imposed, an order of forfeiture follows, even for the motor-vehicles involved. If the trial magistrate had interrogated this provision of the law that was brought to her attention, she should not have made the erroneous orders.

24. Having examined the record of the lower court, I am satisfied that the order made by the learned magistrate Hon. Z. Abdul, SRM was illegal, irregular and improper. Therefore, I quash and set it aside. The exhibits, motor-vehicles in question inclusive, shall be returned to the custody of the Investigation Officer until hearing and further orders by the court. There having been interference in the matter, I direct that the matter be allocated to another court for hearing and determination on a priority basis.

25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 25<sup>TH</sup> DAY OF MARCH, 2021.**

**L. N. MUTENDE**

**JUDGE**