



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CRIMINAL APPLICATION NO. E009 OF 2021**

**THE COMMISSIONER, KENYA REVENUE AUTHORITY.....1<sup>ST</sup> APPLICANT**

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

**VERSUS**

**TRIMAX FIBRE INFRASTRUCTURE AND**

**ALLIED SERVICES LIMITED.....1<sup>ST</sup> RESPONDENT**

**BAABZ FREIGHT FORWARDERS LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

[1] The Notice of Motion dated 26 January 2021 is expressed to have been brought by the two applicants herein pursuant to the provisions of Article 159(2)(d) and Article 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, 2004. They seek the following orders:

[a] Spent

[b] That **Motor Vehicle Registration No. KCV 986D/ZG1031** be availed before Court whenever it is required.;

[c] That the Court be pleased to review and set aside or discharge the order of Hon. Richard Odenyo, Senior Principal Magistrate, issued on 22 January 2021;

[d] That an order for the payment of taxes of **Kshs. 413,421/=** being penalty to bond or revenue on the stolen consignment of 725 bales of mosquito nets;

[e] That **Motor Vehicle KCV 986D/ZG1031** be returned to be used as an exhibit in **Eldoret Chief Magistrates Criminal Case No. E794/2020: Republic vs. Francis Kahinga, Abraham Some and Grace Wanjiku**; and that an order be made directing the respondents to comply with the license that was executed in respect of the subject transaction with a view of ensuring that the consignment is delivered to its destination;

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

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

[2] The application was premised on the grounds that, vide a ruling dated 22 January 2021, Hon. Richard Odenyo, SPM, ordered for the release of **Motor Vehicle Registration No. KCV 986D/ZG1031** in **Eldoret Criminal Case No. E794/2020: Republic vs. Francis Kahinga, Abraham Some and Grace Wanjiku**, notwithstanding that the said motor vehicle had been impounded pursuant to the provisions of the **East African Community Customs Management Act, 2004 (hereinafter, EACCMA)**. Thus, it was the contention of the applicants that the learned magistrate erred in law and fact by failing to appreciate the provisions of **Section 16(1)(h)** of the **EACCMA, 2004**, which provides that goods in transit which have been declared for or are intended for transfer to another partner State are under customs control until they are delivered to their destination; and that any interference with such goods, as was the case with the subject goods, makes them subject to forfeiture under **Section 210(f)** and **211(1)** of **EACCMA**.

[3] The applicants further averred that the learned magistrate erred by disregarding the provisions of **Section 99(1)(a)** of **EACCMA** by making an order for the release of the subject motor vehicle in disregard of the fact that some 152 bales remained therein; whose handling required the approval of 1<sup>st</sup> applicant. They further faulted the magistrate for failing to appreciate that a tax demand to the tune of **Kshs. 413,421/=** had already been issued to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> applicant in accordance with the provisions of **Regulation 104(12)** of the **East African Community Customs Management Regulations, 2010**; which amount was yet to be paid by the time the impugned order was made.

[4] Lastly, it was the contention of the applicants that the subject motor vehicle is a crucial exhibit in **Eldoret Criminal Case No. 3794/2020**; wherein the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons pleaded not guilty. It was, thus, their assertion that the motor vehicle will undoubtedly be required as an exhibit at the hearing of the case against the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons.

[5] The application was supported by the affidavit filed therewith, sworn on **26 January 2021** by the investigating officer, **No. 83189 PC Chrispine Otieno**. He explained in the said affidavit that the 1<sup>st</sup> respondent, a firm engaged in the transportation business, was hired by the 2<sup>nd</sup> respondent to transport 877 bales of imported mosquito nets to the **Democratic Republic of Congo (hereinafter "the DRC")**. **PC Otieno** further averred that the goods, though sealed, were interfered with and some stolen while in transit within Kenya. Consequently, their investigations led to the arrest of three persons, who were subsequently arraigned before the court at Eldoret in Chief Magistrate's Court **Criminal Case No. E794/2020**. **PC Otieno** added that whereas the 1<sup>st</sup> accused person, **Francis Kahinga**, pleaded guilty and had his case disposed of summarily, the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, **Abraham Some** and **Gladys Wanjiku**, denied the charges and their trial is yet to commence. He annexed a copy of the Charge Sheet to his affidavit as **Annexure CO-2**. He acknowledged that, when the facts were read in respect of the 1<sup>st</sup> accused, the subject motor vehicle was produced and marked as the **Prosecution's Exhibit No. 12**.

[6] **PC Otieno** explained that, upon the conclusion of the case against the 1<sup>st</sup> accused, an application was filed by the 1<sup>st</sup> respondent before the lower court dated **1 December 2020**, seeking the release of the **Motor Vehicle Registration No. KCV 986D/ZG1031**; which application was opposed by the applicants; and that it was in respect of that application that the impugned ruling dated **22 January 2021** was delivered. He took issue with the fact that the motor vehicle was released and yet it was the obligation of the 1<sup>st</sup> respondent to ensure delivery of the goods to **the DRC**. He exhibited copies of the ruling and the licence issued to the 1<sup>st</sup> respondent by the 1<sup>st</sup> applicant as **Annexures CO-4 and CO-5** to the Supporting Affidavit.

[7] In reply the 1<sup>st</sup> respondent relied on an affidavit sworn on **1 February 2021** by its Managing Director, **Martin Mutua Nyamai**, who averred therein that the 1<sup>st</sup> respondent is a victim whose vehicle was stolen and was only recovered after he made a report to the police. He further averred that the said motor vehicle was vandalized in the process; and that the 1<sup>st</sup> respondent has had to incur huge costs in repairing it. A copy of an estimate of the repair charges was annexed to the affidavit of **Mr. Nyamai** as **Annexure 'MTN 1'**. He otherwise dwelt largely with issues of law in his affidavit, defending the impugned ruling and asserting that the applicant ought to have appealed instead of seeking revision since there is no illegality or impropriety in the proceedings before the lower court.

[8] On its part, the 2<sup>nd</sup> respondent filed a Replying Affidavit sworn on **16 February 2021** by one of its directors, **Abdikadir Ali**, by which it conceded that **Motor Vehicle Registration No. KCV 986D/ZG 1031** belonging to the 1<sup>st</sup> respondent was hired by the 2<sup>nd</sup> respondent to transport the goods in issue from Mombasa to **the DRC**; and that the bond issued pursuant to the **EACCMR** for that transaction is yet to be cancelled by the exit office. The 2<sup>nd</sup> respondent further confirmed that the subject motor vehicle was released by an order of the lower court at the instance of the 1<sup>st</sup> respondent. **Mr. Ali** further averred that it remains the obligation of the 1<sup>st</sup> respondent to ensure the entire consignment, including the goods that were abandoned at **Eldoret West Police Station** upon the release of the motor vehicle, is delivered to its final destination.

[9] The application was urged orally on **24 March 2021**. **Ms. Opiyo** for the 1<sup>st</sup> applicant relied on the Supporting Affidavit and its annexures and pointed out that the goods in question are subject to customs control in line with **Section 16(a) (i) and (h)** of the **EACCMA**. She reiterated the applicant's stance that a tax demand was issued to the respondents which is yet to be complied with. She urged the Court to take into account that the 1<sup>st</sup> respondent's driver pleaded guilty before the subordinate court; and therefore that, by releasing the subject motor vehicle without the approval of the Commissioner, the lower court erred. She also took issue with the fact that the recovered goods have been abandoned at **Eldoret West Police Station**. She accordingly prayed for an order for recovery of the tax due; an order in respect of the remaining consignment; and an order for the conditional release of the subject lorry, directing that it be availed before the lower court as and when required. Her submissions were supported by **Ms. Kegehi** for the 2<sup>nd</sup> applicant.

[10] On behalf of the 1<sup>st</sup> respondent, **Mr. Mwalimu** opposed the application. He relied on the Replying Affidavit sworn on behalf of the 1<sup>st</sup> respondent by **Mr. Martin Mutua Nyamai** and took the stance that the issues raised by **Ms. Opiyo** do not fall within the jurisdiction of the Court for the specific purposes of **Article 165(6) and (7)** of the **Constitution**. In his view, the applicants have not shown that there is some procedural defect or illegality in the proceedings of the lower court or in the impugned ruling to warrant the Court's intervention by way of revision. He accordingly suggested that the issues complained of by the applicants ought to have been taken on appeal, granted that all they have demonstrated is their dissatisfaction with the ruling of the lower court.

[11] **Mr. Mwalimu** also submitted that, since the provisions under which the charges were brought do not envisage forfeiture, the argument that the motor vehicle was wrongly released is untenable. He urged the Court to note that the motor vehicle has already been produced before the lower court as an exhibit; and that to require that it be availed for production as an exhibit would be unwarranted as an exhibit cannot be produced twice. Regarding the tax demand, it was the submission of **Mr. Mwalimu** that the 1<sup>st</sup> respondent is not a party to that demand and therefore is not bound by it. He likewise took the view that an order for delivery of the recovered goods to **the DRC** is not one of the orders that can be made by the Court on revision; and that, in any case, the applicants have not demonstrated that the 1<sup>st</sup> respondent has failed to discharge the bond.

[12] On his part, **Mr. Ndege** for the 2<sup>nd</sup> respondent, supported the position taken by counsel for the applicants. He reiterated the averments of

the 2<sup>nd</sup> respondent as brought out in the affidavit of **Mr. Abdikadir Ali** and urged the Court to find that it was erroneous for the lower court to release the lorry and leave the container at the police station with some of the goods. His posturing was that the 1<sup>st</sup> respondent had been contracted to transport the goods from **Mombasa to the DRC** and therefore that the motor vehicle ought not to have been released without the goods; and without ensuring that the remaining goods were delivered as envisaged by the terms of the transportation contract.

[13] In response to the respondents' submissions, **Ms. Opiyo** explained that the applicants could not have filed an appeal because the lower court case is yet to be heard and determined. In her view, the best recourse was by way of revision. She reiterated her stance that the motor vehicle was produced only in respect of the 1<sup>st</sup> accused; and that it will be required as an exhibit at the trial of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. She urged the Court to find in favour of the applicants and added that both respondents have the responsibility to ensure the goods reach their destination.

[14] 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. The application was hinged on **Article 165** of the **Constitution** which provide thus in **Sub-Articles (6) and (7)**:

**(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] The Court of Appeal had occasion to consider the scope of this supervisory role in **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 Others** [2014] eKLR, albeit within the context of a dispute in connection with the impeachment of a Governor. Here is what it had to say which I find pertinent:

**“Our reading of Article 165 (6) of the Constitution reveals that the role of the High Court for purposes of removal of a Governor from office is *inter alia* supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed. If the process for removal of a Governor is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. (See *Mumo Matemu – vs- Trusted Society of Human Rights Alliance & 5 Others (supra)*). 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.”**

[16] 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.**

[17] 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."**

[18] In the light of the foregoing provisions of the law, the Court called for the lower court in **Eldoret Chief Magistrate's Criminal Case No. E794 of 2020: Republic vs. Francis Kaiga Murungi and 2 Others** record for perusal in line with **Section 362** of the **Criminal Procedure Code** aforesaid. I have accordingly carefully perused and considered the same, and it is manifest therefrom that the accused persons were jointly charged with the offences of stealing goods in transit, contrary to **Section 279(c)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**; as well as interfering with goods subject to customs control and removal of customs seals from a vehicle in transit contrary to **Sections 203(f) and 195**, respectively, of the **EACCMA, 2004**.

[19] The record further shows that the 1<sup>st</sup> accused pleaded guilty to all three counts; and that the facts of the case were then given for purposes of the summary procedure involving the 1<sup>st</sup> accused. Those facts are that the 1<sup>st</sup> accused, who was then employed by the 1<sup>st</sup> respondent herein as a driver, was assigned the duty of driving **Motor Vehicle Registration No. KCV 986D/ZG 1031** from Mombasa to **the DRC** to deliver some 877 bales of mosquito nets. The lower court was told that, on **1 November 2020**, the motor vehicle disappeared from the tracking system while in transit and the 1<sup>st</sup> accused could not be reached on his mobile phone.

[20] The lower court was further told that, out of concern, the 1<sup>st</sup> respondent caused the matter to be reported to the Police at **Industrial Area Police Station**. The motor vehicle was later found at Jua Kali area in Eldoret Town with its seal tampered with. On inspection, only 152 bales of mosquito nets were found in the container. The recovered motor vehicle and trailer were then towed to **Eldoret West Police Station**, and the applicant was accordingly notified. Subsequent investigations led to the arrest of the accused persons; including the 3<sup>rd</sup> accused, who the lower court was told is the wife of the 1<sup>st</sup> accused. The Prosecution produced several exhibits before the lower court to support the facts as furnished, which included the subject motor vehicle with its trailer. They were marked as **the Prosecution's Exhibit 12** before the lower court.

[21] The 1<sup>st</sup> accused admitted those facts and was consequently convicted and sentenced on **11 December 2020** to 5 years' imprisonment on Count I; and 2 years' imprisonment, respectively, on Counts II and III. In respect of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, the case has since been set for hearing on **7 June 2021**.

[22] Thus, it was upon the conviction of the 1<sup>st</sup> accused that an application was made for the release of **Motor Vehicle Registration No. KCV 986D** by **Mr. Mwalimu**, who appeared before the lower court on behalf of the 1<sup>st</sup> respondent herein. That application was dealt with on an *inter partes* basis, after which the learned magistrate, **Hon. Odenyo**, delivered his ruling on **22 January 2021**. Here is the view he took of the application (per the handwritten version of the proceedings):

**“I have considered the submissions by counsel for the applicant, counsel for the 1<sup>st</sup> interested party and counsel for the 2<sup>nd</sup> interested party as well as the sentiments of the prosecution counsel who concurred with the submissions of the 2<sup>nd</sup> interested party. In my view the ends of justice would best be served by releasing the vehicle to the applicant. This is because the claim by the 1<sup>st</sup> interested party is based on the contract between them, which can easily be enforced in a civil claim. Likewise the claim by the 2<sup>nd</sup> interested party is enforceable against the 1<sup>st</sup> interested party only without necessarily driving the applicant to penury by grounding the motor vehicle which he uses to generate income and to meet his loan obligations.**

**I do therefore allow the application by the applicant herein. I order that the motor vehicle registration no KCV 986D/2G 1031 which was produced as exhibit 12 be released to owner/applicant.”**

[23] Hence, the question to pose is whether, in the circumstances, the learned magistrate can be faulted in terms of **correctness, legality or the propriety** of his ruling dated **22 January 2021**. The record shows that the learned magistrate gave the parties a hearing in respect of the Notice of Motion dated **1 December 2021**; and that reasons were given for the impugned decision. There is no allegation, in the instant application, of any procedural flaw in the proceedings leading up to the release of the motor vehicle or even that the plea of the 1<sup>st</sup> accused in the lower court matter was not unequivocal. Indeed, at prayer (b) of the Notice of Motion dated **26 January 2021**, the applicant simply asked that an order be made for the lorry to be availed before court whenever required for purposes of the pending trial in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons.

[24] In support of prayer (e) of the Notice of Motion, it was averred that the motor vehicle is a necessary exhibit in the lower court matter. The argument of learned counsel for the applicant was that whereas the motor vehicle was produced in respect of the 1<sup>st</sup> accused, it is yet to be produced in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> accused. That, to my mind, hardly qualifies for an illegality or impropriety. The fact is that the motor vehicle had been procedurally produced and formally marked as an exhibit before the lower court; and should the need arise for it to be availed for viewing, the trial court is well placed to handle such an eventuality. I note too that at paragraph 8 of the Supporting Affidavit filed on behalf of the 1<sup>st</sup> respondent before the lower court, it was indicated that the motor vehicle had been photographed by the police for evidential purposes. Again, it would be for the Prosecution to raise the issue and for the lower court to determine whether or not such photographs would suffice for purposes of the trial.

[25] The Court was also asked to make an order for the payment of taxes in the sum of **Kshs. 413,421/=**, being the penalty due in respect of the stolen consignment of 725 bales of mosquito nets. A demand to that effect dated **8 December 2020** was annexed to the Supporting Affidavit of **Christpine Otieno** and marked as **Annexure CO 6**. And, in her submissions, counsel linked that demand to the subject motor vehicle and submitted that the 1<sup>st</sup> applicant stands to suffer loss of revenue by the mere fact of that release. I find that connection strained, granted that in **Regulation 104(13)** of the **EACCMR**, the responsibility of paying the penalty in connection with the bond is that of the bonded owner; in this case the 2<sup>nd</sup> respondent. It provides that:

**“Where the quantity of goods in transit is found to be less than that specified in the entry or where the period allowed expires before any part of the goods is exported, the owner of the goods shall immediately pay to the proper officer the penalty to bond, except that in the case of discrepancy, the penalty payable shall be calculated proportionately to the discrepancy unless the discrepancy is accounted for to the satisfaction of the proper officer.”**

[26] Indeed, the demand aforementioned was addressed, not to the 1<sup>st</sup> respondent who is the owner of the subject motor vehicle, but to the 2<sup>nd</sup> respondent. In any case, **Regulation 130(1)** of **EACCMR** recognizes that:

**Where any goods are liable to duty, then such duty shall constitute a civil debt due to a Partner State and be charged on the goods in respect of which the duty is payable; and such duty shall be payable by the owner of the goods and may, without prejudice to any other means of recovery, be recovered summarily by legal proceedings brought by the Partner State.**

[27] I have referred to the above provisions to demonstrate, not only that the 1<sup>st</sup> applicant has other more efficacious avenues available to it to ensure the tax demand is complied with, but also to underscore the fact that the tool of revision is not designed for purposes of tax recovery.

[28] Perhaps the only valid concern is the applicants' assertion that the subject motor vehicle was released and yet it is liable to forfeiture pursuant to **Section 211(1)** of the **EACMA**. That provision states that:

**“(1) 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.”**

[29] It is instructive therefore that forfeiture of a motor vehicle used in the conveyance of goods for purposes of the above provision is predicated on proof that the goods are liable to forfeiture under the Act. Thus far, there is no proof that the recovered 152 bales of mosquito nets are liable to forfeiture. To the contrary, the applicants prayed for an order, vide prayer (e) of the Notice of Motion dated **26 January 2021**, compelling the respondents to comply with the terms of their licence by delivering the recovered goods to their destination in **the DRC**. Hence, in the absence of proof that the recovered goods are liable to forfeiture, there would be no basis for faulting the learned trial magistrate for having released the subject lorry; and I so find.

[30] There was warranted concern and a sense of trepidation in the submissions of counsel for the 1<sup>st</sup> applicant in connection with the recovered goods. She complained that, although the motor vehicle was released, the container was itself abandoned at **Eldoret West Police Station** without the authority of the Commissioner; and therefore that the release order was made in disregard of **Section 99** of the **EACCMA**. She accordingly prayed for directions on the remaining bales, now lying in a container at the police station. In this respect she had the support of **Mr. Ndege**, counsel for the 2<sup>nd</sup> respondent.

[31] My considered view however is that the **EACCMA** and the **Regulations** thereunder have clear provisions on the matter. For instance, **Regulation 104(14)** of the **EACCMA Regulations**, provides that:

**“Payment of the penalty to bond under sub-regulation (13) shall not absolve the owner from exporting the goods within the period allowed under sub-regulation (4) and where the owner fails to export the goods, the goods shall be liable to forfeiture unless the Commissioner otherwise directs.**

[32] Moreover, authorities abound for the principle that where the law provides for an alternative dispute resolution mechanism, that procedure ought to be explored first before seeking the intervention of the Court. In **Speaker of National Assembly vs. James Njenga Karume** [1992] eKLR for instance, the Court of Appeal held that:

**“...in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”**

[33] In the result, therefore, it is my finding that the application for revision is not only unwarranted but also that it is completely devoid of merit. The same is hereby dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF APRIL 2021**

**OLGA SEWE**

**JUDGE**