



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS CRIMINAL DIVISION CRIMINAL REVISION E134 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**HUMPHREY KARIUKI.....1<sup>ST</sup> RESPONDENT**

**PETER NJENGA.....2<sup>ND</sup> RESPONDENT**

**ROBERT THINJI.....3<sup>RD</sup> RESPONDENT**

**GEOFFREY KAARIA KINOTI.....4<sup>TH</sup> RESPONDENT**

**SIMON MAUNDU.....5<sup>TH</sup> RESPONDENT**

**KEPHA GITHU GAKURE.....6<sup>TH</sup> RESPONDENT**

**AFRICA SPIRITS LIMITED.....7<sup>TH</sup> RESPONDENT**

**WOW BEVERAGES LIMITED.....8<sup>TH</sup> RESPONDENT**

**AND**

**KENYA REVENUE AUTHORITY.....INTERESTED PARTY**

**RULING**

1. The subject application herein is a notice of motion application dated; 19<sup>th</sup> April 2021, brought under the provisions of; Article 159 (2) (d), 165(6) & (7) of the Constitution of Kenya; section 121, section 362 and 364 of the Criminal Procedure Code, ( Chapter 75) Laws of Kenya; section 211, 214(3) and 215 of the East African Community Customs Management Act, 2004; section 28 of the Excise Duty Act, No. 23 of 2015 and Regulations 32 and 33 of the Excise Duty (Excisable Goods Management Systems) Regulations 2017 and all other enabling provisions of the law.

2. The applicant is seeking for orders as here below reproduced

*a) That, the application be certified as urgent and the same be heard ex-parte in the first instance;*

*b) That; the honourable court be pleased to exercise its supervisory powers of revision and revise, vary and/or set aside the orders issued in; Criminal Case No. 1333 of 2019; Humphrey Kariuki Ndegwa & 8 others, by Hounarable Andayi, Chief Magistrate, issued on 23<sup>rd</sup> November, 2020, where the court ordered the handing over of the premises of; WOW Beverages Limited located in Thika, within Kiambu County, to the 4<sup>th</sup> and 9<sup>th</sup> Respondents by the Directorate of Criminal*

*Investigations (DCI), the Director of Public Prosecutions (DPP) and Kenya Revenue Authority;*

*c) That, the Honourable court grants stay of proceedings in Milimani Criminal Case No. 1333 of 2019; Republic versus Humphrey Kariuki Ndegwa & 8 others in the first instance ex-parte;*

*d) That, the court do call for and examine the record in the criminal proceedings before the subordinate court in Milimani Criminal Case No. 1333 of 2019; Humphrey Kariuki Ndegwa & 8 others, that is before Honourable Andayi for purposes of; satisfying and pronouncing itself as to the correctness, legality or propriety of the findings and orders issued on 23<sup>rd</sup> November, 2020;*

*e) That, the Honourable court be pleased to make any other order or relief as it may deem just and fair to meet the ends of justice;*

*f) That, the costs of the application be borne by the Respondents.*

3. The application is based on the grounds on the face of it and an affidavit of the even date, sworn by; No. 67707 PC Shem Gichuki. The deponent avers that, the respondents herein are charged vide criminal case number 1333 of 2019, in the Chief Magistrate's Court, at Nairobi, with various offences, as stated in the charge sheet therein.

4. That, following an application made by the 1<sup>st</sup>, 4<sup>th</sup> and 9<sup>th</sup> respondents, the learned trial Magistrate, Honourable F. Andayi ordered that, the premises of the 9<sup>th</sup> respondent be handed over to the 4<sup>th</sup> and 9<sup>th</sup> respondent. That, prior to the issuance of that order, the applicant had applied for consolidation of; criminal case numbers; 1333 of 2019, 1334 of 2019, and 1342 of 2019.

5. The case numbers 1333 of 2019 and 1342 of 2019, were then consolidated into the subject matter herein as number 1333 of 2019. Further, the accused in criminal case number; 1342 of 2019, were discharged. However, that order of discharge is a subject of High Court Criminal Appeal No. E51 of 2020.

6. Be that as it were, it is further averred that, at the time of applying for consolidation, the applicant disclosed that the exhibits they intend to use in the criminal case, are both movable and fixtures connoting the premises. Further, there is another suit, being Milimani Anti-Corruption Criminal Case No. 12 of 2020; Republic Vs Prabhu Sethu, where the subject exhibits will be used by the prosecution.

7. Further after the court made the order for release of exhibits, on; 27<sup>th</sup> November 2020 (sic), the applicant sought for a stay of the order but the same was declined vide a ruling delivered on; 8<sup>th</sup> April 2021, thus asserting the order issued on 23<sup>rd</sup> November 2020. The applicant argues that, the trial court overstretched its mandate by releasing exhibits that are a subject of another different suit, and which have not been produced as exhibits in the subject criminal case herein.

8. That, the release of the exhibits will be direct interference of the prosecution case and/or expose it or render it a mistrial. Additionally, it will defeat the provisions of; section 121 of Criminal Procedure Code, that deals with the right to a fair trial and due process. Thus, it was pre-mature to release the exhibits.

9. Further, other than being exhibits therein, the premises itself is liable for forfeiture by virtue that, they were sued in commission of tax and customs offences. Finally, justice demands that, it shall be administered without due regard to procedural technicalities.

10. However, the application was opposed by the 1<sup>st</sup> respondent's own replying affidavit dated 9<sup>th</sup> May 2021, in which he avers that, the applicant conceded to the release of the premises and therefore he is shocked at the turn of events.

11. Further, another visit to the scene is not necessary as noted by the trial court in the impugned ruling. That, the court has visited the premises on three (3) different occasions and taken electronic and physical notes, therefore the handover of the premises cannot injure, prejudice or compromise prosecution's case.

12. That to the contrary, the scene has been massively interfered with by the applicant's officers through vandalism and is worthless and of no assistance to the prosecution case.

13. Additionally, the applicant cannot turn private property into exhibit stores, thus contravening the provisions of; Article 40 of the Constitution of Kenya, and in disregard of the provisions of; section

10 of the National Police Service Act, that prescribes the manner in which exhibits should be stored.

14. The 1<sup>st</sup> respondent further argued that, the handing over order does not in any way compromise or affect the prosecution case, in that, the prosecution prepared and disclosed a list of exhibits and the subject premise is not one of them. Further, on 5<sup>th</sup> May 2021, the prosecution supplied a "schedule of discovery as at 5<sup>th</sup> May 2021" and not all exhibits listed therein, are in the premises in question.

15. That, he has not been charged with any offence under, the East Africa Community Management Act, 2004, to justify the reliance on sections 211, 214(3) and 215 (1) thereof.

16. Finally, the 1<sup>st</sup> respondent argued that, the applicant is an unrepentant contemnor, who has done nothing to purge its contempt and should be shy to approach the court for exercise of its discretionary jurisdiction.

17. The 3<sup>rd</sup> respondent filed a replying affidavit he swore dated; 11<sup>th</sup> March 2021, in which he deposed that, the applicant conceded to hand over of the premises so long as the 9<sup>th</sup> Respondent conducted legal business. Further, the subject premises are not listed in any of the applicant's disclosed exhibits, or at all and neither is it indicated in the updated schedule of discovery dated 5<sup>th</sup> May 2021.

18. Further, the averments that, the premises are liable for forfeiture is legally misconceived and not supported by law. Additionally, the trial

court has visited the scene, thrice and properly ordered for release of the premises upon finding that, no further investigation is going on at the scene.

19. The 3<sup>rd</sup> respondent argued that, the prosecution will not suffer any prejudice if the premises in question are handed over, as the exhibits are already in possession of the applicant as deposed; under paragraph (a) to (e) of the replying affidavit, opposing the application by the respondents for the release of the exhibits.

20. That, the subject application is intended to shield the applicant from the obvious and admitted contempt of court, and that the Anti-corruption case cited has no bearing whatsoever, with the subject criminal case herein.

## **ADDITIONAL MATERIALS**

1. The 4<sup>th</sup> respondent opposed the application on his behalf, and on behalf of the 9<sup>th</sup> respondent, of which he is the Managing Director. He argued that, there were no charges made alleged against the premises, as having committed any tax offence. That, the real question is whether, the Directorate of Public Prosecutions(DPP), Kenya Revenue Authority(KRA) and Directorate of Criminal Investigations(DCI); can invade premises, close down an individual's premises, pending the hearing and determination of the criminal case, and/or disregard orders lawfully issued by the court.

2. He argued that, the actions of the applicant are in contravention of the provisions of; articles 24, 31, 40 and 50 of the Constitution of Kenya. Further, the provisions of section; 158 of EACCM provide the manner in which searches and seizures are conducted in relation to tax matters.

3. Further, sections; 60 of the Tax Procedures Act, provides for the manner of storage of data and equipment, whereas section 40 thereof, provides for the detention and forfeiture of products and goods that offends the provision of Excise Duty Act. As such, the allegation of forfeiture under regulations 30(1) (g), 32, and 33 of the Excise Duty (Excisable Goods Management Systems) regulation does not apply.

4. That, if the orders sought are granted, the prosecution will use them to sanitize the unlawful seizure and detention of the subject premises. He argued that, investigations are over and therefore, premises being a crime scene does not arise; neither is the argument that, the premises are being used as exhibit store. He averred that, the applicant has also failed to provide the information and documents the trial court ordered it to.

5. The respondent denied the allegations that, the subject exhibits herein are for use in the prosecution Anti-Corruption criminal case number 12 of 2020. The allegations that, the respondents are charged with offences under EACCM, 2004 were also denied. It was averred that, the subject premises has never been a scene of crime in case number 1333 of 2019. It was further averred that, the delay by the prosecution of twenty-one (21) months in commencement of the criminal case, informed the trial court's order to release the premises.

6. The respondents cited the ruling in the *Platinum Distillers Case*, to argue that, the applicants are allowed to hold the premises for a period of not more than 30 days. Further, the applicant has not demonstrated that, the Chief Magistrate exercised his discretion wrongly.

7. The 5<sup>th</sup> Respondent also opposed the application vide a replying affidavit he swore dated; 12<sup>th</sup> May 2021, deposing briefly that, a similar application dated; 20<sup>th</sup> November 2020, was dismissed for want of jurisdiction and lack of merit.

8. That, the subject application is made in bad faith and is intended to delay the hearing of the main criminal case which has been pending since; 20<sup>th</sup> November 2019, when he took plea; thus violating his rights under, Article 50 of the Constitution of Kenya.

9. It is noteworthy that, there were other responses to the application. Be that as it may, the application was disposed of vide filing of submissions. The 1<sup>st</sup> Respondent filed submissions dated; 24<sup>th</sup> May 2021, supported by various legal authorities cited therein and supplied.

10. In a nutshell, he submitted that, prayers (a) and (c) of the application are spent, as the application is past ex parte stage. Thus the only remaining prayer is (d). Further the applicant's submissions that, a stay of the order was sought "and/or stay of proceedings pending the hearing and determination of this application" is clear misinterpretation of orders sought.

11. That, revisionary jurisdiction is discretionary and can only be exercised exceptionally and sparingly, as held in the case of; *Republic Vs Anthony Thuo Karimi (2016)*. Neither will the court exercise revisionary jurisdiction or interlocutory stage of a trial to interrupt the criminal trial, occasioning delay and undermining the absolute constitutional right of the accused to, an expeditious trial, pursuant to, Article 25 and 50(2) of the Constitution of Kenya 2010.

12. Further reference was made to the cases of; *Thomas Patrick Gilbert Cholmondeley vs Republic (2008) eKLR* and *Joseph Lendix Waswa Vs Republic (2020) Eklr*, to argue the applicant should await the conclusion of the matter. That, revisionary jurisdiction, should not be invoked to micro manage the trial at the subordinate court.

13. Similarly, the applicant has not demonstrated the elements of; incorrectness, illegality and/or impropriety or irregularity in the impugned ruling or order. The 1<sup>st</sup> Respondent rebutted the argument that, consolidation of the charges amounts to "change in circumstances" and argued that, neither is it one of the circumstances to invoke the provisions of; section 362 of the Criminal Procedure Code.

14. As regards for forfeiture of the premise, the 1<sup>st</sup> Respondent submitted that, from the provisions of the law under which he is charged, as per consolidated charge sheet, none of the charges attract the issue of forfeiture upon conviction. That, he is not charged under; EACCM, and that the prosecution having opted to sort out a tax issue through criminal proceedings, should appreciate, he is presumed innocent until

proved guilty. Further, punishment is the discretionary power of the trial court and not the applicant.

15. Finally, it was submitted that, Article 159 of the Constitution cited by the applicant, is not a panacea for all short coming, as stated in;

*Raila Odinga vs IEBC and others (2013)*. That it was not meant to oust the litigant's obligation to comply with procedure imperatives.

16. The 4<sup>th</sup> Respondent filed his submissions dated; 25<sup>th</sup> May 2021, and argued that, Sergeant Tenai, did not raise the issue of holding the premises pending the hearing of the case, or forfeiture thereof at the time of hearing the application at the Chief Magistrate's court, thus, being a new issue, it cannot be raised at the revisionary application stage, therefore on that premises, the application should fail.

17. The 5<sup>th</sup> respondent filed submissions dated 12<sup>th</sup> May 2021 and argued that, a similar application having been dismissed by the trial court on 8<sup>th</sup> April 2021, the court should find that, this application has no merit and dismiss it.

18. That, grant of the orders sought herein will infringe on the respondents' sight to expeditious hearing of the criminal case. The respondent relied on the cases of; *Anthony Murimi Waigwe Vs Attorney General & 4 others (2020) eKLR* to submit that, the purpose of expeditious trial is to avoid the accused remaining on trial for too long and having anxiety as to his fate.

19. The 9<sup>th</sup> respondent filed submissions dated 24<sup>th</sup> May 2021. It was submitted that, pursuant to the provisions of; Article 157 (1) of the Constitution of Kenya, the applicant should exercise the prosecutorial powers, in the interest of administration of justice, and prevent abuse of the process. That the objective of tax law is enhance revenue collection and not to kill business. Therefore, the orders sought for will not achieve that purpose.

20. Further, the order of forfeiture can only be made by the court. Similarly, the applicant having disobeyed the court order to hand over the premises cannot have audience before the court. Finally, it was submitted that, the applicant has not shown that any of the alleged exhibits belong to the 9<sup>th</sup> respondent, and neither is the premises in issue an exhibit.

## ANALYSIS AND CONCLUSION

1. I have considered the arguments advanced together with the submissions and I find that, first and foremost, I did not have the benefit of the replying affidavit dated; 8<sup>th</sup> September 2020, filed by the applicant in response to the applications filed by the 1<sup>st</sup> 4<sup>th</sup> and 9<sup>th</sup> Respondent. The applicant did not annex a copy thereto, to their supporting affidavit. However, all that I can gather therefrom, is the summary of the impugned ruling dated; 23<sup>rd</sup> November 2020.

2. Secondly, although the affidavit in support of the application makes reference to several annexures marked "SG1 to SG 6", only annexure "SG1 and SG2" were annexed to the affidavit and even then, annexure SG2, is incomplete in content. Whether it is due to inadvertency on the part of the deponent, or otherwise, it is not clear.

3. Be that as it were, I note that, all the prayers in the application are spent save for prayer (b) as supported by prayer (d). In that case, this ruling will restrict itself to that prayer.

4. It suffices to note that, the lower or subordinate court file has already been called for and examined and the remaining task is for the court to satisfy itself as to; whether its jurisdiction is properly invoked pursuant to the provisions of; section 362 of the Criminal Procedure Code and whether it should grant the prayer sought for.

5. The provisions of section 362 of Criminal Procedure Code stipulates 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"*

6. It follows from the aforesaid that, for the court to revise any order made by the trial court, that order must pass the test of correctness, legality or propriety.

I have considered the impugned ruling in the light of these provisions.

7. First and foremost, it is noteworthy that, the ruling dealt with several issues raised by the applicants therein, as summarized therein form pages 4 to 7. The subject issue herein, of handing over of the suit premises was just one of the issues raised. I shall therefore restrict this ruling to that issue.

8. Indeed, the impugned ruling has addressed that, issue at page 24 of the ruling and stated as follows;

*"On the prayer for release of the premises to the 9<sup>th</sup> accused person, in the replying affidavits, the prosecution deposes that, the applicants are free to conduct their business but the same should be legally done. There is no other specific response to that prayer objecting to it and so, I find that this is the response to the prayer. I have also not found any submission in response to that prayer by way of objection. Indeed, when the court visited the premises on the three occasions, there was no indication that the*

Respondents were actively involved in investigations at the scene or that there was anything to warrant the continued the continued treating the premises as a scene of crime under polite guard. There is no doubt that the continued closure of the premises is hurting the applicants and yet a criminal prosecution is not meant to be a punishment to an accused person.

*In the circumstances, I find that good reasons have been given for the release of the scene of crime to the 9<sup>th</sup> accused person through the 4<sup>th</sup> accused person. In order to avert further, waste and loss to the owners and considering the difficult economic circumstances the whole world is undergoing caused by the COVID – 19 Pandemic, the Respondents are therefore given seven days from today within which to hand over the premises that were described herein as a crime scene to the 4<sup>th</sup> and 9<sup>th</sup> accused persons herein. The reason for giving the seven days is to enable all the parties involved being the Applicants on the one hand and the DPP, DCI and KRA on the other hand, to jointly participate in the process of hand-over and take-over with the necessary inventories of the scene taken by all the involved parties” (emphasis added).*

9. From the content above, it does appear that, the applicant had no objection to the release of the subject premises to the 4<sup>th</sup> and 9<sup>th</sup> Respondents. It is therefore not quite clear, as to what has changed thereafter an application for revision of that order.

10. At this stage, I shall examine the reasons advanced by the applicant in support of prayer herein. In a nutshell, I understand the same to be as follows;

- a) *The subject premises are exhibits for the prosecution case, and have not been produced;*
- b) *In addition, the premises hold other exhibits yet to be produced in Anti-corruption case number 12 of 2020;*
- c) *Release of the premises shall occasion great miscarriage to the prosecution case, and/or evidential prejudice;*
- d) *The premises are subject to forfeiture pursuant to, EACCM Act 2004, under which the Respondents are charged; and as per section 214(3) thereof, the goods are to be detained until after the trial;*
- e) *Further regulations 30 (1)(g), 32 and 33 of Excise Duty (Excise Goods Management Systems) Regulations, 2017, envisages such forfeiture; and*
- f) *That, section 121 of Criminal Procedure Code envisages detention of the exhibits until the case is heard and determined.*

11. The question that, arises is whether these grounds met the threshold of; section 362 of Criminal Procedure Code. Before I deal with that question, several arguments have been raised by the Respondents which I shall address, and which I summarize as follows:

- a) *That, the subject premises are not listed among the exhibits to be relied on by the prosecution.*
- b) *There is no correlation between the suit herein and the suit number 12 of 2020;*
- c) *Release of premises shall not prejudice the prosecution’s case, in that the court has already visited the scene and released it as stated in the ruling;*
- d) *The issue of forfeiture was not raised at the hearing of the 1<sup>st</sup>, 4<sup>th</sup> and 9<sup>th</sup> Respondent’s application and therefore it cannot be raised at the revision application hearing; and*
- e) *The applicant did not oppose release of the premises save, to argue that, it should be used for lawful business.*

12. Having considered the rival arguments and/or the submissions by the respective parties, and taking into account the fact that, the hearing of the main criminal suit is still to be concluded and/or determined, it is imperative that, this court restricts itself to the requirements of; section 362 of Criminal Procedure Code and guard against making any order that, may prejudice the same.

13. In that case, I find that, the issue as to whether the premises are exhibits or not, should be dealt with by the trial court at the pre-trial conference, where the parties will have an opportunity to address the court on the same. Again, as to whether the scene of crime is an exhibit or not, should be deduced from the list of exhibits provided by the prosecution.

14. As to whether the premises have been produced or not, again, that issue should be dealt with by the trial court. Indeed, the trial court was live to the same and from the content of the ruling, I gather that, the court has visited the scene of crime three (3) times. I further note from the ruling that, the trial court directed as follows:

*“Since the court visited the scene and in the presence of all parties saw what it looked like, there is a baseline upon which evidence of; witnesses can be taken without the court necessarily sitting at the scene. If the applicants wish to have the evidence taken at the scene, then that issue be raised at the pretrial. Otherwise the parties are free to refer to the court record on observations made at the scene during the visit.*

*However, if the applicant is of the view that, the premises ought to be formally produced, it is a normal court practice and/or practice of procedure, to produce an exhibit even before a trial commence, if the interest of justice dictates. That can be done” (emphasis added).*

15. As to whether the same exhibits are required in Anti-Corruption case number 12 of 2020, I believe that matter can only be dealt with in that case. The trial court cannot issue orders herein regarding an exhibit to be used in another case. The appropriate application for the same be made in that matter.

16. On the overall issue of forfeiture, I find that, it does not seem to have been raised during the hearing of the applications dated 30<sup>th</sup> June 2020. Therefore, I agree with submissions of the Respondents that, it cannot be raised for the first time in the revision application. Even then, this court cannot delve into the substance thereof, as that may prejudice the hearing of main criminal case

17. Finally, as to whether the prosecution's case will be evidentially prejudiced if the court does not grant the orders sought, I find the answer in the negative, in view of the aforesaid, directives and/or observation the court has given.

18. Be that as it were, as stated in the ruling of the trial court, the applicant had no objection to the release of the premises, when they responded to the applications dated 30<sup>th</sup> June, 2020. Therefore, there is no clear reasons advanced why the premises should not be handed over to the 9<sup>th</sup> Respondent, as ordered.

19. All in all, I find that, the applicant has not met the threshold of the provisions of; section 362 of Criminal Procedure Code. There is no impropriety, irregularity or incorrectness, in the impugned ruling.

20. To the contrary, the manner in which the applicants have framed grounds; XV, XXVI, XXVII paragraph 11 and 12, that the learned trial Magistrate "erred in law and procedure" renders the application to be more of "an appeal" than a revision application.

21. In the light of the foresaid, I find that, the application has no merit and I dismiss it. However, before I pen off, as a matter of concern, I note from the materials placed before the court that, the matter herein has been pending in court since the year 2019. The parties, have quoted the provisions of; Article 159(2) on expeditious disposal of cases and should purpose to live to it, for expeditious disposal of the matter. That will solve some of the issues raised herein.

22. The court is live, to the fact that, the COVID-19 pandemic has generally disrupted court proceedings, but the parties should take advantage technology to progress the matter. I say no more.

Those then are the orders of the court.

Dated, delivered virtually and signed on this 30<sup>th</sup> day of June 2021.

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr Muller holding brief for Mr Kilukumi for 1st Respondent

Mr Oonge holding brief for Issa Mansus & Mr Kipkemoi for the 3<sup>rd</sup> Respondent

Ms Dar for the 4<sup>th</sup> Respondent

Ms G Mwangi for the 5<sup>th</sup> Respondent No appearance for 6<sup>th</sup> Respondent No appearance for the 7<sup>th</sup> Respondent No appearance for the 8<sup>th</sup> Respondent

Mr B Musyoki and Mr Ouma for the 9<sup>th</sup> Respondent.

Mr Mwenda for the applicant

Edwin Ombuna – Court Assistant