



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL REVISION NO. 84 OF 2020

(CORAM: F.M. GIKONYO J.)

(Being an application for revision of the record, proceedings and order of the Honourable G.N Wakahiu (C.M) of 17th December 2020)

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

-VERSUS-

SIDAI KARENKA AND ANOR.....ACCUSED PERSONS

AND

LUCY WANJIKU NDUNGU.....RESPONDENT

JUDGMENT

[1]. Before me is the prosecution's application dated 23rd December 2020 seeking the following orders;

i. Spent.

ii. That the ruling delivered on 17th December 2020 in Chief Magistrate's Court Narok Criminal Case No. 280 of 2017 be stayed pending the inter parties hearing and determination of this application.

iii. That the Kenya Wildlife Service's Narok is prohibited from releasing the motor vehicle registration number KCD 632L Isuzu Pick Up pending hearing and determination of this application.

iv. That the High Court does recall for the record of the Chief Magistrate's Court Narok Criminal Case No. 280 of 2017 for the purpose of satisfying itself as to the correctness, legality or propriety of the forfeiture proceedings and the ruling delivered on 17th December 2020 in the chief magistrates court no. 1 (former court no. 2).

[2]. The application is premised on the grounds on the face of the application and the supporting affidavit of Anthony Karanja prosecution counsel of the office of the Director of public prosecutions sworn on 23rd December, 2020.

Brief facts.

[3]. The motor vehicle registration number KCD 632L Isuzu Pick Up was used in or connected with the commission of an offence of dealing in game meat. The vehicle was impounded at Oldonyo Rasha Narok South on 18th February 2017 while transporting game meat. The driver escaped but two accused persons were arrested, charged, convicted and sentenced in Narok Criminal Case No. 280 of 2017 before Hon W. Juma (C.M.).

[4]. The motor vehicle at the time of the commission of the offence was jointly owned by John Gathogo Ndungu and Equity Bank.

[5]. After conviction the court conducted forfeiture proceedings. John Gathoga Ndungu the co-owner participated. The court delivered its ruling on 12th March 2019 to the effect that the motor vehicle registration no. KCD 632L be forfeited to Kenya Wildlife Services. The other co-owner Equity Bank did not participate in the proceedings since it was not served with a notice to show cause.

[6]. Being aggrieved by the decision to forfeit the motor vehicle to KWS, John subsequently appealed Narok High Court Civil Appeal No. 12 of 2019. The court vide ruling dated 6th May 2020 ordered a retrial of the forfeiture proceedings before a different magistrate of competent

jurisdiction. The court further ordered that John Gathoga Ndungu and Equity Bank Ltd to participate in the re trial proceedings with or without counsel.

[7]. While High Court Civil Appeal No. 12 of 2019 was still pending, the motor vehicle was transferred to the respondent herein Lucy Wanjiku Ndungu on 14th January 2020.

[8]. During retrial proceedings Equity Bank was summoned to attend court. The Credit Manager Kangema Branch attended court and testified to the effect that the bank had discharged itself from the ownership of the motor vehicle and refinanced the motor vehicle to Lucy Wanjiku Ndungu.

[9]. Following the retrial order by this court, John Gathoga Ndungu filed an application dated 3rd July 2020 in the Chief Magistrate's Court seeking for the release of the motor vehicle to him.

[10]. Before the application could be heard and determined, John filed a notice to withdraw the application on 3/9/2020.

[11]. On 3/9/2020 the respondent herein Lucy Wanjiku Ndungu filed an application dated 3/9/2020 in the same cause seeking for the release of the motor vehicle to her. The re trial court heard the application and delivered its ruling on 17th December 2020 to the effect that motor vehicle registration no. KCD 632L be released to the respondent herein.

[12]. Being aggrieved with the decision of the retrial court the DPP filed this application seeking a revision of the ruling and order of the retrial court to release the motor vehicle to the respondent herein Lucy Wanjiku Ndungu.

Applicant's Case

[13]. The applicant's case is that John Gathoga Ndungu the co- owner participated in the forfeiture proceedings in the lower court and the vehicle was forfeited to Kenya Wild Life Services on 12th March 2019.

[14]. While the High Court Civil Appeal No. 12 of 2019 was pending, the motor vehicle was transferred to the respondent Lucy Wanjiku Ndungu on 14th January 2020, whereas the forfeiture order issued by the lower court had not been set aside by the High Court.

[15]. The respondent was not the owner of the subject motor vehicle when it was involved in the commission of the offence of dealing in game meat.

[16]. Pursuant to the ruling delivered by the high court John Gathoga Ndungu filed an application in the Chief Magistrates' Court 2 seeking release of the motor vehicle which application was then withdrawn at the behest of the applicant.

The Response.

[17]. The application is opposed by the respondent through a Replying Affidavit sworn on 20th January, 2021 by Lucy Wanjiku Ndungu.

[18]. The respondent avers that at all material times before the forfeiture the subject motor vehicle was jointly owned by John Gathoga Ndungu and Equity Bank Ltd.

[19]. John Gathoga Ndungu was not driving the subject motor vehicle on 18th February 2017 when it was impounded at Oldonyo Rasha Area for dealing with game meat.

[20]. Equity Bank Limited were not issued notices to show cause pursuant to Section 389 A of the Criminal Procedure Code and hence it did not participate in the forfeiture proceedings. Therefore, neither the Respondent nor Equity Bank Ltd were aware of the forfeiture proceedings before the magisterial courts.

[21]. Subsequently and after the respondent had offset all the outstanding loan and/ or arrears due against the said motor vehicle, the same was transferred to her on or about January 2020.

[22]. She acquired the subject motor vehicle registration number KCD 632L through an arrangement with Equity Bank Ltd and not from John Gathoga Ndungu.

[23]. She lawfully acquired the subject motor vehicle and she is also an innocent purchaser. There were no caveats registered against the subject motor vehicle at the time of transacting with equity bank limited. She therefore insists that the aforesaid transfer was not fraudulent or meant to frustrate the forfeiture proceedings against both Equity Bank Ltd and John Gathoga Ndungu. They did not also collude whatsoever.

[24]. She urged this court to consider her rights to acquire and own property as envisaged under article 40(1) of the constitution while construing the legality, correctness and propriety of the decision of the subordinate court.

[25]. During trial before Hon. Wakahiu summons were issued to the Equity Bank manager. He participated in the forfeiture proceedings but John Gathoga Ndungu opted not to participate.

[26]. She averred that Section 389A of the Criminal Procedure Code was adhered to since all parties concerned were aware of the forfeiture proceedings including John Gathoga Ndungu who opted not to participate.

[27]. She therefore prayed that this honourable court do find that her motor vehicle registration number KCD 632 L was legally, procedurally and correctly released to her by the subordinate court on 17th December 2020 and the order recorded or passed by the learned magistrate Hon. Wakahiu is regular.

APPLICANT'S SUBMISSION

[28]. The applicant submitted the registered owners of motor vehicle registration number KCD632L at the time of commission of the offence were John Gathoga Ndungu and Equity Bank Ltd. Therefore, notices informing the parties of the forfeiture proceedings should be served upon them as provided by law.

[29]. The applicant submitted that during re trial no formal notice was issued by the court to Equity Bank Ltd to show cause why the motor vehicle should not be forfeited to the state. The court summons did not amount to a notice as envisaged under Section 389A of C.P.C. Furthermore, Equity Bank were summoned when the retrial proceedings were underway and they did not participate in the proceedings from the onset. The failure by the retrial court to issue and/ or serve a notice to show cause to John Gathoga Ndungu and Equity Bank Ltd was against the High Court ruling and the subsequent proceedings ordering a release of the motor vehicle to the respondent were a nullity.

[30]. The applicant submitted that the respondent was not the owner of the motor vehicle the time of commission of the offence. Hence the respondent was not properly a party in re trial of the forfeiture proceedings as she could not be in a position to give an account of the motor as at the time of the commission of the offence. Only the owner of the said motor vehicle at the time of commission of the offence could be able to show cause and show his guilt or otherwise.

[31]. The applicant submitted that there is no provision under Section 389A CPC requiring a party (claiming interest or ownership) to move to court through a notice of motion application seeking for release of the motor vehicle.

[32]. The applicant submitted that at the time when the motor vehicle ownership was transferred from John Gathoga Ndungu, he could not confer or transfer ownership to another person by dint of the forfeiture order being in force as the same had not been stayed or set aside by the high court.

[33]. The applicant submitted that the vehicle's ownership at the time of the transfer vested in Kenya Wild Life Services to whom the vehicle had been forfeited. Equity bank had not better title of over the motor vehicle to transfer to the respondent herein. The failure and/omission by John Gathoga Ndungu the co-owner of the motor vehicle to notify Equity Bank that the vehicle had been forfeited could not sanctify the title or transfer ownership to the respondent.

[34]. The applicant submitted that the act to have the motor vehicle transferred to the respondent herein who is the mother to John Gathoga Ndungu was not done in good faith but a ploy utilized to defeat the forfeiture order issued by Hon. W. Juma on 12.03.2019.

[35]. The applicant prayed that this court orders a retrial of the forfeiture proceedings before a different magistrate of competent jurisdiction other than the one who dealt with this matter.

RESPONDENT'S SUBMISSION

[36]. The respondent submitted that Equity Bank was a co-owner of the subject motor vehicle and on 8/1/20 the bank discharged its effect from the co ownership and in turn refinanced the vehicle to her in the month of November 2018. The bank was never aware that the motor vehicle had been forfeited to the state.

[37]. The respondent submitted that the investigating officer stated that there was no caveats registration against the subject motor vehicle or notice was given to Equity Bank to avert transfer to a third party. Equity Bank therefore ended up financing the subject motor vehicle to the respondent. Neither Equity Bank nor the respondent were aware of the forfeiture proceedings before the magistrate court.

[38]. The respondent submitted that the judgment in Narok Criminal Appeal 12 of 2019 and Section 389A of the CPC was complied with when the retrial learned magistrate issued summons to Equity Bank manager who in turn participated in the forfeiture proceedings. The trial court cannot force an individual who is aware to participate in forfeiture proceedings, all it can do is to notify him/her. John Gathoga Ndungu was duly aware of the proceedings and chose to withdraw his participation hence trial court cannot be faulted. Whereas John was entitled to participate in accordance to the ruling of J. Bwonwonga no one could compel him to participate. John chose to withdraw his application.

[39]. The respondent submitted that the forfeiture proceedings cannot be vitiated for the sole reason that the respondent filed a notice of motion application as well. The court ought to give much regard to the substantive justice as opposed to procedural technicalities. She relied in the case of **Republic Vs John Nganga Mbugua 2014 eKLR**, **John Syimonjero V Director Of Public Prosecution and Another 2018 eKLR** and **Peter Nyambura V Director Public Prosecutions 2018 eKLR**

[40]. The respondent submitted that the forfeiture order issued by Hon. Juma was not effected / implemented by the state. No steps were taken whatsoever to execute the order. No records were produced to support that at one point the vehicle ownership was on KWS. The respondent blamed the state for not notifying the Equity Bank which was the custodian of the log book of the forfeiture order. The investigating officer did not exercise any form of diligence whatsoever to protect innocent third parties who would have otherwise be affected by the forfeiture order. Therefore, the applicant has come with unclean hands seeking to set aside an order against an innocent third party. She relied in the case of **Peter Igiria Nyambura Vs Director of Public prosecutions [2019] eKLR**.

[41]. The respondent submitted that Forfeiture proceedings are independent from the prosecution of an accused or suspect. She cited the case of *Jr Misc. Civil Application No. 58 Of 2015 Republic Vs Ministry of Internal Co-Ordination & 2 Others Exparte Evans Nyakwara Makori 2016 eKLR.*

[42]. The respondent submitted that in forfeiture proceeding the court must satisfy itself beyond reasonable doubt that the registered owner used the subject item to commit an offence. In the present situation the previous owners were not the drivers during the commission of the offence therein and neither were they among the accused persons.

[43]. The respondent submitted that John Gathoga Ndungu was not driving the motor vehicle on 18/2/17 when it was impounded therefore the same should not be forfeited. She urged this court to protect her rights envisaged under Article 40(1) of the constitution Since she is innocent purchaser and did not collude with John whatsoever. She prayed that this court do find that the motor vehicle legally, procedurally and correctly released to her by the retrial court on 17/12/2020 and that the order recorded or passed by the learned magistrate Hon. Wakahiu is regular.

ANALYSIS AND DETERMINATION

[45] This is a revision application. It is founded upon supervisory jurisdiction conferred upon the court in article 165(6) of the Constitution as follows: -

(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.

[46] In exercise of the supervisory jurisdiction the court may call for the record of any judicial or quasi-judicial proceeding pending before the lower court or body and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. See article 165(7) of the Constitution which provides as follows: -

(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.

[47] Therefore, Section 362 of the Criminal Procedure Code which is existing law must be seen within the wider scope and objective of revision provided in article 165(7) of the Constitution, which is, to ensure the fair administration of justice. Nonetheless, section 362 of the CPC provides useful guide in revision applications 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.”

[48] I have considered the issues raised on Notice of Motion, replying affidavit by the respondents and submission of parties. Two matters are strikingly glaring; (i) the trial court veered off course; and (ii) the allegation that the transfer of the motor vehicle was done during the pendency of a forfeiture order.

Veering off course

[49] This court (Bwonwong’a J.) remitted the trial court’s file for purposes of determination of forfeiture of Motor vehicle KCD 632L sought by the prosecution in the criminal proceeding where the vehicle was alleged to have been used in the commission of the crime. The trial court acknowledged this was the scope of his mandate in the retrial ordered by the High Court. But, the trial court was preoccupied with application of release of the vehicle by the respondent instead of focusing on forfeiture as at the time of the commission of the offence and deal with the subsequent transfer as one of the issues in the forfeiture proceedings.

Probity of transfer during tenure of forfeiture

[50] The order of forfeiture by Hon. Juma was made on 12th March, 2019 and remained in force until 6th May, 2020 when the High Court (Bwonwong’a J.) set it aside. From the record, the transfer of the vehicle to Lucy Wanjiku Ndungu was done in January 2020 or there about. See paragraph 6 of her affidavit sworn on 20th January 2021 where she deposed:

6. THAT subsequently and after I had offset all the outstanding loan and/or arrears being against the said motor vehicle, the same was transferred to me on or about January, 2020.

[51] The DPP has argued that Equity Bank and John Gathoga could not have passed any good title on such property which had been forfeited by a court order. The old good law on property states; (i) *nemodat quod non habet* that; no one gives what they do not have; and (ii) *nemo plus iuris ad alium transferre potest quam ipse habet*; that; one cannot transfer to another more rights than they have. Such are pertinent issues which ought to have been considered and determined within forfeiture proceeding. In this case, it is quite apparent that the transfer of the vehicle was done when forfeiture order was still in force. Notably, John Gathoga was still a co-owner of the vehicle with Equity Bank at all material times. In addition, John was well aware of the forfeiture order. The pendency of an appeal does not operate as stay of the order appealed from. See order 42 rule 6 of the Civil Procedure Rules. The court also notes that the respondent has not denied she is the mother of John Gathoga. In all these, John Gathoga was aware of the forfeiture order and its effect in law. Yet, he cunningly withdrew from forfeiture proceedings, and the trial court seems to have not given any significance to these matters. Such circumstances may found an inference of connivance. What does the law call such transactions?

[52] I hark back the ancient wells. In the case of **Mcfoy –vs- United Africa Co. Ltd (1961) 3 All E R 1169-** Lord Denning described such acts in the following terms:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

[53] Anything that takes place contrary to the order of the court is void, and therefore a nullity. The law has never allowed a person to reap from his own unlawful acts or perpetuate force and suppression of law. It is clear John Gathoga was bent at defeating justice. And, the trial court fell into his trap when he pretended to withdraw from the forfeiture proceedings, thereby, shifting focus of the forfeiture. Once a party has been given due notice, the court should determine the forfeiture on the basis of the evidence adduced. The trial court missed the point in removing John from the forfeiture proceeding and placing a burden on the prosecution to take appropriate action against John. Therefore, the probity of the methodology adopted in resolving the forfeiture issue is impeachable through revision. For that reason, I set aside the entire proceedings leading to and the ruling and orders thereto delivered on 17th December 2020 by Hon. C.M. Wakahiu. I also order retrial of forfeiture proceedings in respect of motor vehicle registration mark KCD 632L for allegedly having been used in the commission of the crime in question. The retrial shall be by a magistrate of competent jurisdiction other than Wakahiu CM. I do note Ngugi J on 24th December, 2020 stayed orders of release of the motor vehicle in issue. Therefore, the vehicle shall remain in the custody of KWS until the matter is finalized. It is so ordered.

[54] Given the orders I have issued, the other arguments presented by parties herein form part of substantive issues in the forfeiture proceedings. Accordingly, I refrain from intense discussion or interrogation thereof.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 28TH DAY OF JULY, 2021

F. M. GIKONYO

JUDGE

In the presence of:

1. Karanja for ODPP
2. Langat for Respondent
3. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE