



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. EO43 OF 2021**

1. MAUR ABDALLAH BWANAMAKA
2. FEDERAL COMMERCIAL INVESTMENT LIMITED
3. ALI MOHAMMED AHMED
4. CAPTAIN SHIPPING AGENCIES LTD
5. ABDULLA HUSEN MEHER .....APPLICANTS

**VERSUS**

**THE HON. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

1. The application before this court was filed vide a Notice of Motion dated 7<sup>th</sup> July, 2021 seeking Orders:-

i. THAT the court be pleased to vary/set aside the order(s)/directions issued on the 24<sup>th</sup> June, 2021 in regard to the rice and in the alternative to issue Order that the rice to be dealt with in accordance with consent orders issued on 26<sup>th</sup> June, 2020 and/or in the alternative to be shipped and/or exported as per the Kenya Bureau of Standards order or directions issued on the 20<sup>th</sup> January, 2021 forthwith.

ii. THAT the court be pleased to issue, vary/set aside order issued on 24<sup>th</sup> June, 2021 about the vessel MV AL FAZAL and in the alternative to order for the immediate release of the same to the owner in compliance with the provision of Sections 100(3), 101(2) and 211(2) of the East African Custom Management Act, 2004.

iii. THAT the order for destruction of the rice for alleged being unfit for human consumption be quashed and in the alternative the goods/rice to be dealt with as per the law in consideration of the consent orders that were issued on the 26<sup>th</sup> June, 2020 respectively.

iv. THAT this court be pleased to make any other order(s) it may deem fit in the circumstances.

v. THAT the court be pleased to Order that the cost of the application be provided for.

2. The backdrop of this instance application is the Ruling delivered on 24<sup>th</sup> June, 2021 in determining the application filed by the Applicant's vide a Notice of Motion dated 8<sup>th</sup> June 2021. The Ruling delivered on 24<sup>th</sup> June, 2021 was to the effect that:

**Para. 13 "this court cannot order the release of rice which has been declared unfit for human consumption into the hands of the Appellants without knowing how they intend to deal with it..."**

**Para. 14 "Concerning the release of the vessel, the matter in the trial court is scheduled for mention on 6<sup>th</sup> of July, 2021 for the owner of the vessel to show cause why it cannot be forfeited. This Order was made after presentations were made in the trial court that the owner of the vessel was in India. Since forfeiture proceedings are still pending in the trial court, it was premature for the Applicants to approach this court after asking for time to avail the owner of the vessel."**

3. The Notice of Motion filed on 7<sup>th</sup> July, 2021 was supported by the sworn affidavit of one Maur Abdalla Bwanamaka filed on even date and a Supplementary Affidavit filed on 26<sup>th</sup> July 2021.
4. It is the deponent's position that a consent order was entered on 26<sup>th</sup> June 2020. This consent order predicated the Applicants capacity to proceed and pay the outstanding tax to the Kenya Revenue Authority. The consignment items paid for were import entry No. 7383804 and 7384029.
5. However, the import entries No. 7384078, 7383724 and 7384055 were time barred and could not receive certificates of conformity. The resultant outcome was the Applicant's inability to pay the requisite levy. The Applicants' woes were further compounded by the court order directing that the goods be destroyed.
6. The Respondent opposed this application vide the Grounds of Opposition filed on 12<sup>th</sup> July, 2021. Here, the Respondent submitted that the application is wholly incompetent and bad in law as the Kenya Bureau of Standards never changed the status of the consignment from import to export. The Respondent further made reference to the directives of the aforementioned agency as captured in the letter dated 20<sup>th</sup> January 2021, directing that the goods be destroyed if the Applicants fail to re-ship the rejected consignment within 30 days.
7. In their Supplementary Affidavit, the Applicants apportioned blame to the bureaucracies of the system. It was their position that they would have complied with the statutory requirements for re-shipment were it not for the highly technical and slow pace of bureaucracies.
8. Based on the foregoing, the issues for determination is whether the Order made on 24<sup>th</sup> June, 2021 should be varied and/or set aside.
9. When the application herein came up for inter-partes hearing on 15<sup>th</sup> of July, 2021, an advocate from the Kenya Bureau of Standards confirmed that they wrote a letter dated 20<sup>th</sup> of January, 2021 to the Applicants directing that the consignment be re-shipped to the country of origin within 30 days in default, the consignment was to be destroyed at the importer's cost. To that end, Ms. Charo-Advocate for the Applicants submitted that the Applicants had applied for extension of time to comply with the directives given in the letter dated 20<sup>th</sup> January, 2021 which was granted by KEBS but the letter of extension was not filed and she sought leave to file the same. She also indicated that KRA had delayed to give waiver which was done on 2<sup>nd</sup> of June, 2021.
10. The Applicants were granted leave to file a Supplementary Affidavit and file all necessary documentation in support of the application. Pursuant to the Order of the court, Supplementary Affidavit dated 26<sup>th</sup> July, 2021 was filed and annexed to it was a letter dated 11<sup>th</sup> February, 2021 where the Applicants were granted 30 more days to finalize the process for the rejected consignment as per the letter **Ref: KEBS/COR/KLD/13/VOL.20 (7)** from the said date to finalize the process.
11. The Applicants have not placed before this court a letter from Kenya Bureau of Standards or any other agency thereof that would have shown an extension of the time to finalize the process for the rejected consignment as of 24<sup>th</sup> of June, 2021 when the Ruling was made.

This is the position as was held in *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 to wit;

**The power to review a judgment or an order can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule**

12. So far, the Applicants have not demonstrated that they have discovered any new evidence that was not in their knowledge or possession previously. In fact, the evidence being relied on is one that was well within their possession and further alluded to during a mention of this matter on 15<sup>th</sup> July 2021.
13. Be that as it may, the rice and the vessel remain to be the subject matter of an appeal vide a Petition of Appeal filed on 8<sup>th</sup> June 2021 by the Appellants/Applicants. In the grounds number 7 and 8, the Applicants have faulted the trial Magistrate for Ordering that the subject rice be destroyed and that the registered owner of the vessel MV AL FAZAL attends court to show cause why the vessel should not be forfeited to the government of Kenya. This court has not been shown that the show cause process in the lower court has been determined or not. Issuing the Orders that are sought by the Appellants/Applicants will be tantamount to determining the appeal in piecemeal. The Appellants'/Applicants' advocate had been advised to pursue the typing of proceedings in the trial court, prepare records of appeal and serve upon the Respondents for purposes of expeditious disposal of the appeal substantially and conclusively. The filing of multiple applications instead of hearing of the appeal is a waste of time for both the Appellants, Respondents and the court.
14. In conclusion, the application is dismissed for want of merit. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED ONLINE THROUGH MS TEAMS,**

**THIS 22ND DAY OF OCTOBER, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**IN THE PRESENCE OF:-**

**OGWEL- COURT ASSISTANT**

**MR. MULAMULA FOR THE RESPONDENT**

**APPLICANT**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**