



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL REVISION NO. E014 OF 2021**

*(From the Ruling in Mombasa CMC Misc. Criminal Application No. E198 of 2021, Kenya Revenue Authority v. Mbaraki Bulk Terminal Limited and African Gas and Oil Company Limited)*

**MBARAKI BULK TERMINAL LIMITED.....1<sup>ST</sup> APPLICANT**

**AFRICAN GAS AND OIL COMPANY LIMITED.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE COURT AT MOMBASA.....1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. The Applicant vide Notice of Motion dated 17<sup>th</sup> May, 2021 brought an application pursuant to Articles 50, 159, 165 (6) and (7) of the Constitution of Kenya, 2010; section 118, 121 (1), 362 and 364 of the Criminal Procedure Code seeking for Orders:

**i) That this court calls for the record in Mombasa Chief Magistrates Court Misc. Criminal Application No. E198 of 2021 for examination for purposes of examining itself as to the correctness, legality and propriety of the order issued therein on 7<sup>th</sup> May, 2021.**

**ii) That pending the hearing and determination of this application *inter partes*, the order issued on 7<sup>th</sup> of May, 2021 be discharged and set aside.**

**iii) That the court be pleased to call up, revise, discharge and vacate the order of the Magistrates Court in Misc. Criminal Application No. E198 of 2021 for a blanket search and seizure of all documents, computers and storage devices, goods and machinery made and issued on 7<sup>th</sup> of May, 2021 as the same is oppressive, repressive and an abuse of the Applicant's rights under the law and the Constitution.**

**iv) That this court be pleased to grant an order prohibiting future arbitrary and capricious searches and seizures by the 2<sup>nd</sup> Respondent of documents, computers and storage devices, goods and machinery, the properties of the Applicants for being prejudicial to the Applicants' rights as enshrined in the Constitution.**

**v) That the court be pleased to grant an order for the 2<sup>nd</sup> Respondent to return all documents, computers and storage devices, goods and machinery that were seized as a result of the orders dated 7<sup>th</sup> May, 2021.**

2. This application was supported by the Affidavit of Joseph Mwella and the grounds on the face of the application.

3. The grounds were:

**a. That Article 165 (6) and (7) of the Constitution of Kenya conferred supervisory jurisdiction over subordinate courts exercising a judicial function.**

**b. That the trial Magistrate issued an absolute and unlimited order with no period duration which the order shall remain in force and no return date for reporting on progress or at all.**

**c. That the order was in contravention of principles for search warrants to be issued under section 118 and 121 (1) of the**

## Criminal Procedure Code.

### **d. That the Applicants have and continue to suffer grave prejudice as a result of the manner in which the learned Magistrate issued orders to search their business premises; resulting in great operational and financial strain.**

4. The Applicants argued that the application sought if allowed will not prejudice the Respondents in any way.
5. In the Supporting Affidavit sworn by Joseph Mwella on 17<sup>th</sup> May, 2021, it was averred that the search warrant was issued without adhering to the guidelines for ex-parte issuance of search warrants by the Magistrates' Court under section 118 and 121 (1) of the Criminal Procedure Code. It was further averred that the Investigating Officer Mutwiri John Muthine had also secured a similar irregular order on 16<sup>th</sup> October, 2020 in Mombasa Misc. Criminal Application. No. 314 of 2020 that authorized him to enter the Applicants business premises, access offices located along Mbaraki and another along Beira Road, Shimanzi, Mombasa County, and to carry away records, relevant documents, data storage device, goods, equipment and to extract CCTV footage relevant for the purposes of carrying out tax fraud investigations. The Order is annexed as JM-4.
6. The Applicant argued that properties seized as a result of the orders issued on 16<sup>th</sup> of October, 2020 in Misc. Criminal Application 314 of 2020 illegally remained in the possession of the 1<sup>st</sup> Respondent for a period of over 6 months and the new orders issued on 7<sup>th</sup> of May, 2021 in Misc. Criminal Application No. E198 of 2021 sought to perpetuate the 2<sup>nd</sup> Respondent's nefarious actions without any regard to the Applicants' rights.
7. It was further contended that the Applicants have continued to suffer grave prejudice by the manner in which Orders to search their business premise were issued, resulting in great operational and financial strain, the trial Magistrate having failed to state the duration within which the Order was to remain in force.
8. The Order issued was in contravention of sections 118, 118A and 121 (1) of the Criminal Procedure Code and the trial Magistrate disregarded the guidelines and issued orders that are prejudicial to the Applicants, thereby compounding their operational difficulties.
9. The Applicants urged the court to invoke the provisions of section 162 of the Criminal Procedure Code and reverse the Orders to correct the manifest injustice occasioned.
10. The Application was opposed by the Replying Affidavit of Mutwiri John Muthine sworn on 15<sup>th</sup> June, 2021 in which he confirmed that he was investigating a case of fraud in relation to tax with respect to the Applicants' companies within the ambit of section 97 of the Tax Procedures Act, 2015.
11. He also confirmed that he received Orders on 16<sup>th</sup> October, 2020 in which search warrants were issued to enable him access the premises of the Applicants to conduct the said investigations. It was his position that at the lapse of 6 months, he had not concluded investigations and therefore they applied for a further 4 months by an Order issued on 7<sup>th</sup> of May, 2021 which is the subject of the Revision herein. This application was sought pursuant to sections 118 and 121 of the Criminal Procedure Code and section 97 of the Tax Procedures Act, 2015. He also denied that the search warrants and extension were absolute and that the commission was ready to comply with the directions given by the court as they are not acting in bad faith.
12. The Respondents contended that the Applicants did not demonstrate how the search and seizure orders were oppressive, repressive and an abuse of their constitutional rights as the Commissioner is only carrying out its mandate under the Constitution and the relevant laws.
13. The application was canvassed by way of Written Submissions where the Applicants submitted that the purported investigation into tax fraud is baseless hence the search warrants should not have been issued in the first instance as there were not reasonable grounds presented to the Magistrate that resulted in the original Order of 16<sup>th</sup> October, 2020 and the extension on 7<sup>th</sup> May, 2021 was out-rightly misguided and manifestly unjust.
14. The Applicants relied on the holding in ***Gordon Ngatia Muriuki v. DPP and 2 Others (2014) eKLR*** to submit that the Orders were issued in total disregard for the law as the threshold for the grant of such orders was not met.
15. It was argued that the trial Magistrate neglected to indicate the time frames within which the search Orders and seizures would subsist and left it open-ended; in total violation of the Applicant's rights.
16. The Applicants contended that since the commencement of the investigations, no evidence had been adduced against the Applicants and further, the property seized as a result of the initial Order are yet to be returned to the Applicants.
17. The Applicant also relied on the case of ***Hassan Mohamed v. Ethics and Anti-Corruption Commission and Another (2018) eKLR*** where the court laid guidelines in relation to search Orders and submitted that the Orders issued by the 1<sup>st</sup> Respondent completely deviated from the guidelines given to the Magistrates court to the detriment of the Applicant's rights.
18. The 2<sup>nd</sup> Respondent in their submissions, reiterated the contents of the Replying Affidavit sworn by Mutwiri John Muthine on 15<sup>th</sup> June, 2021 and urged the court to dismiss the application but that they were ready and willing to comply with any directions issued by this court on the modalities of the extended period.
19. Having considered the application, the Replying Affidavit and submissions thereto, the issues for determination are whether the

Applicants have satisfied the court that there is need to call for the record in Mombasa Chief Magistrate's Court Miscellaneous Criminal Application No. 198 of 2021 for examination for purposes of satisfying itself as to the correctness, legality and propriety of the Order issued on 7<sup>th</sup> May, 2021.

20. The Order which the Respondents wanted extended in Miscellaneous Criminal Application No. E198 of 2021 was issued in Miscellaneous Criminal Application No. 314 of 2021 and it was to the effect that:

**“I now therefore authorize No, 12084 Mutwiri John Muthine-an investigator with the Kenya Revenue Authority, to enter the Respondents business premises, access office located along Mbaraki and another located along Mbeira Road-Shimance, Mombasa County and carry away records, relevant documents, data storage devices, goods, equipment and extract of CCTV footage relevant for purposes of carrying out tax fraud investigations.”**

21. The Order was issued based on the Affidavit of the investigator sworn on 16<sup>th</sup> October, 2020 in which it was claimed that the Applicants herein had gross under declaration of their income tax turn over for the years 2015 – 2018 and under valuation of exports and that the Commissioner had lost revenue amounting to Ksh. 5, 533, 843/= and Ksh. 200, 580, 779/= respectively.

22. Although the Order issued was general in nature, annexure MJM-2 (i) and (ii) itemized what was seized from the Applicants' premises. MJM 3 (i), (ii) and (iii) are release inventory, KRA security pass for asset movement and description of laptops and desktops released to the driver of the Applicants on 3<sup>rd</sup> December, 2020.

23. There is nothing to show why the said items were released to the Applicants driver while rest remained with the Respondents and the filing of a fresh application in a separate file to extend Orders in the previous file in this matter falls short of acting in good faith on the part of the Respondents.

24. The Investigating Officer- in his affidavit, has not indicated how far he has gone with the investigations and whether he has submitted any of the documents, computers and storage devices and ETR machines for examination by experts to enable him to establish the claims of tax evasion and under declaration of income and under valuation of exports by the applicants.

25. This court therefore finds that there was no justification in extending the Orders issued on 16<sup>th</sup> October, 2020 without the Investigating Office giving an account of how he had utilized the Order initially issued and without being accountable to the Applicants concerning their properties which he had seized pursuant to the search warrant.

26. The manner in which the Investigating Officer has conducted the investigation from the point of applying for search warrants to the seizure and detention of the Applicants' properties was riddled with impropriety. The Applicants-by virtue of being companies duly registered in Kenya, are protected by and entitled to the right to property as envisioned in Article 40 of the Constitution of Kenya, 2010. As such, any act that limits and/or curtails this enjoyment should be exercised with due caution and within the parameters of the law and the Constitution.

27. In conclusion, the application has merits and the same is allowed. The Respondents are hereby ordered to release the Applicants' properties within 14 days.

28. No orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF OCTOBER, 2021**

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

**JUDGE**

**In the presence of:-**

Ogwel- Court Assistant

Mr. Mulamula for 2<sup>nd</sup> Respondent

Mr. Onyango Advocate for Applicants

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

**JUDGE**