



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**MISC CRIMINAL APPLICATION NO E336 OF 2021**

**STANLEY IRUNGU NDUMU.....APPLICANT**

**VERSUS**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**RULING**

The applicant has applied for the following orders.

- 1) Spent
- 2) An order directing the release of motor vehicle registration No. KCV 256 P lorry Isuzu, from the custody of the Kenya Revenue Authority, to the applicant.
- 3) An order to make provision for costs.

The application is supported by 17 grounds that are set out on the face of the notice of motion dated 1<sup>st</sup> October 2021, with the major grounds being the following. The applicant together with his financier, Messrs Co-Operative Bank of Kenya Ltd, is the registered owners of motor vehicle registration No. KCV 256 P Isuzu lorry. The said motor vehicle was impounded by police in the night of 17/07/2021 as the vehicle was carrying cartoons of goods which the police alleged to be counterfeit alcohol. The police took the vehicle to Kenya Revenue Authority (KRA) yard where it has been locked for the last two and half months. The vehicle was seized by the police and was in the end taken to Capital Hill police station.

Furthermore, the applicant has stated that the vehicle is hired to transport goods and this is what it was doing when it was impounded. The applicant produced to the police the documents of ownership as well as the commercial contracts and the owner needs the lorry released back to him so that he will continue with his commercial activities. The police arrested the driver and later released him on bond on condition that he was to report to them as and when required. The police have not given reasons as to why they are holding the lorry. The driver and the applicant have been reporting to the Capital Hill police station and KRA.

The applicant and the driver have given the police all the information they needed. They disclosed to the police the owners of the alcohol and the Go-down premises at Mlolongo from where the alcohol had been taken. The owners of the alcohol paid the applicant the hiring charges through M-pesa. The applicant was never the owner of the alcohol. The conduct of the KRA and the police has reduced the applicant into a pauper for he was relying on the lorry to provide for his family as well as to meet his financial obligations including repaying the loan granted by the financier (Co-Operative Bank of Kenya Ltd).

The applicant has suffered and will continue to suffer prejudice and loss if the lorry will not be released to him.

In addition to the grounds in support of the application the applicant has deposed to a 23 supporting affidavit; in which he has substantially replicated the same matters that have been set out on the face of the notice of motion. I therefore find it unnecessary to reproduce them here.

**The submissions of counsel for the applicant.**

Messrs F.N. Njanja & Company advocates filed written submissions in support of the application. Counsel has summarized the contents of the applicant's supporting affidavit. He has also pointed out that the police have refused to release the subject lorry to the applicant. Counsel further submitted that the applicant has fully explained himself to the police that the subject lorry belongs jointly to him and Co-operative Bank of Kenya Ltd. Counsel also submitted that the applicant is not the owner of the alcohol and he disclosed to the police the owner of the counterfeit goods.

Counsel further submitted that it was only when the applicant moved the court that the respondents charged the driver of the lorry on 19/10/2021. The applicant is not an accused in that criminal case, and the lorry is also not the subject of those criminal proceedings.

Counsel cited *John Mbaabu & Another v Kenya Revenue Authority (2020)e-KLR* in which this court (Limo, J) observed that there was no dispute that the petitioners/drivers were found transporting unexcisable goods or unaccustomed goods and the main question was whether by so doing they committed any offence. That court also observed that Regulation 30 of the Excise Duty (Excisable Goods Management System-EGMS) Regulations created various offences in relation to unaccustomed goods and that the Respondent had not preferred any charges against any one in regard to the seizure of the petitioners lorries. That court found the Respondents liable for breaching the fair trial rights of the petitioners and proceeded to award damages.

He further submitted that there is no legal and justifiable reasons as to why the respondents, should continue holding the subject lorry; since the only connection that the lorry is that it was used to transport the alleged counterfeit goods.

### **The case for the respondents.**

The respondents through the 24 paragraphs replying affidavit of No. 99886 PC Kibet Langat of the office of the directorate of criminal investigations currently seconded to the Enforcement and Department of the Kenya Revenue Authority (KRA) has filed the said affidavit in opposition to the application. The deponent has deposed to the following major averments.

He has deposed that he has been shown and read the applicant's application and the supporting affidavit together with the annexes. He has also deposed that KRA is an agency that collects and receives all revenues. Further, under section 5 (2) of the KRA Act (Cap 469) Laws of Kenya, KRA administers and enforces all provisions of the written laws set out in Part I and II of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenue in accordance with those laws.

Additionally, under Part I of the First Schedule to the KRA Act, KRA enforces the Excise Duty Act, No. 23 of 2015 including its subsidiary legislation namely the Excise Duty (Excise Goods Management System Regulations, 2017, referred to hereinafter as "EGMS" Regulation, 2017.

Furthermore, the 2<sup>nd</sup> respondent has been experiencing problems in effectively assessing, collecting and accounting for all tax revenues due to various acts and omissions perpetrated by some tax payers which result in incorrect and lower tax declarations; which result in loss of substantial government revenue. The foregoing has been commonly perpetrated through the following ways.

- A. Manufacturing of excisable goods without a valid licence.
- B. Affixing of counterfeit excise stamps on excisable goods.
- C. Selling of excisable goods bearing no excise stamps.

It is for that reason that the Excise Duty Act, 2015 and the EGMS Regulations were enacted to allow for the seizure of excisable goods affixed with counterfeit stamps and any vehicle suspected of having been used in conveying of excisable goods in respect of taxes that have not been paid.

The deponent has deposed that on 17<sup>th</sup> July 2021 the DCI parkland officers through intelligence intercepted motor vehicle registration No. KCV 256P make Isuzu FRRR,white/green colour along the southern by-pass at Kikuyu area.

The deponent has further deposed that the driver of the subject motor vehicle namely Moses Gichoya Nganga was conveying 1000 cartons (20,000 bottles) of 250 ml Venice vodka which were affixed with counterfeit excise stamps. And that after verification of the goods the vehicle and the 1000 were seized vide Notice of offence number 9585, which is attached to this affidavit.

Furthermore, the deponent has deposed that on 19<sup>th</sup> October 2021 the said driver was charged with others not before court with the offence of conveying excisable goods affixed with counterfeit excise stamps contrary to Regulation 30 (1) (g) as read with Regulation 30 (2) of the Excise Duty (Excisable Goods Management System) Regulation 2017; a copy of the notice of the offence, is attached to the affidavit marked as "KRA 1".

After valuation of the excise duty payable it was established that the 2<sup>nd</sup> respondent stood to lose shs 1,327, 000/- from this tax evasion scheme.

Based on advice from his counsel which he believed, the deponent has deposed that Regulation 32 (b) of the EGMS Regulations 2017 mandates the 2<sup>nd</sup> respondent to seize any vehicle that has been used in transporting excisable goods; that have not complied with the Regulations.

Again based on advice of his counsel which he believes, the deponent has deposed that that Regulation 32 (d) of the EGMS Regulations

2017 empowers the 2<sup>nd</sup> respondent to seize any excisable goods that are affixed with counterfeited excise stamps.

The deponent has deposed from his own knowledge that the said excisable goods and the motor vehicle are key exhibits in Criminal Case No. E118 of 2021, have not been produced as exhibits in court and releasing them before being produced in court will prejudice the prosecution case.

Based on the advice of his counsel the deponent which he believes, the deponent has deposed that EGMS Regulations 2017 provides for a procedure of disposing the motor vehicle seized under them and that Regulation 33, the said motor vehicle should be disposed of in the manner the 2<sup>nd</sup> respondent consider fit.

Furthermore, based on advice of his counsel which he believes to be true, the deponent has deposed that in view of the said legal procedures, the instant application is premature and does not lie in law.

Finally, the deponent has deposed that he deposed to matters that are true to the best of his knowledge except those that are based on belief and information, grounds and sources which he has disclosed.

#### **Issues for determination.**

I have considered the affidavits of the parties and the submissions of the applicant in the light of the applicable law.

I find that the contention of the applicant is that he did not know that the goods were unexcisable or unaccustomed. He merely was hired and was paid for his hiring charges.

On the other hand, the contention of the Respondents is that these goods were unexcisable or unaccustomed goods. And that the driver of the applicant (Moses Gichoya Nga'ng'a) was found transporting the said unexcisable or unaccustomed goods. It is for this reason that the Respondents have charged the said driver in Nairobi (Milimani) Chief Magistrates Court in Criminal Case No. E118 of 2021 with the offence of conveying excisable goods that were affixed with counterfeit excise stamps contrary to Regulation 30 () () as read with Regulation 30 (2) of the Excise Duty (Excisable Goods Management System) Regulations, 2017. It is also the contention of the Respondents that the law allows them to seize and detain the lorry that was transporting the said goods.

I find that the Respondents have taken the view that the said lorry is a potential prosecution exhibit in the on-going case in that magisterial court.

I find that the law allows them to seize and detain the unexcisable or unaccustomed goods namely alcohol (vodka) by virtue of Regulation 32 (d) of the EGMS Regulations. I further find that Regulation 32 (b) of the EGMS Regulations authorizes KRA to seize any vehicle that that has been used to transport unexcisable or unaccustomed goods.

I further find that in the instant application, the applicant's driver is being prosecuted in Nairobi (Milimani) Chief Magistrates Court in Criminal Case No. E118 of 2021, with the offence of conveying excisable goods that were affixed with counterfeit excise stamps.

I also find that the foregoing case cited by counsel for the applicant is distinguishable from the instant case in that in the instant application the driver of the applicant has been charged in court; whereas in that cited case no one had been charged in court.

In the premises, I find that the law requires that I do not make findings that might prejudice the fair trial of the on-going case in the magisterial court.

The application is premature.

It therefore follows that the orders sought might prejudice the prosecution case.

In the premises, I find that the applicant's application fails and is hereby dismissed in its entirety.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021**

**J M BWONWONG'A**

**JUDGE**

In the presence of-

Mr. Kinyua court assistant

Mr. Kagoi for the applicant

Ms. Akunja for the Respondent.