



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL REVISION NO 26 OF 2019

MISC. CRIMINAL APPLICATION NOS. 26 AND 51 OF 2019

CO-OPERATIVE BANK OF KENYA LTD.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

CHARLES GESANDA MISATI.....INTERESTED PARTY

(Being application for revision of the forfeiture order of Hon.C. Juma, CM,

delivered on 29/11/2019 in the Chief Magistrate's Court at Narok

in Criminal Case No. 654 of 2019, R. v Mboloi Mutua)

RULING

The case for the applicant

1. The applicant has applied for the revision of the forfeiture order in which the trial court forfeited motor vehicle registration No. KCW 134A make Toyota Hilux.

2. Pursuant to the provisions of articles 40, 47, 50 and 165 (3), 6 and 7 of the 2010 Constitution of Kenya and sections 362, 364 and 389A of the Criminal Procedure Code (Cap 75) Laws of Kenya, section 68 of the Forest Conservation and Management Act, and section 6 and 7 of Movable Property Security Rights Act No. 13 of 2017, the applicant seeks the following orders. 1)spent

2) spent

3) the court be pleased to review, vary, or vacate the orders of forfeiture

4) the court be pleased to order the release of the subject motor vehicle No. KCW 134A make Toyota Hilux to the applicant.

3. The application is supported by seven grounds that are set out on the face of the notice of motion dated 29th November 2019. The major grounds are as follows. First, the applicant has a financier's interest in the subject vehicle, which is registered in the joint names of the applicant and the borrower namely Charles Gesanda Misati (the interested party). Second, the applicant was not served with notice to show cause why the subject vehicle should not be forfeited as such orders were made without the applicant being accorded an opportunity of being heard. Third, if the forfeiture orders are left to stand they will adversely affect the applicant since the vehicle is the only security for the loan facility granted to the said borrower. Fourth, the applicant was not a party to the offence that led to the forfeiture orders and its financial interest needs to be protected.

4. The application is supported by a 23 supporting affidavit of the applicant's acting branch bank manager, Superdan Guya. In that affidavit, the deponent has deposed to the following major matters. The applicant granted a loan facility to the interested party in the sum of Kshs 3, 749,895/= with which he bought the subject vehicle. The other matters deposed to by the deponent are set out on the face of the notice of motion, which I do not need to replicate herein. Furthermore, he has deposed that on 15th November 2019 he received a letter dated 15th November 2019 that the vehicle had been forfeited. Finally, he has deposed that they became aware of the trial proceedings upon receipt of the aforesaid letter.

The submissions of the applicant.

5. Messrs Mitheka & Kariuki advocates for the applicant made the following submissions. They submitted that section 68 (1) (a) and (c) of the Forest Conservation and Management Act does not allow for automatic forfeiture of the vehicle. The court ought to adhere to article 47 (1) of the Constitution of Kenya which provides for procedural fairness. If there is a lacuna in article 47 (1), in respect of the forfeiture procedure then recourse ought to be had to section 348A of the Criminal Procedure Code as held by Nyakundi J, in **Peter Igiria Nyambura v DPP (2018) ECLR**.

6. It also is their submission that the interested party gave evidence in which he produced a copy of the log book in the trial court. A copy of that log book showed that the vehicle is registered in the joint names of the applicant and the interested party.

7. Counsel further submitted that the applicant was denied the opportunity to be heard as directed by article 47 (1) of the Constitution. The court (Nyakundi, J) in **Embankment Investment Ltd v DPP (2018) ECLR** when faced with a similar situation proceeded to set aside a forfeiture order made by a trial court without according the applicant an opportunity to be heard.

8. Furthermore, counsel submitted that the applicant is a co-owner based on section 6 (4) of the Moveable Property Act No 13 Of 2017 which reads as follows: **“6 (4) A security agreement entered into in accordance with this section is enforceable and creates a security right, irrespective of the satisfaction of the requirements that may be imposed by any other written law”**

9. Counsel have submitted that based on the immediate foregoing provisions of the law, an order of forfeiture cannot defeat the financier’s proprietary interest in the subject vehicle.

10. Finally, counsel have submitted that if the court directs that the forfeiture orders should stand, the applicant should be given the proceeds of the forfeited vehicle in satisfaction of the credit facility that was extended to the interested party to the tune of Kshs 3,669,674.67 as per section 9 of the Moveable Property Security Rights Act No. 13 of 2017.

The case for the respondent

11. The respondent has filed two grounds of opposition. First the application is an abuse of the court process as the orders of forfeiture of the vehicle were granted as a consequential order as per section 68 (1) of the Forest Act. Second, the revision application is bad in law as the orders sought are orders in which an appeal lies to the High Court and therefore the instant application contravenes section 364 (5) of the Criminal Procedure Code.

Issues for determination

12. I have considered the rival submissions of both parties in the light of the applicable law. As a result, I find the following to be the issues for determination.

- 1) Whether or not the applicant was entitled to be heard before the forfeiture orders were made by the trial.
- 2) Whether or not the existence of the right of appeal barred the applicant from filing and prosecuting this application.
- 3) What are the appropriate orders to be made?

Issue 1.

13. The applicant by virtue of granting a loan facility to the interested party to the tune of Kshs 3,669,674.67 became the co-owner of the subject motor vehicle registration No. KCW 134A make Toyota Hilux. In terms of article 47 of the Constitution of Kenya the applicant had a right to be granted a fair hearing before the recording of a forfeiture order. The applicant was also entitled to be heard pursuant to the provisions of section 389A of the Criminal Procedure Code. The applicant was not a party to the proceedings in the lower court. It was incumbent upon the trial court to have the applicant served with a notice to show cause why the vehicle should not be forfeited since it was a co-owner. The applicant was a beneficial owner of the subject vehicle, by virtue of the provisions of section 6 (4) of the Moveable Property Act No 13 Of 2017, which reads as follows: **“A security agreement entered into in accordance with this section is enforceable and creates a security right, irrespective of the satisfaction of the requirements that may be imposed by any other written law.”**

14. It is clear that the applicant was condemned without being heard.

Issue 2

15. I further find that the existence of a right of appeal did not bar the applicant from seeking a remedy in this court as it did. Furthermore, the application is not an abuse of the court process, for it is merely enforcing its right to be heard, that is guaranteed by both the Constitution in article 47 (1) and the Criminal Procedure Code in section 389A.

16. In the premises, I find that the application succeeds with the result that the forfeiture orders of the lower court are hereby set aside. The only issue now is one of making appropriate orders.

Issue 3

17. I find as persuasive *Embankment Investment Ltd v DPP (2018) eKLR*, in which the High Court (Nyakundi, J) faced with a similar situation proceeded to remit back to the trial court the same matter for that court to comply with the provisions of section 68 of the Kenya Forest Conservation and Management Act and section 389A of the Criminal Procedure Code.

18. The upshot of the foregoing is that this matter is hereby remitted to the trial court to comply with the foregoing provisions of the law.

Ruling signed, dated and delivered in open court at Narok this 20th day of February 2020 in the presence of Mr. Kilele holding brief for Mr. Ochoki for the applicant and Ms. Torosi for the respondent.

J. M. Bwonwong'a

Judge

20/2/2020