



**REPUBLIC OF KENYA**

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

**CRIMINAL MISC. APPLICATION NO. 15 OF 2018**

**IN THE MATTER OF ARTICLE 40 (1) AND 50 (2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 362 AND 364 OF THE CRIMINAL PROCEDURE CODE (CAP 75) LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR DIRECTIONS IN THE NATURE OF RIGHT TO PROPERTY**

**AND**

**IN THE MATTER OF REPUBLIC VERSUS ELVIS OMARI CRIMINAL CASE (KAJIADO) NUMBER 353 OF 2018**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REVISION OF THE ORDER OF FORFEITURE OF MOTOR VEHICLE KCE  
317M**

**AND**

**IN RESPECT OF EMBANKMENT INVESTMENT LIMITED.....APPLICANT**

**VERSUS**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**RULING**

The applicant moved this court under certificate of urgency and a notice of motion filed in court on 10<sup>th</sup> April 2018 pursuant to Article 40 (1) (3) Article 50 (2) of the Constitution 2010, Section 55 (1) of the Kenya Forest Conservation and Management Order, Section 362, 364 and 389A (1) (2) of the CPC seeking the following orders.

- 1. That this Honourable court be pleased to review, vary or vacate its orders of 22<sup>nd</sup> March 2018.**
- 2. That the Honourable court do exercise its discretion in revision of the ruling and the order made as to forfeiture of the motor-vehicle Number KCE 317M to the Kenya Forest Department,**
- 3. That this court do exercise its discretion and order the respondent release the motor vehicle to the applicant forthwith**
- 4. That the applicant's motion for the orders sought is supported by his affidavit sworn on 10<sup>th</sup> April 2018.**

#### **Background**

It is deposed that the applicant is the owner of the subject motor vehicle registration KCE 317M which was part of the exclusive in criminal case No. 353 of 2018. It is further deposed that one Elvis Omar the accused in the criminal proceedings was an employee and driver of the applicant.

In paragraph 7 of the affidavit its deposed that the motor vehicle was forfeited to the Kenya Forest Department without a notice to show cause issued to the applicant. The applicant further avers that though the driver admitted the offence of carrying charcoal whether a permit he paid the fine of Ksh. 60,000 and in addition the motor vehicle was forfeited nevertheless. That the forfeiture of the motor vehicle is in contravention to his rights to property enlisted in the constitution.

In opposition, a replying affidavit was sworn on 16<sup>th</sup> May 2018 by Akula Alex the Senior Prosecution Counsel for the respondent. The opposition to the applicant is centered on the following averments:

That the applicant Amos Anyua has no locus stand to promote the application that the applicant has not demonstrated that the accused in the criminal case acted without authority or permission of the applicant. That the ownership of the motor vehicle KCE 317M has not been sufficiently proved by the applicant. that the applicant has not demonstrated that he is entitled to the release of the motor vehicle.

In this application Learned Counsel for the applicant Mr. Mwangi dwelt on the merits of the application on the following grounds: that the forfeiture under section 68 (1) of the Forest Conservation and Management Act is not mandatory. Learned counsel further contended and argued that though forfeiture is provided there is no procedure on how it is to be considered by the trial court. He submitted that the fall back provisions are therefore construed to be section 389 A of the CPC. In support of the applicant Learned Counsel appeared reliance and cited the case of **Republic Versus Aden Ibrahim HCC 59 of 2015, Republic Versus Principal Magistrate at Eldama Ravine & 3 others 2014 EKLK, Republic Versus Kenya Police Service & another 2014 EKLK**. In all that, Learned Counsel urged this court to set aside the forfeiture order and release the motor vehicle to the applicant.

On the part of the respondent Mr. Akula submits that the applicant is devoid of merits due to the delay. Secondly, the circumstances in which the motor vehicle was forfeited. That the law provides that since further penalty be imposed for the offender of the crime under section 68 of the Kenya Forest Conservation and Management Act.

### **Analysis**

I have now perused the trial court record, the notice of motion, affidavits in support and objection raised by the respondent. In this case the applicant has preferred a revision procedure against the order of the trial magistrate under section 362 of the CPC. The object of section 362 is clear it vests jurisdiction in the High court with powers over the subordinate courts.

The basic jurisdiction behind section 362 of the CPC is to empower the High court to exercise revisionary powers over subordinate courts to call for the record and examine the propriety, correctness and legality of the proceedings at order. The power however is to be exercised only in exceptional cases where there is prima facie evidence that a failure of justice has been occasioned.

It is trite that under this jurisdiction the court will be looking at errors of law or procedure, abuse of power, orders or findings made in excess of jurisdiction or another case in a fair administration of justice.

This court has entertained this application to determine whether the learned trial magistrate committed an illegality or irregularity and impropriety in passing the impugned order on forfeiture.

Although the applicable section is not indicated in the order by the learned trial magistrate the proceedings in this issue are provided for under section 68 of the Kenya Forest Conservation and Management Act. Under this section it provides as follows:

**(a) when a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the court may in addition to any other order**

**(b) if it is proved to the satisfaction of the court that the person so convicted is the agent or employee of another person, that other person to pay by way of compensation to the forest owner, the value of the forest product, unless after hearing that other person the court is satisfied that the offence was not due to his negligence or default.**

**(c) the forest produce be removed and any vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the service.**

It is the applicant's contention that the forfeiture proceedings did not comply with this provision in forfeiting the motor vehicle allegedly owned by the applicant. The aggrieved order, as deduced from the record states that:

***"Accused fined Ksh. 60,000 in default six months in jail. In addition, and as by the la, the exhibits 88 bags of charcoal and motor vehicle registration number KCE 317M Isuzu lorry are forfeited and surrendered to the Forest Conservation".***

An overview of the statutory scheme of section 68 (1) of the act where a person is convicted of the offence of damaging or removing the forest produce the first consideration on the part of the court in addition to another punishment prescribed by the statute is on the aspect of compensation. ***"The catch words are compensation, a sum equal to the value of the forest produce"*** in the offence charged. In the event there is no valuation an amount of Kenya shilling ten thousand (Kshs. 10,000/=) has been set as the basic figure for each offence.

The other element of section 68 is the introduction of sufficient cause to be shown to a third party who may not be party to the proceedings under this Act but has a legal right or interest to be protected. This is more specifically to the owners of the instruments of crime like the vessels, motor vehicles, tools or implements used in the commission of the crime. The Act provides for forfeiture of such vehicles or vessels and tools.

As can be seen from the section 68 the trial court has other penalties to impose beside forfeiture in addition to the fine for the offence under section 64 of the Act. The forfeiture of the vessel, motor vehicle under this provision is discretionally and not mandatory. Likewise, the statute indicates due process and right to be heard in forfeiture proceedings. It is therefore not a mandatory or an automatic order to follow a conviction of an offender under this Act.

In my conceded view, an accused person or a third party who is the owner of the vessel, vehicle, tool used in the commission of the offence as to answer to the seizure and forfeiture of the items. The procedure prescribed is for the trial court to examine the rights of the parties as per the provisions under section 68 of the Act read together with section 389 of the code. This was meant to cater for a third party who is not the owner of the subject motor vehicle or vessel, tool used in committing the offence.

By the section introducing the words **for the court to be satisfied** it imports a connotation of a right to be heard before any forfeiture against any instrument or vessel used in commission of the crime is allowed. The state must initiate forfeiture proceedings under section 68 of the Act.

The other essence is where the accused in court is not the owner of the motor vehicle, or vessel, tool used in committing the offence. The state must bring an action for forfeiture under section 68 of the Act. This would involve a notice to be sent to the owner of the vehicle or any person whose right to title or interest will be affected by the proposed order to forfeit the article or vessel.

It is also clear from section 68 that it allows the owner or any other person with a right or interest in the vessel to show by preponderance of the evidence that he did not have reason to know that the vehicle was to be used in the commission of the offence under this Act.

What the Act does not provide for is the automatic forfeiture of the vehicle to the Forest Service as this will contravene Article 40 of our constitution which provides on right to private property and right for an opportunity to be heard.

The more comprehensive provisions on forfeiture proceedings is provided for under section 389A of CPC. To me forfeiture is a separate judicial proceeding as indicated under section 68 of the Kenya Forest Conservation and Management Act. I see section 389 A of our code as the appropriate provision to entertain the proceedings of this nature.

I am of the view if courts allow forfeiture as an automatic penalty after conviction an innocent owner who has no defence to such proceedings will be prejudiced. The forfeiture order in the present case is based on the theory that the property is guilt of the offence and the owner must be held accountable for the wrongs of others to whom he entrusts his property. Secondly, that the owner was negligent when he allowed his vehicle or instrument to be misused and must be punished.

The forfeiture proceedings under section 68 of the Act focus on additional punishment and compensation to the conservator of forest in Kenya. The guilty of the owners of property is not the letter and spirit of this section.

In the present application it is apparent that the applicant had no knowledge of the transportation of the charcoal by the accused person being the reason he has approached this court through revisionary jurisdiction.

How his vehicle came to be part of the criminal proceedings before the trial court is a matter squarely to be considered under section 68 of the Act as read with section 389 A of the CPC.

I have considered the trial court proceedings and the procedural irregularity complained of by the applicant. I make the following findings:

That the section 68 of the forest Act was not complied with as to due process and an opportunity for the applicant to present this case. Section 68 is not mandatory on forfeiture of vessel, motor vehicle instrumental in the commission of the offence.

In forfeiture proceedings sufficient evidence must be adduced in satisfaction of the requirement under section 68.

It is not possible to discern from the decision of the trial magistrate the section she used to order for forfeiture of the subject motor vehicle and the reasons upon which influenced her decision. From the record, the owner of motor vehicle KCE 317M was not established. In my conceded view, one of the fundamental aspect on forfeiture should be to establish right of ownership of the vessel or motor vehicle before a final order is made by the trial court.

Finally, the decision was reached in total contravention to the right of fair hearing on the part of applicant. As a consequence, the forfeiture order is hereby quashed and set aside.

I am not persuaded that this court should order a return of the motor vehicle to the applicant. The gravity of the offence requires compliance with section 68 but not limited to forfeiture.

In the premises this file is remitted back to the Chief Magistrate to comply with the provisions of section 68 of the Kenya Forest Conservation and Management Act and read together with section 389 A. It is so ordered.

**Dated, delivered and signed in open court on 31<sup>st</sup> May 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Mwangi: For the Applicant

Mr. Akula: For the Respondent

Mr. Mateli: Court Assistant