**Kimathi v Republic (Miscellaneous Criminal Application E107 of 2025) [2025] KEHC 11363 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11363 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MAKADARA**

**MISCELLANEOUS CRIMINAL APPLICATION E107 OF 2025**

**J WAKIAGA, J**

**JULY 2, 2025**

**BETWEEN**

**BONIFACE MWENDA KIMATHI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This application was initially filed under certificate of urgency at the Criminal Registry at Milimani on the 4th June 2024 and the same was transferred to the Criminal registry at Kibera when it was not certified urgent and directions on service and filing of responses issued.

2. Upon the creation of this High Court registry with supervisory jurisdiction over the trial court, the file was transferred to this court for trial and determination.

3. By the Notice of Motion dated 19th April 2024, the applicant sought the order that this court calls for the file in criminal case number 63 of 2019 at JKIA law courts for purposes of reviewing the order of the trial court Hon. M Kitagwa dismissing the claimant's notice of motion dated 30th November 2023 seeking the release of the motor vehicle registration number KBJ 502 E and finding that they subject motor vehicle was involved in the conveyance of bhang, as necrotic drug.

4. The applicant sought that the motor vehicle be released to him as the registered owner based on the grounds set upon the face of the application to wit, the applicant had leased his motor vehicle to one Yusuf Mohamed the accused before the trial court through an agreement dated 30th march 2019 and that it was during the period of the said lease that the same was used in the commission of the offence.

5. That on 27th May 2021, the accused was found guilty and the court directed that the motor vehicle be forfeited to the state upon which the applicant filed an application to this court for revision of the said judgement and by a ruling thereon dated 16th May 2022 Nzioka J found that the order thereon

was irregular the applicant having not been served with the forfeiture notice or given an opportunity to be heard and remitted the file back to the trial court the subject of this ruling.

6. The application was supported by an affidavit sworn by the applicants in which it was deposed that pursuant to the order of the court herein, the applicant filed an applicant to the trial court and vide a ruling thereon dated 9th September 2022 the court reopened the case and the applicant filed application thereon dated 2nd December 2022 in which he sought the release of the said motor vehicle , which application was opposed by the respondent through an affidavit dated 4th January 2023 in which to was contended that that three motor vehicle had been modified irregularly creating a compartment that stored drugs which facts were within the knowledge of the applicant.

7. By a ruling thereon dated 27th April 2023, the trial court dismissed the said application without according the applicant the opportunity to be heard. The applicant filed a further application dated 30th November 2023 for the release of the motor vehicle which application was once again dismissed on 26th March 2024 and the subject of this ruling.

8. In support of the application, it was deposed that the applicant was the registered owner of the subject motor vehicle which he had leased to the accused person at a weekly rate of Kshs. 120,000 which he paid until the first week of May 2023 when he lost contact with the accused person, causing him to report the missing motor vehicle on 13th May 2023, when he learned that the motor vehicle had been detained as an exhibit in the criminal case no 63 of 2019.

9. It was deposed further that throughout the proceedings the applicant was a prosecution witness and that he was not a party to the alleged offence and was not aware that the motor vehicle had been used to utilized by the accused person to commit the alleged offence or for any other illegal purpose and that the continued confiscation of the motor vehicle was contrary to section 20 of the Act which provides that where the owner of the conveyance that was used to commit the offence was not concerned or privy to such use the conveyance shall be restored to the owner by the court.

10. At the hearing of the application, Ms Kariuki on behalf of the prosecution conceded to the application on the basis that the applicant had testified in court as prosecution witness and that Justice Nzioka had ruled that the procedure used by the court in ordering forfeiture was wrong.

**DETERMINATION**

11. Having called for and perused the lower court file, the following facts are undisputed : that the applicant herein produced before the trial court the certificate of ownership and an agreement of lease to the accused person before the court who then converted the subject motor vehicle into a fuel tanker and that at the time of its arrest it was under the custody and control of the accused person and that when he could not trace the same he reported to the police and was issued with OB to that effect, these facts were not denied by the prosecution and or the accused person.

12. The applicant on 18th November 2020 made an oral application before the trial court for the release of the subject motor vehicle under the provisions of section 20 of the Narcotic Act and by a ruling thereon the court ordered that the same be inspected and preserved until the final judgement and that upon this ruling the applicant filed the application for revision to this court referred to herein above.

13. Forfeiture proceedings in criminal matters where there is no express provision is provided for under section 389A of the criminal; procedure code which requires that the if it appears to the court that the goods or things should be forfeited , it shall cause to be served on the person believed to be the owner notice to show cause and if the court finds that the goods or things belong to some person who was innocent of the offence in connection with which they may or are to be forfeited and who neither knew

nor had reason to believe that the goods or thing were being used in connection with that offence and exercised all reasonable diligence to prevent their being so used, it shall jolt order their forfeiture .

14. The court in Watu Nominees Company limited v Republic [2023] KEHC 2177[KLR] had this to say "As far as the spirit of the law on criminal forfeiture is concerned, I hold a strong view that the provisions in the Act did not oust the guarantees and protection of right to property in article 40 of *the Constitution*. The combined effect of the forfeiture orders in the Act as a summary judgement and conviction of the accused persons creates an unusual and perhaps even harsh result in this case. It might be a favourite weapon in the war against intermeddling with our forest cover but trial courts should not lose sight of the broad effect to the decisions based on that statutory interpretation and the helpful guide on fundamental right's to property provided for in *the constitution*. While I am extremely sympathetic to the need to address our nations serious forest destruction problems, I do not believe that a disproportionately summary forfeiture can be reasonably be justified as an additional tool to punish the perpetrators of the crime. In my observation the trial court decision appears strained for several reasons. First, is the protection of the right to property in article 40 of *the Constitution* and the session magistrate duty to determine whether a notice is required to the other third parties with a legal lien to the chattel in question. Secondly, the requirement for notice gives the accused person to demonstrate the intention to contest the proposed forfeiture by the state. Third, the right to just fair administrative action under article 47 of *the Constitution* has particular significance in the Kenyan Context. It would be in my view a grave Lacuna in our legal system if a decision on forfeiture criminally is to be carried out by trial courts in a summary procedure contextually involving other interested parties to the seized property without giving them an opportunity to be heard as stipulated in article 50 of *the Constitution*. Due process is best defined in one word-fairness. Looked at from the lens of revisionary jurisdiction judge can one say that the process on forfeiture was fair? Did the state have the right to bring the action on forfeiture in the first place? I see two fundamental condition precedents to guarantee the fairness of the process on forfeiture.

    a. Was adequate notice given?. At the minimum it means that those other citizens or institutions who will be affected by the decision on forfeiture ought to have been given advance notice of what the state intended to do and how the action by the court may deprive them of their property.

    b. Did the person, or persons, or legal entity have an opportunity to be heard before the final decision to forfeit the chattel to the state. "The right to be heard is embodied in the Latin phrase "audi alteram partem" which literally means "hear the other side". The right to be hard imposes a peremptory duty on every person, body or tribunal vested with power to resolve a dispute to fairly hear both parties and consider both sides of the case before making a decision on the matter, no man should be condemned unheard. The body or tribunal should not base its decision only on hearing one side: it must her both sides and not her one side in the absence of the other. In so doing, it should grant equal opportunity to both parties to present their cases or divergent viewpoints and should hold the scale fairly and evenly between them". [See Peter Kaluma Judicial review Law Procedure and Practice Page 176 para 6.2] and also see "Central Organization of Trade Union [Kenya]v Benjamin K.Nzioki and others, Civil Application No. NAI 249 of1993 [108-93 UR] [Unrep] Errington v Minister of Heath [1935] 1KB 249, at 268, per Greer LJ."

15. In this matter the fact that there was no notice served upon the applicant was answered by the ruling of Nzioka J which led to the applicant filed by the applicant herein and which the trial court dismissed in the following terms

16. The only issue therefore for determination is whether the court was right in dismissing the applicants claim to the effect that he had no knowledge of the criminal activities of the accused persons. From the affidavit and the actions taken by the applicant, I find and hold that the same was not privy to the actions by the accused persons and that is why he become a prosecution witness. The same took reasonable action by reporting to the police when he was not able to get in touch with the accused person who had the actual and physical control of the subject motor vehicle.

17. I find and hold that the applicant satisfied the provision of section 20 of the Act and therefore allow the application herein by revising the determination of the trial court herein and substitute the same with an order allowing the release of the motor vehicle herein to the applicant and it is ordered.

**DATED SIGNED AND DELIVERED THIS 2nd DAY OF JULY 2025**

**J WAKIAGA**

**JUDGE**

In the presence of;

Ms. Kariuki – Prosecutor

Irene – Court Assistant

Boniface Mwenda - Accused