



**Kenya Revenue Authority v Asoka & another (Revision Case  
E357 of 2023) [2024] KEHC 3093 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3093 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
REVISION CASE E357 OF 2023  
HM NYAGA, J  
MARCH 14, 2024**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... APPLICANT**

**AND**

**MALLON HUSSEIN ASOKA ..... 1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. By an Application dated November 22, 2023, the interested party has sought the following orders;
  - i. That the Application filed herein be certified urgent and be heard Ex-parte in terms of prayer 2 below and service of this Application be dispensed with in the first instance.
  - ii. That pending hearing and determination of this Application, this Honourable Court be pleased to order stay of execution of the orders issued by Hon. B. R. Kipyegon (PM) on September 26, 2023 directing the release of 73 bags of uncustomed skimmed milk powder to the 1<sup>st</sup> Respondent.
  - iii. That this Honourable Court be pleased to urgently call for the record in Molo Criminal Case Number E1325 of 2022 and examine the same to determine the propriety of the orders issued on September 26, 2023 directing release of 73 bags of uncustomed skimmed milk powder to the 1<sup>st</sup> Respondent.
  - iv. That this Honourable Court be pleased to review, vacate, revise and/or set aside the order issued by the Learned Trial Magistrate on September 26, 2023 in Molo Criminal Case Number E1325 of 2022 directing release of 73 bags of uncustomed skimmed milk powder to the 1<sup>st</sup> Respondent and



- v. That this Honourable Court be pleased to grant any other order or relief as it may deem just and fair to meet the ends of justice.
  - vi. The Application is propped by the grounds set out on the face of it and is supported by the Affidavit of Anne Wambui Kamau.
2. The Application is supported by the grounds set out on its face and the Affidavit of Daniel Okello.
  3. In a nutshell, the Applicant states that on July 18, 2022 the 1<sup>st</sup> Respondent (accused person in the trial record) was charged before Molo Chief Magistrate's Court in Criminal Case Number E1325 of 2022 for the offence of Being in Possession of uncustomed goods, Contrary to Section 200(d) (iii) as read with Section 210 (c) of the *East African Community Customs Management Act (EACCMA), 2004*. (The Act). The Particulars are that on June 29, 2022 at Rusoga Sawmill area along Eldoret Nakuru Highway, Kuresoi North area, Molo Sub-County within Nakuru County, jointly with others not before court, he was found with uncustomed goods to wit 73 bags of skimmed milk powder of 50kgs each on board motor vehicle registration number KCZ xxxx make Isuzu NPR Lorry, with a dutiable valued of Kshs. 1,725,752.85, which he knew or ought to have reasonably known to be uncustomed goods. That the 1<sup>st</sup> Respondent pleaded not guilty.
  4. The Applicant further states that while the matter was pending hearing, a report from the Kenya Bureau of Standards (KEBS) was submitted and it was to the effect that the said skimmed milk powder had failed the yeast and mould test, but the same could be eliminated if the product was consumed when hot. That KEBS thus recommended that;
    - a. The products to be sold in a controlled market as opposed to the open market.
    - b. The milk powder be subjected to heat treatment to kill yeast and mould at the time of consumption.
    - c. The consignment be dispensed with in the shortest time possible.
  5. It was further averred that subsequently, the 1<sup>st</sup> Respondent changed his plea, and entered a plea of guilty. He was subsequently convicted and sentenced to a fine of Kshs. 50,000= and in default to serve six (6) months imprisonment.
  6. The Applicant further avers that after an Application by the 1<sup>st</sup> Respondent the trial court also made an order for the release of the skimmed milk powder to the 1<sup>st</sup> Respondent on the basis of the report by KEBS.
  7. The Applicant avers that the 2<sup>nd</sup> Respondent did not object to the said Applicant nor seek the comments of the Applicant who is the complainant and the body mandated by law to enforce tax laws. That the Applicant was thus denied the Constitutional right to be heard before adverse orders were made against it.
  8. It is also averred that in any case, the orders in question are contrary to the provisions of Section 214 (3) (a) of *the Act*, which provide that upon conviction, the seized goods were liable to forfeiture and stand condemned.
  9. The Applicant thus sought that the orders in question be revised as no customs duty has been paid on the said goods.
  10. It is also stated that the order in question compromised the safety and general good of the public as the goods are not fit for human consumption, since the Applicant does not possess the know how nor technical expertise to enforce the recommendations by KEBS.



11. It is further averred that the order is incapable of being enforced as it sought the unconditional release of the goods whereas the report by KEBS gave conditions. That the goods, being perishable, their nature is likely to deteriorate, hence pose danger to the public.
12. This court ordered a stay of the trial court's orders in question issued on September 26, 2023 and directed that both Respondents be served with the Application. To date no response has been filed by either Respondent.
13. The Applicant filed Written Submissions in support of the Application.
14. The Applicant states that it has the necessary locus standi as it is the state agency empowered to enforce tax laws and as such it has the duty to bring to the court's attention the impugned court order for it to satisfy itself as to its propriety or legality and satisfy itself that the trial court acted procedurally as set out under the Act. To buttress the above position, I was referred to the decision in *Dominic Gichovi Mugo vs Republic* Criminal Case No. 7 of 2015 where the court reiterated the purpose of an Application for Revision. Also cited was *Republic v Wekesa & Another* [2010] eKLR.
15. The Applicant referred the Court to Section 215 of *the Act* which provides that;
  - “(1) Where any person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of the offence, then the conviction of the person for the offence shall, without further order, have effect as the condemnation of the thing.”
16. I was also referred to *Abdiaziz Mohammed Warsame v ODPP & KRA* Eldoret High Court Petition No. 34 of 2019 which is in reference to Section 215 of *the Act*, states as follows;
  - “(1) Where any person is prosecuted for an offence under this *Act* and anything is liable to forfeiture by reason of the commission of the offence, then the conviction of the person for the offence shall, without further order, have effect as the condemnation of the thing.”
17. To the Applicant, the effect of condemnation is evidence and the goods were released to the Kenya Revenue Authority to be dealt with in accordance with *the Act*. Cited to support this point was *Republic v Hassan Shana Mshana* [2014] eKLR where it was held that;
  - “(1) Where any person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of the offence, then the conviction of the person for the offence shall, without further order, have effect as the condemnation of the thing.”
18. The Applicant submits that while the above provisions on how to deal with such goods upon conviction is clear. The trial court erred, since, firstly then were not available for release to the accused. Secondly, the order in question was issued without giving the complainant a right to be heard. On the right to be heard, the Applicant referred the court to *Kenya Revenue Authority v Tegemea Marti Mfinanga* High Court Revision No. E154 of 2021.
19. The Applicant further submits that the trial court failed to consider the public interest in the nature of the KEBS report dated April 26, 2021 which showed that the goods in question had to be disposed in a controlled environment. Thus, the trial court, in ordering the unconditional release of the goods endangered public health and safety.



20. It was further submitted that it would be unconscionable to allow the 1<sup>st</sup> Respondent to benefit from his own crime by having the condemned goods released to him without payment of the requisite duties thus giving him an unfair market advantage over tax compliant payers.
21. The Applicant thus prayed that the orders of the trial court issued on 26<sup>th</sup> September 2023, be revised and/or set aside and be substituted with an order that the goods in question be condemned under Section 215 (1) of *the Act* and be forfeited to the Applicant for further dealing or disposal.
22. The Applicant also prayed that the 1<sup>st</sup> Respondent be condemned to pay the costs of this Application.
23. As I stated earlier, the Respondents did not file any response. They did not file any submissions either.
24. The issues for the court to determine are;
  - a. Whether the Applicant has the locus standi to make the Application.
  - b. Whether there are sufficient grounds adduced to revise the orders of the trial court issued on September 26, 2023.
  - c. Who will bear the costs of the Application.
25. The Applicant is a state agency established under the *Kenya Revenue Authority Act* Cap 469 Laws of Kenya. It is charged with the responsibility of collecting revenue on behalf of the Government of Kenya. Its functions are set out under Section 5 of the *Act* as follows;-

“ 5. Functions of the Authority

- (1) The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipt of all revenue.
- (2) In the performance of its functions under subsection (1), the Authority shall—
  - (a) administer and enforce—
    - (i) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;
    - (ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;
  - (b) to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and



(c) to perform such other functions in relation to revenue as the Minister may direct.

(3) The Minister may, by notice in the Gazette, amend the First Schedule”

26. Under the [East African Customs Management Act](#), the Directorate of Customs is empowered under Section 4(1) thereof to co-ordinate and monitor any of the functions set out being;

- “(a) administration of the Common External Tariff;
- (b) enforcement of the Customs law of the Community;
- (c) trade facilitation as provided for in Article 6 of the Protocol;
- (d) administration of the Rules of Origin;
- (e) compilation and dissemination of trade statistics;
- (f) application and interfacing of information technology in Customs administration;
- (g) training in Customs related matters;
- (h) quality control in Customs operations and enforcement of compliance;
- (i) Customs related negotiations; and
- (j) activities of the Commissioners in the implementation of this [Act](#).”

27. Whereas the Director of Public Prosecutions is the sole person/institution mandated by Article 157 of the [Constitution](#) to prosecute all the criminal cases, the Applicant is the one mandated to enforce all laws regarding tax in general and in this case, the payment of custom duty. Thus the DPP acts in the interest of the complainant in every matter.

28. The orders in question were issued at the behest of the Prosecutor on the material day. The Applicant was not involved.

29. I am thus of the view that the Applicant, having been adversely affected by the orders of the trial court, has the requisite locus standi to make the present Application.

30. The High Court’s power of Revision are derived from Article 165 (6) and (7) which provide that;

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

31. Further Section 362 and 364 of the [Criminal Procedure Code](#) provide that;

“362. Power of High Court to call for records



The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

364. Powers of High Court on revision

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may —
- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

Therefore, the High Court has the jurisdiction to call for the records of the subordinate court and examine the same to ascertain itself of the correctness, legality or propriety thereof.

32. The orders which the Applicant seeks to be revised were issued by the trial court on September 26, 2023. The said order reads as follows;
- “Goods be returned to the owner”
33. This was after an Application by the state counsel, who tendered the report from KEBS dated April 26, 2023.
34. It is not in dispute that the 1<sup>st</sup> Respondent, having first denied the charges, changed his plea to that of guilty and was duly convicted and sentenced to a fine of Kshs. 50,000/= in default to serve six (6) months imprisonment.
35. Having been convicted, then the provisions of Section 215 of *the Act* were to be applied. The said section provides for the condemnation of the “thing” being the subject of the case, the skimmed milk powder.
36. Having been condemned, it was improper for the trial court to then order that the “thing” be returned to the owner. This was a thing for which no taxes in the form of customs duty had been paid. The order had the effect of releasing an uncustomed thing back to the offender, which is obviously incorrect. Further, the order was issued without the consideration of payment of any duty thus making the 1<sup>st</sup> Respondent a beneficiary of his crime. In this regard I am in agreement with the reasoning of the court in *Abdiaziz Mohammed Warsame v ODPP and KRA (supra)*.
37. I am thus in agreement with the Applicant that after conviction, the court ought to have ordered that the goods in question be forfeited/ released to the KRA, the only entity entitled to deal with goods seized under *the Act*.



38. I have noted that the trial court relied on the report by KEBS dated April 26, 2023 which provided for release of goods under certain conditions.
39. The trial court overlooked the fact that the report referred to release of the products as per KRA procedures. These procedures are what are set out under Section 215 of *the Act*. The report did not purport and it could not have purported that the goods be released to the 1<sup>st</sup> Respondent.
40. I am therefore satisfied that the order of the trial court issued on September 26, 2023 was improper and I hereby set it aside. It is substituted with an order that the goods in question shall be released to the Applicant for appropriate disposal under the law.
41. As to costs, I think that whereas the Applicant is entitled to the same, the Application for release of the goods was not done by the 1<sup>st</sup> Respondent but by the prosecuting counsel.
42. As such, I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

C/A Oleperon

State counsel Ms Okok

Applicant present

Ms Cynthia Opiyo for KRA

