



Henery v republic & 2 others (Miscellaneous Criminal Revision E247 of 2024) [2024] KEHC 12809 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CRIMINAL REVISION E247 OF 2024
EM MURIITHI, J
OCTOBER 24, 2024
IN THE MATTER OF THE CRIMINAL PROCEDURE
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF MISCELLANEOUS APPLICATION CASE NUMBER
E032 OF 2024 AT THE CHIEF MAGISTRATE'S COURT AT MERU
IN THE MATTER OF AN APPLICATION BY DR. JAMES MURUNGI HENERY FOR
REVISION OF ORDERS DISMISSING HIS APPLICATION DATED 19TH SEPTEMBER, 2024**

BETWEEN

JAMES MURUNGI HENERY APPLICANT

AND

REPUBLIC 1ST RESPONDENT

JOSEPH MUNGATHIA M'IKIRERA 2ND RESPONDENT

COFACE CREDIT LIMITED 3RD RESPONDENT

RULING

1. By a certificate of urgency dated 26/9/2024 pursuant to sections 150, 362, 364, 365, 366 and 367 of the *Criminal Procedure Code*, Articles 49, 50 (1), 165 (6), 165 (7) of the *Constitution* and all other enabling provisions of the law, the applicant seeks:
 - a. Spent
 - b. Spent



- c. This Honorable Court be pleased to review and or set aside orders of the Resident Magistrate Hon. Nyamweya dated 24th September, 2024 in Meru Chief Magistrate’s Court Miscellaneous Application Numbers E032 of 2024 (Coface Credit Ltd v Republic).
 - d. Further and in the alternative, this Honorable do make such other Orders as it may deem just and expedient pending the hearing and determination of Meru Chief Magistrate’s Court Criminal Case Numbers E032 of 2024 (Republic v Joseph Mungathia & Emily Nkirote Mungathia).
2. In his affidavit in support of the application, the applicant avers that there will be a miscarriage of justice if this court does not intervene and offer guidance as to the proceedings with respect to Meru Chief Magistrate’s Court miscellaneous application number E032 of 2024 involving Motor Vehicle Registration No KDB XXX W. The subject motor vehicle is to be used as evidence in criminal case No E1612/2023 and the 3rd respondent filed miscellaneous application No E032/2024 for its release, which application was dismissed on 28/5/2024. The 2nd respondent, who was never a party in the proceedings successfully applied for reinstatement of the dismissed application, and the motor vehicle was released to him. He filed an application dated 24/9/2024 to set aside the proceedings of 17/9/2024, but the same was dismissed by the trial court. He is apprehensive that the vehicle might be disposed of by the 2nd respondent, who is the 1st accused in criminal case No E1612/2023.
 3. The 2nd respondent swore a replying affidavit on 8/10/2024 in opposition to the application. He contends that the application is misplaced, an afterthought, lacks merit and is an abuse of the court process as the subject vehicle has no relation to criminal case No E1612/2023 because it is not an exhibit thereto. He has exhibited a sale agreement to show that the subject vehicle, although registered in the name of his daughter Emily Nkirote Munga’tia, belongs to him. He traded his motor vehicle registration No KCJ XXX Q and topped up the balance to get the subject vehicle. He used the subject vehicle as collateral in obtaining a loan from the 3rd respondent to pay the balance of the purchase price, which loan he is still servicing. His daughter Emily Nkirote has consented to the vehicle being released to him and the Office of the Director of Public Prosecutions recommended that the vehicle be released to him. More importantly, the applicant failed to prove what interest he has in the subject vehicle, and his grievance with the trial court’s decision ought to have been raised through an appeal. In his view, the trial court considered all the evidence, followed the right procedure and he will be greatly prejudiced if the orders sought are issued.
 4. The DPP indicated it did not wish to participate in the application as it is a dispute about ownership of motor vehicle and its interests are catered for in that the trial court had directed that photographs of the motor vehicle be taken before release and a further order that the accused availed the motor vehicle if necessary, and its interest was that whichever party takes the motor vehicle that party shall avail the motor vehicle when directed by the court.
 5. The application was argued orally with counsel urging their respective cases as set out in the affidavits, and a ruling was reserved.

Determination

6. The power of the Court in revision of orders of the trial court is indubitable under section 362 of the [*Criminal Procedure Code*](#) as follows:

“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.”

7. Revisionary power of the High Court is further entrenched under Article 165 (6) and (7) of the Constitution, which provide as follows:

“(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.”

8. Pursuant to Article 165 (7) of the Constitution, this Court has called for and examined the trial court file with particularity to the proceedings of 17/9/2024 which precipitated to the release of the subject vehicle to the 2nd respondent.

9. The trial court’s record is clear that the release of the motor vehicle to the 2nd respondent had been initiated by the 3rd respondent vide an application dated 19/2/2024, seeking the release of the vehicle to it. That application was nevertheless dismissed on 28/5/2024 at the request of the prosecution for want of prosecution. The 2nd respondent moved the court vide the application dated 11/9/2024 seeking that, “this Honorable court be pleased to set aside its order dated 28th May 2024 dismissing this suit and reinstate the same for hearing and final determination of the application dated 29th January 2024.”

10. Surprisingly, when the 2nd respondent appeared in court on 17/9/2024 for the hearing of his application, he erroneously hoodwinked the court into releasing the motor vehicle to him as follows;

“Accused: I have an application dated 11/9/2024 for the police to use photos of my vehicle so that I can use my vehicle as it has been idle for long.

Prosecution: I have no objection. I pray that the accused be asked to avail the vehicle.

Court: The prosecution to use photographs of the vehicle as evidence and release the vehicle KBD 467 W to the accused. The accused will be required to avail the vehicle when required to. File closed.”

11. Sight must not be lost of the fact that the order for the release of the vehicle had been sought by the 3rd respondent in its application of 9/2/2024, and the 2nd respondent was not a party thereto. In his application of 11/9/2024, the 2nd respondent sought the reinstatement of the 3rd respondent’s application of 9/2/2024.

12. Since Craig v Kanseen [1943] 1 ALL ER 108, it is established that an order made ex parte, without hearing a party, is a nullity, which shall be set aside ex debito justitiae.

The right to be heard cannot be gainsaid. In James Kanyita Nderitu & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman (Civil Appeal 6 of 2015) [2016] KECA 470 (KLR) (17 June 2016) (Judgment), the Court of Appeal while considering the setting aside of an irregular default judgment underscored the right to be heard as follows:

“...In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice



that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986-1989] EA 456).”

13. This court finds that the proceedings of 28/5/2024 and 17/9/2024 ought to be set aside *ex debito justitiae* as the 3rd respondent, the registered owner of the vehicle, was condemned unheard when the adverse orders were issued for the release of the vehicle to the 2nd respondent, who was on the face of it a stranger to those proceedings as urged by the Counsel for the applicant.
14. Without prejudice to the proceedings of the trial court, this Court notes that the applicant, the complainant in criminal case No E1612/2023 has not established the nexus between the vehicle and that case as an exhibit, or otherwise.

Order

15. Accordingly, for the reasons set out above, the court allows the application for Revision in the following terms:
 - a. The proceedings of 28/5/2024 and 17/9/2024 in Meru Chief Magistrate’s Court Miscellaneous Application Number E032 of 2024 (Coface Credit Ltd v Republic) together with the consequential orders incidental thereto are hereby set aside.
 - b. The 2nd Respondent shall cause the Motor Vehicle Registration No KDB XXXW to be delivered to the Officer Commanding Station at Meru Police Station within the next two (2) days, in default of which the court bailiff may recover the motor vehicle and deliver it to the police station at the cost of the 2nd Respondent.
 - c. The application dated 9/2/2024 shall be heard on merit in the presence of the 2nd and 3rd Respondents herein and/or their counsel by the trial court differently constituted. For that purpose, the trial court files shall be returned to the trial court forthwith.
 - d. There shall be no order as to costs.
16. File closed.
Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Achura for the Applicant.

Mr. Masila for the DPP 1st Respondent.

Mr. Mutuma G. for the 2nd Respondent.

