



Galot & another v Republic & another (Miscellaneous Criminal Application E144 of 2022) [2023] KEHC 2263 (KLR) (Crim) (20 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E144 OF 2022
JM BWONWONG'A, J
MARCH 20, 2023**

BETWEEN

**MOHAN GALOT 1ST APPLICANT
LONDON DISTILLERS (K) 2ND APPLICANT**

AND

**REPUBLIC 1ST RESPONDENT
THE COMMISSIONER INVESTIGATIONS AND ENFORCEMENT KENYA
REVENUE AUTHORITY 2ND RESPONDENT**

RULING

1. The notice of motion for determination is made pursuant to article 50 (2) (k) and 159 (2) (d) & (e) and sections 211 (1) of the *Criminal Procedure Code* (cap 75) Laws of Kenya.
2. The applicants have sought leave to adduce fresh additional new evidence.
3. The application is based on the grounds set out on the face of the notice of motion and supported by an affidavit sworn by the 1st applicant dated November 9, 2022.
4. The grounds raised are as follows. The first applicant is the principal and chairman of the board of directors of the 2nd applicant. He filed High Court Criminal Revision No E144 of 2022, in which he challenged the decision of the trial court in refusing to terminate criminal proceedings in Milimani Chief Magistrate's Court Criminal Case No E802 of 2022.
5. Judgement in the Tax Appeals Tribunal Appeal No 408 of 2021 was delivered on November 4, 2022. The tribunal allowed the 2nd applicant's appeal and set aside the 2nd respondent's objection dated June



- 9, 2021. The judgement is pertinent to the just and fair determination of the application for revision before this court.
6. The respondent will not suffer prejudice if the application is allowed.
 7. No 81348 PC Amollo John deposed a replying affidavit dated July 26, 2022 for the respondents. He averred as follows. Investigations were conducted in respect of the alleged deliberate under declaration of production volumes of the 1st and 2nd applicants.
 8. As a result, the applicant was charged with various tax offences.
 9. The Tax Appeals Tribunal and Magistrate's court have separate and distinct jurisdictions. The tribunal is established to hear appeals against any tax decision made by the Commissioner of Taxes and cannot make a finding on whether a suspect is guilty or not of tax offences.
 10. The applicant has not demonstrated that the continued prosecution of the criminal case manifests an abuse of the court process.
 11. Section 193A of the [Criminal Procedure Code](#) provides for concurrent prosecution of civil and criminal proceedings.
 12. The application lacks merit and should be dismissed.

The submissions of the parties

13. The parties decided not to file submissions. They relied on their respective affidavit evidence.

Issues for determination

14. I have considered the application, the response and the applicable law. The issue for determination is whether the applicants the applicants have made out a case for the grant of the orders sought.

Analysis and determination

15. The applicant filed the present application pursuant to article 50 (2) (k) of the 2010 [Constitution](#) of Kenya, which provides for the right of an accused to a fair trial. Among the rights provided for a fair trial is the right to adduce and challenge evidence. He also relied article 159 (2) (d) & (e) of the 2010 [Constitution](#) of Kenya, which provides that justice shall be administered without undue regard to procedural technicalities and promotion of the principles of the [constitution](#).
16. Furthermore, he relied on sections 211 (1) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, which provides for the procedure to be followed after the close of the prosecution case.
17. In the instant application, the applicant sought to adduce additional fresh new evidence. The evidence consists of the judgement from the Tax Appeals Tribunal, being Tribunal Appeal No 408 of 2021, which was delivered on November 4, 2022. The applicant claimed that the two matters are related and the magistrate court has no reason to continue with the criminal case pertaining to the subject matter before the trial court, which exercises criminal jurisdiction.
18. He has therefore sought to adduce additional new evidence in this application for revision.
19. On the prayer to adduce further evidence, section 358 of the [Criminal Procedure Code](#) (Cap 75) allows an appellate court to admit fresh new evidence in the interests of justice in a pending appeal in the High



Court. Courts have severally dealt with this issue. I will only cite the case of *Samuel Kangu Kamau v Republic* [2015] e-KLR, where the Court of Appeal stated as follows –

“It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal.”

20. In the present case, the applicant has not been candid on whether the intended additional evidence is new, and when he became aware of the same. The applicant has not indicated whether the matter before the trial court has been concluded or not.
21. From the record, no appeal has been preferred in this court.
22. Further, the applicant has failed to disclose whether this additional evidence is going to be adduced on appeal or on revision. The relevance of that evidence has also not been disclosed in relation to the criminal case he is facing in the lower court.
23. Furthermore, additional fresh evidence may only be adduced in an appeal that is pending before the High Court. The applicants have not demonstrated there is an appeal pending in this court.
24. Finally, the new additional evidence cannot in law be produced in revisional proceedings. This is clear from sections 362 and section 364 of the Criminal Procedure Code.
25. The applicant has therefore not met the threshold and as such the application before court is found to be lacking in merit.
26. In light of the foregoing, the application before the court is premature and is consequently struck out.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Mbaye for the applicants

Ms Joy Adhiambo for the respondents

