



Watu Nominees Company Limited v Republic & 2 others (Criminal Revision E007 & E008 of 2023 (Consolidated)) [2023] KEHC 2177 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E007 & E008 OF 2023 (CONSOLIDATED)
RN NYAKUNDI, J
MARCH 22, 2023**

BETWEEN

WATU NOMINEES COMPANY LIMITED APPLICANT

AND

REPUBLIC 1ST RESPONDENT

EDWIN KIBET 2ND RESPONDENT

BRIAN KIPTUM LANGAT 3RD RESPONDENT

RULING

1. In relation to these matters, for purpose of expediency as premised by the applicant’s motions given their shared similarity, this court takes the approach of consolidation in determining the issues expressly pleaded and subsequent remedies arising thereto. Essentially the motions are seeking the following orders:
 1. That this application be certified as urgent and service of the same be dispensed with in the first instance.
 2. That the court enjoins Applicant herein as an interested party for purposes of this Application and suit generally.
 3. That pending the hearing inter parties of this application the Honourable Court be pleased to grant a temporary order of stay of the execution of its orders made on the 17th day of January 2023 and all consequential orders thereof in Iten Spm Criminal Case No E 056 OF 2023.
 4. That the honourable court be pleased to review the orders made on the 17th day of January 2023 and set the same aside with all consequential orders in Iten Spm Criminal Case No E 056 Of 2023 And Criminal Case No E037 Of 2023



5. That an order do issue for the suit Motorcycles registration Numbers KMPN 672N TVS Star HLX-150 and KMFN TVS Star HLX -150 to be released to the Applicants herein.
 6. That cost of this application be in the cause.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit to said application.
 3. The applicant contends that the accused persons, one Edwin Kibet and Brian Kiptum Langat were arrested on 12th January 2023 and charged in court on 13th January 2023 for the offence of being in unlawful possession of charcoal in a national forest contrary to section 64(1)(e) of the [forest conservation and management act](#) 2019 in Iten Spm Criminal Case No E037 OF 2023 and Iten Spm Criminal Case No. E056 OF 2023. They were convicted on there own plea of guilty and fined a fine of Kshs. 10,000/= or 2 months imprisonment in default.
 4. The trial court issued a notice to show cause to the owner of the motorcycle to show cause why the motorcycle should not be forfeited to the state. Further, that when the case came up for the notice to show cause on January 16, 2023, the motorcycle was forfeited because the accused was absent. The applicants stated that they did not participate in the proceedings since it was neither served with a notice to show cause nor informed of the existence of this suit. Had it been served it would have attended court and shown cause as to why the same should not have been forfeited. The applicant further stated that the at the time of the commission of the offence was jointly owned by the Accused and the Applicant by virtue of an Asset financing scheme over the suit Motorcycles.
 5. The applicant deposed that section 389A of the Criminal Procedure Code provides for the procedure for forfeiture of goods and further, that after financing, the motor cycles they were released to the accused persons. At no point in time has the Applicant been in possession, control use and or management of the suit motor cycles either by itself or through its servants and or employees, even on the date that the offence was committed save for the financial interests that accrued as a result of the Asset Financing scheme. The applicant informed the court that the accused persons had not finished servicing the loan and it had accrued arrears. In addition, the applicant stated that there is an error apparent on the face of the record and it is apprehensive that that suit Motor Cycles might be auctioned leading to a loss of security over the loan. The applicant prayed the court allow the application as it was in the interests of justice.

Analysis and Determination

6. The only issue in both applications for determination is whether the prayer for review should be granted to quash the impugned decision by the trial court on automatic forfeiture of the named motor cycles apparently used in conveying the forest produce. It is worthy to note that criminal forfeiture in Kenya is dependent upon a conviction of an accused persons for a crime which provides a basis for the forfeiture. From my understanding of the law criminal forfeiture is in personam, against the accused persons alleged to have committed an offence under the Kenya [Forest Conservation and Management Act](#) 2016. One drawback to this type of forfeiture in our statute is that only property in which the accused persons have a true interest may be forfeited criminally. Therefore, the property which is held by nominees or straw owners on behalf of the accused may be forfeited criminally but the state must satisfy the threshold in the due process clauses on a right to a fair hearing espoused under article 50 of [the Constitution](#). It is not in dispute that the state must prove that the accused is the true owner, for reason that any property, chattel, vessel, motor vehicle owned by other third parties who are not convicted as part of the criminal case may not be part of the forfeiture criminally.



7. 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 heard 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 hear both sides and not hear 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.
8. I conceive that these principles weighted against the notice of motions by the applicant and the remedies sought carry home a degree of conviction on my part that there is merit as premised in the affidavits. This leads me to the following analogy.
9. Upon considering the applications and the annexures to the same it is apparent that the suit motorcycle was used in the commission of an offence contrary to section 64(1)(a) as read with section 64(2) of the *Forest Management and Conservation Act* which provides as follows;



- (1) Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest—
 - (a) fell, cut, take, burn, injure or remove any forest produce;
 - (2) Any person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.
10. Section 68(c) of the same act provides for compensation for loss and damage, specifically on forfeiture, as follows;
- (1) Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the forest produce shall be forfeited to the owner.

The court may in addition to any other ruling order—

(c) the vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the Service:
11. Whereas the act provides for forfeiture, the same should not be read in isolation. Section 389A of the *Criminal Procedure Code* provides as follows;
- (1) Where, by or under any written law (other than section 29 of the *Penal Code*), any goods or things may be (but are not obliged to be) forfeited by a court, and that law does not provide the procedure by which forfeiture is to be effected, then, 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 their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown; and, at that time and place or on any adjournment, the court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things:

Provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner (if any) as the court thinks fit.
 - (2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.
12. A clear reading of the same reveals that it is a requirement that notice to show cause as to why the goods should not be forfeited must be served on the owner of the goods. The same is couched in mandatory terms and therefore there is no leeway for the goods to be forfeited to the state in the absence of said notice. The failure to notify the applicant of the impending forfeiture was contrary to the provisions of the criminal procedure code and in contravention of the principles of natural justice as the applicant had rights to said property. It amounts to condemning the applicant unheard, a clear violation of article 50 of *the Constitution* of Kenya. Further, I must highlight that under article 47(1) every person has a right to a fair administrative action. In situations where the court intends to seize any property it must hold an inquiry where the prosecution must satisfy and demonstrate that the chattel, vessel or motor



vehicle ought to be forfeited to the state. It is at that stage the owner is allowed an opportunity to raise a defence to the forfeiture. This procedure was clearly overlooked by the trial court.

13. It is evident, from the annexures, that the accused person had a loan facility with the applicant and the motor cycle registration no. KMPN 672N and KMPN 672N was security as the applicant was registered as the financier in the log book. It follows that the applicant was to be notified of the impending forfeiture which it was not. It is apparent that the trial court acted ultra vires the provisions of section 389A and this occasioned an error apparent on the face of the record and an error of law
14. From the three notice of motions dated 6th February, 2023 by the Applicant, in Criminal Revision No. E007 of 2023 & Criminal Revision No. E008 of 2023, I am satisfied that the Applicant has brought itself within the ambit of article 165 (6) & (7) of the Constitution on supervisory jurisdiction over the subordinate courts as construed in conjunction with section 362 of the Criminal Procedure Code on Revisionary Jurisdiction. Notably, I concur with the applicants affidavit evidence discloses the following features:
 - i. That the decisions to forfeit the motor cycles was grossly erroneous in absence of the session magistrate acting in contravention of the provisions of the law.
 - ii. That the findings made ignored both procedural and substantive fairness on notice and an opportunity that the parties affected by the decision.
 - iii. The material evidence on those parties was never considered, therefore, rendering the judicial discretion as exercised arbitrary or perverse.
15. Overall, the principle of proportionality in sentencing is a splendid canon and most persuasive to the sentencing court to factor before inflicting any sanction or penalty against a convicted offender. It is based on an appealing notion that punishment should equal the crime. The question then which arises is whether the response on forfeiture was commensurate to the harm caused by the accused persons or sought to be prevented by the decision on forfeiture. The living standard approach in sentencing is for the court to establish some level of parameters for proportionality to find its place in the final outcome of the verdict. With this I arrive at a considerable position that there is merit to grant the orders sought by the Applicant. To that extent, I hereby invoke the powers conferred under section 362 as read with Section 364 of the Criminal Procedure Code and set aside the order on forfeiture and substitute it with one of vesting the property in the ownership of the applicant. The motorcycle registrations No. KMPN 672N TVS Star HLX-150 and KMPN 645N TVS Star HLX 150 be released to the applicant forthwith with no sanction on any costs to accrue or demanded by the person, organization, in whose custody the aforesaid motor cycles are stated to be detained. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 22ND DAY OF MARCH 2023

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R. NYAKUNDI

JUDGE

Coram: Before Hon. Justice R. Nyakundi

Wabomba Masinde & Co. Advocates

