



**Narano Kenya Limited v Republic (Criminal Revision  
E002 of 2023) [2023] KEHC 17242 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL REVISION E002 OF 2023  
WM MUSYOKA, J  
MAY 12, 2023**

**BETWEEN**

**NARANO KENYA LIMITED ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Revision arising from the forfeiture order made on 16th February  
2023, in Busia CMCCRC No. E2424 of 2021, Republic vs. Henry  
Barasa Onyango and another, by Hon. EC Serem, Resident Magistrate)*

**RULING**

1. The proceedings herein were initiated by way of a letter dated February 28, 2023. The applicant seeks revision. It is not a party to the criminal proceedings in Busia CMCCRC No. E2424 of 2021, but complains that the forfeiture order, made with respect to the goods the subject of those proceedings, affected it, for it was the owner the goods, and had a permit to import them, and will be prejudiced should the forfeiture order be executed. Its principal complaint is that section 389A of the [Criminal Procedure Code](#), cap 75, Laws of Kenya, was not complied with, which would mean that its goods would be alienated without it being heard, which is contrary to the rules of natural justice.
2. Section 389A of the [Criminal Procedure Code](#) provides as follows:  
“389A. Procedure on forfeiture of goods  
  - (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.”
3. The effect of that provision is that before forfeiture is ordered by the court, in cases where it is provided for, other than in section 29 of the *Penal Code*, cap 63, Laws of Kenya, the court ought to issue a notice to show cause to the owner or apparent owner of the goods sought to be forfeited. That presupposes that the owner of the goods ought to be heard before the forfeiture order is made. The right of the owner of the goods being heard is so critical that where the owner is unknown, the law requires that a notice be published in a newspaper and through other medium. The second bit of it is that where the owner shows cause that it was innocent in connection with the offence for which forfeiture is sought, the court shall not order forfeiture.
4. Revision, which is provided for under section 362 of the *Criminal Procedure Code*, targets orders, decisions and sentences made or imposed by the trial court, with a view to address any incorrectness, irregularity, illegality or impropriety in them, or the manner that the proceedings leading up to them were conducted. The provision targets the act of or conduct by the trial court, with the intent to correct or straighten out or smoothen any mistakes or errors made by that court, which rendered its decision irregular, improper, incorrect or illegal.
5. Does section 389A of the *Criminal Procedure Code* apply here? The starting point should be with respect to section 29 of the *Penal Code*, which provides for forfeiture with respect to the offences defined in sections 118 and 119 of the Penal Code, with respect to compounding felonies and penal actions. The offences under sections 118 and 119 are excluded from the procedure set out in section 389A of the *Criminal Procedure Code*.
6. The accused persons, in Busia CMCCRC No. E2424 of 2021, faced 4 counts: of malicious damage to property, contrary to section 339(1) of the *Penal Code*; wilfully obstructing a police officer, contrary to section 103(a) of the *National Police Service Act*, No. 11A of 2011; conveying uncustomed goods, contrary to sections 200(d), 210(c) and 213 of the *East African Community Customs Management Act*, No. 1 of 2005; and possession of uncustomed goods, contrary to section 210 of the *East African Community Customs Management Act*. Clearly, none of the provisions under which the counts are premised fall under section 29 of the *Penal Code*.
7. It was alleged, in the course of the proceedings, that the sugar, the subject of counts III and IV, belonged to a third party. That was raised for the first time on November 23, 2021, by the Advocate for the accused persons, Mr. Okutta, while objecting to an application for adjournment. The third party was not disclosed then. At the oral hearings, none of the witnesses presented identified the applicant herein as the owner of the sugar in question. The accused persons, in their defence statements, denied having anything to do with the sugar, and the lorry carrying it. In the end they were acquitted of the charges



- relating to the uncustomed goods, but it was ordered that the said goods, sugar, be forfeited to the Kenya Revenue Authority, to be dealt with in accordance with the laid down procedures.
8. Forfeiture could only arise with respect to the charges under counts III and IV. The question is, does the law creating the offences charged under counts III and IV provide for forfeiture? The provisions cited in the 2 counts are sections 200(c)(d)(iii), 210 and 213 of the *East African Community Customs Management Act*. Section 200 creates offences relating to prohibited, restricted and uncustomed goods, and such offences include that of carrying, acquiring and possessing uncustomed goods. Section 210 defines goods liable to forfeiture to include uncustomed goods. section 213 gives power to police officers to seize goods liable to forfeiture. So, clearly the East African Community Customs Management Act does carry provisions that provide for forfeiture, and the offences charged in counts III and IV touch on forfeiture.
  9. Section 389A of the *Criminal Procedure Code* will apply only where the law under which the forfeiture is contemplated “does not provide the procedure by which forfeiture is to be effected.” The question then is, does the *East African Community Customs Management Act* provide a procedure or mechanisms by which forfeiture is to be effected? It does. I have already referred to section 213, which enables police officers to seize goods liable to be forfeited. Section 214 provides for procedures upon seizure of goods, notices ought to issue to the owner, to show cause, and there are provisions on what ought to be done thereafter. Section 215 deals with situations where there is a prosecution relating to the seized goods. Where a conviction is made, the same would have the same effect as a condemnation of the goods without more. On acquittal, the court may release the goods to the person from whom they had been seized, or to the owner, or it may condemn them. So, on account of sections 213, 214 and 215 of the *East African Community Customs Management Act*, section 389A of the *Criminal Procedure Code* does not apply to the proceedings that were conducted in Busia CMCCRC No. E2424 of 2021, with respect to counts III and IV, for the *East African Community Customs Management Act* has clear provisions on “the procedure by which forfeiture is to be effected.”
  10. Was the trial court wrong in the manner in which it applied section 215 to the proceedings it was conducting? That law says that where there is an acquittal, the court will either release the goods to the persons from whom they were seized, or the owner, or condemn them. It condemned them, by ordering their release to the Kenya Revenue Authority, to deal with them in accordance with the set procedures. The goods could not be released to the accused persons, because they dissociated themselves with them. They could not be released to the owner, for the owner was unknown. No one came forward to claim them. The name of the applicant herein, Narano Kenya Limited, did not come up at all in the course of the proceedings. When the lorry that was carrying the sugar was being processed for release to the person who claimed to be its owner, the owner of the sugar was not disclosed. So, there was no owner to whom the court could order the sugar be released to. Section 215 does not oblige the court to seek ought the owner of the goods the subject of such criminal proceedings. As there was no known owner of the sugar, and the accused had denounced it, and the lorry owner did not claim the sugar nor point to any known owner, the trial court was not in error in condemning the goods, as it did.
  11. Counts III and IV would not have been prosecuted had the applicant come forward to claim the sugar, and provide evidence that customs duty had been paid for it. It is not lost on me, that the Advocate who acted for the accused persons, in Busia CMCCRC No. E2424 of 2021, also acted for the lorry owner, at the time when the lorry carrying the sugar was being released. He is also on record saying that the sugar belonged to a third party, who, I presume, is the applicant herein. That Advocate is the one now on record for the applicant herein. If customs duty for the sugar in question had been paid for, the proceedings in Busia CMCCRC No. E2424 of 2021 would not have been necessary, at least in respect



of counts III and IV, for the owner would have presented proof of the same, to establish that the goods in question were “not uncustomed.” I find it inconceivable that sugar is being held at some warehouse, exposed to diminution in value, when the owner is sitting pretty somewhere without laying claim to it, while criminal proceedings are being conducted with respect to it. I also find it inconceivable that the owner did not find it necessary to come out of the woodwork, during the trial in Busia CMCCRC No. E2424 of 2021, to stake its interest in the matter, like the owner of the lorry did, by presenting proof that the customs duty had been paid for the goods the subject of the trial, and thereby assist the trial court make appropriate orders in the end. The owner cannot claim ignorance of the fact of the seizure of the goods in 2021, and it ought to raise eyebrows that it is only emerging in 2023, claiming that the goods were in fact not uncustomed. It cannot be that it is now that it has discovered that its goods never arrived at their destination.

12. I find no merit in the application for revision, sought through the letter dated February 28, 2023, and I hereby dismiss the same.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 12<sup>TH</sup> DAY OF MAY 2023**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang - Court Assistant.

**Appearances**

Mr. Okutta, instructed by Ouma Okutta & Associates, Advocates for the applicant.

Mrs. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

