



**Sidian Bank Limited v Republic & 3 others (Criminal Revision  
E144 of 2023) [2024] KEHC 15054 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15054 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL REVISION E144 OF 2023  
AK NDUNG’U, J  
NOVEMBER 20, 2024**

**BETWEEN**

**SIDIAN BANK LIMITED ..... APPLICANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**ANTHONY KAMAU MUTITU ..... 2<sup>ND</sup> RESPONDENT**

**PC MURIUKI MURIITHI ..... 3<sup>RD</sup> RESPONDENT**

**FREDRICK WACHIRA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant (Sidian Bank Ltd) being aggrieved by the orders of 12<sup>th</sup> October, 2023 in Nyahururu Chief Magistrate’s Court Criminal Case No. E2118 of 2021 (Republic vs Antony Kamau Mutitu) in the matter of their application dated 30<sup>th</sup> August, 2022, has approached this court through a letter by their advocates dated 24<sup>th</sup> October, 2023.
2. The Applicant is seeking that this honourable court do call for file Nyahururu Chief Magistrate’s Courts Criminal Case E2118 of 2021 (Republic vs Antony Kamau Mutitu) and/or record of proceedings in relation to an application dated 30<sup>th</sup> August, 2022 filed therein by Sidian Bank Ltd over which matter and application the Hon. F. Lesantos Larabi RM presided, and to bring the file to the High Court pursuant to Section 362 and 364 of the Criminal Procedure Code Cap. 75 Laws of Kenya in order for High Court to satisfy itself of the correctness, legality and/or propriety of the order made on 12<sup>th</sup> October, 2023 by Hon. F. Lesantos Larabi.
3. The grievance by the applicant is the dismissal of their application dated 30<sup>th</sup> August, 2022 seeking release of motor vehicle Reg. No. KCM 913E Toyota Hiace, a security for loan monies owing to the Applicant by the 2<sup>nd</sup> Respondent.



4. The application is premised on the following grounds;
  1. The honourable trial court erred in fact by holding that the said application dated 30<sup>th</sup> August, 2022 was directed only against the accused person.
  2. The honourable trial court erred in fact by holding that the investigating officer and that the complainant, despite having responded to the said application dated 30<sup>th</sup> August, 2022, had been prejudiced because they were not joined as parties to the application.
  3. The honourable trial court erred in law by holding that the right to approach the court and seek the procedural remedy under Section 177(a) of the Criminal Procedure Code can only be asserted by such person as the court grants leave to be enjoined as a party.
  4. The honourable trial court erred in law by restricting the exercise of its powers under Section 177(a) of the Criminal Procedure Code to only such property as has been produced in exhibits.
  5. The honourable trial court erred in fact and law by failing to appreciate that the state, through the investigating officer, did not have any bona fides in claiming that the subject motor vehicle was to be produced as an exhibit as the thing alleged to have been obtained by false pretences was not the motor vehicle itself but monies paid by the complainant to the accused person.
  6. The honourable trial court erred in fact and law by failing to balance the competing statutory rights under the Moveable Property Security Rights Act of 2017 and the states powers under the Criminal Procedure Code taking into account the fact that the state had failed to cause the arrest of the accused person for more than one year since the accused person absconded bond.
5. In essence the Applicant invokes this court's powers under Sections 362 of the Criminal Procedure Code Cap. 75 Laws of Kenya to revise the impugned orders.
6. The Applicant filed its submissions dated 20<sup>th</sup> April, 2024 stating that the main ground in the application was that the subject motor vehicle is the Applicant's security for monies advanced to the accused person.
7. That Section 362 of the Criminal Procedure Code, provides;

“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.”
8. Further, that Section 364(1) (b) of Criminal Procedure Code provides;
  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-
    - b) in the case of any other order other than an order of acquittal, alter or reverse the order.”
9. It is submitted that under Section 362 of the Criminal Procedure Code the Applicant must demonstrate that the decision challenged was not correct, legal or proper. The Applicant may also demonstrate that the proceedings were irregular. It is urged that these powers are extensive. They are such as this court in its appellate jurisdiction would exercise. Section 364(5) of the Criminal Procedure



Code provides that where an appeal lies, and no appeal is filed, the powers of revision cannot be exercised.

10. That the ruling of the trial court at the foot states that the Applicant had a right of appeal within 14 days and it is their submission that, that statement flies in the face of unyielding rule that an appeal is a creature of statute and unless a statute provides for appeal either as matter of right or upon leave, no court purport to grant such right. The court is invited to consider the decision in Robert Kariuki Njagi & Another vs Republic & Another [2018] eKLR where the high court declined to grant leave to appeal against a decision on the basis that there was no provision in the code empowering the high court to do so.
11. Counsel submits that it is this unyielding position on appeals which made it unsafe for the Applicant to take advantage of the statement “right of appeal 14 days” as the code does not provide for appeals against orders made under Section 177(a) of the Criminal Procedure Code.
12. Further, that in the persuasive decision of Justice Mativo in Republic vs Antony Thuo Karimi [2016] eKLR it was held;

“The basic object behind the powers of revision is to empower the high court to exercise the powers of an appellate court to prevent failure of justice in cases where the code does not provide for appeal.”
13. On time limitation, it is submitted that applications for revision are not time bound and this much is apparent from Section 362 and 364 of the Code and affirmed by Justice F. Muchemi, whose views we urge your lordship to find persuasive, in Director of Public Prosecution v Jackson Muriithi Kithangari [2015] eKLR where the Judge held;

“The Respondent argued that this application was brought out of time in that it was not filed within 14 days. Unlike appeals. Which must be lodged within 14 days, application for revision is not limited. It was held in the case of Bernard Kwemoi Ssunganya v Republic [2011] eKLR that;

“.....There is no time limit between which an order may be revised, unlike appeals which have to be brought within a specified time.”
14. There is therefore a proper application for revision before this court. This application is the only recourse the Applicant has against the ruling of 12<sup>th</sup> October, 2023.

### **Joinder of parties;**

15. The applicant submits that at paragraph 39 of the ruling, the trial court holds that the application was preferred “solely against the accused person leaving other necessary parties such as the prosecution, the investigation officer who has the custody of the subject matter and the complainant so that any order made in essence would made against them without hearing them”.
16. That upon the application being argued in open court, counsel for the ODPP stated that the application be served upon investigating officer. At no time since 31<sup>st</sup> August, 2022 did the prosecution counsel claim that the office was not served.
17. Further, on the inter partes date of 20<sup>th</sup> September, 2022, the trial court recognized the Complainant’s stake and directed that the application be served upon him. This was done, as an order was made that the complainant be served, it is not correct that the complainant was not joined as a party.



18. That all the persons with an interest to the subject matter of the Applicant's application dated 30<sup>th</sup> August, 2022 duly participated and none of them were prejudiced in any way.

The necessity for leave for the Applicant to be joined as a party to the Criminal Proceedings;

19. An argument is advanced that there is no prescription that persons with a claim must first seek leave to be joined as parties. This is especially so when one considers that the Applicant's interest in the matter is a security right only. In any event, if the Applicant did not have right to make any application without leave, why then were the complainant and the investigating officer filing responses in their own rights? It is the stake which an Applicant is able to prove before the trial court which entitles that complainant move the court and assert that claim.

20. That Section 177(a) does not in any way fetter the trial court's power to order restitution to only such property as is produced as an exhibit. The powers of the court come into play when a person is charged with an offence before that court and where any property is taken from him.

21. The decision relied upon by the court in *Petroleum Institute of East Afric v Republic & 2 Others* [2021] eKLR where the trial court held that unless an exhibit is produced, the court would not have jurisdiction to produce it is challenged on ground that the unyielding position does not take into account any issue raised as to the bona fides of the state claiming that an item is an exhibit.

22. The court is urged to consider the reasoning of Justice Muchemi in *Republic v John Nganga Mbugua* [2014] eKLR, where Justice Muchemi held;

“It is the practice in criminal cases that photographs will be taken by the scene of crime personnel of exhibits and scenes of crime which will be produced in evidence during the hearing. If it is possible to avail the exhibit itself, the photographs may also be produced. If the vehicles is released after its photographs are taken, no miscarriage of justice will be occasioned during the trial.....

It does not make any sense to keep the vehicle of the Applicant which is an income generating asset in police custody until the pending criminal case is finalized.”

23. It is urged that If the court upholds the position that there is no jurisdiction under Section 177(a) unless an item is produced as an exhibit during the trial of a charge, criminal proceedings will be used as the legally sanctioned avenue to defeat proprietary rights in chattels majority of which, and specifically the subject motor vehicle, are prone to depreciation and degradation.

24. Counsel adds that the accused absconded on 30<sup>th</sup> May, 2022, since then the matter has been mentioned and the investigation officer placed on oath to explain the whereabouts of the accused. On every occasion, the prosecution sought more time. In these circumstances, what happens to the security right that was not challenged by any document by the complainant?

25. The court is urged to examine the Applicant's application, the affidavit in support, the supplementary affidavit, the replying affidavits and submissions by the parties. The complainant did not prove that the Applicant's security right was acquired after his agreement with the accused person. Even if such was the case, once a security right is perfected under the Moveable Property Security Rights Act of 2017, the right is good against all persons including purchasers who have not perfected their interests.

26. The investigating officer in no uncertain terms deponed that it is the accused person who yielded possession of the vehicle to him. The complainant claims to have purchased from the accused which purchase he has not proved.



27. The high court in *Joseph Kithuku Kitonga & Another v Officer in Charge of Police Station Bamburi & 3 Others* [2020] eKLR in revision proceedings ordered the sale of perishable goods and monies so recovered by held pending the hearing and determination of the charge. The jurisdiction objection cannot be an unyielding rule.
28. It is the Applicant's case that none of the its officers were charged with any offence in connection with the charge before the trial court. The inquiry as to whether the security ought to be released ought to have taken into account the nature of the charge, the bona fides of the claim that the item is an exhibit, the probability of a charge being expeditiously heard and determined. Claims of third parties who are not party to the alleged offence, the due diligence undertaken by the alleged complainant and the remedies of the complainant in a civil action at common law and under the *Sale of Goods Act*.
29. That the trial court adopted a narrow approach in its decision making and this occasioned grave miscarriage of justice to the Applicant and the honourable court ought to find the ruling of the trial court erroneous as it failed to take into account relevant factors. That it be set aside and substituted with an order directing the release of the security upon such terms as this court finds just.
30. The 4<sup>th</sup> Respondents filed their submissions through his counsel dated 30<sup>th</sup> May, 2024 stating that he purchased motor vehicle registration number KCM 913E from the 2<sup>nd</sup> Respondent vide a sale agreement dated 4<sup>th</sup> July, 2017. He made the initial deposit and took possession of the vehicle and remained in possession of the same until sometimes in 2022 when he learnt that the motor vehicle was being sought to be attached whereupon he reported the matter to the police who took possession of the vehicle, arrested the 2<sup>nd</sup> Respondent and charged him with the offence in the lower court.
31. The Applicant herein claims that the motor vehicle is a moveable security in its favour and that the 2<sup>nd</sup> Respondent executed a chattels mortgage in its favour on 31<sup>st</sup> July, 2017, though no evidence has been presented in the lower court of registration of the alleged chattels mortgage.
32. The court is urged to look at the documents annexed to the supplementary affidavit of Jackline Ndungu on 5<sup>th</sup> May, 2023 and in particular a document dated 8<sup>th</sup> May, 2018 letter of deposit of collateral documents and which is at page 32 of the said affidavit. Going by the documents it is apparent that the logbook for the vehicle was in custody of the accused person until 11<sup>th</sup> May, 2018 and contradicting the position of the Applicant that a chattel had been registered in its favour.
33. It is the 2<sup>nd</sup> Respondent's submission that the court was in no in error in holding that it could not release the motor vehicle at this stage, since if the motor vehicle is release to the Applicant they will definitely dispose off the same and the 2<sup>nd</sup> Respondent will thus be prejudiced even before his case is heard and determined.
34. The motor vehicle continues to depreciate and it is the 4<sup>th</sup> Respondent's proposal that the motor vehicle be sold at the best possible price and the proceeds thereof deposited in court which in essence would protect both the interest of the Applicant as well as those of the 4<sup>th</sup> Respondent.
35. The 1<sup>st</sup> Respondent filed its submissions dated 23<sup>rd</sup> September, 2024 stating the motor vehicle in question was sold vide a sale agreement dated 4<sup>th</sup> July, 2017 which was before a mortgage was executed in its favour.
36. From the foregoing it is evident that the subject motor vehicle is the main subject in the matter before the trial court, as it is the object of which the offence of obtaining by false pretense was founded. Further the inconsistencies in the Applicant's allegation in claiming a right over the subject motor vehicle is clearly an afterthought meant to frustrate the 2<sup>nd</sup> Respondent's right over the subject motor vehicle.



37. That the trial court was right in dismissing the Applicant's application on 12<sup>th</sup> October, 2023 in favour of the 2<sup>nd</sup> Respondent and it is the State's submission that the ruling was properly founded and within the law and therefore urges the honourable court to dismiss the application herein and uphold the lower court's ruling made on 12<sup>th</sup> October, 2023.
38. I have had occasion to consider the revision application and the opposition thereto. I have had due regard to the applicable law both in statute and as enunciated in case law. Of determination is whether the revision jurisdiction of this court has been properly invoked and if in the affirmative, whether the orders sought are merited.
39. The High Court's power of revision is set out in Article 165 (6) and (7) which provides:
- “(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 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.”
40. Section 362 of the Criminal Procedure Code provides:
- “The High Court may call 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.”
41. Section 364(1) of the Criminal Procedure Code provides:
- 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 his 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 section 354, 357 and 358, and may enhance sentence;
- b. In the case of any other order other than an order of acquittal alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”
42. This jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of Joseph Nduvi Mbuvi vs Republic [2019] eKLR where he stated;
- “In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary



jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

43. In the instant case, the revision sought is in respect of a challenge on the findings of the magistrate on an application dated 30<sup>th</sup> August 2022 by the Applicant which findings resulted in the dismissal of the application on 12<sup>th</sup> October 2023.
44. Suffice it to note that the said application was fully heard based on affidavit evidence (and annexures thereto) and submissions by the parties.
45. I have had the advantage of reading the ruling by the trial court. It is a reasoned ruling and was determined on the merit of the case based on the facts before the court.
46. What readily emerges is the existence of live competing proprietary rights over the chattel the subject matter in these proceedings between the Applicant and the 4<sup>th</sup> Respondent.
47. The question that then arises is whether the revision jurisdiction can be successfully employed to resolve a matter raising contentious issues of evidence. Tied to that, is whether a finding on merit by a trial court can be a subject of a criminal revision envisaged under Sections 362 and 364 of the Criminal Procedure Code.
48. To demonstrate the purview within which this dispute properly falls, it is opportune to quote from excerpts of submissions by the Applicant and the 4<sup>th</sup> Respondent.
49. The Applicant submits;

“The complainant did not prove that the Applicant’s security right was acquired after his agreement with the accused person. Even if such was the case, once a security right is perfected under the Moveable Property Security Rights Act of 2017, the right is good against all persons including purchasers who have not perfected their interests.

The investigating officer in no uncertain terms deponed that it is the accused person who yielded possession of the vehicle to him. The complainant claims to have purchased from the accused which purchase he has not proved”.
50. The 4<sup>th</sup> Respondent at some point submits;

“The Applicant herein claims that the motor vehicle is a moveable security in its favour and that the 2nd Respondent executed a chattels mortgage in its favour on 31st July, 2017, though no evidence has been presented in the lower court of registration of the alleged chattels mortgage.”
51. These 2 excerpts clearly place the dispute beyond the review jurisdiction of this court. The review jurisdiction should not in the circumstances be used as a shortcut to achieve what is clearly a civil dispute requiring full ventilation in a trial. Indeed the Applicant is very well aware of the nature of the dispute and had in the supporting affidavit to the application before the lower court deponed that on learning of the seizure of the said chattel, they made an application before Milimani Commercial Courts in Misc APP. No. E1440 of 2021 and the court ordered the DCIO to release the same if no criminal complaint had been made.



52. I have no doubt that in the circumstances of this case the revision jurisdiction of the court is ousted and am fortified in that finding by the holding of Mativo J (as he then was) in *Republic v Anthony Thuo Karimi* [2016] eKLR, (a decision which the applicant has relied on by selectively picking an endearing line) where he held;

“The revisional powers of a High Court are very wide. Such powers are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. The object of conferring such powers on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. Section 364 (1) (a) confers on the High Court all the powers of the appellate court as mentioned in Sections 354, 357 and 358.

The revisional powers are entirely discretionary. There is no vested right of revision in the same sense in which there is vested right of appeal. These sections do not create any right in the litigant, but only conserve the powers of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts do not exceed their jurisdiction, or abuse the powers vested in them by the Code.

Guided by the above legal interpretations, the question that begs to be addressed in this case is whether or not the withdrawal in question can be challenged on its correctness, legality, propriety or regularity as provided under section 362 of the Criminal Procedure Code. Section 87 (a) of the Criminal Procedure Code provides for withdrawal of cases. The prosecutor made the application, the accused opposed and insisted that he wanted the case to proceed and the court made a ruling on the issue. The procedure followed was correct and provided for under the law. I find nothing at all in the proceedings to suggest that the matter falls under the requirements for revision, namely, correctness, legality, propriety or regularity of the order nor do I find any other sufficient reason to exercise the revision powers of the court.

If the accused is not happy with the decision, then he ought to have filed an appeal. The power of revision cannot be exercised where the accused could have appealed.

In my view, the issues raised by counsel for the accused do not fall under the provisions for revision. Accordingly, I find that this is not a proper case for the court to exercise its powers of revision”.

53. In the end, the outcome of the criminal trial will not finally solve the proprietary rights of the Applicant and the 4<sup>th</sup> Respondents. The criminal trial will only resolve the criminal element in the relationship between the 4<sup>th</sup> Respondent and the Accused. Conventional wisdom would have demanded that the Applicant and the 4<sup>th</sup> Respondent would have endeavoured to secure the chattel against loss or waste even as they pursue their respective claims with the Accused again being a central party.
54. A quote from the decision of Ong’ino J in *Joseph Kithuku Kitonga & another v Officer in Charge of Police Station Bamburi & 3 others* [2020] eKLR would be a good guide in that direction. In a similar application, the learned judge stated;

“On the second issue, and whether the trial Court was justified in arriving at the decision to release the 297 bags of cement to the 3rd Respondent. The Applicant through the Learned



Counsel submits that while the 3rd Respondent was out on bond and investigation ongoing the court ordered the release of the 297 bags of cement to the 3rd and 4th Respondents while the same had not been produced as exhibit in court to prove the case against the 3rd Respondent and another suspect who is still at large. The 1st and 2nd Respondents also seem to support the submissions by the Applicant and seeks to have the orders by the Learned Magistrate revised. Both the Applicant and 3rd Respondent seek to have ownership of the 297 bags of cement. On this I am guided by the provisions of Section 121(1) of the CPC on the detention of property. This is a case where two parties are disputing on goods and ownership it would therefore be unjust to release the exhibits to one party without the court determining the ownership by either of the parties in a trial.

19. The balance of justice demands that thorough investigations be done and having taken all the facts and the circumstances of this case, I believe it would be in the best interest of Justice that the earlier orders by the Learned Magistrate Honorable D. Odhiambo, Resident Magistrate, Shanzu be revised in the following terms:-

- a) The 297 bags of cement to remain in custody of Bamburi police station.
- b) In consideration that the cement is at risk of being wasted due to vagaries of weather the Investigating Officer in conjunction with the applicants and the respondents to dispose the same at the best possible price within 14 days of the date of this ruling and handover the proceeds for safe custody to the OCS Bamburi police station to be kept as exhibit pending conclusion of investigations and determination of ownership of the subject cement”.
- c) .....

55. Now a final word on the matter. A perusal of the trial court record shows that by an order of that court dated 19<sup>th</sup> June 2024, and upon application by the state, the Criminal case was withdrawn under Section 87(a) of the CPC. There was no order in respect of the exhibits. This court can only leave the matter at that electing to let the parties take any action as they may deem necessary.

56. In view of the foregoing analysis, the application herein fails and is dismissed.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**A.K. NDUNG’U**

**JUDGE**

