



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE 512 OF 2020

PROTO ENERGY LIMITED.....1ST APPLICANT

ENERGY & PETROLEUM REGULATORY AUTHORITY.....2ND APPLICANT

VERSUS

REPUBLIC1ST RESPONDENT

DANIEL MULE ANTHONY 2ND RESPONDENT/APPLICANT

GIFT MULI KYALO3RD RESPONDENT

SAMUEL ANYONA..... 4TH RESPONDENT

JOE KARIUKI MWORIA 5TH RESPONDENT

FRANCIS MWITI MOTONGA6TH RESPONDENT

JOSHUA MWENDA MUTHAMA7TH RESPONDENT

BENARD MOGAKA NYAGAI8TH RESPONDENT

PEYAS MOSETI AYOGA9TH RESPONDENT

RULING

This matter is coming up before the court for 2 applications. The first Application is the one of the applicant, Proto Energy Limited, dated 6.5.2020. The said application at this inter partes stage, has in my view 3 prayers remaining for determination, prayers 5, 6 and 7 as follows;-

5. THAT this Honourable court be pleased to call for an examine the record, proceedings and order of the Hon. E. Kimilu (PM) in Chief magistrate's court at Milimani Criminal Case No. 336 of 2020 dated 23.4.2020, (to the effect that the exhibits namely empty gas cylinders and motor vehicle registration number KBL 244K, Isuzu lorry, be released to the 1st accused) for the purposes of satisfying itself as to the correctness, legality, regularity and or propriety of the said record, proceedings and order.

6. THAT this Honourable court be pleased to set aside the order of the Hon. E. Kimilu (PM) in Milimani Criminal Case No. 336/2020 dated 23.4.2020 (above).

7. THAT this Honourable court be pleased to order the detention and preservation of all the physical and documentary evidence in Milimani Chief Magistrate's Criminal Case No. 336 of 2020 (including the gas cylinders and motor vehicle KBL 244K) until the conclusion of the said case.

The said application is supported by the Affidavit of the one Major (Retired) Samwel Ole Tolu, sworn on 6.5.2020, to which several annextures have been attached.

The 2nd application coming up herein is that of 2nd Respondent/Applicant, dated 17.6.2020. the said application at this stage, has 2

substantive prayers, number 2 and 3 as follows:-

2. THAT this court be pleased to review, vacate and or set aside its orders of 15.5.2020 and further issue an order directed to the investigating officer and the DCIO Parklands police station that motor vehicle registration number KBL 244K ISUZU lorry detained at Parklands police station be released forthwith to the applicant.

3. THAT the investigating officer be ordered to have the motor vehicle as an exhibit photographed and ensure the photographed are processed in the manner authorized by the relevant regulations.

Attached to this application is an affidavit of the 2nd Respondent/applicant sworn on 17.6.2020.

At the hearing of these 2 applications, Mr. Musundi appeared for the 2nd Respondent/Applicant, (applicant in the 2nd application), Mr. Mshweshwe for the Interested Party, Mr. Omollofor the applicant (in the 1st application), and learned counsel Ms. Chege appeared for the state/1st Respondent. The parties agreed to canvass these 2 applications by way of written submissions. I have noted the said submissions of the parties.

The 1st applicant, (applicant in the first application, Proto Energy Limited, has submitted that the first issue for determination is whether the order of the hon. E. Kimilu (PM) of 23.4.2020 is amenable for revision under section 362 of the Criminal Procedure Code. while submitting that the trial court erred in ordering that the exhibits could be released once the some have been photographed, counsel relied on the case of **DPP Versus Maria Pakine Tenkewa t/a Naresho Bar Restaurant (2017)eKLR**, in which the Honourable JUDGE held that it was premature to order such release , thus'

“Why temper with this evidence by releasing it and have the case prosecuted by way of production of photographs... the release was premature in absence of them not being marked, identified and admitted in evidence.”

The 2nd issued raised by the applicant is whether the Honourable Principle magistrate had jurisdiction to issue the orders to the effect that the said motor vehicle loaded with the gas be released. Counsel relied on various decisions of the High Court, that a trial court does not have jurisdiction to order the release of exhibits held by the prosecution. The cases including:

- (i) ***Pronto Energy Ltd 7 others Versus republic (2020)eKLR, Lesiit, J.***
- (ii) ***Simon Okoth Odhiambo Versus Republic (2005)eKLR.***
- (iii) ***Republic Versus Mohamed Kakundi Kiboni (2019)eKLR, Nyakundi J.***
- (iv) ***DPP Versus Maria Pakine Tenkewa t/a Naresho Bar Restaurant (2017)eKLR, R. Nyakundi, J.***

Finally, the applicant relied on **Republic Versus Everline Wamuyu Ngumo (2016)eKLR**, in which the court, (Bwonwong'a J.) held,

“I find that the trial court was not entitled to direct that the motor vehicle be released to the respondent/accused in order as the court put it, “to save it from wear and tear due to immobilization of the engine. The reason for this is that the motor vehicle has not been produced as an exhibit. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.”

In that case, the court was persuaded by the finding in the similar case of **Republic Versus Mombasa Development Limited, NAI, Criminal revision No. 122/1998**. The applicant, in the filed submissions has also cited other cases on which similar findings were made, including **Petroleum Institute on EA Versus republic and 5 others (2021)eKLR**, A. Onginjo J, **William Odhiambo Abok Versus AG and 2 others (2019)eKLR**, E. C. Mwitia J, **Petroleum Institute of East Africa Versus Republic and 5 others (2021)eKLR**, L. N. Mutende J, **and Petroleum Institute of east Africa Versus Republic and 3 others (2021)eKLR**, A. Ongonjo J.

For the 1st Respondent/state, it was submitted that the trial court misdirected itself in making a finding to have the motor vehicle released to the applicant in the 2nd application/2nd respondent in the 1st application. That a trial court cannot make an order releasing exhibits which are yet to be produced before court.

The 2nd Respondent, Daniel Mule Antony, also the applicant in the 2nd application, on the other hand submitted that the order of release of the exhibit was proper in so far as the applicant is the owner of the motor vehicle. That photographic evidence would be sufficient in the circumstances. Secondly, that the applicant is engaged in legitimate business. Thirdly, that under section 177(a) of the Criminal Procedure Code, there is no requirement that the court must first have received the exhibit before such order can issue.

It was also submitted that the applicant, Proto Energy Limited, has not shown any prejudice it stands to suffer if the motor vehicle is released at this stage. Counsel relied on a number of authorities as follows:-

- i) Martin Thiong'o Nyamwathi Versus DCIO Kabete and 2 others (2018)eKLR, that

“the right to own property thereof is sacrosanct and a constitutional imperative under Article 40. The applicant has lost income for over 1 month and should not continue incurring losses in his transport business indefinitely In all

fairness, it suffices to say that the motor vehicle should be photographed and the log book deposited as security.

ii) Republic Versus Moses Orwa Ongola (2020)eKLR, that;

“There is no doubt that the said vehicle is the property of the applicant. And article 40(3) bars the state from depriving a person of property of any description, or of any interest in, or right over property of any description.”

It was submitted that the application of the applicant is unmerited and malicious to the extent of frustrating the 2nd Respondent. It was proposed that the said vehicle may be ordered released on conditions that photographs of the same be taken and the logbook to be deposited. An undertaking was given to produce same in court when required.

The Interested Party, Energy and Petroleum Regulatory Authority, supported the submissions of the applicant (Proto Energy Limited).

I have considered the submissions made by the learned counsel for the parties. I have also considered the 2 applications, the affidavits filed in support of and in opposing the applications, the annexures and the various authorities cited. I have also considered the proceedings and record of the lower court, and the various statutory and constitutional provisions this court has been referred to.

From the onset, it must be stated that the 2 applications before the court are closely related. Whereas the application of Proto Energy Limited (1st application) seeks to have the aggrieved orders of the Honourable Principal Magistrate revised, the application of the 2nd Respondent (the 2nd application), seeks that the orders of stay of the lower court orders issued by the court be vacated or set aside and that the said exhibit be released to the 2nd Respondent as ordered by the Lower court.

Two undisputed factors stick out in this application, both of which are relevant. First, is the fact that the main trial before the lower court is yet to be determined, and that the exhibits subject of this application are yet to be produced formally as exhibits. Second is the fact that at least 1 party in the proceedings has objected to the release of said exhibits at this stage.

The issue herein clearly hinges on the question of at what stage that the court assumes the role of custodian of exhibits. The court only assumes this role the moment the exhibits have been identified and produced as such before the court. Until this is done, the exhibits remain under the custody of the investigating officer or the party who wishes to have the same produced in evidence. It is therefore my considered view that, barring any agreement of the parties, it would be improper for a trial court to order release of such exhibits whose custody it has not yet assumed. I therefore align myself with the finding of the court in the case of ***DPP Versus Marius Pakine Tenkewa t/a Naresho Bar Restaurant (2017)eKLR, Supra***, that ordering release of such exhibits would be tantamount to tempering with the same as much as it would be premature. Various authorities cited above by the applicant are also in support of this position.

On the other hand, the 2nd Respondent (applicant in the 2nd application, has argued in support of the order of the lower court and made submissions based on the constitutional provisions regarding rights to property. As enumerated above, at least 2 decisions were relied on in support of the submissions, with the ration decidendi therein being that the rights of the applicant to earn a living and do business using the exhibit ought not be curtailed.

I have considered these submissions which I find spot on in as far as same aim at the realization of the rights to own property and to earn a living, which the 2nd Respondent without a doubt is entitled to. Suffice it to state that the 2nd respondent in enjoyment of these rights must do so in accordance with the law.

The accuseds before the lower court are charged under section 99(1) of the Petroleum Act, 2019. Section 120 of the said Act provides:

“Where a person is convicted of an offence under this Act, in addition to any other penalty imposed, an order shall be made –

(a) For forfeiture of any vehicle, aircraft, vessel or equipment used in the commission of the offence,

(b) For the forfeiture of Petroleum recovered in the course of the commission of the offence.”

The learned trial magistrate ought to have prior to issuing the said orders of release, considered the consequences of that order in view of the possibility of order of forfeiture issuing at the conclusion of the case. There is no evidence to show that it did. The court was obligated to preserve the exhibit to await the outcome of the criminal case or a determination on whether or not the offence charged had been committed.

Under section 362 of the Criminal Procedure Code:

“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 reordered or passed, and as to the regularity of any proceedings of any such subordinate court”

And under section 364 of the said Act, the court is mandated to,

“In the case of any other order other than an order of acquittal, after or reverse the order.”

Being convinced that the orders of the learned trial magistrate issued on 23.4.2020, were improper, I allow the application of the applicant

dated 6.5.2020 in terms of prayers 6 and 7 of the same. I otherwise dismiss the application of the 2nd Respondent dated 17.6.2020 wholly. Each party will bear on costs of this application. Orders accordingly.

D. O. OGEMBO

JUDGE

3.11.2021.

COURT:

RULING READ OUT IN OPEN COURT (ONLINE) IN THE PRESENCE OF MR. OMOLLO FOR APPLICANT, ALSO HOLDING BRIEF FOR MR. MSHWESHWE FOR 2ND APPLICANT, MR. MUTUMA FOR THE STATE, AND MS. NJOMO FOR MR. MUSUNGI FOR RESPONDENT

D. O. OGEMBO

JUDGE

3.11.2021.