



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC CRIMINAL APPLICATION NO E091 OF 2021**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> APPLICANT**

**OFFICE OF THE DEPUTY PUBLIC PROSECUTIONS.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOHN PETER AKELLO.....1<sup>ST</sup> RESPONDENT**

**VICTOR SANDE BUSERA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In its Notice of Motion dated 28<sup>th</sup> October 2021 and filed on 21<sup>st</sup> October 2021, the 1<sup>st</sup> Applicant herein prayed that the orders Hon W. K. Onkunya issued on 19<sup>th</sup> October 2021 be reviewed, set aside and/or discharged and that this court be pleased to make any other order or relief as it would deem just and fair to meet the ends of justice. Its application was supported by an affidavit of its officer, Job Lomechu, that was sworn on 28<sup>th</sup> October 2021.

2. It averred that under the Kenya Revenue Authority Act, it was an agency of the Government for the collection and receipt of all revenues set out in the said Act. It added that it was responsible for enforcing the East African Community Customs Management Act, 2004 (EACCMA). It further averred that the Kenyan tax regime relied on full disclosure and all individuals or companies who imported goods were required to voluntarily declare the correct information on the imported goods for purposes of assessment of the duty payable.

3. It contended that on 30<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent's Lorry Make Isuzu FRR Registration Number KCR 078M (hereinafter referred to as "the subject Motor Vehicle") that was intercepted by police officers as it was being driven along Busia- Manyoni Road by the 2<sup>nd</sup> Respondent herein. The subject Motor Vehicle was driven to Matungu Police Station where it was found to be ferrying two hundred (200) bags of fifty (50kg) of sugar that attracted a duty value of Kshs 610,000/=. The said subject Motor Vehicle was seized under Seizure Notice No 48401 and driven to the 1<sup>st</sup> Applicant's Warehouse at the Inland Container depot at Kisumu for further investigations.

4. It asserted that the investigations revealed that the sugar had been imported without complying with the customs procedure thus evading payment of custom duty. The 2<sup>nd</sup> Respondent was charged under two (2) counts under EACCMA while the sugar and the subject Motor Vehicle were forfeited. It was its contention that the seized goods could only be released to the owner of the same upon acquittal while the effect of a conviction would be forfeiture.

5. It was emphatic that the subject Motor Vehicle ought not to be released as it would prejudice the ongoing **Kisumu Cr Case No E1209 of 2021** as the Prosecution had a duty to preserve the evidence for purposes of using the same during trial.

6. In response to the said application, on 8<sup>th</sup> November 2021, the 1<sup>st</sup> Respondent swore a Replying Affidavit on even date. He stated that he was the registered owner of the subject Motor Vehicle that he bought through a financial facility at the NIC Bank which facility continued to accrue interest and penalties as the same was not been serviced due to non-usage of the said subject Motor Vehicle.

7. He contended that the Prosecution was yet to commence the hearing and that the duration of the pendency of the case was not guaranteed due to several reasons that were outside its control. He asserted that the 2<sup>nd</sup> Respondent was issued with a delivery note by an existing company in Kenya which he believed was genuine and there was no way of knowing that the duty had not been paid on the cargo.

8. He averred that the Applicant (**sic**) had not yet demonstrated how it would be prejudiced if the subject Motor Vehicle was released as EACCMA did not make it mandatory for the vessel to be remanded by the 1<sup>st</sup> Applicant. He pointed out that the continued detention of the

subject Motor Vehicle who were the owners of the Inland Container Depot and the 1<sup>st</sup> Applicant who claimed daily warehouse rent. He therefore urged this court to order the unconditional release of the said subject Motor Vehicle.

9. In its Supplementary Affidavit that was sworn by Job Lomechu on 12<sup>th</sup> November 2021 and filed on 15<sup>th</sup> November 2021, the 1<sup>st</sup> Applicant averred that there had been no inordinate delay in prosecuting the case and that in any event, delay was not the only consideration for the release of the subject Motor Vehicle.

10. It was its averment that whereas it was not mandatory for it to detain any vessel, a police officer or an authorised public officer had power to detain a vessel, aircraft, goods, animal or other thing that was liable for forfeiture and that the same had to be deposited in a customs area as defined by EACCMA. It pointed out that the 1<sup>st</sup> Applicant reserved the right to apply for a waiver of the charges by the Commissioner on account of the instant proceedings.

11. The 1<sup>st</sup> Applicant's Written Submissions and List and Bundle of Documents were dated 12<sup>th</sup> November 2021 and filed on 15<sup>th</sup> November 2021 while the Respondents' Written Submissions were dated 17<sup>th</sup> November 2021 and filed on 18<sup>th</sup> November 2021. The 2<sup>nd</sup> Applicant did not respond to the present application and/or file any Written Submissions as it associated itself wholly with the 1<sup>st</sup> Applicant's Written Submissions.

12. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

### **LEGAL ANALYSIS**

13. The 1<sup>st</sup> Applicant submitted that it was necessary for it to maintain some level of control over the goods to enable it collect revenue once it has assessed goods for duty to be paid. In this regard, it placed reliance on Section 16(1)(i) of EACCMA that provides that the goods it seizes are subject to its control. seized goods payable.

14. It further submitted that under Sections 34, 42(3) and 68 of EACCMA and Regulation 84(1) of the East African Community Customs Management Regulations, 2010 (hereinafter referred to as "EACMMR") that items stored under customs control attract rent and other charges but that under Regulation 85 of EACMMR, the owner of the goods could apply for waiver of rent and charges to mitigate the costs.

15. It placed reliance on Section 153 of the EACCMA which empowers it to stop and search any vehicle and further that the seized items are liable to forfeiture as provided in Section 199 and Section 210 of the EACCMA. It also added that under Section 213 (1) of the EACCMA, an item can be seized if the police or an officer or any authorised public officer has reasonable grounds to believe that such item is liable for forfeiture. It further referred this court to Section 214 of the EACCMA that provides that seized items shall not be released until after determination of the prosecution.

16. It further relied on the case of **Simon Okoth Odhiambo s Republic [205] eKLR, Republic vs Noordin Osman Haji Jama & 3 Others [2016] eKLR** and **Republic vs Marias Pakine Tenkewa t/a Naresho Bar Restaurant [2018] eKLR** where the common thread was that anything seized for any offence under the EACCMA shall remain under detention until after the conclusion of the trial.

17. On their part, the Respondents submitted that the Charge Sheet did not disclose the partner state where the alleged sugar emanated from. They argued that the Delivery Note that was relied upon was from a Kenyan company and that nothing had been submitted to demonstrate that the subject Motor Vehicle crossed the Kenyan territory and ferried the goods into the country.

18. They further argued that Section 214 of the EACCMA was enacted before the Constitution of Kenya, 2010 was promulgated and hence the continued detention of 1<sup>st</sup> Respondent's subject Motor Vehicle deprived him his right to own and enjoy the usage of the said subject Motor Vehicle pending the hearing and determination of the criminal proceedings which may not be concluded at any definite time.

19. It was their submission that Section 214 of the EACCMA only applied after a person had been found guilty of the offence he had been charged with and that the said provision was introduced to curb transporters from fleeing the jurisdiction of the trial court. They averred that the said subject Motor Vehicle was owned by a law abiding Kenyan citizen and the 1<sup>st</sup> Respondent had not taken out a license to carry goods on transit out of the jurisdiction of Kenya. They were emphatic that there was nothing that prevented this honourable court from exercising its jurisdiction and temporarily releasing the subject Motor Vehicle pending the hearing and determination of the case.

20. It was their submission that Section 214 of EACMMA should not be used to strangle businesses and honest taxed payers. They cited Korir J when he stated that Kenya Revenue Authority was killing businesses in the guise of collecting taxes. They did not cite or furnish this court with a copy of the said case.

21. This court carefully considered the parties' Written Submissions and noted that the same also delved into the merits or otherwise of the seizure of the subject Motor Vehicle to a great extent. This court was slow to consider and analyse the same for the reason that that was a function of the Trial Court. What was for consideration before this court was whether or not the Learned Trial Magistrate ought to have ordered the release of the subject Motor Vehicle pending the hearing and determination of the criminal case as it was not in dispute that the 1<sup>st</sup> Applicant had power under EACCMA to seize items that it reasonably believed to be liable for forfeiture.

22. Indeed, Section 211 (1) of EACCMA states that:-

**“A vessel of less than two hundred and fifty tons register, and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.”**

23. Section 214(3)(a) of the EACCMA further states that:-

**“Where any thing liable to forfeiture under this Act has been seized, then**

**if any person is being prosecuted for the offence by reason of which the thing was seized, the thing shall be detained until the determination of such prosecution and dealt with in accordance with section 215 (emphasis court)”;**

24. Section 215 of the EACCMA further stipulates that:-

**1. Where any person is prosecuted for an offence under this Act and any thing is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.**

**2. Where any person is prosecuted for an offence under this Act and any thing is liable to forfeiture by reason of the commission of such offence, then, on the acquittal of such person (emphasis court), the court may order the thing either—**

**(a) to be released to the person from whom it was seized or to the owner thereof (emphasis court); or**

**(b) to be condemned.**

25. It did appear to this court that the seized goods can only be released to the owner prior to the institution of the proceedings as envisaged under Section 213(4) and Section 213(7) of the EACCMA and/or after a person has been acquitted under Section 215(2) of the EACCMA.

26. Notably, Section 213(4) of EACCMA states that:-

**“Where a person seizing and detaining a thing liable to forfeiture under this Act is a police officer and that thing is or may be required for use in connection with any court proceedings to be brought otherwise than under this Act, the police officer may, subject to subsection (5) keep that thing in the custody of the police until those proceedings are completed or until it is decided that no proceedings shall be instituted (emphasis court).”**

27. Further, Section 213 (7) of the EACCMA provides that:-

**“The Commissioner may, at any time prior to the commencement of any proceedings (emphasis court) relating to any aircraft, vessel, vehicle, goods, animal or other thing which had been seized under this Act, if he or she is satisfied that it was not liable to seizure, release and return it to the person from whom it was seized.”**

28. The 2<sup>nd</sup> Respondent had since been charged with conveying uncustomed goods contrary to Section 199 (b) as read with Section 199 (c) of EACCMA and possession of uncustomed goods contrary to Section 200 (d) (iii) as read with Section 210 and 211 of EACCMA. As envisaged in Section 215(2) of the EACCMA, the goods could not be released until the 2<sup>nd</sup> Respondent had been acquitted of the charges that had been preferred against him.

29. The question of whether or not the subject Motor Vehicle was carrying genuine goods from an existing Kenyan company and whether or not the 1<sup>st</sup> Applicant had adduced evidence to demonstrate that the seized sugar was uncustomed and/or whether the subject Motor Vehicle and sugar were liable to forfeiture were matters of evidence that were not within the jurisdiction of this court. They were matters to be dealt with by the Trial Court.

30. Notably, delay in the hearing of cases or extraneous factors such as servicing financial facilities are not considerations within the context of Section 214(3) of the EACCMA. What is pertinent is that the detained goods are to remain detained until the conclusion of the case. This court fully associated itself with the holding in the case of **Crywan Enterprises Ltd vs Kenya Revenue Authority [2013] eKLR** where Majanja J found and held that forfeiture of goods and vessels under EACCMA was not *ultra vires* Article 40(2) of the Constitution of Kenya.

31. As the question of whether or not the Respondents ought to pay the warehouse rent and other charges was not one before the court, this court did not deem it necessary to pronounce itself on the same. Suffice it to state that this court noted that Sections 34, 42(3) and 68 of the EACCMA did not specifically refer to detained goods. The said Sections made reference to cargo that was unloaded and or to be unloaded or goods that were to be deposited in a Customs Warehouse.

32. Notably, Section 32 of the EACCMA states that:-

**1. Save as otherwise provided in the Customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded (emphasis court) shall be entered by the owner within twenty one days after the commencement of discharge or in the case of vehicles on arrival or such further period as may be allowed by the proper officer, either for—**

**(a) Home consumption;**

**(b) warehousing;**

(c) transshipment;

(d) transit; or

(e) export processing zones.

2. Where any entry is delivered to the proper officer, the owner shall furnish with the entry full particulars supported by documentary evidence of the goods referred to in the entry.

3. Entries for goods to be unloaded may be delivered to the proper officer for checking before the arrival at the port of discharge of the aircraft or vessel in which such goods are imported; and in such case the Commissioner may in his or her discretion permit any goods to be entered before the arrival of such aircraft or vessel or vehicle.

4. Where any goods remain unentered within the period specified under subsection (1) then such goods shall, if the proper officer so requires, be removed by, or at the expense of, the agent of the aircraft or vessel in which such goods were imported to a Customs warehouse.

5. Where entered goods are not removed from the port of discharge after the expiry of the twenty one days prescribed under subsection (1), the goods shall be deemed to be in a customs warehouse.

33. Further, Section 42 (3) of the EACCMA provides that:-

1. Where any goods which have been deposited in a Customs warehouse are not lawfully removed within thirty days after deposit, then the Commissioner shall give notice by publication in the Gazettes of the Partner State or newspaper of wide circulation in the Partner State that unless such goods are removed within thirty days from the date of notice they shall be deemed to have been abandoned to Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit:

Provided that any such goods which are of a perishable nature, or are animals, may be sold by the proper officer without notice, either by public auction or by private treaty, at any time after deposit in the Customs warehouse.

2. Notwithstanding subsection (1) the Commissioner may extend the period for the removal of goods imported by the Partner States' Governments, or diplomatic mission or aid agencies.

3. Where any goods have been deposited in a Customs warehouse then they shall be subject to such rent and other charges as may be prescribed."

34. In addition, Section 68 of the EACCMA states that:-

**"Where any goods are deposited in a Government Goods in Government warehouse(emphasis court), then they shall be subject to such rent and other charges as may be prescribed or as may be provided for in this Act; and, if such rent and other charges are not paid to the proper officer when lawfully demanded, the goods in respect of which such rent and other charges are due may be sold, and the proceeds thereof applied, in accordance with section 42."**

35. Having carefully analysed the affidavit evidence and the respective parties' Written Submissions, it was the considered view of this court that the Learned Trial Magistrate applied the wrong principles when she directed that the subject Motor Vehicle be released to the 1<sup>st</sup> Respondent. Indeed, this had the potential of prejudicing the 1<sup>st</sup> Applicant's case as there was no guarantee that the said subject Motor Vehicle would still be available during the hearing or as and when it was required. Indeed, there are many factors that could lead to the said subject Motor Vehicle not being available. These included repossession by the financier of the facility with facilitated the purchase of subject Motor Vehicle, accidents, sale to a third party amongst many other reasons.

36. It is also important to point out that the EACCMA does not make any provision of an owner of a registered motor vehicle executing a personal bond for the release of a seized motor vehicle or release of such a motor vehicle pending the hearing and determination of criminal proceedings.

37. There was no guarantee that such personal bond would be executed without prejudicing the 1<sup>st</sup> Applicant. Notably, the order of 19<sup>th</sup> October 2021 did not address itself to the sugar that the 1<sup>st</sup> Applicant had contended was not declared for purposes of paying duty and releasing the same to the 1<sup>st</sup> Respondent was tantamount to making a determination of its status before the criminal matter was heard and determined. It was the view of this court that release of the said subject Motor Vehicle was premature.

## **DISPOSITION**

38. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> Applicant's Notice of Motion application dated 28<sup>th</sup> October 2021 and filed on 29<sup>th</sup> October 2021 was merited and the same be and is hereby allowed in terms of Prayer (c) therein. There shall be no order as to costs as the 1<sup>st</sup> Applicant is a government institution and it would be punitive to award costs in favour of the Government against its citizen.

39. The Trial Court is hereby directed to dispose of the criminal proceedings expeditiously.

40. It is so ordered.

**DATED and DELIVERED at KISUMU this 2<sup>nd</sup> day of December 2021**

**J. KAMAU**

**JUDGE**