



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

MISC. CRIMINAL APPLICATION NUMBER 9 OF 2020

IN THE MATTER OF ARTICLE 40(1) AND (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 362 AND 363 OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR DIRECTIONS IN THE NATURE OF RIGHT TO PROPERTY

AND

IN THE MATTER OF REPUBLIC VERSUS CHRISTOPHER OCHIENG IN BUSIA CRIMINAL CASE NO. 721 OF 2020

AND

**IN THE MATTER OF AN APPLICATION FOR REVISION OF THE ORDER FOR FORFEITURE OF MOTOR VEHICLE
REGISTRATION NUMBER KCM 849A ISUZU FRR TRUCK**

AND

IN RESPECT OF G4S KENYA LIMITED. APPLICANT

VERSUS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

R U L I N G

This is an application by the Applicant G4S Kenya Ltd approaching this court under Section 362 and 364 of the Criminal Procedure Code. The application is premised on Article 40(1) (3) Article 50 of the Constitution of Kenya 2020 and Section 255 of the Kenya Forest Conservation and Management Act. The applicant is seeking orders: -

- 1) That this honourable court be pleased to view, vary or vacate the orders of forfeiture of motor vehicle registration No. KCM 849A Isuzu FRR truck made on 17th April, 2020.***
- 2) That this honourable court be pleased to exercise its direction in revision of the ruling and the order made as to forfeiture of motor vehicle registration No. KCM 849A Isuzu FRR Truck to the Kenya Forest Service.***
- 3) That this Honourable court be pleased to exercise its direction and order the Respondent to release the said motor vehicle to the applicant forthwith.***

The applicant is premised on the grounds that: -

- i) That the applicant is the beneficial owner of motor vehicle registration number KCM 849A Isuzu FRR Truck.***
- ii) That the motor vehicle registration number KCM 849A Isuzu FRR Truck was forfeited to the Kenya Forest Department by the trial court without notice to show cause why it should not be forfeited contrary to the Constitution of Kenya.***

The application is supported by the affidavit of Matthews Avomba M'Mbusu, the Western Regional Manager of the applicant sworn on 23rd April, 2020. He depones that motor vehicle Registration number KCM 849A Isuzu FRR Truck is registered in the name of Holiday Cars & Tours Ltd. His company G4S leased the said motor vehicle from Holiday Cars & tours Ltd for use in the delivery of goods and services. On 11th April, 2020 the said motor vehicle was allocated to **CHRISTOPHER OCHIENG** to deliver goods from Kisumu to Busia. Unknown to him on the return journey the said driver carried unauthorized goods, which was charcoal. He was arrested and charged with the offence of unlawfully transporting charcoal without a permit. He pleaded guilty and was convicted.

The trial magistrate then ordered the charcoal and motor vehicle forfeited to the state. He depones that as beneficial owner of the motor vehicle, no notice to show cause was issued to them before the forfeiture order was made.

M/s Ngare for Officer of Director of Public Prosecutions filed response by way of grounds of opposition stating: -

- 1. The instant application is frivolous, vexatious and an abuse of the process of the court.***
- 2. That the said application is devoid of merit and that the circumstances to which the motor vehicle was forfeited by the trial court was within the confines of Section 68(1) (c) of the Forest Conservation and Management Act NO. 34 of 2016.***
- 3. The Applicant Matthews Avomba M'Mbusu is a stranger to this proceedings and neither the owner or beneficial owner of the***

motor vehicle registration NO. KCM 849A Isuzu FRR Truck.

The Respondent further submits that the applicant is a stranger in seeking the review orders of the trial court. From the documents annexed to the said application, he is neither the registered owner nor the beneficial owner of the subject motor vehicle.

Christopher Ochieng the driver of the motor vehicle KCM 849A and an employee of the Applicant was charged with the offence of: -

“Unlawful transporting Charcoal without permit contrary to Section 67 (1) (1) as read with Section 67 (2) of the Forest conservation and management Act No. 34 of 2016.

Christopher Ochieng: On the 11th day of April, 2020 at Bumala town within Busia County was found transporting 32 bags of Charcoal without a permit from the Conservator of forest and in the contravention to the act using motor vehicle registration No. KCM 849A (Isuzu FRR Truck).”

He appeared before court for plea on 17th April, 2020 where he denied the charge and plea of not guilty entered. Later at 3 p.m. he appeared before the same court where he asked to be allowed to change his plea. The charge was read to him when he pleaded guilty and the trial magistrate stated: -

“Court: Fined Ksh.20,000/- in default 30 days in prison. 14 days right of appeal. Exhibits forfeited to the state.”

It is this order of forfeiture that the applicant seeks revision by this court. The Forest Conservation and Management Act No. 34 of 2016 was enacted to give effect to Article 69 of the Constitution to provide for development and sustainable management of Forest Resources. Part IX of the Act created offences and penalties. Section 67 of the Act created other offences. Section 68 provides; -

68. (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. No. 34 Compensation for loss or damage. 724 No. 34 Forest Conservation and Management 2016 The court may in addition to any other ruling order—

(a) that such person pay to the forest owner, by way of compensation, a sum equal to the determined value of the forest produce so damaged, injured or removed and where the value cannot be estimated, ten thousand shillings for each offence:

(b) if it is proved to the satisfaction of the court that the person so convicted is the agent or employee of another person, that other person to pay by way of compensation to the forest owner, the value of the forest produce, unless after hearing that other person, the court is satisfied that the offence was not due to his negligence or default;

(c) the vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the Service: Provided that the value of the forest produce shall be either the commercial value of the forest produce or the cost of restoring the damage caused to the forest as a result of the offence committed, whichever is higher.

(2) Where a person is convicted of an offence of occupying or cultivating land in a forest area without a licence, the court may, in addition to any other penalty imposed under this Act, order such person to remove any buildings, enclosures, huts or crops within a period to be specified in the order, and if the person so convicted fails to comply with an order within the period so specified, the buildings, enclosures, huts or crops shall be deemed to be the property of the Service, the County Department responsible for forestry or the private forest owner, as the case may be, and may be disposed of as the Service, County Department responsible for forestry or the private forest owner may think fit: Provided, however, that expenses incurred as a result of keeping in custody anything seized or detained under this section shall be borne by the person whose property is seized or detained.

It is this Section which, therefore provides that upon conviction, the court may order, vehicles, vessels and tools used in the commission of the offence. The procedure for forfeiture of goods upon conviction is provided for in Section 389A of the Criminal Procedure Code Section 389A Provides:-

“(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.”

The court where the question of forfeiture arises should, therefore, follow the following steps before an order for forfeiture or otherwise is made. These steps are: -

i) A notice should be served on the person to be believed to be the owner.

ii) The notice should specify the goods or things to be forfeited.

iii) If the owner cannot be found, the notice shall be advertised in the local dailies.

iv) If the court finds that the property to be forfeited belongs to an innocent party it shall not order forfeiture and vice versa.

From the perusal of the proceedings the learned trial magistrate did not follow the provisions for forfeiture. The order for forfeiture was, therefore, made without following the procedure. Section 362 of the Criminal Procedure Code gives the court power of revision. Section 362 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.

In view of the non-compliance with the provisions of Section 389a of the Criminal Procedure Code by the trial magistrate. I, hereby set aside the order for forfeiture of Motor Vehicle Registration NO. KCM 849A Isuzu FRR Truck. I, hereby direct the trial magistrate to cause for the proper forfeiture proceedings in respect of Motor Vehicle KCM 849A Isuzu FRR Truck in accordance with the provisions of Section 389A of the Criminal Procedure Code.

Dated, signed and delivered at Bungoma this 7 day of May 2020.

S N RIECHI
JUDGE