



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. 506 OF 2020

LESIT, J

PROTO ENERGY LIMITED.....APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

ABDI KASSIM ABDI.....2ND RESPONDENT

ANFA FARAH ELMI.....3RD RESPONDENT

MICHAEL KINYANJUJI.....4TH RESPONDENT

JOHN NTHIONGO MACHARIA.....5TH RESPONDENT

ZACHARIA ONCHIRI.....6TH RESPONDENT

SOSPETER MWANGI.....7TH RESPONDENT

LUMUMBA ONDARI.....8TH RESPONDENT

RULING

1. The Applicant, **PROTO ENERGY LIMITED** has, by Notice of Motion brought under **sub-section 121, 362 of Criminal Procedure Code** and **sub-section 4, 9, 16, 19 and 20 of Victims Protection Act** and **section 12 of the Petroleum Act of 2019** dated 21st April 2020 sought that for reasons to be recorded, the application be heard *ex parte* for purposes of prayers 3 and 4, which prayers seek:

3. That the honourable court be pleased to certify this application against the Order of the Honourable K. Cheruiyot (SPM) in Chief Magistrates Court at Milimani Criminal Case No.303 of 2020 dated 10th March 2020, (to the effect that the exhibits namely empty gas cylinders and motor vehicle registration No. KCJ 276U be released to the owners) as urgent and an urgent date be set for the hearing of this application *inter partes*.

4. That this honourable court be pleased to stay the execution of the Order of the Honourable K. Cheruiyot (SPM) in Chief Magistrates Court at Milimani Criminal Case No. 303 of 2020 dated 10th March 2020 (to the effect that the exhibits namely empty gas cylinders and motor vehicle registration No. KCJ 276U be released to the owners) pending the hearing of this application *inter-partes*.

2. The Applicant seeks that the court grants prayer 5 to the effect that:

5. That this honourable court be pleased to call for and examine the Record, proceedings and order of the Honourable K. Cheruiyot (SPM) in Chief Magistrates Court at Milimani Criminal Case No. 303 of 2020 dated 10th March 2020, (to the effect that the exhibits namely empty gas cylinders and motor vehicle registration No. KCJ 276U be released to the owners) for the purpose of satisfying itself as to the correctness, legality, regularity and or propriety of the said Record, Proceedings and Order.

3. The Applicant then seeks that this court grants prayers 6, 7, 8 and 9 as follows:

6. That this honourable court be pleased to set aside the order of the honourable K. Cheruiyot (SPM) in Chief Magistrates Court at Milimani Criminal Case No. 303 of 2020 dated 10th March 2020, (to the effect that the exhibits namely empty gas cylinders and motor vehicle registration No. KCJ 276U be released to the owners)."

7. That this Honourable Court be pleased to order the detention and preservation of all physical and documentary evidence in Chief Magistrate's Court at Milimani Criminal Case No. 303 of 2020 dated 10th March 2020 (including the exhibits namely gas cylinders and motor vehicle registration No. KCJ 276U) until the conclusion of the said case.

8. That the applicant be at liberty to apply for such further or other orders and/or directions as this Honourable court may deem fit and just to grant and that the honourable court makes such further or other orders it deems appropriate.

9. The costs of this application be provided for.

4. The application is premised on 13 grounds cited on the face of the Notice of Motion which can be summarized as follows:

"1) That the Application the victim and complainant of the crimes alleged in Milimani Chief Magistrate's Criminal Case No. 305 of 2020, being the registered owner and proprietor and proprietor of All Proto and Progas branded liquefied Petroleum gas cylinders in the Republic of Kenya.

2) That on 21st February 2020 between 12.30 a.m. and 2 a.m. at Moregas Limited Depot in Industrial Area in Nairobi, the 1st to 7th accused persons were found in possession of and dealing with assorted liquefied petroleum gas cylinders including those owned by the Applicant, in a manner contrary to the Petroleum Act No. 2 of 2019.

3) That in the course of the arrest of the 1st to 7th re-accused/Respondents about 1000 pieces of assorted liquefied petroleum gas cylinders and a motor vehicle registration No. KCJ 276 U were recovered and preserved as prosecution exhibits to be adduced at the trial in Chief Magistrate's Criminal Case No. 3030 of 2020.

4) That the 1st to 7th accused/Respondents were on 24th February 2020 released on bail pending trial after they pleaded not guilty to the charges.

5) That the trial magistrate in the said criminal case released the gas cylinders and motor vehicle registration No. KCJ 276U to the owners upon application by the 1st to 7th accused/Respondent.

6) That the gas cylinders and motor vehicle were an integral part of the prosecution's case in criminal trial and that release of the said exhibits will adversely affect the trial as it is bound to:

a) break the evidentiary chain of custody.

b) will violate the constitutional right of the Applicant who is the victim, without according it a hearing and before it was informed of the said proceedings.

c) the said exhibits gas cylinders and motor vehicle are subject to mandatory statutory forfeiture order should the prosecution result in a conviction of the accused persons.

d) that the order of release of the said empty gas cylinders and motor vehicle was incorrect, illegal, irregular and or improper.

e) that the release will prejudice and improperly hamstrung the fair hearing of the case by the trial court before the Chief Magistrate's Criminal Court Case No. 303 of 2020.

f) that it is in the best interest of justice that the application be heard as a matter of urgency.

5. The application is supported by a Supporting Affidavit sworn by Major (RTD) Samuel Ole Tolu, the Chief Security Officer of Proto Energy Limited, the Applicant in this application. The deponent has annexed several documents to his affidavit. He has annexed:

- The Applicant's certificate of Incorporation as 'My Gas Limited' under the Companies Act (cap. 486) as a Limited Company dated 17th December 2015 as SOT.1(a).
- A Certificate of Change of Name from "My Gas Ltd" to "Proto Energy Ltd" dated 15th March 2017 as SOT – 1(b).
- A Petroleum Business License (LPG) to Proto Energy Ltd at the premises indicated on the License No. PET. 3421 issued by Energy Regulatory Commission marked SOT – 2(a) and a license to Applicant to carry out Export and wholesale of LPG in bulk by Energy Regulatory Commission marked SOT – 2(b).

- A license by same ERC to Applicants to carry out the business of Transport of LPG in Bulk marked SOT – 2(c) and License for transport of LPG in cylinders marked SOT – 2 (d) and 2(e) and 2(f) with trucks to be utilized in the said transportation listed.
- The Certificate of Registration of Trade Mark under Rule 63 of the Trade Marks Act Cap. 506 and of the Certificate of Registration of Assignment all marked as annexure SOT.3.
- Also annexed is a Registration of the Business Registration Service under the Companies Act 2015 marked SOT-4.
- The affidavit also annexes a Certificate of Search from National Police Service listing items recovered after conduct of a search by the Anti-counterfeit and Contraband Unit, DCI Headquarters dated 21st February 2020 as SOT-5, a charge sheet in Chief Magistrate’s Milimani Criminal Case No. 303 of 2020 dated 21st February 2020 marked SOT-6 together with an Amended Court Order by Hon. K. Cheruiyot Senior Principal Magistrate dated 10th March 2020 marked SOT-7.
- As well as Notice of Motion and Supporting Affidavits filed before the Chief Magistrate’s Criminal Case No. 3030 of 2020 marked SOT 7(b) and SOT-7(c).

6. The 1st Respondent to this application is the State. The 2nd to 5th Respondents are the persons charged before the Chief Magistrate’s Criminal Case No. 303 of 2020 as the accused Nos. 1 to 7 respectively. All the Respondents were duly served with the application and the affidavit of service is on record. None filed any response.

7. When the application came up for hearing before this court on 8th June 2020 and 15th June 2020 directions were given as to the service of the application and hearing. Finally, the application was urged on 22nd October 2020 by Mr. Omolo for the Applicant and Mr. Mutuma for the 1st Respondent. The 2nd to 8th accused/Respondents did not appear despite being served with the hearing notice.

8. Mr. Omolo urged the court to consider the Notice of Motion application dated 21st April 2020 which sought revision of the Hon. K. Cheruiyot, Senior Principal Magistrate in Milimani Chief Magistrate’s Criminal Case No. 303 of 2020, made on 10th March 2020 releasing motor vehicle registration No. KCJ 276U and around 1000 empty Gas Cylinders to the owners be reviewed, on grounds it was erroneous, both items having been recovered from the accused persons before that court at the time of arrest. He urged that the case is yet to be heard.

9. Mr. Mutuma for the ODPP the 1st Respondent submitted on points of law. He did not oppose the application on grounds the complainant in the case was the Applicant before this court, and that since the application for release of the motor vehicle and gas cylinders was not made by the Applicant, the order of release was erroneous.

10. This court’s powers of revision is limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such lower court and in exercising supervisory jurisdiction under **Article 165(6) of the Constitution**, the court does not exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice. (See **Chris Phillip Obure v Republic [2020] eKLR**)

11. I have considered the application for revision. I have also called for the record of the Milimani CM’s Criminal Case No. 303 of 2020 for the purpose of satisfying myself as to the correctness, legality, regularity and or propriety of the said record, proceedings and order.

12. I note that the 2nd to 8th Respondents, herein after referred to as the accused persons, were arraigned in court and charged with nine counts of offences under the Petroleum Act of 2019. Counts 1 to 4 were the offence of illegally refilling LPG cylinders of other brands without authority from brand owners to fill contrary to section 99 (1) (m) of the Petroleum Act (hereinafter the Act), and section 13 (1) and 14 (a) of the Act’s Regulations, as read with section 99 (1) (ii) of the Act. The Brands in question were named as K-Gas and More Gas Ltd.

13. Counts 5 to 9 were the offence of transporting liquefied petroleum gas without a valid license from the Energy and Regulatory Authority contrary to Regulation 18 (1) of the Legal Notice 100 of 2019 of the Petroleum (Liquefied Petroleum Gas) Regulations of 2019. The vehicles involved in the transportation are five and are identified in the charges.

14. The accused persons pleaded not guilty to the charges and were released on bond. The 3rd to 7th accused in the charge sheet filed an application dated 26th February, 2020 seeking the release of all the motor vehicles and the gas cylinders found on each of the vehicles to themselves. The application was certified urgent on 28th February, 2020 and was set for hearing on the 2nd March, 2020. On 2nd March, 2020, the application was allowed as prayed on the grounds the same was unopposed.

15. The Applicant in this Revision is Proto Energy Limited. Mr. Omolo, urged the application for revision. In the filed application, it has been shown that the instant application is premised on the ground the Applicant is the complainant in the CM’s Criminal Case No 303 of 2020, where the impugned order was made, and is the registered owner of all Proto and Progas branded liquefied petroleum gas cylinders. That part of the cylinders the accused persons were found dealing with contrary to the Act belonged to the Applicant. The order releasing the 1000 empty cylinders and the motor vehicle registration no. KCJ 276 U is the one they now challenge before the court.

16. **Section 120 (a) and (b) of the Act** provides that:

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

(a) For the 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;”

17. The accused persons were charged of violating **section 99 (1) (l)** of the **Act**. **Section 120** of the **Act** provides that anyone convicted of an offence under the **Act** shall have an order of forfeiture of any vehicle or equipment used in the commission of the offence as well as any petroleum recovered in the course of the commission of the offence. The offences the accused persons faced in the trial court were subject to the provisions of this section of the **Act**. The case was yet to be heard. The exhibits, as listed in the charge were yet to be identified in court and produced as evidence. Any order of release was clearly premature.

18. I hold that a trial court cannot make an order releasing exhibits which have not been produced in evidence. Secondly the court cannot release summarily exhibits which have not been produced by the State unless the application is by the State. The exhibits were cited in the particulars of the charge, making it clear that to be able to successfully prosecute the case they had to be produced in court as evidence.

19. The application by the accused persons in which they applied for the release of the exhibits was vague. It did not disclose the ownership of the exhibits sought to be released. It merely stated that the Applicants were the owners/drivers. The capacity in which the application was sought was very material in assisting the court determine whether the Applicants had locus to claim the release of the exhibits. The application was to that extend incompetent for being vague and or opaque in that respect.

20. The issue of exhibits should have been of concern to the ODPP as that would affect the very foundation of the charge and the entire case for that matter. The learned trial magistrate ruled that since the prosecution did not oppose the application it was allowing unopposed, which the court proceeded to do summarily. The ODPP should have resisted the release of their exhibits by opposing the said application.

21. Since the offences charged were subject to the forfeiture penalty specified under **Section 120** of the **Petroleum Act**, the exhibits could not be released at an interlocutory stage of the trial, before the court could determine whether an offence as charged had been committed or not.

22. In the result the application dated 21st April, 2020 is allowed in terms of Orders 6, 7 and 8 of the application as follows:

a. The order by Hon. Cheruiyot in Milimani Criminal Case No 303 of 2020 dated 10th March 2020 be and is hereby set aside.

b. An order be and is hereby issued ordering the detention and preservation of all exhibits in the case including all the empty gas cylinders and the vehicles cited in the particulars of the charge facing the accused persons in the lower court case number 303 of 2020, until such time as the case is heard, the exhibits are produced in evidence and eventually the case reaches its logical conclusion and or finalized.

c. There will be no orders as to costs.

DATED SIGNED AND DELIVERED THROUGH TEAMS THIS 9TH DAY OF NOVEMBER, 2020

LESIT, J

JUDGE

In the presence of

Kinyua CA

Mr. Omolo For Applicant

Mr. Mutuma For the 1st Respondent

N/A for the 2nd to 8th Respondents

LESIT, J.

JUDGE

November 9th, 2020