



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL REVISION NO. 244 OF 2018

COUNTY GOVERNMENT OF KITUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

AND

1. JOHN KASUMO MBATHA.....1ST INTERESTED PARTY

2. JONATHAN MWINZI.....2ND INTERESTED PARTY

R U L I N G

1. On the **24th May 2018**, the firm of **C.K. Nzili & Co. Advocates** having been instructed by the County Government of Kitui wrote to this court a letter of complaint seeking an order of Revision in respect of Motor Vehicle Registration No. **KBY 157U** (*subject motor vehicle*) in Mwingi **SPMCC Case NO. 224 and 228 of 2018** respectively.

2. The content of the letter was that the interested parties were charged with **being in possession of Charcoal without a permit** Contrary to **Section 16 (e)** of the **Kitui County charcoal Management Act NO. 6 OF 2014**. The 2nd Interested party pleaded guilty to the charge and was **fined Kshs. 50,000/=**. Where after the charcoal was ordered to be forfeited to the County Government of Kitui. The case against the 2nd interested party was terminated. Thereafter, **John Kasuma Mbatha (1st Interested party)** applied for release of the subject Motor vehicle as a co-owner and the court released the Motor vehicle to him.

3. It is therefore the complaint of the County Government of Kitui that, there was an error apparent on the face of the record as the order was made on a file that was already closed; the notice to show cause was made in a different file from the **one where the order** for release was made; the Magistrate did not issue a notice to the **co-owner, Equity Bank Limited** of the motor vehicle as required by the law. Therefore the notice was not a mere technicality. In that regard it seeks revision.

4. Following the nature of the order sought which would affect several parties this court directed service of the letter upon respective parties to elicit their response.

5. The impugned order having been to the benefit of **John Kasuma Mbatha**; he was directed to respond. He filed an affidavit in reply where he deponed that he is the legal owner of the subject motor vehicle whose driver **Jonathan Mwinzi** was charged in Criminal Case NO. 228 of 2018 and after the driver pleaded guilty the court ordered the owner of the motor vehicle to show cause as to why the motor vehicle could not be forfeited to the State.

6. That, he appointed an advocate to move to court and have it released which he did on **22nd May 2018** and the Applicant, County Government of Kitui appeared as an Interested Party. That allegations of orders having been made on a file that was closed were unfounded as the order made was not prejudicial to the third party.

7. The ODPP who did not oppose the application for release of the Motor vehicle in the trial court did not file any Response.

8. My duty at this stage is to enquire into the matter and satisfy myself as to the correctness, legality or propriety of the order made by the subordinate court. **(See Section 362 of the Criminal Procedure Code)**

9. **John Sasuma Mbatha** was charged in SRM CR.C NO. 224 of 2018 with the offence of being in possession of charcoal **without a permit**

Contrary to **Section 16 (e) of the Kitui County Charcoal Management Act No.4 of 2014**. Particulars of the offence being that on the **18th day of May 2018**, at about 16.00 Hours, at **Sosoma Forest in Mwingi –East Sub county of Kitui County**, was found with 100 bags of charcoal on Motor vehicle Registration Number **KBY 157U** make Hino without charcoal movement permit from Kitui County Government.

10. At the outset he pleaded guilty but prior to facts being presented he changed the plea to one of not guilty. Subsequently he traced his driver and escorted him to Mwingi police station. In the premises charges against him were terminated pursuant to the provisions of **Section 87(a) of the Criminal Procedure Code** on the 22nd day of May 2018. In the meantime, **Jonathan Mwinzi** was charged with the offence of being in possession of the stated charcoal that was found on the subject motor-vehicle. He pleaded guilty to the charge and the charcoal was forfeited to the State and released to the County Government of Kitui for disposal. In the same vein the court directed the owner of the motor vehicle to show cause as to why it could not be forfeited to the state within the next fourteen (14) days.

11. On the same date, instead of John Kasuma Mbatha moving the court as directed in SRMCR.C NO. 228/2018, he approached the court in Criminal Case NO. 224/2018 by way of **Notice of Motion** dated **22nd May 2018**, seeking release of the subject motor-vehicle. He availed a copy of Registration Certificate NO. K76558Q which indicated the owner of the Motor vehicle as Equity Bank Limited and John Kasima Mbatha. In addition, there was a letter from Equity Bank confirming that the Bank had advanced loans to the stated individual; John Kasuma Mbatha.

12. The application was prosecuted on the 23rd May 2018 and the record reads thus:

“Mr. Maina: We have served with the applicant’s application yesterday which application is dated 22nd May 2018. On our part we have no objection to the applicant’s application against the background of the forfeiture of the subject charcoal and the imposed fines against the accused person.

K. Sambu-SPM

22.5.2018

Applicant in person JOHN KASUMA MBATHA: I apply for my presented application be allowed.

K. Sambu –SPM

22.5.2018

Mr. Nzili; I appear of the interested party, the County Government of Kitui. I do confirm that I have been served with his applicant’s application, minus the copy of search. I have come across the copy of the search which indicates that the subject motor vehicle is co-owned with Equity Bank and a third party.

The applicant in the circumstance may be forewarned against getting involved with the charcoal business in future without compliance with the laid down law. I have obtained the applicants profile from my client and he appears to be engaged on the charcoal business and should be advised to desist forthwith.

In a nutshell we have no objection to applicant’s application for release of the subject motor vehicle.

K. Sambu- SPM

23.5.2018

Court order

The applicants Notice of motion application dated 22nd May, 2018 having been compromised by the parties, both by the prosecutions counsel Mr. Maina and Mr. Nzili, counsel for the interested parties plus county government of Kitui, be and is hereby allowed in terms of the prayers sought herein on condition that he shall henceforth undertake to comply and to strictly achieve to the laid down laws of the land”.

K. Sambu-SPM

23.5.18’

13. On the **25th May 2018**, the firm of Munyoki Peter & CO. Advocates representing Jonathan Mwinzi filed an application by way of Notice of Motion in Criminal Case NO. 228/2018 seeking review of the orders made on 23rd May 2018 in Criminal case No. 224/2018 instead of being made in Criminal Case NO. 228 of 2018 on the grounds that the file No. 224/2018 had been closed therefore it was erroneous for the court to make an order for release of the motor vehicle thereon.

14. The Application was canvassed and Mr. Nzili representing the County Government of Kitui was in agreement that there was an error apparent on the face of the record, therefore the court acted pursuant to **Section 346 of the Criminal Procedure Code** and allowed the application in its entirety. The court delivered itself thus:

“I have heard all the parties, through their respective advocates on record and in exercise of my discretion and powers donated under Section 346 of the Criminal Procedure code do hereby allow the presented notice of Motion application dated 25th May 2018 in terms of the orders sought therein their entirety”

15. In the application dated 25th May 2018, it was not indicated who the Applicant was. The parties were **DPP vs. Jonathan Mwinzi** described as “accused”. The Advocates (Munyoki Peter & Co. advocates) were indicated as appearing for the Applicant. The affidavit in support of the Application was sworn by John Kasuma Mbatha who described himself as the owner of the subject motor-vehicle. The court was asked to *review, vary and/or rectify the errors* in the order issued on 23rd May 2018 that were made on the wrong file namely 224 of 2018 which had been closed instead of Criminal Case No. 228 of 2018.

16. The Application that was allowed was ambiguous and similarly the order made allowing it in its entirety was similarly ambivalent.

17. **Section 346 of the Criminal Procedure Code** provides thus:

“Errors and omissions in orders and warrants

.....The court may at any time amend a defect in substance or in form in an order or warrant, and no omission or error as to the time and place, and no defect in form in an order or warrant given under this Code, shall be held to render void or unlawful an act done or intended to be done by virtue of that order or warrant, provided that it is therein mentioned, or may be inferred therefrom, that it is founded on a conviction or judgment, and there is a valid conviction or judgment to sustain it....”.

The provision of law is in respect of errors and omission made in orders and warrants. The order the court was being asked to rectify had not been made in criminal case NO. 228/2018 therefore the application should have been made in the appropriate file. Secondly the order made by the learned Magistrate could not be interpreted to tell what exactly the trial Magistrate had in mind when he allowed the order. Hence it was incorrect and therefore improper.

18. Looking at what transpired in Criminal Case No. 224/2018, the case was terminated under **Section 87(a) of the Criminal Procedure Code thus:**

87. (a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;”

19. At the point of terminating the proceedings, facts had not been presented therefore the subject motor vehicle had not been adduced in evidence. This means that the court purported to release what was not in its custody. What transpired was therefore null and void. It was an illegality.

20. From the foregoing, I do quash and set aside the court’s order dated 28/5/2018 and **direct that the file be placed before the Senior Principal Magistrate’s Court, Mwingi** for compliance with the law.

21. Mention on the **19.9.2019**.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of September 2019

L.N. MUTENDE

JUDGE