



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NUMBER 189 OF 2018.

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 177 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF AN APPLICATION FOR RESTITUTION OF PROPERTY

AUGUSTINE THIONGO NJOROGE.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

AND

JENNIFER KANG'ETHE.....APPLICANT

RULING.

Background

1. Jennifer Kang'ethe, hereafter the Applicant, by way of Notice of Motion filed on 4th May, 2018 prays (i) that the Court be pleased to stay the order by Hon. J. Kibosia, SRM dated 26th April, 2018 in **Makadara Criminal Case No. 2310 of 2018(Republic v. Augustne Thiongo Njoroje)** ordering the forfeiture to Kenya Forest Service of 140 bags of charcoal, (ii) that the Court be pleased to revise or vary the order issued on 26th April, 2018 and issue orders that the 140 bags of imported charcoal be released to the Applicant, (iii) alternatively, the Court be pleased to order that Makadara Criminal Case No. 2310 of 2018 be placed before the trial court for review and the Applicant be afforded an opportunity to be heard, and(v) any other orders that the court deems fit to grant.

2. The application is based on the grounds that at all material times to the matter the accused in the criminal case was a driver instructed to drive motor vehicle registration number KBT 891R carrying 140 bags of imported charcoal from Uganda, the property of the Applicant. Upon the conviction of the driver, the charcoal was forfeited to the Kenya Forest Service. The accused was convicted on his own plea of guilty for the offence of importation of charcoal without an import permit contrary to Rule 18(1) as read with Rule 20 of the Forest Rules, 2009. The Applicant contended that she had all the authorization and documentation for importing the said charcoal obtained through her proxy one Peter Wambua and as such the accused was wrongly charged. That the effect of the conviction was to deny her of her property.

3. According to the prosecution, the driver having pleaded guilty implied that the charcoal was unlawfully imported. As such, a forfeiture order was warranted as the charcoal then was the property of the Kenya Forest Service. It was further the case for the Applicant that she was not afforded an opportunity to address the court before the harsh order was made.

4. The application is supported by an affidavit sworn by the Applicant on 2nd May, 2018 in which she reiterated the grounds upon which the application is based. Annexed to the application are custom documents and the proceedings before the lower court.

5. The Respondent, through Mr. Momanyi, filed grounds of opposition on 4th June, 2018. They are that; (i)the application was an abuse of

the court process and merely intended to waste the court's time, (ii)the annexures filed by the Applicant refer to one Peter Mwangi who was a proxy, (iii)neither the Applicant nor the said proxy was an accused person in Makadara Criminal Case No. 2310 of 2018, (iv)the Applicant has not demonstrated to the court that she is the owner of 140 bags of charcoal, (v)neither the Applicant nor the proxy had an import permit as required by the Forest Rules of 2009, and (vi)neither the Applicant nor her proxy had a charcoal movement permit as required under the Forest Rules, 2009.

Submissions.

6. The application was canvassed before me on 13th June, 2018 with Mr. Angwenyi representing the Applicant whilst Mr. Momanyi acted for the Respondent. Mr. Angwenyi submitted that the Applicant did not have an issue with the fact that the accused pleaded guilty but the order of forfeiture of the charcoal to the State. He concurred that Rule 18(1) of the Forest (Charcoal) Rules, 2009 deals with import permits but added that the charcoal was imported with all the proper documentations which were attached to the application. He submitted that in as much as the accused pleaded guilty he was wrongly charged as he was not the owner of the charcoal. With regards to one Peter Wambua (not Peter Mwangi) he submitted that he was a broker who processed the import documents. That the cargo manifest indicated the amount of charcoal and the number plate of the vehicle transporting the same as per the charge sheet. He submitted that the difference in the entries in the documents related only to the amount of bags as the charge sheet indicated 140 bags instead of 154 bags shown in the manifest. He justified this with the fact that by the time the charcoal reached the point of impounding, some bags of charcoal had been sold on the way. He presented the original import documents for viewing by the court.

7. Mr. Momanyi in opposing the application submitted that the documents annexed to the application were a letter from Pabbo Sub-County which complied with Rule 14(1)(b) of the Forest (Charcoal) Rules, 2009 which unfortunately was not complied with. Further, that an import permit under Rule 18 was not obtained. He submitted that it was on these two grounds that the charcoal was forfeited to the State. That all the licences were supposed to be in a prescribed form. He submitted among the documents attached to the application only one of them complied with Rule 18 of the Forest (Charcoal) Rules, 2009. He referred to the other documents as a payment authorization and a manifest from Kenya Revenue Authority. He therefore urged the court to dismiss the application and uphold the forfeiture order by the trial court.

8. In reply, Mr. Angwenyi submitted that the payment authorization and cargo manifest equals an import permit. He disputed that Rule 14 applied to the case as the charges related Rule 18(1) as read with Rule 20 of the Regulations. That therefore the test was whether the importer had complied with Rule 18(1) which he submitted was complied with as the documents were import documents.

DETERMINATION.

9. I have accordingly considered the respective rival submissions. The order being challenged in this application is the forfeiture of the charcoal to the Kenya Forest Services. Whereas the Applicant does not challenge the conviction of the accused who was her driver, a submission was made that nonetheless, the conviction was not legal on two grounds; first that the accused was not the importer of the charcoal and second, that he had the necessary documentation to show that the charcoal was legally imported. In a nutshell, it was argued that he was wrongly charged under Rule 18(1) of the Forest (Charcoal) Rules, 2009. I have read the proceedings leading to the conviction of the accused and no doubt the plea of guilty was unequivocal for which reason this court cannot delve into its legality. The question is whether the forfeiture of the charcoal was properly invoked.

10. The first issue the court must hinge its determination on is the fact that the accused was merely a driver and may have just pleaded guilty to get himself off the hands of the law. The charcoal was imported by the Applicant through an agent one Mr. Peter Wambua. This is a normal procedure for traders who usually will import their merchandise through agents. In such circumstances, the import documentation will usually bear the name of the agent and goods only transfer to the legal owner upon arrival at their final destination. Clearly then, there was nothing unusual in the import documents bearing the name of Peter Wambua. The test now remains whether the said documents met the requirements of Rule 18 of the Forest (Charcoal) Rules, 2009. Subsection (1) of the Rule provides for the requirement of a permit before one can import charcoal. The permit is applied for using a standardized form set in Form 5 in the Schedule to the Rules. Upon qualification an importer is granted the permit which conforms to Form 6 in the Schedule.

11. The Applicant herein does not profess to have had either of these forms in her possession. Instead, she relies on a charcoal movement permit from Pabbo Sub-County in Uganda, the cargo manifest of motor vehicle Reg No. KBT 891R, payment authorization from Kenya Revenue Authority and payment slip from National Bank of Kenya. She submits that the documents meet the requirements of Rule 18. In this court's view, given the statutory requirement to conform to the forms set out under the Schedule leads me to conclude that she failed to show that she was in possession of the required import certification. She ought to have obtained the Permit before embarking on the importation business.

12. What remains is to determine the propriety, legality, regularity and correctness of the order forfeiting the charcoal? In making the order, the trial court delivered itself as follows;

“I have considered the facts and circumstances thereof. I have noted that the logging/transportation of charcoal has recently been an issue of public attention and since the issue of the origin of the charcoal is not an issue for determination I will proceed to sentence as follows:

i. The accused person is to pay a fine of 100,000/= in default to serve 3 months imprisonment.

ii. 14 days right of appeal.

iii. Exhibits to be forfeited to Kenya Forest Service and owner has 14 days to show cause why the lorry should not be forfeited to the State.”

13. There is no doubt that the Applicant, through her proxy, paid for the importation of charcoal from Uganda, as can be clearly seen in the cargo manifest of motor vehicle KBT 891R . She also paid taxes on the imports as per the payment authorization from the Kenya Revenue Authority. No doubt the charcoal came to the country without the Import Permit stipulated under Rule 18(1). The Permit as prescribed under Form 6 is addressed to the Collector of Customs at the Kenya Revenue Authority. An interesting turn of event obtained when KRA accepted payment of the Value Added Tax (VAT) without satisfying itself that the Import Permit had been issued. The net effect of the action by KRA was to legitimize the importation of the charcoal. I think it would be extremely harsh and unreasonable to validate the forfeiture of the charcoal when the duty has already been accepted by the government. It would amount to double jeopardy on the part of the Applicant who has incurred costs in payment of the court fine and the VAT.

14. As a caution, in future, KRA must satisfy itself that an Import Permit issued pursuant to Rule 8(1) is in possession of the Importer before accepting the payment of VAT. Otherwise, the failure to do so will be tantamount to denying the government revenue and curtail regulation of charcoal importation in instances where importers craft means of importing charcoal illegally. It is important that the DPP serves this ruling upon the Collector of Customs at the Kenya Revenue Authority for future compliance.

15. The net effect of my observation is that this application must succeed. I allow the same with an order that I set aside the order issued on 26th April, 2018 in Makadara Criminal Case No. 2310 of 2018 forfeiting the 140 bags of imported charcoal. I accordingly order that the said 140 bags of charcoal be forthwith released to the Applicant. No order as to costs.

DATED and DELIVERED this 19th day of **JULY, 2018**.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant present in person.
2. Mr. Momanyi for the Respondent.