



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL MISC. APPLICATION NO. 48 OF 2016**  
**JUSTUS KIPRONO LANGAT.....APPLICANT**  
**Versus**  
**REPUBLIC.....RESPONDENT**

**RULING**

The applicant Justus Kiprono Langat pursuant to a notice of motion filed in court on 1/12/2016. I invoked the revisionary jurisdiction of this court under the provisions of section 362 as read with section 364 of the Criminal Procedure Code.

In the said notice of motion the applicant sought the following order:

- That this honourable court do recall the Chief Magistrate record in Cr. Case No. 1954 of 2016 and do exercise its discretion in revision of the ruling by the learned trial magistrate made on 8/11/2016 on forfeiture of the exhibits (subject matter of the trial).

The notice of motion was supported by an affidavit by Mr. Kiprono Langat who deposed inter alia: that his employee one Barasa was charged with the offence under Betting, Lotteries and Gaming Act Cap 131 of the Laws of Kenya.

- That upon the indictment the employee pleaded guilty to the charge whereas he was convicted and sentenced accordingly by the trial court.
- That in the scheme of events the learned trial magistrate ordered for forfeiture of the gaming machines without giving him a hearing as provided for under section 389A of the Criminal Procedure Code.
- That the prosecution at the trial did not have the advantage of ownership of documents which were in the applicant's custody.

The learned counsel Mr. Nyabero submitted in support of the application and urged this court to exercise revisionary powers and restore the rights to property to the applicant.

Mr. Akula the senior prosecution counsel conceded to the application on the strength of grounds on the notice of motion and attachments on ownership of goods in question.

I have considered the application and arguments by both counsels on the subject matter on forfeiture of goods in criminal law. Revision jurisdiction under section 362 as read with section 364 is the power of the high court to call for and examine the record of an inferior court or tribunal for purpose of satisfying itself as to correctness, legality or propriety of any finding, sentence or order recorded or imposed by such inferior court or tribunal.

The revisionary jurisdiction for this court is to satisfy itself as to the regularity and propriety of any proceeds was order of the impugned inferior court in Chief Magistrate's Court Criminal Case No. 1954 of 2016.

The ground upon which this revision is premised concerns the forfeiture order made on 8/11/2016 forfeiting the eight machines to the state. This was done by the learned trial magistrate convicting some of the accused persons on their own plea of guilty and passing a sentence of a fine of Ksh.1,500 in default one month imprisonment.

The bone of contention according to the applicant is that the learned trial magistrate erred in law for not complying with the provisions of section 389A of the Criminal Procedure Code.

The procedure for the forfeiture of any aircraft, vessels or vehicle which is used or employed by the person convicted in the commission or to facilitate the commission of an offence of which he is convicted to be followed is laid down in section 389A of the Criminal Procedure Code as required by section 311 (2) of the Penal Code.

The provisions of section 389A provides as follows:

**“(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 of 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 foods 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 court thinks fit.**

**(2) If the court finds that the foods or things belong to some person who was innocent of the offence in connection with which they may or are to be forfeited and who neither know nor had reason to believe that the foods or things were being or were to be used in connection with that offence and exercised all reasonable diligence to prevent their being so use, 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.”**

Case law on application of section 389A:

In the case of **Peterson Njeru & Another v Maralal Senior Resident Magistrate & Attorney General [2010] KLR** the court held interalia:

**“Without hearing persons having an interest in the lorry the learned magistrate was in violation of the rules of natural justice and issued an order of certiorari.”**

In **Mwasi v Republic [1989] at pg 544** the Court of Appeal observed as follows:

**“Forfeiture is a penalty – it can only be treated as a penalty where the evidence shows that the property forfeited belongs to the accused.”**

The general principle of criminal law is that virtually every kind of property tangible or intangible may be a subject of confiscation and forfeiture by the trial court under appropriate circumstances. See (**Charles**

Doyle Article on crime and forfeiture). The procedure on confiscation and forfeiture is provided for on various statutes but section 389A of the code sets the guidelines where there is no clear provisions to guide trial courts on matters of forfeiture. The due process envisaged under section 389A is to enable the claimant to demonstrate:

**(i) Possessory interest in the property.**

**(ii) That the proprietary interest in the property precedes the vesting order of it in the state.**

**(iii) That prior to the state interest the property had been acquired in good faith and as a bonafide purchaser for value.**

**(iv) That as a bonafide purchaser for value at the time he had no reasonable cause to believe the property was subject matter in a criminal trial for forfeiture.**

**(v) That the claimant did not know nor was he aware that the property in question was involved in illegal or criminal activities.**

It is at this stage in answer to the above questions that an order regarding the property under seizure for forfeiture can be made and reasons supporting that judicial process issued to the claimant who has right or interest to the seized property but was subject to the criminal proceedings. In my view the procedure under section 389A of the code was well intended and the provisions to guide adjudication process of any property subject to a criminal process in order to avoid constitutional issues which might arise under Article 50 of the Constitution on the right to a fair hearing and Article 40 on the right to private property.

The position I hold however is that under section 389A if the seized property is in itself outlawed by law i.e. contraband goods, fake currency, or counterfeit goods etc, the principle of natural justice shall not apply. That does not seem to be the case in this application. In compliance with section 389A the learned trial magistrate was required to cause a notice to be served upon the owner of the property to be forfeited to show cause why such an order for feature to the state should not be made in respect of the machines. The court is event mandated to go as far as advertising the notice in the daily newspapers where the owner of the property is not known.

I have perused and evaluated the lower court record. It is clear that the learned trial magistrate did not invite the applicant to participate in proceedings on forfeiture of his property. I agree with the prosecution counsel that the process was tainted with illegality prior to an order of forfeiture to the state by the trial court. It speaks by itself that no such judicial hearing took place on forfeiture were entertained by the trial court. This court was not surprised that the respondent counsel rightly so conceded to the application by the applicant. The applicant has demonstrated by way of documentary evidence the right of ownership to the property which was forfeited without being given an opportunity to be heard by the learned trial magistrate. In cases of this nature forfeiture is not an automatic penalty to be granted without an adjudication and due process of law before a final order.

In invoking the powers conferred under Article 362 as read with section 364 of the code it is apparent that the trial court acted ultravires the provisions of section 389A. This occasioned an error apparent on the face of the record and an error of law. Accordingly the decision reached is untenable in law. As a result this court sets aside the order on forfeiture and substitutes it with one of vesting the property in the ownership of the applicant. The notice of motion dated 1/12/2016 is hereby allowed with no orders as to costs.

**Dated, read and signed in open court at Kajiado this 5<sup>th</sup> day of May, 2017.**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Mr. Nyabero for applicant

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant