



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 38 OF 2015

REPUBLICAPPLICANT

VERSUS

HANGE ENTERPRISES RESPONDENT

RULING

This Notice of Motion application dated 10th April, 2015 and which is expressed to be brought under section 3, 3A order 45 rules 1, 2, 3(2) 57 rule 1 of the Civil Procedure Act.

Seeks the review of its orders made in the Miscellaneous application No. 107 of 2015 releasing containers Nos. DFSU 1142678, HJCU 8410848 and HJCU 23517.

The grounds are that the Applicant has been furnished with new facts and evidence that disclose new and important matters.

Secondly, that documents presented to the applicant by the Ministry of Mining disclose new and compelling evidence that the Respondent hereof through deceit, misrepresentation, fraud and non disclosure of material facts secured the orders of the Court in a fraudulent manner.

Thirdly, that the information was not within the knowledge of the applicant when the matter was canvassed in Court as Counsel for the applicant had not sought instructions from the relevant Ministry.

Further that upon seeking instructions it has come to light that the mineral export permits application dated 30th October, 2014 was a forgery. That the Ministry special license No. 368 issued in favour of Tavez connections Ltd. Was not assigned to the Respondent.

That the affidavit sworn by Abdikarim Ahmed Ismael is full of falsehoods and is misleading.

This application is opposed on the grounds that the ownership of copper ore in question was not challenged and that the application was done in bad faith.

That no amount of new evidence can correct the anomaly in procedure of the trial Court in Criminal Case No. 2059 of 2014.

This Court in its ruling dated 20th January, 2015 did observe that section 389 A of the Criminal Procedure Code provides for the procedure on forfeiture of goods thus,

“Where it appears to the Court that the goods should be forfeited its mandatory (as the word “shall” is used) to cause to be served on the owner on a notice that it will at a specified time and place order the goods to be forfeited unless good cause is shown. The Court further observed that there was no evidence that the stated procedure was followed”.

It ordered the goods to be released to the applicant Hange Enterprises upon presentation of the necessary documents of ownership.

While its goods practice to seek instructions from the parent Ministry, I find this was a clear case of failure to follow the law and procedure on forfeiture of goods. The Court was not dealing with ownership per se. That's why it ordered a conditional release premised on production of ownership documents. Meaning that there would be no release without proper proof of ownership. That proof of ownership process would entail production of some of the documents now stated to be forgeries.

The issue of forgery of documents hinges on criminality. Forgery being a criminal offence cannot be proved through affidavits but through the laid down legal process.

The orders of forfeiture made by the lower Court were unlawful as they did not comply with section 389 A of the Criminal Procedure Code. This Court, therefore, cannot pretend to perfect them. The unlawfulness of the forfeiture cannot be reviewed.

The remedy that presents itself, is that of stay of this Court's order dated 20th January, 2015.

This stay is granted principally on account of the allegations of forgery. I accordingly grant a stay for 30 days only pending legal action by the Director of Public Prosecution on the forgery allegations. In default the goods to be released as earlier ordered upon presentation of proper documents of ownership.

Ruling delivered dated and signed in open Court this **4th** day of **May, 2015**.

M. MUYA

JUDGE

4TH MAY, 2015

In the presence of:-

Learned Counsel Masila holding brief Muteti for the prosecution.

Learned Counsel for the Respondent Mr. Muganda holding brief Nabwana

Court Assistant Mr. Musundi

M. MUYA – JUDGE

4/5/2015

Court:

Certified copies of the ruling to be furnished to the Director of Public Prosecution and the Respondents.

M. MUYA

JUDGE

4TH MAY, 2015