

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
MISCELLANEOUS APPLICATION NO. E182 of 2024

KENYA REVENUE AUTHORITY.....
.....APPLICANT

VERSUS

MOHAMED ALI SHEIKHRESPONDENT

RULING

1. By an application dated 16.9.24, the Applicant seeks the following orders:
 - a) *That pending the hearing and determination of this Application, this Honorable Court be pleased to order stay of execution of the orders issued on 12th September, 2024 directing release of 59 tins of Anchor branded milk powder and 81 tins of Hilwa branded milk powder.*
 - b) *This Honorable Court be pleased to call for the record in Malindi Chief Magistrate Court Criminal Case No E656/2024 Republic Versus Mohamed Ali Sheikh and examine the same to determine the propriety of the orders issued on 12th September 2024 directing release of 59 tins of Anchor branded milk powder and 81 tins of Hilwa branded milk powder which are restricted goods.*
 - c) *This Honorable Court be pleased to revise, vary and/or set aside the order issued on 12th September 2024 in Malindi Chief Magistrate Court Criminal Case No E656/2024 Republic Versus Mohamed Ali Sheikh directing release of 59 tins of Anchor branded milk powder and 81 tins of Hilwa branded milk powder.*
 - d) *This Honorable court be pleased to invoke its powers and jurisdiction to review and/or revise the orders of the subordinate court under Article 165(6) of the Constitution of Kenya 2010 and Section 362 of the CPC and issue any other order as it may please and deem necessary to meet the demands of fair administration of justice including and not limited to*
 - i) *Ordering the forfeiture of the subject restricted goods in accordance with Section 210 (b) of the East African Community Management Act (EACCMA) 2004.*
 - ii) *No orders as to cost.*
2. The Applicant states that the Respondent was on 11.9.24 charged with the offence of conveying restricted goods contrary to Section 199(b)(iii) of the East Africa Community Customs Management Act (EACCMA). He was convicted on his own plea of guilt. The trial court then ordered the release of the goods to the Respondent, upon payment of taxes.

3. The Applicant's complaint was that the trial court failed to appreciate the import of section 210(b) of EACCMA which provides that restricted goods dealt with contrary to the conditions regulating the importation or carriage coastwise are liable to forfeiture and that section 213 vests power upon the Commissioner to seize such goods. Further that the trial court failed to consider that under section 215 conviction of an accused person has the effect of condemnation of the thing seized and that release of the consignment to the Respondent following conviction offended the principle of *ex turpi causa non oritur actio*.
4. The Respondent opposed the Application by a preliminary objection dated 8.10.25. The objections are that the revision contravenes the provisions of Article 165(6)(a) and (7) of the Constitution; that the revision contravenes the provisions of Article 157(6)(a) and (b) of the Constitution as the Applicant lacks authority to institute the revision; that the that the revision contravenes the provisions of Sections 362 and 365(5) of the Criminal Procedure Code as this applies to a court *suo moto* or by a party to the criminal case; that the revision introduces new charges that were not in the charge sheet. The Respondent urged that the Application be struck out with costs.
5. It is the preliminary objection that is the subject of this ruling.
6. The parameters for consideration of a preliminary objections are well settled. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, Sir Charles Newbold rendered himself thus:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

And Law, JA stated:

[A] Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

7. A preliminary objection must be raised on a pure point of law. It cannot be raised if facts must be ascertained and what is sought must not be the exercise of judicial discretion. A preliminary objection should be argued on the assumption that all the facts pleaded by the

other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

8. In the first and second objections, the Respondent challenges the *locus standi* of the Applicant to bring the present Application. The Respondent submitted that the Application contravenes the provisions of Article 165(6)(a) and (7) of the Constitution. He contended that it was the Director of Public Prosecutions (DPP) in exercise of the powers under Article 157(6) and (7) of the Constitution and not the Applicant who ought to have filed this Application or appealed against the impugned decision. Additionally, that the Applicant did not decline the tax on the goods. Further, that this Court can only entertain an appeal. The Respondent also faults the Applicant for not seeking the consent of the DPP before instituting the revision as any criminal prosecution can only be undertaken by the DPP.
9. The Applicant's position is that it has the requisite *locus standi* to bring the Application. It was submitted that under Section 5(1) of the Kenya Revenue Authority Act, the Applicant is mandated to administer and enforce all provisions of written laws listed in the First Schedule for the purpose of assessing, collecting and accounting for all revenues in accordance with those laws. It was further asserted that the Applicant has a direct and enforceable statutory interest in all matters touching on administration and enforcement of customs laws.
10. **This Court has supervisory jurisdiction over subordinate courts. Article 165(6) and (7) of the Constitution thereof provide as follows:**
 - (6) *The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
 - (7) *For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***
11. **In exercise of its supervisory jurisdiction, this Court is empowered to call for the record of proceedings in such subordinate courts, and make and give appropriate orders and directions as it deems necessary to ensure the fair administration of justice.**
12. **Upon obtaining the record of criminal proceedings in subordinate courts, this Court is required to examine the same and satisfy itself as to the correctness, legality or propriety of any finding, sentence or order.**

13. Section 362 of the Criminal Procedure Code provides:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

14. Section 364 confers upon this Court the power of revision as follows:

(1) *In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*

(a) *in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*

(b) *in the case of any other order other than an order of acquittal, alter or reverse the order.*

(c) ...

15. As can be seen, the Court can exercise its power of revision in instances where a lower court record has been called for, or which has been reported for orders or of its own motion where the record comes to the knowledge of the Court.

16. In the present case, the Application has been brought by the Applicant which was the complainant in the court below.

17. Section 9(1)(d) of the Victim Protection Act provides as follows:

A victim has a right to—

(d) *have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;*

18. A purposive interpretation of the foregoing provision must mean that a complainant/victim who has been adversely affected by a decision of the court has the right to file a revision, which is a *dispute that can be resolved by the application of law*.

19. The participation of victims in criminal proceedings is now widely accepted and has been codified both nationally and internationally. In Waswa v Republic [2020] KESC 23 (KLR), the Supreme Court considered such participation and stated:

52. *The participation of victims in criminal trial proceedings, though a novel trend in our laws, is in accord with international developments that have embraced the place of victims in the trial process. Our Constitution under article s 2(5)*

and (6) permits us to apply the general rules of international law and also provides that any treaty or convention ratified by Kenya forms part of the law of Kenya.

53. *The role of a victim in a criminal trial is recognized in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). In this Declaration, it is evident that in the context of the criminal justice system, it is a central obligation of governments to comply with the victim's rights to access to justice and fair treatment, restitution, compensation and assistance.*

20. Duly guided, I find that the Applicant herein as the complainant having been adversely affected by the orders of the trial court, has the requisite *locus standi* to file the Application herein.

21. I now turn to the objection that the revision contravenes the provisions of Sections 362 and 364(5) of the Criminal Procedure Code. The Court finds that the contention by the Respondent that the order of forfeiture was not applied for and denied by the trial court to warrant a revision and that the same is brought in bad faith without legal basis are all facts that need to be ascertained. Similarly, the objection that the revision introduces new charges that were not in the charge sheet, is also a fact that need to be ascertained.

22. In this regards, I can do no better than restate the words of Sir Charles Newbold in the Mukisa Biscuit case (supra):

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. (emphasis)

23. In the end and in view of the foregoing, I find the preliminary objection unmerited and the same is dismissed with costs to the Applicant.

DATED, SIGNED and DELIVERED in MALINDI this 17th day of April 2026

**M. THANDE
JUDGE**