



Watu Credit Limited v Republic & 5 others (Criminal Revision E003, E004, E005, E006 & E007 of 2023 (Consolidated)) [2024] KEHC 2931 (KLR) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL REVISION E003, E004, E005, E006 & E007 OF 2023 (CONSOLIDATED)**

JRA WANANDA, J

MARCH 22, 2024

BETWEEN

WATU CREDIT LIMITED APPLICANT

AND

REPUBLIC 1ST RESPONDENT

VINCENT KIPLAGAT 2ND RESPONDENT

CHRISTOPHER KIBET 3RD RESPONDENT

DANIEL KIPRUTO 4TH RESPONDENT

HILLARY KEMBOI 5TH RESPONDENT

EMMANUEL KEMBOI 6TH RESPONDENT

RULING

1. The matters pending before this Court are various Applications filed through Messrs Wabomba Masinde & Co. Advocates seeking to invoke this Court’s power of Revision. The Applications arise out of 5 different criminal cases concluded before the trial Court. In the cases, the Applicant, an Asset Financing company, seeks release of motor-cycles forfeited to the State by the trial Court upon the respective riders thereof being convicted and sentenced for offences of illegally transporting forest produce.
2. The cases are as follows:
 - i. Iten SPMCRC E313 of 2023 - Republic v Vincent Kiplagat in which the 2nd Respondent was charged with the offence of transporting forest produce (charcoal) without a movement permit contrary to Rule 14(1) of the Forest Rules 2012. He was convicted on his own plea of guilty and fined a sum Kshs 4,000/- and in default, to serve 3 months in prison. The charcoal was



forfeited to the State and the Court also issued a Notice to the owner of the motor-cycle used to transport the charcoal to show cause why the motor-cycle should not be forfeited to the State. There is however no indication in the trial Court file that any further action has been taken ever since.

- ii. Iten SPMCRC E179 of 2023 - Republic v Christopher Kibet in which the 3rd Respondent was charged with the offence of transporting forest produce (charcoal) without authority contrary to Rule 11(1) as read with Rule 27 of the Forest Rules 2009 and Section 77(e) of the Forest Conservation and Management Act 2016. He was convicted on his own plea of guilty and fined Kshs 5,000/- and in default, to serve 2 months in prison. Similarly, a Notice was then issued requiring the owner to show cause why the motor-cycle used to carry the charcoal should not be forfeited to the State. There being no appearance by the owner on the material date, the motor-cycle was forfeited.
 - iii. Iten SPMCRC E392 of 2023 - Republic v Daniel Kipruto Toroitich in which the 4th Respondent was charged with the same offence as above. He too was convicted on his own plea of guilty and fined a sum of Kshs 4,000/- and in default, to serve 1 month in prison. A Notice was then issued requiring the owner to show cause why the motor-cycle used to carry the charcoal should not be forfeited to the State. There being no appearance by the owner on the material date, the motor-cycle was forfeited.
 - iv. Iten SPMCRC E448 of 2023 - Republic v Hillary Kemboi in which the 5th Respondent was charged with the same offence as above. He too was convicted on his own plea of guilty and fined a sum of Kshs 5,000/- and in default, to serve 2 months in prison. In this case, too, a Notice was issued to the owner to show cause why the motorcycle used to carry the charcoal should not be forfeited to the State. The motor-cycle was initially forfeited but the record indicates that the same was later released to the owner, upon application.
 - v. Iten SPMCRC E312 of 2023 - Republic v Emmanuel Kemboi in which the 2nd Respondent was charged with the offence of transporting forest produce (charcoal) without a movement permit contrary to Rule 14(1)(a) of the Forest Rules 2012. He too, was convicted on his own plea of guilty and fined a sum Kshs 3,000/- and in default, to serve 3 months in prison. The charcoal was forfeited to the State and a Notice issued to the owner of the motor-cycle used to carry the charcoal to show cause why the same should not be forfeited to the State. There is no indication in the trial Court file that any further action has been taken ever since.
3. From a reading of the respective Applications and the Affidavits in support, the Applicant's case is basically that the Applicant did not participate in the proceedings since it was neither served with the respective Notices to show cause nor was it informed of the existence of the criminal cases, that had the Applicant been served, it would have attended Court and showed cause why the motor-cycles should not be forfeited, that there has been no delay in making the Applications and that no prejudice will be suffered by the State.
 4. I observe from the Record that the Applicants did approach the trial Magistrate's Court with similar Applications seeking the setting aside of the orders forfeiture. The trial Court however declined to hear the Applications ruling that it was *functus officio* and that the grievance ought to be referred to a higher Court, either by way of Appeal or Revision.
 5. I note that in each of the 5 Applications, the Applicant has also made a prayer to be joined into these Causes as an interested party. It is not clear why such a prayer is necessary yet the Applicant is the initiator of all the Causes. Be that as it may, since the prayer, as peculiar as it sounds, is not opposed, I will, for record purposes, now grant it.



6. All the Applications are opposed by the State vide the respective Replying Affidavits filed.
7. In her Replying Affidavit sworn in respect to Iten High Court Criminal Revision E003 of 2023 and arising from Iten SPMCRC E313 of 2023, the lead file, Prosecution Counsel appearing for the State, Judith Betty Ayuma, deponed that no forfeiture order for the motor-cycle was made and as such there is nothing to Review, and that the Applicant ought to seek release of the motor-cycle from the lower Court given that the same has never been forfeited to the State.
8. In her respective Replying Affidavits sworn in Iten High Court Criminal Revision E004 of 2023, arising from Iten SPMCC E179 of 2023, and in Iten High Court Criminal Revision E005 of 2023, arising from Iten SPMCC E392 of 2023, Ms Ayuma deponed that the order for forfeiture of the motor-cycle was made upon failure by the proprietor to attend Court to show Cause, that the Applicant has not given sufficient reasons for the review sought herein since at the time of the forfeiture, the interest that they had in the motor-cycle existed and the Applicant must have known of its detention and whereabouts as most asset financing institutions put trackers on their assets and this must have been the case herein, that the Applicant had prior notice of the date of forfeiture orders but failed to attend Court, that the trial Court cannot be faulted for the failure and/or omission, and that there is no way that the Prosecution or the trial Court could have known of the asset financing scheme. She added that there was no error apparent on the face of the Ruling, that due process was adhered to by the trial Magistrate prior to pronouncing the forfeiture order, and as such, the issue of the same being erroneous is neither here nor there
9. In her Replying Affidavit sworn in Iten High Court Revision No E006 of 2023 arising from Iten SPMCC No E448 of 2023, Prosecution Counsel, Mercy Mutheu Muema, deponed that the motor-cycle therein was co-owned by the 5th Respondent and the Applicant by virtue of Asset Financing, that the same was forfeited to the State, that an Application for release of the motor-cycle was made and the same was released to the rightful owner, and that the Application is therefore time-barred and is wrongly before this Court.
10. In her Replying Affidavit sworn in Iten High Court Revision No E007 of 2023 arising from Iten SPMCC No 312 of 2023, Prosecution Counsel, Mercy Mutheu Muema, deponed that the motor-cycle therein was co-owned one Francescor Murgor and the Applicant by virtue of Asset Financing Scheme, that the accused (5th Respondent) could have informed the owners of the motor-cycle about the Notice to show Cause, that the owners were granted an opportunity to be heard before the decision of forfeiture was made by the trial Court, that the owners failed and/or ignored to attend and the forfeiture was therefore regular and within the law
11. In a nutshell, the prosecution's general position was that the owners of the motor vehicle were given sufficient notice to show cause why the respective motor cycles should not be forfeited to the State and that as such, the forfeiture is legal.

Hearing of the Application

12. It was then agreed and directed that this matter be canvassed by way of written Submissions. Pursuant thereto, the Applicant filed Submissions on 27/03/2023. For the State however, I have not come across any Submissions filed.

Applicant's Submissions

13. Counsel for the Applicant urged that criminal forfeiture is dependent upon conviction of an accused person for a crime which provides a basis for forfeiture, that where an Act provides for forfeiture, it



should not be read in isolation. He cited Section 389A of the Criminal Procedure Code and submitted that a reading of the same reveals that it is a requirement that notice to show cause why the goods should not be forfeited must be served on the owner of the goods, that the same is in mandatory terms and therefore there is no leeway for the goods to be forfeited to the State in the absence of a notice, that the Applicant was not informed of the impending forfeiture, contrary to the provisions of the Criminal Procedure Code and in contravention of the principles of natural justice, that the Applicant had rights to the respective motor-cycle and therefore, it amounts to condemning it and a violation of Article 50 of the *Constitution* of Kenya. He cited the case of Eldoret High Court Criminal Revision E007 & E008 of 2023 where, he submitted, it was averred that where other citizens or institutions will be affected by the decision of forfeiture, advance notice ought to be given on what the State intended to do and how that action may deprive them of their property, that the Learned judge also pronounced that a person or legal entity has the right to be heard before the final decision to forfeit the chattel. Counsel also cited the case of *Peterson Njeru & Rachel Njoroge v Maralal Senior Resident Magistrate* (2010) eKLR.

14. Counsel submitted further that under Article 47(1) of the *Constitution*, every person has a right to a fair administrative action, that in situations where the Court intends to seize any property, it must hold an inquiry where the prosecution must satisfy and demonstrate that the chattel, vessel or motor vehicle and in this instant, motor-cycles, ought to be forfeited, that it is at that stage that the owner is allowed an opportunity to raise a defence to the forfeiture and that this procedure was clearly overlooked by the trial Court. He averred further that due process is best defined in one word – fairness - that there are two fundamental condition precedents to guarantee the fairness of the process on forfeiture; first, whether notice was given, and second, whether the persons or legal entity had an opportunity to be heard before the final decision to forfeit the chattel, that it is evident, from the annexures, that the accused person(s) had loan facilities with the Applicant and the motor cycles were the respective securities and the Applicant was registered as the financier in the log-book, that the Applicant was to be notified of the impending forfeiture but which it was not, that it is apparent that the trial Court acted ultra vires the provisions of Section 389A aforesaid and this occasioned an error apparent on the face of the record and an error of law.
15. Counsel submitted further that forfeiture has to be determined and supported by substantial evidence to establish ownership of the property by creating a nexus to the charge, that in the instant cases, the Magistrate relied on the *Forest Conservation and Management Act* which specifically authorizes forfeiture and therefore, Section 389A of the *Criminal Procedure Code* is inapplicable in the circumstances of the case. He submitted further that a presumptive innocent person whose property is subject of criminal proceedings should not lose the property without an opportunity to be heard, that the trial Court must hold an inquiry where the prosecution must satisfy and demonstrate that the chattel, vessel or motor vehicle ought to be forfeited, that the Applicant has brought itself within the ambit of Article 165 (6) & (7) of the *Constitution* on supervisory jurisdiction over the subordinate courts as construed in conjunction with Section 362 of the *Criminal Procedure Code*, that the decisions to forfeit the motor-cycles was grossly erroneous, that the findings ignored both procedural and substantive fairness on notices and an opportunity to the parties affected by the decision, that the material evidence of those parties was never considered, and that therefore, rendering the judicial discretion as exercised, arbitrary and/or perverse.

Analysis & Determination

16. The issue for determination in this matter is “whether this Court should invoke its Reversionary powers over subordinate Courts and set aside the trial Court’s respective orders forfeiting the respective motor-cycles to the State”.



17. Regarding jurisdiction, this Court has supervisory role over Subordinate Courts by virtue of the provisions of Article 165(6) and (7) of the Constitution which provides 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.”

18. Section 362 of the Criminal Procedure Code, then provides as follows:

“Revision

362. Power of High Court to call for records

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.”

19. That the trial Court possessed the power to order for forfeiture of the motor-cycles to the State is not in doubt. Indeed, Section 68(1)(c) of the Forest Conservation and Management Act provides as follows:

“Where a person is convicted of an offence of damaging, infringing or removing forest produce from any forest, the forest produce shall be forfeited to the owner. The court may in addition to any other relief order -

.....

c) the vessels, vehicles tools or implements used in the commission of the offence be forfeited to the service provided that the value of the forest produce shall be either the accurate value of the forest produce or the use of restoring the damage caused to that forest as a result of the offence committed whichever is higher”

20. Section 389A of the Criminal Procedure Code then outlines the procedure for forfeiture 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 or 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 goods 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 the court thinks fit.



- (2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, 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.
21. The issue before this Court is the validity of the trial Court's orders of forfeiture of the motor-cycles to the State. The respective trial Courts ordered the owners of the motor-cycles to show cause why the same should not be forfeited to the State and when they did not show up in Court, forfeiture orders were swiftly issued. However, the Court did not cite the statutory provisions under which it exercised the power of forfeiture. The Applicants have now emerged claiming to be the owners.
22. One fact that the Applicant has managed to demonstrate, by documentary evidence, and which was not challenged, is that each of the motor-cycles was the subject of Asset Financing facilities extended by the Applicant to the Respondents as loanees. Accordingly, the respective motor-cycles were registered in the joint names of the Applicant and the respective Respondents. The Applicant still therefore held recognized, genuine, legal and/or beneficial interest in the motor-cycles. For all intents and purposes, until the Respondents completed payment of the loan, the Applicant was therefore the real owner of the motor-cycles. It therefore follows that the Applicant, as the owner, ought to have been served with the respective Notices to show cause.
23. Another fact that is evident from the record is that there is no evidence of service of the Notices to show cause upon the Applicant in any of the 5 cases. In fact, there does not seem to have been any effort made, not even by the Prosecution, to serve the notices upon the Applicant. I would not however fault the trial Court or the Prosecution for this omission since at no time during the proceedings was it disclosed to the Court that the Applicant was the owner of the motor-cycles. The Respondents never disclosed to the Court that the motor-cycles were under existing Asset-Financing arrangements. Once they were convicted and fined, the Respondents simply paid the fines and disappeared thus abandoning the motor-cycles in Court. The Court therefore had no mechanism to discover ownership and under these circumstances, innocently issued the forfeiture orders.
24. The State Counsels' response on the issue of non-service of the notices is that the Respondents (as accused persons) should have notified the owners of the same. I find this response to be misplaced. The Respondents cannot be presumed to be agents of the Applicant. Similarly, the allegation that the Applicant must have known that the motor-cycles were detained at the Court or police station because they must have had "trackers" is not a serious one. In any event, the allegation is not even supported by any evidence.
25. The right to a fair trial by an impartial and independent Court or tribunal established by law is guaranteed by Article 50(1) of the *Constitution*. Therefore, the right to a fair hearing and due process is a fundamental anchor in the administration of justice. Under Article 47(1), every person has a right to a fair administrative action. In failing to notify it of the notices, the Applicant's rights were clearly violated. It was the duty of the prosecution to establish ownership of the motorcycles and then notify such owner(s) of the notices to show cause. This duty was clearly not discharged.



26. Faced with a similar Revision matter in which, as herein, service of the notice to show cause upon the owner of a motor vehicle ordered by the trial Court to be forfeited was not proved, Nyakundi J, in the case of *Peter Igiria Nyambura v Director of Public Prosecutions* [2018] eKLR, remarked as follows:

“Applying the above principles I am satisfied that the owner of the motor vehicle registration No KBL 373 was not served nor was he aware that his vehicle had been seized by the police for the alleged offence. The failure to serve notice both under Section 68 of the Act and Section 389A of the Criminal Procedure Code occasioned prejudice and a failure of justice against the applicant.”

27. It is evident that the procedure for forfeiture was not adhered to. To allow such a decision to stand would occasion an injustice to the Applicant and will be in contravention of the law.

Final orders

28. In the premises, I order as follows;

- i. The orders issued in the following two matters, forfeiting the respective motor-cycles involved therein to the State, are hereby set aside and the trial Court directed to forthwith release the motor-cycles to the Applicant:
 - a. Iten SPMCRC E179 of 2023 - Republic v Christopher Kibet – Order made on 24/04/2023 - Registration No KMGA 822Z).
 - b. Iten SPMCRC E392 of 2023 - Republic v Daniel Kipruto Toroitich – Order made on 24/04/2023 - Registration No not indicated in the trial Court’s proceedings (but stated by the Applicant to be KMGD 977Y).
- ii. For the following two matters, there is no evidence that any forfeiture orders have been made. Since it appears that the Notices to show cause issued therein are still pending for determination, the trial Court is directed to fix hearing dates for the Notices, notify the Applicant, and thereafter make appropriate orders:
 - a. Iten SPMCRC E313 of 2023 - Republic v Vincent Kiplagat – Registration No KMGD 351T
 - b. Iten SPMCRC E312 of 2023 - Republic v Emmanuel Kemboi Biwott - Registration No KMFG 708C.

However, in the event that forfeiture orders were made in the two matters, then the same are hereby set aside and the trial Court directed to forthwith release the motor-cycles to the Applicant.
- iii. For the following matter, there is evidence in the trial Court file that the motor-cycle involved therein was duly released to the 5th Respondent on 26/06/2023:
 - a. Iten SPMCRC E448 of 2023 - Republic v Hillary Kemboi - Registration No not indicated in the trial Court’s proceedings (but stated by the Applicant to be KMGG 131V).
- iv. I make no order on costs.
- v. All the files referred to above shall now be returned to the trial Court for the respective action set out above.



DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE

