

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL REVISION NO.4 OF 2023

(Originating from Misc. Criminal Application No. 4 of 2023 in Kisarawe District Court at Kisarawe)

KAYO DONYO SHANGALIMA.....APPLICANT

Vs

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

Date of last Order: 6-9-2023

Date of Ruling: 17-10-2023

B.K.PHILLIP,J

This application is made under Section 372(1) of the Criminal Procedure Act and Section 44(1) (a) of the Magistrates Court's Act. The applicant's prayers are reproduced verbatim below:

- 1) *That this Honorable court be pleased to call for and examine the records of Kisarawe District Court in Misc. Criminal Application No.9 of 2023 for the purpose of satisfying itself as to the correctness, legality, or propriety of the finding therein and orders recorded or passed and as to the regularity of all such proceedings therein , and thereby*
 - i) *Set aside the order of forfeiture to the Government of the United Republic of Tanzania 299 of heads of cattle*
 - ii) *That the proceeds of sale of the 299 heads of cattle amounting to Tshs.74, 750,000/= be paid to the applicant herein as and being the owner of the cattle wrongfully seized and sold.*

2) Any other orders deems fit and just.

The application is supported by two affidavits. The first one is sworn by the applicant, whereas the second one is sworn by one Yona Donyo Shangalima, the applicant's son. The learned State Attorney, Clarence Josemary Mhoja, appeared for the respondent and swore a counter affidavit in opposition to the application. The applicant was represented by the learned Advocate, Denis Msafiri.

The application was heard ex-parte against the respondent since the learned State Attorney defaulted in entering appearance in court on the hearing date, despite being aware of the hearing date, which was fixed in his presence.

Mr. Msafiri started his submission by adopting the contents of the two affidavits in support of the application and went on to submit as follows: On April 6, 2023, the District Court of Kisarawe (henceforth "the lower Court") ordered the auction of 299 heads of cattle, which belonged to the applicant. Furthermore, it ordered the deposit of the proceeds of the auction in the Forfeited Assets and Revenue Collection account No. 52010101511 at NMB Bank and issued a notice that if the owner of the said 299 heads of cattle shows up, they can be refunded the proceeds of the auction. Mr. Msafiri contended that the above-mentioned orders were made in the absence of the applicant. The applicant became aware of this on August 8, 2023. The 299 heads of cattle were auctioned for Tshs 74,750,000/= only. The application filed at the lower court stated that the 299 heads of cattle were found in Nyerere National Park, and the owner

was unknown. The respondent moved the lower court under Section 47(1) of the Police Force and Auxiliary Services Act and Section 25(1)(d) of the National Parks Act, read together with Regulation 7(i) and 12 of the National Parks Regulations GN. No. 50 of 2002, to issue the aforesaid orders.

Moreover, it was Mr. Msafiri's contention that the affidavits in support of this application show that the 299 heads of cattle were seized in the presence of Yona Donyo Shangalima, who was taking care of them. He was arrested by the Park Rangers and put under custody for the whole night. The applicant made a follow-up of his cattle. He went to the place where they were kept. He introduced himself to the Park Rangers as the owner of the 299 heads of cattle, and in response, the Park Rangers directed him to leave the area and told him that he would be informed when he could buy back the cattle. Mr. Msafiri was emphatic that the affidavit in support of the application filed at the lower court contained wrong information, and the application was filed with ill intent to deprive the applicant of his cattle by selling them clandestinely.

Referring to this court to Section 47(1) of the Police Force and Auxiliary Services Act, Mr. Msafiri argued that the Police officer has powers to seize unclaimed movable properties and furnish an inventory or description thereof to a Magistrate, whereas Section 47(2) of the same Act provides that if the property is not easily perishable, then the Magistrate is supposed to issue an order that the said property be kept, and a notice in respect of the existence of the seized property be affixed in conspicuous places, including at the Court and Police Station within the court's jurisdiction. The

notice has to specify the property and call upon anybody claiming to be the owner of the property in question to appear in court within six months from the date of the notice. If the property exceeds Tshs 50/=-, then the Magistrate is supposed to order that the notice in respect of the property in question be published in the Government Gazette. Pursuant to Section 47(3) of the same Act, after the expiry of six (6) months, the court can order either the auction or destruction of the property in question.

It was Mr. Msafiri's argument that the 299 heads of cattle were capable of being kept for six months while awaiting the owner to show up, and the notice in respect of those cattle was supposed to be published in a Government Gazette because the value of 299 heads of cattle was more than Tshs. 50/=-. He contended that the application for the auction of the cattle was filed on April 6, 2022, and heard and determined on the same day. No notice was issued to the public, and the order for the auction of the cattle was issued before the expiry of six months as required by the law.

Commenting on the Counter Affidavit sworn by the learned State Attorney in opposition to this application, Mr. Msafiri submitted that the same is full of general denials, thus it did not shake the applicant's affidavits. In addition, Mr. Msafiri argued that the fact that there is no counter affidavit sworn by Mr. Nchambi Nguza Sema, the one who seized the 299 heads of cattle, is fatal.

Mr. Msafiri was of the view that the 299 heads of cattle were sold at a throwaway price of about Tshs. 25,000/=- per head of cattle at a flat rate,

whereas 130,000 heads of cattle were big enough to be sold for Tshs. 800,000/= each, and the remaining 169 heads of cattle were big enough to be sold at the price of Tshs. 450,000/ each. He contended that the lowest purchase price for all 299 heads of cattle was Tshs. 180,050,0000/=. Therefore, there was a loss of Tshs. 106,700,000/= compared to the proper value of 299 heads of cattle.

In conclusion of his submission, Mr. Msafiri implored this court to set aside the lower court's order for the forfeiture of the 299 heads of cattle and order that the applicant be paid the proceeds of the auction, which is Tshs. 74,750,000/=. Moreover, he was of the view that the applicant can claim the difference between the allegedly proper value of the 299 heads of cattle and the proceeds of the auction (Tshs. 106,700,00/=) from the respondent in a separate suit.

Having analyzed the submission made by the learned Advocate Msafiri and perused the affidavit filed by the applicant in support of this application, as well as the lower court's records, let me proceed to determine the merit of this application. The task of this court is to determine the correctness and/or propriety of the proceedings of the lower court and the orders made therein. As correctly submitted by Mr. Msafiri, the lower court's records reveal that the 299 heads of cattle were ordered to be auctioned following the application made by the Republic/respondent herein under Section 47(1) of the Police Force and Auxiliary Services Act (Cap 322 R.E. 2002), Section 25(1)(d) of the National Parks Act (Cap 282 R.E. 2002) as amended, read together with Regulation 7(i) and 20, both of the National Parks Regulations as amended, praying for orders that the unclaimed

property, namely 299 heads of cattle found in an area within Nyerere National Park and seized by Park Rangers, be forfeited to the Government and be disposed of by way of public auction. The learned State Attorney who appeared at the lower court tendered in court a map showing the area where the 299 heads of cattle were seized, that is, within Nyerere National Park (Exhibit P3), the certificate of seizure (Exhibit P2), and a copy of the notice on the seizure of the 299 heads of cattle (Exhibit P4). In addition, the lower court visited the kraal where the 299 heads of cattle were kept and said 299 heads of cattle were admitted as Exhibit P1 collectively.

Back to the merits of this application, in order to address Mr. Msafiri's arguments that the lower court did not abide by the procedures provided in Section 47 of the Police Force and Auxiliary Services Act due to its failure to issue a six-month notice prior to the order for the auction of the 299 heads of cattle, I need to start by looking at the provisions of Section 47 of the Police Force and Auxiliary Services Act under which the lower Court ordered the auction of the 299 heads of cattle in question. For clarity and ease of understanding the coming discussion, let me reproduce the whole of Section 47 of the Police Force and Auxiliary Act below:

"47 (1) It shall be the duty of every police officer to take charge of all unclaimed movable property and to furnish an inventory or description thereof to a magistrate.

(2) If such property is neither money nor property subject to speedy and natural decay nor property the immediate sale of which would, in his opinion, be for the benefit of the owner, the magistrate shall detain or give orders for the detention of any such property and shall cause a notice to be posted in a conspicuous place at his court and at the police stations within his jurisdiction specifying such property

and calling upon any person who may have a claim thereto to appear and establish his claim within six months from the date of such notice. If the magistrate is of the opinion that the value of the property is clearly in excess of fifty shillings, he shall also cause a similar notice to be published in the Gazette, the date by which any person is to establish his claim to such property being the same date as is prescribed by the magistrate in the notice which he causes to be published locally.

(3) Such property, if no person shall within six months from the date of the notice aforesaid establish his claim thereto, may be sold or, if the magistrate thinks it expedient, may be destroyed by order of the magistrate, and on the completion of the sale or destruction the right to take legal proceedings for their recovery of such property or the proceeds of such sale shall cease:

Provided that if such property is a firearm or ammunition the magistrate may order that it shall be disposed of in such manner as the Inspector-General may direct.

(4) The proceeds of the sale of such property shall be apportioned in the following manner—

- (a) one-half shall be paid to the credit of the Police Rewards Fund;
- (b) such proportion of the remaining one-half as the magistrate may direct shall be paid to the finder of the property; and
- (c) the Balance shall be paid to the general revenue of the United Republic.

(5) **If the magistrate is of the opinion that such property is subject to speedy or natural decay or that its immediate sale would be for the benefit of the owner the magistrate shall detain or give orders for its detention and may at any time direct it to be sold without having caused the notice prescribed in subsection (2) to be given prior to the sale or, if he thinks it advisable to do so, he may order it to be destroyed. On completion of a sale**

or destruction under this subsection the right to take legal proceedings for the recovery of the property sold or destroyed shall cease. [ss. (5A)]

(6) The proceeds of such sale shall remain in such custody as the magistrate may direct and the magistrate shall immediately after such sale cause a notice of such sale to be posted in the manner prescribed in subsection (2) specifying the property sold and calling upon any person who may have any claim to the proceeds of such sale to appear and establish his claim within six months from the date of such notice. [ss. (5B)]

(7) The proceeds of such sale shall be paid to the person who establishes his claim thereto. On the expiration of six months from the date of such notice, if no person shall establish his claim thereto, the right to take legal proceedings from the recovery of such proceeds shall cease, and such proceeds shall be dealt with in accordance with the provisions of subsection (4). [ss. (5C)]

(8) When the unclaimed movable property consists of money the same shall be dealt with in all respects as if it were the proceeds of a sale ordered by virtue of the provisions of subsections (7) and (8). [ss. 6]"

(Emphasis is added)

Section 47(5) of the Police Force and Auxiliary Act confers discretionary powers to the court to issue an order for the sale of unclaimed property without giving the notice prescribed in Section 47(2) of the Police Force and Auxiliary Act in cases where the court finds that the property in question is of speedy decay or where it is of the view that the immediate disposal of the property will be of benefit to the owner. In this case, the proceedings reveal that the learned State Attorney who appeared at the lower court informed the trial Magistrate that the 299 heads of cattle were kept in an area where there was no grazing area; thus, they were subject

to starving if kept there for a longer period. The affidavits in support of this application reveal that the 299 heads of cattle were seized on April 2, 2023, and auctioned on April 8, 2023. Therefore, they stayed for more than five days without proper grazing. I have noted that in his submission, Mr. Msafiri did not address the issue of the availability of grazing areas and water in the area where the 299 cattle were kept and how it was possible to keep them for six (6) months. With the undisputed facts explained above on the challenges of keeping the said 299 heads of cattle for a longer period, I am of the settled opinion that by issuing an order for the auction of the 299 heads of cattle, the lower court exercised its discretionary powers judiciously; otherwise, the cows could have starved and died. With due respect to Mr. Msafiri, I am not inclined to agree with him that the cows were capable of being kept for a longer period since it is obvious that 299 cows need a larger grazing area with canyons and/or big ponds for drinking water.

From the foregoing, Mr. Msafiri's concern about the speedy disposal of the application is, in my opinion, misconceived because the delay in the determination of the application would be to the detriment of the owner of the 299 heads of cattle, as they could have died of hunger. In addition, the lower court's records show that the application was filed under a certificate of urgency, so it was quite proper to have it disposed of expeditiously. I have also noted that relying on the contents of the affidavit in support of this application, Mr. Msafiri challenged the contents of the affidavit sworn by the Park Rangers, claiming that it contains false information, namely, that the 299 heads of cattle were seized in Nyerere National Park. My

stance on this argument is that the affidavit sworn by the applicant cannot be treated as a counter affidavit to the affidavit sworn by the Park Rangers in support of the application that was filed at the lower court, and, in fact, it did not counter all the facts deposed by the Park Rangers in his affidavit, which includes the map (Exhibit P3) showing the location where the cows were seized from, namely, in Nyerere National Park, 2.8 kilometers from the boundary.

In his affidavit, the applicant deposed that on April 8, 2023, he was informed about the auction of the 299 heads of cattle by his Maasai friend called Simango who lives in Kitongale Village, and upon close follow-up, he managed to find the person who bought the said 299 heads of cattle. However, the applicant did not file any affidavit sworn his friend Simango to substantiate his assertion afore stated. In my opinion, the failure to file the affidavit sworn by Simango is fatal in substantiating his assertion that he was not aware of the auction of the said 299 heads of cattle, whereas he knew that they were seized by the Park Rangers, as deposed in his affidavit.[See the case of **Airtel Tanzania Limited Vs Misterlight Electrical Installation Co. Limited and Arnord Mulashani, Civil Application No. 37/01 of 2020** (unreported)]. It is also worth noting that the application for the auction of the 299 heads of cattle was made under the proper provisions of the law, so the lower court was properly moved. In conclusion, the applicant's prayer for an order that the 299 heads of cattle were unlawfully seized and auctioned is dismissed.

With regard to the value of the 299 heads of cattle, the applicant has not substantiated his assertion that the said 299 heads of cattle were worth

Tshs. 180,050,000, not Tshs. 74,750,000, bearing in mind that in an auction, the price is determined by the current market value of the auctioned property at the time of the auction, and the highest bidder is the one who buys the property in question. After all, the applicant was not at the auction, and there is no evidence regarding the market trend and prices of cattle at the time the auction in question took place. On the applicant's prayer for payment of the sum of Tshs. 74,750,000, being the proceeds of the auction, I am in agreement with Mr. Msafiri that the applicant deserves to receive the proceeds of the auction because the law provides for it, [see Section 47(7) of the Police Force and Auxiliary Act]. Since the lower court ordered that in case the owner of the heads of cattle in question shows up, the proceeds of the sale can be refunded to him/her, what the applicant is supposed to do is to comply with the lower court's order.

In the upshot, this application succeeds to the extent explained above. I give no order as to costs.

Dated this 17th day of October 2023.


B.K. PHILLIP

JUDGE.

