



**Assets Recovery Agency v Mwangi & 2 others (Anti-corruption and Economic Crimes Miscellaneous E030 of 2024) [2024] KEHC 14600 (KLR)
(Anti-Corruption and Economic Crimes) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14600 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES MISCELLANEOUS E030 OF 2024
EN MAINA, J
NOVEMBER 22, 2024

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

ANTHONY NYAGA MWANGI 1ST RESPONDENT

ERNEST GITHINJI WAWERU 2ND RESPONDENT

PETER MUKANGU MWANGI 3RD RESPONDENT

RULING

1. This is a ruling on two applications by the 1st and 3rd Respondents both seeking to rescind, set aside or vary the preservation order issued by this court on 1st July 2024. The impugned order stated as follows: -

“1) That preservation order be and is hereby issues prohibiting the 1st, 2nd and 3rd Respondents and/or their employees, agents, servants or any other persons acting on their behalf from selling, transferring or dealing in any manner with the following properties/assets developments improvements and structures thereon:

- a. LR No. Ruiru East Block 1/5093 registered in the name of the 1st Respondent, Anthony Nyaga Mwangi.
- b. L.R. No. Kiambaa/Thimbigua/6503 Registered in the name of the 3rd Respondent, Ernest Githinji Waweru.



2. That preservation an order be and is hereby issued preserving any rental income, benefit of profit accruing from L.R No. Ruiru East Block 1/5093 registered in the name of the 1st Respondent, and L.R No. Kiambaa/Thimbigua/6503 registered in the name of the 3rd Respondent.
3. That an order be and is hereby issued directing that any rent, benefit or profit generated from properties known as LR No. Ruiru East Block 1/5093 and LR No. Kiambaa/Thimbigua/6503 be deposited in the Applicant's criminal Asset Recovery Fund Account No. 1240221339 held at Kenya Commercial Bank, pending the hearing and determination of intended forfeiture application.
4. That an order be and is hereby issued directing the Chief Land Registrar to register a caveat against the records of each of the properties specified in order 1 above.
5. That the orders shall be for a period of ninety (90) days.
6. That service of the order be done within twenty-one (21) days of today's date.

Given under my Hand and the Seal of this Honourable court this 1st day of July 2024.

Issued at Nairobi this 1st day of July 2024.”

2. The first application is the 1st Respondent's Notice of Motion dated 31st July 2024. The same seeks to discharge the preservation order so as to give him unconditional access and use of any rental, benefit or profit accruing from asset LR No. Ruiru East Block 1/5093 which is registered in his name. The order also seeks to revoke or lift the caveat placed on the asset as a result of the impugned preservation order. The gist of the application is that the impugned order was based on unreasonable and baseless apprehension of the law as it was not demonstrated that there was imminent danger or risk transferring or wasting the property; that the order was not merited as the ARA/Respondent did not establish a causal link between the acquisition and development of the asset and the corrupt conduct alleged against him; that the asset was acquired and developed before the alleged corrupt conduct and further that the impugned order has left the 1st Respondent/Applicant with no source of income hence exposing his family and dependents to hardship and poverty. Further that the order, without just course, condemned the 1st Respondent/Applicant's spouse one Margret Wangu Muriithi who has a beneficial/matrimonial interest in the property.
3. The second application is the 3rd Respondent's Notice of Motion dated 19th September 2024. The same is expressed to be brought under Section 89 of the POCAMLA, Articles 22, 23 and 40 of *the Constitution* and Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Orders 51 Rules 1 and 4 of the Civil Procedure Rules. The application seeks to vary the preservation order so as to discharge, property LR No. Kiambaa/Thimbigua/6503 on the ground that the same belongs to the 3rd Respondent and not to the 1st Respondent as alleged.
4. The applications were vehemently opposed. In a replying affidavit sworn by Cpl. Isaac Nakitare on 18th September 2024 he deposes that contrary to allegations by Ms Margret Wangu Muriithi, in her affidavit sworn in support of the 1st Respondent's application, Property LR No. Ruiru East Block 1/5093 belongs to the 1st Respondent as sole proprietor; that she did not annex any evidence of that property's encumbrance on account of Kshs. 7 million; that there is no evidence that she has been repaying that loan or that she is the one who developed the property; that to the contrary there is evidence



that the funds used to develop the property were stolen from the Information & Communication Technology Authority (ICTA) and that the preservation order is necessary to preserve the subject matter. Further that Ms Margret Wangu Muriithi, the 1st Respondent's spouse, has admitted to owning a business which generates income and she is therefore in good financial standing as would enable her meet her needs. He also refers to a business known as Imaney's Daycare and Kindergarten Ltd whose shareholders are the 1st Respondent and his spouse which he deposes generates income which can sustain them and hence they will not suffer any hardship. He urges this court not to rescind or vary the preservation order.

5. In response to the 3rd Respondent's application, Cpl. Isaac Nakitare deposes that the property LR No. Kiambaa/Thimbigua/6503 was acquired by the 2nd Respondent through funds stolen from ICTA and is hence a proceed of crime; that it was only transferred to the 3rd Respondent so as to conceal and disguise its real source. That it was therefore used to launder the stolen money and that the 3rd Respondent was not able to explain how the property was developed. He deposes that investigations have revealed that the 3rd Respondent is in a good financial position and shall not be affected by the preservation order and therefore the same should not be discharged.
6. The application was canvassed through written submissions. I have carefully considered the two applications, the grounds thereof, the annexures, the rival submission of the learned Counsel for the parties and the law.
7. Applications for preservation orders are granted ex parte and may only be set aside upon the person affected fulfilling the requirements set out in Section 89 of the POCAMLA.
8. The burden to prove that the preservation order has deprived the person concerned, in this case the 1st Applicant, of his means to provide for reasonable living expenses hence occasioned him undue hardship as a result and that such hardship outweighs the risk that the preserved property may be destroyed, lost, damaged, concealed or transferred, lies with the person concerned/1st Applicant.
9. "Reasonable living expenses are the expenses a person necessarily incurs in achieving a reasonable standard of living. This is a standard that meets a person's physical, psychological and social needs...." See the case of Assets Recovery Agency v Lilian Wanja Muthoni t/a Sahara Consultants & 5 Others [2019] eKLR.
10. Whereas a party may seek the rescission of a preservation order on grounds that it was obtained through fraud or non-disclosure of material facts and is hence not merited, in the circumstances of these proceedings, given the facts being relied upon by the 1st Applicant, it would be more appropriate that the merits of the proceedings be litigated and heard at the stage of hearing the forfeiture application which as I understand has already been filed in court.
11. Where a party is genuinely interested in having the court to make provision for reasonable living expenses then they ought to approach the court under Section 88 of the POCAMLA which states: -

“ 88. Provision for expenses

- (1) A preservation order may make such provision as the court deems fit for reasonable living expenses of a person holding an interest in property subject to a preservation order and his family or household.
- (2) A court shall not make provisions for any expenses under subsection (1) unless it is satisfied that—



- (a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and
- (b) the person has disclosed under oath all his interest in the property and has submitted to that court an affidavit.”

12. Be that as it may, the 1st Applicant’s Notice of Motion which is brought under Section 89 of the POCAMLA is properly before the court. The only issue is whether it is merited. To succeed in proving that the preservation order has deprived him of reasonable living expenses the 1st Applicant must, in my view, demonstrate that he could only meet those expenses from the preserved property but not any other. In other words, that he has no other means of income.
13. The order granted under Section 89 is discretionary. The Applicant must satisfy the conditions as the court’s discretion cannot be exercised at a whim. In this case however, the 1st Applicant instead of trying to convince this court that he has no other means of meeting his and his family’s living expenses is more concerned with proving that his spouse also has a stake in the preserved property. He also seeks to be allowed to access all the income that is derived from the property without indicating what the living expenses he wishes to meet with that income are. It is apparent from the grounds on the face of the application and the facts deposed to in the supporting affidavit that by his application the 1st Applicant is concerned with the procedure by which preservation order was granted but not merely with its variation as provided in Section 89. He has not provided this court with any evidence as would assist it to fathom what his living expenses are or whether in fact they are reasonable. Additionally, apart from stating that their kindergarten business went under, he has not furnished this court with evidence to confirm that that is in fact the position. The averment that his spouse was using the rental income from the property to offset loans is not a ground for this court to rescind the order as loans do not amount to living expenses. Accordingly, the application of the 1st Applicant is not merited.
14. The 3rd Respondent’s application also concerns the merits of the Applicant’s case and the same must also await to be litigated during the hearing of the forfeiture application.
15. The upshot is that the two Notices of Motion are dismissed as they do not meet the threshold. The costs thereof shall abide the main forfeiture application.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 22ND DAY OF NOVEMBER 2024.

E N MAINA

JUDGE

