



**Attorney General v Kabuga & 2 others (Anti Corruption and Economics
Crime Miscellaneous Application 38 of 2016) [2023] KEHC 3666 (KLR)
(Anti-Corruption and Economic Crimes) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI CORRUPTION AND ECONOMICS CRIME
MISCELLANEOUS APPLICATION 38 OF 2016**

EN MAINA, J

APRIL 27, 2023

BETWEEN

THE ATTORNEY GENERAL APPLICANT

AND

**FELICIAN KABUGA ALSO KNOWN AS KABUGA FARACEAN 1ST
RESPONDENT**

**MUKAZITONI JOSEPHINE ALSO KNOWN AS MUKAZITON
JOSEPHIN 2ND RESPONDENT**

KENYA TRUST COMPANY LIMITED 3RD RESPONDENT

Court issues preservation orders under international law for property owned by a fugitive and non-fugitive

The case arose from an application by the Attorney General of Kenya, seeking preservation orders against property jointly owned by Felician Kabuga, an internationally wanted fugitive, and his spouse. Kabuga, indicted by the International Criminal Tribunal for Rwanda (ICTR) for crimes of genocide and crimes against humanity, was using his Kenyan assets to evade capture. The case hinged on Kenya's international obligations under United Nations Security Council Resolutions to freeze the assets of international fugitives, specifically under Chapter VII of the UN Charter. The court had to determine whether Kenya's domestic laws could support such asset freezing in the absence of specific legislation at the time the proceedings were initiated. The court upheld the State's obligation to comply with international treaties, despite the constitutional protection of property rights, holding that freezing orders were necessary to support international justice.

Reported by John Ribia



International Criminal Law – international obligations – duty to assist international criminal tribunals – international responsibility and cooperation in pursuing fugitives indicted for war crimes - freezing orders - preservation of property under international law, enforcement of Security Council resolutions - freezing of property jointly owned by a fugitive and spouse – applicable law - whether Kenya’s domestic laws in 2008 (before the Constitution of Kenya, 2010 and the Proceeds of Crime and Anti-Money Laundering Act) allowed for the preservation, freezing, or seizure of property belonging to a fugitive against whom there was a valid warrant of arrest - Constitution of Kenya, 2010 articles 2(5)(6), 25, 39, 40, 49, and 60; Geneva Convention Act (Cap 198) section 60; Vienna Convention on the Law of Treaties articles 26,27, and 46; United Nations Security Council Resolution 955 (1994); United Nations Security Council Resolution 1503 (2003); United Nations Security Council Resolution 1534 (2004); Proceeds of Crime And Anti-Money Laundering Act (Cap 59A) section 115(1) (2).

Land Law – joint ownership – freezing orders against joint property – where a fugitive and a non-fugitive jointly owned land – rights of non-fugitive where an order freezing the fugitive’s land was to be enforced - whether the court could properly order the freezing, preservation, attachment or seizure of property where doing so will affect a joint owner, who had equal right to the property and who was not a fugitive against whom there was a valid and enforceable warrant of arrest - whether the court could freeze property that was jointly owned by a fugitive and a non-fugitive and that had already passed to the non-fugitive via death of the fugitive - Land Act (Cap 284) section 2.

Brief facts

The Attorney General of Kenya sought orders to preserve property jointly owned by Felician Kabuga, who was indicted by the International Criminal Tribunal for Rwanda (ICTR) for genocide-related crimes, and his spouse. The application relied on Kenya’s international obligations under several United Nations Security Council resolutions requiring member states to freeze assets of individuals aiding fugitives from international justice. Kabuga had evaded capture by using his wealth, including proceeds from Kenyan properties, to finance his flight and interfere with the ICTR’s proceedings. The property in question was jointly owned by Kabuga and his wife, and managed by Kenya Trust Company. The Attorney General argued that the funds from this property were being used to evade justice.

Issues

- i. Whether Kenya’s domestic laws in 2008 (before the Constitution of Kenya, 2010 and the Proceeds of Crime and Anti-Money Laundering Act) allowed for the preservation, freezing, or seizure of property belonging to a fugitive against whom there is a valid warrant of arrest.
- ii. Whether the court could properly order the freezing, preservation, attachment or seizure of property where doing so will affect a joint owner, who had equal right to the property and who was not a fugitive against whom there was a valid and enforceable warrant of arrest.
- iii. Whether the court could freeze property that was jointly owned by a fugitive and a non-fugitive and that had already passed to the non-fugitive via death of the fugitive.

Held

1. Unlike the section 115(1) and (2) of the Proceeds of Crime and Anti-Money Laundering Act, (POCAMLA) as at the time of institution of the instant proceedings there was no legislation in Kenya specifically providing for preservation of the property of a fugitive hence the reason for invoking the jurisdiction of the High Court under section 60 of the Repealed Constitution. Sections 115(2) of the Proceeds of Crime and Anti-Money Laundering Act as read with section 82 of the POCAMLA now cloth this court with the requisite jurisdiction to issue such orders. The application would be *ex parte* and hence the preservation order would be issued *ex parte* but for a limited period of ninety days.
2. Kenya being a member state of the United Nations it was legally obligated to observe the United Nations Resolutions. Section 6 of the Sixth Schedule of the Constitution of Kenya 2010 provided that all rights and obligations, however arising, of the Government or the Republic and subsisting



- immediately before the effective date shall continue as rights and obligations of the national government or the Republic under the Constitution.
3. Resolution 1503 (2003) which was adopted by the Security Council urged member states to consider imposing measures against individuals and groups or organizations assisting indictees at large to evade justice including measures designed to restrict the travel and freeze the assets of such individuals, groups or organizations. Acting under Chapter VII of the Charter of the United Nations a special obligation was placed on Kenya, Rwanda, the Democratic Republic of Congo (DRC) and Congo to intensify co-operation to bring the 1st respondent and all other indictees to the International Criminal Tribunal for Rwanda (ICTR).
 4. The impugned resolutions did not conflict with Constitution and the law as to warrant the court not to apply them. Although the 1st respondent had been brought to book and was facing trial at the ICTR, it was necessary to issue a preservation/freezing order on the property so as to assist to bring him to book and to aid Kenya in meeting its international obligation noting that the monies collected from the property was his property albeit jointly with his spouse, and was most likely being used to assist him to evade arrest. The question of whether or not the property was lawfully acquired was immaterial.
 5. The property in issue was jointly owned by the 1st respondent and his spouse who was named in the proceedings as the 2nd respondent though deceased. As the proprietorship was a joint tenancy the rights of the proprietors were indivisible as per section 2 of the Land Act. It was not possible to divide the ownership so as to freeze or preserve only that portion of the property that belongs to the 1st respondent. As such, the 1st respondent being a proprietor with equal rights to the property, the court was entitled to freeze/preserve the whole of the property
 6. It was unfortunate that the 2nd respondent's rights were affected. It was instructive that that was not a matrimonial property where the court would have been obligated to consider the plight of the 1st respondent's spouse as such. It was also not lost to the court that as at the time of writing this ruling the rights of the 2nd respondent to the property had been extinguished by reason of her demise and the property now solely belonged to the 1st respondent.

Application dismissed.

Orders

2nd respondent ordered to pay the costs of both.

Citations

Cases

Kenya

1. *Mongare v Attorney General & 3 others* Civil Appeal 123 of 2012; [2014] KECA 887 (KLR) - (Applied)
2. *Muslims for Human Rights (Muhuri) & another v Inspector General of Police & 5 others* Petition 19 of 2015; [2015] KEHC 5143 (KLR) - (Applied)
3. *Rono, Mary v Jane Rono & another* Civil Appeal 66 of 2002; [2005] KECA 326 (KLR) - (Applied)

Statutes

Kenya

1. Constitution (Repealed) section 60 - (Interpreted)
2. Constitution of Kenya articles 2(5)(6); 25; 39; 40; 49; 60; Schedule 6; section 6, 7- (Interpreted)
3. Land Act (cap 280) section 2 - (Interpreted)
4. Proceeds of Crime And Anti-Money Laundering Act (cap 59A) section 115(1)(2) - (Interpreted)

Swaziland

Geneva Convention Act (cap 198) section 60 - (Interpreted)

Instruments

Vienna Convention on the Law of Treaties, 1969 articles 26, 27, 46



Advocates

None mentioned

RULING

Procedural History

1. On May 5, 2008, the Attorney General, through the Director of Public Prosecutions filed an originating motion dated May 5, 2008 which is supported by the affidavit of Thomas Khamala Bifwoli, State Counsel sworn on even date. The application seeks orders as follows:-
 - “1) Spent.
 2. This honourable court be pleased to issue Orders for the Preservation of the property known as House No 6 on LR No.1/1154 (Spanish Villas) (“the subject property”) and Restraining the above-named respondents and any of them whether jointly or severally or by their Agents, Servants or in any manner or means from alienating, selling, disposing off, wasting or damaging the subject property or any part thereof or any interests or rights therein until the conclusion or other determination of the case (Case No ICTR-97-22-1) pending in the International Criminal Tribunal for Rwanda (The ICTR) against the 1st respondent herein or until further orders of this honourable court.
 3. All rental income or proceeds collected or received by the 3rd respondent herein or any other managing agent from the use or occupation of the subject property less any management fee payable be deposited with the Registrar of the High Court of Kenya until the conclusion of the case referred to in paragraph 1 above or until further orders of this honourable court.
 4. Service of these orders be effected upon the above named respondents by way of advertisement in at least one local, one regional and one international newspaper.
 5. There be liberty for any of the above-named parties to apply for extension,
 6. The above-named parties are at liberty to apply for extension, variation, discharge or setting aside of these orders or any of them.”
2. The originating motion was made *ex parte* under section 60 of the repealed Constitution, the Geneva Convention Act Cap 198, Kenya’s obligations under International law and the Resolutions of the United Nations Security Council and was premised on grounds that: -
 - “1. Kenya is a signatory to the United Nations Charter and a full member of the United Nations.
 2. Kenya's obligations under international law include an obligation to abide by the resolutions of the United Nations Security Council especially where such resolutions are made under Chapter VII of the UN Charter.



3. The UN International Criminal Tribunal for Rwanda (ICTR) was established in 1994 by UN Security Council Resolution under Chapter VII of the UN Charter that imposes an obligation upon all member states of the United Nations to abide by and fully comply with the resolutions of the UN Security Council made under the said Chapter VII.
4. Several UN Security Council Resolutions call for cooperation of States with the ICTR in the search and arrest of fugitives as well as the tracing and freezing of their assets.
5. The 1st respondent is accused of having committed, during 1994 Rwanda, various international crimes including genocide, conspiracy to commit genocide, incitement to commit genocide, complicity in genocide and crimes against humanity, for which he was indicted in 1997 and an international warrant of arrest issued in respect thereof.
6. Resolution Nos. 1503 of 2003 and 1534 of 2004 of the UN Security Council specifically and by name mention Kenya's obligations to cooperate with the UN-ICTR, further calling upon Kenya to intensify cooperation in the arrest and detention of the fugitive Felicien Kabuga, the 1st Respondent herein.
7. The highlights of UN Security Council Resolutions stressing State cooperation and State obligations in relation to the matter at hand include:

Resolution 955 (1994)

Acting under Chapter VII of the Charter of the United Nations,

1. Decides hereby, having received the request of the Government of Rwanda (S/ 1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

Resolution 978[1995]

Stressing the need for States to take as soon as possible any measures necessary under their domestic law to implement the provisions of resolution 955 (1994) and of the Statute of the International Tribunal for Rwanda.



1. Urges States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda;

Resolution 1165[1998]

Urges all States to cooperate fully with the International Tribunal for Rwanda and its organs in accordance with resolution 955 (1994), and welcomes the cooperation already extended to the International Tribunal in the fulfilment of its mandate;

8. The UN Security Council Resolutions specifically calling upon Kenya to cooperate include:

Resolution 1503 [2003]

Welcoming steps taken by States in the Balkans and the Great Lakes region of Africa to improve cooperation and apprehend at-large persons indicted by the ICTY and ICTR, but noting with concern that certain States are still not offering full cooperation,

Urging Member States to consider imposing measures against individuals and groups or organizations assisting indictees at large to continue to evade justice, including measures designed to restrict the travel and freeze the assets of such individuals, groups, or organizations,

Urging the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy),

Noting that the above-mentioned Completion Strategies in no way alter the obligation of Rwanda and the countries of the former Yugoslavia to investigate those accused whose cases would not be tried by the ICTR or ICTY and take appropriate action with respect to indictment and prosecution, while bearing in mind the primacy of the ICTY and ICTR over national courts,

Noting that the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular,



3. Calls on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR;
4. Calls on all States to cooperate with the International Criminal Police Organization (ICPO-Interpol) in apprehending and transferring persons indicted by the ICTY and the ICTR;

Resolution 1534 [2004]

Recalling that resolution 1503 [2003] called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies), and requested the Presidents and Prosecutors of the ICTY and ICTR, in their annual reports to the Council, to explain their plans to implement the Completion Strategies,

Reiterating its support for the ICTY and ICTR Prosecutors in their continuing efforts to bring at large indictees before the ICTY and the ICTR,

Noting with concern the problems highlighted in the presentations to the Security Council on 9 October 2003 in securing adequate regional cooperation, Acting under Chapter VII of the Charter of the United Nations,

2. Reaffirms the necessity of trial of persons indicted by the ICTR and reiterates its call on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo and the Republic of the Congo to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on all at-large indictees of the ICTR to surrender to the ICTR;
3. Emphasizes the importance of fully implementing the Completion Strategies, as set out in paragraph 7 of resolution 1503 [2003], that calls on the ICTY and ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial



activities at first instance by the end of 2008 and to complete all work in 2010, and urges each Tribunal to plan and act accordingly;

6. Requests each Tribunal to provide to the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments;
7. Declares the Council's determination to review the situation, and in the light of the assessments received under the foregoing paragraph to ensure that the time frames set out in the Completion Strategies and endorsed by resolution 1503 [2003] can be met;
 9. In addition to the obligations for cooperation by Kenya with the ICTR under the aforementioned Resolutions, there is the additional obligation under the Statute and the Rules of Procedure and Evidence of the ICTR to Cooperate.
 10. The Attorney-General has officially received a request from the Prosecutor of the ICTR for further cooperation and especially for the freezing of the assets of the 1st respondent. This request imposes an additional obligation upon the State to forthwith comply therewith.
 11. Joint investigations carried out during December 2007 by Kenya Police/ICTR Officers have revealed that the 1st respondent and his wife the 2nd respondent jointly own a house (No.6) on LR No 1 /1154 located in Kilimani Estate along Lenana Road ("Spanish Villas") in Nairobi. The said property was acquired in 1995.
 12. Since January 1998, the management of the said house was taken over by



Kenya Trust Company Ltd, the 3rd respondent herein under a contract signed by Uwamariya Bernadette, the 1st 2nd respondents' Daughter.

13. The rental income from the said house was collected by the 3rd respondent and deposited in the 1st respondent's Bank Accounts (No.24872) held at Commercial Bank of Africa, Wabera St. Nairobi.
14. The same Bank Account was closed in 2005 whereupon the rental income was henceforth deposited in the 3rd respondent Bank Account (No 0150032016) held at the same Bank.
15. Since September, 2006 the 3rd respondent has been sending the rental income from the said house on a quarterly basis to an account (No 000-0760048-53) held at Banque De La Poste in Belgium.
16. The joint investigations further reveal that the 1st respondent has also been an owner/shareholder and director of various companies and businesses, both registered and unregistered in Kenya whereat he has, by himself and/or by his agents and/or employees failed and/or refused to pay lawful taxes and other revenue from the proceeds of trade due to the agencies of the Government of Kenya.
17. The 1st respondent is using his substantial wealth including that generated in Kenya to avoid capture, to assist other ICTR fugitives at large elude capture and to substantially interfere with prosecution witnesses who have or are presently giving evidence at the trials of the other accused persons at the ICTR in Arusha.
18. In view of the information now available to the Government of Kenya in respect of the 1st respondent, the ICTR Prosecutor may, if Kenya does not



fully cooperate as requested, take the following possible lines of action against Kenya:

- a. Report to the Security Council at its next or any other session or at any other time through the Secretary General of the United Nations that Kenya has failed and/or refused and/or is delaying its cooperation in the freezing of the assets of the ICTR indictee/1st respondent;
 - b. Seek to satisfy the President of the ICTR that Kenya has failed to comply with an obligation under Rule 61 of the ICTR Statute in respect of a request by the Prosecutor "to adopt provisional measures to freeze the assets of the accused" and upon being so satisfied, the ICTR President shall notify the Security Council thereof.
19. The further implication of such a referral by the ICTR President is the possibility of sanctions against Kenya by the Security Council.
 20. There is urgency in the matter as the ICTR Completion Strategy approved by the Security Council requires the ICTR to complete the prosecution of all its current indictees by December 2008 hence the added impetus for additional measures by the government of Kenya to address the issue of the respondentfugitive.
 21. The ICTR Prosecutor is required to report to the Security Council every 6 months and in view of the additional information available to the Government that the respondentfugitive indictee has assets in



Kenya, it is necessary to freeze these assets to avoid any allegations or perceptions that Kenya may be complicit in acts of genocide.

22. Kenya has the legal and moral obligation to assist in the prosecution of international crimes of any nature wherever committed.”

3. The originating motion was heard *ex parte* by the Hon. Muga Apondi J (Retired), who by his ruling delivered on May 6, 2008, allowed the application in the following terms:-

“In view of the above analysis, I hereby concede to the application on the following terms:

- i. I hereby issue an Order for the Preservation of the property known as House No 6 on LR No 1/1154 (Spanish Villas) (“the subject property”) and Restrain the above named respondents and any of them whether jointly or severally or by their Agents, Servants or in any manner or means from alienating, selling, disposing off, wasting or damaging the subject property or any part thereof or any interests or rights therein until the conclusion or other determination of the case (Case No ICTR-97-22-1) pending in the International Criminal Tribunal for Rwanda (The ICTR) against the 1st Respondent herein or until further orders of this honourable court.
- ii. All rental income or proceeds collected or received by the 3rd respondent herein or any other managing agent from the use or occupation of the subject property less any management fee payable be deposited with the Registrar of the High Court of Kenya until the conclusion of the case referred to in paragraph 1 above or until further orders of this honourable court.
- iii. Service of these orders be effected upon the above named respondents by way of advertisement in at least two local, one regional and one international papers.
- iv. The above-named parties are at liberty to apply for extension, variation, discharge or setting aside of these orders or any of them.

I hereby decline to make any orders to costs at this stage. Those are the orders of the court.”

4. Subsequently the 2nd respondent filed a notice of motion dated July 28, 2008 and sought to set aside the above orders and the maintenance of status quo ante. Simultaneously with that application, the 2nd respondent filed a notice of preliminary objection which was premised on the following grounds:-

- “ 1. The suit/application is incompetent, Bad in law in and a non-starter so far as it is founded on non-existent criminal proceedings.
2. The filing of the suit as a miscellaneous criminal application by originating notice of motion is fundamental defective in procedure consequently rendering it a nullity and/or void ab initio.
3. The Court has no jurisdiction to entertain the application or grant the orders sought.



4. The court is not an agent of the International Criminal Tribunal for Rwanda (ICTR) or a chamber of the ICTR.
 5. The grant of the order sought is not within the competence of the ICTR Chamber and this court cannot make orders not within the jurisdiction of or ultra vires a Chamber of the ICTR
 6. No justifiable claim or cause of action is disclosed or set out as against the second applicant or at all.
 7. The Geneva convention Act is not applicable and cannot form the basis of the application.
 8. Resolutions of the Security Council do not have the force of law in Kenya and cannot form the basis of or legally support the application.”
5. The preliminary objection was heard *inter partes* and by a ruling delivered on June 30, 2009 the Hon. Muga Apondi J, (Retired), dismissed the preliminary objection and held:-
- “(a) For the preservation of the property known as House No. 6 on LR No 1/1154 (Spanish Villas) (“the subject property”) and restraining the above names respondents and any of them whether jointly or severally or by their agents, servants of in any other manner or means from alienating, selling, disposing off, wasting or damaging the subject property or any part thereof or any interests or rights herein until the conclusion of other determination of the case. (Case No ICTR -97-22-1) pending in the International Criminal Tribunal for Rwanda (The ICTR) against the 1st respondent herein or until further orders of this honourable court.
 - (b) All rental income or proceeds collected or received by the third Respondent herein or any other managing agent from the use or occupation of the subject property less any management fee payable be deposited with the Registrar of the High Court of Kenya until the conclusion of the case referred to in paragraph 1 above or until further orders of this honourable court.”
6. Being aggrieved by the above ruling, the 2nd respondent appealed against the ruling. However, in a judgment delivered on September 25, 2015 the Court of Appeal dismissed the appeal on grounds that the preliminary objection did not raise a purely point of law and that there were several contested facts that required to be heard at the trial. The court observed that: -
- “It was contestable and uncertain whether UN Security Council Resolutions are applicable and enforceable in Kenya. The issue of whether the proceeds of the suit property were being utilized to finance a fugitive on the run from international justice system was a contested one.”
7. The court upheld the direction of the Hon. Muga Apondi J (Retired) to consolidate the originating motion and the notice of motion seeking to set aside the orders of the court and have them heard together. The court also directed that the proceedings now pending before the High Court between the parties hereto be concluded taking into account sections 6 and 7 of the Sixth Schedule and article 2(5) and (6) of the *2010 Constitution*. It further observed that the pertinent question in dispute between the parties was whether the laws of Kenya allow preservation, attachment, freezing or seizure of property



of a fugitive on the run against whom there was a valid and enforceable warrant of arrest and concluded that in answering that question, the nationality or citizenship of the fugitive was irrelevant.

8. Parties were then directed by this court to file written submissions in respect to the two applications.
9. Learned counsel for the ODPP/Applicant begun by describing the role suspected to have been played by the 1st Respondent in the Rwanda genocide which took place between April 6, 1994 and July 17, 1994. Counsel submitted that following the genocide the United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, which was to operate pursuant to the statute of the International Tribunal for Rwanda (The statute). Amongst the persons indicted under the Statute was the 1st respondent who was on the run and against who a warrant of arrest had been issued.
10. Counsel submitted that following the indictment of the 1st respondent and acting under Chapter VII of the Charter of the United Nations more specifically Resolutions No 955 of 1994, 978 of 1995, 1165 of 1998, 1503 of 2003 and 1534 of 2004, the United Nations Security Council called upon member states, including Kenya, to co-operate with the ICTR in tracing and freezing the assets of the 1st respondent; that it was with a view to implementing the aforesaid United Nations Security Council Resolutions that the applicant filed the originating motion herein in order to preserve the 1st and 2nd respondents' property LR No.1/1154 (Spanish Villas) House No. 6 pending hearing and determination of the ICTR case No. ICTR-97-22-1.
11. Counsel contended that the application was brought under section 60 of the repealed *Constitution of Kenya*, the *Geneva Convention Act*, Cap 198, Kenya's International law, the United Nations Security Council Resolutions, the inherent powers of the court and all enabling provisions of the law and practice.
12. On the issue of jurisdiction, learned counsel relied on the judgment of the Court of Appeal in the preliminary objection where it stated:-

“ 25. The appellant contended that since the subject property is jointly owned with Mr Felicien Kabuga, who has never entered appearance in this matter, then the High Court has no jurisdiction. In our view the jurisdiction of the High Court over property situated in Kenya is neither dependent on the type nor mode of ownership of the property i.e. jurisdiction is not dependent on whether the title to property is joint or common, in trust, leasehold or freehold; or is held as a present or future interest; jurisdiction is not dependent on whether the registered owner is physically present in Kenya; the High Court's jurisdiction over real property is dependent on the fact that the property is located within the geographical boundaries of the Republic of Kenya. The Joint ownership of House No 6 on LR No 1/1154 is immaterial in determining the jurisdiction of the High Court. As was stated by this court in *Rafiki Enterprises Limited – v – Kingway Tyres & Automart Limited*, Civil Application No. NAI 375 of 1996 in both civil and criminal matters, there is nothing in law which would prevent the High court from having jurisdiction since its jurisdiction is both original and unlimited.”

13. As to whether the law of Kenya allows for preservation of the property of a fugitive, Counsel asserted that as Kenya is a member of the United Nations and hence a State Party to the United Nations Charter it is bound by articles 25, 39, 40 and more especially 49. Counsel stated that the issue of the applicability



and enforceability of the United Nations Security Council Resolutions to Kenya was also considered by the Court of Appeal.

14. Counsel asserted that the United Nations Security Council Resolution 1503 (2003) which was adopted by the security Council at its 4817th meeting on August 28, 2003 stated:-

“Urging Member States to consider imposing measures against individuals and groups or organizations assisting indictees at large to continue to evade justice, including measures designed to restrict the travel and freeze the assets of such individuals, groups or organizations.”

15. Quoting article 26, 27 and 46 of the Vienna Convention on the Law of Treaties (Vienna Convention), Counsel stated that a party to a treaty cannot invoke the provisions of its municipal (domestic) law as justification for a failure to perform its obligations and urged this court to grant prayers 2 and 3 of the Originating Motion.
16. It is to be noted that the 2nd respondent passed away before these proceedings could be concluded and was substituted by her son Nshimyumuremyi Donatien who is the administrator of her estate.
17. The 2nd respondent who was represented by the firm of Ogetto Otachi & Company Advocates vehemently opposed the application and urged this court to set aside the *ex parte* order of preservation. Learned counsel submitted that it was not proved that income from the property was being used to aid the 1st respondent to avoid capture and substantially interfere with prosecution witnesses; that in fact the 2nd respondent has proof that the funds were actually wired into the 2nd respondent’s account. Counsel reiterated that the applicant has not demonstrated that there is any Kenyan legislation that authorizes freezing of the assets of a suspect or fugitive; that the Constitution provides for the sanctity of property as a fundamental right and the resolutions relied upon by the applicant are inconsistent with the Constitution and that furthermore there was no allegation that the property was unlawfully acquired or that it related to any crime. Learned counsel cited several cases to support the respondent’s submission that the Resolutions are not binding on Kenya and as such this court has no jurisdiction in the matter.
18. Citing the case of *Muslims for Human Rights (Muburi) & Another v Inspector General of Police & 5 others [2015]* eKLR counsel contended that the right to property can only be limited when acquired in furtherance of an offence; that in this case there is no basis for such limitation as there are no criminal proceedings against the 2nd respondent. Further that the limitation of the 2nd respondent’s right is misinformed as the same is only prejudicial to herself and no other party. Counsel urged this court to dismiss the applicant’s originating motion and in its place allow the 2nd respondent’s notice of motion to lift the preservation order and to award the costs of both applications to the 2nd respondent.
19. In its judgment on the preliminary objection the Court of Appeal dealt substantially with the issue of the enforcement and applicability of the United Nations Resolutions and whether or not they are binding on Kenya and concluded as follows:-

“86. For the foregoing reasons whereas the United Nations Security Council Resolutions Nos 955 of 1994; 978 of 1995; 1165 of 1998; 1503 of 2003 and 1534 of 2004 are binding on Kenya at the international plane and any violation thereof can invoke the state responsibility, the Resolutions are not self-executing within Kenya’s domestic legal system. As the resolutions create a binding legal obligation for Kenya they should be accorded respectful consideration within Kenya’s domestic system; they should not be accorded



the status of being a source of law to be applied by the Kenyan courts in the absence of implementing legislation; the said Security Council Resolutions are not a source of law in Kenya and are only applicable to the extent that Kenyan courts can make reference to them to determine rights and obligations under Kenyan law or where necessary to draw the court into the field of international law or to fill a gap of ambiguity where domestic law is ambiguous, uncertain or totally lacking. Kenyan courts when making reference to Security Council Resolutions cannot review or interpret the jurisdictional competence of the Security Council or of ICTR. Kenyan courts can only refer, consider and apply the resolutions to the extent that they are not inconsistent with the Constitution or any other written law. Within this context, deference to a foreign court or international organ by Kenyan courts is not acting on behalf of the foreign court but implies a respectful consideration of decisions or resolutions of these extra-territorial institutions.”

20. The Court of Appeal went further and found that the Security Council Resolutions were obligations of Kenya as at the effective date of the *Constitution of Kenya 2010*. It observed however that this case was initiated in 2008 prior to the effective date and noting that article 2(5) and (6) of the *2010 Constitution* makes International law part of Kenya law, it directed this court to conclude the proceedings taking into account sections 6 and 7 of the Sixth Schedule and article 2(5) and (6) of the *2010 Constitution*.
21. Given the foregoing finding of the Court of Appeal the issue of whether this court has jurisdiction to entertain these proceedings is behind us. As was held by that court the Resolutions create a binding legal obligation for Kenya they should be accorded respectful consideration within Kenya’s domestic system and while they cannot be accorded the status of being a source of law in the absence of implementing legislation Kenyan courts can make reference to them, inter alia, to determine rights and obligations under Kenyan law or to fill a gap or ambiguity where domestic law is ambiguous, uncertain or totally lacking. However as was held by the Court of Appeal and given the hierarchy of our law they apply only to the extent that they are not inconsistent with the constitution or any other written law.

Issues for Determination: -

- a. Whether the laws of Kenya allow preservation, attachment, freezing or seizure of property of a fugitive on the run against whom there is a valid and enforceable warrant of arrest;
- b. Whether the court can properly order the freezing, preservation, attachment or seizure of property where doing so will affect a person who has equal right to the property and who is not her/himself a fugitive against whom there is a valid and enforceable warrant of arrest;
- c. Whether the order issued by this court ought to be set aside; and
- d. Who shall bear the costs.

Issue (a) Whether the laws of Kenya allow preservation, attachment, freezing or seizure of property of a fugitive on the run against whom there is a valid and enforceable warrant of arrest;

22. Unlike the current section 115(1) and (2) of the *Proceeds of Crime and Anti-Money Laundering Act*, (POCAMLA) as at the time of institution of these proceedings there was no legislation in Kenya specifically providing for preservation of the property of a fugitive hence the reason for invoking the jurisdiction of the High Court under section 60 of the Repealed Constitution. Sections 115(2) of the *Proceeds of Crime and Anti-Money Laundering Act* as read with section 82 of the POCAMLA now cloth this court with the requisite jurisdiction to issue such orders. Indeed, the application would be



ex parte and hence the preservation order would be issued *ex parte* but for a limited period of ninety days. Be that as it may as was stated by the Court of Appeal Kenya being a member state of the United Nations it was legally obligated to observe the United Nations Resolutions. Section 6 of the Sixth Schedule of the Constitution of Kenya 2010 provides: -

“Rights, duties and obligations of the State;

Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this constitution.”

23. Resolution 1503 (2003) which was adopted by the Security Council at its meeting on August 28, 2003 urged member states to consider imposing measures against individuals and groups or organizations assisting indictees at large to evade justice including measures designed to restrict the travel and freeze the assets of such individuals, groups of organizations. Acting under Chapter VII of the Charter of the United Nations a special obligation was placed on Kenya, Rwanda, the Democratic Republic of Congo (DRC) and Congo to intensify co-operation to bring the 1st respondent and all other indictees to the ICTR.

24. As already pointed out there was a gap in our law as there was no legislation to freeze the known assets of the 1st respondent in Kenya so as to comply with the above obligation. It is for that reason that the Hon Muga Apondi, J (Retired) invoked the unlimited jurisdiction of this court under the new repealed section 60 of the Constitution to fill in the gap, a thing which even the Court of Appeal recognized is permissible. (See the case of Mary Rono v Jane Rono Civil Appeal No 66 of 2002 [2005]eKLR and the case of Dennis Mogambi Mongare v The Attorney General & others Civil Appeal No 123 of 2012 [2014] eKLR. See also paragraph 81 of the Court of Appeal judgment where it held:-

“ 81. Having evaluated the comparative jurisprudence from different countries we are now in position to answer the question whether UN Security Council Resolutions that are subject of this appeal are binding, applicable and enforceable in Kenya. We have established that the said Resolutions are binding on Kenya as a member of the United Nations. At the domestic level, Kenyan courts have held that resort to international customary law and international instruments ratified by Kenya is proper in order to fill a gap or uncertainty in law in the absence of implementing domestic legislation. We are also convinced that a court in Kenya ought not to restrict the right of the Sovereign Republic of Kenya to respect and observe her international obligations unless there are compelling reasons – a court of law ought not to encourage the country to violate her international obligations.”

25. I have considered the impugned resolutions and it is my finding that there is no conflict between them and our Constitution and the law as would warrant this court not to apply them.

26. Although the 1st respondent has now been brought to book and is currently facing trial at the ICTR I agree with and adopt the ruling of Muga Apondi J (Retired), that it was necessary to issue a preservation/freezing order on the property so as to assist to bring him to book and to aid Kenya in meeting its international obligation noting that the monies collected from the property was his property albeit jointly with his spouse, and was most likely being used to assist him to evade arrest. The question of whether or not the property was lawfully acquired is immaterial.



27. I would be reluctant to set aside the preservation order in view of the grave charges against the 1st respondent and the fact that the trial is yet to be concluded.

Issue (b) Whether the court can properly order the freezing, preservation, attachment or seizure of property where doing so will affect a person who has equal right to the property and who is not her/himself a fugitive against whom there is a valid and enforceable warrant of arrest;

28. It is not in doubt that the property in issue is jointly owned by the 1st respondent and his spouse who is named in these proceedings as the 2nd respondent though now deceased. The question that arose is whether the court could properly freeze/preserve the property yet she has an equal right to the property. My finding on this issue is that as the proprietorship is a joint tenancy the rights of the proprietors are indivisible – see section 2 of the *Land Act*. That being the case, it is not possible to divide the ownership so as to freeze or preserve only that portion of the property that belongs to the 1st respondent. As such, the 1st respondent being a proprietor with equal rights to the property, the court was entitled to freeze/preserve the whole of the property and it is unfortunate that the 2nd respondent's rights were affected. It is instructive that this was not a matrimonial property where the court would have been obligated to consider the plight of the 1st respondent's spouse as such. It is also not lost to this court that as at the time of writing this ruling the rights of the 2nd respondent to this property had been extinguished by reason of her demise and the property now solely belongs to the 1st respondent.

Issue (c) Whether the order issued by this court ought to be set aside;

29. Having found that this court has jurisdiction to freeze/preserve the property and that the ownership thereof is indivisible in view of the joint ownership, I think I have said enough to show that the order ought not to be set aside.

Issue (d); who shall bear the costs?

30. Costs follow the cause and in this case the 2nd respondent not being successful in both applications is ordered to pay the costs of both.
31. Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF APRIL 2023

E N MAINA

JUDGE

