



Assets Recovery Agency v Odiero (Miscellaneous Civil Application E027 of 2023) [2023] KEHC 25648 (KLR) (Anti-Corruption and Economic Crimes) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
MISCELLANEOUS CIVIL APPLICATION E027 OF 2023
EN MAINA, J
NOVEMBER 23, 2023**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

ANTONY KEFA ODIERO RESPONDENT

RULING

1. By an order issued on 25th August, 2023 the court (Lady Justice D Kavedza), inter alia preserved: the funds USD 368,185.77 held in the Respondent’s bank account number 02006230xxxxxx in National Bank of Kenya Limited; Motor vehicle registration number KDE 369G Range Rover; and, Motor vehicle registration number KCN 880Q Mercedes Benz E250.
2. The Respondent/Applicant, by a Notice of Motion dated 8th September, 2023 – brought under Sections 81 and 89 of the *Proceeds of Crimes and Anti-Money Laundering Act* (herein after referred to as “POCAML” or “the Act”); and Order 45 Rule 2 of the *Civil Procedure Rules*, 2010 – seeks for the orders that:
 1. Spent
 2. The Honourable court be pleased to discharge, vary and /or set aside its orders of 25th August, 2023 directing the preservation of the Respondent’s motor vehicles registration No. KDE 369G, Range Rover, Chassis number SALGA2JE2EA1xxxxxx and KCN 880Q, Mercedes-Benz E250, Chassis number WDD2120472Axxxxxx and/or in the alternative
 3. The Applicant to release motor vehicles registration No. KDE 369G, Range Rover, Chassis number SALGA2JE2EA151305 and KCN 8800, Mercedes-Benz E250, Chassis number



WDD2120472Axxxxxx upon registration of a caveat by the Director General of the National Transport and Safety Authority;

4. The Honourable Court to order for the release of USD 60,000 held in the Respondent's account 0200623xxxxxx domiciled at National Bank of Kenya, Yaya Centre branch;
5. Cost of this application be provided for.
3. The Application is based on the grounds on the face of it, and on the grounds averred in the Supporting Affidavit sworn by Antony Kefa Odiero evenly dated.
4. In sum, the Respondent/Applicant's (Antony Kefa Odiero) case is that the Applicant/Respondent (herein after referred to as "Assets Recovery Agency" or the "Agency") has not disclosed any evidence indicating that his account held at the National Bank under Account Number 0200623xxxxxx has been used to perpetuate criminal activities. Nevertheless, that the actions of the Applicant/Respondent have caused him [Respondent/Applicant] undue hardship and interfere with his normal day to day activities.
5. In particular, that he is to pay staff salaries for the month of August, 2023; and the arrears for the last two (2) months. Also, that the two (2) motor-vehicles are his means of transport and tools of trade; hence, him and his staff are rendered immobile.
6. It is averred that the Applicant/Respondent focus - based on their own application dated 22nd August, 2023 and annexures therein having the Respondent's/Applicant's suspect transactions - on the subject bank account from 29th September, 2020 to 16th February, 2023.
7. To the Respondent/Applicant, there is no nexus and/or transaction in/between the said dates involving the two (2) motor-vehicles which are preserved; since he was registered as the owner of motor vehicles: Mercedes E250 registration number KCN 880Q on 10th May, 2019; and Range Rover registration number KDE 369G on 4th October, 2021.
8. The Respondent/Applicant maintains that there lacks any existence of transactions [from the subject account within the period specified by the Agency] for payment and/or transaction involving the two (2) motor vehicles; despite the fact that the Applicant/Respondent [Agency] in their application averred that the purchase of the motor vehicles, identified by the Agency, were acquired using the illegitimately acquired funds.
9. According to the Respondent/Applicant, despite the Applicant/Respondent [Agency] having obtained ex-parte orders freezing his subject account in Misc Criminal Application E092 of 2023 for more than 55 days, they still lack any evidence to implicate the Respondent/Applicant in any criminal or unlawful conduct. As to the motor vehicles, that the same can still be preserved by a caveat being registered against them, while the matter is being heard and determined on its merits.
10. Further, the Respondent/Applicant (Antony Kefa Odiero) in his Supporting Affidavit deponed as follows, that:
 - "(1) I am an adult male of sound mind. I am the Respondent. I am well seized of the facts and issues arising in the matter and I swear this Affidavit in support of this application;
 2. I am business man involved in insurance brokerage, flower export among other businesses. I particularly run two companies as a Director/Shareholder namely Ensign Insurance Brokers Limited and AIB Petals Limited;



3. I operate a dollar account with the National Bank of Kenya, Yaya Centre Branch identified by the name Antony Kefa Odiero Acc. No. 020062xxxxxx ;
4. I am aware that on 28th June 2023, the Applicant vide an ex-parte application in Misc Criminal Application E092 of 2023 sought to freeze my account under the guise of investigating a suspected case of money laundering and drug trafficking activities. I was not listed as a party and neither was I made aware of the said application;
5. The Magistrate Court issued an order to freeze my account for 21 days. I only got to learn of this order when I went to deposit money in the said account on 1st July 2023;
6. On 20th July 2023, the Applicant sought an extension of the said order and the Magistrate Court issued a further 14 days' extension till 3rd of August 2023;
7. On 3 August 2023, the Applicant had sought and obtained a further extension of the freezing order till 18/08/2023;
8. Vide summons dated 4th August 2023, I was summoned by the Applicant officers to appear on 8 August 2023 to respond to inquiries in relation to an alleged offence of money laundering;
9. I honoured the summons by the Applicant and attended to the said summons on 8th and 9th August 2023 and in the said meeting I was neither informed of any complaint or evidence of money laundering or drug trafficking allegations but was instead asked questions which purported to audit my lifestyle and source of income. Curiously the Applicant officers declined to take my business invoices which explained the cash deposits to my account;
10. On 25th August 2023 the Magistrate Miscellaneous application was closed;
11. Unknown to me, two days earlier the Applicant's approached this Court ex-parte and obtained preservation orders on cash held at my personal bank account 02006230xxxxxx domiciled at National Bank of Kenya, Yaya Centre branch and my two motor-vehicles; Range Rover registration number KDE 369G and Mercedes Benz registration KCN 8800;
12. Upon learning on social media of the preservatory (sic) orders issued by this court I voluntarily surrendered the two motor-vehicles to the Applicant on 29th August 2023;
13. The actions of the Applicant have caused me undue hardship and interfered with my normal day to day activities more particularly;
 - i. The two motor-vehicles are my means of transport and tools of trade at my offices rendering my staff and I immobile;
 - ii. Motor-Vehicle Mercedes Benz registration KCN 880Q was being used exclusively by my staff at Ensign Insurance Brokers Ltd and AIB Petals;



- iii. The Applicant's focus based on their own application dated 22nd August 2023 and annexure FM-2 is on 'suspect' transactions on my account from 29th September 2020 to 16th February 2023;
- iv. There is no nexus and/or transaction in between the said dates involving the two motor-vehicles which are preserved;
- v. To be specific, I was registered as the owner of motor vehicle Mercedes E250 registration number KCN 880Q on 10th May 2019 and Range Rover registration number KDE 369G on 4th October 2021;
- vi. There exists no transaction from the subject account, within the period specified by the Applicant for payment and/or transaction involving the two motor vehicles despite the fact that the Applicant in its application avers that;

3. That preliminary investigations established that the Respondent is involved in a suspected scheme of money laundering as flagged in his bank account and ultimately using the illegitimately acquired funds to purchase motor vehicles which is been identified by the Agency.

- 14. My motor-vehicles are susceptible to damage under the Applicant's custody as they will be parked at a basement whilst the same vehicles can be secured by a caveat being registered;
- 15. The ex-parte orders of this honourable court's orders are occasioning me and my staff undue hardship;
- 16. Despite the Applicant having obtained ex-parte orders freezing my account in Misc Criminal Application E092 of 2023 for more than 55 days, the Applicant still does not have any evidence to implicate me in any criminal or unlawful conduct;
- 17. I require USD 60,000 to be able to pay staff salaries for the month of August 2023 and the office lease for the month of August 2023 and arrears for June and July 2023;
- 18. No party will suffer any prejudice should the orders sought be granted; (sic)
- 19. I swear this Affidavit in support of to the Applicant's Notice of motion application herein while urging this Honourable Court to exercise its discretion in favour of the Applicant by granting the orders sought;
- 20. What is deponed to hereinabove is true to the best of my knowledge, information and belief sources and full particulars whereof have been disclosed."

11. In response to and opposing the Application, the Applicant/Respondent [Agency] filed their Replying Affidavit dated 27th November, 2023 deponed by Fredrick Musyoki, an investigating officer at Assets Recovery Agency.



12. The deponent avers that under Sections 81, 82, 86 and 87 of the [Proceeds of Crime and Anti-Money Laundering Act](#), the Respondent is mandated to apply, ex-parte, to court for orders prohibiting any person from dealing in any manner with any property/assets, provided that there are reasonable grounds to believe that such properties/assets are proceeds of crime, subject to such conditions as the court may specify.
13. Accordingly, that the Applicant/Respondent [Agency] went ahead to file for the preservation of the funds in the bank account, together with two (2) motor vehicles belonging to the Respondent/Applicant vide Miscellaneous Application E027 of 2023; Whereby, on 25th August, 2023 this Honourable Court granted the Applicant/Respondent [Agency] the orders sought - in accordance with Section 82 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and ordered the funds and the subject motor vehicles be preserved.
14. Thereafter, that in compliance with Section 83 (1)(2) of the [Proceeds of Crime and Anti-Money Laundering Act](#), the Respondent gazetted the court order vide Kenya gazette number 11773 dated 1st September, 2023.
15. As per the Applicant/Respondent [Agency], the Respondent/Applicant has not sufficiently demonstrated any reasonable evidence to warrant the setting aside or varying this honourable court's order issued on 25th August, 2023. That the Application dated 8th September, 2023 and the averments do not meet the threshold set under Section 89 of the [Proceeds of Crime and Anti-Money Laundering Act](#), 2009.
16. In particular, it is claimed, that the Respondent/Applicant has not proved or demonstrated that he will suffer hardship as a result of the preservation order, or that the hardship he will suffer as a result of the court order outweighs the risk of the funds - subject to the preservation order - will be destroyed, lost, damaged, concealed, or transferred.
17. It is stated that under Section 90 of the [Proceeds of Crime and Anti-Money Laundering Act](#), 2009 when preservation order is granted in accordance with Sections 81 & 82 of the [Act](#), and is in force, the Applicant/Respondent [Agency] shall apply to the High Court for orders forfeiting to the Government, all or any of the assets that is subject to the preservation order. As such, that the Applicant/Respondent will file an intended forfeiture application seeking for forfeiture of the funds, and motor vehicles in issue.
18. To the Applicant/Respondent [Agency], the assets in issue are presumed to be proceeds of crime; and thus, the Respondent/Applicant is not entitled to utilize the same; pending filing, hearing, and determination of the forfeiture application.
19. Further, that the Respondent/Applicant has not furnished this honourable court with proof of the motor vehicles being for business use considering that as the same is registered in his name, and not of either of the companies. Also, that the Respondent/Applicant cannot purport to have had only the two (2) vehicles being used by himself, and by his companies owing to the nature of his business, especially the flower business.
20. It is the Applicant/Respondent [Agency] assertion that during the subsistence of the preservation order, investigations will be ongoing to establish whether the motor vehicles have been used or are intended for use in the commission of a crime, or are proceeds of crime. It is stated that registration of a caveat on motor vehicles is not enough to preserve the motor vehicles.
21. The Applicant/Respondent [Agency] claimed that if the motor vehicles are left in the custody of the Respondent/Applicant, the motor vehicles are at risk of being destroyed, lost, damaged, concealed,



- or transferred; and hence, will render the intended forfeiture application of the assets nugatory. The motor vehicles, it is conceded, are in the custody of the Agency which has the responsibility of preserving the value of the motor vehicles; and therefore, the allegation of them being susceptible to damage is baseless.
22. The Applicant/Respondent [Agency] avers that the Respondent/Applicant [Antony Kefa Odiero] purports to be in need of funds to pay salaries for his staff; however, that no transaction in the bank statements showing the payment of salaries by him in the previous months before the preservation orders were issued.
 23. According to the Agency, the Respondent/Applicant has been making cash deposits to the account; and therefore, it demonstrates that the Respondent/Applicant is in possession of funds which he is making from his businesses. That the funds from his business sources are now not being channelled to the preserved account. So, it is alleged the Respondent/Applicant has other sources of income that can sustain his businesses, and his lifestyle. Resultantly, that variation of the preservation orders is not warranted.
 24. As per the Applicant/Respondent [Agency], setting aside, or discharging, or varying the preservation order shall render the intended forfeiture application nugatory. Therefore, that the instant application is unmeritorious, and the orders sought ought to be denied.

Party's Submissions

25. In buttressing their cases, the parties filed their respective written submissions. The Respondent/Applicant (Antony Kefa Odiero) through his counsel, in supporting his case, filed a written submission dated 2nd October, 2023. In sum, it is submitted that the standard of proof applicable in civil forfeiture is on a balance of probability, and the burden of proof is on the party alleging, which burden can only shift once the Applicant has discharged the initial burden of providing some evidence or reasonable suspicion to implicate the Respondent. Reliance for this position is placed on the case of *William Kabogo Gitau vs George Thuo & 2 Others* (2010) 1 KLR 526.
26. It is contended that in the present matter, the Applicant/Respondent [Agency] has not shown any evidence, close to 100 days later, implicating the Respondent/Applicant as a criminal, and/or a benefactor of any criminal conduct.
27. As per the Respondent/Applicant, the Applicant/Respondent [Agency] has not conducted any investigations on him: they have never sought or requested for any documents from him. Instead, all they have done is seek an order ex-parte.
28. It is the Respondent/Applicant's submission that it was never and cannot be the business of the law to criminalize enterprise for having money; and that he has clearly demonstrated the businesses he is engaged in. Also, that he offered his bank statement and other documentary evidence in the form of invoices, which were rejected by the Applicant/Respondent's [Agency] officers.
29. The Respondent/Applicant maintains that the Applicant/ Respondent [Agency] must have some reasonable suspicion to obtain account freezing orders, and or continue to freeze the said accounts. In that regard, the case of *Emmanuel Suipanu Siyanga v Republic* Criminal Appeal 124 of 2009 [2013] eKLR was relied upon.
30. That in the present matter, there is no evidence from the Applicant/Respondent [Agency]. Also that the Replying Affidavit of Fredrick Musyoki, and the initial Affidavit in support of the ex-parte Application contain no material evidence to prove any of the allegations. The Affidavits are averred in general terms, and lack specificity to warrant freezing an account for close to 100 days and counting.



31. It is the Respondent/Applicant submission that the subject two (2) motor vehicles, have no nexus to the suspect transactions period which are alleged to have been done or concluded. That the two (2) motor vehicles, specifically the Mercedes Benz was being used by his staff, and there is no other evidence to the contrary. Also, it is claimed that had the Agency's officers visited his business operations, they would have understood his [Respondent's] business activities.
32. It is posited that the Respondent/Applicant has demonstrated to court that he has staff who are paid every month, and the continued freezing of his bank accounts has placed their employment in jeopardy.
33. Further, it is the averments that ever since his bank account was frozen on 28th June, 2023 he has been subjected to inhumane and degrading treatment; noting that he has been labelled as a drug trafficker, 'wash wash' guy, and a money launderer - when no evidence exists to substantiate the allegations - which has affected his business and reputation.
34. Additionally, the Respondent/Applicant contended that in the alternative, the Applicant/Respondent [Agency] suffers no prejudice, should the motor-vehicles be registered a caveat on, and retain the log books as the cars are used in the Respondent's/Applicant's business. That cars are high end and require high maintenance; and holding the cars at the Applicant's/Respondent's [Agency] basement makes them susceptible to mechanical damage.
35. To the Respondent/Applicant, this case is pure witch-hunt without any factual or evidentiary basis; and is meant to criminalize enterprise for having money in bank accounts - which investigative authorities perceive to be too much. In the end, the Respondent/Applicant beseeched this court to allow his Application as prayed.
36. Conversely, the Applicant/Respondent [Agency], in promoting their case, filed their written submissions dated 19th October, 2023. On the preservation order already made; it is submitted, that the Respondent/Applicant has not established that the preservation orders was erroneously sought or made; neither that the Respondent/Applicant was sued in error; nor that the order was made as a result of a mistake common to the Applicant/Respondent [Agency]. Therefore, that this instant Application ought to be dismissed.
37. In their submission, it is stated that the Agency - pursuant to Section 81 and 82 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) - is mandated to apply ex parte to the Court for orders prohibiting any person from dealing in any manner with any property or assets, provided that there are reasonable grounds to believe that such property is proceeds of crime, or benefits/profits of crime, or intended, or used for the commission of crime subject to such conditions as the court may specify.
38. Further, that under Section 90 of the *POCAMLA*, when preservation orders are in force, the Applicant/Respondent [Agency] may apply to the High Court for orders forfeiting to the Government all or any of the property that is subject to the preservation order.
39. It is the Applicant/Respondent's [Agency's] position that they are only needed to make a prima facie case, and where the court is satisfied that there is evidence, which if accepted, will establish the Agency's belief based on reasonable grounds - within the meaning of *POCAMLA* - that the funds sought to be preserved are proceed of crime or proceeds of unlawful activities directly or indirectly owned by the Respondents.
40. As such, that the evidence placed before the court at the time of granting the preservation of funds orders established to the satisfaction of the court that the Agency's belief was based on reasonable grounds that the funds in the account of the Respondent are proceeds of crime under *POCAMLA* or proceeds of unlawful activities and owned by the Respondent either directly or indirectly.



41. According to the Applicant/Respondent [Agency], the Respondent/Applicant is suspected of having acquired the funds under preservation through money laundering. The Respondent/Applicant's accounts are suspected to have been used as instrumentality of money laundering, contrary to the provisions of the [Proceeds of Crime and Anti-Money Laundering Act](#).
42. That, such is a classical scheme of money laundering meant to disguise the source of the funds which are proceeds of crime. Laundering the proceeds of criminal activities is meant to conceal the source of the funds, and the subsequent investment out of the funds in order to make it difficult to detect the offence of money laundering, and difficult to trace the properties procured through the proceeds of crime.
43. To the Agency, the Respondent/Applicant has devised a complex strategy for concealing and disguising their proceeds of crime contrary to the provisions of Sections 3 and 4 of the [Proceeds of Crime and Anti-Money Laundering Act](#).
44. It is submitted that in money laundering schemes, ownership of the proceeds of crime may be direct or indirect. The thread of transactions showing the deposits of the funds in a structured manner forms a pattern of transaction that depicts the Respondent/Applicant as money launderers, and the accounts of the Respondent as instrumentally of crime.
45. Accordingly, that the funds were suspiciously deposited into various accounts owned and operated by the Respondents/Applicant. That it is the deposit of the funds into these accounts over which the Respondent/Applicant had control completed the concealment of the source of the suspect funds.
46. It is posited, thus that the Respondent's/Applicant's action of depositing cash into their accounts and the inability to provide a cogent explanation of the source of the same is sufficient evidence they had intended to disguise the source of the funds.
47. The Applicant/Respondent [Agency] urges this courts to reject this instant Application; since it has not established that the preservation of funds order was erroneously sought or made, or they were erroneously sued, or that the order was made as a result of a mistake common to the Agency. Consequently, that the court should dismiss the instant Application, by the Respondent/Applicant.
48. Additionally, the Applicant/Respondent [Agency] submitted that the Respondent/Applicant [Antony Kefa Odiero] has not met the threshold of Section 89 of the [Proceeds of Crime and Anti-Money Laundering Act](#), 2009; and Order 45 of the [Civil Procedure Rules](#). In Particular, that the power of the court to vary or review or rescind its order is provided for under Section 89 of the [POCAMLA](#), and Order 45 Rule 1 of the [Civil Procedure Rules](#).
49. It is maintained, by the Applicant/Respondent [Agency], that in order for the court to grant setting aside/variation/review orders, the Respondent/Applicant must prove due to the court order: they are deprived of reasonable living expenses; Suffers undue hardship; The hardship outweighs the risk of preserving the subject property; They have no any other means of surviving other than what has been preserved by the order of this Honourable Court dated 25th August, 2023; An error is apparent on the face of the record; A cognizable mistake, or; Any other sufficient reasons.
50. Therefore, that a party seeking variation or review of a court order issued under Sections 81 and 82 of the [POCAMLA](#) must bring themselves within the confines of Section 89 of the [POCAMLA](#); and must be aggrieved by the order of the court which is sought to be varied or rescinded. Reliance was placed on the cases of [Assets Recovery Agency v Pamela Aboo](#) [2018] eKLR; and [Assets Recovery Agency v Jane Wambui Wanjiru & 2 others](#) [2019] eKLR which affirms that position.



51. According to the Applicant/Respondent [Agency], from the Respondent/Applicant's Affidavits in support of the Notice of Motion for setting aside/variation/review there is nothing that demonstrated any of the legal threshold required. That in the Notice of Motion, Affidavit, and submissions only states mere assertions, which are not new facts or important evidence that may warrant grant of the prayers sought.
52. Especially, that the Respondent/Applicant has not demonstrated he relied on the funds in issue to provide for his reasonable living expenses; Thus, in absence of such evidence, the Applicant is not entitled to any variation or discharge of this honourable court order - under Section 89 of the [POCAML](#).
53. Further, the Agency posits that under Section 84 of the [POCAML](#), a preservation or surrender orders cannot be varied/discharged, if: there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order; or there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or that the order is not rescinded.
54. The Applicant/Respondent [Agency] points out that it is in the process of filing forfeiture application - in respect of the funds and assets subject to the preservation orders – and the orders remain unsatisfied; hence, this honourable court should not rescind, or set aside, or vary, or discharge. Also, that the Respondent/Applicant has not proved or demonstrated that he will suffer hardship as a result of the preservation orders.
55. Notably, that the funds in the accounts are presumed to be proceeds of crime which were obtained through money laundering, and the Respondent/Applicant has no right to remain with the funds. As per the Agency, the Respondent/Applicant's arguments that he lawfully acquired the said funds can only be canvassed at the hearing of the forfeiture application and is not merited at this stage.
56. The Applicant/Respondent [Agency] maintained that varying or rescinding the preservations orders shall render the intended forfeiture application an academic exercise, and shall amount to granting permission to a party to benefit from proceeds of crime which is contrary to the import and purpose of the [Proceeds of Crime and Anti-Money Laundering Act, 2009](#).
57. The Agency advanced the argument as held by the Court of Appeal in the case of [National Bank of Kenya Ltd v Ndungu Njau](#) Nairobi CA Civil Appeal No. 211 of 1996, where it was held that a review may be granted whenever the court considers that it is necessary to correct an appellant error on omission on the part of the court. The error or omission must be self-evidence and should not require a deliberate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect expression of the law.
58. In the end, it is submitted that the Notice of Motion dated 8th September, 2023, the supporting Affidavits, and the Applicant's submissions have no merit, are misconceived; thus the prayers sought ought not be granted for those reasons. Therefore, that the Application be dismissed with costs.

Analysis and Determination

59. After a careful consideration of the Application and the responses thereto, together with the submissions, cited authorities, and annexures; I find the issue that crystalizes for determination as: Whether the Respondent/Applicant has met the threshold for variation or rescission of the preservation orders made on 25th August, 2023.



60. Section 89 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) states as follows in regard to variation and rescission of preservation orders: -

“ 89. Variation and rescission of orders

(1) A court which makes a preservation order—

- a. may, on application by a person affected by that order, vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—
 - i. that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and
 - ii. that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
- b. shall rescind the preservation order when the proceedings against the defendant concerned are concluded.”

61. The impugned preservation orders were made ex parte on 25th August, 2023 by this court [Lady Justice D Kavedza] upon the Application of the Applicant/Respondent [Agency] brought through an Originating Motion dated 22nd August, 2023 which was supported by the affidavit of Sally Amadi sworn on the same date. The orders were made pursuant to Section 82 of the *POCAMLA*, which states: -

“ 82. Preservation orders

- (1) The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
- (2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—
 - (a) has been used or is intended for use in the commission of an offence; or
 - (b) is proceeds of crime.”

62. The purpose of preservation which is granted for a period of ninety (90) days is to safeguard against the dissipation of the suspected property, so as to allow the Agency to complete investigations and where necessary, to file a forfeiture application. Should the Agency file a forfeiture application, the



Respondent has a right to respond to that application and make an application to have the property discharged and where successful the property is discharged. Nevertheless, as provided in Section 89 of the [POCAML](#) a person affected by a preservation order may also apply to have it varied or rescinded.

63. Flowing from the provisions of Section 89 of the [POCAML](#) the threshold for variation or rescission of a preservation order is two-fold, the Applicant must satisfy the court that:
- (a) the operation of the order concerned will deprive them of the means to provide for their reasonable living expenses and cause undue hardship; and,
 - (b) the hardship outweighs the risk that the property concerned may be lost, concealed or transferred.
64. While the variation or rescission of the order rests in the discretion of the court, it [court] must be satisfied the Applicant is unable to provide for himself or his kin, and is therefore suffering undue hardship.
65. Further, Section 88 of the [POCAML](#) 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.”
66. In granting the preservation order, the court was satisfied that there was on the material placed before it, reasonable grounds to warrant the order. I have carefully perused the evidence placed before me by the Respondent/Applicant, and come to the conclusion that he does not meet the threshold for discharge of the order.
67. Firstly, the mere fact that the Respondent/Applicant [Agency] had first obtained freezing orders in the Magistrates’ Court is not per se sufficient ground to grant the application as that is a procedure provided for in law by Section 118 of the [Criminal Procedure Code](#), and Section 180 of the [Evidence Act](#).
68. Secondly, the Respondent/Applicant claims that he is unable to pay his staff’s salary, and office lease [rent] for the month of August, 2023 including the arrears on both [salary and rent] for June, and July 2023; - thus seeking USD 60,000. Also, he alleges that his two (2) motor vehicles are the means of transport and tools of trade at his offices hence they are rendered immobile.
69. To my mind, therefore, it is clear that the presented reasons/circumstances are not about reasonable living expense which warrants setting aside of the preservation order. It is my finding that whatever



hardship is likely to flow from the failure to pay the staff's salaries and rent for a business premises do not outweigh the risk that the funds and assets may be lost, concealed, or transferred.

70. Moreover, it is my finding that the Applicant has not sufficiently demonstrated that he does not have any other property from which he can meet his expenses; hence, it is also evident that the hardship allegedly being suffered by the Respondent/Applicant does not outweigh the risk of the preserved funds and assets being lost, concealed, or transferred.
71. In the premise, the Respondent/Applicant's Notice of Motion dated 8th September, 2023 is found to be unmerited and the same is dismissed with costs to the Applicant/Respondent [Assets Recovery Agency].

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF NOVEMBER 2023.

.....

E N MAINA

JUDGE

In the Presence of:

Mr. Malema for Applicant

Mr. Muchui for ARA/Respondent

Raymond – Court Assistant

