Assets Recovery Agency v Cullinan Private Jet Corp & another (Miscellaneous Application E034 of 2023) [2023] KEHC 26768 (KLR) (Anti-Corruption and Economic Crimes) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26768 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

MISCELLANEOUS APPLICATION E034 OF 2023

EN MAINA, J

DECEMBER 20, 2023

BETWEEN

ASSETS RECOVERY AGENCY ..... APPLICANT

AND

CULLINAN PRIVATE JET CORP ..... 1ST RESPONDENT

GLO-JET INTERNATIONAL LIMITED ..... 2ND RESPONDENT

RULING

1. This ruling concerns the application by the Respondent to rescind, set aside, vary and/or review the ex-parte preservation order issued by this court on 22nd September 2023 in respect of the Respondents' account numbers; -

    a. Account Number 01904057361250 in the name of Cullinan Private Jets Corp held at I & M Bank.

    b. Account Number 01904057366250 in the name of Cullinan Private Jets Corp Limited held at I & M Bank.

    c. Account Number 6658001882 in the name of GIO Jet International Limited held at Ecobank Bank Limited.

    d. Account number 6658001881 in the of Glo Jet International Limited held at Ecobank Limited.

2. The gist of the application for the preservation order was that there were reasonable grounds to believe that the funds in the afore-stated accounts were proceeds of crime.

3. Prior to that, the Applicant had obtained orders through the Chief Magistrates ACC Miscellaneous Application No. E150 of 2023 enabling it to investigate the accounts and to freeze the same.

4. It is alleged that the Applicant opened an inquiry into the activities of the Respondents through a file number 85 of 2023 and established that there were reasonable grounds to believe that the accounts received huge deposits of cash suspected to be unlawfully acquired hence proceeds of crime.

The Parties

5. The Applicant (hereinafter referred to as "the Agency") is the Asset Recovery Agency established under Section 53 of the Proceeds of Crime and Anti Money Laundering Act (herein after referred to as the (POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. The agency has authority to institute civil proceedings for the recovery of proceeds of crime and seek orders for forfeiture of assets to the government where there are reasonable grounds to believe that such assets are process of crime. The agency also has policing powers under Section 53A of the (POCAMLA) to enable it investigate, identify, trace, freeze and recover proceeds of crime.

6. The 1st Respondent is a company number PVT-BEUXYQJ3 registered on 23rd December 2022 under the *Companies Act* in Kenya providing exclusive executive international private jet chartered services. It is alleged to be a subsidiary of a company registered in the State of Miami in the United States of America.

7. The 2nd Respondent is a company registered as Company Number PVT-8LUQ3XL registered on 2nd May 2018, under the *Companies Act* in Kenya. It is a subsidiary of Glo-jet International Corp which is registered under the laws of the State of Florida and incorporated on 10th February 2021 in the United States of America.

The applicant's case

8. The application is expressed to be brought under Sections 1A, 1B, 3A & 80 of the *Civil Procedure Act*, Order 45 Rule 1 & 51 Rule 1 of the Civil Procedure Rules 2010; Sections 81 and 89 of the POCAMLA and other enabling provisions of the Law. The application seeks orders that:

    i. Spent

    ii. That this Honourable Court be pleased to rescind, set aside, vary and/or review the ex parte preservation orders it issued on 22nd September 2023 in respect of the Subject accounts.

    iii. The Honourable court be pleased to grant any other orders it deems just and fit in the circumstances.

    iv. That costs of this Application be provided for.

9. The application is premised on the following grounds;

    i. That the Applicant obtained Account Debits Restriction Order over the Subject accounts in the Magistrates Court, ACEC Misc. Appl. No. E150 OF 2023 ON 25th August 2023 which was to subsist for 21 days. The application was based on suspicion that funds in the subject accounts were proceeds of crime and money laundering.

    ii. On 1st September 2023, the Respondents applied to Court to have the order set aside and the applicant in its response sought a further 14days extension of the order to complete investigations.

iii. The Court gave a ruling on 22nd September 2023 finding that the Respondents' application raised triable issues and opined that the Debits Restriction Order has a limited lifespan.

iv. The Applicant then filed a fresh application in this Court seeking ex-parte orders to preserve the funds in the subject accounts on 22nd September, 2023. The application is the same as that filed in the lower court to irregularly gain an extension of the orders the Applicant failed to get in the subordinate Court which is an abuse of the Court process.

v. The applicants have been unable to account for the extent of investigations conducted within the time granted by the lower Court: 25th August 2023 to 25th September 2023, or demonstrate what the investigation yielded in 30 days thus failing the reasonable grounds test.

vi. The Application and its supporting Affidavit is couched in general terms contrary to the Rules of Evidence on burden of proof, falls short of specifying particulars of fraud, money laundering, suspicious deposits and the grounds forming the belief that the Respondent's funds were obtained through illegitimate means.

vii. The preservation orders were obtained on the basis of allegations, suspicions and presumptions contrary to the tenets of law and natural justices no evidence was tabled to demonstrate existence of a prima facie case to justify the impugned ex-parte preservation orders.

viii. The Applicant conveniently failed to disclose to this Court that they had summoned two top directors of the Respondents in their offices for questioning where critical information and supporting documents relating to the operations of the Respondents was presented.

ix. The preservation order will only operate to exacerbate an already bad situation where the Respondents cannot run their day to day operations or meet their obligations to third parties.

x. The operation of the ex-parte order will cause undue hardship to the Respondents in that:

    a. Part of the funds in the accounts are meant to finance their day to day business operations and preservation bars the Respondents from operation;

    b. The Respondents will be unable to meet their financial and legal obligations to their employees and third parties and three directors have already issued their resignation notice due to non-payment of salary;

    c. Cheques to third parties which were dishonoured will attract penalties as well as the monies remaining outstanding;

    d. The Respondents run the risk of being subjected to expensive Court action and litigation for failure to discharge their financial obligations and commitments to third parties.

    e. Newspaper reports on the orders issued against the Respondents have negatively affected revenue flow to the Respondents due to customer's due diligence before bookings, leading to loss of revenue.

    f. The hardships the Respondents continue to suffer far outweigh the risk that the funds in the Accounts may be destroyed, lost, damaged, concealed or transferred.

    g. The Respondents are subsidiaries of highly revered conglomerates with International presence with Annual turn overs of millions of dollars, so should the Court find that the funds are proceeds of crime, the applicant will still be able to recover the amounts.

h. It is in the interest of Justice that the orders sought be granted as prayed."

10. The application is supported by the affidavits of Louis Iteba Pamba and Geoffrey Somoni Birundi sworn on 28th September, 2023 which largely reiterate the grounds upon which the application is brought.

11. In his affidavit Louis Iteba Pamba deposes that he is the Executive Director and Chief Executive Officer of the 1st Respondent which is duly registered in Kenya with its parent company being registered in the United States of America and which has subsidiaries in forty-seven (47) other countries in the world.

12. He deposes that the 1st Respondent provides exclusive executive international private jet-chartered services to cross continental customers: that on 22nd September 2023, the Agency obtained preservation orders against their USD and KSHS accounts held at I&M Bank based on an application whose grounds were that their investigations had revealed complex fraud and money laundering schemes by the Respondents therefore rendering the funds in the accounts as proceeds of crime liable for preservation and forfeiture under the POCAMLA; that the agency claimed it had been informed that the accounts had received huge cash deposits from various sources believed to have been illegitimate; that on 25th August 2023, the Agency obtained an ex-parte Debits Restriction Order which was to subsist for 21 days and which lapsed on 1st September 2023.

13. He deposed that the Agency held a meeting with him and the Chief Executive Officer of the 2nd Respondent on 5th and 6th September respectively where they voluntarily shared information and documents outlining their business operations, which documents have been annexed and marked LIP-2. After the meeting, the Agency filed a response to the application without taking into account the disclosures made at the meeting, and instead sought a further 14 days to continue with investigations. In its ruling, the Court directed that the Debit Restriction Order would lapse on 25th September 2023 as the order had a lifespan.

14. He deposed that instead of appealing or seeking a review of the Magistrate's order, the Agency applied for an ex-parte preservation order in this court without disclosing the lower court orders in breach of the rules of Res Judicata.

15. He contended that no cash deposits have ever been made in the subject accounts as all funds therein are wired from the Central Revenue Collection, Disbursement and Financial Management Centre (CRCDFMC) based at the Company's Headquarters in Orlando, Florida.

16. He further deposed that the 1st Respondent has fully complied with the tax laws of Kenya and the United States of America.

17. He deposed that the Debits Restriction Order issued by the Lower court resulted in various pre-issued cheques bouncing, forcing the 1st Respondent to make last minute cancellations of paid private jet hires, causing huge financial loss and exposing it to the risk of litigation. Nine copies of cheques were annexed to the affidavit.

18. He explained that as a result of the preservation orders, the parent company is considering closure of the Kenyan subsidiary and moving the operations to South Africa citing a "hostile environment for international strategic investment.

19. He averred that media reports made on the preservation order on the day they were issued caused the Respondent negative publicity which has undermined it's revenue flow.

20. He contended that the Respondents were subsidiaries of revered conglomerates with annual turn overs of millions of dollars and in the event that the court finds that the funds are proceeds of crime, the Applicant shall be able to recover the same.

21. He urged the court to set aside the preservation orders hanging over the head of the Respondents.

22. In his affidavit Geoffrey Somoni Birundi deposed that he is the CEO of the 2nd Respondent a subsidiary of the Glo Jet International Corp based in Orlando, Florida, USA which is a company providing private air charter services and which is part of a global conglomerate operating in forty-seven (47) countries around the world.

23. He deposed that the company operates a USD and a KSHS. Account with Eco Bank Kenya Limited and abides with all laws and regulations relating to the operations of that account: The accounts receive money from their holding company in the USA to make payments for salaries, service providers and bills.

24. He further deposed that the Agency obtained orders restricting debits in the subject accounts from the lower court on 25th August 2023 but neglected to serve the 2nd Respondent though the orders affected them drastically: They were only informed by the Bank five days later when they went to transact. Consequently, nine cheques whose copies have been annexed were dishonored causing the 2nd Defendant to pay penalties.

25. He explained that the Respondents are subsidiaries of two US based multi-billion-dollar corporations and that the funds which have orchestrated the current legal issues pale into insignificance, more so, the USD 500,000 wired from the 1st Respondent's to the 2nd Respondent's account which has been placed on record.

26. He contended that suspicion alone does not amount to sufficient grounds for an order to freeze the Respondent's account and that the Agency had not accounted for the thirty days given by the subordinate court and the ninety days given by this court to conduct investigations.

27. He contends that once the Respondent received a ruling in their favour in the Magistrates court, the Agency should only have moved this court to appeal that ruling or to seek forfeiture of the funds but not to file a fresh matter in this court without new evidence and without a report of the investigations they had alluded to have carried out.

28. He deposed that the Agency did not visit any of the Respondent's offices during the conduct of their investigations despite claiming that the investigation was a matter of public interest.

29. He deposed that the Agency confirmed that it had concluded investigations and gave the magistrates court the go-ahead to close the file: That due to the preservation orders, third parties whom the Respondent owes financial obligations have ceased dealing with them and threatened to initiate Court proceedings against them and that there is danger of the Kenyan subsidiary being closed and operations moved to South Africa. He annexed a copy of funds transfer to the South African subsidiary.

30. He averred that as a policy, designed to rid their operations of money laundering and economic crimes, local subsidiaries do not receive cash deposits or payments for charter services and instead payments are made directly to the holding company's bank account in the United States. The funds are then wired to the local banks of the subsidiaries for their operations and other financial commitments. He annexed a copy of a Standard Air Charter agreement setting out the financial policy of the Respondents.

31. He further deposed that the 2nd Respondent is engaged in legitimate business, is compliant with all laws and regulations relating to its operations and should be protected from harmful decisions such as that undertaken by the Agency.

32. He averred that being an aviation company handling huge sums of money, the Respondent, their International Board of Directors adheres to set rules on the POCAMLA as highlighted in their website portal as well as their Charter Contract.

33. He contended that the Agency's mandate to protect public interest by discouraging money laundering should be balanced against the right of an individual to enjoy their property and therefore the POCAMLA should only be deployed upon reasonable grounds so as not to infringe individual's rights. He contended that in the current matter, the Agency is not protecting public interest but engaging in economic harassment and persecution that could lead to the closure of the Respondent, loss of jobs to staff, loss of tax revenue to the government thus occasioning irreparable damage to the Respondent and innocent third parties. He urged the court to set aside the preservation orders unless and until the Agency proves the suspicion that they have alluded to in their application.

The Respondent's case

34. The respondent opposed the application through a replying affidavit sworn by Alfred Musalia on 6th October 2023 where he deposed that the Agency sought the preservation order over the subject accounts which were granted by this court on 22nd September 2023 in accordance with Section 82 of the POCAMLA.

35. He contended that the applicants have not sufficiently demonstrated any reasonable evidence to warrant the setting aside, variation or rescinding of the preservation order.

36. He deposed that the present application did not meet the threshold provided in Section 89 of the POCAMLA as they have not proved that they will suffer hardship as a result of the preservation order or that the hardship suffered outweighs the risk of the preserved funds being destroyed, lost, damaged, concealed or transferred.

37. He further deposed that the application is a ploy to deplete the subject accounts and render the forfeiture application nugatory.

38. He contended that the Respondents had failed to demonstrate that they lacked any other means other than the suspect funds under preservation and their reasonable living expenses cannot be catered for by any other means.

39. He explained that under Section 90 the POCAMLA, when preservation orders are granted under Section 81 and 82 of the Act, the 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. He deposed that since the monies in the subject accounts are presumed to be proceeds of crime, the applicants are not entitled to utilize it pending filing, hearing and determination of the forfeiture application and rescinding the preservation order would render the forfeiture application nugatory.

40. He further deposed that the Respondent's argument that the funds are genuinely acquired and not proceeds of crime can be dealt with in the forfeiture application and cannot be sustained at the preservation stage.

41. He contended that the application herein is not merited and the prayers sought should be denied.

The Respondents/ Applicant's submissions

42. Learned Senior Counsel for the Respondent/Applicant, Prof. Lumumba, submitted that the Agency's motivation for obtaining the impugned preservation orders is shrouded in secrecy; are contrary to the rules of natural justice as the replying affidavit to failed to lay any basis for the suspicion/presumption that the funds in the subject accounts are proceeds of crime. He submitted that in exercise of its administrative mandate, the Agency, had affected the legal rights and interests of the Respondents who have a right, under Section 4 (1) and (2) of the *Fair Administrative Action Act*, to administrative action that is reasonable and procedurally fair, and have a right to be given written reasons for any administrative action taken against them. He asserted that the Agency's action is premised on suspicion and presumptions.

43. The Counsel further submitted that Sections 107 and 108 of the *Evidence Act* provide that he who alleges must prove and as the Agency has not disclosed the grounds for the said suspicion and presumption, it is impossible to objectively interrogate the alleged reasonableness and propriety of the suspicion so as to conclude that the actions of the Agency are not actuated by malice and an abuse of this court's process.

44. The Respondents relied on the decision on Florence Kibera -v- Deborah Achieng Aduda & Rene Johnny Dierkx (2019) eKLR where the court held that:

> "…..we must ask the question whether litigants are using Courts to promote the administration of justice or frustrated it. Pursuing a claim based on bad and with no genuine belief in its merits, or for an improper ulterior motive is an abuse of the process of the Court. As Lord Blackburn said … in Metropolitan Bank -v- Pooley (1885) 10 App Case 210,220-221, the Court has the right to protect itself against the abuse of its processes".

45. Senior Counsel further submitted that the Agency had been granted thirty (30) days to investigate the subject accounts and the activities of the Respondents by the magistrate's court but they have not demonstrated the outcome of their investigations nor shared a report thereof to warrant this court to issue further preservation orders. Senior Counsel asserted that the investigation officers met with the Directors of the Respondents who gave them information and the documentation needed to clear any concerns; that the Agency has not indicated what it initially intended to investigate, the ground it has covered and the investigation that is still pending; that it would be unfair for the Agency to continue holding the two Respondents at ransom for longer than ninety (90) days and have their operations drastically affected by the enforcement of the previous Restraint Order and the current preservation order, while it continues investigating in perpetuity on the basis of mere unsubstantiated suspicious presumptions.

46. Counsel for the Respondents further submitted that the two companies have tendered evidence of threatened legal action against them by third parties to whom they owe contractual and legal obligations which they have been unable to meet because of the order freezing debit transactions in the subject Bank Accounts. The Demand Letter is annexed to Geoffrey Birundi's Supporting Affidavit and the Agency has proven that some of the funds in the Accounts were to be applied towards management of the day to day running of the Respondent's operations including the payment of staff salaries. It was their submission that the suffering of the Respondents as a result of the two orders far outweighs the risk that the funds may be transferred.

47. Counsel for the Respondents further submitted that preservation orders as provided for under Section 82 of the POCAMLA should be based on reasonable grounds to believe that the monies in the

accounts have been used, are intended to be used or are proceeds of crime, which fact, the court must be satisfied before granting the orders.

48. Further, that Section 84(c) of the POCAMLA provides that a preservation order may be rescinded before the expiry of its period and it is on this premise, and the fact that no basis has been laid for its existence, that the Respondents have approached this Court to have the Preservation Order set aside.

49. Learned Senior Counsel argued that the ex-parte orders issued on 22nd September 2023 have negatively affected the Respondents and the Agency has not demonstrated why those orders should continue to subsist: The suffering outweighs the risks of having the orders in place. Learned Senior Counsel reiterated that none of the ingredients and/or requirements set out by statute have been satisfied by the agency and submitted that the orders ought to be vacated with immediate effect.

50. The Respondents relied on the following precedent:Florence Kibera -v- Deborah Achieng Aduda & Rene Johnny Dierkx (2019) eKLR (is it only one or did you delete the others)

The submissions of the Respondents.

51. Mr. Adow, Learned Counsel for the Agency, submitted that Section 81 and 82 of Proceeds of Crime and Anti Money Laundering Act mandates the Agency to apply ex parte to the court for orders prohibiting any person from dealing in any manner with any property provided there is reasonable grounds to believe that the property is a proceed of crime, or it is used or intended to be used in committing crime, subject to conditions as the court may specify. He submitted that the Agency only needed to demonstrate that there is a Prima Facie Case with sufficient evidence placed before the court, which if accepted, would be reasonable grounds to believe that the assets are proceeds of crime.

52. Counsel submitted that the Respondents are suspected to have acquired the monies in the subject accounts through money laundering contrary to the provisions of the POCAMLA; that the source of funds is concealed and disguised through subsequent investment hence making it difficult to trace it to proceeds of crime. Counsel added that in money laundering schemes, ownership of the proceeds of crime may be direct or indirect; that the threads of transactions showing deposits of funds from different jurisdictions in a structured manner depicts the Respondents as money launderers and their accounts as instrumentalities of crime; that the Respondents did not give a cogent explanation of the source of the funds which is sufficient evidence that their intention is to disguise the source of the funds. Counsel argued that the Respondents have not established that the preservation order was erroneously sought or made, or that they were erroneously sued. He urged this court to dismiss the application.

53. On whether the order could be rescinded or set-aside, Counsel asserted that the power to do so is provided in Section 89 of POCAMLA and Order 45 Civil Rule 1 of the Procedure Rules; that the Respondents must prove, that the order has deprived them of their reasonable living expenses and as a result they have suffered undue hardship and the hardship outweighs the risk of preserved property dissipating: They have no other means of survival other than the preserved property or that there was an error apparent on the face of the record, or a cognizable mistake or any other sufficient reason.

54. To support his submissions Counsel relied on the case of Assets Recovery Agency -v- Pamela Aboo (2018) eKLR where the Court stated:

> " The burden of proof articulated under Section 89 of the POCAMLA lies with the party seeking to discharge preservation orders. The Applicant/Respondent must therefore prove or demonstrate that the order concerned will deprive her of the means to provide for reasonable daily expenses. Secondly, that she will suffer undue hardship as a result of the

preservation order which outweighs the risk that the concerned property may be concealed or transferred. . .Freezing of the account therefore will not deprive her of reasonable living expenses since it is not an account she withdraws money from . . . She only made deposits and did not make withdrawals . . . She has not presented to the Court any proof of invoices and payments from customers, evidence of payments to suppliers for goods received or services rendered by her business, as proof of the existence of such business . . . without any supporting documents, or paper trail of transactions that led to these Bank deposits, it is my considered view that prima facie, there is reasonable ground to believe that the monies so deposited may have been proceeds of crime."

55. Counsel also cited the case of Assets Recovery Agency -v- Jane Wambui Wanjiru & 2 Others (2019) eKLR where it was held:

> " ... The freezing of the two accounts did not stop the business from running. The Applicants have not alleged that they have closed the business.
>
> The ... business must be up and running. They can as well operate new accounts and continue with legitimate business."

56. Counsel contended that the affidavits sworn by the Respondents in support of this application did not contain any facts in line of the ingredients mentioned in the above quoted cases. That the affidavits contain mere assertions which are not new facts or important evidence that warrants grant of the prayers sought. Further that the Respondents did not demonstrate that they relied on the funds to provide for their reasonable living expenses and in the absence of such evidence, they are not entitled to variation or discharge of the preservation order.

57. Counsel for the Agency further submitted that under Section 84 of POCAMLA, preservation orders cannot be varied or discharged if there is an application for forfeiture pending in regard to the property, where there is an unsatisfied forfeiture order, or if the order is not rescinded. He contended that the Agency is in the process of filing a forfeiture application in respect of the funds and this court should therefore not rescind, set aside, vary or discharge the preservation order. He reiterated that the money in the subject accounts is reasonably believed to be proceeds of crime obtained through money laundering and the Respondents have no right to remain with it. He contended that the argument that the money was lawfully acquired can only be canvassed at the hearing of the forfeiture application but not at this stage.

58. The Agency further argued that rescinding the preservation orders would render the intended forfeiture application an academic exercise and shall amount to granting permission to a party to benefit from proceeds of crime contrary to the purpose of POCAMLA. Counsel relied on the Court of Appeal decision in the case of National Bank of Kenya Limited -v- Ndungu Njau Nairobi CA Civil Appeal No. 211 of 1996 where the Court stated:

> "A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident 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. In the instant case, the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matter in controversy and exercised his

discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could be a good ground for an appeal but not for review."

59. Mr. Adow concluded his arguments by stating that the application by the Respondents, the supporting affidavits and the submissions have no merit and are misconceived and for that reason the prayers sought should not be granted. He also relied on the following cases:Assets Recovery Agency -v- Pamela Aboo (2018) eKLRAssets Recovery Agency -v- Jane Wambui Wanjiru & 2 Others (2019) eKLRNational Bank of Kenya Limited -v- Ndungu Njau Nairobi CA Civil Appeal No. 211 of 1996

The Issues for determination

60. Having considered the application, the response thereto and the rival submissions of learned Counsel for the parties, the cases cited and the law, the issues that arise for determination are: -

    i. Whether the Preservation order issued by this Court on 22nd September 2023 was merited;

    ii. Whether the Respondents have met the threshold for setting aside the preservation order.

    iii. Whether the Agency's anticipated application for forfeiture of the subject assets can stop the court from allowing the current application

    iv. Who should bear the costs of the Application.

Issue (i):-Whether the Preservation order issued by this Court on 22nd September 2023 was merited.

61. On this issue the Respondents assert that the preservation order issued by this Court on 22nd September 2023 is Res Judicata as a similar application with similar effect had been made and granted in the Magistrate's court. They contend that once the orders lapsed granted by that court lapsed, the Agency made a fresh application for preservation in this court instead of either seeking a review in the lower court, appealing the lower court's decision or proceeding to file a forfeiture application in this court.

62. It is however instructive that the proceedings in the magistrate's court and in this case are distinct and totally different. The proceedings in the magistrate's court are brought under Sections 118, 118A and 121 of the Criminal Procedure Code and Section 180 of the *Evidence Act*. The applications made in that court are for purposes of obtaining warrants for conducting searches and investigating accounts and for freezing those accounts during the pendency of the investigations. On the other hand, the order, which is the subject of this application is obtained from the High Court under Section 82 of the POCAMLA for purposes of preserving the property in question pending filing of an application for forfeiture. The order has a lifespan of ninety days from the date it is published in the Kenya Gazette and is discharged automatically or upon determination of the forfeiture application if filed. While the order in magistrate's court is obtained to aid in the investigations the order obtained from this court is intended to restrict any dealings in the property so as to keep it intact. The application made to this court is therefore of a completely different nature from that in the Magistrate's court and it is my finding therefore, that these proceedings are not Res Judicata. My so saying finds support in the case of Assets Recovery Agency v Pamela Aboo [2018] eKLR where dealing with a similar issue the court stated:-

> " 23. The second issue for determination is whether the suit by the Assets Recovery Agency against the Applicant is res judicata. Section 7 of the *Civil Procedure Act* Cap 21, Laws of Kenya states that:
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> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former

suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

24. The Respondent/Applicant in her application submitted that the matter before the court is res judicata in accordance with the provisions of Section 7 of the *Civil Procedure Act* Cap 21 and as such should be dismissed. However, it was the Agency's submission that the matter before the court does not qualify to be termed as res judicata since neither, this court nor any other court of concurrent jurisdiction has ever determined the matter.

25. I observe that the Chief Magistrate's Court did not try this matter. In any case the Chief Magistrate's court is not a court of concurrent jurisdiction. An ex parte application was made before the Chief Magistrate's court under Section 118 of the Criminal Procedure Code, seeking orders of search, access and preservation of fund. The purpose of the application was to commence investigation into the accounts of the Respondent/Applicant to establish whether a formal application should be brought under POCAMLA. There is no evidence that this application has been entertained in the High Court before. The question of its being res judicata does not therefore arise.

26. I must also point out that the revision sought herein is not the kind envisaged under Order 45 of the *Civil Procedure Act*. The provisions of Order 45 CPR do not apply. The revision provided for under section 89 POCAMLA is specific to preservation orders made under POCAMLA or the ACECA."

63. The Respondents also claim that the preservation orders are unmerited as the Agency did not prove that there were reasonable grounds to believe that the funds in the subject accounts were proceeds of crime or that they had been used or were intended to be used to commit a crime.

64. The Respondents also argue that the preservation orders were based on the Agency's investigation of the subject accounts and its conclusion that the accounts had received huge deposits from other jurisdictions whose source was not satisfactorily explained. They contend that the time period provided by the lower court and which the Agency has now enjoyed under the preservation orders was sufficient for investigations yet no investigation report has been tabled before this court. On its part, the Agency contends that the argument whether the funds in the preserved accounts are proceeds of crime or not, is premature as it can only be raised in the forfeiture application.

65. I have considered these arguments carefully and it is my finding that they have no merit. Once a preservation order has been granted the onus to prove that it ought to be discharged or varied lies with the applicant. In this case this court granted the preservation order as provided in Section 82 of the POCAMLA which states:

“(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.

(a)	has been used or is intended for use in the commission of an offence; or
(b)	is proceeds of crime.

(3)	A court making a preservation order shall at the same time make an order authorizing the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.
(4)	....."

66. The application before the court was made ex parte and the court was satisfied that upon the facts presented there were reasonable grounds to grant the order. In the case of Assets Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (Interested Party) [2020] eKLR, the court stated as follows:

> " It is therefore clear from the wording of section 82(2) that a court issuing preservation orders is persuaded by reasonable grounds to believe that the property concerned was intended for use in the commission of the offence or it amounts to proceeds of crime. What constitutes reasonable suspicion is for the individual judge or Jury to determine depending on the circumstances and or merits of each case. The same must be founded on existence of factual foundation and not mere imagination or malice. See Timothy Isaac Bryant and others vs. inspector of police and 7 others and Emmanuel Suipenu Siyanga vs. (supra) where the court stated that "... a suspicion cannot be held reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion." (Underlining mine).

67. It is my finding that prima facie the facts presented to this court by the Agency/Respondent in the supporting affidavit, disclosed reasonable grounds to believe that the funds in question are proceeds of crime. That prima facie evidence is of course subject to the Agency/Respondent proving its case on a balance of probabilities at the hearing of the forfeiture application, if any, where the Respondent shall also get opportunity to present his/her evidence.

68. In the case of Asset Recovery Agency v Samuel Wachenje the court observed:

> " Whether or not the subject motor vehicles were born out of proceeds of crime, can only be canvassed at the hearing of the forfeiture application. The rival arguments placed before this court in this application cannot enable the court to make a finding on that issue one way or the other, with any degree of certainty,"

69. Accordingly, in my considered view, save in cases where it is proved that the order was obtained fraudulently or there is an error so apparent on the face of the record that it invalidates the order, the merits or otherwise of the order can only be argued at the hearing of the application for forfeiture if one is filed: short of that the applicant must bring their case within the provisions of Section 89 of the POCAMLA. This application for variation is clearly not the appropriate forum to argue the merits of the order.

Issue (ii):- Whether the Respondents have met the threshold for setting aside the preservation order.

70. The power of this court to vary or set aside a preservation order derives from Section 89 (1) of the POCAMLA which states:

> "(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 authorizing 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...." (Underlining mine).

71. Therefore, for an Applicant to succeed they must meet the following conditions:

a. Demonstrate that the order deprives the applicant of their reasonable living expenses and causes undue hardship to them;

b. Demonstrate that the hardship suffered outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.

72. As earlier stated the onus to prove that the conditions have been met lies with the applicant and the standard of proof is on a balance of probabilities as it is trite that he who asserts must prove. (See Section 108 of the *Evidence Act*). My holding finds support in the case of Assets Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (Interested Party) (supra), where the court stated :-

> "It is therefore incumbent upon the respondent/applicant to prove that the applicant/ respondent does not deserve the orders sought on the account that the orders will deprive him the means to provide for his reasonable living expenses and cause him unnecessary hardship and, that his suffering outweighs the risk that the property will be destroyed, lost, damaged concealed or transferred."

73. The Respondents herein annexed copies of cheques drawn to third parties which they claim were dis-honoured as a result of the impugned preservation order and demand letters from third parties threatening to sue them for not meeting their financial obligations. They also alleged that some of their staff have handed in their resignation letters due to non-payment of their salaries. In other words, it is their contention that they are undergoing financial hardship which is threatening to cripple their operations. The question would then be whether inability to pay salaries and debts due to financial hardship falls within the definition of "reasonable living expenses" as envisaged in Section 89 (1) (a) (i) of the POCAMLA.

74. In the United Kingdom case of TDK Tape Distributor (UK) Ltd v Video Choice Ltd [1986] 1 WLR 141, 146 Skinner J defined "living expenses" as :-

> " ..ordinary recurrent expenses involved in maintaining the subject of the injunction in the style to which he is reasonably accustomed. It does not include exceptional expenses."

75. Similarly, in the Matter of Cantor Index Ltd v Lister [2002] CP Rep 25, in determining whether the proper construction of the freezing order in that case permitted a living expenses provision to be rolled over, Neuberger J, observed that:

> " The purpose of this part...is to enable the defendant to live his private and social life in a reasonable way, no doubt taking into account his previous lifestyle, despite the making of the freezing order."

76. Closer home in the case of Assets Recovery Agency v Lilian Wanja Muthoni T/A Sahara Consultants & 5 Others [2019] eKLR Ong'udi J defined reasonable living expenses as "expenses a person necessarily incurred in achieving a reasonable standard of living".

77. Likewise in the case Assets Recovery Agency v Samwel Wachenje alias Sam Mwadime & 7 others [2016]eKLR L. Achode J as she then was held that:

> " 34) The foregoing section therefore gives the court power to vary a preservation order, where it can be sufficiently proven that the operation of the order will deprive the applicant of the means to provide for his reasonable living expenses, causing him undue hardship. Further the said undue hardship should be such as outweighs the risk that the property concerned may be destroyed, lost or transferred.
>
> 35) .....
>
> 36) The applicants claim that the motor vehicles which they allegedly bought using company funds are used in the running of these businesses. They have however not demonstrated that these vehicles are used as a means of transport "necessary for their travel in executing their business dealings as pleaded. In any case, the foregoing is not one of the pre-requisite conditions for the granting of a variation, or recession order under Section 89(1) (a) of the POCAMLA and order 45, rule 1 of the Civil Procedure Rules.
>
> 37) I have considered the rival arguments on this issue and find that the applicants have failed to demonstrate how the subject motor vehicles are the means by which they provide for their reasonable living expenses. It is also not clear how compliance with the order of 31st December, 2015 will cause them undue hardship, which far outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred."

78. It is therefore clear to me that the living expenses envisaged in Section 89 (1) of the POCAMLA are the personal living expenses of the Applicant a natural person, but not of a company. The deponents of the affidavits of the Respondents do not allude to any hardship suffered by themselves, or by the other directors of the two Respondent companies, personally. Their only claim is that the preservation order has exposed the companies' operations to grave danger to the extent that the parent company has threatened to relocate to other countries. Even then no evidence was tendered that the cheques annexed

to the affidavit were presented to the banks and were in fact dishonoured. There is also no evidence from any of the Respondent's creditors that indeed they are owed money by the Respondents. A dishonoured cheque would definitely have remarks to that effect from the bank to which it is presented and in this case there are no remarks to that effect. Cheques are generated internally and the mere fact of their having been drawn is not evidence that they were not honoured.

79. The preservation orders are in respect to four bank accounts. The Respondents have not disclosed whether their companies run other accounts and there is no proof that their business operations have come to a halt since the preservation orders which affect only the four accounts needless to say were issued. The Respondents have also not demonstrated that their suppliers and employees were being paid from the four accounts that are affected by the impugned order.

80. Moreover, the Respondents claim to be subsidiaries of global multi-billion dollar companies with operations in 47 countries in different parts of the world and which have financial muscle to support the Kenyan entities. This in itself contradicts the allegation that the Respondents are likely to meet their financial obligations because of the preservation order. Indeed, they assert that should their assets in the preserved accounts be forfeited their parent company is capable of sustaining them.

81. I find that the Respondents having failed to prove to this court that the preservation orders have kept the natural persons in those companies from meeting their reasonable living expenses their application does not meet the threshold set out in Section 89 (1)(a) (i) of the POCAMLA and this court need not to consider the second condition.

Issue (iii):- Whether the Agency's anticipated application for forfeiture of the subject assets can stop this court from allowing the current application.

82. The Agency submitted that they intend to file an application seeking forfeiture of the funds in the subject accounts and for that reason, the present application should not be allowed. It was argued that a preservation order may not be varied or rescinded if there is a forfeiture application which is yet to be determined. It is instructive however that the order remains in place only once a forfeiture application is filed –see Section 84 (a) of the POCAMLA otherwise Section 89 makes it clear that a party affected by the order may apply for its variation or rescission during the pendency of the order. As earlier explained a preservation order is valid for ninety days from the date of its gazettement unless a forfeiture application is filed in which case the preservation persists until the forfeiture application is heard and determined. In my considered view. An intended but yet to be filed forfeiture application cannot be a bar to an application for variation or setting aside of a preservation order and this issue must therefore be answered in the negative.

Issue (iv):- Who should bear the costs of the application.

83. Costs follow the event and the 1st and 2nd Respondents who are the applicants herein shall bear the costs of the application.

Final Disposition.

84. The Notice of Motion dated 28th September, 2023 is dismissed for want of merit and the costs thereof are awarded to the Agency.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF DECEMBER, 2023.

E. N. MAINA

JUDGE