



Assets Recovery Agency v Njunge & 5 others (Anti-Corruption and Economic Crimes Civil Suit E028 of 2021) [2022] KEHC 12140 (KLR) (Anti-Corruption and Economic Crimes) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E028 OF 2021**

EN MAINA, J

JULY 28, 2022

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

ESTHER WAGIO NJUNGE 1ST RESPONDENT

MARGARET WANJA MUTHUI 2ND RESPONDENT

LIGHT HOUSE TRADING COMPANY LTD 3RD RESPONDENT

GRACE NYAMBURA NDIRITU 4TH RESPONDENT

MERCY WAMBUI NYAMBURA 5TH RESPONDENT

CYNTHIA WANJIKU NYAMBURA 6TH RESPONDENT

RULING

1. The 1st, 3rd to 6th Respondents/Applicants have filed a Notice of Motion dated 17th February 2022 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 of the *Civil Procedure Rules* 2010 which seeks the following orders:

- 1) Spent.
- 2) Pending the hearing and determination of this application inter partes this Honorable Court be pleased to stay the proceedings in HCACEC Application No. E028 of 2021 (the forfeiture proceedings).



- 3) Pending the hearing and determination of the intended appeal, this Honorable Court be pleased to issue a stay of proceedings in High Court Anti-Corruption & Economic Crimes Civil Application No E028 of 2021 (the forfeiture proceedings).
 - 4) The costs of this application be provided for.”
2. The grounds for the application as can be discerned from its face and supporting affidavit of Esther Wagio Njunge sworn on 17th February, 2022 can be summarized as below:-
- (i) The Applicant obtained ex parte orders from the Chief Magistrates Court in Misc. Criminal Application No E1422 of 2021, Misc. Criminal Application No E1423 of 2021 and Misc. Criminal Application No E1700 of 2021, to investigate and restrict debits from the 1st, 2nd and 3rd Respondents bank accounts. The 1st, 3rd, to 6th Respondents filed a Misc. Application No. E022 of 2021 in this court, seeking various orders inter alia to quash the orders issued by the Chief Magistrates Court in CM Misc. Application No E1423 of 2021 and CM Misc. Criminal Application No E1700 of 2021, which application was heard and dismissed by this court in its ruling delivered on 16th December 2021.
 - (ii) The Respondents are dissatisfied with the decision of the Honorable Court and seek to appeal the decision and have filed a Notice of Appeal and Request for Proceedings dated 21st December 2021.
 - (iii) The Respondents contend that the appeal is arguable and raises a prima face case as evidenced by the grounds in the draft Memorandum of Appeal. That the forfeiture proceedings form a series of chain emanating from the impugned orders of the subordinate court in Nairobi Chief Magistrate Court Miscellaneous Criminal Application No E1423 of 2021 and Nairobi Chief Magistrate Court Miscellaneous Criminal Application No E1700 of 2021 and which orders the Respondents contend are illegal, unprocedural, irregular and issued in violation of the Constitution and the law.
 - (iv) They contend that they stand to suffer great prejudice and irreparable harm should this application not be granted as the forfeiture proceedings founded on the impugned orders will progress and thus perpetuating the violation of the Respondents’ constitutionally enshrined rights. That should the forfeiture application proceed, the instant application would be rendered nugatory and its success a pyrrhic victory as the court proceedings in the forfeiture application would have sanctioned the irregularities and illegalities sought to be prevented.
 - (v) That the forfeiture application, to the extent that it stands on illegal orders is groundless in line with the maxim ex nihilo nihil fit. That should the appeal succeed to the effect that the subordinate court lacked the requisite jurisdiction, then the success of that appeal would amount to naught, as the suit would have been determined by a court thereby exposing the parties and the Court to a waste of judicial time.
 - (vi) Lastly, this application has been made timeously and expeditiously without any unreasonable delay; that the Respondents have demonstrated that they have a prima face arguable case; that the application was filed expeditiously and that the application has established sufficient cause to the satisfaction of the court that it is the interest of justice to grant the orders sought.

The Response

3. The Applicant/Respondent opposed the Application through the replying affidavit of CPL Fredrick Muriuki sworn on 18th March 2022.



4. The Applicant/Respondent contends that the respondents'/Applicants' appeal is not arguable; that the issues raised by the respondents are moot as they were considered and determined by this Court; that the impugned orders obtained in the Chief Magistrate Court enabled the Applicant/Respondent to conduct investigations and gather evidence which culminated in the preservation proceedings and the subsequent forfeiture proceedings and that the orders were obtained in accordance with the law and the respondents failed to prove the alleged illegality, unconstitutionality or irregularity of the said orders.
5. The Applicant/Respondent avers that the Respondents/Applicants have not demonstrated the prejudice or irreparable harm they will suffer should their prayers be rejected and therefore they are not entitled to the stay orders they seek. The Applicant/Respondent also contends that the forfeiture application herein was properly instituted in accordance with the provisions of the *Proceeds of Crime and Anti-Money Laundering Act* and the respondents will suffer no prejudice if the forfeiture proceedings are heard. The Applicant/Respondent also contends that the forfeiture Application has merit and is supported by evidence that the funds and assets in issue are proceeds of crime. Further, it is argued that the Chief Magistrates Court, which issued the orders sought to be quashed, had jurisdiction to grant those orders.
6. The Respondents and the Applicant filed written submissions dated 23rd June 2022 and 26th July 2022 respectively, which this court has fully considered alongside the grounds and affidavits.

Issue for determination

Whether the Respondents/ Applicants have met the threshold for grant of stay of the forfeiture proceedings herein pending appeal.

Analysis and determination

7. The test for stay of proceedings is high and stringent. The general practice is that a stay of proceedings should not be granted unless the proceedings are shown to be frivolous or vexatious, or manifestly groundless and lacking in cause of action (See *Halsbury's Law of England, 4th Edition. Vol. 37* page 330 and 332). Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* sets out three conditions for grant of stay of proceedings pending appeal:-

Order 42 Rule 6

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless –

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

8. The above conditions have been the subject of various decisions in various courts.
9. In the case of *Kenya Wildlife Service vs James Mutembei* (2019) eKLR Gikonyo J observed: -

“[5] Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”

Similarly in the case of *Principal Kathiani High School & another v Joseph Mbugua Gitbehu t/a Mwaki Jumla Supplies* [2021] eKLR Odunga J held:-

“24. In *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990* [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to Section 1A(2) of the *Civil Procedure Act* “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

10. On the first limb of whether the Respondents have established a substantial loss, the Respondents have filed a draft Memorandum of Appeal enumerating 13 grounds of appeal against the ruling delivered by this court on 16th December 2021 in Misc. Application No. E022 of 2021. In that application the Respondents/Applicants had challenged the jurisdiction of the magistrate’s court to issue orders for investigation of their accounts. The Court of Appeal has already dealt with a similar issue in the case of *Samuel Watatua & Another v Republic* Nairobi Criminal Appeal No. 2 of 2013 (unreported) cited in the case of *Ruth Wendy Wambui v Republic* [2016] eKLR and came to the conclusion that the orders issued by the trial magistrate were lawful. Accordingly, I find that the draft Memorandum of Appeal does not raise arguable grounds that would warrant an inference by this court that the appeal has high chances of success.
11. On the second limb on whether the Respondents will suffer substantial loss should the orders for stay be declined, it is not enough for the Respondents to merely put forward assertions of substantial loss without documentary or any other evidence to support such contention. The court in exercising its discretion should be guided by adequate and proper evidence of substantial loss, unfortunately,



no such evidence has been adduced by the Respondents. Moreover even were this court to hear the application for forfeiture and the Appeal succeeds no loss would be occasioned to the Applicants as the decision of the Court of Appeal would act to overturn that of this court and hence no forfeiture if any is ordered would take place.

12. On whether the application has been filed without undue delay, it is my finding that although the application was filed timeously this ground cannot stand alone to grant a stay of proceedings where the first two limbs of the test for stay have not been satisfied.
13. The court takes cognizance that the forfeiture proceedings were filed more than a year ago and that this court and the parties and their Advocates are enjoined by Sections 1A and 1B of the *Civil Procedure Act* to see their just, fair and expeditious disposal. To grant the orders sought would only occasion further delay. The application is therefore dismissed with costs to the Applicant/Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2022.

E N MAINA

JUDGE

