Assets Recovery Agency v Wanjohi (Miscellaneous Application E024 of 2022)
[2022] KEHC 14483 (KLR) (Anti-Corruption and Economic Crimes) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

MISCELLANEOUS APPLICATION E024 OF 2022

EN MAINA, J

OCTOBER 27, 2022

BETWEEN

ASSETS RECOVERY AGENCY ..... APPLICANT

AND

ISABEL NYAGUTHII WANJOHI ..... RESPONDENT

RULING

1. By the Notice of Motion dated 15th June, 2022 the Respondent who is the Applicant in this application has sought orders to rescind, vary and set aside the exparte preservation orders issued by this court on 7th June, 2022 in regard to her account No. 8700124416801 held at Standard Chartered Bank. It is also sought that the funds in the account which are currently in the Assets Recovery Agency/Respondent's USD account NO. 1292910038 KCB Bank be released to the Applicant's account unconditionally.

2. The gist of the application is that the Agency/Respondent after freezing the account vide an order of the Chief Magistrate's Court Misc. Cr. Appl. No. E029 of 202 issued on 19th April, 2022 and upon completing investigations it on 6th June, 2022 unfroze the account, withdrew the matter and marked it as settled.

3. It is argued that the decision to withdraw the matter and mark it as settled was reached after the Applicant provided evidence that:-

   "(b)(iii)

   (1) Platcorp Group deals in micro-finance.

   (2) The Group consists of 15 companies in 7 African counties

   (3) The Applicant is the head of Treasury of Platcorp Group

(4) Platcorp Group lends money to small-medium enterprises as well as to low and middle-income individuals, and has loans in excess of USD 290,000,000 and borrowings from various funders to Platcorp Group of approximately USD 170,000,000; and

(5) The funds were lent to the Applicant by Platcorp Mauritius, the holding company and were part of the borrowings referred to hereinabove for an onward lending to Premier Credit South African which is a subsidiary company."

4. It is the Applicant's case that upon learning of the freezing orders she recorded statements with the Agency's Corporal Sautet and provided evidence proving the following:-

"a) That she was employed by Platinum Corporation as its Head of Credit. Her duties included raising funds for the entire Platcorp Group (page 18 of the Application dated 15th June, 2022 is a chart reflecting Platcorp Holdings Group Structure.

b. That Platinum Kenya was a subsidiary of the Platcorp Group that dealt in micro finance. The group had several subsidiaries in Africa, including South Africa and Lesotho.

c. That Platinum Lesotho and Premier Credit Sought Africa share a Common monetary Area (CMA). Whereas it is easy to trade in Rands within the CMA, any foreign exchange dealings, out of the area have to be sanctioned by both countries' respective Central Banks. This is often time consuming.

d. As Platinum Lesotho was in dire need of funds, it was suggested that the Holding Company, Platcorp Holdings (Mauritius) would lend money to a senior employee for onward lending to Premier Credit South Africa.

e. That the Annual Report and Audited Accounts of Platcorp Holdings for the financial year ending 2021 shows that Platcorp had over USD 21,419,977, in its bank account (at page 32 of the Application dated 15 June, 2022 is a Consolidated Statement of Financial Position as at 31 December, 2021)

f. That this transaction was not only approved by Platcorp's Board of Directors, but also by the South African Reserve Bank (through FNB), and by the Respondent's Bankers, Standard Chartered Bank in Kenya."

5. That despite supplying the above evidence she learnt from AF Gross & Co. Advocates that the funds in her account had been frozen by the Agency. She stated that in a follow up meeting held on 16th May, 2022 the Agency informed her that they were satisfied with her explanation and that they had recommended that the accounts be unfrozen but in a bizzare twist she was advised to await the orders to lapse as the Government of Kenya needed funds, in the short term, to pay teachers' salaries; that on 6th June, 2022 after lapse of the orders she once again requested her bankers to remit the funds to South Africa but the bank declined only for her to read in the Business Daily of freezing orders issued by this court. It is her contention that the orders were obtained ex parte on 7th June, 2022 a day after the matter was marked as settled and freezing orders issued on 19th April, 2022 discharged.

6. The Respondent/Applicant contends that she had provided the Agency with proof that the funds were not proceeds of crime; that the orders have had a massive adverse reaction on the business of platcorp as none of its funding partners are prepared to deal with a company or an individual accused of money laundering or whose funds are of suspect origin and that her reputation has been destroyed and she is unable to deal with Banks and other institutions and it will adversely affect her professional career as Head of Credit. She asserts that the manner of obtaining the freezing orders was calculated to injure the reputation both of Platcorp Group and herself.

7. It is also the Respondent/Applicant's case that the onus to prove that the funds are proceeds of crime lies on the ARA/Respondent; that to discharge the onus the Agency would have to prove the nature of the crime committed in respect to the funds, the perpetrators and the persons charged with the crime; that the Agency has also failed to prove that the Respondent/Applicant had knowledge that the funds were proceeds of crime; that without mens rea the Agency/Respondent's case is not proven and that the Agency/Respondent has come to court with dirty hands and is undeserving of equitable relied which is what preservation orders are.

8. Counsel for the Respondent/Applicant relied on the following cases to urge this court to set aside the preservation order:-*Fundo Soberano De Angola & others v Dos Santos & Others* [2018] EWH 2199 where an exparte order was set aside due to material non-disclosure.*Bank Mellat v Nickpour* [1985] E.S.R 87*Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2019] eKLR.*Kwale International Sugar Company Limited v Kenya Bureau of Standards & 5 others* [2019] eKLR which quoted with approval the Indian case of *Ganga Saran & Sons Vs IT Officer* AIR 1981 SC 1363*Kenya Revenue Authority v Pevans East Africa Limited* [2020] eKLR.*Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 others* [1998] eKLR*Hassan Kiptoo Kosgey v Spring West Kenya limited* [2019] eKLR*Kenya Anti- Corruption Commission v John Joel ria and 17 Others* [2012] eKLR

9. Counsel contended that the Respondent/Applicant demonstrated that the funds were proceeds of a loan and that the Agency's argument that the loan agreements were not attested has no basis because the requirement for such attestation only applies to agreements for disposition of an interest in land under Section 3(1) and (3) of the *Law of Contract Act*.

10. Counsel argued that the Agency's obligation to fight crime must be balanced with the rights of the Applicant and that other Commonwealth jurisdictions with similar law to ours have advised investigating agencies to tread carefully. In support of that submission Counsel cited the following cases:-*Ms Radha Krishan Industries v State of Himachal Pradesh & others* [2021] 6 SCC 771.*Onto circuit India v Axis Bank* [2021] SCC online SC 55.

11. Counsel submitted that in both cases it was held that the procedure subscribed for obtaining a freezing order must be strictly followed.

12. Counsel submitted that whereas the provisions of the *Proceeds of Crime and Anti-Money Laundering Act* are well intentioned the unrestrained exercise of powers vested to the Agency can be draconian and must be exercised only for reasonable cause based on a fair evaluation of all information. Counsel asserted that at the very least the Agency must at the time of applying, disclose all information received and produce all statements rendered for the court to make a fair evaluation. Counsel reiterated that the Respondent/Applicant has explained how the funds ended up in her account; that it was a company to company transaction with her as a conduit. Counsel stated that the Respondent/Applicant has therefore discharged the burden of proof but the Agency's only rebuttal is that it has reasonable belief that the funds are proceeds of crime which belief is not based on a rational cause. Counsel stated that the Respondent/Applicant has shown the personal harm to herself, her reputation and also the adverse effect on Platcorp Group and she is therefore entitled to the prayers sought.

13. On its part the ARA/Respondent's case is that on 19th April, 2022 it obtained exparte orders in the magistrates court using police powers in Misc. Application No. E029 of 2022; that the said orders were to search, inspect, seize, freeze and preserve funds in the account owned and/or controlled by the Respondent/Applicant; that the orders were served upon the banks whereupon statements of the accounts and other documents necessary for the investigations were supplied; that on 6th June, 2022 the Applicant/Respondent closed the file in the magistrate's court the same having been spent; that on the same date the applicant conducted its investigations which established there were reasonable grounds to believe the funds in the account are proceeds of a money laundering scheme and it proceeded to obtain the impugned order from this court and the orders were granted on 7th June, 2022.

14. Further that the freezing order issued by the Magistrate's court lapsed once the file was closed in line with the holding in the case of *Asset Recovery Agency v Ibrahim* [2020] eKLR; that the preservation (impugned) order obtained from this court was duly gazetted on 17th June, 2022 as required under Section 83 of the *Proceeds of Crime and Anti-Money Laundering Act*.

15. It is contended that the preservation order was lawful as held in the case of *Assets Recovery Agency v Ibrahim* [2020] eKLR where the court stated:-

> " 50. Before a preservation order is made, the court making such order must be satisfied that there are reasonable grounds to do so. Having issued the said orders, it is presumed that the court having perused material placed before it was satisfied that there was prima facie evidence or reasonable ground to believe that the property in question was obtained as a result of proceeds of crime or through money laundering.
>
> 51. The court is therefore bestowed with wide discretionary powers to decide on whether to grant preservation orders or not. As to whether eventually the preserved property is to be forfeited or not is a matter of evidence upon fling a forfeiture application or suit. In the case of *Asset Recovery Agency v Lilian Wanja Muthoni T/A Sahara Consultants and 2 Others* application No. 49/2018 Anti-Corruption and Economic Crimes Division Nairobi the court has this to say.
>
> > " On 29th October 2018 this court after considering all that was filed herein was satisfied that there were reasonable grounds to believe that the funds in the 1st Applicant's accounts were proceeds of crime. It therefore granted the orders preserving the said funds. There is no dispute that a forfeiture suit *vide* Misc. Application No.58 of 2018 has been filed and served on the Respondents/ Applicants. It is in that suit that evidence will be led for the court to determine whether indeed the said funds are proceeds of crime or not."

16. The Applicant/Respondent contends that the Respondent/Applicant does not meet the threshold prescribed by Section 89(1) of the *Proceeds of Crime and Anti-Money Laundering Act* for rescinding, varying or setting aside of the order of preservation; that the Applicant has not demonstrated that the order will deprive her of reasonable living expenses, and cause her undue hardship; that the order does not extend to her salary account and further that as the funds were intercepted when the Respondent/ Applicant was in the process of transferring the same to South Africa there is a real danger that should

the preservation order be discharged the funds will be dissipated and the forfeiture application which should be filed within 90 days after gazzetement of the preservation order shall be rendered nugatory.

17. It is further argued that the application is supported by a defective and incompetent affidavit for not being authorized as required under Order 4 Rule 1(4) of the *Civil Procedure Rules* and hence it is incurably defective.

18. On whether there was a money laundering scheme it is contended that the Applicant opened an USD account on 6th April, 2022 and indicated the purpose of account to be general/personal transactions and the source of the foreign currency as income from employment, but in the statement she recorded during the investigations she indicated the source to be an unsecured loan of USD 1Million from Platcorp Holdings (Mauritius) whose purpose was not disclosed and a loan from Premier Credit South Africa for the same amount; that the two loan agreements produced by the Applicant were not attested by witnesses; that the Applicant is not a high net worth individual as is referred to in paragraph 13 of her Supporting Affidavit as she is not a bank or financial institution and neither is she licensed to carry out money lending business; that the two agreements dated the same date and for the same amount without disclosing the purpose were intended to execute a well-orchestrated scheme of money laundering as defined in Section 3 of the *Proceeds of Crime and Anti-Money Laundering Act*. Counsel posed the question that if Platcorp Holdings (Mauritius) intended to send the funds to its subsidiary in Lesotho why did it not do so directly; why the funds were sent to the applicant, to be sent to Premier South Africa for onward transmission to Platinum Credit Lesotho and further why the funds were not sent to Platinum Kenya instead of to the Respondent/Applicant who is its employee if indeed they had to pass through the Kenyan financial system.

19. Counsel for the ARA/Respondent asserted that the Respondent/Applicant has not demonstrated that the hardship she will suffer outweighs the risk that the funds can be dissipated and that it will be prejudicial to the public interest to lift the preservation orders.

20. In rejoinder by way of further submissions dated 18th July 2022, Learned Counsel for the Respondent/Applicant submitted that the Applicant has demonstrated that the harm suffered due to the order is beyond her personal self; that the hardship has extended to the Platcorp Group with damage to reputation hampering its daily operations; that in regard to the issue of authority to swear required under Order 4 Rule 1(4) of the *Civil Procedure Rules*, courts have severally held that the authority does not have to be filed at the time of filing the suit; that there is no document to support the alleged extract of the reasons given for account opening; that the Respondent/Applicant has severally informed Cpl. Sautet that the reason for the arrangement in regard to the funds was ease of business and that the funds were back to back loans and the complexity of the transaction is clearly beyond the comprehension of the Agency/Respondent.

21. Counsel for the Respondent/Applicant asserted that there is nothing illegal about borrowing and lending money; that a loan as defined in *Black's Law Dictionary, 9th Edition* is:-

> "An act of lending; a grant of something for temporary use.... A thing for the borrower's temporary use; esp., a sum of money lent at interest."

22. Counsel contended that the documents marked INW5 and 6 fall within the legally known and accepted definition of a loan; that a valid loan agreement can be secured or unsecured; that loan is not invalidated by reason of not being attested and that not stating purpose of a loan cannot render it invalid or illegal.

23. On the issue of reasonable belief Counsel reiterated that the onus is on the Agency to prove that the funds are proceeds of crime; that it has not discharged that burden; that the explanation offered by the Respondent/Applicant as to the course of funds is reasonable; that a mere statement that there are reasonable rounds to believe funds are of suspicious origin is not enough, that the belief must be reasonably pegged to an offence that is obvious on the face of it; that the Agency must table evidence to come to that conclusion yet in this case no evidence was provided that an offence was committed in Kenya, Mauritius or South Africa. Further that the transaction was countenanced/approved by all the governing authorities in the said countries and that the money does not leave the supervision and control of the Platcorp Group. Counsel reiterated that the Respondent/Applicant has shown the personal harm to herself, her reputation and the harm to the Platcorp Group and is hence entitled to have the preservation orders set aside under Section 89 of the *Proceeds of Crime and Anti-Money Laundering Act*.

Analysis and Determination

24. Having considered the application, the grounds on its face, the supporting affidavit, the annextures thereto, the response of the Applicant/Agency, the rival submissions and the law, I discern the following to be the issues for determination.

    i. Whether the application is fatally defective.

    ii. Whether the Respondent/Applicant is deserving of the orders sought.

Issue (i) Whether the application is fatally defective.

25. It is trite that in civil proceedings brought on behalf of a corporation the affidavit in support of the proceedings must be duly authorized under the seal of the company or else it is liable to be struck out, see Order 4 Rule 1(6) of the *Civil Procedure Rules*. My finding is that failure to exhibit the requisite authority at the beginning is curable and it was indeed cured by the authority being filed subsequently. The application is therefore competent and properly before this court.

Issue (ii) Whether the Respondent/Applicant is deserving of the orders sought.

26. It is not in doubt that this court issued a preservation order in regard to the funds the subject of this application. From the record the order was issued on 7th June, 2022 pursuant to an application by the ARA/Respondent dated 6th June, 2022.

27. A preservation order is granted exparte under Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* upon the Agency demonstrating that there are reasonable grounds to believe that the property concerned either (a) has been used or is intended for use in the commission of an offence; or (b) is proceeds of crime. In this case the Agency relied on the affidavit of Corporal Sautet Matipei; sworn on 6th June, 2022 which in the considered view of this court justified grant of the order. That is not to say that this court has formed the opinion that an offence has been committed as it can only arrive at such a conclusion after hearing both sides. At the stage of granting the order the Agency is only required to demonstrate that reasonable grounds exist. Section 84 of the *Act* states that the order shall expire 90 days after the date on which notice of its making is published in the Gazette unless inter alia the order is rescinded before the expiry of that period.

28. The grounds upon which a preservation order may be rescinded or varied by this court are set out in Section 89(1) of the *Proceeds of Crime and Anti-Money Laundering Act* which states:-

    " 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 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."

29. From a reading of the section, an order may be varied or rescinded if, either it is demonstrated the order will deprive the applicant of the means to provide for his/her reasonable living expenses and cause undue hardship for him or her and that the hardship 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. The court may also rescind the order once the proceedings against the defendant are concluded. In my view the use of the adjunct "and" between sub article 1(i) and (ii) means that (ii) is in addition to (i) and must be proved in addition to (i).

30. The proceedings against the defendant have not been concluded since this court has been informed that it is still under investigation so the impugned order cannot be rescinded under Section 89(b) and the issue therefore is whether the Applicant meets the threshold of variation in sub-section (1)(a).

31. The gist of the Respondent/Applicant's case as stated in the Notice of Motion, the grounds thereof, the supporting affidavit and the certificate of urgency by which the Notice of Motion was filed, is that the Respondent/Applicant was not entitled to the order given because, firstly it had withdrawn the application for freezing orders files in the lower court and marked it as settled upon being satisfied that the funds were not proceeds of crime. Secondly that the preservation order had ruined the reputation and self-esteem of the Respondent/Applicant by imputing that she is a criminal and money launderer. Further that the consequences of the orders will be disastrous not only to her but to the 11,000 people employed by the Platcorp Group and for the lower income people who wish to access loans at affordable rates.

32. At paragraphs 39, 40 and 41 of the supporting Affidavit she has enumerated the harm that will be visited upon Platcorp Group if the order is not rescinded. In the same affidavit she has also disputed that the funds were proceeds of crime and contended that her explanation on the source of funds is plausible.

33. Whether or not the funds the subject of the impugned preservation order is a matter for determination upon hearing both parties to the proceedings should a forfeiture application be filed. As already stated, for a preservation order to issue the Assets Recovery Agency need only demonstrate reasonable grounds that the property is proceeds of crime or it has been used or is intended for use in the commission of an offence. This is in my view is akin to requiring a party to demonstrate that they have an arguable appeal or defence that raises triable issues which as has often been held need not be one that must succeed either at the appeal or the trial as the case may be. I am not therefore persuaded that the fact that the Assets Recovery Agency/Respondent has not at this stage proved that the funds were being used for money laundering is a ground to discharge the order.

34. The Respondent/Applicant has also urged that the order should be set aside because the Applicant withdrew the application in the lower court and marked it as settled. It was explained to this court that the said application was made to seek search warrants for purposes of investigating the account. It is trite that such orders are granted for a limited period for purposes of aiding investigations after which they lapse. As was held in the case of *Mape Building & General engineering v Attorney general & 30 others* [2016] eKLR:-

> "73. The 2nd Respondent moved the court. Statute law under Section 118 of the *Criminal Procedure Code* and Section 180 of the *Evidence Act* allowed them to do so. The application should be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence.
>
> 74. To avoid arbitrary infringement of a citizen's privacy or property through entries or searches or services, the *Criminal Procedure Code* provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. The order or warrant is never to be granted as a matter of course.
>
> 75. It can thus be clearly understood why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24 (1) of the *Constitution*.
>
> 76. In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte.
>
> 77. The Petitioner also laid challenge to the fact that the freezing order appears indefinite. My view is that Section 121(1) of the *Criminal Procedure Code* is relatively clear. The section provides for the item seized to be so seized and detained for as long the investigations or prosecution is still on-going. The

> Respondents have explained the rather complex nature of the investigations. The investigations, at the time of the hearing of this Petition were still on-going. They involved inquiries into allegations of money laundering. I am also satisfied that the seizure and freezing actions will not lead to any waste of the money in the bank accounts now frozen."

35. The issue of the "life" of orders obtained under Sections 118 and 121 of the *Criminal Procedure Code* and Section 180 of the *Evidence Act* has however since been settled by the Court of Appeal in the case of *Samuel Watatua & Another v Republic* Court of Appeal Nai Criminal Appeal no. 2 of 2013 (unreported) where the court stated:-

> "..... in certain cases, as stated in the Kibiti case (*supra*) where properties or monies in bank accounts may be dissipated before the matter is heard inter partes, exparte orders may be granted but only for a short period. Thereafter the application (for seizure/freezing) should be served upon all persons likely to be affected by any ensuing orders and no final order should be made until the matter is heard inter parties, pursuant to Article 50 of the *Constitution*, accorded an opportunity to be heard."

36. The search warrants and freezing orders obtained in the lower court having been obtained for purposes of investigation they obviously became spent once the warrants were obtained and investigations completed. It was therefore lawful and procedural for the ARA/Respondent to move to this court to obtain preservation orders. As was stated in the case of *Abdulharman Mahmoud Sheikh & 6 others V Republic & others* [2016] eKLR:-

> "The letter, spirit, purpose, and gravamen of the *Proceeds of Crime and Anti-Money Laundering Act* is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after due process, to the state, on behalf of the public which is deemed to have suffered some injury by the criminal conduct."

37. The mere fact therefore that the ARA/Respondent marked the file in the lower court as settled does not qualify as a ground to discharge the orders herein. There was in any event nothing placed before this court to demonstrate that the ARA/Respondent was satisfied with the evidence placed before it by the Respondent/Applicant and that based on that evidence it had agreed not to move forward with the matter.

38. Turning to the merits of the application, Section 89(1)(a) of the *Proceeds of Crime and Anti-Money Laundering Act* has expressly set out the grounds upon which a preservation order may be varied or rescinded. The applicant must demonstrate that the operation of the order will deprive them of the means to provide for their reasonable living expenses and cause undue hardship to them. The grounds cited by the Applicant in the instant case are that the order has ruined her reputation and her self-esteem and has also adversely affected the Platcorp Group. Nowhere has she stated that she has been deprived of her means to provide for her reasonable living expenses and that as a result she has suffered undue hardship. To the contrary it is evident that the preserved funds do not belong to the Respondent/Applicant personally but to a company to which she was but an employee. (See paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,11, 14, 15, 16 et al of her supporting affidavit sworn on 15th June, 2022). Her own salary, as was submitted by Counsel for the ARA/Respondent was not affected by the order. My finding therefore is that the grounds raised do not meet the threshold of Section 89 (1) (a) of the *Proceeds of Crime and Anti-Money Laundering Act*. I need not therefore consider subsection (1)(a) (ii).

39. The upshot is that the application is devoid of merit and it is dismissed with costs to the ARA/ Respondent.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022.

E N MAINA

JUDGE