



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI- CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISC NO E027 OF 2020

ASSETS RECOVERY AGENCYAPPLICANT/RESPONDENT

VERSUS

JOYCE TERESIA AKINYI OCHIENG.....RESPONDENT/APPLICANT

RULING

1. The respondent moved the court by way of a Notice of Motion dated 22nd September, 2020 for preservation orders, in respect of motor vehicles registration numbers KCR 521Z TOYOTA CROWN and KCC 865G TOYOTA DBA- KGC 10 owned or registered in the names of the applicant herein, which they believed were proceeds of crime and or intended to be used for criminal activities.

2. The court (Ngugi, J) granted the said orders ex parte and directed that caveats be registered on the subject motor vehicles by the Director General of NTSA and that they be surrendered to the Director of Criminal Investigations, for safe custody.

3. In compliance with the provisions of the Proceeds of Crime and Anti- Money Laundering Act, the Agency caused the order to be Gazetted on 9th October, 2020. In the meantime, by an application dated 28th September, 2020, the applicant herein under a certificate of urgency moved the court for the following orders:

- a) The Honourable court be pleased to stay the order of preservation issued on 23rd September, 2020 prohibiting the sale, transfer or disposal off or other dealings with the subject motor vehicles, pending the hearing and determination of this matter.*
- b) The Honourable Court be pleased to vary, set aside and or review the order issued by the court herein.*
- c) That the court does grant any other relief it deemed fit.*

4. The application was supported by the grounds on the face thereof and by an affidavit sworn by the applicant. The grounds which for the purposes of this ruling, may be summarized as follows: that the applicant had been greatly prejudiced and had suffered great prejudice, as a result of an order that was issued through concealment of material facts and by misleading the court.

5. It was contended that the preservation order had heavily deprived the applicant of means of reasonable living expenses and caused her hardship, during the period of Covid 19 pandemic. Further the order had greatly prejudiced the applicant's business, family and personal affairs, subjecting her to excessive financial hardship, distress and inconvenience, as a result of seeking seeking alternative means of transportation for herself and family.

6. It was contended that the respondent had not availed or demonstrated any reasonable grounds to believe that the preserved motor vehicles were obtained through illegitimate trade in narcotic and did not meet the threshold under Section 82 of the Act.

7. In the affidavit in support, the applicant deposed that, the allegations that the motor vehicles were from the proceeds of crime was based on an ongoing criminal proceeds at the Chief Magistrates Court at JKIA CASE no 121 of 2019 and that as per the provisions of Article 50(2)(a) of the constitution, every accused person is deemed innocent until proven guilty.

8. It was deposed further that she had in the said case made an application for the subject motor vehicles, which were not exhibits, to be released to her, which application was still pending as at the time when the preservation application was made.

9. It was contended that the applicant had other sources of income including proceeds from sale of property known as VILLA No. 5 erected on LR NUMBER 3734/223, which was sold at the sum of Ksh. 43,000, 000. And that she was an investor who had invested in real estate

business, that the proceeds of the sale were deposited into her current account, before being transferred into her savings account and were therefore not as a result of money laundering.

10. It was contended further that she was a director of NEW PORT INN LIMITED which operated a bar and restaurant premises known as deep west resort with a daily income of less than Kshs.1,000,000, which she deposits in her bank account and therefore the respondent had not produced any evidence linking her with illegal activities.

11. It was deposed that motor vehicle registration No. KCR 521Z was purchased at a sum of Kshs.2,200,000 under HIRE PURCHASE via instalments of six (6) months from 2nd October 2018 and was therefore not a proceed of crime. As regard KCG 856G, it was contended that the same was bought for Kshs.400000 from UNIQUE HEAVY EQUIPMENT AND CONSTRUCTION LIMITED the transfer of which was effected in July, 2018, vide a court order issued in CMCC No. 6004 of 2018 the seller thereof having declined to effect the transfer to her.

12. The applicant contended that she was an investor in real estate business since 2004, which business involved huge cash bank deposits, in respect of the said transactions, copies of the sales agreements were attached. It was deposed that the applicant was very hard working having started many businesses that had created employment to many citizen and did not own any illegally acquired property.

13. In response to the application, the respondent filed a replying affidavit through CPL FREDRICK MURIUKI in which he deposed that on 13th July, 2019, a team of police officers, arrested the applicant who was suspected to be dealing in illicit trade in narcotic drugs, contrary to the provisions of Narcotic Drugs and Psychotropic substances (control) Act No. 4 of 1994, during which a total of 1050 grams of Heroin were recovered from the Resort associated with her.

14. It was stated that the analysis the heroin was found to be at 40% purity, which was a narcotic drug and that the Agency received information that the applicant had acquired massive assets/properties, using proceeds obtained from the illegitimate trade of wildlife trophies and narcotic drugs and received funds which were suspected to be proceeds of crime contrary to the provisions of Proceeds of Crime and Anti- Money Laundering Act.

15. He deposed further that they commenced investigations into the applicant's bank accounts, which established that the same had received suspicious huge sums of cash and cheque deposits, most of which were made in trenches below Ksh.1,000,000, to evade the reporting guidelines by the Central Bank of Kenya.

16. In the course of his investigations, it was deposed that it was established that the subject motor vehicles were properties of the applicant, which there was reasonable cause to believe were procured/ acquired using proceeds of crime, from the illegitimate trade of Narcotic drugs.

17. It was contended that the order sought to be varied did not cover the business owned by the applicant and therefore her living expenses from the said business were not affected. It was stated further that the applicant had not adduced any evidence to demonstrate the hardship visited upon her, as a result of the order issued by the court, for the preservation of the same, pending suit for forfeiture.

18. It was contended that the subject matters herein are presumed to be proceeds of crime and could not constitute genuine assets owned by the applicant, who had not complied with the court order is issue.

SUBMISSIONS

19. Directions were issued to the effect that the application be determined by way of written submissions. On behalf of the applicant, it was submitted that the order issued herein, was obtained through concealment of material facts and without any evidence that the motor vehicles were obtained through illegitimate trade of narcotic drugs.

20. It was submitted that the respondent had failed to make full disclosure of facts regarding the relationship between the source of money used to purchase the motor vehicles and the illicit trade and dealing in drugs. It was contended that without such disclosure the court could not be able to arrive at a fair and just decision for which the following cases were submitted in support: **BAHADURALI EBRAHIM SHAMJI v AL NOOR JAMAL & 2 others [1998] eKLR and ETHICS & ANTI – CORRUPTION COMMISSION v. JOSEPH CHEGE GIKONYO & another [2016] eKLR**

21. It was contended that the Respondent application was triggered by the arrest of the applicant and her subsequent charging for an alleged offense of trafficking Narcotic Drugs, which case was still pending at the trial court. It was submitted that there was no evidence linking the applicant to illegal activities and therefore no prima facie case was presented to court, to enable it grant the orders, for which the case of **ETHICS AND ANTI-CORRUPTION COMMISSION v MINISTRY OF MEDICAL SERVICES & another [2012] eKLR** was submitted in support.

22. It was the applicants case that the orders were unconstitutional, unjust, irregular and lacking in nexus of the allegations. It was contended further that the order for the preservation was unconstitutional as it was against the applicants right of ownership of property, which had subjected the same to undue hardship, thus denying her loss of livelihood, since she was using the vehicles in running, supporting her business and to cater for her family.

23. It was contended that the order had heavily deprived the applicant means of reasonable living expenses and commuting, as she was using the same for business and their seizure coming during the covid 19 situation, had caused more suffering. It was submitted that the applicant had explained the sources of her funds and the evidence in respect of the purchase of the subject motor vehicles and it was submitted that on the authority of **ASSETS RECOVERY AGENCY vs ROSE MONYANI [2020] eKLR** the order should be discharge.

24. It was therefore contended that the applicant had met the threshold to enable the court discharge the order, which was secured through

none disclosure of material facts by the respondent.

25. On behalf of the respondent, it was submitted that Section 89 of PROCAMLA placed the onus on the applicant to demonstrate the deprivation of means to provide for reasonable living expenses or undue hardship suffered to warrant the variation and or rescission of the preservation order issued. In support of the submission, reliance was placed on the case of **ASSET RECOVERY AGENCY V. SAMUEL WACHENJE alias SAM MWADIME & 7 others [2016] eKLR** where the court stated that, the section gives the court the power to vary the order, where it can be sufficiently proved, that the operation of the order will deprive the applicant of the means to provide for his reasonable living expenses, causing him undue hardship, which must be weighed against the risk of the property concerned being destroyed, lost or transferred.

26. It was contended that the burden of proof must be discharged by the applicant. It was the respondent's case that the applicant's living expenses from her business had not been affected by the preservation order issued. It was submitted that the applicant through affidavit evidence had confirmed that her business was generating reasonable income and therefore her allegations of undue hardship, due to the preservation orders were not true.

27. It was further submitted that the applicant had not adduced evidence to support her contention that the subject motor vehicles were used for business, family and personal transportations and that they were luxury vehicles which were not tool of trade and were therefore suspected to be proceeds of crime.

28. It was contended that the applicant will have the opportunity to show how the assets were acquired at the forfeiture stage, when the same is filed under the provisions of Section 90 of the Act and not at this stage of the proceedings. It was stated that to allow the application at this stage, will render the filing and the determination of the intended forfeiture application an academic exercise and shall amount to granting permission to the party to benefit from the proceeds of crime, which was contrary to the purpose of the Act.

29. It was submitted further that the applicant was suspected to have acquired the assets and funds under preservation through proceeds of crime, obtained from the illegitimate trade of prohibited narcotic drugs, which she laundered in purchasing the motor vehicles under preservation, within the meaning of Sections 3 and 4 of the Act. It was stated that the applicant remained strongly suspected of having committed complex organized crime, as per the available evidence, which indicated that she was engaged in illegitimate of narcotics drug trade and the order was to secure the assets which were likely to be forfeited to the state.

30. It was finally submitted that the Agency only need to make out a prima facie case where the court is satisfied that there is evidence establishing reasonable grounds within the Act and therefore the preservation orders were lawfully granted.

ANALYSIS AND DETERMINATION

31. The following facts are not contested as regards this cause; the applicant was charged and is currently facing a charge of trafficking Narcotic Drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994**. That as a result of the said arrest, the Respondent searched the applicants bank accounts, which was found to have had several cash deposits, leading to a reasonable suspicion that they were proceeds from the trade in drugs.

32. The respondent thereafter moved to court for preservation of the two motor vehicles, the subject of this application, which order was granted by the court and which the applicant has moved the court to set aside.

33. I have for the purposes of this ruling, identified the following issues for determination:- whether the order for preservation was properly issued and whether the applicant has made up case for the discharge of the said order.

34. Preservation order is provided for under Sections 81 and 82 of the Act, which provides as follows:

“82. Preservation Orders (1) The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property. (2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned— (a) has been used or is intended for use in the commission of an offence; or (b) is proceeds of crime. (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) Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.”

35. At this stage of the proceeding, the court is only required to be satisfied, that there are reasonable grounds to believe, that the property in question was obtained as a result of proceeds of crime and or intended for criminal purposes. What constitute reasonable grounds will ordinarily be from the affidavits and documents annexed thereto by the Agency.

36. Once the order is issued, the Agency is required under section 83 of the Act to gazette the same, which order will last for 90 days unless the Agency filed an application for forfeiture.

37. The order so issued may be rescinded or varied under the grounds set out in section 89 of the Act which provides as follows:

“(1) A court which makes a preservation order— (a) may, on application by a person affected by that order, vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied— (i) that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and

cause undue hardship for the applicant; and (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and (b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded.”

38. It is at the forfeiture stage of the proceeding, when the person affected with the order is required to show that the property was legally obtained, as supported by the evidence of his source of income as was stated in the south African case of **NATIONAL DIRECTOR OF PROSECUTIONS v MOHAMED 2002 SA843** where the court stated:-

“There is however a defence at the second stage of the proceedings when forfeiture is sought by the state. An owner can at that stage claim that he or she obtained the property legally and for value and that he or she neither knew that property constituted the proceeds of crime or had been an instrumentally in an offence.”

39. At the first stage of the proceedings the applicant only required to prove to court that the order for preservation has or will deprive her of reasonable living expense and or that she will suffer undue hardship as a result of the order.

40. In answer to the first issue as to whether the order was lawfully granted, I have looked at the affidavit in support of the application and the fact that the applicant has not denied the fact that she is currently facing a charge in respect of necrotic drugs and find that there was prima facie evidence placed before the court, to show that the subject matter herein may have been proceeds of crime. From the record of the proceedings, the affidavit evidence before the court confirmed that there was a prima facie case and the Agency had disclosed all the relevant material. I therefore find no merit on this ground.

41. On the issue of hardship, it is clear from the applicant’s evidence that she approached the court as if it was at the second stage of proceedings. She only attempted to show the court that she has legitimate business and sources of income. She however failed to show the court any hardship she had suffered or would suffer as result of the preservation order. The two stages of the proceedings are distinct and the amendment required to discharge/vary the order are not the same as those required at the forfeiture stage.

42. The applicant had an opportunity to disclose the nature of the hardship but she failed to do so. She further failed to show any link between the use of the said motor vehicles for business, family and personal purposes, the absence of which entitles the court to draw adverse inference in favour of the respondents, that having been charged with the offense of trafficking in narcotic drugs, the applicant will have to explain the source of her funds at the second stage of the proceedings. On the basis of the facts placed before the court at this stage, the applicant has failed to show any hardship suffered as a result of the order which has affected a measurable means of livelihoods.

43. In the end the court has only been asked to speculate about the hardship that the applicant has suffered by the preservation order, which could have been easily explained in her affidavit if any, leading me to conclude that she has failed to prove hardship as required under section 89 of POCAMLA and as stated by the court in the case of **ASSET RECOVERY AGENCY v. SAMUEL WACHENJE (supra)** where the court held that hardship should be such as outweighs the risk that the property concerned may be destroyed and **ASSET RECOVERY AGENCY v PAMELA ABOO [2018] eKLR**. Where the court stated that the burden of proof as articulated under Section 89 of POCAMLA lies with the party seeking discharge preservation order and must prove or demonstrate that the order concerned will deprive her of the means to provide for reasonable living expenses and 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.

44. The applicant failed to demonstrate to court how the subject motor vehicles are relied upon in providing for him reasonable daily living expenses and since the subject motor vehicle are still legally hers until the state proves otherwise during the second stage of proceedings, I am unable to see how her constitutional right to property is violated by the preservation order issued at this stage.

45. I therefore find no merit on the application herein which I hereby dismiss with no order as to cost.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28th DAY OF JANUARY, 2021

.....

J. WAKIAGA

JUDGE

In the presence:-

Ms Okoth/Nkatha/Mr. Kurauka for the Applicant

Ms Ngelechei for the Respondent

Court Assistant – Potishoi