



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISC. CRIMINAL APPLICATION NO. 31 OF 2020**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VS-**

**SWALEH YUSUF AHMED.....1<sup>ST</sup> RESPONDENT**

**ASMA ABDALLA MOHAMED.....2<sup>ND</sup> RESPONDENT**

**RULING**

**The Application**

1. The Appellant the State in Shanzu SPM's Court Criminal Case No. 988 of 2017 was aggrieved by judgment of then Y.A Shikanda delivered on 25<sup>th</sup> August, 2020 acquitting the respondents herein and lodged appeal No. 22 of 2020. Pending the hearing and determination of the said appeal, the appellant filed application dated 3<sup>rd</sup> September, 2020 seeking that an order do issue for preservation of Motor Vehicle registration number KCH 429W Station Wagon and money amounting to Kshs. 503, 400/= which were produced as exhibits pending the hearing and determination of the appeal.
2. The application was supported by the affidavit sworn by inspector Albashir Olow on 3<sup>rd</sup> September, 2020 and the grounds on the face of the application to the effect that the appeal has high chances of success and that if the exhibits are not preserved the appeal shall be rendered nugatory.
3. The Respondents opposed the application vide a replying affidavit sworn by Swaleh Yusuf Ahmed the 1<sup>st</sup> appellant sworn on 14<sup>th</sup> October, 2020 and averred that they were acquitted of the charges against them and that exhibits which were recovered from them should naturally be returned to them as there was no evidence upon which order applied for may be based.
4. The Respondents argued that the appeal will not require the exhibits but only the records of the lower Court. It was also averred that the grounds of appeal did not raise any question of forfeiture and the orders sought will only prejudice the Respondent and are meant to deny them the enjoyment of their acquittal.
5. The application was canvassed by way of written submissions. The Respondents in their submissions argued that the application is misconceived, for reasons that the section under which it is brought, sections 356 and 357 of the Criminal Procedure Code is only available to accused person/Appellant and not the republic. It was also argued that the Court on appeal will not require exhibits but only the record of the Lower Court. It was also said that forfeiture is not an option in this case even if the appeal succeeds there was no claim of conveyancing or sale of narcotics.
6. It was also submitted that the Appellant had not demonstrated that the appeal has overwhelming chances of success. It was also contested that the exhibits are proceeds of crime as the application before Court is not brought under Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and the Assets Recovery Agency has not pursued to prove that the exhibits were proceeds of crime. The Applicants were therefore not empowered to begin recovery proceedings and the pending appeal was not a recovery proceeding. The Court was urged to dismiss the application.
7. The Appellants in its submissions relied on the case of **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR** where the Court stated that;

***“this is a claim for civil recovery. A claim for civil recovery can be determined on the basis of the conduct in relation to property without the identification of any particular unlawful conduct. The plaintiff herein is therefore not required to prove that the***

***defendant actually committed an act of corruption in order to invoke the provisions of the ACECA.”***

8. The Applicant submitted that criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. It was further submitted that whether or not the 1<sup>st</sup> respondent and his co-accused are ultimately convicted or acquitted does not have a bearing on the suit for recovery of assets believed to be proceeds of crime. Reliance was placed on the case of **Kenya Anti-Corruption Commission v James Mwathethe Mulewa & Another** [2017] eKLR where even though the defendant in the suit had been acquitted in his criminal trial, the Court still held that his failure to explain the source of his assets justified their forfeiture to the state.

9. The appellant submitted that the orders for preservation of the exhibits in issue ought to issue pending the hearing and determination of the appeal since the appeal has very high chances of success and in the event the same is successful and the exhibits have been released and transferred to third parties and the money utilized, it will highly prejudice the appellant and the object and spirit of POCAMLA shall be lost. The appellant further submitted that the respondents have not demonstrated how they acquired the money in issue and that the motor vehicle in question is registered under Musa Athman Kiberige who has not sought return of the same.

10. The appellant submitted that it is at liberty to expeditiously pursue the appeal or invite the Assets Recovery Agency to set in and commence the process of civil forfeiture which is not hobbled down by the requirement for conviction as encapsulated under criminal forfeiture.

#### **Determination.**

11. I have considered the issues raised on the Notice of Motion, replying affidavit by the Respondent and submission of parties. In my view, the issue which arises for my determination is whether the Applicant has satisfied the conditions necessary to warrant grant of a preservation order.

12. Section 82 of Proceeds of Crime and Anti Money Laundering Act provides as follows:

***“(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 Sub-Section (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 authorising the seizure of 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).....***

13. In light of the aforementioned provision, I note that the Asset Recovery Agency is the body tasked with bringing forth applications for preservation and/or seizure of assets of proceeds of crime and not the Office of the Director of Public Prosecutions. In the present case, the Court is burdened with the duty of determining from the material placed before it whether a *prima facie* case has been established by the Applicant to warrant issuance of preservation orders *ex parte*. The Court in **ETHICS & ANTI CORRUPTION COMMISSION V MINISTRY OF MEDICAL SERVICES & ANOTHER** [2012] eKLR observed that;

***“However, it is my view that for the Court to grant the orders under section 56 (1) a prima facie case must be presented before court that the property in question has been the subject of some corrupt dealings. It is not enough for the Commission to simply walk into Court with a request and expect the said orders to be granted. Where the said orders are granted and it turns out that either the Court was misled or no prima facie case existed that the property was acquired as a result of corrupt conduct, the Court would be perfectly entitled to vacate the orders. It is therefore not correct for the Commission to submit that by granting the orders sought by the 2<sup>nd</sup> respondent herein, the Court will be stopping the Commission from conducting investigation”.***

14. In my view, for the appellant/applicant to successfully establish a *prima facie* case, they ought to demonstrate that they have an arguable appeal with high chances of success, that there is reasonable suspicion that the assets in question were acquired from proceeds of crime and that there is a danger that the said assets will be disposed of to third parties and the monies utilized if the preservation order is not granted.

15. First, after reading the judgment by the Trial Magistrate, I noted that there is no mention of whether the items in question were acquired with proceeds of crime thus clear that this issue and that of forfeiture of the exhibits in question did not come up before the Trial Court. It is noteworthy that from looking at the petition of appeal, the appellant has also not raised and/or addressed the issue of forfeiture of the exhibits by the state,

16. I note that the respondents herein were arrested on 26<sup>th</sup> July, 2017 and took plea on 31<sup>st</sup> July, 2017. It is not explained why since the year 2017 to date, the Asset Recovery Agency has never instituted asset recovery proceedings as provided for under the Proceeds

of Crime and Anti Money Laundering Act and instead the prosecution has opted to file an application for preservation of exhibits pending appeal.

17. **Section 92 (4) of the POCMLA provides that** the validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated. **From the reading of this section, it is clear that there is nothing that hindered the Asset Recovery Agency from instituting asset recovery proceedings during or after the trial in the subordinate Court.**

18. **The appellants also ought to demonstrate reasonable suspicion that the said exhibits were acquired from proceeds of crime. In Emmanuel Suipenu Siyanga vs Republic Cr. Appeal 209 (2013) eKRL the court held;**

*“...a suspicion cannot be held to be 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”.*

19. **The supporting affidavit by Inspector Albashir Olow, states that after conducting a search at the Registrar of Motor Vehicles, he discovered that Motor Vehicle Registration No. KCH 429 W belongs to Musa Athman Kabirige confirmed by the Respondent in their response stated that they had hired the said motor vehicle from the said Musa Athman Kabirige. Musa was not accused in the trial Court and cannot be said to have acquired the Motor Vehicle by proceeds of crime.**

20. **As admitted by the Applicant/Appellant in their submissions the Assets Recovery Agency can commence the process of civil forfeiture which is not bogged down by the requirement for convictions. It is therefore misleading for the Appellant to submit that in the event the appeal is successful and the exhibits have been released, then the object and the spirit of POCAMLA shall be lost.**

21. **From the above, it is not in dispute that the subject Motor Vehicle does not belong to any of the respondents, I am of the view that the applicant/appellant herein should at the very least have served the owner of the suit motor-vehicle notifying him of their intention to challenge the release of the subject motor vehicle and consequently have it forfeited to the state. It is very evident that the appellant/applicant failed to demonstrate the reasonable suspicion required to show that the assets were acquired from proceeds of crime.**

22. **Based on the materials placed before the Court, and the reasons highlighted herein above, I am not satisfied that the appellant/applicant has established a *prima facie* case to warrant grant of preservation orders as sought in the application herein. The application dated 3<sup>rd</sup> September, 2020 is therefore dismissed with no orders as to costs.**

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT, THIS 18TH DAY OF MARCH, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**