



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

HCACEC MISC. NO. E018 OF 2021

ASSET RECOVERY AGENCY.....APPLICANT

VS

PETER MWAI MURITH I

GOLDENSCAPE TREES AFRICA LIMITED

GOLDENSCAPE GREENHOUSE LIMITED

GOLDENSCAPE GROUP LIMITED

SILVERSTONE PROPERTIES LIMITED.....REPOENDENTS

AND

JOHN KINYAGIA KAMAU

T/A SUMMARDAY PALACE..... INTERESTED PARTY

RULING

Introduction

1. By an application dated 6th July 2021, the Applicant, John Kinyanjui Kamau T/A Summerday Palace seeks to be enjoined in these proceedings as an Interested Party. He asserts that he has an interest in Motor Vehicle Regn No. (Particulars Withheld), one of the assets the subject of preservation orders issued by this court on 15th June 2021. The application is brought under Sections 81, 82, 83 and 89 of the Proceeds of Crime and Anti Money Laundering Act (POCAML A); Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act; Order 51 of the Civil Procedure Rules and it seeks the following orders:

“i. Spent

ii. That the Honourable Court be pleased to enjoin John Kinyagia Kamau T/A Summerday Palace as an Interested Party in the proceedings

iii. Stay of the order given on 15th June 2021 with respect to motor vehicle registration number [Particulars Withheld] pending hearing and determination of this application

iv. Release of the said motor vehicle to the interested party

v. The court be pleased to set aside, vary or vacate the order made on 15th June 2021 and all other consequential orders therein authorising the seizure and forfeiture of motor vehicle registration number [Particulars Withheld]”

2. In opposition the respondent has filed a replying affidavit sworn by Corporal Jeremiah Sautet on 31st August 2021.

3. The parties filed written submissions in support of their respective positions and highlighted the same on 4th October 2021.

Interested Party/Applicant's Case

4. In the supporting affidavit sworn on 6th July, 2021 by John Kinyagia Kamau and the Supplementary Affidavit sworn on 3rd August 2021 Mr. Kamau describes himself as the sole proprietor of Summerday Palace and deposes that the business was registered on 14th March 2018. He deposes that he is involved in the business of transporting building materials and that he purchased motor vehicle registration number [Particulars Withheld] for the purpose of expanding his business; that at the time of purchase the vehicle was registered in the name of Willow Motors Ltd; That he carried out due diligence by conducting a search at the National Transport and Safety Authority (NTSA) that confirmed the vehicle was owned by Willow Motors. That he purchased the motor vehicle from

Willow Motors on 17th May 2021 with money borrowed from NCBA Bank and that the purchase price was Ksh. 7,500,000/=. He deposes that he raised Kshs.1,500,000/= with the balance of Kshs.6,000,000/= being paid by the bank directly to Willow Motors Ltd whereupon the bank opened a loan account in his name. Repayment was to start on 2nd July 2021.

5. It is the applicant's case that according to the Copy of Records for the vehicle it is registered in the joint names of NCBA Bank and himself; that the vehicle is insured by Sanlam General Insurance for the period 20th May 2021 and 19th May 2022; that after taking possession of the vehicle, he hired it to Kenmut Agencies to enable him repay his loan but on 1st July 2021 at around 10pm, police officers from Mihango Police Station seized the vehicle pursuant to orders issued by this court on 15th June 2021 and that the vehicle is currently impounded and kept at CID Headquarters, Kiambu Road.

6. It is the applicant's case that by a letter dated 2nd July 2021 NCBA bank notified him that he was in default of his monthly instalments and that the bank would take remedial action if the default persists. The applicant contends that he is a purchaser for value without notice of any fraud or defect in title as he was not a party to the current proceedings nor was he aware of their existence; that he was not a party to the acts culminating in the impugned seizure order nor did he purchase the vehicle from any of the respondents in these proceedings; that by the time the orders were obtained title to the motor vehicle had already passed to him and the Asset Recovery Agency would have learned of the same from a simple search. Further that no caveat had been placed on the vehicle as alleged by the Agency and the duration between the respondent's letter to NTSA dated 8th April 2019 requesting that a caveat be placed and the applicant's search on 26th April 2020 is about one year. Further that, the Agency is not blaming the applicant for any irregularities that may have taken place with respect to the caveat.

7. The applicant avers that he is suffering unnecessary financial hardship since the motor vehicle was bought with a loan and he is obligated to pay monthly instalments without the benefit of an income from it. The vehicle is also depreciating and wasting to his detriment.

8. In his Counsel's submissions filed on 6th September 2021, the applicant states that the applicable law upon which his application is premised is Section 89 (1) and (2) of POCAMLA that empowers this court to vary, rescind or set aside preservation orders where it is sufficiently proved that the operation of the order will deprive the applicant of the means to provide for his reasonable expenses causing him undue hardship. He states further that he has to demonstrate that the undue hardship far outweighs the risk of the subject properties from being lost destroyed or transferred. He places reliance on the cases of *Assets Recovery Agency vs Pamela Aboo (2018) eKLR*, *Assets Recovery Agency Vs Jane Wambui Wanjiru & 2 Others (2019)eKLR* and *Assets Recovery Agency Vs Samuel Wachenje & 7 Others (2016) eKLR* which he submitted set out the principles to be considered in such applications.

9. It was further submitted that the applicant risks breaching one of the fundamental conditions of his agreement with Kenmut Agencies that the truck would be available for the duration of the hire agreement. He submitted that the agreement has been compromised by the seizure of the vehicle by the Agency and further that he has since been issued with demand notices by the Bank for defaulting. He submitted that as at 1st September 2021, the bank had demanded repayment of Kshs. 461,864 which if the applicant failed to raise within 7 days the bank would cancel the loan and demand payment of the entire loan amount and it is for that reason that the applicant urges this court to vary, rescind or set aside the preservation orders of 15th June 2021 to the extent that it applies to the subject vehicle.

The Respondent's Case

10. The respondent opposed the application through the affidavit sworn by Cpl. Jeremiah Sautet on 31st August, 2021. The averments by Cpl. Sautet are echoed in the submissions of Counsel for the respondent which reduce the issues in the application to two namely whether the application meets the threshold of Section 89 of POCAMLA and Order 45 Rule 1 of the Civil Procedure Rules and whether ownership of the subject vehicle ought to be determined at this stage.

11. The respondent submits that Section 89 of POCAMLA places the burden of proof upon the applicant as the party wishing to discharge the preservation orders as was held in the case of *Asset Recovery Agency Vs Pamela Aboo (supra)*. Counsel also submits that the applicant must prove on a balance of probabilities that the order concerned will deprive him of the means to provide for reasonable daily living expenses and that he will suffer undue hardship. Further that the said hardship as a result of the preservation order outweighs the risk that the property may be concealed or transferred. Counsel for the respondent also cited the case of *Gulamhussein Mula Jivanji & Another vs Ebrahim Mulla Jevanji & Another (1929-30)12KLR41* where the court held that:-

“Apart from any consideration whether the course adopted by the learned judge in relation to the exparte order was or was not well founded, the question emerges as to the precise character of the grievance which must be expressed by a person applying for review of judgment under order XLII.”

12. The respondent further cited the case of *National Bank of Kenya Limited Vs Ndungu Njau Nairobi CA Civil Appeal No.211 of 1996* in which the Court of Appeal held that:

“A review may be granted whenever the Court considers it 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 a sufficient ground for review that another judge would 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....”

13. It is the respondent’s contention that from the affidavits sworn by the applicant nothing therein demonstrates that he has met any of the requirements under POCAMLA. That pursuant to its mandate in accordance with the provisions of Sections 81, 82, 86 and 87 of POCAMLA the Agency applied for ex parte orders prohibiting any person from dealing in any manner with property it reasonably believed to be proceeds of crime; That on 9th July 2020 the Agency received information that the respondents in the suit were engaged in defrauding members of the public, racketeering, obtaining money by false pretences and money laundering and the investigations revealed that they received funds from members of the public, transferred the funds to bank accounts and business entities belonging to the 1st respondent and ultimately used the funds to purchase properties which include the subject motor vehicle. The respondent contends that the applicant’s act of purchasing the vehicle was a scheme devised in collaboration with the respondents in the suit with a view to conceal and disguise proceeds of crime in contravention of Sections 3 and 4 of POCAMLA which prohibit acquisition, use and possession of property known to be proceeds of crime.

14. On the issue of ownership the agency reiterated that it demonstrated that the vehicle was sold and transferred while there was an existing caveat against its transfer; that during investigations and upon conducting a search, the Agency established that the vehicle was as at 4th July 2019 registered in the name of the 1st Respondent and it wrote to the Director of NTSA to place a caveat against its title; that it subsequently obtained the preservation orders herein pending filing of a forfeiture application; that however, when the respondents got wind of the investigations the 1st respondent sold the suit vehicle to one Mr. Michael Njage Kamau t/a Willow Motors for Kshs. 6,100,000; that this development prompted the agency to seek explanation from the NTSA Director as to how the vehicle was sold despite the caveat and NTSA responded that the caveat was in fact placed on 8th April 2020 but was irregularly lifted through infiltration of NTSA systems suspected to have been orchestrated by the 1st respondent. Further that NTSA also confirmed that the vehicle was registered in the name of the 1st Respondent prior to the infiltration.

15. The respondent therefore submitted that the vehicle was not available for sale or transfer and that the irregular lifting of the caveat in order to facilitate the sale and transfer of the vehicle to third parties which vehicle was the subject of active investigations was a clear demonstration of a money laundering scheme. Further that, under Section 3 of POCAMLA, one is guilty of money laundering upon engaging in a transaction in property which they know or ought to have reasonably known as proceeds of crime with the intention of disguising its source and ownership.

16. The respondent concluded by stating that questions of ownership and lawful acquisition of the suit vehicle can only be canvassed during the hearing of the forfeiture application which has been filed well within the prescribed 90 days and that the application herein is pre-mature and unmerited. Counsel contended that there is a real risk that the vehicle will be disposed or hidden if the preservation orders are varied rendering any forfeiture order practically unenforceable. Counsel prayed that the application be dismissed with costs.

17. The preservation order sought to be set aside was issued exparte under **Section 82 of the Proceeds of Crime and Money Laundering Act (POCAMLA)**.

Section 82 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.

(3) A court making a preservation order shall at the same time make an order authorising 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.”

18. **Section 84 of POCAMLA** provides that the duration of the preservation order is 90 days after the date on which notice of the making of the same is published in the Kenya Gazettee, **unless there is an application for a forfeiture order pending; there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order or the order is rescinded before the expiry of that period.**

19. During the hearing of this application Counsel for the respondent informed this court that they had that very morning filed an application for forfeiture of the properties the subject of the preservation order. The filing of a forfeiture application would therefore imply that any further applications can only be made in that file but not in the file for preservation. Be that as it may this court must consider this application the same having superseded the application for forfeiture.

20. By his application herein the applicant seeks to rescind the order for preservation in so far as it relates to m/v (Registration No. withheld)

Section 89 of POCAMLA upon which the application is made 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.”

21. In my understanding Section 89(1) sets out three conditions which an applicant must meet before the preservation order is varied or rescinded namely:-

(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 to him/her;

(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.

(iii) The proceedings against the defendant concerned must have been concluded.

22. The Interested Party/Applicant has filed documents to demonstrate that he purchased this motor vehicle from a third party but not from the defendant in this case. He has also annexed documents to show that he purchased the motor vehicle with a bank loan and also that he was using the motor vehicle for hire and that as a result of the seizure he is unable to repay the loan and the bank is now demanding that he pays or it will take remedial action against him and that he risks to breach his agreement with the party to whom he leased the vehicle.

23. At paragraph 17 of his supporting affidavit sworn on 6th July he deposes that he is an **innocent purchaser for value** and at paragraph 20 he states that **he is suffering unnecessary financial hardship** as a result of the impugned order as he is now required to pay monthly loan instalments without the benefit of income from the vehicle. This deposition is repeated at paragraph 13 of his supplementary affidavit sworn on 3rd August, 2021.

24. I have considered the application, the grounds thereof and both the written and oral submissions of Counsel for the parties. It is my finding that the Interested Party/Applicant does not meet the conditions set out in Section 89(1)(a) of the POCAMLA. As was held in the case of **Assets Recovery Agency Vs Pamela Aboo (Supra)** the onus of proof lies with the party who wishes to rescind the preservation order. It is my finding that the applicant has not discharged that burden. It is not enough in an application for variation of preservation orders for the Applicant to merely state that he is an innocent purchaser for value or that he is suffering financial hardship because he is required to repay a loan without the benefit of income from the property in issue. In my considered view, the applicant must prove albeit on a balance of probabilities firstly, that the order concerned **will deprive him of the means to provide for his reasonable living expenses and cause undue hardship for him**. Nowhere in his affidavit or his Counsel's submissions is it stated, alleged or asserted or even implied that the applicant is not able to provide for his **reasonable living expenses**. The gravamen of the Interested Party/Applicant's application seems to me to be that he is required to repay a loan without the benefit of an income from the motor vehicle in issue. The applicant has not stated that the vehicle is his only means of income and it is in fact obvious to this court that he has other means of providing for his reasonable living expenses apart from this vehicle. **At paragraph 3 of the Supporting Affidavit** he has deposed that he is **currently engaged in the business of transporting building materials** and the reason he purchased the vehicle was to diversify his business which he purported to do by leasing the vehicle to a third party. Clearly therefore the vehicle is not his only means of income. That ground of undue hardship must therefore fail.

25. Secondly, the Applicant has not demonstrated on a balance of probabilities that the hardship that the order will occasion him outweighs the risk that the motor vehicle if released to him may be destroyed, lost or damaged. This was crucial in this case given that ownership of the motor vehicle was transferred after the investigations were instituted and upon the respondent placing a caveat against the vehicle's title. The circumstances of this case are indeed unique in that the respondent's caveat placed in order to secure the motor vehicle is said to have been removed in a clandestine if not fraudulent hence unlawful manner, a fact which the Respondent considers material to this case and which must therefore be determined before an order for release of the motor vehicle can be made. A letter from NTSA dated 31st August, 2021 confirmed that a caveat was placed on 8th April, 2020 but that the same was lifted irregularly through infiltration of NTSA's motor vehicle systems. Given the above I would decline to vary or rescind the order as there is no assurance from the applicant that he is capable of providing security for the vehicle or that he himself has no intention of disposing it pending the hearing and determination of the proceedings against the defendant. Further, **Section 89(1)(b) of POCAMLA** provides that the court can rescind an order only when the proceedings against the defendant concerned are concluded. In this case there is an application for forfeiture and the proceedings against the 1st defendant are therefore yet to be concluded.

26. In the upshot the application dated 6th July, 2021 is dismissed for lack of merit. The costs of the application shall be in the cause.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER, 2021.

E.N. MAINA

JUDGE