



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISC. APPLICATION NO. 16 OF 2016

ASSET RECOVERY AGENCY APPLICANT/RESPONDENT

V E R S U S

CHARITY WANGUI GETHIRESPONDENT/APPLICANT

RULING

Background

1. On 3rd March 2016, the applicant/respondent obtained a surrender, seizure and preservation order against the respondent/applicant vide Nairobi Misc. Application No. 30/2015 Assets Recovery Agency v. Charity Wangui Gethi prohibiting the transfer, disposal or any dealing with motor vehicle Reg. No. KCD 241Q. The said motor vehicle was then the subject of investigations relating to allegations of money laundering and being obtained using proceeds of crime which had a bearing with the infamous case of NYS scandal.
2. Pursuant to those orders, the motor vehicle was surrendered to the investigating officer one Cpl Sautet Jeremiah Matipei of CID headquarters where the motor vehicle was kept to date. An attempt by the respondent/applicant for the court to rescind and or vary the preservation orders vide an application dated 26th January 2016 was dismissed on 12th January 2017.
3. Subsequently, the applicant/respondent (ARA) filed an application for forfeiture of the motor vehicle to the State. Through its judgment delivered on 20th November 2018 under this file, the court dismissed the applicant's (ARA) forfeiture application on grounds that there was no proof that the money used to purchase the motor vehicle in question was out of criminal activities (crime) or associated with money laundering.
4. Aggrieved by this decision, the agency (applicant) filed a Notice of appeal to the Court of Appeal. At the same time, they filed a Notice of Motion dated 3rd December 2018 seeking stay of execution of the Judgment orders pending hearing and determination of the intended appeal. Subsequently, on 1st February, 2019 the court granted a limited stay of execution for a period of 60 days to enable the applicant eventually file its appeal and any appropriate application before the Court of Appeal.

Respondent's / Applicant's Case

5. Aware that the limited stay of execution for a period of 60 days had lapsed and there being no further stay orders from the Court of Appeal staying the judgment of 20th November 2018, the respondent/applicant moved this court vide his application dated 31st July 2019 pursuant to Article 165(3)(a) of the Constitution, Sections 3 & 3A of the Civil Procedure Act seeking orders that;

(1) The Honourable Court be pleased to order that motor vehicle Reg. No. KCD241Q Jeep Cherokee, currently held at the Directorate of Criminal Investigations in Nairobi pursuant to preservation orders in Misc. Application No. 30/15 be released to the respondent forthwith.

(2) That upon grant of prayer 1 above, this Honourable Court be pleased to impose any conditions it deems fit and just in the interest of justice.

(3) That the costs of this application be provided for.

6. The application is premised upon grounds highlighted on the face of it and further amplified by an affidavit sworn on 31st July 2019 by the applicant. The applicant basically gave a brief back ground of the case as highlighted herein above. She averred that, the court having dismissed the applicant's /respondent's case and the limited period of stay orders having lapsed, there was no legal basis for the

applicant/respondent to keep holding the subject motor vehicle for over four (4) years now thus exposing it to waste and other vagaries related to harsh weather conditions like over-exposure to sun shine.

7. She contended that as a successful party, she should have the motor vehicle released to her for use to avoid further wastage.

8. In submission, the firm of Were and Oonge appearing for the respondent/applicant filed their submissions on 22nd May 2020. Mr. Muriungi who prosecuted the application literally adopted the averments contained in the affidavit in support of the application. Counsel submitted that for justice to be done, the subject motor vehicle should be released to the respondent/applicant even if on balanced conditions to avoid wastage.

9. He further contended that the motor vehicle can be released with orders that the applicant/respondent do hold its log book as security. In support of this proposition, counsel relied on the decision in the case of **R v. Permanent Secretary Ministry of Transport, Attorney General (Interested party) Exparte Fanuel Inzira Misango (2019)eKLR** where the court stated that:-

“Where an unsuccessful party chooses to exercise his right of appeal, the said right must be balanced against the rights of the successful party, who was entitled to enjoy the fruits of the judgment.”

10. Regarding the argument by the applicant/respondent that Section 97 of POCAMLA guarantees the agency a right of appeal and that preservation orders cannot be rescinded during the pendency of an appeal, counsel contended that an appeal does not operate as an automatic stay hence the reason why the applicant sought for stay of execution pending appeal which was granted for 60days.

11. Learned Counsel opined that under Section 89(1)(b) of POCAMLA this court can rescind preservation orders upon conclusion of the proceedings against the defendant herein. According to Mr. Muriungi, the applicant should have moved the Court of Appeal for substantive stay of execution orders and not to introduce and hide behind Section 97 of POCAMLA at this time thus prejudicing the respondent's/applicant's rights.

Applicant's/Respondent's Case (ARA)

12. In response to the application, the respondent filed a replying affidavit sworn on 26th February 2020 by Cpl Sautet Jeremiah Matipei who averred that the application is misconceived as the applicant's/respondent's appeal challenging this court's judgment is pending before the Court of Appeal and that the same is scheduled for Case Management sometime in October 2020.

13. He sought refuge in Section 97 of POCAMLA to argue that a preservation order shall remain in force pending the outcome of any appeal against the impugned decision. That the continued retention of the motor vehicle is in line with the requirement of the said section pending the determination of the appeal.

14. He further averred that release of the motor vehicle will prejudice the applicant/respondent's case as the respondent/applicant may further dissipate the motor vehicle in question. That it will not be in the public interest to have the motor vehicle released.

15. In submission, Esther Muchiri learned State Counsel appearing for the applicant/respondent filed her submissions on 26th May 2020 opposing the application. According to counsel, the Agency has filed an appeal against the impugned decision and the same is due for hearing on 26th October 2020. That the applicant/respondent has a strong and arguable appeal which may be rendered nugatory if it succeeds. Counsel also referred the court to Section 97 of POCAMLA and its effect on this application.

16. Further, M/s Muchiri urged the court to await the outcome of the Court of Appeal decision. Counsel contended that since the Court of appeal is seized of this matter, this court cannot adjudicate over the same. In support of this position, she referred the court to the holding of the Supreme Court in the case of **Law Society of Kenya v Attorney General and Another, Supreme Court Petition 4/2019**.

17. Concerning the wasting away of the motor vehicle, counsel asserted that there was no evidence or proof that the m/v is wasting away as alleged. As regards the prayer to rescind the preservation orders M/s Muchiri opined that the same prayer was dismissed under **Misc. Application No. 30/2016**.

Analysis and determination

18. I have considered the application herein and response thereto. I have also considered rival submissions by both counsel. Issues that crystalize for determination are;

(i) whether the applicant is entitled to release of motor vehicle KCD 241Q.

(ii) whether Section 97 of POCAMLA is applicable in the circumstances of this case.

Whether the Applicant is entitled to release of motor vehicle KCD 241Q and whether Section 97 of POCAMLA is applicable

19. Due to the linkage between the two issues, I will deal with them concurrently. From the pleadings and submissions of both counsel, the factual aspects of this case are largely not disputed. It is true that on 3rd March 2016, this court issued preservation orders in respect of motor vehicle KCD 241Q belonging to the respondent/applicant. It is also not disputed that the applicant's/respondent's application for forfeiture of the said motor vehicle was dismissed on 20th November 2018. Further, it is an admitted fact that, the applicant/respondent sought stay of

execution and the same was allowed on 1st February 2019 for a limited period of 60 days to enable the applicant/respondent (ARA) file its appeal before the Court of Appeal and seek any other appropriate orders.

20. As of now, there is no stay of execution orders from either the High Court nor the Court of Appeal. In other words, the applicant should under ordinary and normal circumstances of litigation be entitled to the release of his motor vehicle. According to the applicant/respondent, as long there is an appeal pending before the Court of Appeal challenging dismissal of the suit, those orders should not be touched. Reliance was strongly placed on Section 97 of POCAMLA. On the other hand, the respondent/applicant is relying on Section 89(1)(b) of POCAMLA which according to him allows lifting of preservation orders upon conclusion of the preservation proceedings.

21. For avoidance of doubt, I will reproduce the two provisions. Section 89(1) provides that-

“A court which makes a preservation order;

(a)

(b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded.”

Section 97 goes further to provide as follows;

“Any preservation order and any order authorizing the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under Section 92(1) shall remain in force pending the outcome of any appeal against the decision concerned.”

22. From the record, it is clear that the forfeiture application was dismissed. Soon thereafter, the applicant/respondent sought stay of execution. The same was granted conditionally. Why would the applicant/respondent apply for stay of execution if Section 97 of POCAMLA was to serve as an automatic provision for stay?

23. Is Section 97 POCAMLA intended to substitute the legal process of obtaining stay orders under order 42 of the civil procedure rules? I do not think so. In my humble view, Section 97 envisages a situation where the court before which a stay order is made is bound to allow such stay application to enable the aggrieved party of the impugned decision to exhaust the appellate process.

24. The applicant/respondent having been given a conditional stay for a period of 60 days to file an appeal before the Court of Appeal and seek any other appropriate action, they should have moved the Court of Appeal for stay orders pending the outcome of the appeal. The stay orders before the High Court have since lapsed and therefore not available for the applicant /respondent to lean on.

25. Reliance on Section 97 of POCAMLA as an automatic stay will defeat the objective of Section 89(1)(b) of POCAMLA which provides that a preservation order shall be rescinded upon conclusion of the proceedings against the defendant. In my view, parliament did not envisage a situation where the two provisions would operate parallel to each other.

26. Proceedings were concluded in favour of the defendant. There is no stay in place. The applicant is entitled to the fruits of his Judgment – see **Republic v Town Clerk of Webuye County Council and Another HCCC 448/2006** where the court held that;

“... a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159(2)(a) and (b) and the applicant’s right of access to justice protected under Article 48 of the Constitution.”

27. Litigants do not approach courts for redress in vain. Once a decision has been made and a decree thereof is drawn, the successful party should not be curtailed from enjoying the fruits of the outcome of his sweat unless there is a stay order in place.

28. What prejudice is the applicant likely to suffer if the motor vehicle is released to the respondent/applicant but secured or insulated against disposal, sale or alienation to a 3rd party? Keeping the motor vehicle immobile for over four (4) years while exposed to vagaries of harsh weather conditions is even more wasteful than being released to the respondent for his continued use while the applicant/respondent holds custody of the log book. In my view, this is a more balanced act than subjecting the motor vehicle to wastage while exposed to prolonged sun shine.

29. It is my finding therefore, that although there is an appeal pending, that alone does not operate as an automatic stay of execution as provided for under Order 42 R 6(1) of the Civil Procedure Rules. The only benefit an aggrieved party has under Section 97 of POCAMLA is that a court before which an application or stay is made is bound to allow the application as a matter of right.

30. In view of the above finding, it is my holding that the application dated 31st July 2019 is merited and the same is allowed as prayed with orders that;

(a) The applicant/respondent through its investigating officer Cpl Sautet Jeremiah Matipei be and is hereby directed to release motor vehicle Registration No. KCD 241Q to the respondent/applicant within 30 days from the date of this Ruling.

(b) That the applicant/respondent shall retain the log book to the said motor vehicle until the matter before the Court of Appeal is determined or further orders of that court.

(c) Each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE 2020.

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J. N. ONYIEGO

JUDGE