



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MISCELLANEOUS APPLICATION NO. 5 OF 2020

IN THE MATTER OF: AN APPLICATION BY THE ASSETS RECOVERY AGENCY UNDER SECTIONS 81 AND 82 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES.

AND

IN THE MATTER OF: KSHS.4,249,785.90 HELD IN ACCOUNT NUMBER 0020264389109 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.

- . KSHS.1,465,576.80 HELD IN ACCOUNT NUMBER 1380262333608 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.**
- . KSHS.2,906,213.90 HELD IN ACCOUNT NUMBER 1580261402765 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.**
- . KSHS.2,692,704.50 HELD IN ACCOUNT NUMBER 0350299195757 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.**
- . KSHS.1,296,033.07 HELD IN ACCOUNT NUMBER 1620262559567 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.**
- . USD 20,906.90 HELD IN ACCOUNT NUMBER 1380262333653 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.**
- . KSHS.2,235,015.27 HELD IN ACCOUNT NUMBER 0816490001 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT DIAMOND TRUST BANK LIMITED.**
- . KSHS.1,161,889.29 HELD IN ACCOUNT NUMBER 01143199727300 IN THE NAME OF HON. MBUVI GIDION KIOKO HELD AT CO-OPERATIVE BANK LIMITED.**
- . USD 7,573.03 HELD IN ACCOUNT NUMBER 0816490012 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT DIAMOND TRUST BANK LIMITED, CAPITAL CENTRE BRANCH NAIROBI.**
- . USD 39,426.50 HELD IN ACCOUNT NUMBER 5048843001 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT DIAMOND TRUST BANK LIMITED, NYALI BRANCH.**

LESIT, J

BETWEEN

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

MIKE SONKO MBUVI GIDEON KIOKO.....RESPONDENT

RULING

1. The application before the court is the one dated May 18th, 2020 filed by the Respondent in the case, **MIKE SONKO MBUVI GIDION**

KIOKO, herein after referred to as Respondent/Applicant. It seeks the following orders:

(1) Moot

(2) Moot

(3) The order herein made on 6th February 2020 by the Hon. Mr. Justice Luka Kimaru be forthwith set aside, vacated, and wholly discharged.

(4) The proceedings herein lodge on 6th February 2020 be struck out and dismissed as against the Respondent MIKE SONKO MBUVI GIDION KIOKO as the same amount to an abuse of the court process.

(5) The costs of this motion be awarded to MIKE SONKO MBUVI GIDION KIOKO and borne by Asset Recovery Agency in any event.

2. The application is premised on 26 grounds cited on the face of the motion. In brief the Respondent/Applicant urges that the summary nature of the proceedings in which orders of a permanent nature were issued against him is in violation of **Article 25(c)** and **Article 50(1)** of the **Constitution** and unknown both under the **Proceeds of Crime and Anti-Money Laundering Act** (hereinafter **POCAML**) and the **Civil Procedure Act** and **Rules** (hereinafter **CPA & R**); that the matter was *res judicata*; that the Applicant/Respondent did not lodge a substantive process to support their Originating Notice of Motion and was therefore void *ab initio*; that the ex-parte order obtained by the Applicant/Respondent should have been served upon the Respondent within 3 days and in any event should have lapsed within 14 days; and, that even under **POCAML** an order has a life of 90 days after which it lapses meaning the current order extinguished as at May 20, 2020.

3. The application is supported by the affidavit sworn by the Respondent/Applicant of even dated and by a Supplementary Affidavit by same deponent dated 25 June, 2020. Mr. Kinyanjui for the Respondent/Applicant also filed written submissions and supplementary submissions with a list of authorities also filed.

4. The Respondent/Applicant have filed a Replying Affidavit sworn by Corporal Sautet Jeremiah dated June 23, 2020. They also filed written submissions with a list of authorities which were also supplied.

5. The Applicant/Respondent's position is that the orders issued by this court on February 6, 2020 were made after the court was satisfied that there were reasonable grounds to believe the assets in the accounts named were proceeds of crime; that **POCAML** provides for applications of this nature to be made ex parte; that forfeiture proceedings were filed before 90 days lapsed and after gazettment of the preservation orders; that this matter is not *res judicata* since the application before the Chief Magistrate was to enable the Applicant/Respondent to conduct investigations pursuant to **section 118** and **section 121** of the **Criminal Procedure Code** and that the preservation orders issued by this court were to prohibit the Respondent/Applicant from dealing with the funds pending forfeiture Application; that the orders issued in this case have not lapsed; that the Respondent/Applicant's right to be heard have not been violated as they are guaranteed under **sections 83** and **section 89** of **POCAML**.

6. I have considered this application and the various affidavits filed for and against this application together with the submissions by both parties, both written and oral and cases cited.

7. Before I go any further, let me clarify that for the purposes of this application I will refer to the Respondent/Applicant as the Applicant while the Applicant/Respondent will be referred to as ARA for convenience.

BACKGROUND

8. ARA approached this court with an Originating Motion dated February 5, 2020 in which it invoked **sections 81** and **82** of **Proceeds of Crime and Anti-Money Laundering Act**, hereinafter **POCAML**, and **order 51** of the **Civil Procedure Rules**, hereinafter **Criminal Procedure Rules**. It sought preservation orders over various named Bank Accounts in the name of Mike Sonko Mbuvi Gidion Kioko. It is not disputed that the preservation orders were issued ex parte by Hon. Kimaru, J on February 6, 2020.

9. It is not disputed that the ARA caused the Preservation Orders to be Gazetted which was done pursuant to **section 83(1)** of **POCAML** vide **Gazette Notice No. 1392 of February 21, 2020**. The ARA served the orders upon the Applicant on February 18, 2020.

10. The ARA then filed Forfeiture Application on May 21, 2020 within 90 days from one day after the date of Gazette of the Preservation Orders, and given the case file No. 16 of 2020.

ISSUES FOR DETERMINATION

11. Having considered the submissions by the counsels in this matter, Mr. Kinyanjui for the Applicant and learned State Counsel Ms Muchiri for the ARA, and the pleadings filed herein, I find that the issues for determination are as follows:

(i) Whether the Preservatory Orders issued in this case followed a process known either in the civil law or criminal process.

(ii) Whether these proceedings are *res judicata* and whether ARA were guilty of material non-disclosure.

(iii) Whether the Preservation Order has extinguished by effluxion of time.

(iv) Whether the Applicant's application meets the threshold of section 89 of POCAMLA.

ANALYSIS

12. Whether the Preservation Order issued in this case followed a process known either in Civil law or criminal process. It is the Applicant's contention that since ARA did not file any suit before or contemporaneously with their Notice of Motion dated February 5, 2020 to found the impugned there is no valid cause of action. That Applicant contends that since impugned orders were obtained exparte, and no further action was taken, the Applicant's constitutional right to fair trial provided under **Article 25(c)** and **Article 50(1)** of the **Constitution**.

13. For this proposition Mr. Kinyanjui cited the case of **Anastacia Wagiciengo vs. Ezekiel Wafula [2018] eKLR** where Kamau J stated:

"It is important to point out that interlocutory orders envisaged under section 3 € of the CPA cannot be granted in a vacuum. The limbs they stand on must be supported by provisions expressly provided under the CPR..."

14. Mr. Kinyanjui urged that there must be a foundational suit as a basis for interlocutory exparte orders. For that proposition Mr. Kinyanjui cited **CFC Financial Services vs. Juja Road Store Limited [2017] e KLR** where the court held:

"The primary purpose of granting interim relief is the preservation of property mitigation of losses, or preservation of peace and public order during the pendency of the suit. A mandatory injunction may be granted on an interlocutory application to preserve or restore status quo ... pending the hearing and determination of the dispute, where the court can give final appropriate relief."

15. In Kinyanjui submitted that mandatory prohibitory orders in civil process as those issued in this case, were in the class of Mareva injunctions. He relied on **International Air Transport Association & Another vs. Akarim Agenices Co. Ltd & 2 others [2014] e KLR** and **Third Chandris Shippig Corporation and others vs. Unimarine SA The Pythia, the Angelic Wings, The Genrie [1979] 2 ALL ER 972** where the meaning and effect of Mareva injunction is defined.

16. Mr. Kinyanjui cited the law in other jurisdictions, including New Zealand, United Kingdom and Seychelles where the court provided that a Civil Suit was instituted by way of filing a plaint.

17. Ms. Muchiri for the State opposed the Applicant's Notice of Motion. Counsel urged that the ARA filed suit under **sections 81** and **82** of **POCAMLA** following investigations which established the Applicant's bank accounts had received suspected stolen funds. Counsel urged that before the court issued the said orders, it was satisfied that there were reasonable grounds to believe that the funds held in the Applicant's bank accounts had received suspicious funds as prescribed under the said sections of **POCAMLA**. For that proposition Counsel relied on **Ethics and Anti-Corruption Commission vs. National Bank of Kenya and Another [2017] e KLR** where the court held;

"Provided that there are some evidential facts at the exparte stage to enable the court in the exercise of its discretion to find that reasonable grounds have been established there are no other valid preconditions to the grant of the exparte order. At the exparte stage the evidential facts need not answer the description of any specific corrupt conduct provided they point to that probability."

18. Ms Muchiri urged that the ARA obtained preservation orders to prohibit the Applicant from transacting, transferring and or dealing in any manner with the funds held in his bank accounts and to safeguard the funds pending the determination of the Forfeiture Application filed in **Civil Application No. 16 of 2020**. Counsel urged that ARA met the threshold for the grant of the said orders under **section 82 (2)** of **POCAMLA**.

19. Ms. Muchiri urged that the Preservation Order issued in this case was not akin to a Mareva Injunction, was not a summary process or mandatory injunction and the threshold in **Giella vs. Casman Brown** does not apply. For that proposition counsel relied on **Asset Recovery Agency vs. Charity Wangai Geitu [2017] e KLR**, **Asset Recovery Agency vs. Jane Wambui Wanjiru & 2 others 2019 e KLR** and **Asset Recovery Agency vs. Lilian Wanja Muthoni & Others [2019] e KLR** all which held that **section 82** of **POCAMLA** provided that an application for an order of Preservation of Property should be made exparte.

20. Ms Muchiri Learned State Counsel submitted that the ARA opted to use the Civil Process mode of Recovery provided for under **Part VIII** of **POCAMLA**. She relied on **Assets Recovery Agency vs. Pamela Aboo [2018] e KLR** and **Kenya Anti-Corruption Committee vs. Stanley Mombo Amuti [2017]**.

21. The ARA invoked **sections 81** and **82** of the **POCAMLA** when it filed this matter before this court. **Section 82** provides for the procedure of seeking an order of preservation of property thus:

82(1) "The Agency may, by an exparte 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."

22. The **Act** is clear that a Preservation Order, once a decision is made to seek it by ARA, may do so by way of an exparte application. **Section 82(2)** continues to provide thus:

82(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.”

23. Mr. Kinyanjui’s argument was that if civil process was applied then, it had to adhere to the requirements of the **CPA & R**, in particular counsel urged that the power to set aside mandatory orders is provided under the CPR, and that the said Act emphasizes the primacy of a suit.

24. The ARA invoked the powers donated under **POCAML**A, and in particular **sections 81 and 82** of the Act. That law is very clear that the Agency may apply for Preservation Order, and that such an application shall be exparte. The same law provides under **section 84(a)** that **“Preservation Order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette, unless –**

(a) There is an application for a forfeiture order pending before the court in respect of the property subject of the Preservation Order.”

25. The process applied by ARA is the Civil process as provided under **POCAML**A, **Part VIII** thereof. The Act breaks down the Civil process into four stages. The application before the court is stage two of the process and is premised under **sections 81 and 82** of the Act. The **CPR & A**, cannot be read into **POCAML**A to limit the application of the preservation order to an injunction as envisaged under the **Civil Procedure Rules**. The two are world’s apart, as they serve different purposes, and both the process of applying and of processing them are different. I see no merit in the challenge of the application on basis it has not premised on any known process of law.

26. As to whether the proceedings are *res judicata* and whether there was material non-disclosure by ARA. Mr. Kinyanjui, learned Counsel for the Applicant relied on the definition of the term *res judicata* under **section 7** of the **Civil Procedure Act** which provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

27. It was Mr. Kinyanjui’s submissions that the prayers sought before this court were the same sought but dismissed before the chief magistrate’s court in the case of **Asset Recovery Agency vs. KCB Bank and 9 others Chief Magistrate’s Court Criminal Application No. 4477 of 2019** Counsel relies on paragraphs 21 and 22 of his clients’ supporting affidavit in which he reiterates as much. Counsel cited **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others [1996] e KLR** where the court held:

“there must be an end to applications of similar nature; that is to say further, under principles of *res judicata* apply to applications within the suit ... There must be an end to interlocutory applications as much as there ought to be an end to litigation ...”

28. Mr. Kinyanjui urged that the **Chief Magistrate’s Criminal Application No. 4477 of 2019** has been proved in Applicant’s affidavit in support of this application, to be a previous suit in respect of which the matter at hand was in issue; the parties were the same or litigating under the same title; a competent court heard the matter in issue; and the issue had been raised once again in these fresh proceedings.

29. Ms Muchiri for the State urged that this matter was not *res judicata*. Counsel urged that the ARA obtained orders in the **Chief Magistrate’s Criminal Appeal No. 4477 of 2019** subject to police powers under **sections 118 and 121 (1)** of the **Criminal Procedure Code** and **section 180** of the **Evidence Act** for authority to investigate and restrict debits in respect of funds held in the Applicant’s and other persons’ bank accounts.

30. Ms Muchiri urged that from the Chief Magistrate’s Court, ARA obtained Applicant’s bank statements and account opening forms and other bank documents. That after their investigations, they came to this court, applied for and obtained preservation orders.

31. **Section 7** of the **Civil Procedure Act** makes it clear what will be regarded as res judicata. It is res judicata where “the matter directly and substantially in issue has been directly or substantially an issue in a former suit”

32. Paragraph 6 of Sautet Jeremiah’s Replying Affidavit states the purpose for which the **Misc. Criminal Application 4477 of 2019** was filed, which was “**to obtain court orders authorizing the ARA to investigate and restrict debits in respect of the funds held in the Appellant’s and other persons’ various bank accounts**”. The deponent annexed the copy of the court order as “**SJM1**”.

33. The order reads in part

“ORDER OF THE COURT

Whereas it has been proved to me on oath that for the purpose of an investigation into the commission of offence of money laundering and proceeds crime contrary to section 3(a) of POCAMLA, it is necessary and desirable to issue warrants to RESTRICT DEBITS for a period of days and investigate books of the following accounts”

34. The Originating Motion dated February 5, 2020 which instituted the instant suit has been brought under **sections 81 and 82** of the **POCAMLA** and **Order 51** of the **Civil Procedure Rules**. It seeks among other orders.

“This Honourable court be pleased to issue preservation orders prohibiting the Respondent and/or his agents or representatives from transacting, withdrawing, transferring using and any other dealings in respect of funds held in the following accounts ...”

35. It is clear that the jurisdiction invoked by ARA in bringing the two applications were different. Counsel urged that one seeking to prohibit debits into the accounts for purposes of investigations and the other for preservation of the proceeds in the accounts named prohibiting the Applicant from dealing in any way with the funds in the named accounts. An order was issued to that effect by Hon. Kimaru, J.

36. **POCAMLA** gives ARA powers to institute forfeiture proceedings in four levels or stages. These are investigations, carried out under the **Evidence Act** and **Criminal Procedure Code**. This is the first level towards forfeiture. The second level is preservation orders provided under **sections 81 and 82** of the **Act**. That is the stage at which these proceedings are premised.

37. The third level is Gazettment under **section 83** of the **Act**. That level has also been invoked and the Gazette Notice is annexed to Mr. Sautet Jeremiah’s affidavit as “**SJM2**”. The fourth level is Application for Forfeiture proceedings under **section 90** and **section 92** of the **POCAMLA**. The proceedings are annexure **SJM3** in the Replying affidavit of Mr. Sautet Jeremiah.

38. I do find that these proceedings are not res judicata and that the jurisdictions of this court to entertain it has not been ousted by any law. I find that ARA followed the process as prescribed under the **POCAMLA** which is the law governing investigations, Preservation and Forfeiture of proceeds of crime and money laundering.

39. As to whether the Preservation Order is extinguished by effluxion of time. I have already dealt with the issue of lapsing of the Preservation Order as provided under **section 84(a)** of **POCAMLA**. The order in this case was issued by this court on February 6, 2020. The Gazette Notice was issued on February 21, 2020. The Forfeiture Application was filed on May 21, 2020, which was within the 90 days window provided under the **Act**.

40. The Applicant’s have urged that the ARA was time barred as they were not served with the Application and were unaware of it. The ARA in response not only provided the Gazette Notices and the Forfeiture Application to show the dates, but has urged that they used the email addresses given to them by EACC to serve the application.

41. These are different times where everything has to be done electronically. That presents its own unique challenges especially technical ones. Such difficulties, like emails bouncing or not going through, cannot defeat efforts made to meet legal timelines. The ARA cannot be penalized for technical failure beyond their control. I find that the ARA met the legal requirements and that the preservation order was properly obtained and has not been extinguished by effluxion of time as urged.

42. The last issue was paused by the State, ARA whether the Applicant’s application meets the threshold of **section 89** of the **POCAMLA**. That **section** provides:

“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.

(2) When a court orders the rescission of an order authorizing the seizure of property under paragraph (a) of subsection (1), the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation order concerned.

(3) A person affected by an order for the appointment of a manager may at any time, apply for the –

(a) Variation or rescission of the order;

(b) Variation of the terms of the appointment of the manager concerned;

Or

(c) Discharge of the manager.

4. The court that made an order for the appointment of a manager –

(a) May, if it deems it necessary in the interests of justice, at any time –

(i) Vary or rescind the order;

(ii) Vary the terms of the appointment of the manager concerned; or

(iii) Discharge that manager;

(b) Shall rescind the order and discharge the manager concerned if the relevant preservation order is rescinded.

(5) A person affected by an order in respect of immovable property may, at any time, apply for the rescission of the order.

(6) The court that made an order in respect of immovable property –

(i) May, if it deems it necessary in the interests of justice, at any time rescind the order; or

(ii) Shall rescind the order if the relevant preservation order is rescinded.

(7) If an order in respect of immovable property is rescinded, the court shall direct the Registrar of Lands concerned to lift any caveat entered by virtue of that order on the land registry in respect of that immovable property, and the Registrar shall give effect to such direction.”

After the Preservation Order is issued, the party against whom it is issued has a right to challenge it by invoking **section 89** of **POCAMLA** and seek variation or rescinding of the order on the basis of the threshold set under the said section. Court has challenged the Preservation Order but has not brought his application within the provisions of **section 89** of **POCAMLA**. I rest that matter there.

43. I have carefully considered the Applicant’s Notice of Motion dated May 18, 2020. I find that the order sought to be set aside and the proceedings sought to be struck out and dismissed were properly filed and orders issued regularly and ought not to be struck out or set aside. Conversely, I find that the Applicant has not met the threshold under **section 89** of the **POCAMLA** to have the impugned preservation orders varied or rescinded or for any other order provided thereunder.

44. In the result I find no merit in this application and consequently dismiss it with costs to ARA.

DELIVERED AT NAIROBI THROUGH TEAMS THIS 30TH DAY OF JULY, 2020.

LESIT, J.

JUDGE

In presence of

Mr. Kinyanjui for Respondent/Applicant

Ms Muchiri for Applicant/Respondent

Gitonga – Court Assistant

LESIT, J.

JUDGE