REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISC APPLICATION NUMBER 13 OF 2016

THE ASSETS RECOVERY AGENCY.....APPLICANT

-VERSUS-

SAMUEL WACHENJE alias

SAM MWANDIME.....1ST RESPONDENT

SUSAN MKIWA MNDANYI.....2ND RESPONDENT

VANDAME JOHN.....3RD RESPONDENT

ANTHONY KIHARA GETHI.....4TH RESPONDENT

NDUNG'U JOHN.....5TH RESPONDENT

GACHOKA PAUL.....6TH RESPONDENT

JAMES KISINGO.....7TH RESPONDENT

-AND-

GRACE AKINYI.....AGGRIEVED PARTY

RULING

1. In the judgment of this court dated 23rd July 2020, I made orders for forfeiture of certain properties registered in the names of or beneficially held by the respondents. Among the properties was motor vehicle registration number KCB 715E S. Wagon Toyota Prado.

2. The Aggrieved Party has now approached this court by way of her application dated 20th August 2020 seeking the following orders:

> ***1. (spent)***
>
> ***2. (spent)***
>
> ***3. THAT this Honorable Court do vary the orders issued herein on 23rd July 2020 to the extent that they directed that motor vehicle registration number KCB 715E be fortified to the state for the reason that it was and/or is an asset which is proceeds of crime;***
>
> ***4. THAT a mandatory injunction does issue directing the Assets Recovery Agency to unconditionally release motor vehicle registration number KCB 715E Black Toyota Harrier to Grace Akinyi, the Aggrieved Party herein;***
>
> ***5. THAT an inquiry be conducted as to the nature of compensation that the Aggrieved Party should be awarded on account of illegal and/or unlawful acts of the Applicant.***

6. THAT the costs of the Application be borne by the Applicant.

3. The application, which was supported by an affidavit sworn by the Aggrieved Party, was premised on the provisions of Rules 3(1) 3(2) of Part 1 of the High Court (Practice and Procedure) Rules, Article 47 of the Constitution, Rule 23 and 25 Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, sections 71, 75, and 93 of the Proceeds of Crime and Anti-Money Laundering Act, sections 4, 6 and 12 of the Fair Administrative Action Act and all other enabling provisions of the law.

4. The Aggrieved Party states in the grounds in support of the application that the Assets Recovery Agency had, on 17th August 2020, in alleged execution of the decree in this matter, seized her motor vehicle registration number KCB 715E Black Toyota Harrier. She further states that she is the registered owner of the motor vehicle which she had lawfully acquired from Autofocus Investments Limited on 25th September 2015 for a sum of Kshs. 2,000,000.00. She had been the registered owner of the motor vehicle at the commencement of these proceedings. This was a fact that would have been made known to the Asset Recovery Agency during their investigation. The Aggrieved Party has never been a party to these proceedings and was not afforded an opportunity to be heard before the orders were issued. She is also not a subject of investigations by the Agency, nor has she been charged with any offence to warrant the confiscation and forfeiture of her asset.

5. It is also the Aggrieved Party's case that the vehicle the subject of the forfeiture order is a Toyota Prado while her vehicle is a Toyota Harrier. The Aggrieved Party contends that the speed and efficiency by which the order issued on 17th August 2020 was executed is telling of the fact that the Agency was aware of her physical whereabouts and interest in the motor vehicle and deliberately failed to afford her an opportunity to be heard as envisaged by the Constitution and the Proceeds of Crime and Anti-Money Laundering Act.

6. In her affidavit in support of the application, the Aggrieved Party avers that she is the registered owner of motor vehicle registration number KCB 715 E, a black Toyota Harrier. She exhibits in the said affidavit a copy of the logbook in respect of the motor vehicle. She deposes that in 2015, she was a Regional Manager of CFC Stanbic Bank Limited. She had acquired the said vehicle from her lawful savings, a fact she demonstrates by her bank statement.

7. She asserts that the acquisition was made pursuant to a lawful agreement for sale made in September, 2015 between her and a company known as Autofocus Investments Limited which ran a licensed car bazaar along Mbaazi Lane, off Ngong Road, Nairobi. Her acquisition of the vehicle was therefore not laced with any illegality. She had purchased the vehicle for a fair value of Kshs. 2,000,000.00 and had duly paid for the vehicle in accordance with the terms of the agreement. The payment was made through her account number […] held at the CFC Stanbic Bank Limited to the car dealer's account number […] held at Imperial Bank Limited. She had taken possession of the vehicle in 2015.

8. The Aggrieved Party states that she had never had any dealings with the respondents and they were all unknown to her. She has also never received any gift or monies from any of the respondents, nor has she been the subject of inquiry by the Agency. She had also not been served with any order by the Agency or been invited to offer any explanation with respect to the motor vehicle. The motor vehicle had been seized by the Agency at her employer's premises on 17th August, 2020 pursuant to a forfeiture order of that date.

9. The Aggrieved Party states that a cursory look at the decree issued in this matter shows that the motor vehicle the subject of the forfeiture order is a Toyota Prado Station Wagon registration number KCB 715E and not a Toyota Harrier. She further avers that she purchased the said motor vehicle in 2015, long before the commencement of these proceedings

10. The Agency filed an affidavit in reply sworn by No. 62652 Cpl. Isaac Nakitare, a police officer attached to the Agency. He avers in his affidavit that on 31st December 2015, the Agency had been granted a preservation order against the assets the subject of the application, which included motor vehicle registration number KCB 715E. It had gazetted the preservation order on 22nd January 2016 vide Gazette Notice Number 325 pursuant to section 83 (1) of the Proceeds of Crime and Anti-Money Laundering Act. It had then filed the present proceedings pursuant to sections 90 and 91 of POCAMLA by its application dated 20th April 2016 seeking orders of forfeiture of the assets the subject of the preservation orders.

11. According to the Agency, at the time of filing the forfeiture application, the information in its possession was that motor vehicle registration number KCB 715E was procured using funds stolen from the National Youth Service and was owned by the 1st respondent in the forfeiture application, Samuel Wachenje alias Sam Mwadime. The Aggrieved Party was not a party to both the preservation and forfeiture applications. The Agency noted that the court had, in the judgment dated 23rd July 2020, ordered that the assets the subject of the application be forfeited to the State.

12. According to the Agency, following the filing of the Aggrieved Party's application, it had learnt of her interest and had conducted investigations into her claim with respect to the motor vehicle. It had also recorded her statement in which she explained the circumstances under which she acquired the said motor vehicle. It had also recorded a statement from one Samuel Munene Gichohi, a car dealer, who explained the circumstances under which he had sold the motor vehicle to the Aggrieved Party.

13. Cpl. Nakitare averred that the Agency was satisfied with the explanations given by the Aggrieved Party and the said Samuel Munene Gichohi. It had established that the Aggrieved Party had acquired the motor vehicle from the car dealer for value. The Agency therefore supported the Aggrieved Party's application for review of the judgment in accordance with section 93 (2) of POCAMLA to exclude motor vehicle registration number KCB 715E from the forfeiture order.

14. I have considered the application by the Aggrieved Party and the response from the Agency. Section 93 of the Proceeds of Crime and Anti-Money Laundering Act contains protection for third party interests and provides as follows:

(1) Where an application is made for a forfeiture

order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—

(a) that the person was not in any way involved in the commission of the offence; and

(b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property, the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

(2) Subject to subsection (3), where a forfeiture order has already been made directing the forfeiture of property, a person who claims an interest in the property may, before the end of the period of twelve months commencing on the day on which the forfeiture order is made, apply under this subsection to the court for an order under subsection (1).

3) A person who—

(a) had knowledge of the application for the forfeiture order before the order was made; or

(b) appeared at the hearing of that application, shall not be permitted to make an application under subsection (2), except with leave of the court. (Emphasis added)

15. In this case, it is apparent that the Aggrieved Party was not aware of the forfeiture proceedings, nor did she participate in the proceedings. She had also acquired the motor vehicle in contention prior to the commencement of the forfeiture proceedings.

16. The Agency's response to the application is essentially a concession that the information on the basis of which it applied for forfeiture of the motor vehicle the subject of this application was incorrect, and that it may not have carried out its investigations sufficiently prior to filing the application for preservation and forfeiture. I am accordingly satisfied that the application for variation of the forfeiture orders issued on 23rd July 2020 to exclude vehicle registration number KCB 715E is merited.

17. The Aggrieved Party has also sought a mandatory injunction directing the Agency to unconditionally release the said motor vehicle to her. She also sought an order for an inquiry to be conducted with regard to the nature of compensation that she should be awarded for the illegal or unlawful acts of the Agency.

18. I note that when the parties appeared before the court at the first hearing of the application on 8th September 2020, the Agency readily conceded its error and orders by consent of the parties were issued for the immediate release of the motor vehicle to the Aggrieved Party. Counsel for the Aggrieved Party, Mr. Luseno, subsequently confirmed that the vehicle had been released to the Aggrieved Party pursuant to the orders issued on 8th September 2020.

19. In the circumstances, the orders that commend themselves to this court, and which I hereby issue, are as follows:

i. That the orders issued on 23rd July 2020 be and are hereby varied to exclude motor vehicle registration number KCB 715E registered in the name of the Aggrieved Party from the forfeiture orders.

ii. That each party shall bear its own costs of this application.

Dated Signed and Delivered at Nairobi this 21st day of October 2020

MUMBI NGUGI

JUDGE