



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

MISCELLANEOUS APPLICATION NO. 53 OF 2018

ASSETS RECOVERY AGENCY..... APPLICANT/RESPONDENT

VERSUS

JANE WAMBUI WANJIRU1ST RESPONDENT/APPLICANT

JOSEPH WANJOHI..... 2ND RESPONDENT/APPLICANT

SIDJOE MANUFACTURERS & SUPPLIERS3RD RESPONDENT/APPLICANT

RULING

1. The Assets Recovery Agency through its Originating Summons dated 16th November 2018 filed in court the same day under certificate of urgency pursuant to Sections 81 and 82 of the Proceeds of Crime and Anti money Laundering Act (POCAMLA) & order 50 rule 1 of the Civil procedure rules obtained exparte preservation orders prohibiting the respondents (applicants) herein from transacting, withdrawing, transferring, using or engaging in any other dealings in respect of funds amounting to;

(i) Kshs.10,013,187.60 in Account No. 2039278483 in the name of Sidjoe Manufacturers and Suppliers held at Barclays Bank Muthaiga North Branch Nairobi.

(ii) Kshs.575,882.30 in account No. 0754417005 in the name of Joseph Wangechi held at Barclays Bank Avenue Branch Nairobi.

2. The same orders also prohibited sale, disposal or transfer of motor vehicles KBU 940W Range Rover and KCD 299H Mercedes Branch whose log books were to be surrendered to the applicants. Similar orders affected L.R 27981/7 I.R. 122131/65, L.R 16217187/17 I.R 9025 and L.R 27981/8 I.R. 12213, all registered in the name of Marudiano Zone Ltd.

3. Upon gazettelement of the said orders and service of the application on the respondents in compliance with section 83(1) of POCAMLA, the respondents moved to this court vide a notice of motion dated 10th December 2018 and filed the same day pursuant to Section 89 (1) POCAMLA, Sections 3 and 3A of the civil procedure Act, and order 51 rule 1 of the Civil Procedure Rules seeking orders as hereunder:

(1) Spent.

(2) That the freezing and preservation orders against the applicant's bank accounts, issued by this honourable court on 16th November 2018 be lifted and or quashed immediately for failing to meet the test required for their granting under Section 82 of the Act and for causing unnecessary hardship to the applicant in line with Section 89 (1) (a) of POCAMLA.

(3) That the preservation orders against the applicants' property issued by this honourable court on 16th November 2018 be lifted or quashed for failing to meet the test required for their granting and for causing unnecessary hardships in line with Section 89 (1) of POCAMLA.

(4) That the caveats registered against the applicants' properties by the Chief Land Registrar and the Director General of the National Transport Safety Authority (NTSA) be lifted.

(5) That the motor vehicles belonging to the applicant that are in the custody of the Director of Criminal Investigations Nairobi be released to the applicants with immediate effect.

(6) That the costs of the application be provided for.

4. The application is predicated upon grounds set out on the face of it and supporting affidavit sworn on 10th November 2016 by Joseph Wanjohi (2nd applicant) with authority from his co-applicants. It is the applicants' averment that the respondents have not demonstrated any reasonable grounds to believe that the properties preserved have either been used or are intended for use in the commission of crime or that they are proceeds of crime and therefore does not meet the threshold under Section 82 of the POCAMLA 2009. Further, that the applicant's business has stalled as a consequence of the frozen accounts thus jeopardising their business transactions.
5. It was contended that the preservation orders obtained against the applicants was open ended hence without a time frame within which investigations were to be conducted thus jeopardising the applicants' business.
6. The applicants further claimed that majority of the assets preserved were acquired before the year 2009 to 2018 the period alleged that they had received money from illegal activities. They alleged that the orders granted were previously the subject of preservation orders before the magistrate's courts for 3 months since 28th August 2018.
7. The applicants dismissed and termed the allegation that they had been depositing cash in tranches of below Kshs.1,000,000/= to avoid detection and questioning by Central Bank as a non starter. Regarding the drinks seized from their home, the applicants averred that they have since been returned to them as the same constitutes genuine import business. Touching on motor vehicle Reg. No. KBU 940W, the applicants stated that the property does not exist as it was involved in a road accident and the same marked as a write off.
8. Disputing involvement in illegal trade on wildlife trophies, the applicants termed the same as trumped up allegations and charges without cogent evidence and that they had no relationship with acquisition of their property before July 2018 when those claims were made.
9. Lastly, the applicants stated that they have been engaged in legitimate importation, wholesale and retail business of high end beverages including alcohol. To prove that claim, the applicants attached copies of cheques showing various bank slips made to the bank by customers and clients marked JW7, copies of business permits and licences dealing in liquor business given to their business enterprise known as Sidjoe Manufacturers and Suppliers marked JW8, certificates of registration of business name, licences, lease agreements for business premises (JW9), copies of sale agreements for sale of land (JW10), copies of invoices and bank deposits from customers and agents (JW11), compliance certificate from KRA to demonstrate import business (JW15), and copies of various invoices and bank deposits made by customers (JW16).
10. In response to the applicant's case, the respondents relied on their replying affidavit sworn on 18th December 2018 by Fredrick Muriuki a police investigating officer dealing with offences relating to Narcotics and wild life related crimes under the proceeds of crime and money laundering Act. The officer stated that on 12th July 2018 a team of officers from DCI arrested the 1st and 2nd respondents who were suspected to be dealing in illicit trade in wildlife trophies and narcotics. That during the search, they recovered from their bedroom four elephant tusks worthy Kshs 700,000 sealed in a cello tape, cash 469,000/= and assorted alcoholic drinks worth 7,000,000/= which they suspected were illegally obtained.
11. That as a consequence, the applicants were charged with Cr. Case No. 9/2018 at Jomo Kenyatta International Airport Magistrates Court. The officer went further to state that, he later received information that the applicants had acquired massive wealth and or assets using proceeds obtained from illegitimate trade of wildlife trophies and narcotic drugs thus offending the provisions of proceeds of Crime and Anti-Money Laundering Act 2009. He however admitted that, sometime on 9th August 2018, he obtained orders vide Misc. Cr. Case No. 2877 and 2878/2018 allowing him to search, inspect, freeze and preserve funds held in the applicants accounts or controlled by the applicants for a period of 14 days. That on 5th November 2018, he again filed an ex parte application under Misc. Appl. No. 4153 and 4154/18 seeking preservation and freezing orders in respect of the accounts affected in the orders now being challenged.
12. It is the respondents' averment that after analysing the accounts in question, they revealed massive suspicious cash deposits made in transactions of below Kshs.1,000,000/= a deliberate attempt to evade detection of money laundering by Central Bank. That they had reasonable cause to believe that the money was acquired through criminal activities hence the properties acquired like motor vehicles and land were products of illegal commercial activities in this case wild life trophies and trade in narcotics.
13. Concerning undue hardship suffered by the applicants as a result of the orders, the respondent contended that it was only two accounts that were affected and the other three containing a total amount of Kshs.341,455/= are not affected hence they can survive on the same. Finally, the respondent asserted that the period of preservation orders had not expired hence they were in the process of filing forfeiture proceedings.
14. Having filed their respective submissions as directed by the court, parties appeared for highlighting of the same on 27th February 2019.

Submissions

Applicant's/Respondent's Submissions

15. On 27th February 2018, the applicants through the firm of M/s Kosgei filed their submissions dated 24th December 2018. M/s Kosgei reiterated the averments contained in the affidavit in support of the application and grounds set out thereto. Counsel reduced the issues for determination as follows:

(a) Whether the ex parte preservation orders issued by the Hon. court on 16th November 2018 were merited.

(b) Whether the applicant/respondent met the statutory threshold set out under Section 82 (2) of POCAMLA for the grant of preservation orders.

(c) Whether the respondent/applicants have met the threshold set under Section 89 (1) a of POCAMLA for revision of preservation orders.

16. Counsel submitted that the exparte orders issued on 16th November 2016 were obtained through misrepresentation of facts and non disclosure of material facts. He expressed himself that the orders were obtained through suspicion and malice hence the applicants cannot be victimised on the basis of suspicion and shoddy investigations which amounts to abuse of the court process. To support this allegation, counsel made reference to the case of **R vs Chief Magistrate's Court (J.W. Murigi) and another exparte Carron Creations Ltd and Another (2016) eKLR** where the court held:

“the first issue to be determined is whether the applicants are guilty of material non-disclosure. The law on this issue is clear that where a party, at the exparte stage of an application fails to disclose relevant material to court and thus obtains an order for the court by disguise or camouflage the court will set aside the exparte orders so obtained”.

17. Mr. Kosgei asserted that the respondents did not demonstrate how the huge deposits and withdrawals were from proceeds of crime thus ignoring the explanation given by the applicants with well demonstrated evidence that the source was from legitimate business. That the applicants did not disclose to the court that they had obtained similar orders previously from other courts. Further, that the respondents did not disclose to the court that the alcoholic drinks seized from the applicants were later returned to them after confirming that they were out of legal business.

18. Mr. Kosgei opined that it was not a crime to own property in Kenya or to be rich hence the respondents' failure to link the assets frozen or preserved with proceeds of crime. To further bolster their case on grounds of non disclosure of material information, counsel made reference to the case of **Galaxy Realtors Ltd. vs Kenya Forest Services (2014) eKLR** and **R vs Kensignton Edimond de Poligna C (1917) 1KB 486**.

19. As to whether the respondent met the statutory threshold set out under Section 82 of POCAMLA for grant of preservation orders, Mr. Kosgei submitted that although exparte orders can be issued, the same must take into consideration Article 50 of the Constitution on the right to be heard. That in the event such orders are granted, the same must be in force within the shortest time possible and not indefinite as in this case. To strengthen his argument, counsel relied on the case of **Watatua and another vs R Criminal Appeal No. 20/13 (U.R.)** as cited in **Timothy Isaac Bryant and 2 Others vs IP General of Police and 7 Others (2014) eKLR** where the court stated that:

“in certain cases as stated in Kibiti case (supra) where properties or monies in bank accounts may be dissipated, before the matter is heard interpartes, exparte orders may be granted but only for a short period. Thereafter, the application should be served upon all persons likely to be affected by any ensuing orders and no final order should be made until the matter is heard interpartes with all parties pursuant to Article 50 of the Constitution, accorded an opportunity to be heard”.

20. That there is no reasonable ground to support or even conclude that the properties acquired before 2018 when the applicants were charged with being in possession of wild life trophies were as a result of such proceeds. That the orders were not granted based on any reasonable grounds as envisaged under Section 82 (2) of POCAMLA hence no prima facie case. Counsel relied on the decision in **Ethics and Anti-Corruption Commission vs Ministry of medical Services and Another (2012) e KLR** at page 8 where the court held that

“a prima facie case must be presented before the court that the property in question has been the subject of corrupt dealings.....”.

21. Touching on whether the applicants have met the threshold set out under Section 89 (1) of POCAMLA for review of preservation orders, counsel urged the court to find that the applicants have met the threshold that the orders are likely to cause hardship and untold suffering and that they are at risk of being rendered destitute on their business which will collapse for lack of funds. That the Kshs.341,445/= in the unfrozen accounts cannot sustain their business which is headed to fail and lack of mobility due to the impounded cars. That the risks suffered far outweigh the risks that the properties are preserved.

22. Learned counsel questioned why forfeiture proceedings have not been held if the respondents were serious.

Respondent's / applicants' Submissions

23. Mr. Adan Mohamed counsel for the respondent adopted submissions filed on 15th January 2019 and averments contained in the replying affidavit. Counsel referred the court to the requisite conditions set out under Section 89 of POCAMLA and Order 45 of the CPRS before an order to set aside or review an exparte order issued under POCAMLA can be granted.

24. Counsel stated that the applicants have not proved that as a result of the exparte orders, they have been subjected to great suffering, hardship or that there is evidence of error apparent, cognizable mistake or any other sufficient reason. That there are three accounts containing Kshs.341,455/= which have not been affected hence available for use.

25. Mr. Mohamed submitted that the applicants have not demonstrated how they have been aggrieved with the exparte orders. Reliance was placed on the case of **Gulamhussein Mulla Jevanji and another vs Ebrahim Mulla Jevanji and another (1929 – 30) 12 KLR 41**. Learned counsel contended that the exparte orders cannot be set aside considering that forfeiture proceedings will be rendered useless. However, he clarified during highlighting of submissions that forfeiture proceedings have since been filed vide ACEC Case No. 7/2019.

26. Mr. Mohamed further submitted that a review order can only apply if there is evidence of an error or omission and that the Judge who issued the order had proceeded on an incorrect expression. The court was invited to refer to the authority in the case of **National Bank of Kenya Ltd vs Ndungu Njau Nairobi CA Civil Appeal No. 211/1996**. He urged the court to find that the assets and money the subject of these proceedings is reasonably suspected to be a subject of money laundering as stipulated under Section 7 and 6 of the POCAMLA.

Determination

27. I have considered the application herein, supporting affidavit, replying affidavit and written submissions by both counsel. Issues that crystalize for determination are:

- (a) **Whether the exparte orders were properly issued or merited.**
- (b) **Whether the respondent (ARA) met the requisite statutory threshold to warrant issuance of the orders under Section 82 (2) POCAMLA.**
- (c) **Whether the applicant have met the criterion for revision as set out under Section 89 (1) of the POCAMLA.**

28. The exparte orders issued on 16th November 2018 are a product of Section 82 of POCAMLA which provides:

Sub-Section (1) – The Agency Director may by way of 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.

(2) The court shall make an order under Sub-Section (1) if there are reasonable grounds to believe that the property concern

- (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).....

29. From the wording of the above quoted provision, it is the duty of the presiding judge to determine from the material placed before him or her that, there is prima facie evidence submitted at the exparte stage to warrant issuance of such orders. In the case of **Ethics and Anti-Corruption Commission vs National Bank of Kenya and Another (2017) eKLR** the court had this to say:

“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”.

30. An exparte order issued under Section 82 is therefore a lawful order sanctioned by statutory law and which cannot be subjected to interpartes at that stage for obvious reasons that; if the respondent was alerted well in advance, the property subject of preservation may be disposed of or transferred to 3rd parties or concealed. However, the right to be heard on exparte orders is also guaranteed under Section 83 of POCAMLA which provides for service of the exparte orders on the offended person who will then be at liberty to challenge the orders. In other words, the door is not sealed at the grant of exparte orders.

31. Based on undisclosed source of information that led to search being carried out in the applicants’ house, four elephant tusks were recovered from therein. That further information revealed that cash in the applicants’ accounts and some of their assets may have been acquired through proceeds of crime. Pursuant to that allegation, the court had reasonable ground to grant the orders. What is reasonable ground? Although the Act does not define the word reasonable, Concise oxford English dictionary 12th edition defines the word reasonable as **“fair and sensible;able to reason logically;as much as is appropriate or fair ; fairly good”**

In the circumstances of the instant case , it is only fair and logical to conclude that there is a probability that the primary source of the money earned by the applicants could be as a result of trading in wild life trophies.

32. As regards proof of reasonable suspicion, the same must be grounded on existence of facts and not mere imagination or malice (**See Timothy Isaac Bryant and Others vs Inspector of Police and 7 Others Misc. Cr. Appeal 219/2014**) and **Emmanuel Suipenu Siyanga vs Republic Cr. Appeal 209 (213) eKRL**) where 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”.

33. I am satisfied that based on the information and materials placed before the court, the court was justified to issue the orders *ex parte*.

Whether the respondent met the requisite statutory threshold to warrant issuance of the orders under Section 82 (2) of POCAMLA.

34. Section 82 (2) of POCAMLA enjoins the respondent (AKA) to prove to the court that there are reasonable grounds to believe that the property in question had a link with proceeds of crime. According to the respondents, recovery of wildlife trophies from the 1st and 2nd applicants' house was sufficient proof that there was reason to believe that the applicants were involved in illegal trade hence the rest of the business is a mere conduit of cleaning ill-gotten money through money laundering. The applicants have sufficiently submitted documentation to show that they are engaged in some importation, wholesale and retail business with clear remittances of appropriate taxes to KRA.

35. However, the bone of contention is that the said business is being used to clean money obtained from illegal trade being sale of wild life trophies. Although a subject of a criminal case, there is reasonable suspicion that recovery of four elephant tusks in the applicants' house is an indicator and a clear pointer that the applicants are engaged in illegal trade. At this stage the respondents are not duty bound to prove beyond reasonable doubt that the monies in the frozen accounts are as a result of proceeds of crime. Can a reasonable person believe that there is a likelihood that the applicants are engaged in illegal trade and proceeds realized from the same is cleaned by legal or legitimate trade? Based on the respondents' case, the answer is yes.

Whether the applicants have met the criterion for variation or revision or setting aside the *ex parte* order

36. Reasons to justify variation or revision of an *ex parte* preservation orders are well articulated under Section 89 of POCAMLA which states that:

Sub-Section 1 – **A court which makes a preservation order;**

(a) may, on application by a person affected by that order, vary or rescind the prohibition order or an order authorising 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 causes 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.

37. It is apparent from Section 89 POCAMLA that it is incumbent upon the applicant to prove existence of the elements set out under the aforesaid provision. The burden of proof squarely lies on the applicant (**See Assets Recovery Agency vs Pamela Aboo (2018) eKLR**). The applicant must also prove existence of an error or omission in the proceedings giving rise to the grant of *ex parte* orders which in this case is lacking.

38. According to the applicant, the freezing of two of their major Business accounts and detention of their two motor vehicles have literally grounded the operations of their business which entirely depend on the same. To them, this is the hardship suffered which supersedes any risks that may be contemplated in the preservation orders.

39. Although the respondent stated that there are three more accounts which are not affected amounting to Kshs.341,455/=, the same cannot manage the value of importation and wholesale business. However, the freezing of the two accounts did not stop the business from running. The applicants have not alleged that they have closed business. The wholesale and retail business must be up and running. They can as well operate new accounts and continue with legitimate business. Further, prohibition orders against the sale of land held in their agents' names is not affected as forfeiture proceedings are ongoing. I do not see any loss suffered by preserving the properties pending the hearing of forfeiture proceedings now filed under ACEC No. 7/19.

40. Can this court vary these orders? Section 90 of POCAMLA provides that while preservation orders are in force, the Agency can apply to the high court for forfeiture proceedings. Since the agency has already filed forfeiture application, the applicants have a chance to challenge the orders. In accordance with Section 84, a preservation order shall expire ninety days after the date in which notice of the making of the order is published in the gazette unless:

(a) there is an application for forfeiture order pending before the court in respect of the property subject to the preservation order.

(b) there is an unsatisfied forfeiture order in force in relation to the property subject to preservation order, or

(c) the order is rescinded before the expiry of that period.

The ninety days period having not expired, the orders can not automatically expire.

41. The applicant submitted so much on nondisclosure of material information arguing that the court was not made aware that there were previous similar orders before the magistrate's court and that the seized alcoholic drinks were returned. whereas it is true that there were such previous orders, disclosure of the same could not affect issuance of the impugned orders. Although good practice demands disclosure of the same, those orders were not in force by the time the exparte orders were issued hence nothing material to disclose. Regarding return of the alcoholic drinks, again it was not so material so as to affect the issuance of the exparte orders.

42. It is unfortunate that the law has set such a low bar of proof of evidence for a party to obtain exparte orders and even retention of the same by the court. That being the law, a court can only sympathise with the situation but enforce the law at such a low bar based on reasonable suspicion.

43. For the above reasons stated, this court is satisfied that the exparte orders were regularly and lawfully issued and that there are no sufficient reasons to warrant variation or review of the same. Accordingly, application herein dated 10th

December 2018 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF APRIL, 2019.

J.N. ONYIEGO

JUDGE