



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

APPLICATION NO. 58 OF 2017

IN THE MATTEE OF: AN APPLICATION FOR ORDERS UNDER SECTION 81 & 82 OF THE PROCEEDS OF CRIME AND ANTI MONEY LAUNDERING ACT (POCAMLA) AS READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES

-AND-

IN THE MATTER OF: PRESERVATION ORDERS FOR KSHS. 19,688,152.35 HELD IN BANK ACCOUNT NUMBERS [PARTICULARS WITHHELD] IN THE NAME OF PAMELA ABOO AT EQUITY BANK LIMITED, DONHOLM BRANCH NAIROBI.

-BETWEEN-

ASSETS RECOVERY AGENCY.....APPLICANT

-VERSUS-

PAMELA ABOO.....RESPONDENT

RULING

1. The main issues for determination in the Respondent/Applicant's Notice of Motion Application dated 21st September 2017 and the Supporting Affidavit, are whether the Applicants application meets the threshold of section 89 of the Proceeds of Crime and Anti- Money Laundering Act, 2009 (POCAMLA) and Order 45 of the Civil procedure Rules. Secondly, whether the suit by the Assets Recovery Agency against the Applicant is res judicata.
2. In the application, the Respondent/Applicant seeks orders that the court be pleased to rescind/set aside the preservatory orders issued on 14th July, 2017 in respect of the Respondents Bank account numbers [particulars withheld] held at Equity Bank, Donholm branch Nairobi. Secondly, that the Honourable court be pleased to issue orders authorizing the Respondent to access Bank account numbers [particulars withheld] held at Equity Bank, Donholm branch Nairobi;
3. The Applicant/Respondent Agency has opposed the application through Replying Affidavits dated 16th October 2017 and 20th November 2017 respectively sworn by Sgt. Fredrick Musyoki and Cpl Isaac Nakitare.
4. Mr. Odoyo learned counsel in his submission states that the application seeks the setting aside of the preservatory orders issued by the court on 14th July, 2017, as no evidence has been provided to satisfy the court to issue such orders. Counsel argues that **Sec 82(2) POCAMLA** requires that the court has to be satisfied that the funds under preservation are proceeds of crime. He asserts that, although the respondent is suspected to have acquired the funds through bribery and money laundering by her husband, there is no evidence that the husband has been charged nor are there intentions to charge him.
5. Counsel further submits that the application filed on 14th July, 2017 by the respondent is res judicata, there having been an application by Asset Recovery Agency in the magistrate's court as indicated in annexure PA2(a) and PA2(b) filed on 9th March, 2017.
6. The court has been told that the Respondent/Applicant filed an application to discharge those orders. A response was filed by the Agency on 5th July, 2017 and the court gave its ruling ordering that the subject account be unfrozen within 20 days. That the Respondent then moved to court for issuance of freeze orders when they ought to have appealed instead of bringing a second application.

7. Learned counsel Mr. Adow for the Respondent Agency has opposed the application. He asserts that for this court to review its orders of 20th July, 2017, the Applicant must bring herself under Sec 58 POCAMLA and Order 45 CPR for the court to grant those orders. She must prove that she is deprived of reasonable living expenses, has suffered undue hardship and that the hardship outweighs the risk of not preserving the property.

8. Counsel contends that the applicant has not demonstrated the existence of any of the above grounds. He points out that the agency has not filed any application before this court to preserve the subject matter other than the one of 14th July, 2017. Neither have they filed any in any other court of concurrent jurisdiction and that the issue of res judicata does not therefore hold any water.

9. Counsel states that the application before the magistrate's court was brought under **Section 118** of the **Criminal Procedural Code**. It was intended to facilitate mandatory investigations to establish whether a formal application should be brought before a court under the POCAMLA.

10. The magistrate's order to preserve the account therefore cannot render the application herein res judicata. Counsel submits that the Agency was not party to the matter adverted to in which Ong'udi J gave orders touching on this matter. That matter however was related to the husband's account which was investigated and for which the Agency never sought any preservative orders. That the ruling therein does not involve the three accounts before this court which belong to Pamela Aboo and hold a total of 20 million.

11. Counsel therefore prays for the application to be dismissed for failing to meet the requirements of the law. In addition he states that the Agency has already filed forfeiture Application No 73 of 2017 against the funds in the said account within 90 days as required by the law.

12. I have begun by examining the grounds of this application to establish whether they meet the threshold in **Section 89 of the POCAMLA**. In the ruling of Odunga J in **Ethics and Anti-Corruption Commission vs Ministry of Medical Services & Another [2012] eKLR**, he captured the purpose of preservation orders under **Section 56(1) ACECA** which reasoning can also apply to **Section 82(1) and (2) POCAMLA**. The judge stated thus:

“However, it is in my view that for the court to grant the orders under Section 56(1) a prima facie case must be presented before court that the property in question has been the subject of some corrupt dealings. It is not enough for the commission to simply walk into court with a request and expect the said orders to be granted. Where the said orders are granted and it turns out that either the court was misled or no prima facie case existed that the property was acquired as a result of corrupt conduct, the court would be perfectly entitled to vacate the orders. It is therefore not correct for the commission to submit that by granting the orders sought by the 2nd respondent herein, the court will be stopping the commission from conducting investigations. The commission is free to conduct its investigations but in a lawful manner. If the conduct of the investigations infringes upon the rights of an individual, the individual is entitled to complain and if the complaint is valid, the court is empowered to bar the commission from improper use of the powers vested in the commission. The Commission's power is meant for the good of the public and not for the purposes for example, of settling personal scores.”

13. Sections 82(1) and (2) of the POCAMLA provide the guiding principle for the court to make preservation orders thus:

(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.

14. Under the foregoing provisions of the law therefore the Agency is mandated to apply ex parte to the court for orders prohibiting any person from dealing in any manner with any property or assets provided that there are reasonable grounds to believe that such property is proceeds of crime subject to such conditions as the court may specify.

15. The case of **Ethics & Anti-Corruption Commission v National Bank of Kenya & another [2017] eKLR** alluded to the exercise of court's discretion thus:

“Provided that there are some evidential facts at the ex-parte 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 ex-parte order. At the ex-parte stage the evidential facts need not answer the description of any specific offences of corrupt conduct provided they point to that probability.”

16. Under **Section 90** of **POCAMLA**, when preservation orders are in force the Agency may apply to the High Court for orders forfeiting to the Government, all or any of the property that is subject to the preservation order. The Agency has filed a forfeiture application herein vide Misc. Application HCC No. 73 of 2017 seeking for forfeiture orders. The said application is pending before this court and is in respect of the funds subject of the preservation/surrender orders.

17. Reasons that sufficiently meet the threshold for varying or rescinding the preservation orders are stated under **Section 89** of **POCAMLA** as follows:

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 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 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.:

The burden of proof articulated under **Section 89** of the **POCAMLA** lies with the party seeking to discharge preservation orders. The Applicant/Respondent must therefore prove or demonstrate that the order concerned will deprive her of the means to provide for reasonable daily living expenses. Secondly that she will suffer undue hardship as a result of the preservation order which outweighs the risk that the concerned property may be concealed or transferred.

18. In her statement, the Respondent/Applicant states that the funds in the various accounts were proceeds from her various businesses and the reason why she had never drawn on them, was that she was saving the funds to enable her to purchase a lorry for her various businesses. Ordinarily a business should have transactions which require money to come in and out of the business and this will be reflected in the bank account statement.

20. I note that she has not demonstrated to the court that she relies on the said monies in the account to provide for her reasonable day to day living expenses. Freezing the account therefore will not deprive her of reasonable living expenses, since it is not an account she withdraws money from.

20. The statements on the relevant accounts show that she only made deposits and did not make any withdrawals. It is also noteworthy that although the Applicant submits that the funds were from her various businesses, she has not presented to the court any form of proof as invoices and payments from customers, or evidence of payments to suppliers for goods received or services rendered by her businesses, as proof of the existence of such business.

21. In the application dated 10th July 2017 and the Supporting Affidavit thereto, the Agency states that it obtained information that there were funds held at Equity Bank, Donholm Branch, Nairobi which funds were suspected to be proceeds of crime. The Agency further states that the funds held in the Respondent's accounts were deposited on behalf of one Alex Mukhwana Khisa who is the Applicant/Respondent's husband.

22. Without any supporting documents, or paper trail of transactions that led to these bank deposits, it is my considered view that prima facie, there is reasonable ground to believe that the monies so deposited may have been proceeds of crime.

23. The second issue for determination is whether the suit by the Assets Recovery Agency against the Applicant is res judicata. Section 7 of the Civil Procedure Act Cap 21, Laws of Kenya states that:

“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.”

24. The Respondent/Applicant in her application submitted that the matter before the court is res judicata in accordance with the provisions of Section 7 of the Civil Procedure Act Cap 21 and as such should be dismissed. However it was the Agency's submission that the matter before the court does not qualify to be termed as res judicata since neither, this court nor any other court of concurrent jurisdiction has ever determined the matter.

25. I observe that the Chief Magistrate's Court did not try this matter. In any case the Chief Magistrate's court is not a court of concurrent jurisdiction. An ex parte application was made before the Chief Magistrate's court under Section 118 of the Criminal Procedure Code, seeking orders of search, access and preservation of fund. The purpose of the application was to commence investigation into the accounts of the Respondent/Applicant to establish whether a formal application should be brought under POCAMLA. There is no evidence that this application has been entertained in the High Court before. The question of its being res judicata does not therefore arise.

26. I must also point out that the revision sought herein is not the kind envisaged under **Order 45** of the **Civil Procedure Act**. The provisions of Order 45 CPR do not apply. The revision provided for under section 89 POCAMLA is specific to preservation orders made under POCAMLA or the ACECA.

27. In sum the Respondent/Applicant has not met the threshold that would avail her revision orders under **Section 89 of POCAMLA**, nor has she proved to the court that the matter is res judicata.

Reasons wherefore the application is found to lack merit and is dismissed with costs.

DATED and DELIVERED at NAIROBI this 13th day of March, 2018.

L. ACHODE

JUDGE