



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 195 OF 2017**

**ASSET RECOVERY AGENCY.....APPLICANT**

**VERSUS**

**STEPHEN VICKER MANGIRA**

**NABIL OLOO MOHAMED**

**BAKARI KILA BAKARI.....RESPONDENTS**

**AND**

**ALI CARS LIMITED**

**DIRECTOR OF PUBLIC PROSECUTIONS.....INTERESTED PARTIES**

**RULING**

1. The application dated 8<sup>th</sup> February, 2018 is premised on the provisions of Articles 2, 19, 20, 21, 22, 40, 43, 159 and 259 of the Constitution of Kenya, 2010, Sections 68 and 69 of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 and Order 40 and 51 of the Civil Procedure Rules, Sections 1A, 1B and 63(e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya and all enabling provisions of the law.

2. The applicant seeks the following orders:-

(i) Spent;

(ii) That pending the hearing and determination of this application, this Honourable Court be pleased to rescind, revoke and/or vary its orders issued on 14<sup>th</sup> July, 2017 to make provision for reasonable living expenses for and on behalf of the 1<sup>st</sup> respondent/applicant and his family of two households in terms of rent at Kshs. 750,000/- per year and School fees at Kshs. 545,000/- per year;

(iii) That the Honourable Court be pleased to rescind and/or vary its orders issued on 14<sup>th</sup> July, 2017 to make provision for legal expenses the 1<sup>st</sup> Respondent/Applicant has incurred since his arrest to date pegged at Kshs. 600,000/= all inclusive;

(iv) This Honourable Court be pleased to order the immediate reinstatement and unhindered

access and control of the following properties in favour of the 1<sup>st</sup> Respondent/Applicant to enable him continue carrying on his trade of car hire and transportation services:-

- (a) KCJ 596H TOYOTA VELFIRE registered in the name of the 1<sup>st</sup> Respondent/Applicant;
- (b) KCK 444A TOYOTA PRADO registered in the name of the 1<sup>st</sup> Respondent/Applicant;
- (c) KBV 628K, TOYOTA STATION WAGON registered in the name of the 1<sup>st</sup> Respondent/Applicant;
- (d) KBP 768Q BMW registered in the name of the 1<sup>st</sup> Respondent/Applicant;
- (e) KCK 768Q BMW registered in the name of the 1<sup>st</sup> Respondent/Applicant;
- (f) KCH 723Z TOYOTA ALPHARD registered in the name of the 1<sup>st</sup> Respondent/Applicant;
- (g) Standard Chartered Bank Kericho branch account number [*withheld*] held by the 1<sup>st</sup> Respondent/Applicant; and
- (h) Kenya Shillings Eighteen Million Five Hundred Thousand (Kshs. 18,500,00);
- (v) Any other order that the court may deem fit; and
- (vi) The costs of and occasioned by this application be provided for.

3. The application is supported by the affidavit of the 1<sup>st</sup> respondent (applicant), Stephen Vicker Mangira sworn on 8th February, 2018. Mr. Nabwana Learned Counsel for the applicant in highlighting his written submissions filed on 9<sup>th</sup> May, 2018, stated that all the assets belonging to the applicant, save for his house in Kericho were seized through conservatory orders. This was after he was suspected of having obtained the assets through money laundering and drug related activities.

4. With regard to the affidavit sworn by Chief Inspector Kingo'o Muyaa that was filed on 14<sup>th</sup> July, 2017, Counsel stated that it shows that Kshs. 2,640,339.60 was frozen though the bank account was opened in the year 2009.

5. It was contended that no evidence was placed before the court to show the amounts that have been obtained through criminal activity. Counsel submitted that the withdrawal of money in August, 2015 was not sufficient to warrant the freezing of the applicant's current account by the respondent.

6. He further indicated that none of the replying affidavits filed by the respondent and the 2nd Interested Party show that the applicant was lying about having two households and seven children who are school going, save for one who was waiting to join college. It was submitted that the total fees payable was Ksh. 545,000/= per year as per the fees structure attached to the applicant's affidavit. The court was urged to grant the applicant reasonable living expenses as one of his daughters, Ivy Mimi Wangila, was out of school due to lack of school fees. It was argued that Section 4 of the Children's Act overrides any interest the respondent and Interested Party may have and specifically, the account at Standard Chartered Bank Kericho, account No. [*withheld*]. It was submitted that the total annual rent payable, was Kshs. 750,000/= which equates to Kshs. 25,000/= per month.

7. Counsel further argued that seizure of the applicant's motor vehicles after he was charged in Shanzu Senior Principal Magistrate's Court criminal case No. 257 of 2017 was unlawful as he was not served with the application for seizure of his assets and was not able to challenge it. The court was urged to release the motor vehicles to the applicant to enable him carry on with his car hire business that was being

conducted in Kericho by ferrying people to Namanga and Kisumu.

8. It was submitted that if the motor vehicles are returned to him, there is no danger of them being sold out to third parties as the prohibition orders disallow any transfer of the applicant's property.

9. The applicant's Counsel stated that the only other income the applicant makes is from traditional healing which has been impaired as his reputation has suffered due to the criminal case that he is facing.

10. On the issue of the provisions under which they have based their application, being Sections 68 and 69 instead of 88 of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 (POCAML), Counsel prayed for the error to be cured under the provisions of Article 159(2)(d) of the Constitution of Kenya. He relied on the case of **Asset Recovery Agency vs Charity Wangui Gethi**, [2017] eKLR, where Ong'udi J held that there should be sufficient facts before granting conservatory orders. Mr. Nabwana submitted that the respondent and the Office of the Director of Public Prosecutions which is the 2<sup>nd</sup> Interested Party have merely made allegations through their affidavits but have not shown that an offence has been committed.

11. Ms Gitiri, Learned Counsel for the respondent relied on their written submissions, replying affidavit and grounds of opposition to oppose the application.

12. She informed the court that under the provisions of Section 82 of the Proceeds of Crime and Anti-Money Laundering Act (POCAML), the Assets Recovery Agency Director may move the court through an *ex parte* application where there is reasonable belief that any property or asset has been used in the commission of a crime or is a proceed of crime. She stated that the said Section gives the court powers to issue preservatory orders.

13. She further stated that after obtaining the *ex parte* orders, on 1<sup>st</sup> August 2017, a notice was published in the Kenya Gazette giving the affected parties notice of the said orders.

14. She indicated that in applying for preservatory orders, they moved the court under the provisions of Sections 81, 82 and 83 of POCAML, as such, any variation of those orders should have been done under Section 88 (2) of the said Act.

15. Counsel contended that the application in issue had not met the threshold under Sections 88 and 89 of the POCAML. In her view, the provisions of Sections 68 and 69 of the POCAML which had been cited by the applicant are inapplicable to the present application.

16. Ms Gitiri argued that Section 88(2) of the POCAML provides the criteria an applicant needs to satisfy before obtaining orders for reasonable expenses, in that an applicant needs to show that he cannot meet the said expenses from other means. It was submitted that an applicant has to show his interest in the seized properties but the applicant herein had shown no interest in the assets seized and why he cannot make any income out of the assets that were not seized.

17. With regard to the provisions of Section 87 of POCAML, it was submitted that the preservatory orders issued can be varied but that the applicant has to show that he will be unable to provide reasonable living expenses. It is also necessary for him to show that he will suffer hardship, which must outweigh the risk of the property being destroyed, damaged and transferred.

18. It was the view of the Counsel for the respondent that if the orders sought for living expenses for the applicant are granted, the money in the bank will be extinguished. She cited the case of **Assets Recovery Agency vs Pamela Aboo**, Anti-Corruption and Economic Crimes Application No. 58 of 2017, and in particular, paragraphs 18, 19 and 20 thereof on evidentiary burden of proof. She also referred to the case of **Asset Recovery Agency vs Charity Wangui Gethi** (supra) at paragraph 26 on the same issue.

19. In concluding her submissions, Counsel stated that the assets seized are exhibits in the Shanzu Court criminal case against the applicant and they had not been produced as exhibits. She urged the court to

uphold the preservative orders as it was in public interest to do so. Further, that the assets stood the risk of being sold or transferred. She also relied on the case of **Abdulrahman Mahmoud Sheikh *alias* Said Juma and Others vs AG and Others** [2016] eKLR.

20. Mr. Jami, Learned Counsel for the 2<sup>nd</sup> Interested Party stated that the Criminal case in Shanzu law courts was slated for hearing on 21st May, 2018 and they intended to produce the exhibits then.

21. He supported the submissions by Ms Gitiri and more so that the court has to satisfy itself that the applicant has met the provisions of Section 88(2) of the POCAMLA. He emphasized that the court has to be satisfied that the applicant cannot meet expenses out of his other property which is not seized. The court also has to be satisfied that the vehicles seized were for car hire and the amount of money that was being made from the said business.

22. Mr. Jami pointed out that no car hire agreements or copies of receipts for car hire transactions were availed by the applicant. In addition, the court was also not told of the amount of money that was being made from the herbal medicine practice before the applicant was charged in court and the amount of money he is making as of now.

23. It was the Counsel's view that if the orders sought are granted, the amount seized will dissipate and nothing will stop the applicant from moving the court again to grant similar orders. He submitted that under Section 36 the Narcotics and Psychotropic Substances Control Act, all assets of a person adjudged or convicted of a narcotics offence are forfeited.

24. Mr. Nabwana responded by stating that the applicant has no other assets that give him an income.

#### **ANALYSIS AND DETERMINATION**

(i) The issues for determination are if the application dated 8th February, 2018 is fatally defective; and

(ii) If the applicant has satisfied the threshold for grant of orders for reasonable living expenses out of the assets seized; and

(iii) If the assets that were seized can be reinstated to the applicant.

25. The application dated 8th February, 2018 is premised on several provisions of the Constitution as well as Sections 68 and 69 of the POCAMLA. Counsel for the respondent took issue with the provisions of Section 68 and 69 of the POCAMLA under which the said application is grounded on the basis that they have no bearing at all with the order sought for provision for reasonable living expenses for the applicant and his family of two households and reinstatement of the properties seized from the applicant.

26. Section 68 of the POCAMLA provides for restraint orders and Section 69 thereof provides instances in which a restraint order may be made. The originating motion filed by the respondent on 13<sup>th</sup> July, 2017 was premised on the provisions of Sections 68, 69, 81, 82, 86 and 87 of the POCAMLA.

27. The application sought preservative orders to be granted against each one of the respondents and/or their employees, agents, servants or any other persons acting on their behalf prohibiting the sale, transfer or disposal of, or other dealings with eight motor vehicles registered in the respondents' names.

28. The applicant also sought orders directing the respondents to surrender the original log books of the motor vehicles. She also sought an order for the Director General of the National Transport and Safety Authority to register a caveat against the records of each of the said motor vehicles.

29. An order was also sought to preserve Kshs. 18,500,000/= seized from the 1<sup>st</sup> respondent and for him not to access, transact and/or deal with Kshs. 2,640,339.60 held at Standard Chartered Bank, Kericho branch account number [*withheld*]. The court granted the orders sought on *ex parte* basis.

30. Bearing in mind the nature of the orders that were granted to the respondent in the *ex parte* application, it is clear that the orders were granted under the provisions of Section 82 of the POCAMLA which provides as follows:-

***“ (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***

***(3) A court making a preservation order shall at the same time make an order authorising the seizure of the 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) Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.”***

31. Going by the provisions cited above, the applicant herein should have moved the court under the provisions of Section 88 of the POCAMLA for the order he seeks. The said Section provides as follows:-

***“A preservation order may make such provision as the court deems fit for reasonable living expenses of a person holding an interest in property subject to a preservation order and his family or household.***

***(2) A court shall not make provisions for any expenses under subsection (1) unless it is satisfied that-***

***(a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and***

***(b) the person has disclosed under oath all his interest in the property and has submitted to that court an affidavit.”***

32. The applicant herein was under obligation to prove that he cannot meet his expenses out of the property which is not the subject of the preservation orders. He was required to make disclosure under oath in a affidavit, of all his interest in the property the subject of the preservation orders. It is on the basis of the foregoing that a court can make an order varying or rescinding preservation orders.

33. The present application is however premised on the provisions of Sections 68 and 69 of POCAMLA which address restraint orders. Restraint orders are akin to injunctive orders which orders were not issued by this court. Section 68(2) provides as follows:-

***“A restraint order may be made in respect of -***

***(a) a realizable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;***

***(b) all property which, if it is transferred to that person after the making of the restraint order would be realizable property.”***

34. Under section 2 of the said Act, ***“Realizable property”*** is defined as:-

**“(a) Property laundered;**

**(b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences;**

**(c) Property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and**

**(d) Property of corresponding value.”**

35. The applicant in applying to set aside the *ex parte* orders under Sections 68 and 69 of POCAMLA is so to say, requesting this court to repackage his case to suit the applicable provisions of the law. Although Mr. Nabwana urged this court to invoke the provisions of Article 159(2)(d) of the Constitution, this court declines to do so due to the fatal defect in the application herein.

36. In the cases of **Asset Recovery Agency vs Charity Wangui Gethi** (supra) and **Manfred Walter Schmitt and Another vs Republic and Another** [2013] eKLR, the applications were grounded on the relevant provisions of the law and they were considered on merit based on affidavit evidence.

37. In view of the defect in the application, it is hereby struck out. Each party will bear its own costs.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of September, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the respondent/applicant

Ms Gitiri for the applicant/respondent

Ms Ogwenko for Mr. Jami for the Interested Party

Mr. Oliver Musundi - Court Assistant