



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**MISCELLANEOUS APPLICATION NO 34 OF 2018**

**CONSOLIDATED WITH**

**ACEC MISC. APPLICATION NO. 36 OF 2018**

**IN THE MATTER OF: AN APPLICATION BY THE ASSETS RECOVERY AGENCY UNDER SECTION 53A (5) AND 54(2) OF PROCEEDS OF CRIME AND ANTI MONEY LAUNDERING, SECTIONS 118 AND 121 OF THE CRIMINAL PROCEDURE CODE AND SECTION 180 OF THE EVIDENCE ACT, FOR FREEZING ORDER FOR A PERIOD OF 90 DAYS**

**AND**

**IN THE MATTER OF: ACCOUNT NO. 0180272692383 IN THE NAME OF LILIAN WANJA MUTHONI T/A SAHARA CONSULTANTS AT EQUITY BANK LTD**

**AND**

**IN THE MATTER OF: ACCOUNT NUMBER 0180290930598 IN THE NAME OF LILIAN WANJA MUTHONI T/A SAHARA CONSULTANTS AT EQUITY BANK LTD**

**AND**

**IN THE MATTER OF: ACCOUNT NUMBER 018027378412 IN THE NAME OF LIDI HOLDINGS LIMITED AT EQUITY BANK LTD**

**AND**

**IN THE MATTER OF: ACCOUNT NUMBER 0180273781178 IN THE NAME OF LIDI ESTATES LIMITED AT EQUITY BANK LTD**

**AND**

**IN THE MATTER OF: ACCOUNT NUMBER 0180273780467 IN THE NAME OF LIDI ESTATES LIMITED AT EQUITY BANK LTD**

**AND**

**IN THE MATTER OF: ACCOUNT NUMBER 0180273781104 IN THE NAME OF LIDI ESTATES LIMITED AT EQUITY BANK LTD**

**ASSETS RECOVERY AGENCY.....APPLICANT**

**VERSUS**

**DIAMOND TRUST BANK LTD.....RESPONDENT**

**AND**

**IN THE MATTER OF AN APPLICATION BY**

LILIAN WANJA MUTHONI T/A

SAHARA CONSULTANT.....1<sup>ST</sup> INTERESTED PARTY

LIDI HOLDINGS LTD.....2<sup>ND</sup> INTERESTED PARTY

LIDI HOLDINGS LTD.....3<sup>RD</sup> INTERESTED PARTY

VERSUS

ASSETS RECOVERY AGENCY.....APPLICANT/RESPONDENT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

CONSOLIDATED WITH

MISCELLANOUS APPLICATION NUMBER 34 OF 2018

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

DIAMOND TRUST BANK LIMITED.....RESPONDENT

LILIAN WANJA MUTHONI T/A

SAHARA CONSULTANTS.....1<sup>ST</sup> INTERESTED PARTY

SHEELA W MBOGO.....2<sup>ND</sup> INTERESTED PARTY

STEPHANIE MARIGU MBOGO.....3<sup>RD</sup> INTERESTED PARTY

SHALOM MALAIKA KAMWETI.....4<sup>TH</sup> INTERESTED PARTY

**RULING**

1. The Asset Recovery Agency (ARA) filed applications in both ACEC Misc Application Nos 34/2018 and 36/2018 by way of Notice of Motion. It sought orders to investigate, freeze and preserve several named accounts for a period of 90 days. The court being satisfied with the material placed before it allowed the applications and granted the orders sought.
2. The accounts sought to be preserved are housed in Diamond Trust Bank (DTB) and Equity Bank respectively.
3. The current Applicants sought leave to be enjoined as parties which was granted vide the application dated 25<sup>th</sup> September in both files which were consolidated for the purpose of arguing these applications. The main prayer is prayer No 6 which seeks the setting aside/varying/discharging the orders issued on 7<sup>th</sup> September 2018.
4. The application is supported by the grounds on the face of the application. The Interested Party/Applicant states that there was no basis for the issuance of the said orders and that the court failed to comply with section 83 of POCAMLA and the right to fair hearing (Article 50).
5. It is further supported by the affidavit of **Lilian Wanja Muthoni** one of the Interested Party/Applicants on behalf of the rest of the interested party/Applicants. In addition to what is already in the grounds she averred that failure by the court to enjoin the Applicants to the proceedings and or give a return date to court amounted to a violation to the rights to a fair hearing.
6. She further averred that the accounts in the DTB had been in existence since the other applicants were minors (11 years). That the Applicant/Respondent did not furnish the court with any compelling grounds or proof to raise reasonable suspicion with respect to fraudulent transactions related to the accounts in question.
7. She further deponed that the Interested Party/Applicant were greatly prejudiced by the continued unlawful operation of the funds preservation orders. She averred that article 47 of the Constitution was and continues to be infringed by the freezing of the accounts without their participation.
8. In his submissions Mr. Ligunya for the Interested Party/Applicants stated that the accounts in the DTB were frozen on 28<sup>th</sup> August 2018.

These accounts are in respect of the deponent, her children and business. That the banks had been frozen since May 2018 on communication by ARA. He contended that there was nothing to support the issue of deposits of Kshs 900,000/- on each of the accounts as deponed to at para 8 of Mr. Musyoki's replying affidavit. Referring to documents annexed to the replying affidavit counsel submitted that there was no deposit of Kshs 900,000/- on any of the accounts on 24<sup>th</sup> July 2018.

9. In respect to ACEC Misc. No 36/18 he submitted that search warrants were issued on 30<sup>th</sup> May 2018 (LWM1) yet there were no annexures, and there is also no report of the finding after the 90 days. He decried the fact that the Interested Party/Applicants were never summoned nor served with the applications. Further that there was no information on the source of information and neither was there anything linking the interested party/Applicants children and business to the National Youth Service (NYS).

10. Counsel submitted that since the Applicant/Respondent got the search orders no action had been taken by it. There were no witness statements by anyone from NYS, nor communication to the Interested party/Applicants. He further stated that there was no link between the money in the account and NYS. He referred the court to two cases which he relied on namely.

**i. Ogolla Mujera advocates LLP v banking fraud Investigation Unit [2016] eKLR.**

**ii. Manfred Walter Schmitt & Anor [2013] eKLR.**

11. It was his submission that based on the above authorities there must be reasonable suspicion before an application for freezing accounts is made. That in the present case no such reasonable grounds had been presented to the court. To the contrary he said the cited case of **ARA vs. Pamela Aboo** was not supportive of the application.

12. The Applicant/Respondent relied on the Replying affidavit by F. Musyoki in opposing the application dated 25<sup>th</sup> September 2018. In it he explained how he had investigated claims of fraudulent theft of funds at the NYS. The said investigations led to the arrest and appearance in court by the 1<sup>st</sup> interested party/Applicant in a criminal case **ACC Nos. 10,13,16 and 17 of 2018 (F.M.1)**. He admitted that on 30<sup>th</sup> May 2018 and 28<sup>th</sup> August 2018 respectively he had made applications before the Chief magistrate's court vide Misc Cr. Application Nos. 1839/18 and 2814/18 seeking orders to search, inspect, seize, freeze and preserve funds in the various named accounts (FM2 & 4).

13. He deponed that the orders were granted and he acted on them. On 7<sup>th</sup> September 2018 he filed a further application before this court seeking orders of preservation of funds in the named accounts for 90 days to enable him complete investigations. The orders obtained were duly served on the respective banks.

14. He averred further that following the arrest and charging of the top management of the NYS the said institution has had administrative challenges leading to the failure in obtaining certain documents. This had led to the delays in concluding the investigations. He however deponed that discharging the preservation orders would negatively impact on the ongoing investigations.

15. Mr M. Adow for the Applicant/Respondent opposed the application and relied on the case of **ARA vs Pamela Aboo ACEC application No 58 of 2017**. He submitted that the applications were for revision yet the orders issued by the lower court had lapsed. It was his argument that ARA could not disclose much because the matter is still under investigation. Further the information they had required verification hence the need for more documents.

16. Referring to section 89 POCAMLA he submitted that nothing had been shown before the court to warrant the variation of the orders. He argued that the bank statements before the court showed deposits of Kshs 900,000/-.

### **Determination**

17. Having considered the application, affidavits, submissions and authorities I find the issue falling for determination to be whether the orders issued by this court on 7<sup>th</sup> September 2018 are justified. The applications by ARA dated 4<sup>th</sup> September 2018 were brought under section 53A(5) and 54(2) of POCAMLA and section 180 of the Evidence Act; sections 118 & 121(1) of the Criminal Procedure Code. Section 53A(5) POCAMLA provides:

**“For the purposes of their functions under the act, the agency Director, certified forensic and financial investigations shall have all the powers privileges and immunities of a police officer in addition to any other powers they may have under the Act.”**

Section 54(2) POCAMLA provides:-

**“The Agency shall have all the powers necessary or expedient for the performance of its functions”**

Section 180 of the evidence Act provides:

**(1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.**

**(2) Any person who fails to produce any such banker's book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine."**

Section 118 Criminal Procedure Code provides:

**"Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."**

Section 121(1) Criminal Procedure Code provides:

**(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.**

**(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.**

**(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise."**

18. The Applicant/Respondent coming under the above provisions supported the application with an affidavit explaining why the funds in the various mentioned accounts which are operated by Interested party/Applicant (Lilian Muthoni Mbogo) should be investigated. The accounts in ACEC Misc. Application No 34 of 2018 are alleged to have each received Kshs 900,000/- on 24<sup>th</sup> July 2018 which is denied by the applicant. There is evidence that the Applicant/Respondent on 28<sup>th</sup> August 2018 obtained search warrants to investigate the said accounts before the main application herein was made. The same happened in the matter under ACEC Misc. Application No 36 of 2018.

19. The current applicant has decried the fact that she and the others were never made parties to this application. Secondly they were never served with the application and/or orders granted herein.

20. It is noted that an application brought under the above provisions is for purposes of investigation and not forfeiture. In an application such as was filed by the Applicant/Respondent what is supposed to be shown is reasonable suspicion in respect to the said accounts or properties. That is why the application is in the first place made *ex parte* for obvious reasons. The Judge/Magistrate must be convinced that there is reasonable suspicion, not material evidence.

21. The only caution should be the limited time for such investigations, so that the orders are not open ended. Secondly once the order has been served on the respondent, the affected party/parties are served and may come to court to challenge the orders as has happened herein. There is no provision for such parties to be enjoined as such in the first instance.

22. It is also clear from the above cited provision of POCAMLA that the ARA officers have the mandate to carry out forensic and financial investigations. The two cases at hand fall under that category and this court cannot bar the agency from investigating these accounts as long as there is reason for carrying out such an investigation.

23. It has been shown that the Interested Party/Applicant (Lilian Muthoni Mbogo) is involved in the operation of all these accounts in both files. It is also not disputed that the said Applicant is facing various criminal charges before the Anti Corruption court Nairobi. That could lay a basis for the need to investigate the various accounts.

24. An issue has been raised in respect to the alleged deposits of 24<sup>th</sup> July 2017 which are non-existent. I have confirmed from the annexed bank statements that indeed there were no deposits of Kshs 900,000 on the said accounts on 24<sup>th</sup> July 2017. However, on further perusal the statements show deposits of Kshs 900,000/- on 24<sup>th</sup> August 2017 in the DTB accounts appearing at pages 202, 205 and 240 of the replying affidavit. Since these deposits are part of the investigation I will not say anything more about them, at this point.

25. I however wish to state that caution must always be taken by the investigative agencies so that only necessary investigations are undertaken. Orders under section 118, 121 Criminal Procedure Code and section 180 Evidence Act should not be used for witch hunt. I support the holdings in the cases of **Ogola Mujera advocates** (supra) and **Manfred Walter Schmitt** (supra) by Achode J and Majanja J respectively.

26. Having had the opportunity of reading through the bank statements filed as annexures in the replying affidavit, I find and agree with Mr. Ligunya that the entries being investigated are not that many to require the applicant/Respondent to take so much time on them.

27. Secondly with the criminal cases facing the main Interested Party/Applicant herein (Lilian Muthoni Mboga) this court takes it that the investigations in the criminal case should have unearthed the material the Applicant/Respondent is looking for. For that reason I find that the ARA has had sufficient time to carry out its investigations.

28. I therefore vary the orders issued on 7<sup>th</sup> September 2018 allowing the Applicant/Respondent 90 days for investigations by giving the ARA up to 29<sup>th</sup> October 2018 5:00 p.m to complete and close its investigations in respect of all the accounts stated in ACEC Misc. Applications Nos. 34/2018 and 36/2018.

Orders accordingly.

**Signed dated and delivered this 23<sup>rd</sup> day of October 2018 in open court in Nairobi.**

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**HEDWIG I. ONG'UDI**

**JUDGE**