



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**MISCELLANEOUS APPLICATION NO. 3 OF 2016 (FORMERLY 601 OF 2015)**

**IN THE MATTER OF: AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR ORDERS UNDER SECTION 69, 81,82 AND 87 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES TO PROHIBIT THE TRANSFER AND DISPOSAL OF OR OTHER DEALINGS (HOWEVER DESCRIBED) WITH THE PROPERTY KNOWN AS MASONETTE HOUSE AT KASARANI L.R NO. 20857/190 & PLOT NUMBER L.R NO. RUIRU, JUJA EAST BLOCK 2/360 AND MOTOR VEHICLES REGISTRATION NUMBERS KCE 852T, KCD 536P, KCB 715E AND KCCE 874R TO THE GOVERNMENT OF KENYA AND**

**IN THE MATTER OF: MASONETTE HOUSE AT KASARANI L.R NO. 20857/190 & PLOT NUMBER L.R NO. RUIRU, JUJA EAST BLOCK 2/360 AND MOTOR VEHICLES REGISTRATION NUMBERS KCE 852T, KCD 536P, KCB 715E AND KCCE 874R.**

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

**-VERSUS-**

**SAMUEL WACHENJE alias SAM MWADIME.....1<sup>ST</sup> RESPONDENT**

**SUSAN MKIWA MNDANYI.....2<sup>ND</sup> RESPONDENT**

**VANDAME JOHN.....3<sup>RD</sup> RESPONDENT**

**ANTHONY KIHARA GETHI.....4<sup>TH</sup> RESPONDENT**

**CHARITY WANGUI GETHI.....5<sup>TH</sup> RESPONDENT**

**NGUNG’U JOHN.....6<sup>TH</sup> RESPONDENT**

**GACHOKA PAUL.....7<sup>TH</sup> RESPONDENT**

**JAMES KISINGO.....8<sup>TH</sup> RESPONDENT**

**RULING**

1. The Notice of Motion application dated 18<sup>th</sup> August 2016 was filed under a certificate of urgency pursuant to **Section 1A, 1B** of the **Civil Procedure Act 2010**, and **Order 1 rules 10 and 2** and **Order 51**

**rule 1** of the **Civil Procedure rules, 2010** and supported by the affidavit of Anthony Kihara Gethi.

2. The Applicant/4<sup>th</sup> Respondent (hereinafter 4<sup>th</sup> Respondent) prayed that; the Court be pleased to find that he was erroneously enjoined in this matter and as such make orders striking/obliterating his name out pending the hearing and determination of the suit. That the Court be pleased to issue a Temporary Injunction or general stay against any imminent proceedings as against the 4<sup>th</sup> Respondent touching on the matter and much more so in regard to the Criminal Case No. 301 of 2016, which was largely informed by the erroneous enjoinder of the 4<sup>th</sup> Respondent in this Cause.

3. The grounds of the Application were that;

a) The “property” so seized by the 1<sup>st</sup> Respondents were neither registered in the name of the Applicant nor were they for his beneficial interest as provided for under the law, more significantly the Proceeds of Crime and Anti-Money Laundering Act, Cap 59 B Laws of Kenya.

b) The Applicant merely acted as the Agent on behalf of his principal the 5<sup>th</sup> Respondent herein and procured the same, without any reasonable suspicion as to the origin of the funds as the price of the said vehicles was well within the market overt and such monies were not so extreme in the Applicants trade as he had dealt with much higher value in the past.

c) Upon the said requisition, the Applicant imported and transferred the same to their rightful owners and thereafter, the same were seized by the 1<sup>st</sup> Respondent through a Court Order which was obtained under Miscellaneous Application No. 601 of 2015 which sought to enjoin him as the 4<sup>th</sup> Respondent while he was not at the material time either registered as the owner or otherwise deriving any interest in the asset.

d) It is only in the interest of justice that the Court be pleased to find that the Applicant was erroneously enjoined and proceed to strike him out as the 4<sup>th</sup> Respondent in the matter as he neither has interest nor is he the owner of the said Chattels/motor vehicles so impounded and as such maintaining him as the 4<sup>th</sup> Respondent would not only be bad in law but also insignificant as to his trial or his defense would be highly prejudiced in the circumstance.

4. The 4<sup>th</sup> Respondent argued that the issues for determination by the Court are whether he was wrongly enjoined in the matter and whether he is an innocent importer in the ordinary course of business without knowledge and beneficial interest in the property the proceeds of alleged money laundering.

5. On the first issue the 4<sup>th</sup> Respondent referred to Section 2,3, and Section 7 of the Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA). He also relied on the case of **Republic v Director of Public Prosecutions & another ex-parte Patrick Ogola Onyango & 8 Others (2016) eKLR**, where the Court set out the ingredients that the prosecution needed to prove being that:

i) the accused entered into or became concerned in an engagement or arrangement;

ii) which he knew or ought to have known facilitated the acquisition, retention, use or control;

iii) of criminal property(proceed of crime);

iv) by or on behalf of another person the effect of which would conceal or disguise the source of the proceeds.

6. It was argued that the 4<sup>th</sup> Respondent’s Supplementary affidavit dated 28<sup>th</sup> March 2017 contained the bills of lading for the year 2013/2014 which were official documents in the records of Kenya Revenue Authority. From the said records, the 4<sup>th</sup> Respondent was in the business of motor vehicle importation and acted in good faith in all transactions including the subject property and acted professionally.

7. The 4<sup>th</sup> Respondent submitted that the oral evidence of Corporal Jeremiah Sautet on 27<sup>th</sup> March 2017 in which he stated that he did not know that the Applicant was an importer, added value because if the investigating officers had known of that fact and had possession of the importation documents, he would not have recommended his prosecution. It was his submission that the said property was and is not registered in his name and at no point in time did he have any interest whether substantial or legal making him an innocent purchaser.

8. On the second issue, the 4<sup>th</sup> Respondent relied on **Order 1 rule 3** of the **Civil Procedure Rules 2010** and on the Code of Civil Procedure by Mulla, 12<sup>th</sup> Edition pages 497 and 549, the Indian provisions which the Applicant argued were similar to those in Kenya and ought to apply *mutatis mutandis*.

9. The 4<sup>th</sup> Respondent submitted that joint tortfeasors may be sued jointly or severally. Thus where more persons are concerned in the commission of a wrong, the person wronged has his remedy against all, or any, or more of them at his option. He referred to the case of **Yowana Kahere & others v Lunyo Estates Ltd**, where a number of tenants had been evicted by a landlord from their separate holdings. Bennet J held that there was a misjoinder of parties and causes of action as there was no question of law or fact in common.

10. In **Stroud v Lawson** the court held that the Plaintiff shareholder was not entitled to join two different causes of action in one suit because the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders did not arise out of the same transaction or series of transactions.

11. The 4<sup>th</sup> Respondent submitted that from the above, justice can only be done if he is struck off this suit as he had suffered unjust treatment in the joinder of a suit, in which nothing can be recovered from him and nothing had been recovered from him. He urged the Court to uphold his application dated 18<sup>th</sup> August, 2016.

### **ASSET RECOVERY AGENCY SUBMISSIONS**

12. The Asset Recovery Agency (hereinafter the Agency) opposed the Notice of Motion in a Replying Affidavit dated 27<sup>th</sup> February 2017, sworn by Sautet Jeremiah Matipei dated 30<sup>th</sup> December 2015. The Agency submitted that the 4<sup>th</sup> Respondent cannot be struck off and removed from the proceedings because he is suspected to have substantial interests in some of the properties and assets under the preservation order. He is suspected to have laundered the funds stolen from coffers of the State contrary to **Sections 3, 4 and 7 of POCAMLA**.

13. The Agency stated that according to their investigations, the Applicant purchased motor vehicles registration numbers KCE 852T and KCD 536P and registered them through proxies such as the 6<sup>th</sup> and 7<sup>th</sup> Respondents, in a classical scheme of money laundering. That the scheme was meant to disguise the motor vehicles which were proceeds of crime, and conceal the source of the funds and the subsequent investment of the stolen funds. This in turn was intended to make it difficult to detect the offence of money laundering and tracing of the properties procured through the proceeds of crime.

14. The Agency asserted that the Applicant had devised a complex strategy for concealing and disguising proceeds of crime by transferring and registering the motor vehicles in the names of third parties, which amounts to money laundering contrary to the provisions of Sections 3 and 4 of the **Proceeds of Crime and Money Laundering Act**.

15. The Agency contended that the funds stolen from the State coffers were deposited into various accounts owned and operated by the 1<sup>st</sup> Respondent and subsequently withdrawn to purchase the properties under preservation. Further that the deposit of the funds into these accounts over which the 1<sup>st</sup> Respondent had control completed the fraud. Subsequent withdrawals of money from the same accounts by the Respondents and use of it to purchase properties in the name of third parties, was meant to conceal

the source of the money used for the purchases.

16. It was argued that under **Sections 81, 82 and 87** of the **Proceeds of Crime and Anti-Money Laundering Act**, the Agency was empowered 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 were reasonable grounds to believe that such property was proceeds of crime subject to such conditions as the court could specify. Under **Section 90** of **POCAML**, it was argued that when preservation orders are in force, the Agency could apply to the High Court for orders forfeiting to the state all or any of the property that was subject of the preservation order.

17. The Agency urged that the evidence placed before the Court that granted the preservation order established to the satisfaction of that Court that the Agency's belief was based on reasonable grounds that the properties/assets were proceeds of crime under POCAML and were owned by the Respondents either directly or indirectly. Thus the Agency's belief was not groundless or frivolous and the Court was inclined to grant the preservation order.

18. The Agency asserted that the 4<sup>th</sup> Respondent had not established that the preservation order was erroneously sought, or that he was erroneously enjoined in the suit, or that the order was made as a result of a mistake. Further that prayer number **(ii)** was misplaced and did not warrant the attention of the Court, as the Agency did not have the mandate to institute criminal prosecution against anyone including the 4<sup>th</sup> Respondent. Counsel urged the court to dismiss the Notice of Motion application dated 18<sup>th</sup> August 2016, as it had no merit is misconceived and the prayers sought cannot be granted.

### **Issues for determination**

Having considered the rival arguments advanced by the respective parties, it is my view that the main issue for determination is whether the 4<sup>th</sup> Respondent was erroneously enjoined and should therefore be struck out in these proceedings.

### **Analysis**

19. The first question the court has to address having said that, is who may be sued. **Order 1** of the **Civil Procedure Rules** provides an answer to this question and in particular **rule 3** thereof which provides *inter alia* that “...**All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if separate suit were brought against such persons any common question of law or fact would arise**”. As correctly observed by the 4<sup>th</sup> Respondent's submissions, this rule makes very broad provisions as to who may be sued or joined in a suit as a defendant.

20. The Code of Civil Procedure by Mulla, 12<sup>th</sup> Edition pages 497 and 549, the Indian provisions which are similar to those in Kenya and to which the Applicant referred this court states the following:-

“Under the present rule, all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist, where if separate suits were brought against such persons, any common question of law or fact would arise, though the causes of action against the defendants may be different, a plaintiff is entitled under to join several defendants in respect of several and distinct causes of action subject to the discretion of the Court to strike out one or more of the defendants on the analogy of Order 1 Rule 2, if it thinks it right to do so. “whatever the law may have been at the time when *Smurthwaite v Hannay* was decided, joinder of parties and joinder of causes of action are discretionary in the sense that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the court to do so if it thinks right.” As a general rule, where claims against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter be disposed of at the same time, the Court will allow the

joinder of defendants, subject to its discretion as to how the action should be tried.”

21. At page 542 under the rubric “Misjoinder of defendants and causes of action” appears:

“Where there are two or more defendants and two or more causes of action, the rule says that the “plaintiff may unite in the same suit several causes of action against the same defendants jointly.” “joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants.” If the causes of action alleged are separate and the defendants are arrayed in different sets, the suit is bad for misjoinder of defendants and causes of action, and is technically multifarious.

22. The only limitation however is that a right of relief exists. **Order 1 Rule 5** of the **Civil Procedure Rules** however qualifies the aforesaid Rule 3 by providing that “**It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him...**”

23. Further it is also trite law that where an Applicant/Plaintiff is not sure or is in doubt as to who to sue he/she should sue everybody remotely connected with the claim so that the question of liability as between the defendants may be determined by the court. Finally, rule 9 of the same order provides that misjoinder or non-joinder cannot be used to defeat an Applicant/Plaintiff’s claim. From the foregoing therefore, it is apparent that the applicant has a very wide latitude to find a cause of action as against any person(s) they believe they are entitled to seek any relief or redress against.

24. **Section 2** of the **POCAML**A defines “Proceeds of Crime” as hereunder:

“proceeds of crime” means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed;

25. The definition of the crime of Money laundering as provided under section 3 of the POCAML A as follows:

*“A person who knows or who ought reasonably to have reasonably known that property is or forms part of the proceeds of crime and—*

*(a) Enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or*

*(b) Performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to—*

*(i) Conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or*

*(ii) Enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or*

*(iii) Remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.*

26. Lastly **Section 4** deals with Acquisition, possession or use of proceeds of crime and describes it as follows:

*“A person who—*

***(a) acquires; (b) uses; or (c) has possession of, property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.***

Section 7 of the **Proceeds of Crime and Anti-Money Laundering Act, 2009** states that;

***7. Financial promotion of an offence***

***A person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.***

**(a) Section 54 (1) and (2) and 55 of the Proceeds of Crime and Anti-Money Laundering Act provides for the recovery function of the Applicant in the same manner as Section 6 (1) (a) of the Anti-Corruption and Economic Crimes Act. The two sections provide *inter alia* that:-**

**“54. Functions and powers of the Agency as hereunder.**

***(1) The functions of the Agency shall be to implement the provisions of Parts VII to XII inclusive and to exercise all powers set forth therein.***

***(2) The Agency shall have all the powers necessary or expedient for the performance of its functions.***

**55. Co-operation with the Agency**

***A person who or a body which has functions relating to investigation or prosecution of offences under this Act and the Agency shall co-operate in the exercise of their powers or the performance of their functions under this Act.***

**Section 6(1) (a) of ACECA on the other hand provides that, “.....The commission shall have the following function....to investigate the extent of liability for the loss of or damage to any public property and to institute civil proceedings against any person for the recovery of such property or for compensation....”**

27. In money laundering schemes, therefore ownership of the proceeds of crime could be direct or indirect. The thread of transaction showing the movements of funds from the NYS, the involvement of the 4<sup>th</sup> Respondent and the subsequent purchase of motor vehicles using the suspected cash, transferring and registering the vehicles in the names of third parties formed a pattern that depicted the substantial involvement and interest of the 4<sup>th</sup> Respondent in the properties preserved.

28. The Agency was therefore within its right to bring on board the 4<sup>th</sup> Respondent in the capacity it chose. The issue of whether the 4<sup>th</sup> Respondent can be sued in his personal capacity or not, for any acts he committed while acting as the agent of his Principal John Kago in the purchase of the preserved motor vehicles would be for him to advance in his defence in the intended trial.

29. The 4<sup>th</sup> Respondent shall have his day in court when he can canvass the issues he has raised before the Court. It will be upto the trial court to make a finding as to whether the 4<sup>th</sup> Respondent was an innocent purchaser in the ordinary course of business of importing cars.

30. It is also noteworthy that there are various statutes in law that expressly provide a shield or immunity to persons appointed as Agents to Principals against liability for their actions whilst in the ordinary course of business. However, such protection is accorded to an Agent acting for a Principal when acting in good faith and without reckless negligence. In my understanding, it is the Agency’s contention against the 4<sup>th</sup> Respondent that he did not act in good faith in the discharge of his duties as an ‘agent’ with regard to the

motor vehicles in question.

31. It is not denied that the 4<sup>th</sup> Respondent purchased the said motor vehicles registration numbers KCE 852T and KCD 536P and registered them through proxies such as the 6<sup>th</sup> and 7<sup>th</sup> Respondents. This is an issue that calls for investigations into his involvement. The Agency only needed to make a prima facie case to satisfy the Court that there was evidence which if accepted would establish the Agency's belief based on reasonable grounds within the meaning of the POCAMLA that the properties/assets sought to be preserved were proceeds of crime or unlawful activities directly or indirectly owned by the Respondents.

32. The Agency sought to enjoin the 4<sup>th</sup> Respondent in this suit so that he could explain himself with regard to the activities complained of. He can demonstrate to the Court that he had no substantial interest in any of the assets under the preservation order since it appears that one of the subject asset vehicles was first registered in his name and later during the investigations transferred to the 6<sup>th</sup> and 7<sup>th</sup> Respondents.

33. To invite this court to decide whether the prosecution in the intended Criminal proceedings against the Respondents will be able to successfully prosecute the 4<sup>th</sup> Respondent on those grounds is to invite the court to wander into the realm of conjecture. The issue of the 4<sup>th</sup> Respondent's actions having been carried out whilst serving as an Agent for his Principal Mr. John Kago in the purchase of the motor vehicles is for him to raise in his pleadings should the criminal proceedings commence. It cannot be used to bar other investigating institutions from commencing proceedings which they are rightly and constitutionally mandated to do in an attempt to recover assets or property that may be proceeds of crime.

34. If anything the defence was raised rather prematurely. The issues raised with respect to the propriety of the institution of the criminal proceedings against the Respondents are issues for determination by the trial court. This Court is not the right forum to determine those issues while investigations are still on-going.

35. As rightly submitted by Miss Okeno learned Counsel the Agency does not have the mandate to institute criminal prosecution against anyone including the Applicant. This is a function of the DPP and it follows that the 4<sup>th</sup> Respondent's prayer number (ii) is misplaced and misconceived.

36. For all the forgoing reasons I find that the application dated 18<sup>th</sup> August, 2016 is lacking in merit and is disallowed in terms of prayers 2 and 3 on the face of the application.

Orders accordingly.

**SIGNED DATED and DELIVERED** in open court this **27<sup>th</sup> day of June, 2017.**

.....

**L. A. ACHODE**

**JUDGE**

In the presence of .....Advocate for the Applicant

In the presence of .....Advocate for the Respondents