



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.155 OF 2014**

**REPUBLIC..... APPLICANT**

***VERSUS***

**HEINZ ANDREAS SCHALLER.....1<sup>ST</sup> RESPONDENT**

**KORNELLA KERSTAIN SCHALLER.....2<sup>ND</sup>RESPONDENT**

**RULING**

The application is dated 23<sup>rd</sup> May 2014 filed by the Director of Public Prosecutions under the provisions of **Articles 2(5) & (6), 157, 165, 259 of the Constitution, 2010, Sections 55, 56, 57, 68, 69, 71, 82 & 85 of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 (POCAMLA), Sections 118 and 121 of the Criminal Procedure Code, Cap. 75, Section 180 of the Evidence Act, Cap. 80, Sections 2 and 5 of the Office of the Director of Public Prosecutions Act, Section 3A of the Civil Procedure Act, Cap. 21 and Order 51 Rule 1 of the Civil Procedure Rules.** The Applicant seeks orders of restraint, preservation and seizure of funds believed to be proceeds of unlawful conduct held in bank accounts at Imperial Bank Limited and Barclays Bank of Kenya in the names of the Respondents, Heinz Andreas Schaller and Kornelia Kerstin Schaller. The Applicant claims that it is conducting money laundering investigations in respect of the said bank accounts held by the Respondents. The investigations commenced on the basis of a request made by the Chief Public Prosecutor of the Republic of Germany seeking legal assistance in securing assets/attachments held in the Respondents' account. The evidence in support of the application is set out in the affidavit of Chief Inspector Tobias Abondo attached to the Directorate of Criminal Investigations, Banking Fraud Investigations Unit.

Consequent upon the said application, summons was issued to the Respondents to enter appearance and respond to the application. They did not enter appearance nor did they file a response to the application.

On 31<sup>st</sup> October 2014, the Asset Recovery Agency filed an application seeking an order that it be enjoined in the suit as an Interested Party mainly because it is the agency established under the **Proceeds of Crime and Anti-Money Laundering Act** to conduct recovery proceedings of property which is or forms part of proceeds of crime. The court granted the agency leave to be enjoined in these proceedings on 4<sup>th</sup> November 2014.

During the hearing of the application, Learned State Counsel Ms. Kithiki appeared for the Applicant. The Applicant's case is that the Respondents are at present on trial in Germany for offences of breach of trust and aiding and abetting breach of trust. According to the Applicant, the application was made following a request made by the Chief Public Prosecutor of the Republic of Germany vide a letter dated 17<sup>th</sup> October 2013 seeking legal assistance in taking measures to secure assets/attachments in accounts held by the Respondents for the purpose of the ongoing criminal investigations against the Respondents. Part of the Applicant's case includes evidence of court documents from the proceedings of the Respondents' trial in Germany. It is alleged that the 1<sup>st</sup> Applicant was employed as a freelance accountant by a company in Germany called GO! Express & Logistics Munich GmbH. It is further alleged that during his employment with the company, the 1<sup>st</sup> Applicant transferred money from his employer's bank accounts to bank accounts held jointly with his wife, the 2<sup>nd</sup> Applicant. As a result of the 1<sup>st</sup> Respondent's activities, the

company incurred losses amounting to at least 3,860,507.14 Euros. Investigations by the German authorities revealed that part of its money approximately 250,000 Euros were routed to the Respondents bank accounts held at Imperial Bank and Barclays Bank of Kenya. According to the Applicant, based on the available material, the Chief Public Prosecutor of the Republic of Germany sought legal assistance in securing funds in the aforementioned bank accounts in order to protect the interests of the aggrieved company.

It was submitted on behalf of the Applicant that upon receipt of the request for legal assistance by the German authorities, the Director of Public Prosecutions through the Banking Fraud Investigation Unit moved the court on 24<sup>th</sup> May 2014 for an order to investigate the bank accounts held by the Respondents in Barclays Bank of Kenya. On 26<sup>th</sup> May 2014, the court granted the motion. The Applicant's case is that there is evidence that the Respondents indeed hold bank accounts in Barclays Bank of Kenya and Imperial Bank Limited. In particular, Bank Account No. 7800003305 at Imperial Bank Limited, Diani Branch and Bank Account No. 2023767034 at Barclays Bank of Kenya, Diani Branch are held in the joint names of the Respondents. In addition, Bank Account No. 2022853840 at Barclays Bank was opened in the name of the 2<sup>nd</sup> Applicant.

The Applicant states that the funds in the aforementioned bank accounts are deemed to be recoverable property within the meaning of the **Proceeds of Crime and Anti-Money Laundering Act**. It is for this reason that the Applicant urged the court to issue a restraint warrant against the Respondents prohibiting them from dealing in any manner with the aforementioned bank accounts, a warrant for preservation of the funds held in the said accounts and a seizure warrant for the bank accounts and other incidental movable property by the National Police Service on behalf of the Applicant. The Applicant further asked the court to provide for the period of the notice to be issued to the Respondents and any other person affected by the orders sought.

Submissions were also made on behalf of the Interested Party. Mr. Githinji for the Interested Party was of the opinion that the said monies held by the Respondents in Imperial Bank and Barclays Bank of Kenya ought to be deposited in the Criminal Asset Recovery Fund (CARF) in accordance with **Sections 109 & 110** of the **Proceeds of the Crime and Anti-Money Laundering Act**. According to Mr. Githinji, the said fund was specifically opened to deal with the preservation of all property and money derived from the fulfillment of the seizure, confiscation and forfeiture orders under the **Act**. According to Mr. Githinji, the National Police Service does not have a fund in which such money could be held.

In a rejoinder, Ms. Kithiki, Learned State Counsel for the Applicant opposed the Interested Party's submission. According to Ms. Kithiki, the Interested Party ought to have made a formal application seeking the prayers sought in its submission. Nonetheless, Ms. Kithiki was of the view that the Criminal Asset Recovery Fund was not properly regulated as the regulations contemplated under the provisions of **Section 113** of the **Proceeds of the Crime and Anti-Money Laundering Act** as to the administrative operations of the fund and the utilization of properties of the fund were yet to be made by the Minister for Finance.

This court has carefully considered the facts of this case. The Respondent in this case was served by substituted service through a Newspaper advertisement. They have not entered appearance. Neither have they filed any papers in response to the application filed by the Applicant. The application is therefore unopposed. In the premises therefore, the interim orders issued by this court on 27<sup>th</sup> May 2014 is allowed and confirmed in terms of Prayers 5, 6, 7 and 8 of the application. An issue that arose during the hearing of the application is whether the funds seized pursuant to the orders of this court should be held in an account held by the **Asset Recovery Agency** established under the **Proceeds of Crime and Anti-Money Laundering Act (POCAML)** or it should be held by the Director of Public Prosecutions and the National Police Service. It was argued on behalf of the Director of Public Prosecutions that since the seized sums were subject to investigations pursuant to mutual legal assistance requested by the Federal Republic of Germany, the said funds should be held by the Director of Public Prosecutions and the National Police Service and not by the Asset Recovery Agency. It was further submitted that the said seized funds were not, *per se*, funds due to the Government of Kenya but in due course, after completion of investigations, may be returned to Germany where the offence was committed. On the other hand, the

Asset Recovery Agency argued that under **Sections 109 and 110 of POCAMLA**, any asset seized or recovered being proceeds of crime should be deposited in an account managed by the Assets Recovery Agency at the Central Bank of Kenya. In that regard it was argued that all government agencies including the Director of Public Prosecutions, is required to co-operate with the Asset Recovery Agency with a view to enabling the said Fund to be operationalized.

After carefully evaluating the facts of this case, this court takes the following view of the matter: **Section 109** of the **POCAMLA** establishes the Criminal Assets Recovery Fund. **Section 110** specifies the monies that shall be held in the fund. In summary, all the monies recovered as a result of orders of confiscation and forfeitures made pursuant to the Act shall be deposited in the said fund. The plain reading of **Section 110(a), (b), (c) and (f)** of **POCAMLA** clearly shows that the monies that shall be deposited in that fund are generally proceeds of crime where the Government of Kenya, on behalf of the people of Kenya, is a party. In the present application, the monies seized pursuant to the orders issued by this court were done on behalf of the Federal Republic of Germany pursuant to mutual legal assistance. The Federal Republic of Germany requested the Government of Kenya through the Director of Public Prosecutions to seize the said funds as it had established that the same were proceeds of criminal activities by the Respondent in this case. In that regard, it was clear to this court that the interest of the Director of Public Prosecution in the said funds is pursuant to its obligation to assist the Federal Republic of Germany to have the said funds returned to Germany pursuant to mutual legal assistance after the conclusion of investigations. The Asset Recovery Agency therefore has no role to play because the said funds will not ultimately be placed in the Criminal Assets Recovery Fund as it does not relate to the proceeds of crime for an offence which the Government of Kenya is party to. This court will therefore direct that the said funds be placed with an account managed by the National Police Service and the Director of Public Prosecutions pending the completion of investigations and further action that may be taken pursuant to mutual legal assistance request made by the Federal Republic of Germany.

For the above reasons, the objection raised by the Assets Recovery Agency for the said funds to be placed under the control of the National Police Service and the Director of Public Prosecutions has no merit and is disallowed. The said seized funds shall be placed under the custody of the National Police Service and the Director of Public Prosecutions pending further investigations and pending further action pursuant to mutual legal assistance request made by the Federal Republic of Germany. It is so ordered.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2016**

**L. KIMARU**

**JUDGE**