



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
MISC. APPLICATION NO. 3 OF 2016

ASSET RECOVERY AGENCY.....APPLICANTS

VERSUS

SAMUEL WACHENJE Alias SAM MWADIME.....1ST RESPONDENT

SUSAN MKIWA MNDANYI..... 2ND RESPONDENT

VANDAMME JOHN.....3RD RESPONDENT

ANTHONY KIHARA GETHI.....4TH RESPONDENT

CHARITY WANGUI GETHI.....5TH RESPONDENT

NDUNG’U JOHN.....6TH RESPONDENT

GACHOKA PAUL.....7TH RESPONDENT

JAMES KISINGO.....8TH RESPONDENT

RULING

Introduction

1. This application is brought by way of Notice of Motion dated 15th January 2016, taken out under **Section 89** of the **Proceeds of Crime and Anti Money laundering Act No. 9 of 2009**, **Order 51** of the **Civil Procedure Rules** and all other enabling provisions of the law. The Applicants pray for orders of the court to vary or rescind the order made on the 31st December, 2015, directing the surrender and seizure of movable properties known as Toyota Prado KCD 536P and Toyota Prado KCE 852 T belonging to the Applicants.

Grounds

2. The application is premised on grounds that the operation of the said orders until further orders are made by the court, would deprive the 3rd and 7th Respondents of means of transport necessary for their travel in executing their business dealings.

3. This, the Applicants state would cause them undue hardship which by far outweighs the risk of transfer of the vehicles, which they undertake not to alienate, waste, destroy or transfer until the proceedings are determined.
4. The Applicants assert that they are not in any way connected with the alleged theft at the National Youth Service and were at all times bonafide businessmen. That the proceeds received from these business dealings are the business earnings from which they purchased the subject motor vehicles. The 3rd Respondent claims that he is a purchaser without notice who bought motor vehicle KCD 536P from the 7th Respondent.
5. Mr. Mwanza learned counsel filed written submissions dated 28th September 2016 on behalf of the Applicants and argued that the two motor vehicles subject of this application were acquired for valuable consideration. That the 3rd Respondent bought Toyota Prado registration No. KCD 536P from the 6th Respondent at a total cost of Kshs.10,400,000/= evidenced by the annexed sale agreement dated 20th May, 2015 in his supporting affidavit.
6. The 7th Respondent submitted that the purchase price of Kshs.10,400,000/= was money belonging to his company, Millennium Instrumentation Ltd and the amount was the payment for work done for the Government of Kenya. Counsel therefore, contended that the Agency has not established any link between the Applicants and the alleged fraud at the National Youth Service.
7. Counsel relied on the holding in Supreme Court of Judicature Court of Appeal (Criminal Division), case of **R Vs NW, SW, RC and CC**, to support his argument. In the aforesaid case the Court of Appeal upheld the ruling, holding that the Respondents had no case to answer because the monies they allegedly transferred to Jamaica could not be criminal property as the prosecution had no evidence of specific criminal conduct.
8. It is upon this premise that he argued that the condemnation of the applicants under POCAMLA would go against the spirit of the law as the alleged criminal offences are yet to be proven.
9. It is counsel's argument that the provisions of **Section 89(1)(a)** of **POCAMLA**, give the court the authority to vary a preservation order if it can be proven that such an action as that of the order in question could cause the Applicants undue hardship. He avers that this would be the case for the Applicants should the order not be varied as the vehicles are used to ease transport and facilitate running of the Applicant's respective businesses. That this need therefore outweighs the risk that the vehicles may be transferred.
10. Learned Counsel further urged that the court should, in the alternative, permit the Applicants to maintain the motor vehicles in their possession, as they have undertaken to preserve them in their names and in good working condition.
11. This is to be achieved by the court's invocation of **Section 89(2)** of **POCAMLA**, to alleviate the risk of the two vehicles being alienated pending the determination of the forfeiture application, by ordering the Applicants to refrain from the sale, transfer or alienation of the vehicles.
12. Learned Counsel contended that the Agency in its replying affidavit dated 11th July 2016, was mistaken to infer that the Applicants had not complied with the court order. That **Section 85(1)** of **POCAMLA** states that in order, to protect property subject to a preservation order any police officer may seize any of that property if there is reasonable grounds to believe that the property will be so disposed of or removed.
13. According to counsel, the import of this section and the plain definitions of the words 'seize' and 'surrender' as used in the order, placed the responsibility upon the Agency to forcibly take possession of the vehicles, which they did not do. As the Applicants have not sold, transferred or otherwise dealt with the motor vehicles, counsel submits that they have thus complied with the court order.

14. **Section 84** of **POCAML**A states that a preservation order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette, unless there is an application for a forfeiture order pending before the court. This is the authority upon which the Agency relied in opposition of the Notice of Motion brought forth by the Applicant's.

15. Counsel states that this was misguided as the pending forfeiture Application would not preclude the court from hearing and determining an application under **Section 89** of **POCAML**A. It is Counsel's contention that by the provisions of **Section 92(b)** the application under **Section 89** must be heard and determined first, the forfeiture application taking a back seat.

16. Learned Counsel further submitted that he seeks the court's confirmation on whether the forfeiture application was made by the 22nd April 2016 as required by **Section 84**, if it was not, then the orders of 31st December 2015 stand expired by operation of law. Similar arguments were made by Mr. Wachira in his oral submissions during the hearing on 2nd November 2016.

Respondent's case

17. The Agency has opposed the application through the replying affidavit sworn by Muthoni Kimani, the Director of Asset Recovery Agency dated 11th July, 2016. Learned State Counsel Mr. Mohammed Adow filed submissions dated 21st October 2016, which he highlighted during the hearing on 2nd November, 2016.

18. The State Counsel argued that the Applicants are in breach of the court order dated 31st December, 2015 and have not demonstrated the reasons behind this non-compliance. He argued that court orders should be obeyed in order to safeguard the rule of law and that a party who obtains a court order must be assured that the order will be obeyed by those to whom it is directed.

19. The State Counsel contended that disobedience of the court order by the Applicants is hence an affront to the supremacy of the rule of law. That in light of this, allowing the Applicant's application would set a bad precedent and render the courts ineffective.

20. **Section 89** of the **POCAML**A as read with **Order 45, Rule 1** of the **Civil Procedure Rules**, grants the court power to review or rescind a court order. The State Counsel opines that for the Applicants to seek an order under these sections, they must first prove that they would be aggrieved by the enforcement of the court order which they seek to be varied.

21. The State Counsel argued that the Applicants do not meet the threshold of the conditions required for the aforementioned sections to be invoked in their favour. That they are yet to prove that they will suffer hardship as a result of the said preservation/surrender orders.

22. The State Counsel submitted that **Section 81, 82, 86** and **87** of **POCAML**A, mandate the Agency 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. That the properties subject to the preservation orders are presumed to have been purchased through funds stolen from the National Youth Service, a public entity.

23. The State Counsel urged that the Applicants jumped the gun in arguing that they lawfully purchased the said vehicles and they thus should not be subject to the preservation orders as no criminal offence has been proven. These arguments, the State Counsel contends, can only be canvassed at the hearing of the forfeiture application. That under **Section 84** of **POCAML**A, a preservation order cannot be varied or discharged if there is a pending forfeiture application before the court.

24. The State Counsel stated that the Agency has filed a forfeiture application vide **Misc. Application HCC No. 171 of 2016**, for forfeiture orders pending before the court in respect of the properties subject to the preservation/surrender orders herein. As the orders remain unsatisfied and have not been rescinded,

the State Counsel contended that the preservation/surrender orders cannot be varied or discharged.

25. The State Counsel argued that rescinding the preservation orders shall grant the Applicants permission to benefit from proceeds of crime, contrary to the purpose of the POCAMLA Act, 2009. He therefore asked the court to dismiss the Applicant's application.

Issues for Determination

26. Having laid out the parties' cases and their submissions including the supporting law, I have framed the issues for determination as follows:

- i. Whether the 3rd and 7th Respondents have complied with the court order issued on 31st December, 2015.
- ii. Whether the application meets the threshold of **section 89** of the **Proceeds of Crime and Anti-Money Laundering Act, 2009** and **order 45** of the **Civil Procedure Rules**.
- iii. Whether the pending forfeiture application precludes the 3rd and 7th Respondents from applying for discharge of preservation and surrender orders.

Applicant's compliance with orders:

27. The Applicant's claimed that the wording of the Order made on the 31st December, 2015 did not expressly place the responsibility of surrendering the vehicles to the Investigating Officer on their shoulders. The impugned order reads as follows:

“That the motor vehicles Toyota Registration Number KCE 852T, Toyota Prado Registration Number KCD 536P and Toyota Prado registration number KCE 874R station Wagon be seized and surrendered to the Corporal No. 75821 Sautet Jeremiah Matipei the investigating Officer into National Youth Service fraud and embezzlement and be detained by the Directorate of Criminal Investigations until further orders are made by the Court.

That in the event the vehicles are not surrendered to Corporal No. 75821 Sautet Jeremiah Matipei the National Transport Safety Authority (NTSA) be and is hereby directed to cancel the road licenses and insurances of the said motor vehicles Prado Registration Number KCE 852T, Toyota Prado Registration Number KCD 536P and Toyota Prado registration number KCE 874R”.

The foregoing order is clear and the argument of the 3rd and 7th Respondent in this regard is therefore mere play on semantics.

28. The words used in the order are “seized and surrendered”. According to Black's Law Dictionary Ninth Edition the word **“seize”** means “to forcibly take possession of a person or property.” While **“surrender”** means “the act of yielding to another's power or control” or “the giving up of a right or claim.” In the Concise Oxford English Dictionary twelfth Edition, **“seize”** means “take hold of suddenly and forcibly”, or “take possession of by warrant or legal right”. **“surrender”** on the other hand means “give up a person, right, or possession on compulsion or demand”.

29. It is therefore clear as pikestaff that the Applicants have not obeyed the said orders because the two words “seize” and “surrender” place the onus on both parties. The Applicants were required to surrender, or give up control, or yield their property, while the Respondent was required to seize or forcibly take possession of the vehicles. As of the date of this argument the Applicants were still in possession of the subject vehicles. While the Respondent stated that the Agency was unable to locate them.

30. This Court has said times without number that Court orders are made to be obeyed as soon as they are issued and it matters not whether the recipient agrees with them or not. In *Hadkinson vs. Hadkinson* (1952) All ER 567, the court stated that court:

“Orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up”.

This point was emphasized in the care of *Kanchanben Ramniklal Shah vs. Shamit Shantilal Shah & 6 Others* (2010) EKLK by Njagi, J (as he then was) as follows:

“A Court Order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith.”

31. If it is true that the Applicants found the wording of the order unclear the avenues for a remedy within the law can be found in the holding in *Nation Media Group Limited v Kamlesh Mansukhlal Danji Pattni & 2 others* (2013)eKLR, where Ngugi J stated that:

“The rule of law requires that orders of the court be obeyed, and if a party is not able to obey them, appeal against them or apply to the court that issued the orders for review. It cannot serve the interests of justice, advancement of the rule of law, or protection of human rights, including the rights of parties such as the applicant, if a litigant can choose when to obey orders of the court, and which orders to obey”.

The Applicants did not exercise any of the options set out above. It is not open to them to pick and choose whether or not to obey the orders of 31st December, 2015.

32. The orders now sought from this court being discretionary, the court finds that it would be a mockery of the judicial process for the court to exercise its discretion, in favour of parties who have a history of disobeying the orders of the said court.

Whether seizure of motor vehicles would cause undue hardship to the Applicants

33. It was alleged by the Applicants that the seizure of the motor vehicles would cause undue hardship to them and for this reason, the preservation order issued on 31st December 2015, should be varied. This application was brought under **Section 89(1)(a)** of **POCAMLA** which provides that:

Variation and rescission of orders

(1) 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;

34. The foregoing section therefore gives the court power to vary a preservation order, where it can be sufficiently proven that the operation of the order will deprive the applicant of the means to provide for his reasonable living expenses, causing him undue hardship. Further the said undue hardship should be such as outweighs the risk that the property concerned may be destroyed, lost or transferred.

35. On the one hand the Applicants' prayer is to be allowed to maintain possession and use of the subject motor vehicles, for the continuance of the running of their businesses as stated in paragraph 15 of their submissions. On the other hand the Respondent has stated that the Applicants should not be allowed to enjoy what are presumed to be the proceeds of crime, purchased through funds stolen from the National Youth Service.

36. The Applicants claim that the motor vehicles which they allegedly bought using company funds are used in the running of these businesses. They have however not demonstrated that these vehicles are used as means of transport **"necessary for their travel in executing their business dealings"** as pleaded. In any case, the foregoing is not one of the pre-requisite conditions for the granting of a variation, or rescission Order under **Section 89(1)(a) of POCAMLA** and **Order 45, Rule 1 of the Civil Procedure Rules**.

37. I have considered the rival arguments on this issue and find that the Applicants have failed to demonstrate how the subject motor vehicles are the means by which they provide for their reasonable living expenses. It is also not clear how compliance with the order of 31st December, 2015 will cause them undue hardship, which far outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.

Forfeiture Application Precluding Applicants from applying for discharge of preservation and surrender orders:

38. Indeed as stated by the Applicants, **Section 92(6) POCAMLA** provides that a forfeiture order shall not take effect before the period allowed for an application under **Section 89**, or an appeal under **Section 96** has expired. The forfeiture order shall also not take effect before such an application or appeal has been disposed of.

39. The Applicants argued that the application brought under **Section 89** should be given priority as the forfeiture order cannot take effect before the court has determined the application brought under **Section 89**. That it is **Section 89** which gives the court power to vary a preservation order if the Applicant proves to the court that they would suffer undue hardship if the preservation order were to be enforced.

40. The Applicants requested the court to confirm the date on which the forfeiture application was made in order to ascertain whether or not the orders of 31st December, 2015 stand expired by operation of law due to delayed filing of the application.

41. The onus was on the Applicants to demonstrate that the application was made out of time as they alleged, in keeping with the time weathered tenet that states that he who alleges must prove. No material has been placed before the court to prove such an assertion.

42. The Applicants' claim that no criminal offence has been proven against them, or that the motor vehicles were not proceeds of crime is quite premature at this stage. In any case the validity of an order under **Section 92(1)** is not affected by the outcome of criminal proceedings.

43. Whether or not the subject motor vehicles were born out of proceeds of crime, can only be canvassed at the hearing of the forfeiture application. The rival arguments placed before this court in this application cannot enable the court to make a finding on that issue one way or the other, with any degree of certainty.

44. From the foregoing the court has therefore found first, that orders made by a court of competent jurisdiction were disobeyed by the Applicants. Secondly, that the application does not meet the threshold of **Section 89 POCAMLA** to warrant the granting of the orders sought. In the premise this court finds and holds that the circumstances of this case are such that, it cannot exercise its discretion to grant the orders sought, for to do so would not serve the interests of justice.

45. In the premise the application dated 15th January, 2016 must fail and is accordingly dismissed with

costs.

SIGNED, DATED this **28th** day of **November, 2016**.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicants

In the presence ofAdvocate for the Respondents