



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Crim Appli 244 of 2008**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF PRESERVATION OF LANDED PROPERTY**

**KNOWN AS HOUSE NO.6 ON LR. NO.1/1154 (ALSO KNOWN AS “SPANISH VILLAS)”**

**BETWEEN**

**THE ATTORNEY GENERAL ..... APPLICANT**

**VERSUS**

- 1. FELICIEN KABUGA (a.k.a. KABUGA FARACEAN etc) ..... 1<sup>ST</sup> RESPONDENT**
- 2. MUKAZITONI JOSEPHINE (a.k.a. MUKAZITON JOSEPHINE)..... 2<sup>ND</sup> RESPONDENT**
- 3. KENYA TRUST COMPANY LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

The application has been brought through originating notice of motion under Section 60 of the Constitution of Kenya, the Geneva Convention Act, Cap.198, Kenya’s obligation under international law and the resolutions of the United Nations Security Council, the inherent powers of the court and all enabling provisions of law, procedure and practice.

The application seeks the following orders:

- 1. That the Honourable court be pleased to issue orders for the preservation of the property known as House No. 6 on L.R. No. 1/1154 (Spanish Villas) (“the subject property”) and restraining the above named Respondents and any of them whether jointly or severally or by their agents, servants or in any other manner or means from alienating, selling, disposing off, wasting or damaging the subject property or any part thereof or any interests or rights therein until the conclusion or other determination of the case (Case No. ICTR-97-22-1) pending in the International Criminal Tribunal for Rwanda (The ICTR) against the 1<sup>st</sup> Respondent herein or until further orders of this Honourable court.*
- 2. All rental income or proceeds collected or received by the third Respondent herein or any other managing agent from the use or occupation of the subject property less any management fee payable be deposited with the Registrar of the High Court of Kenya until the conclusion of the case referred to in paragraph 1 above or until further orders of this Honourable court.*
- 3. Service of these orders be effected upon the above named Respondents by way of advertisement in at*

*least one local, one regional and one international newspaper.*

4. *There be liberty for any of the above named parties to apply for extension, variation, discharge or setting aside of these orders or any of them.*
5. *Costs be provided for.*

According to the bundle of documents produced to the court – specifically on pg 21 – the 1<sup>st</sup> Respondent viz, Felicien Kabuga was born in 1935 in Muniga **Secteur**, Mukarange **Commune**, Byumba **prefecture**, Rwanda and is a wealthy and influential businessman. Among other positions, he was the President of the National Defence Fund, Rwanda. Under President HABYARIMANA's rule, political and financial power in Rwanda was consolidated within a tight circle, the core of which was the extended family of the President. Felicien Kabuga was a prominent member of this group by reason of marriage of two of his daughters to two sons of President HABYARIMANA and First Lady AGATHE KANZIGA. KABUGA also had control of the employees of the business enterprises that he headed, such as Kabuga ETS.

In his submissions, Mr. Keriako Tobiko, the Director of Public Prosecutions, stated that the application seeks to freeze certain assets of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents following a request to the Attorney-General from the International Criminal Tribunal Rwanda that is based in Arusha, Tanzania. He produced a copy of the request at pg 52 of the bundle. The said request has been written by the Chief Prosecutor viz, Hassan B. Jallow. Apart from the above, Mr. Tobiko informed the court that the 1<sup>st</sup> respondent had been charged for the following crimes before the ICTR:

***Count I: Conspiracy to commit Genocide.***

***Count II: Genocide or alternatively***

***Count III: Complicity in Genocide***

***Count IV: Direct and Public Incitement to Commit Genocide***

***Count V: Extermination as a Crime against humanity.***

Subsequently, in 1997, the 1<sup>st</sup> respondent was indicted for those offences and a warrant of arrest was issued against him. Thereafter, Kenya was requested to assist in arresting Kabuga to face trial. According to Mr. Tobiko, the 1<sup>st</sup> respondent has to date managed to evade arrest and evade justice. That is despite the public advertisements that have been made by the Criminal Investigation Department (CID) of Kenya. Subsequently, Mr. Tobiko referred the court to:

§ ***Resolution No.955 of the United Nations***

§ ***Resolution No.1165 of 1998 of the United Nations***

§ ***Resolution No.1431 of 2002 of the United Nations***

§ ***Resolution No.1503 of 2003 of the United Nations***

§ ***Resolution No.1534 of 2004 of the United Nations.***

The theme running through the above resolutions is for member states of the United Nations to assist in the investigations to trace the suspects of the genocide in Rwanda so that they can be brought to book. Besides the above, Mr. Tobiko also submitted that, Kenya being a member of the United Nations has an obligation under international law to give full co-operation to the Arusha Tribunal. He also referred the court to a book titled "***International Criminal Law***" that was written by Antonio Cassese. In addition to the above, Mr. Tobiko also submitted that following investigations by a joint team of CID officers and

investigators from ICTR – it revealed that Kabuga and his wife (2<sup>nd</sup> respondent) jointly own a “**Spanish villa**” at Lenana Road – House No.6 on LR. No.1/1154).

Initially, the rents were collected by the 3<sup>rd</sup> respondent who used to deposit the same in the Account No.24872 of the 1<sup>st</sup> respondent at the Commercial Bank of Africa, Wabera Street. Subsequently, that account was closed and the 3<sup>rd</sup> respondent started remitting an equivalent of KShs.290,000/= quarterly to the Account No.000-0760048-53 of the 2<sup>nd</sup> respondent in Belgium. The fear expressed by Mr. Tobiko is that Kabuga may be using the proceeds to help him avoid capture and evade justice.

This court has carefully considered the application together with all the annexures. No doubt, this court is fully aware that the 1<sup>st</sup> respondent has for a long time been sought on allegations of genocide and other related crimes in Rwanda. I am also fully aware that the United Nations had established an International Criminal Tribunal for Rwanda at Arusha – a couple of years ago.

Basically, the said Tribunal has been mandated to deal with serious violations of international humanitarian law in Rwanda. It is due to the total circumstances in this matter that the court decided to proceed ex-parte on the matter. This court is fully aware that Kenya is a member of the United Nations and hence bound by the resolutions of the Security Council. Significantly, Kenya also plays host to a number of the United Nations agencies. Key among them are United Nations Environmental Programme (UNEP) and Habitat. Specifically, Resolution 1503 of 2003 requested Kenya among other states to intensify co-operation with and render all necessary assistance to the ICTR. The investigations by the CID officers from Kenya and investigators from the ICTR are not only meticulous but also detailed. They clearly show that the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent own the property – “Spanish Villa” LR. NO.1/1154 along Lenana Road, Nairobi. The investigations also show explicitly the Bank accounts and transactions that the 1<sup>st</sup> respondent and his wife have been involved in. Whereas the 1<sup>st</sup> respondent is presumed to be innocent unless proved otherwise, the ball is in his court to come forward so that he may be subjected to the due process of the law.

During the same, he may defend himself given the serious allegation against him. On my part, I do concur with the sentiments of the learned author of “**International Criminal Law**” viz, Antonio Cassese when he states the following:

***“It is apparent from the provisions of the Statute of the ICTY as developed and spelled out by the judges in the aforementioned case that the relations between the ICTY (and the ICTR) and States are shaped as follows:-***

***(i) the Statutes of the Tribunals impose upon states an obligation to co-operate; this obligation is at the same time sweeping (for it embraces any matter where the Tribunal may need the co-operation of a State), and strict (for it is assisted by the sanctioning powers of the Security Council in case of non-compliance by a State);***

***(ii) it follows from that obligation that States are not allowed to rely upon such traditional clauses for refusing co-operation or extradition as ‘double criminality’, political offence, nationality of the person requested for surrender, etc.;***

***(iii) the Tribunal is endowed with broad and binding powers, for it can issue binding orders to States (for the handing over of evidence, arrest of suspects, etc.) or subpoenas to individuals acting in a private capacity;***

***(iv) although States may invoke national security concerns as a ground for refusing the transmission of documents and other evidence, this is subject to strict limitations, and the Tribunal may have the final say on the matter (see Blaskic (subpoena), §§ 61-9); (v) the collection of evidence may be carried out by the authorities of the relevant State, but the Tribunal’s prosecutor is authorized to undertake investigations and gather evidence directly (that is, without going through the official channels) on the territory of the States of the former Yugoslavia, as well as on the territory of those***

*States which have passed implementing legislation authorizing such Tribunal's activity (see Blaskic (subpoena), §§53-4);*

*(v) in case of non-compliance by a State with the obligation to co-operate stemming from the Statutes, the Tribunals may make a judicial finding of failure to co-operate, and the President is then authorized to submit it to the Security Council.”*

In view of the above analysis, I hereby concede to the application on the following terms:

*i) I hereby issue an Order for the Preservation of the property known as House No.6 on L.R> No.1/1154 (Spanish Villas) (“the subject property”) and Restrain the above named Respondents and any of them whether jointly or severally or by their Agents, Servants or in any manner or means from alienating, selling, disposing off, wasting or damaging the subject property or any part thereof or any interests or rights therein until the conclusion or other determination of the case (Case No.ICTR-97-22-1) pending in the International Criminal Tribunal for Rwanda (The ICTR) against the 1<sup>st</sup> Respondent herein or until further orders of this Honourable Court.*

*ii) All rental income or proceeds collected or received by the 3<sup>rd</sup> Respondent herein or any other managing agent from the use or occupation of the subject property less any management fee payable be deposited with the Registrar of the High Court of Kenya until the conclusion of the case referred to in paragraph 1 above or until further orders of this Honourable Court.*

*iii) Service of these orders be effected upon the above named Respondents by way of advertisement in at least two local, one regional and one international papers.*

*iv) The above named parties are at liberty to apply for extension, variation, discharge or setting aside of these orders or any of them.*

I hereby decline to make any orders to costs at this stage.

Those are the orders of the Court.

Ruling read signed and delivered in open court in the presence of Mr. Keriako Tobiko – the Director of Public Prosecutions on behalf of the Attorney-General of the Republic of Kenya.

**MUGA APONDI,**

**JUDGE.**

**6<sup>TH</sup> MAY, 2008.**