



**Assets Recovery Agency v Al-Siddique Motors Limited & another  
(Miscellaneous Application E042 of 2024) [2025] KEHC 2751 (KLR)  
(Anti-Corruption and Economic Crimes) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2751 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
MISCELLANEOUS APPLICATION E042 OF 2024**

**LM NJUGUNA, J**

**MARCH 12, 2025**

**BETWEEN**

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

**AND**

**AL-SIDDIQUE MOTORS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ADAN BISHAR MOHAMMED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant, Al-Siddique Motors Limited is in the business of selling motor vehicles.
2. The 1<sup>st</sup> Respondent is Assets Recovery Agency established under Section 53 of the Proceeds of Crime and Anti Money Laundering Act (herein after referred to as the (POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime.
3. The Applicant's Notice of Motion dated the 22<sup>nd</sup> January 2025 which is supported by the affidavit of Ali Bin Ijaz is expressed to be brought under Sections 1A, 1B, 3A & 80 of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules 2010; Section 89 Proceeds of Crime and Anti-Money Laundering, 2009 (POCAMLA) and it seeks the following orders:
  - a. (Spent).
  - b. That the honourable court be pleased to vary, discharge and/or rescind the orders issued on 27<sup>TH</sup> August 2024.



- c. That the honourable court be pleased to issue an order directing the Assets Recovery Agency to forthwith release Motor Vehicle Registration Number KDN 851P, Toyota Noah and its original logbook to the 2<sup>nd</sup> Respondent/Applicant.
  - d. That the costs of the application be provided for.
4. The Applicant relies on the grounds stated in its application, Supporting Affidavit, Further Affidavit sworn by Ali Bin Ijaz dated the 11<sup>th</sup> of February 2025 and the submissions dated the 14<sup>th</sup> of February 2025.
  5. In his affidavit Ali Bin Ijaz deposes that he is one of the Directors of the Applicant and that they sold Motor Vehicle Registration Number KDN 851P Toyota Noah (hereinafter referred to as “the subject motor vehicle”) to one Adan Bishar Mohamed, the 2<sup>nd</sup> Respondent for purposes of this Application for Kshs. 2,650,000.00.
  6. He deposed that they attempted to repossess the subject vehicle after the 2<sup>nd</sup> Respondent in this case paid Kshs. 1,545,000.00 deposit but then fell behind on the agreed-upon installment plan.
  7. He contended that, only at that point did they learn that the motor vehicle was the subject of investigations in Kahawa MCCR Misc. E294/2024 and upon filing an application for the release of the subject motor vehicle in that matter, the 1<sup>st</sup> Respondent, filed an application for preservation orders, which were granted in the first instance ex-parte.
  8. He further deposed that they continue to be deprived of their duly acquired property in terms of the actual subject motor vehicle, and the outstanding sum of Kshs. 1,395,500.00 still owed to them which is causing great hardship.
  9. The Applicant relies on the case of Asset Recovery Agency v Ali Abdi Ibrahim [2020] eKLR where the court held that:

“72. Society has legitimate expectation that courts shall reasonably balance individual interest with public interest which in any event is superior unless proved that the application for preservation is extremely malicious, founded on bad faith and amounts to an abuse of power or court process.”

### **1<sup>st</sup> Respondent’s Case.**

10. The 1<sup>st</sup> Respondent opposed the application through a replying affidavit sworn by Zachariah Lekishon who is an investigator attached to the 1<sup>st</sup> Respondent dated the 3<sup>rd</sup> of February 2025 and written submissions dated the 20<sup>th</sup> of February 2025.
11. He contended that the applicants have not sufficiently demonstrated any reasonable evidence to warrant the setting aside, variation or rescinding of the preservation order.
12. He deposed that the present application has not met the threshold provided in Section 89 of the POCAMLA as they have not proved that they will suffer hardship as a result of the preservation order or that the hardship suffered outweighs the risk of the preserved vehicle being destroyed, lost, damaged, concealed or transferred.
13. He deposed that the agency has filed forfeiture proceedings vide High Court ACEC Suit No. E003 of 2025, therefore, varying preservation orders dated 27<sup>th</sup> August 2024 will be detrimental to the matter.



14. He deposed that, the 2<sup>nd</sup> Respondent has failed to give a clear explanation on the source of funds used to purchase the motor vehicle in question, and from the preliminary investigations conducted, there are reasonable grounds to believe that the motor vehicle is tainted property and proceeds of crime.
15. The Respondent relied on the case of ACEC Civil Suit No. 2 of 2019 *Assets Recovery Agency vs James Thuita Nderitu & others* where at paragraph 71 the court held that;

“since the respondents have failed to provide even an iota of evidence to show how the suspected funds from NYS were received in their accounts and for what particular purpose, the respondents are beneficiaries of proceeds of crime and the funds in the said accounts are proceeds of crime as they were obtained directly as a result of money laundering and other predicate offences.”
16. Additionally, the 1<sup>st</sup> Respondent submitted that the motor vehicle was seized after it was found to be smuggling Eritreans into the country and, therefore, it is subject to a criminal act and therefore, an instrumentality of crime.
17. The 1<sup>st</sup> Respondent contends that there exists forfeiture proceedings in respect to the motor vehicle which will be defeated if the orders herein are granted. They further relied on the case of *Assets Recovery Agency Vs Charity Wangui Gethi* [2017] eKLR, where the court at para 25 & 26 held that;

“until that issue is determined by the trial court, the Respondent/Applicant cannot claim an absolute right over that property.”
18. The 1<sup>st</sup> Respondent submitted that if the motor vehicle is left in the custody of the Applicant, it will be at risk of being destroyed, lost, damaged, concealed, or transferred; and hence, will render the forfeiture application of the assets nugatory.
19. The motor vehicle, it is conceded, is in the custody of the Agency which has the responsibility of preserving the value of the motor vehicles; and therefore, the allegation of them being susceptible to damage is baseless.
20. It is the Agency’s submission that the application dated 22<sup>nd</sup> January 2025 ought to be dismissed with costs as the Applicant has not met the threshold for variation under Section 89(1).

### **Issue For Determination.**

21. Having considered the application, the response thereto and the rival submissions, the cases cited and the law, the issue that arises for determination is: -
  - I. Whether the Respondents/Applicants have met the threshold for setting aside the preservation order.

### **Analysis.**

22. The impugned preservation orders were issued ex parte on 27<sup>th</sup> August, 2024 upon the Application of the 1<sup>st</sup> Respondent brought by way of an Originating Motion dated 26<sup>th</sup> August, 2024. The orders were made pursuant to Section 82 of the POCAMLA, which states;

“ 82. Preservation orders

- (1) The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to



such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

- (2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—
- a. has been used or is intended for use in the commission of an offence; or
  - b. is proceeds of crime.”

23. The 90-day preservation period is intended to prevent the suspected property from being lost so that the Agency can finish its investigations and, if required, file a forfeiture application and there is already a forfeiture application which is pending determination before the court.
24. It is my finding that prima facie the facts presented to this court by the Agency/1<sup>st</sup> Respondent in the supporting affidavit, discloses reasonable grounds to believe that the motor vehicle in question is a proceed of crime.
25. However, that prima facie evidence is of course subject to the Agency/1<sup>st</sup> Respondent proving its case on a balance of probabilities at the hearing of the forfeiture application, where the Applicant shall also get an opportunity to present his/her evidence.
26. I thus find that this application for variation is clearly not the appropriate forum for the Applicant to argue the merits of the case. I place reliance on the case of *Asset Recovery Agency v Samuel Wachenje* where the court held that:

“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,”

27. The power of this court to vary or set aside a preservation order derives from Section 89 (1) of the POCAMLA which states:-

- “(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 authorizing 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; and



- b. shall rescind the preservation order when the proceedings against the defendant concerned are concluded...”

28. Therefore, for an Applicant to succeed they must meet the following conditions, they must:
- a. Demonstrate that the order deprives the Applicant of their reasonable living expenses and causes undue hardship to them;
  - b. Demonstrate that the hardship suffered outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.
29. Section 108 of the Evidence Act provides that he who alleges must prove. As stated previously, the Applicant bears the burden of demonstrating that the requirements have been satisfied, and the standard of proof is based on the balance of probability.
30. I am further guided by the case of Assets Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (Interested Party) (supra) where the court held that: -
- “It is therefore incumbent upon the respondent/Applicant to prove that the applicant/ Respondent does not deserve the orders sought on the account that the orders will deprive him the means to provide for his reasonable living expenses and cause him unnecessary hardship and, that his suffering outweighs the risk that the property will be destroyed, lost, damaged concealed or transferred.”
31. While the variation or rescission of the order rests in the discretion of the court, the court must be satisfied that the Applicant is unable to provide for himself or his kin, and is therefore suffering undue hardship as a direct result of the order.
32. Additionally, I am guided by the case of Assets Recovery Agency v Cullinan Private Jet Corp & another (Miscellaneous Application E034 of 2023) [2023] KEHC 26768 (KLR) where Judge Maina stated that: -
- “the living expenses envisaged in Section 89 (1) of the POCAMLA are the personal living expenses of the Applicant a natural person, but not of a company.”
33. From their argument, the Applicant herein has failed to demonstrate to this court that they rely on the subject motor vehicle for their daily reasonable expenses. It is not enough to claim ownership of the motor vehicle; the Applicant must also show that the order operates to their detriment.
34. Looking at the applicant’s affidavit, it makes no mention of any personal hardships to himself as a director and the other directors personally. Additionally, there is no proof that their business operations have come to a halt since the preservation orders which affect only one motor vehicle was issued.
35. Moreover, the Applicant has not sufficiently demonstrated that he does not have any other property from which he can meet his expenses; it would be amusing for the Applicant who is in the business of selling motor vehicles to depone that his establishment relies only on the proceeds from the sale of the subject motor vehicle.
36. It is also evident that the hardship allegedly being suffered by the Applicant does not outweigh the risk of the preserved asset being lost, concealed, or transferred.



37. Consequently, I find that the Applicant has failed to convince the court that it is deserving of the orders sought in the application dated 22<sup>nd</sup> January 2025.

**Determination.**

38. In the premises, the application is hereby dismissed for want of merit.

39. It is trite law that costs follow the event. The Applicants herein shall bear the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 12<sup>TH</sup> DAY OF MARCH 2025.**

.....

**L.M. NJUGUNA**

**JUDGE**

In the presence of: -

Miss Kinuva for the 2<sup>nd</sup> Respondent/Applicant

Mr. Muyove for the Applicant

Miss Irari holding brief for Miss Amadi for the Assets Recovery Agency

Court Assistant – Adan

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