



**Assets Recovery Agency v Yves & another (Civil Suit E023 of 2023) [2024] KEHC 12619 (KLR)  
(Anti-Corruption and Economic Crimes) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12619 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
CIVIL SUIT E023 OF 2023  
EN MAINA, J  
OCTOBER 17, 2024**

**BETWEEN**

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

**AND**

**FUMBISHA ILUNGA YVES ..... 1<sup>ST</sup> RESPONDENT**

**POST BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling on the order of Gikonyo J in his judgment herein on 15<sup>th</sup> July 2024. The order requires the 1<sup>st</sup> Respondent to show cause why it should not refund the funds withdrawn from the 1<sup>st</sup> Respondent's account while there was a preservation order in place.
2. The background of the notice to show cause, is that on 5<sup>th</sup> June 2023 the Assets Recovery Agency/ Applicant sought and was granted an order for preservation of a sum of Kshs. 3,729,052.96 (hereinafter referred to as "the Suit Funds") in the 1<sup>st</sup> Respondent's Acc. No. 0785040xxxxxx domiciled in the 2<sup>nd</sup> Respondent bank. The said sum was reasonably believed to be proceeds of crime. The preservation order was subsequently gazetted on 16<sup>th</sup> June 2023 as required under Section 83(1) of the *Proceeds of Crime and Anti-Money Laundering Act* (the POCAMLA). It is admitted that the preservation order was duly served upon the 2<sup>nd</sup> Respondent bank which in turn is said to have contacted the 1<sup>st</sup> Respondent and informed him that he could no longer access his funds.
3. However, when the Applicant filed an Originating Summons for forfeiture of the funds under Section 90(1) of the POCAMLA, it transpired that the subject account/funds were dissipated. It was then that the Applicant instituted contempt of court proceedings against the Respondents. The application was then heard and considered by Gikonyo J at the same time as the forfeiture application.



4. In his judgment delivered on 15<sup>th</sup> July 2024, Gikonyo J came to the conclusion that the suit funds were indeed proceeds of crime and ordered their forfeiture to the Government of Kenya as provided in Section 92 of the POCAMLA.
5. In regard to the contempt proceedings Gikonyo J directed that the Respondents appear in person before this court to show cause why the 2<sup>nd</sup> Respondent should not refund the now forfeited funds. Gikonyo J also directed that depending on this court's decision on the above, this court shall enter a "personal judgement" against the 1<sup>st</sup> Respondent, for the forfeited sum and the costs of this suit, for enforcement against and attachment of any other property of the 1<sup>st</sup> Respondent.
6. Accordingly, on 31<sup>st</sup> July 2024 the 1<sup>st</sup> Respondent and one George Onyango, a representative of the 2<sup>nd</sup> Respondent bank, appeared before this court to show cause who were both questioned on oath by this court, Counsel for the Applicant and their advocates on record.
7. George Onyango stated that he is the Operations Manager in charge of the bank's Security and Investigations; that he was aware of the preservation order served on to the Bank on 6<sup>th</sup> June 2023; that he blocked the account for 90 days from the date the order was served upon the bank and allowed the customer to access the funds on 11<sup>th</sup> September 2023 when, in his view, the 90 days lapsed. When the law regarding the duration of the order as set out in Section 84 of the POCAMLA was put to him by this court he conceded that by 11<sup>th</sup> September, the preservation order had not lapsed. During cross-examination he confirmed that the funds were withdrawn over the counter and that it is he who invited the 1<sup>st</sup> Respondent to withdraw the funds. He conceded that the first withdrawal was on 11<sup>th</sup> September 2023. He also conceded that he did not inquire from the ARA/Applicant whether the funds were available for withdrawal. This despite that he was in good rapport with the Applicant's investigating officer, one Mr. Musyoki.
8. When asked questions by the Advocate for the bank, George Onyango conceded that he had dealt with similar cases but contended that he was not aware that the duration of the preservation order begun to run from the gazettelement of the order. He averred that to him time begun to run from the date the order was served upon the bank.
9. On his part, the 1<sup>st</sup> Respondent stated that he is a businessman from the Democratic Republic of Congo (DRC). He revealed that it was George Onyango who, through a telephone call, informed him that his account had been frozen; that it was also George Onyango who called him to say that the 90 days had lapsed and he could access the account. He conceded that he withdrew all the suit funds in the account leaving a balance of Kshs.2,000. He averred that he withdrew the money at the bank's Adam's Arcade Branch although he learnt about the preservation order from the bank's main branch. He stated that he knew George Onyango because it was he who informed him about the preservation order. He further disclosed that when the 90 days elapsed George Onyango called him and told him he could access his funds, but first he had to consult a certain advocate whom he would refer him to. He stated that George Onyango referred him to one Kamwiti. He stated that when he went there the said Kamwiti said he was an advocate that he had to pay 10% of the preserved funds to him before he could have access to the account and that it was only once he paid the 10% that he was allowed to withdraw the funds. He stated that the he did not know why he was asked to pay 10% of the funds and that he only did so because he was told to do so by the bank official, George Onyango.

## Submissions

10. After listening to the parties this court directed their Counsel to sum up by way of written submissions. Miss Amadi, Learned Counsel for the Applicant, underscored the duty of all persons and institutions



to obey the law and to uphold the Rule of Law for good order and the administration of justice. Counsel asserted that obedience of court orders is mandatory. She contended that the dignity and authority of the Court must be protected and those who disobey its orders must be punished to prevent a state of anarchy. She submitted that in order to succeed in these contempt proceedings, the Applicant was required to prove the terms of the preservation order, knowledge of the order, failure by the Respondents to comply and also that the conduct of the Respondents was deliberate. She stated that the terms of the preservation order served upon the Respondents were clear, unambiguous and binding and that the 2<sup>nd</sup> Respondent acted in clear breach of the terms of the order by lifting it and releasing the funds to the 1<sup>st</sup> Respondent.

11. Miss Amadi asserted that this court should not condone the deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the contemnors as courts do not make orders in vain. She urged this court to order the 2<sup>nd</sup> Respondent to refund the decretal sum of Kshs. 3,732,052.60 that was lost from its custody but which it had a duty to ensure did not dissipate and to further impose a fine of Kshs. 5,000,000 on the 2<sup>nd</sup> Respondent as punishment so as to deter conduct which frustrates the fight against money laundering and organized crimes. To support her submissions, Counsel relied on the following cases: *Hadkinson v Hadkinson* [1952] ALL ER 567; *Chuck v Cremer* (1), (1 Coop. temp. Cott 342)
12. Mr. Kimani Wachira, Learned Counsel for the 1<sup>st</sup> Respondent, submitted that the 2<sup>nd</sup> Respondent was alive to the procedure for preservation of accounts and had an internal system to enable accurate tabulation of the number of days for which the order was to run; that notifying the 1<sup>st</sup> Respondent when the order lapsed was therefore the 2<sup>nd</sup> Respondent's liability. Counsel submitted that the 1<sup>st</sup> Respondent had no control over the preserved funds until the account was activated by the 2<sup>nd</sup> Respondent and hence contempt if any should be ascribed to the 2<sup>nd</sup> Respondent for misinforming its client. Counsel asserted that the 2<sup>nd</sup> Respondent bears full responsibility for the withdrawal of the suit funds, and that appropriate reliefs should be made in favour of the 1<sup>st</sup> Respondent. To support his submissions Counsel relied on the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR.
13. On his part, Mr. Chasia, Learned Counsel for the 2<sup>nd</sup> Respondent Bank, submitted that the preservation order herein was dealt with as previous ones; that the 2<sup>nd</sup> Respondent had never had a previous incident of this nature; that it was the 2<sup>nd</sup> Respondent who notified the 1<sup>st</sup> Respondent that there was a preservation order in place but that it was the ARA/Applicant's mandate to ensure that all parties with an interest in the preserved funds were notified of the duration of the preservation order hence the 2<sup>nd</sup> Respondent cannot be faulted for the mistake of the ARA/Applicant.
14. Counsel asserted that Section 84 of the POCAMLA limits the validity of preservation orders to 90 days unless there is an application for forfeiture of the property pending before the court. Counsel stated that the order was lifted after 90 days and that this was communicated to the 1<sup>st</sup> Respondent by his own advocate. Counsel argued that Mr. Onyango merely suggested an advocate to the 1<sup>st</sup> Respondent by giving him a business card but that the 1<sup>st</sup> Respondent was at liberty not to take up the services of the advocate recommended. Counsel stated that the recommendation of an Advocate to the 1<sup>st</sup> Respondent was not unlawful and that it has not been demonstrated that Mr. George Onyango derived any benefit from that recommendation. Counsel averred that the 2<sup>nd</sup> Respondent Bank acted in good faith and urged this court not to hold it in contempt and to dismiss this application.
15. In support of his submissions, counsel for the 2<sup>nd</sup> Respondent relied on the following cases: -*Milimani HCACECS Misc. Appl. No. 20,21 & 22 of 2016*; *Ogola Mujera Advocates LLP Vs Banking Fraud Investigation Unit & Others* [\*Kenya Chemical Workers Union v Kenya Flexgravure Limited \(Cause\*](#)



### **Issue for Determination.**

16. The application for contempt having been considered by Gikonyo J at the same time as the forfeiture application and this court having heard the contemnors and their Counsel by way of Notice to Show cause, the only issue for determination by this court is who between the Respondents is liable to refund the initially preserved but subsequently forfeited funds.

### **Analysis and Determination**

17. It is not disputed that the Applicant obtained preservation orders over the suit funds and served the Respondents with the same. It is also not disputed that the suit funds were withdrawn before the preservation order had elapsed. It is also not disputed that it is an official of the 2<sup>nd</sup> Respondent bank that gave the 1<sup>st</sup> Respondent access to the account. The point of divergence between the ARA/Applicant and the Respondents is on when the duration the preservation order started to run; whether it was from the time it was served upon the 2<sup>nd</sup> Respondent or from the date it was gazetted. The duration of a preservation order is prescribed under Section 84 of the POCAMALA which states: -

“ 84. Duration of preservation orders

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—

- (a) there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order;
- (b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or
- (c) the order is rescinded before the expiry of that period.”

18. It is clear from the above provision that time begins to run from the date of gazettelement not the time of service of the order. However, the date of gazettelement ceases to be of relevance if an application for forfeiture is filed. In this case the preservation order was served upon the 2<sup>nd</sup> Respondent on 6<sup>th</sup> June 2023, by which time it had not been gazetted. The Order was gazetted ten days later, on 16<sup>th</sup> June 2023. The duration of the preservation order should therefore have begun to run on 16<sup>th</sup> June 2023. However, once an application for forfeiture of the money was filed on 20<sup>th</sup> September 2023 the date of gazettelement became irrelevant and the funds were to remain preserved pending the hearing and determination of the application. The preservation order was therefore still in place when the funds were withdrawn.
19. It is the 2<sup>nd</sup> Respondent’s contention that it was the Applicant’s duty to inform the Respondents when the order started to run and when it would expire. This despite the 2<sup>nd</sup> Respondent which being a player in the banking industry, had dealt with several other orders of a similar nature. The law does not require the ARA/Applicant to serve the gazette notice upon the person concerned or the bank where the preserved funds are domiciled, - See Section 83(1) of the POCAMLA which states:-

“ 83

- 1) If a court makes a preservation order, the Agency Director shall, within twenty-one days after the making of the order, give notice



of the order to all persons known to the Agency Director to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette.

20. It is trite that ignorance of the law is not a defense. The 2<sup>nd</sup> Respondent must have by virtue of being a Financial Reporting Centre under the POCAMLA dealt with similar orders and was deemed to know the law concerning preservation orders. It was also deemed to know that the duration of the order begun to run from the date of gazettment and not from the date the order was granted/issued and indeed that is the reason banks and other organizations have Legal Departments to advise them on matters law. The 2<sup>nd</sup> Respondent cannot therefore be heard to plead ignorance of the provisions of Section 84 of the POCAMLA.
21. When parties appeared before this Court to show cause, it transpired that the 1<sup>st</sup> Respondent withdrew the suit funds upon the invitation, prodding and advice of George Onyango who even went to the extent of referring him to an advocate. It became clear to this court therefore that had George Onyango not prodded the 1<sup>st</sup> Respondent he would not have withdrawn the funds.
22. I reject the argument by Counsel for the 2<sup>nd</sup> Respondent that George Onyango, acted in good faith and did not benefit from the violation of the court orders. His conduct of referring the 1<sup>st</sup> Respondent to “an Advocate” who demanded 10% of the preserved funds so that the 1<sup>st</sup> Respondent could access the funds betrays his motive. What pray, may I ask, was this 10% for? Was the payment of 10% necessary given that the bank did not incur any costs upon the preservation order being granted? Was the involvement of an Advocate necessary given that all the 1<sup>st</sup> Respondent required to do, upon lapse of the order at the appropriate time, was for him to go to the bank to access his funds?
23. Neither George Onyango nor Counsel for the 2<sup>nd</sup> Respondent bank explained the legal basis for referring the 1<sup>st</sup> Respondent to an advocate, even assuming the order had lapsed and what justification there was to charge 10% of the preserved funds. The conduct of George Onyango not only leaves a lot to be desired but raises reasonable suspicion that he derived a benefit by permitting the 1<sup>st</sup> Respondent to access the funds. This was also a clear exploitation of the 1<sup>st</sup> Respondent. This court condemns George Onyango’s conduct and urges the Director of the Financial Reporting Centre to look into it with a view of censuring the bank if nothing else.
24. However, even having found as I have, it is not lost to this court that it is the 1<sup>st</sup> Respondent who in fact withdrew the funds. In other words, it is he who benefitted from the same. That he was influenced into so doing by an officer of the bank is immaterial as this is not a criminal trial but proceedings to determine who is liable to refund the funds which have since been forfeited to the State by this court.
25. Accordingly, the finding of this court is that the 1<sup>st</sup> Respondent must, in the first instance, be held personally liable to refund the funds. In the premises, it is hereby ordered that the 1<sup>st</sup> Respondent shall, within 21 days of this ruling, refund the funds by depositing the same into an account as shall be advised by the Applicant. In default, the Applicant shall be at liberty to execute against him. Only in the event that the ARA/Applicant finds it completely impossible to recover the funds from the 1<sup>st</sup> Respondent shall the same be refunded to the Applicant by the 2<sup>nd</sup> Respondent bank, but noting that the bank is a public institution, the same shall then be recoverable by the bank from George Onyango, whose misconduct occasioned the dissipation of the funds.
26. As costs follow the event and as this case is no exception I order that the costs of this application shall be borne by the Respondent.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI ON THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.

E. N. MAINA

JUDGE

