



Assets Recovery Agency v Muthama (Anti-Corruption and Economic Crimes Civil Suit E012 of 2022) [2023] KEHC 1787 (KLR) (Anti-Corruption and Economic Crimes) (2 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E012 OF 2022**

EN MAINA, J

MARCH 2, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

FRANCIS MWENDA MUTHAMA RESPONDENT

RULING

1. On May 6, 2022 the Assets Recovery Agency (ARA/applicant filed an originating motion seeking to have a sum of Kshs 35 million held in the respondent/applicant's bank account No 66XXXXXXXX at NCBA Bank, Changamwe Branch, forfeited to the State for being proceeds of crime. (The ARA/applicant had earlier obtained preservation orders which shall subsist pending the hearing and determination of the forfeiture application).
2. The application was duly served upon the respondent whereupon he opposed the application through a replying affidavit sworn by himself on July 1, 2022. The matter was then placed before the Deputy Registrar for case management as required by the High Court Practice Directions. Thereafter the respondent/applicant filed an application which the Deputy Registrar placed before me for hearing and determination.
3. The application is the notice of motion dated January 10, 2023 and supported by the respondent/applicant's affidavit sworn on even date. The application is expressed to be brought under sections 81 of the *Proceeds of Crime and Anti-Money Laundering Act*, 2009, orders 18 and 19 of the *Civil Procedure Rules* and articles 19, 20, 22, 23, 25, 40, 47, 48, 50 and 159 of the *Constitution* of Kenya and the rules of natural justice.



4. By the application, the respondent seeks an order to cross-examine Corporal Isaac Nakitare the Investigating Officer concerning his conduct, investigations and averments in the affidavits dated May 6, 2022 and supplementary affidavit dated August 16, 2022 both in support of the originating motion. The application is premised on grounds that:-

- “ 1) That the applicant pursuant to his constitutional right desires to have the case against him heard and determined in open court.
- 2) That it is public knowledge that various state organs and individuals have been used to target individuals who have been perceived and/or to stand their ground against the powers that be.
- 3) That it is for the interest of justice and public perception that the state organs and individuals be subjected to examination of their conduct, investigations and actions in order for the court and that the applicant to see, hear and gauge the demeanour of the parties.”

Submissions

5. Learned counsel for the respondent submitted that the respondent/applicant’s right to fair trial more so to adduce and challenge evidence is guaranteed by articles 25 and 50(2) (a) (k) of the Constitution and as such the respondent/applicant has a right to examine and challenge the allegations and evidence of Cpl Nakitare through cross examination. Learned counsel stated that the right to cross-examine is also embedded in section 81 of the Proceeds of Crime and Anti-Money Laundering Act as well as in order 18 and order 19(2)(1) of the Civil Procedure Act and that this court ought therefore to grant the application. Further, that the right to face one’s accuser and test his evidence by way of cross examination is not only enshrined in the Constitution but in the rules of natural justice. Counsel opined that writing something on paper is quite easy but defending it under cross examination is the hard part. Counsel placed reliance on a decision which he did not however attach as indicated in his submissions.
6. No submissions were filed for the applicant/respondent.

Disposition

7. Section 81(1) of the Proceeds of Crime and Anti-Money Laundering Act provides that all civil forfeiture proceedings, as is the originating motion herein, shall be civil proceedings while section 81 (2) provides that the rules of evidence applicable in civil proceedings shall apply to civil forfeiture proceedings. The proceedings are also governed by the practice directions for this court as gazetted by the Emeritus Chief Justice on June 26, 2018.
8. Order 3 rule 1(1) of the Civil Procedure Rules provides that:-

“ Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.” (emphasis mine)

It is my finding that the procedure for instituting suits envisaged under section 90 of the Proceeds of Crime and Anti-Money Laundering Act is by way of application. Subsections 1 and 2 of section 90 states:-

- “ 90. Application for forfeiture order



1. If a preservation order is in force, the agency director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.
 2. The Agency Director shall give fourteen days' notice of an application under subsection (1) to every person who served notice in terms of section 83(3).”
9. That is the mode by which the Assets Recovery Agency has always approached this court.
10. Where a suit is instituted by way of an application the same is proved through affidavit evidence. There is therefore nothing sinister or untoward that these forfeiture proceedings are brought by way of originating motion. However, I agree with learned counsel for the respondent that even then a party wishing to cross-examine the deponent of an affidavit may be granted leave to do so. Indeed order 19 rule 2 (1) of the Civil Procedure Rules provides that:- “upon an application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross examination of the deponent.” Subsection (2) then states that such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the court otherwise directs.
11. It is clear from the wording of order 19 rule 2 that the power of the court to order attendance of a deponent for cross examination is discretionary. It does not come to the applicant as a matter of course or of right as has been submitted by learned counsel for the respondent. That said it is trite that the discretion of the court must be exercised judicially – not at a whim or arbitrarily. The applicant must demonstrate that he has reasonable grounds for wanting the discretion to be exercised in his favour. In the instant application the respondent gave three grounds for his application namely: -
- a. That it is pursuant to his constitutional right that he desires his case to be heard in open court.
 - b. That it is public knowledge that various state organs and individuals have been used to target individuals who have been perceived and/or to stand their ground against powers that be
 - c. That it is for the interest of justice and public perception that the state organs and individuals be subjected to examination of their conduct, investigations and actions in order for the court and that the applicant to see, hear and gauge the demeanour of the parties.
12. It is my finding that whereas ground (1) may be reasonable, as section 124 of the Proceeds of Crime and Anti-Money Laundering Act also provides that hearings should be held in open court, grounds (b) and (c) seem to me to be merely intended to scandalise the deponent of the affidavit and hence the same do not constitute sufficient or reasonable grounds upon which this court can exercise its discretion in the applicant’s favour. The court’s discretion ought never to be exercised in favour of a litigant whose intention appears to be to intimidate or scandalise a witness. Be that as it may, the applicant is entitled to seek clarification from the deponent and also to impeach his credibility and for those reasons I am inclined to grant the application to have him cross-examined. The cross examination must however be for that purpose only but must not be used to scandalise or intimidate the witness. The application is allowed upon those terms as it is also noted that the applicant has through its principal state counsel filed a notice of no objection to the application.
13. The costs of the application shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 2ND DAY OF MARCH 2023.

E N MAINA

JUDGE

