



**Assets Recovery Agency v Mbuvi (Miscellaneous Application 16 of 2020)
[2023] KEHC 3113 (KLR) (Anti-Corruption and Economic Crimes) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
MISCELLANEOUS APPLICATION 16 OF 2020**

EN MAINA, J

APRIL 13, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

MIKE SONKO GIDEON MBUVI RESPONDENT

RULING

1. On May 21, 2022 the Assets Recovery Agency/ respondent filed an originating motion under sections 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* in which it seeks orders as follows:
 1. That this honourable court be pleased to issue orders declaring that the funds held in the respondent's bank accounts as listed herein below are proceeds of crime liable for forfeiture to the applicant;
 - i. Kshs 4, 249, 785.90 held in account No 00202643xxxxx at Equity Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.
 - ii. Kshs 1,465,576.80 held in account number 13802623xxxxx at Equity Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.
 - iii. Kshs 2,906,213.90 held in account number 15802614xxxxx at Equity Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko
 - iv. Kshs 2,692,704.50 held in account number 03502991xxxxx at Equity Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.
 - v. Kshs 1,296,033.07 held in account number 16202625xxxxx at Equity Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.



- vi. USD 20, 906.90 held in Account number 13802623xxxxx at Equity Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.
 - vii. Kshs 2,235,015.27 held in account number 081649xxxxx at Diamond Trust Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.
 - viii. Kshs 1,161,889.29 held in account number 011431997xxxxx at Co-operative Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.
 - ix. USD 7, 573.03 held in account number 08164xxxxx at Diamond Trust Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko
 - x. USD 39,426.50 held in account number 50488xxxxx at Diamond Trust Bank Limited in the name of Mike Sonko Mbuvi Gidion Kioko.
2. That this honourable court be pleased to issue orders of forfeiture of the funds held in the accounts in prayer 1 above to the Assets Recovery Agency on behalf of the government.
 3. That this honourable court be pleased to issue an order that the said funds be transferred to the applicant's deposit account for recovered criminal assets fund, account No 12xxxxxxx9 at Kenya Commercial Bank.
 4. That the honourable court do make any other ancillary orders it deems fit and just for the proper execution of its orders.
 5. That costs be provided for.
2. The originating motion which is supported by the affidavit of CPL Sautet Jeremiah, a police officer attached to the applicant and is premised on the following grounds:
1. That the applicant is the Assets Recovery Agency established under section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (herein after referred as *Proceeds of Crime and Anti-Money Laundering Act*) as a Body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime.
 2. That under part viii of *Proceeds of Crime and Anti-Money Laundering Act* the Agency has authority to institute civil forfeiture proceedings for the recovery of proceeds of crime and seek orders for forfeiture of assets to the Government where there are reasonable grounds to believe that such assets are proceeds of crime.
 3. That the applicant has policing powers under section 53A of *Proceeds of Crime and Anti-Money Laundering Act* to enable it investigate, identify, trace, freeze and recover proceeds of crime.
 4. That the respondent is a male adult of sound mind, a resident of Nairobi county; the current Governor of the Nairobi city county Government and the owner of funds held in ten (10) bank accounts which the applicant seeks to be forfeited to the Government.
 5. That the applicant received information on suspected money laundering and proceeds of crime by the respondent, private companies, entities and other individuals involving public funds from Nairobi city county government.
 6. That on December 9, 2019 and January 27, 2020 the Respondent was charged with others with various offences including conflict of interest contrary to section 42(3) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*, money laundering contrary to section 3 of



Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), acquisition of proceeds of crime contrary to section 4 of POCAMLA among other offences.

7. That on December 11, 2019, the applicant obtained orders *vide* Misc application No 4477/2019 Assets Recovery Agency v Kenya Commercial Bank & 8 others authorizing it to investigate and restrict debits in respect of the funds in the respondent's bank accounts held at Equity Bank, Kenya Commercial Bank Limited, Diamond Trust Bank Limited and Co-operative Bank Limited and National Bank of Kenya.
 8. That the applicant conducted investigations which revealed that the respondent's accounts had received huge suspicious cash deposits/transfers both in US dollars and Kenya shillings.
 9. That on February 6, 2020 the applicant filed Nairobi High Court Misc application No 5 of 2020, Assets Recovery Agency v Mike Sonko Mbuvi Gideon Kioko and obtained orders preserving funds in the said accounts and orders prohibiting the respondent and/or his agents, representative from transacting, transferring and /or dealing in any manner with the funds held in the bank accounts.
 10. That on February 21, 2020 the applicant gazetted the preservation orders pursuant to section 83(1) of *Proceeds of Crime and Anti-Money Laundering Act* *vide* gazette notice No 1392.
 11. That further investigations and financial analysis by the applicant into the respondent's accounts revealed that between August 2017 and December 2019, the respondent received huge suspicious cash deposits in different bank accounts depicting a clear case of money laundering designed to conceal, disguise and hide the nature and source of funds and thereby acquire and benefit from proceeds of crime.
 12. That the investigations and financial analysis of various suspicious cash transactions into the respondent's accounts did not find any justifiable reasons for the said cash deposits.
 13. That there are reasonable grounds to believe that the funds held in the respondent's bank accounts are proceeds of crime liable for forfeiture to the applicant under *Proceeds of Crime and Anti-Money Laundering Act*.
 14. That it is in the interest of justice that the orders of forfeiture do issue forfeiting the above funds to applicant on behalf of the state.
 15. And on any other ground that may be adduced during the hearing of the application.
3. The respondent now applicant in the present application has never filed a response to the originating motion. He has instead filed two applications one dated May 11, 2020 and the other dated February 1, 2023 wishing to have the originating motion struck out. In the present notice of motion dated February 1, 2023 he seeks orders that:
- “ 1) Spent
 - 2) The suit and entire proceedings herein be struck out and dismissed with costs to the respondent Mike Sonko Gidion Kioko for being an abuse of court process as the primary bases of these proceedings levied against Mike Sonko Mbuvi Gidion Kioko were dismissed *vide* a ruling of the Anti-Corruption Court on December 21, 2022 in Nairobi ACCM 31 of 2019 and Nairobi ACCM 32 of 2019



3. Cost of this motion be awarded to the respondent/applicant.”
4. The grounds for the application as can be discerned from the face thereof and which are reiterated in the supporting affidavit of the respondent/applicant sworn on February 1, 2023 are that:
 - “ 1) The proceedings herein were premised on the allegations levied in CM ACC 31 of 2019 as consolidated with CM ACC 32 of 2019 against the applicant herein Mike Sonko Mbuvi Gidion Kioko by the Asset Recovery Agency.
 2. The depositions tendered by the Asset Recovery Agency do not premise or found their claims on any other bases other than the allegations of alleged corrupt conduct by the applicant as Nairobi city county governor as explicated in the 2 cited cases.
 3. The applicant has been a public servant hitherto and no allegations were set out to found the claims constituting these proceedings as against the applicant.
 4. After the EACC witnesses had testified in both the Anti-Corruption Cases - in CM ACC 31 of 2019 as consolidated with CM ACC 32 of 2019 - the Hon Ogoti rendered his ruling on December 21, 2022, in which he made a finding of acquittal under section 210 of the Criminal Procedure Act.
 5. There is therefore no basis howsoever for the continuation of these proceedings as they were based on a suspicion of my alleged misuse of public office to siphon off the monies alleged in the 2 cases referenced above.
 6. The applicant will clearly be facing an unfair process of having to answer to claims by the ARA based on allegations that the criminal process has held unsustainable in law against him.
 7. In as much as the right to a fair trial under article 25(c) of the Constitution of Kenya is non-derogable, the applicant is not willing to cede such rights and abrogate his stated inherent such as now attempted by the ARA by means of the claims herein made founded on charges the DPP and the EACC have failed to prove in CM ACC 31 of 2019 as consolidated with CM ACC 32 of 2019 which they taken before the Anti-corruption court.
 8. This honourable court will manifestly be derogating from article 25(c) of the Constitution if these proceedings continue any further, now that the 2 alleged Anti-Corruption cases have been terminated under the law, and since the sole object of these proceedings was to act as corollary process to coincide with the now dismissed alleged corruption claims against the applicant.
 9. The sustenance of these proceedings clearly amounts to an abuse of court process and hence this application. This honourable court cannot certainly permit such abuse of its process, by the narrow and unfounded allegations by the ARA.
 10. Article 20 of the Constitution contemplates the intervention of the court when there is a demonstrable threat to a violation of the chapter 3 of the Constitution's rights of a citizen as indeed is demonstrably apparent in this case.



11. The court is duty bound to protect jealously the right to a fair trial, to access justice, and to have the court determine a lawful dispute before it, but the alleged bases of the claim by the ARA has been dismissed by the anti-corruption court and there can be no blanket demand for proof of acquisition of wealth on Kenyans absent a public service element.
 12. It is imperative that the court intervenes as sought, to terminate these proceedings as the foundational bases and allegations of corrupt conduct on the part of the applicant.”
5. In opposition to the application the ARA/respondent relied on a replying affidavit sworn on February 21, 2023 by CPL Sautet Jeremiah. The gist of the ARA/respondent’s case is that the proceedings herein are predicated on an investigation which revealed that the ten personal bank accounts of the applicant were suspected to have been used in the money laundering of proceeds of crime by receiving and transacting in huge cash deposits between the period 2017 and December 2019.
 6. The ARA/respondent contended further that the proceedings, being in the nature of civil forfeiture, cannot be affected by the outcome of the criminal proceedings.
 7. The application was canvassed through written submissions. The applicant was represented in the matter by Mr Harrison Kinyanjui Advocate whereas the respondent appeared through Miss Esther Muchiri Advocate.

Issue For Determination

The issue that arises for determination is whether the acquittal of the applicant/respondent in CM ACC 31 of 2019 as consolidated with CM ACC 32 of 2019 should give rise to the striking out of these proceedings

Analysis And Determination

8. I have fully considered the facts deposed to in the affidavits, the rival submissions and authorities cited thereat and the law.
9. Section 92(4) of *Proceeds of Crime and Anti-Money Laundering Act* makes it expressly clear that forfeiture proceedings under section 90 are not dependent on the outcome of criminal proceedings or investigations with a view to institute such proceedings. The section states:

“92 (4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated”
10. In the case of *Assets Recovery Agency v Pamela Aboo* [2018] eKLR the court cited with approval the case of *Director of Assets Recovery and others, Republic v Green & others* [2005] EWHC 3168 where the court stated as follows:

“In civil proceedings for recovery under part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained...”



11. Similarly, in the case of *Teckla Nandjila Lameck v President of Namibia 2102* (1) NR 255(HC) cited with approval in the case of *Assets Recovery v James Thuita Nderitu & 6 others* [2020] eKLR the court held as follows:

“...Asset forfeiture is, as is stated in section 50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution.

...even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above.

See also *Martin Shalli v Attorney General of Namibia & others* High Court of Namibia case No POCA 9/2011.”

12. This court concurs with the above findings and reiterates that it is immaterial that the criminal proceedings brought against the respondent/applicant in the trial court were determined in his favour. My finding is also fortified by the provisions of part viii of the *Evidence Act* which makes it clear that not all judgments are admissible in civil proceedings. Part viii of the *Evidence Act* provides as follows:

“43. Judgments, etc, excluding jurisdiction.

The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, may be proved when the question is whether such court ought to take cognizance of such suit or to hold such trial.

44. Judgments in rem.

(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.

(2) Such judgment, order or decree is conclusive proof—

- (a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;
- (b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
- (c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
- (d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

45. Other judgments of a public nature.



Judgments, orders or decrees, other than those mentioned in section 44 of this Act, are admissible if they relate to matters of a public nature relevant to the inquiry, but such judgments, orders or decrees are not conclusive proof of that which they state.

46. Inadmissible judgments.

Judgments, orders or decrees other than those mentioned in sections 43, 44 and 45 of this Act are inadmissible except where the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.

47. Proof that judgment was incompetent or obtained by fraud or collusion.

Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

47A. Proof of guilt.

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

13. Arising from the above provisions the respondent/applicant would have to persuade the court trying this case that the judgment(s) in the criminal case(s) is/or are admissible in these civil proceedings. The time do so would be in the course of the hearing but not at this preliminary stage.

14. In the premises, I find that this application is not only misconceived but it is also devoid of merit and it is therefore dismissed with costs to the applicant/respondent.

15. It is so ordered.

SIGNED DATED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF APRIL 2023

E N MAINA

JUDGE

