



**Assets Recovery Agency v Cornelius & another (Miscellaneous Application E003 of 2023)
[2023] KEHC 19258 (KLR) (Anti-Corruption and Economic Crimes) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
MISCELLANEOUS APPLICATION E003 OF 2023**

EN MAINA, J

JUNE 22, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

AFRICAN CONFIDENCE LIMITED 1ST RESPONDENT

ANTON RYAN CORNELIUS 2ND RESPONDENT

RULING

1. By an Order dated 28th February, 2023, this court preserved the funds in the 1st and 2nd Respondents' bank account No. 0512388001 with Kshs. 145,235.06, Account No. 5512388001 with USD 308,332.80 and Account No. 0579377002 with USD 40,680.16 all domiciled at DTB Bank Limited. By the Notice of Motion dated 21st March 2023 which is supported by the affidavit of the 1st Respondent sworn on even date and his supplementary affidavit sworn on 16th May 2023, the Respondents now seek to have the preservation orders varied and/or rescinded for being obtained through concealment of material facts or in the alternative, this court be pleased to modify and vary the Court orders dated 28th February 2023 and to provide for the reasonable living expenses and/or operational expenses of the Respondents and that costs be provided for.
2. The gist of the application is that upon first securing orders from the Lower Court freezing the Applicants' accounts, the Agency summoned the 1st Applicant for interrogation and production of statements and on 15th December 2022 the 1st Applicant presented himself at the Agency's office in Nairobi as directed by the Agency and answered all questions that were posed by the Agency's Investigators and his responses were duly reduced into written statements; that on 4th January 2023, the Agency's officials visited the 1st Applicant's residence at Watamu, Kilifi County where they inspected the consignment of Motor Bike Covers shipped into the Country by the 2nd Applicant and again the



officials posed more questions and the 1st Applicant's responses were again duly reduced into written statements; that on 30th January 2023, the Applicants wrote a follow-up letter to the Agency raising concerns relating to the hardship caused by the freezing of the accounts for over 69 days as at the 30th January 2023 and on 17th February 2023, the Agency Officials visited Mombasa and required the 1st Applicant to be present for further interrogation whereupon the Agency's officials again posed further questions and the 1st Applicant's responses were duly reduced into a written statement.

3. Further that during the investigations, the Agency constantly sought for the extension of the orders of the lower court issued on the 1st November 2022 and as a result the Respondents were unable to access the bank accounts for a period of 111 days. After that the Agency immediately sought for fresh orders effectively freezing Applicant's access of the subject accounts for a further 90 days; that have and continue to deprive the Applicants of the means to provide for the 1st Applicant's reasonable living expenses and that of his family members hence occasioning him and his household extreme hardship and deprivation. The Applicant gives the instances of such deprivation to be that he can no longer sustain and provide for his ailing mother Heather Anne Cornelius, sister Natasha Cornelius and brother Joshua Cornelius; that the 1st Applicant's mother who is ailing in the United Kingdom has no source of income and greatly relies on him for financial support and she is now struggling to meet basic needs and her utility bills also remain unpaid; that his brother who is enrolled at Leeds Beckett University in the United Kingdom is also facing extreme hardship since he (the 1st Applicant) is unable to settle utility bills and further that his ability to source for funds from friends and business associates has now been completely frustrated due to the Article published prominently in the Standard Newspaper of 1st March, 2023 entitled 'Asset Recovery Agency accuses British trader of Laundering over Sh130 million' which article detailed the existence of the instant proceedings.
4. The Applicants further contend that the preservation orders were obtained through deliberate withholding or concealment of material facts with a view of misleading the court because: -
 - a) As per the provisions of Section 84 of the *Proceeds of Crime and Anti-Money Laundering Act*, the preservation orders have a time limit of 90 days.
 - b. In a deliberate quest to circumvent the statutory 90 days' time limit provided by the aforementioned Section 84 of the Act, the Agency first sought for orders freezing the suit accounts vide Nairobi Miscellaneous Application No. 116 of 2022, Assets Recovery Agency -V- DTB Bank Ltd which Orders restricted the Applicant's access of the accounts from the 1/11/2022 up to the 27/02/2023 which amounted to 117 days.
 - c. Upon the lapse of the 117 days period, the Agency moved to withdraw the lower Court Miscellaneous Application and launched the instant Application in effect seeking for fresh 90 days freeze orders.
 - d. The effect is that the Agency will have secured the freeze of the accounts for a period of 207 days.
 - e. The Agency deliberately chose to first seek freezing orders from the Lower Court and then proceeded to file the instant application with the effect of having the accounts frozen for over 200 days with a view of circumventing the provisions of Section 84 of the Act.



- f. Consequently, the Agency failed to inform the Court of the previous Court orders that had been secured by the Agency for a period of 117 days for the purported purpose of completion of investigations.”
5. Further that the Agency deliberately withheld material facts from the Court and further misled the Court on the averments in paragraphs 7,9,10,11,12,13 and 14 of the Supporting Affidavit because, during the various interrogations by the Agency, the Applicants supplied full information and supporting documents as follows with regard to the funds:-
- “i. On or about 13/11/2017, there was a Shares Transfer involving the 1st Applicant’s mother and Sister who were the Vendors who were then transferring their shares in Dalton Ltd to Thomas Morton and Emma Morton.
 - ii. At the time Dalton Ltd owned property known as V/443 Original Number 63/2) as per clause No. C and Schedule 2 of the Share Purchase Agreement.
 - iii. The 1st Applicant was duly nominated as the contact person on behalf of the Vendors as per Clause 13.1 of the Agreement dated 13/11/2017.
 - iv. The Vendors’ Advocates in the transactions were Kaplan & Stratton, Advocates as per clauses 1.1(p) and (q) of the Agreement.
 - v. The Vendors were paid a total Kshs. 62,000,000 for the shares as per clauses 1.1 (h) and 3.1 of the Agreement and the same was deposited into the Vendors’ Advocates’ Bank Account as per clause 3.1 (a) and (b) of the Agreement.
 - vi. On the 20/12/2017, the 1st Applicant entered into a renewable Loan Agreement with Global Gums Holding Limited based in Pakistan where the is Applicant was to loan a sum of USD.410,000 to the Company and the same was to be repaid on interest basis by the Company.
 - vii. On the basis of the above-mentioned Agreement the 1st Applicant was nominated by his mother and sister to manage a portion of the proceeds of the transfer and the Vendor’s Advocate duly transmitted a sum of USD.440,000 by way of bank transfer to Zehra Karim, the representative of Global Gums Limited on the basis of the loan agreement.
 - viii. The business relationship between the 1st Applicant and the Global Gums Company was constantly renewed and this translated into considerable growth of the investment portfolio.
 - ix. Subsequently in 2018, the 1st Applicant incorporated Jossimba Limited as the sole director and the Company then established a Bank account at Bank One Ltd, in Mauritius and the funds paid by Global Gums Holding Limited were then subsequently remitted through Jossimba’s account in Bank One.
 - x. The 1st Applicant as the sole director of Jossimba Limited would then utilize the funds received for investment purposes in various stocks.”



6. That, the nature of business and the challenges experienced by the 2nd Applicant was brought to the attention of the Agency being that:-

- i. The 1st Applicant has been a frequent visitor to Kenya over the years with a permanent residential home in Watamu, Kilifi County.
- ii. The Company gave the 1st Applicant the opportunity of noticing a thriving business in Pakistan involving the sale of canvas motorbike seat covers which appeared appealing to motorbike owners in Pakistan and the 1st Applicant saw a business opportunity of introducing the seat covers in Kenya.
- iii. In 2019, the 1st Applicant incorporated the 2nd Applicant with its intended core business being import and sale of motorbike seat covers.
- iv. The 1st Applicant then made a request to the Directors of Global Gum Holdings Limited to assist him in identifying the local manufacturers of the motorbike seats and assemble a reasonable consignment of the consignment and to ship them from Pakistan to Kenya on behalf of the 2nd Respondent.
- v. In the year 2020, the 2nd Applicant received the consignment of motorbike seat covers ready for sale in Kenya.
- vi. However, the 2nd Applicant was unable to progress with its business interest due to the onset of the Covid-19 pandemic which rendered the 1st Applicant who is the 2nd Applicant's sole Director incapable of travelling from the United Kingdom, to oversee the operations of the 2nd Applicant, due to the Covid lockdown that was in place in the United Kingdom for a period of over 10 months.
- vii. It later became apparent that the Kenyan market was not receptive to the concept of the seat covers and the bike owners were not willing to invest in the same on the notion that the seat covers would not handle the usual rains and that the material used to manufacture the covers was not comfortable enough.
- viii. The consignment thus largely remained unsold and the 2nd Applicant opted to seek storage of the consignment at the 1st Applicant's home to save on storage costs.
- ix. The funds utilized by the 2nd Applicant during the acquisition of the motorbike consignment as well as the shipment and clearance of the same were sourced from funds deposited from Bank One into the 2nd Applicant's account at DTB bank
- x. The Agency officials visited the Applicant's premises on 04/01/2023 at Watamu and inspected the items not sold."

7. The Applicants also contend that they had specifically indicated to the Agency that eventually large sums of money were transferred from Bank One in Mauritius to the 2nd Respondent's Account because the Bank One account was due for closure for the reason that, Mauritius had introduced some Legislative regulations and the had an effect on the Bank's internal operations policy and that Applicants were thus required to move all its funds and close accounts; that, the movement of USD. 994,847 on 30/07/2021 from Jossimba Account at Bank One, Mauritius to the 1st Applicant's account



at DTB bank was on the basis of the closure of bank Account at Bank One; that the aforementioned sums were forwarded by Bank One, Mauritius through JP Morgan Chase Bank, New York which Bank was merely acting as the clearing Bank and not the source bank and that the Applicants had also indicated to the Agency that the funds deposited into the DTB accounts were being utilized to explore other possible business opportunities for the 2nd Applicant in the Democratic Republic of Congo.

8. The Applicants contend that they availed a flash disk containing all the necessary documents relating to the sources of funds, Incorporation, and operations of Jossimba Limited, and the 2nd Applicants for examination and verification by the Agency. Consequently, the claim by the Agency that the Applicants failed to give explanations or that they were evasive or gave inconsistent information is a claim only used by the Agency in their attempt at misleading the court into granting the preservation orders.
9. They assert that they have never engaged in any money laundering activities or any questionable activities whatsoever and in the interest of justice, this court should consider granting the orders sought so as to prevent further hardship and inconvenience upon the Applicants.

Response by the Assets Recovery Agency/Respondent

10. The Assets Recovery Agency/Respondent opposed the application through the replying affidavit sworn by Bernard Gitonga on 27th April 2023. The Respondent avers that it is yet to file an application for forfeiture as the preservation orders were still valid when this Application was filed; that the orders for restriction of the Respondents accounts and warrants to investigate issued in Misc. Application No E116 of 2022 were valid; that the Respondents failed to honour summons to the Agency's offices until 15th December 2022 well past 45 days time limit as he was in South Sudan, and that the Agency was dissatisfied with the explanations by the Applicant necessitating the filing of the preservation application for a preservation order.
11. The Respondent avers that this application does not meet the threshold set in Section 89(1) of *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) as the Applicants have not produced sufficient evidence to prove that they had pending bills; that the preservation order is not intended to occasion the Respondents/Applicants any adversity but to protect the suspected funds from being transferred withdrawn or spent as failure to preserve the said funds would render the intended forfeiture proceedings nugatory; that the explanation given by the Applicants as to the source of funds deposited in the subject accounts was not satisfactory and that the documents provided by the 1st Respondent/Applicant did not support his explanation and was full of inconsistencies as it involved third parties; that the nature of the business declared by the 2nd Respondent/Applicant and the transactional activity in the bank account at DTB Bank Limited do not correlate as the 2nd Respondent/Applicant transacted enormous amounts of money.
12. The Applicant further states that the Supporting Affidavit of the Applicants confirms that the 2nd Respondent/Applicant's motorbike cover business never kicked off as the Kenya market was not receptive and motor bike owners were not willing to buy the seat covers; that the 2nd Respondent/Applicant gave inconsistent information as to the source of the funds; that on one hand the 1st Applicant informed the Agency that the large deposits in his account were as a result of closure of his account at Bank One Limited in Mauritius while on the other hand, stating that the large deposits were a repayment of a loan that he advanced to Global Gums Limited in Pakistan; that the said loan facility agreement having been signed in 2017 and the period having been for 1 year and at 15% per annum interest rate, the 1st Respondent/Applicant would ordinarily have received funds from Global Gums Limited in the year 2018 but the huge funds were deposited into 2nd Respondent/Applicant's on



diverse dates in the year 2020 and therefore the inconsistencies openly exhibited by the 1st Respondent/Applicant is not satisfactory and therefore the preservation orders were justified.

Analysis and determination

13. The Respondents/Applicants contend that the preservation orders issued by this court on 28th February 2023 should be set aside for the reason that they were obtained irregularly through the concealment of material facts and that as a result of the order they have been deprived of the means to provide for their own and their kin's reasonable living expenses.

14. Section 89 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) states as follows in regard to variation and rescission of preservation orders:-

- “ 89. Variation and rescission of orders
- (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 authorising 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.”

15. The issue for determination therefore is (a) Whether the Respondents/Applicants have met the threshold for variation or rescission of the preservation orders made on 28th February 2023.

16. The impugned preservation orders were made by this court ex parte upon the Application of the Agency through an Originating Motion dated 27th February 2023 which was supported by the affidavit of Bernard Gitonga sworn on the same date. 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.”



17. The essence of preservation which is granted for a period of 90 days is to safeguard against the dissipation of the suspected property so as to allow the Agency to complete investigations and where necessary, to file a forfeiture application. Should the Agency file a forfeiture application, the Respondent has a right to respond to the application and make an application to have the property discharged and where successful the property is discharged. However as provided in Section 89 a person affected by a preservation order may also apply to have it varied or rescinded.
18. Flowing from the provisions of Section 89 the threshold for variation or rescission of a preservation order is twofold: the Applicant must satisfy the court that:
- “ a. the operation of the order concerned will deprive them of the means to provide for their reasonable living expenses and cause undue hardship and
 - b. the hardship outweighs the risk that the property concerned may be lost, concealed or transferred”
19. While the variation or rescission of the order rests in the discretion of the court must be satisfied that the Applicant is unable to provide for himself or his kin and is therefore suffering undue hardship.
20. Further Section 88 of the POCAMLA states:-
- “ 88. Provision for expenses
 - (1) A preservation order may make such provision as the court deems fit for reasonable living expenses of a person holding an interest in property subject to a preservation order and his family or household
 - (2) A court shall not make provisions for any expenses under subsection (1) unless it is satisfied that—
 - (a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and
 - (b) the person has disclosed under oath all his interest in the property and has submitted to that court an affidavit.”
21. In granting the preservation order this court was satisfied that there was, on the material placed before it, reasonable grounds to warrant the order. I have painstakingly perused the evidence placed before me by the Applicants and come to the conclusion that they do not meet the threshold for discharge of the order. To begin with the mere fact that the Assets Recovery Agency/Respondent had first obtained freezing orders in the magistrates’ court is not per se sufficient ground to grant the application as that is a procedure provided for in law (See Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act). Secondly whereas the 1st Applicant alleges that his mother is not able to cater for her medical expenses he has in grounds 14(a)(i) to (x) of the application revealed that she received a sum of Kshs. 62,000,000/= upon sale of some shares and that he (the 1st Applicant) utilized only a portion of that to advance a loan to Global Gums Limited. I believe therefore that what remained of the income from the sale of the shares is available to her and hence she is not suffering any hardship. As for the education of his brother abroad that clearly is not a reasonable living expense which would warrant setting aside of the preservation order. It is my finding that whatever hardship is likely to flow from the failure to pay the fees and up keep of his brother does not in any event outweigh the risk that the funds may be lost, concealed or transferred.



22. In regard to the prayer for provision of reasonable living expenses it is my finding that the applicants have not sufficiently demonstrated that they do not have any other property from which they can meet their expenses. Those expenses have not, in any case, been specified and it is also evident that the hardship allegedly being suffered by the 1st Applicant does not outweigh the risk of the preserved funds being lost, concealed or transferred.
23. The upshot is that the applicant's Notice of Motion dated March 21, 2023 is found to be without merit and the same is dismissed with costs to the Assets Recovery Agency/Respondent.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 22ND DAY OF JUNE 2023.

E.N. MAINA

JUDGE

