



**Assets Recovery Agency v Rainbow Techemploy Africa Limited (Anti-Corruption and Economic Crimes Civil Suit E040 of 2022) [2023] KEHC 19713 (KLR) (Anti-Corruption and Economic Crimes) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19713 (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 E040 OF 2022**

**EN MAINA, J**

**JULY 6, 2023**

**BETWEEN**

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

**AND**

**RAINBOW TECHEMPLOY AFRICA LIMITED ..... RESPONDENT**

**RULING**

1. On March 9, 2023 this court entered a default judgment in favour of the Assets Recovery Agency/ applicant when it became apparent to it that the respondent was not intent on defending these forfeiture proceedings. This was given that the respondent’s advocate had on several occasions failed to attend court not even to prosecute the notice of motion dated November 3, 2022 which they themselves had filed.
2. By the notice of motion dated March 14, 2023 the respondent has urged this court to set aside the default judgment on grounds that the respondent/applicant has never been served with the documents in the forfeiture application and the application; that counsel for the respondent/applicant was prevented from taking part in the virtual proceedings of this court on March 9, 2023 because she lost connectivity and her call dropped; that by the time connection resumed the matter had already been dealt with and the judgment entered and further that the respondent/applicant has an arguable defence with high chance of success.
3. The respondent/applicant also avers that this application be allowed in the interest of justice.
4. The applicant/respondent opposed the application through the replying affidavit of Isaac Nakitare sworn on May 2, 2023. The main ground for opposing the application is that the supporting affidavit thereto is a forgery; that the deponent has not deponed to the authority to swear the affidavit on behalf



of the respondent which is a corporation and that the respondent's advocate failed to attend court despite being aware of the dates.

5. The notice of motion was canvassed by way of written submissions.
6. I note from the respondent's/applicant's submissions that a prayer for striking out the forfeiture application for want of service has been added.

### **Analysis And Determination**

7. I have carefully considered the application, the grounds on its face, the affidavits in support and in reply, the rival submissions of learned counsel for the parties and the cases cited.
8. Whether to set aside the default judgment entered herein on March 9, 2023 is in the discretion of the court. That discretion is unfettered save that it should not be exercised to aid a party intent only in delaying the matter. (See the case of *Maina v Mugiria* [1983] KLR 78.
9. The *Proceeds of Crime and Anti-Money Laundering Act* has clear timelines for every step in the proceedings hence, for instance once the Assets Recovery Agency obtains a preservation order from this court under section 82 the order must be served upon the respondent within twenty-one (21) days. The section specifically states that "service shall be upon all the persons known to the Agency Director to have an interest in the property which is subject to the order." Section 83 (4) provides that once served with the notice the person who has an interest in the property "shall serve a notice of their intention to oppose the making of the forfeiture order or to apply for an order excluding their interest in the property upon the Director of Assets Recovery Agency within fourteen days after service and where the person has not been served (with the notice under section 82 as the respondent/applicant alleges he was not served) within fourteen days after the notice has been published in the gazette."
10. Section 90 of the Act dictates that where the Assets Recovery Agency applies for an order for forfeiture as is the case here, the application shall within fourteen days be given to every person who served notice under section 83(3) and the person who served a notice under section 83(3) may appear at the hearing of the application to either oppose the making of the order or to apply for an order excluding their interest in the property or for varying the order.
11. Further section 91 states that where a person does not serve the notice under section 83(3), they may within 14 days of becoming aware of the existence of the preservation order apply for leave to serve that notice out of time.
12. The respondent/applicant herein first made its application for leave to file a notice of its intention to oppose the forfeiture application on December 1, 2022. In the grounds stated in the certificate of urgency and on the face of the application it indicated that it was never served with the order for preservation but that the same was published in the Kenya gazette on July 15, 2022. From July 15, 2022 when the respondent/applicant is deemed to have had notice of the order to December 1, 2022 when it filed its application is clearly more than the fourteen days reserved for bringing such applications in section 83(4)(b) of the *Proceeds of Crime and Anti-Money Laundering Act*. Be that as it may, this court was prepared to hear its application to file the notice out of time as provided in section 91(1) of the *Proceeds of Crime and Anti-Money Laundering Act* but counsel did not attend court on January 24, 2023 when the case was fixed for directions despite having been duly notified of the date by the Deputy Registrar. In fact, the record shows that counsel was present when the Deputy Registrar gave the date. No explanation has been given by counsel for the non-attendance.
13. The record will bear me out that counsel did not also attend court on the next date given although they were also served and so this court deemed that the application dated December 1, 2022 had been



abandoned and it entered a default judgment for the Assets Recovery Agency/respondent as provided in section 95(1) of the [Proceeds of Crime and Anti-Money Laundering Act](#) which states: -

- “95(1) If the Agency Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 91(1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who served notices in terms of section 83(3) have knowledge of notices given under section 91(2), the High Court may—
- (a) make any order by default which the High Court could have made under sections 88(1) and (2);
  - (b) make such order as the High Court may consider appropriate in the circumstances; or
  - (c) make no order.” (emphasis mine).

14. The default judgment herein was therefore properly entered and is a regular judgment of this court. The respondent/applicant could not have been given notice of the application for an order of forfeiture as it had not served the notice required under section 83(4) (b) despite having notice of the order on July 15, 2022 when it was gazetted. It cannot therefore be heard to say that the default judgment is irregular given that it did not serve the notice under section 90(1) of the Act.
15. Be that as it may and in an endeavour to uphold the respondent/applicant’s rights to access to justice and equal protection of the law and in the interest of justice this court shall exercise its discretion in the respondent’s favour and allow the application. I do note that the deponent of the supporting affidavit has sworn a supplementary affidavit and explained how he appended the signature on that affidavit despite being out of the country. This raises a reasonable doubt on the Assets Recovery Agency/respondent’s contention that the affidavit is a forgery. By bringing this application expeditiously the respondent/applicant has demonstrated that it is keen in defending the forfeiture application.
16. The upshot is that the respondent/applicant’s notice of motion dated March 14, 2023 is allowed; the default judgment entered herein on March 9, 2023 is set aside and the respondent is deemed to have filed and served its notice of intention to oppose the making of a forfeiture order out of time.
17. The respondent/applicant shall however bear the costs of the application. It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 6<sup>TH</sup> DAY OF JULY 2023.**

**E N MAINA**

**JUDGE**

