



Assets Recovery Agency v Ahmed & 2 others (Anti-Corruption and Economic Crimes Civil Suit E031 of 2023) [2024] KEHC 13957 (KLR) (Anti-Corruption and Economic Crimes) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13957 (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 E031 OF 2023
PJO OTIENO, J
NOVEMBER 6, 2024**

BETWEEN

ASSETS RECOVERY AGENCY APPELLANT

AND

SWALEH YUSUF AHMED 1ST RESPONDENT

ASMAR ABDALLA MOHAMED 2ND RESPONDENT

MBARAK ABDALLAH YUSUF AND OTHER 3RD RESPONDENT

RULING

1. The third (3rd) Respondent has brought the Notice of motion expressed to be brought pursuant to article 159 (2)d of *the constitution* as well as sections 1A (1) 1B (1)d and 3A of the *Civil Procedure Act*, and sought an order that this file be transferred to the High Court of Kenya sitting at Mombasa.
2. The reasons advanced to ground the application are given to be that the overriding objectives of the court demand that suits be tried in a just expeditious, proportionate and affordable manner. In the context of this matter, it was pointed out that the respondents are a widow and a son who were recently bereaved by the ultimately death of the other two respondents who thus find it expensive to conduct this matter in Nairobi. It was equally pointed out that section 12 (a), *Civil Procedure Act*, commands that suits be instituted and prosecuted where the subject matter is situated, hence, in this matter, the property sought to be forfeited are situated in Mtwapa, a small town situated some 25Km from Mombasa but 550Km from Nairobi, the seat of trial ought to be Mombasa.



3. It was equally ascertained that section 15 command that suits be instituted where the defendants reside and that in this matter the defendants reside within Mombasa and its environs and not Nairobi which is far off.
4. In conclusion it is contended that no valid reason had been proffered to institute this matter in Nairobi and that in doing so the applicants were merely forum shopping.
5. Those same reasons are reiterated in the affidavit support sworn by James Ongamo Advocate without any addition nor subtraction.
6. The motion was resisted by the replying affidavit of Nicholas Sune, an investigator with Asset Recovery Agency. He depones that having read and understood the grit and gist of the application for transfer, he had been advised that the firm of Bryant & Co. Advocates are strangers to the suit as the said 3rd Respondent is already represented by Magolo & Co. Advocates. It is also asserted that the Affidavit in support of the application is irredeemably and fatally defective for having been sworn by an advocate on factual positions.
7. On the merits, the application is viewed to be made out of bad faith and in total disregard of the Practice Directions for Anti-Corruption and Economic Crimes Division of the High Court, gazetted on 9/12/2016 and mandating that all matters be filed at the Principal Registry and heard, as of practice, virtually. It is added that no demonstrated prejudice will visit the 3rd Respondent if the matter is heard virtually like all others and that on timing, coming when the matter had been progressed towards judgment, the application is not only pointing towards bad faith but also suspicion.
8. To the Agency, it is in the best interest of the 3rd Respondent, who alleges to reside in Dubai, that the matter is heard virtually whether he be in Mombasa or Dubai and irrespective whether the judge sits in Nairobi or Lodwar because there would be no need for the 3rd Respondent to travel to Nairobi with an underscore that virtual court sessions promote overriding objectives by eliminating travelling costs. It was then concluded that no interest of justice would be served by an order for transfer to Mombasa without a designated Anti-corruption judicial officer with jurisdiction to handle the matter. The court is thus implored to maintain the status quo and push the matter towards closure.
9. Mr. Magolo, who has always appeared for all the Respondents went on record and said he supported the application which support was evident for the submissions filed and dated 9/10/2024.
10. Even though it was the understanding of the court that the application would be urged orally, Mr. Magolo did well to file submissions. Mr Bryant and Mr. Ogonda on their part offered oral submissions.
11. In his oral submissions offered before the court on the 31/10/2024, Mr. Bryant for the 3rd Respondent took the position that since section 81 of POCAMLA categorise and designate proceedings under it to be civil in nature, the *civil procedure Act* did apply to such proceedings hence no escape from what sections 1A, 1B 3A, 12 and 15 of the Act provide. He stressed that the proceedings in the matter point to the fact that the Assets sought to be forfeited are all situated at Kikambala and Mtwapa just like all the Respondents live in Mombasa save that the 1st and 4th Respondents are dead.
12. On the gazetted practice Rules, the counsel submitted that a gazette notice is subsidiary to all the statute and cannot override a statute. He added that the chief Justice has no power to override parliament so as to water down the constitutional dictate to make litigation affordable and expeditious. He then added that in this matter, he might require to have people cross-examined. He however did not name the persons to be cross-examined. With such submissions he urged that the application be allowed and the matter so transferred.



13. Mr. Magolo for the 2nd and 4th Respondent, as said before, told the court that he supports the application wholly and buttressed the applicant's submissions by saying that the chief Justice has no mandate to amend *civil procedure Act* by the practice directions.
14. For the applicant, the position taken is that in waiting till the matter nears judgment, to bring the current application, by counsel who is a total stranger to the proceedings, the 3rd Respondent is acting in bad faith and not interests of the administration of justice. It is its submission that the practice direction were duly promulgated and gazetted way back and has taken root by which the Anti-corruption cases, are by practice, handled virtually. He stressed that virtual proceedings is guarantee for expeditious, affordable and justice dispensation as underpinned under the practice directions. He added that it being alleged that the 3rd Respondent resides in Dubai, it was in his best interest that the matter be heard virtually at the seat of the Anti-corruption and Economic Crimes division of the High court.
15. Nothing, he said, hindered even cross-examination of witnesses from being conducted virtually. The advocate concluded by submitting that having been progressed to near closure, it was only just that the matter remains where it is for conclusion. He prayed that the application be dismissed for having been brought in bad faith.

Issues for Analysis and Determination

16. Being an application for transfer the only issue for determination is whether sufficient material has been availed to merit the grant of the prayer sought.
17. Ordinarily, the transfer envisaged under *Civil Procedure Act*¹ is from High Court to the lower court and vice versa as well as between the subordinate courts. The Act generally does not anticipate transfer from one High Court Registry to another. The logic and rational is that there is only one High Court operating in different registries.
18. Lately, the High Court is organised into divisions but it remains the same court. For that reason, it is understandable that the 3rd Respondent could not lay his hands on any explicit provision permitting the sought transfer and had to resort to general provisions on the overriding and inherent powers of the court essentially establishing the inherent character of the court as a dispenser for justice.
19. Back to the trail and happenings in the file. the court notes that as early as the 9/11/2023, when the matter appeared before the judge for the very first time, Mr. Magolo attended and told the court that he was for the Respondents, without distinction.
20. As the matter was coming for case management directions, the same counsel requested for 21 days to enable him file a comprehensive response to application. With the consent of the applicant, the court acceded to the request. He had not done so by the 19/1/2024 when the matter was in court next and was granted additional 14 days to file the response.
21. Once again no Replying affidavit was filed till the 13/3/2024 when counsel then requested for another two days to do so. It was so filed at long last but come the 4/4/2024 when parties attended before the judge, counsel for the Respondents addressed the court as follows;

¹ Head notes of Section 18 provides; Power of High Court to withdraw and transfer case instituted in subordinate court;



Mr. Magolo:

“No objection although I would have expected them to withdraw the application. We are also seeking time to file a replying affidavit as our client, the 3rd respondent is out of the country and getting the statement from a foreign bank has proven difficult.”

22. From the summary of the proceedings, there remain no doubt that Mr. Magolo has been on record for all the Respondents since inception. That being the position, if the 3rd respondent was to be intent on getting another advocate on record, the proper document to file ought to have been a Notice of Change of Advocates². The Notice of Appointment filed when subjected to the strict interpretation of the Civil Procedure Rules would turn out as improper and unacceptable.
23. On that strict application of the law, the Notice of appointment filed by Ms Bryant Law Advocates, would be of no consequence for having been effected contrary to Rules. If the court was to be technical, it would be sufficient at this juncture to find that Ms Bryant was not properly on record with the consequence that the pleading filed by the firm were improperly filed and deserve being struck out. The court is however not anxious to proceed that way but to do substantive justice to the matter by giving it a merit-based determination.
24. On the merits, the court poses to itself the question; why did the judiciary establish the Anti-corruption Economic Crimes Division of the High Court and give it a Principal Registry in Nairobi.
25. To this court, corruption and the fight against the vice, is a central issue the Kenyan people thought important enough to be addressed by a whole chapter 6 of *the constitution*. The Kenyan people view the cancer of corruption to take the repute of a national tragedy that need combat by precision and matters handled in a decisive, expeditious and laser focused manner. The corruption related disputes are to be given special and specific attention hence the law that in the magistracy, it requires a special designation to sit and handle corruption and Ethics related case and within determinate timeframes.
26. That was, to my understanding, the thought behind the establishment of the high court division. The collective fight against corruption demanded, and continues to demand, that a dedicated division be created away from the usual disputes to enable that division have the desired focus so that timely and expeditious closures are achieved. The rational was and remains that if the corruption related cases were to be heard and dealt with in the usual manner, like any other dispute, where a judicial officer or judge has every manner of dispute on the daily cause list, the focus and timelines expected would be lost sight of.
27. The next question the court views important is whether centralisation of the registry in Nairobi negates on the constitutional values on access to justice and need to take judicial services closure to the people.
28. It is understandable that access to justice, which entail costs and distance proximity court services are cardinal values in *the constitution*. when the *Civil Procedure Act* was enacted in the year 1924, the only known infrastructure for access court and justice provision was the physical court rooms. That was the purpose to be served by sections 12, 13, 14 and 15 of the Act. Indeed, no law can remain static but the law must align with other development in society. Today, access to court is not limited to personal and physical ability to reach a court house. Courtesy of the technology, Kenyans living within an outside jurisdiction and any other person seeking judicial services, can access court at the convenience, pleasure and leisure of their sitting room, bedroom and even washroom. With such developments, the restriction on how to file and handle court disputes have been largely transformed. It is now possible

² Order 9 Rule 5,



for any person to have his matter filed, managed and heard to conclusion, without him being personally present in the court house and even within the boundaries of Kenya.

29. When the parties addressed me in this matter, Mr. Bryant readily acknowledged that we have made great strides and that it was possible to deal with a matter without the need to attend a physical court session save that he intimated that in this case there may be need for cross-examination of witness. No particulars of such witnesses were disclosed
30. That position was new, not taken in the Application and made from the bar. It strikes the court that as of today directions had been given, with the respondents' participation by counsel, that the matter be heard by way of submissions. Pursuant to such directions, Mr. Magolo has filed written submissions for the 2nd and 4th respondents only. Throughout all attendance before the court no hint was ever made that any deponent of any affidavit would be required for examination. The need for cross examination of undisclosed witness cannot be the basis to order transfer.
31. The court views the change of heart to demonstrate the intention to delay the just, expeditious and proportionate conclusion of the matter. That ought not be allowed but discouraged.
32. In any event, Mr. Bryant has innumerable times said that his client does not live in Kenya but in Dubai. The question one must ponder over is whether Mombasa is nearer to Dubai than Nairobi!
33. It is the finding by the court that the Practice Directions for The Anti-Corruption and Economic Crimes Division of The High Court, do not negate on the right to access to efficient, expedient, proportionate and affordable justice. To the contrary, it promotes all the values and attributes of access to justice with additional convenience and flexibility.
34. The court view the application made pursuant to article 159 not to further the values that provision enshrines but to counter same. Such must be discouraged. That is best achieved by dismissing the application so that the matter proceeds to its logical conclusion and closure. With the focus to progress the matter, the court deems Mr Bryant properly on record for the 3rd respondent. In that capacity, he shall file and serve any desired Replying Affidavits as well as submissions within 7 days from today.
35. So that no more undue time is taken or procedural directions, the applicant has the leave, upon being served, to file any supplementary Affidavits and submissions if need shall arise. That shall be done within 7 days after service by Mr Bryant.
36. Thereafter, the respondents will have the liberty to file any further affidavits and submissions within 7 days after service by Mr Ogonda
37. The costs of the dismissed application are awarded to the Agency.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 6TH DAY OF NOVEMBER, 2024

PATRICK J O OTIENO

JUDGE

