



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO. 62 OF 2015

REPUBLIC.....APPLICANT

VERSUS

1. ABDULRAHIM MAHMOUD SHEIKH alias SAID JUMA SAID

2. SHEIKH MAHMOUD ABDULRAHMA

3. MAHMOUD ABDULRAHMAN SHEIKH

4. MUSA JACOB LITHARE

5. NICHOLAS WAWERU JEFWA

6. SAMWEL BAKARI JEFWA

7. POTENTIAL QUALITY SUPPLIES LIMITED

8. SAMUEL MBOTE MUNDIA.....RESPONDENTS

R U L I N G

1. Application dated 7th day of February 2019 was brought by 1st, 2nd and 3rd applicants – Abdulrahim Mahmoud Sheikh alias Said Juma Said, Sheikh Mahmoud Abdulrahma and Mahmoud Abdulrahman Sheikh under Articles 159(2), 165, 283(1) of the constitution of Kenya 2010, Section 68(9) and 89 of the proceeds of crime and Anti-money Laundering Act Chapter 59B and all enabling provisions of the law seeking that orders made on 25th August 2015 be varied and on rescinded with respect to the following properties:-

i. Motor vehicles Registration: -

a) KCB 400H Toyota Land Cruiser registered in the names of Abdulrahman Mahmoud Sheikh.

b) KCA 907 R Toyota Pearl Station Wagon registered in the names of Agemate Enterprises and specially owned by Mahmoud Abdulrahman Sheikh and proceed order that the said motor vehicle be released.

2. The applicants sought that the court orders and directs that the 3rd Respondent be allowed and be at liberty to access his account namely:-

- Co-operative Bank Account No. 0110xxxxxxxx in the name of Mahamoud Abdulrahman Sheikh (3rd Applicant).
- Barclays Bank of Kenya A/C No. [Particulars withheld] in the name of Mahamoud Abdulrahman Sheikh- (3rd Applicant) and that the 3rd applicant be allowed to withdraw upto Kshs.5,000,000/=.

3. The application was supported by grounds on the face of the application and affidavit of Mahmoud Abdulrahman Sheikh. The 3rd Applicant/Respondent averred that the dormant stay of the 2 motor vehicles at the police station i.e. KCB 400 H Toyota Landcruiser and KCA 907R pearl station wagon have made their value to tremendously go down such that KCB 400 H has deteriorated from

Kshs.5,860,000/= to Kshs.4,220,000/= whereas KCA 907R has been devalued from Kshs.550,000/= to Kshs.390,000/=.

4. The 3rd Respondent/Applicant also averred that they were ready to surrender title-deed for parcel of land No. Mombasa/BLOCK XV/481 measuring 0/0159 Ha valued at Kshs.7,000,000/= and upon which a four storey building valued at Kshs.50,000,000/= stands. The 3rd Applicant asked that he be allowed to access money held in the bank accounts in order to take his sickly wife to India for medication.

5. In opposition to the application the Attorney General the 1st interested party herein filed a preliminary objection to the effect that the application dated 7th February 2019 is *res judicata* having been heard and determined by a competent court of law; that the applicants herein lack audience before the court for non-compliance of restraint orders issued by the court on 25th August 2015 and that the application is bad in law, vexatious and an abuse of the court process.

6. The second interested party Assets Recovery Agency also filed a similar preliminary objection to that of 1st interested party. Vide application dated 8th May 2019, the Director Assets Recover Agency sought for orders for sell or otherwise dispose by public auction motor vehicles that are subject of the restraint order issued on 25th August 2015 and that the proceeds be deposited in the Agency's preservation A/C No. [Particulars withheld] held at KCB KICC Branch. The application is supported by the ground on the face of the application and affidavit of No. 75821 CPL Jeremiah Sautet sworn on 8th May 2019.

7. In supplementary affidavit sworn by Mahmoud Abdulrahman Sheikh on 18th October 2018, the 3rd Respondent averred that he required treatment urgently as he had fallen sick. He annexed invoices for the treatment –MAS 4. He said the trial in CR. Case No. 1132 of 2015 was yet to be concluded and over 20 witnesses had testified. He said that his land, bank accounts and motor vehicles have never been subject of the criminal trial.

8. The 1st interested party filed another preliminary objection dated 8th November 2019 in opposition to the application dated 7th February 2019 on the grounds that:-

a) The application is incompetent, frivolous, vexatious and an abuse of the court process and ought to be struck out.

b) That the motorvehicles Reg. No. KCB 400 H and KCA 907 R are suspected proceeds of crime and the subject of freezing orders made as 25/8/2015.

c) That the subject matter of the application now before court are realizable properties within the meaning of Section 105 of the Wildlife Conservation and Management Act and Section 57(1) of the Proceeds of Crime and Anti-money Laundering Act 2009.

d) That there is real risk that if released the motor vehicles will be wasted, disposed, transferred and/or moved away from the jurisdiction of this court.

e) That the applicants have not discharged the evidential burden to warrant grant of the orders sought noting that they presently enjoy an order availing them reasonable living expenses in the sum of Kshs.300,000/= per person each month flowing from the order issued on 28th January 2016.

f) That the application is *res judicata*.

g) That the applicants are guilty of material non-disclosure hence not deserving of the orders sought.

h) That the applicants have not met the threshold required for grant of the orders sought.

9. It appears from the consent order entered into by the advocates on record on 19/12/2017 that an order had been issued on 28/1/2016 allowing the applicants to make withdraw Kshs.300,000/= each per month and a one off withdrawal of Kshs.4,000,000/= from A/C No. 011xxxxxxxxxxx – Co-operative Bank and Barclays Bank Account No. 202xxxxxxxx for purposes of meeting medical bill and air ticket.

10. On 9/7/2019 Mr. Magolo Advocate for the 1st, 2nd & 3rd Applicants (Application dated 7/2/2019) proposed that preliminary objections dated 3rd May 2019 and Notice of motion dated 8th May 2019 filed by 2nd interested party as well as the preliminary objection dated 6th May 2019 and grounds of opposition dated 8th November 2019 be heard and determined together with application dated 7/2/2019.

11. In the oral submissions in court Ms. Mwangeka argued that a similar application dated 27/4/2016 was dismissed by Justice P.J.O. Otieno J and the current one is duplication of the same. She submitted that on 15/12/2017 the applicants in a previous application were granted limited access to 3rd applicants, 2 bank accounts. She argued that the Mombasa CMC CR. Case No. 1132 of 2015 was still pending and the motor vehicles and money in the said bank accounts are exhibits. Ms. Mwangeka further submitted that there was no change in circumstances to warrant the orders being sought.

12. Mr. Magolo Advocate on the other hand submitted that they had filed submissions to the effect that there was a medical emergency that required urgent attention. He argued that the motor vehicle that were detained are wasting away. He said proceedings to recover monies alleged to be proceeds of crime were started by the Respondents but they had not followed the same.

13. Ms. Mwangeka said the applicants were guilty of filing multiple application. The applicants conceded that they had access to the 2

accounts to withdraw Kshs.300,000/= per month for subsistence and Kshs.4,000,000/= was also ordered withdrawn to take 3rd applicants wife to India.

14. I have considered the application dated 7th February 2019, the preliminary objections dated 3rd May 2019 and 6th May 2019 as well as application dated 8/5/2019 and the grounds of opposition filed by 1st interested party dated 8/11/2019 and find that the 1st, 2nd & 3rd Applicants. In application dated 7.2.2019 are already having access to two accounts i.e. Co-operative Bank A/C No. 011xxxxxxxxxxx and Barclays Bank of Kenya A/C No. 202xxxxxxxx from which each one of them draws Kshs.300,000/= monthly.

15. The orders were 1st made in notice of motion dated 21/9/2015 by Hon Muya J and subsequently by Hon. Chepkwony J. On 28/1/2016 a one off withdrawal of Kshs.4,000,000/= was made to enable the wife of 3rd Applicant to go to India for treatment. I suppose there was evidence then requiring her to proceed to India for treatment. I have perused the annexures to 3rd Applicant/Respondents affidavit in support of the application dated 7/2/2019 and supplementary affidavit but I have not come across any medical report indicating that the 3rd Applicant/Respondent's wife has been recommended to seek treatment in India.

16. What is annexed are documents showing she has been treated and undergone Candice tests on various hospitals in Mombasa. When she allegedly went to India following the withdrawal of Kshs.4,000,000/= no report was filed in court showing that she needed to go back for further treatment. Being that the applicants already have access to the 2 accounts to the extent of Kshs.900,000/= per months since 28/1/2016, I think that it would not be fair and just to allow them to continue withdrawing from accounts which the Hon. Justice Muya on his rulings dated 25th & 28th August 2015 seized pursuant to Section 105(1) of the Wildlife Conservation & Management Act and Section 57(1) of proceeds of Crime and Anti-money Laundering Act.

17. This court was not given accounts of the money so far withdrawn and what are the balances to be able to know whether those accounts are exhausted/overdrawn and /or how much funds remain as account balances. The application dated 7/2/2019 is therefore dismissed.

18. From the Respondents grounds of opposition a copy of Misc. CR. Application No. 37 of 2016 was annexed showing that the applicants herein had made a similar application dated 28/4/2016 through the firm of Ms. Gikandi & Co. Advocates seeking access to the said accounts. It is not disclosed whether the orders were granted or not and whether Misc. CR. Application No. 37of 2016 was closed or it is still pending.

19. I would agree with the Respondents that there is duplicity of applications in regard to assets related to criminal trial in Mombasa CMC Cr. Case No. 1132 of 2015 which practice should be discouraged at all costs as it drains precious judicial energy and time.

20. In the same breath the interested parties herein having applied to seize the motor vehicles, land and bank accounts belonging to the applicants herein vide application dated 3rd July 2015 pending the hearing and determination of CR. Case No. 1132 of 2015 they have a duty under Article 50 (2)(a), and (e) to prosecute the charges against the applicants expeditiously without unreasonable delay.

21. The continuous holding of the properties seized over 5 years ago and requiring the court to issue orders disposing of the said seized goods without evidence goes against the grain & spirit of the constitution as to right to own property and privacy to such property.

22. The interested parties ought to prove either through the criminal trial or in a cause commenced to recover assets that the monies in the accounts in question, the land and the vehicles seized from the applicants herein are indeed proceeds of crime and money laundering.

23. The application dated 8/5/2019 is also not allowed as it will interfere with the exhibits to be produced in CR. Case No. 1132/15. The 2nd Respondent/2nd interested party Applicant in application dated 8/5/2019 should approach the trial court in CR. Case No. 1132 of 2015 and agree how to preserve the motor vehicles in question pending the trial therein.

Dated, signed and delivered at Mombasa this 4th day of February 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE