



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 195 OF 2017

ASSET RECOVERY AGENCYAPPLICANT

-VERSUS-

1. STEPHEN VICKER MANGIRA

2. NABIL LOO MOHAMED

3. BAKARI KILA BAKARIRESPONDENTS

AND

ALI CARS LIMITEDINTERESTED PARTY

RULING

1. The application for determination is dated the **19th May, 2021** and was filed by **Stephen Vicker Mangira** and **Nabil Loo Mohamed** (hereinafter “the Applicants”) on **20th May, 2021**. The Asset Recovery Agency is the Respondent in this application and will be referred to as such for purposes of discussion in this Ruling.

2. The application is expressed to be brought under **Articles 2, 40, 50(2)(a) and 159 of the Constitution, Section 177 of the Criminal Procedure Code, Section 2, 56(2), 60(a), 68(9)(b), 88 and 89 of the Proceeds of Crime and Anti-Money Laundering Act (herein-after referred to as “POCAMLA”)** and **Sections 1A, 1B, 3A and 7** all of the **Civil Procedure Act**. In that application, the Applicants seek for the following orders:-

a) Spent;

b) Spent;

c) The preservation orders given on 13th July, 2017 be nullified, set aside, discharged or rescinded or be declared to be spent and overtaken by events;

d) This court be pleased to direct that the sum of Kshs.18,500,000.00 deposited into the Depositors Account by the Accountant for Shanzu Law Courts pursuant to the orders made in Shanzu SPM Criminal Case No.257 of 2017 on 12th April, 2019 at Kenya Commercial Bank and Seven (7) Motor Vehicles Registration Numbers KCH 596H Toyota Velfire, KCK 444A Toyota Prado, KBV 628K Toyota Station Wagon, KBP 768Q BMW, KCK 768Q BMW, KCH 723Z Toyota Alphard and KCK 444B Toyota Land Cruiser (herein-after referred to as “the property”) be released to the 1st Respondent/Applicant, Stephen Vicker Mangira unconditionally and with immediate effect;

e) In the alternative and without prejudice to prayers (b), (c) and (d) above and without any admission that the Preservation Orders given on 13th July, 2017 were lawful or should remain in force this Court be pleased to vary those orders in the following manner:

[i] An amount of Kshs.10,000,000.00 out of the sum of Kshs.18,500,000.00 held in the Court Depositors Account at Kenya Commercial Bank on orders of the Chief Magistrates Court in Shanzu (and claimed by Asset Recovery Agency) be paid to the 1st Respondent’s Advocates, Kinyua Muyaa & Co as payment for their legal fees inclusive of VAT for the

following matters:-

- a) Petition No.4 of 2019 which they filed and prosecuted on my behalf up to conclusion;
- b) The Appeal to the Court of Appeal against part of the Judgment in Petition No.4 of 2019;
- c) The successful defence of Shanzu Senior Principal Magistrate's Criminal Case No.257 of 2017. In criminal case Assets Recovery, the DPP and DCI wanted the 1st Respondent to be jailed for 14 years for each of the nine counts (126 years) or a fine not exceeding 5 Million Shillings for each Count (more than Kshs.45 Million as some of the vehicles a worth more than Kshs.5 Million) or to both 126 years and more than Kshs.45 Million;
- d) These proceedings (Misc. Civil Application No. 195 of 2017) for preservation orders for the property and the money in the 1st Respondent's Bank Account at Standard Chartered Bank; and
- e) Misc. Civil Appl. No. 269 of 2017 for forfeiture of all the property described above;

[ii] This Court be pleased to order and direct that an amount not exceeding Kshs.2, 500,000.00 be released to obtain a comprehensive insurance cover for the seven (7) vehicles to enable them to be used on public roads for the 1st Respondent's car hire business. These can be paid directly to an insurance company acceptable to the Court.

[iii] An amount of Kshs.175,000.00 be paid to a suitable security company or car tracker to install tracking devices for the said seven vehicles and those vehicles be released to the 1st Respondent for his use pending the conclusion of these proceedings or further orders of the Court until the final determination either to the Supreme Court of Kenya or East African Court of Justice if there are any appeals. The details will be provided if the Court accedes to this application.

[iv] An amount not exceeding Kshs.3,000,000.00 be authorized for use from the sum of Kshs.18,500,000.00 for the repairs and maintenance of the seven vehicles which have not moved for over 4 years. This money can be paid directly to Toyota Kenya and Bavaria, the dealers of BMW on quotations and Invoices that those entities will provide. The Court will then be sure that these payments will be paid to third parties directly to the restoration of those vehicles.

[v] The Sum of Kshs.1,800,000.00 out of Kshs.18,500,000.00 be released to the 1st Respondent to pay his debts and for his living expenses until he gets the vehicles back on the road and generating income. This amount will also cover the costs of doing business, the marketing, hiring drivers, arranging their night outs and for fuel and service before the business starts breaking even.

[vi] The balance, Kshs.1,200,000.00 be moved to the 1st Respondent's account at Standard Chartered Bank, Kericho to continue earning interest and to be subjected to order number 8 in the preservation orders given on 13th July, 2017 until these proceedings and the forfeiture proceedings in Civil Application No.269 of 2017 are concluded or until further orders of the Court.

f) Costs of this application be provided for.

3. The application is supported by an Affidavit sworn on **19th May, 2021** by **Stephen Vicker Mangira**, the 1st Respondent/Applicant herein and on the grounds as on the face of the application.

4. The Applicants' property, as deponed by the 1st Respondent/Applicant was impounded by the Applicant/Respondent on grounds that it was believed to be proceeds of crime and money laundering. A preservation order was then issued by this court on **13th July, 2017** prohibiting the Respondent/ Applicant from dealing with the said property until investigations are concluded in line with **Section 55 of the Proceeds of Crime and Anti-Money Laundering Act**. The investigations led to the Applicants to be arrested and were charged with offences of money laundering contrary to **Section 3(a)(i) as read with Section 16 (1)(a) of the Proceeds of Crime and Anti-Money Laundering Act** in Shanzu SPM Criminal Case No.257 of 2017 (*Republic vs Nabil Loo Mohamed, Bakari K. Bakari, Stephen Vicker Mangira and Lilian B. Martin*).

5. The criminal case proceeded for hearing and after full trial, the Applicants were acquitted of all charges and no restraint order was made with regard to the properties. According to the Applicants, the "no guilty" finding and their acquittal in the Criminal case should lead to an automatic termination of the preservation order in this case and the forfeiture proceedings in **HCCC No.269 of 2017**. That, since both the preservation proceedings and forfeiture proceedings were brought under the provisions of the **Proceeds of Crime and Anti-Money Laundering Act**, a restraint order could only be issued under **Section 68** of the said Act if the court was satisfied there were criminal investigations with regard to an offence under the Act. Therefore, since the Applicants were acquitted of all the criminal charges preferred against them and there being no further active investigations, there is no reasonable explanation to believe that the applicants were leading a criminal lifestyle or have benefited from such conduct.

6. Further, that under **Sections 81 of Proceeds of Crime and Anti-Money Laundering Act**, the Civil Proceedings for forfeiture cannot be sustained for the reason that the Applicants have been tried on the same facts in the criminal case and the Civil Proceedings cannot serve a better purpose than re-opening the same facts. Therefore, there is no justification for the preservation orders and/or any order of seizure. As such, the Applicants lament that their rights to property as protected under **Article 40 of the Constitution, 2010** have been infringed.

7. It has been added that the subject motor vehicles which were initially under the custody of the DCI were taken over by officers from the Asset Recovery Agency without any valid court order and its counsel has refused to account for the same. The Applicant then describes the actions of seizure of the subject motor vehicles by the Assets Recovery Agency as misuse of power to steal the motor vehicles and urges this court to intervene and order for the release of the motor vehicles unconditionally.

8. Similarly, the Applicants have averred that they have suffered loss of interest and income that would have earned from the Kshs.18.5Million after the court had directed that the money be deposited in an interest earning account and besieges the court to order the release of the money to them.

9. The application herein is opposed by the Applicant/Respondent via a **Notice of Preliminary Objection** dated 3rd June, 2021 and filed on even date. The **Notice of Preliminary Objection** raises the following grounds: -

1. THAT the Applicant/Respondent obtained Preservation Orders vide MSA HCMA No.195 of 2017, Assets Recovery Agency vs Stephen Vicker & 2 Others pursuant to Sections 81, 82 and 83 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) prohibiting the Respondents/Applicant and/or their agents from transferring or dealing in any money with the assets under Preservation.

2. THAT the preservation order was published in the Kenya Gazette on 1st August, 2017 vide Gazette Notice No.7407 as required under Section 83 of the POCAMLA.

3. THAT during the subsistence of the preservation order, the 1st Respondent filed an Application to vary the Preservation Orders on 9th February 2018. The Application was heard and a ruling delivered by Hon. Lady Justice Njoki Mwangi on 28th September, 2018 striking out the Application.

4. THAT Section 84 of POCAMLA provides that Preservation Orders shall expire 90 days after the date on which notice of the making of the order is published in the Gazette unless there is an application for a forfeiture pending before the Court in respect of the property subject to the Preservation Order.

5. THAT pursuant to Section 90 and 91 of POCAMLA the Applicant/Respondent filed an application for forfeiture on 31st October, 2017 seeking orders for forfeiture of the assets vide MSA HCMA No.296 of 2017, Assets Recovery Agency vs Stephen Vicker & 2 Others.

6. THAT the Application for forfeiture is still pending for determination before the Court.

7. THAT the Respondent/Applicants were charged in Shanzu Criminal Case No.257 of 2017 and were acquitted under Section 215 of the Criminal Procedure Code vide a Judgment delivered on 12th May, 2021 by the Chief Magistrate, Shanzu Law Court.

8. THAT Section 92(4) of the POCAMLA provides that the validity of forfeiture order 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.

9. THAT what is pending for determination is the forfeiture application and not the preservation application. The Respondent/Applicant is at liberty to raise issues herein in this application in the application for forfeiture.

10. The application was canvassed by way of oral submissions on 3rd June, 2021 with Mr. Kinyua appearing for the Respondent/Applicant and M/S Gitiri for the Applicant/Respondent.

11. M/S Gitiri on the other hand was of the view that the instant matter is already spent and the only matter which is pending is the forfeiture application pending before the Hon. Lady Justice Njoki Mwangi in **HCCC No.269 of 2017**. He added that the court therefore lacks jurisdiction to determine the instant matter as the issues raised in this application can be canvassed in the forfeiture proceedings.

12. M/S Gitiri further expressed the view that the present civil proceedings are different from the Criminal proceedings in which the Applicants were acquitted. And while the criminal proceedings are prosecuted by the ODP, the civil proceedings are guided by the **Proceeds of Crime and Anti-Money Laundering Act** and are predominantly prosecuted by the **Asset Recovery Agency**, which is an independent body. Therefore, there need not to be a criminal conviction for a civil forfeiture to be maintained.

13. In explaining the validity of preservation orders, M/S Gatiri submitted that once the orders are granted ex-parte under **Section 84 of Proceeds of Crime and Anti-Money Laundering Act**, they will automatically expire after 90 days unless there is a forfeiture application filed. If that scheme of things is met, then the forfeiture orders continue to subsist. In the instant case, a forfeiture application was made under **Mombasa Misc. Civil Application No.269 of 2016**, within the period of 90 days and as such, the orders granted continued to subsist.

14. In the same note, the Applicants exercised their rights as provided under **Section 89 of the Act** by making an application seeking to have the preservation order revised but the same was struck out. As things stand, M/S Gatiri reiterated that under **Section 92(4) of Proceeds of Crime and Anti-Money Laundering Act**, the criminal proceedings have no bearing in the present civil proceedings and it is the court under the forfeiture proceedings to determine whether or not property under question is proceed of crime.

15. Mr. Kinyua, counsel for the Applicants has vehemently opposed the view that the matter had already been spent. He argues that the Respondent had filed an application in this particular matter even after preservation orders had been issued. Displeased with the court

Ruling, the Respondent filed an appeal which is pending before the Court of Appeal vide **Appeal No.E005 of 2020**. His view is that, once the preservation orders are made, the file remains active until all active proceedings against the Defendants are concluded or alternatively until when the judge otherwise rescinds those orders.

16. The Learned counsel has also submitted that by virtue of **Section 89 of Proceeds of Crime and Anti-Money Laundering Act**, the orders issued herein should be rescinded once the proceedings against the Defendant (as per Section 2 of POCAMLA) have concluded. In addition to that Mr. Kinyua submitted that there were no orders made to seize the motor vehicles so that the suggestion that the instant application be made in the pending forfeiture proceedings is not tenable as there is no forfeiture order that has been made in that particular case. He has relied on **Section 90 of the Proceeds of Crime and Anti-Money Laundering Act** to buttress the argument that the forfeiture proceedings are dependent upon a preservation order hence the application at hand is properly before the court.

17. Further, **Mr. Kinyua** has added that when a preservation order is made and within 90 days thereafter forfeiture proceedings are filed, assuming nothing else happens, then the parties are bound by the forfeiture proceedings. But if the criminal proceedings have been commenced and concluded, then the preservation order must be rescinded first. Therefore, it cannot be gain said that **Section 89 of Proceeds of Crime and Anti-Money Laundering Act**, does not refer to the criminal proceedings when in fact the said Section uses the word "defendant" which word is defined under **Section 2** of the same **Act** to include an accused person if criminal proceedings are commenced against the Respondent.

Analysis and Determination

18. I have considered the application by the Applicants/1st and 2nd Respondents dated **19th May, 2021**, the affidavit in support thereof and the Preliminary objection filed in response, the annexures, the oral submissions, together with the law and the authorities relied on. I find the following issues fall for determination:-

a) Whether the preliminary objection dated 3rd June, 2021 is merited;

b) Whether the preservation orders given on 13th July, 2017 are still valid and if so, whether they should be nullified, set aside, discharged or rescinded;

*c) Whether the sum of Kshs.18,500,000/= and the seven (7) motor vehicles being Registration Numbers KCH 596H Toyota Yelfire, KCK 444A Toyota Prado, KBV 628K Toyota Station Wagon, KBP 768Q BMW, KCK 768Q BMW, KCH 723Z Toyota Alphard and KCK 444B Toyota Land Cruiser (hereinafter "the property") should be released to the 1st Respondent/Applicant, **Stephen Vicker Mangira unconditionally; and***

d) What convenient orders should the court make.

a) Whether the Notice of preliminary objection dated 3rd June, 2021 is merited.

19. Having read through the preliminary objection not one but more than two times, I understood the gist of the objection to be premised on two fronts. The first being that there are pending forfeiture proceedings in **Mombasa High Court Misc. Application No.269 of 2017** and the instant application ought to have been filed in those proceedings. Secondly, that the validity of the forfeiture order is not affected by the outcome of the criminal proceedings.

20. In response, **Mr. Kinyua**, counsel for the 1st Respondent/Applicant has urged the court to take note that there is no forfeiture order in place to warrant this application being made in the forfeiture proceedings, and further, that the preservation order should be rescinded once the criminal proceedings are concluded and acquittal orders confirmed.

21. I wish to first point out that it is trite that a **Preliminary Objection** should always consist of a pure point of law, either pleaded or arising by clear implication of the pleadings, and which is argued on the understanding that it may dispose of the case at a preliminary point. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969)EA 696**, the Court stated that a **Preliminary Objection** raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.

22. The undisputed facts of this case are that there are Seven (7) motor vehicles as listed in the preceding paragraphs and Kshs.18,500,000.00 belonging to the **Mr. Stephen Vicker Mangira**, the 1st Applicant which were taken custody of by the Asset Recovery Agency courtesy of a preservation order issued by the court on **13th July, 2017**. Those orders were issued on the grounds that the confiscated property was believed to be proceeds of crime and money laundering.

23. Thereafter, and pursuant to **Section 84 of POCAMLA** the Asset Recovery Agency instituted forfeiture proceedings which are now pending the under **Mombasa High Court Misc. Application No.269 of 2017**. The Respondent/Applicants were then Charged and prosecuted for the offences of money laundering for which they were later acquitted on **12th May, 2021**.

24. On one hand, **Mr. Kinyua** Counsel for the Respondent/Applicants submits that the Applicants have been acquitted of all offences preferred against them hence there would be no basis of holding that property further. He lays heavy emphasis on the provision of **Section 89(1)(b) of Proceeds of Crime and Anti-Money Laundering Act** and seeks the court to appreciate that under that provision, a court only has the option of rescinding the preservation orders once the proceedings against the Defendant Concerned are concluded.

25. **M/S Gitiri** on the other hand, is of the opinion that the application is premature as the forfeiture proceedings have not been expended on

the fact that the Applicants had been acquitted from all charges brought against them. According to her, the Asset Recovery Agency did not preside over the criminal proceedings against the Applicants and cannot be said to have exhausted the investigations against the Applicants until the forfeiture proceedings are concluded.

26. **Section 89** of the **Proceeds of Crime and Anti-Money Laundering Act** provides as follows:-

89. Variation and Rescission of Orders

(1) A court which makes a preservation Order:-

(a)

(b) Shall rescind the preservation order when the proceedings against the defendant concerned are concluded.

27. The above provision should be read in harmony with **Section 92** of **Proceeds of Crime and Anti-Money Laundering Act** which reads as follows:-

(1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities 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.

(2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.

(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.

28. The above Sections illustrate that the drafters of the Proceeds of Crime and Money Laundering Act appreciated instances where a person accused of money laundering would be released and/or convicted of the charges while the civil forfeiture proceedings are still pending. In such a scenario and as duplicated above, **Section 92(4)** of the **Proceeds of Crime and Anti-Money Laundering Act** lays the guide as to the outcome of the criminal proceedings in respect of an offence in which confiscated property is concerned and would not affect a preservation order in force or an application for forfeiture order in line with **Section 90** of the same Act.

29. Therefore, it would appear to me, and I so hold, that the validity of preservation orders which lay the basis of the forfeiture proceedings is not predicated on the existence of a conviction or an affirmation of a predicate offence. In the former, the Asset Recovery Agency has to lead evidence in the forfeiture proceedings to prove that the subject property are proceeds of crime, independent of what happens in the criminal case. It is until then, and only then, that the court can pronounce itself on whether the subject property has to be forfeited to the state as proceeds of crime or to be released back to the Defendant.

30. In my view, the term **Section 89(1)(b)** of **Proceeds of Crime and Anti-Money Laundering Act** should be construed to accommodate both forfeiture and criminal proceedings against the Defendant so as to elicit the intentment under **Section 92(4)** of the same Act. I believe such was also the view of the court in the case of **Republic –vs- Department of Public Prosecution & Others, J.R. Civil Application No.102 of 2016** where it was held thus:-

“The offence of money laundering must be deemed as ‘stand alone’ offence. In proving that the proceeds or property are proceeds of crime even circumstantial evidence will be crucial. There is in my view no need to await any prior convictions of other offences or before launching the prosecution of alleged money launderers.

I have added the emphasis to illustrate that even the legislators appreciated instances where there may be no one to prosecute hence there may be no conviction for a predicate offence or crime. The need to prove predicate offence before laying a charge of money laundering was effectively dispensed with. The principal offender who committed the predicate offence may never be there to be prosecuted, yet access to the proceeds of crime would have been achieved.

31. In view of the above discussion, and having considered the material placed before me, I do hold that the instant application has been taken up prematurely since the proceedings to be concluded against the Respondent/Applicants are not only the criminal proceedings in which they were acquitted but also the forfeiture proceedings. It is only until the subject property can be pronounced as or not proceeds of crime that the same can be considered.

32. As such, it is this court’s finding that the **Preliminary Objection** dated **3rd June, 2021** is merited and is hereby upheld. It would therefore be inconsequential to belabor on the other issues pointed out at the onset of my analysis for determination.

33. In the resultant, the application dated **19th May, 2021** deserve to be dismissed and the same is hereby dismissed but with no orders as to costs.

It is hereby so ordered.

DATED AND SIGNED and DELIVERED VIRTUALLY at MOMBASA this 25TH day of AUGUST, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY at MOMBASA this 2ND day of SEPTEMBER, 2021.

J. N. ONYIEGO

JUDGE