



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**MISCELLANEOUS APPLICATION NO. 43 OF 2019**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS UNDER SECTIONS 81 & 82 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT (POCAMLA) AS READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES.**

**AND**

**IN THE MATTER OF: PRESERVATION ORDERS FOR A TOTAL OF KSHS. 1,788,675.92/ HELD IN BANK ACCOUNT NUMBER 00010100088 AT SIDIAN BANK AND ACCONT NUMBER 0325610001 HELD AT DIAMOND TRUST BANK AND MOTOR VEHICLES REGISTRATION NUMBERS KCM 465X TOYOTA AXIO, KCR 297A, KBT 692W, KCC 646D, KBY 184H AND KCH 179N ISUZU BUS COACHES**

**BETWEEN**

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

**VERSUS**

**ROSE MONYANI MUSANDA.....RESPONDENT**

**AND**

**SIDIAN BANK LIMITED.....INTERESTED PARTY**

**RULING**

1. By an originating motion dated 8/10/2019, filed by the Asset Recovery Agency (Applicant) Pursuant to Sections 81 & 82 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), this court issued ex parte orders against the respondent/applicant (Rose Monyani Musanda ) directing that;

- 1) That the application is certified urgent.
- 2) That a Preservation Order is granted prohibiting the respondent or her agents or representatives from transacting, withdrawing, transferring, using and any other dealings in respect of funds held in the following accounts;
  - (i) Kshs. 1,462,963.47/= held in Bank Account No. 00010100088 in the name of Monyani Rose Musanda held at Sidian Bank Kangemi Branch.
  - (ii) Kshs. 325,712.45 held in Bank Account No. 0325610001 in the name of Monyani Rose Musanda held at Diamond Trust Bank, Madina Mall Branch.
- 3) That the preservation order is hereby granted against the respondent and or her employees, agents or representatives acting on her behalf prohibiting the sale, transfer or disposal off or other dealings with the following motor vehicles;
  - i. KCM 465X Toyota Axio,
  - ii. KCR 297A Isuzu Bus Coach

iii. KBT 692W Isuzu Bus Coach

iv. KCC 646D Isuzu Bus Coach

v. KBY 184H Isuzu Bus Coach

vi. KCH 179N Isuzu Bus Coach

4) That the respondent is hereby directed to surrender the original logbooks of the motor vehicles specified in paragraph 3 above to the applicant within 7 days herein.

5) That an order is hereby granted directing the Director General of National Transport and Safety authority to register a caveat against the records of each of the motor vehicles specified in order 3 above.

6) That the Respondent is hereby ordered to surrender the motor vehicles specified in paragraph 3 above to the applicant and be assembled at the Directorate of Criminal Investigations along Kiambu Road with immediate effect.

7) That the orders be gazetted and notice be served upon the persons interested in the affected property within 21 days pursuant to section 83 of POCAMLA.

2. Aggrieved by the above orders, the Respondent/Applicant moved this court on 29/10/2019 vide a notice of motion of even date pursuant to Section 89 of POCAMLA and Order 40 Rules 1 and 2 of the Civil Procedure Rules enjoining Sidian Bank as an interested party thereby seeking orders that;

a. The exparte orders of 8/10/2019 be discharged.

b. Pending hearing and determination of the application, a conservatory order to issue releasing the motor vehicle KCR 297A Isuzu NQR, KCH 179N NQR, KBY 184H, Isuzu NQR to the Respondents/Applicants.

c. An order of injunction to issue directed at the interested party herein (Sidian Bank Kawangware Branch) to unflag the Applicant's bank account No. 01001010008803 and Account No. 01014000572482 for resumption of normal operations in the processing of loan and other bank related activities.

d. That the orders issued on the 8<sup>th</sup> October, 2019 against the Applicant's motor vehicles in prayers 3 and 4 above be rescinded and the applicant be allowed to operate the said vehicles and bank accounts normally.

e. That cost of this application be provided for.

### **Respondent's/Applicant's Case.**

3. The application is premised upon grounds set out on the face of it and an affidavit sworn by Rose Musanda on 29/10/2019.

4. According to the respondent, the impugned exparte orders were unconstitutional, unjust, irregular, unprocedural and lacking in nexus of the allegations. That she is a business woman engaged in the transport industry under the umbrella Sacco called Latema. She contended that the motor vehicles carted away from her were lawfully acquired hence deprivation of ownership of property through unconstitutional means. She stated that, the unlawful preservation of the property has subjected her to undue hardship thus denying/exposing her to loss of livelihood.

5. It was further her claim that, she acquired her property after selling her plot ref. No. 35 at Kitale which proceeds together with money generated from the sale of second hand clothes was used to seek financing from Nyeri Motors Services Ltd who offered her motor vehicle registration No. KBQ 281U at Kshs. 3,080,016/=. That she put the said motor vehicle under the management of Star Services and later moved to Latema Sacco. She averred that after completing loan repayment, Nyeri Motors released the log book to her name.

6. That through another asset financing option by Equity Bank, she jointly acquired another motor vehicle registration number KBT 692W NQR Isuzu a 33 seater at kshs. 4,300,000/=. She claimed that the said motor vehicle got stolen from the parking after a 9 months of purchase. That as a consequence, the insurance compensated her a sum of kshs. 3,200,000/= out of which Equity recovered its loan balance of kshs. 1,600,000/= leaving her with Kshs. 1,600,000/=.

7. That using the Kshs.1,600,000/=compensation, she approached Central Farmers Garage (CFG) who together with Sidian Bank (interested party) financed her to acquire KBY 184H NQR Isuzu a 33 seater matatu. After 36 months repayment at Kshs. 140,000/= per month, she completed the loan and had the motor vehicle registered in her name. As proof of the said loan financing, she attached a letter of offer marked RM-2. That with that motor vehicle at her disposal, she joined other investors to create an empire in the transport industry.

8. She further averred that, after selling motor vehicle KBQ 281U, she deposited the proceeds to Sidian Bank (interested party) to obtain a loan which she used to acquire motor vehicle registration No. KCC 646D which she also later sold after full repayment. That she later joined hands with one Margaret Wambui with whom they obtained a loan facility from Sidian Bank (interested party) to procure motor vehicle Registration No. KCH 179N which was registered in her sole name because the bank had built trust on her. She stated that KCH 179N was worth 4.5 million which was raised through 1.2million being proceeds from the sale of motor vehicle No. KBQ 281U and 2.2million from

the sale of KCC 646D.

9. It was further stated that, after repaying the loan for KCC 646D, she again acquired a loan from Sidian Bank who financed the purchase of motor vehicle KCR 297A after she deposited money out of proceeds acquired after selling her motor vehicles. She claimed that the motor vehicles KCR 297A, KCH 179N and KBY 184H which were seized by the Asset Recovery Agency belonged to Margaret Wambui and Tom Konduti Odhiambo.

10. She further stated that sometime in July 2019, she was arrested and charged jointly with her children (Mercy Musanda and Anne Musanda) on allegations of trafficking of Narcotics and psychotropic substances. She claimed to be out on bond with Margaret Wambui as her surety using the log book of KCH 179N as security having transferred the same to her after clearing the loan. That KBY 184H which she had sold to Tom Konduti Odhiambo was held as security to secure the release of her son-in-law with whom she has been charged in the drug related charges at JKIA Law Courts.

11. She expressed her disappointment on the freezing of her Sidian Bank Account no. 01001010008803 Kawangware account which is in her name and also account no. 10140005572482 which is the motor vehicle account for loan repayments and asset financing. That the JKIA court criminal charges have not been proved and have no bearing to her investments which is otherwise legally acquired through lawful sources of income.

12. It was further deponed that motor vehicle Axio KCM 465 X is held by the investigating officer investigating the criminal charges and an application for its release is pending before JKIA Law Courts. That motor vehicle KCR 297A is still on loan and that the logbook is still in her joint name with Sidian bank (interested party). That loans advancement cannot constitute a crime of money laundering.

#### **Applicant's/Respondent's Case**

13. In response to the application, the Applicant/Respondent (Assets Recovery Agency) relied on a replying affidavit sworn on 11<sup>th</sup> November, 2019 sworn by Corporal Fredrick Muriuki an Investigating Officer pursuant to the National Police Act. Mr. Muriuki averred that on 14/06/2019 he and other officers arrested the respondent/applicant who was suspected to be dealing with illicit trade in Narcotics. That upon search on her residence, a total of 796.66grams of Heroin were recovered and a sum of cash Kshs, 49,842/=.

14. That on 8<sup>th</sup> August, 2019, the applicant/Respondent Agency received information that the respondent had acquired massive assets/properties using proceeds obtained from illegitimate trade of wildlife trophies, psychotropic and narcotic drugs. That following that revelation, he filed a misc. Criminal Application no. 3463/2019 seeking orders to search, inspect and freeze account number 01001010008803 in the name of Monyani Rose Musanda with Sidian Bank and account no. 032561001 in the name of Rose Musanda with Diamond Trust Bank, Madina Mall Branch. That the suspicious massive deposits made into the two accounts revealed massive deposits below Kshs. 1,000,000/= with the intention of evading detection from Central Bank hence the conviction that they were out of illegitimate trade in narcotics.

15. He further deponed that the impugned motor vehicles were acquired using proceeds of crime. In his view, this court's order of 8/10/2019 did not affect the respondent's accounts nos. 0550196682276 and 1330299655400 held at equity, account no. 01694393322100 held in cooperative bank and account no. 001050062566 held in Sidian Bank hence she has not been denied her sources of income and living.

16. He asserted that it will not be in order to lift the preservation orders while the applicant is in the process of filing forfeiture application for recovery of the assets and funds in issue. That the greater public interest outweighs the respondent's personal interest and that the lifting of the orders will render the intended forfeiture application nugatory.

17. In her rejoinder, the Respondent filed a supplementary affidavit filed on 22/11/2019 denying involvement in any illegal trade.

#### **Interested Party's Response.**

18. Through a replying affidavit sworn on 20/11/2019 by Beverline Chweya a legal officer working with Sidian Bank, she averred that the purchase of motor vehicle registration no. KCR 297A by the respondent was financed by the interested party to the tune of Kshs 2.8 million which loan has not been repaid in full. She attached a bank statement held in their bank by the respondent Exhibit BC pages 1-9, swift confirmation that 2.8 million was credited to the respondent's account (exhibit BC at page 20), copy of log book in their joint names with the respondent (Exhibit BC at page 21-23 and that with the order of 8/10/2019 they are unable to recover their loan.

#### **Respondent's Submissions.**

19. In submission, the firm of Omwoyo Momanyi Gichuki & Co. Advocates appearing for Respondent/Applicant filed their submissions on 25/10/2019 basically restating the averments contained in the affidavit in support of the application. Mr. Nyaberi submitted that all the bank deposits indicated in the frozen bank accounts were lawful sources of income arising from management of matatu business. Counsel opined that cash obtained from Sidian Bank to acquire property cannot be said to be proceeds of crime.

20. Counsel further contended that the applicant had failed to make full disclosure at the ex parte stage regarding the relationship between the source of the money used to purchase the impugned motor vehicles and the illicit trade and dealing in drugs. He expressed the view that without full disclosure of material information the court will not be able to arrive at affair and just decision. To support this proposition, counsel referred the court to the holding in the case of **Bahadurali Ebrahim Shamji vs Al Noor Jamal and 2 others (1998)eKLR.**

#### **Interested Party's Submissions.**

21. Mr. Muriithi appearing for the interested party adopted the averments contained in their replying affidavit to the application for discharge of the impugned orders. He submitted that the bank stands to suffer if the orders are not lifted as the recovery process of their loan facility has been hindered following the preservation of the motor used as security. That the subject motor vehicle ought to be exempted from the forfeiture proceedings pursuant to section 94 (1) of POCAMLA.

22. Learned counsel urged that the applicant (Agency) was guilty of non-disclosure of material information regarding the status of the motor vehicle KCR 297A which was obtained through a loan facility. To support this assertion, counsel made reference to the holding in the case of **Ethics & Anti-corruption Commission v Joseph Chege Gikonyo and Another (2016) eKLR** where the court set aside freezing orders for non-disclosure of material evidence.

#### **Applicant's/Respondent's (Agency) Submissions**

23. Mr. Mohamed Adow appearing for the applicant/respondent basically reiterated the contents in the affidavit in support of their application and reply to the respondent's/applicant's application plus submissions filed on 27/11/2019. Mr. Mohamed submitted that the respondent was in contempt of the court and does not deserve audience for disobeying Orders of 8/10/2019 by failing to surrender log books for motor vehicles registration Nos. KCR 297A, KCH 179N and KBY 184H Isuzu all of which are in the respondent's names. To support the proposition that the respondent does not deserve audience for disobedience to court orders, counsel referred to the decision in the **Nation Media Group Ltd vs. Kamlesh Mansukhlal Damji Pattni & 2 others (2013) eKLR**. **Hadkinson vs. Hadkinson (1952) ALL ER 567**.

24. Mr. Mohamed further submitted that the respondent had not met the threshold for discharge of the impugned orders pursuant to Section 89 of the POCAMLA and Order 45 Rule 1 of the Civil Procedure Rules. That the burden of proof lies with the respondent which proof has not been discharged. Counsel placed reliance on the decision in the case of **Assets Recovery V Pamela Aboo (2018) eKLR**. Regarding the claim that the respondent has suffered untold hardship and suffered as a result of the impugned orders, counsel submitted that the respondent has four more accounts which were not touched hence the alternative sources of income to continue earning a living.

25. Learned counsel further contended that there is no error or omission on the order being challenged to warrant review. To support that position the court was referred to the decision in the case of **National Bank of Kenya Ltd vs. Ndungu Njau Nairobi court of appeal civil appeal number 211 of 1996**. Counsel also urged that in money laundering schemes, ownership of proceeds of crime can be direct or indirect. That the motor vehicles in question were acquired through proceeds of crime and the money used to subsequently acquire other motor vehicles does not become clean money.

26. Learned counsel further submitted that since there is reasonable suspicion that the motor vehicles were obtained through proceeds of crime there is reasonable ground to preserve the accounts. That suspicion is reasonable if founded on existent facts. To justify his submissions, counsel referred to the decision in the case of **Timothy Isaack Bryant and others vs. Inspector of police and 7 others Misc. Criminal Application no. 219/2014 and Emmanuel suipenu Siyanga vs. Republic criminal appeal no. 209/2013**

#### **Analysis and Determination.**

27. I have considered the application herein, affidavits in support, reply thereto and submissions by counsel. Issues for determinations are;

- a) **Whether the orders of 8<sup>th</sup> October 2019 were properly issued**
- b) **Whether the respondent has met the threshold for discharge of the orders made on 8/10/2019.**

28. The impugned orders were issued ex parte pursuant to Section 82 and 83 of the POCAMLA Act.

Section 82 provides that

- 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 exemptions as may be specified in the order, from dealing in any manner with any property.**
- 2) **The court shall make an order under sub-section (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.**
- 3) **A court making preservation orders shall at the same time make an order authorizing the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.**
- 4) **Property seized under Sub-Section (3) shall be dealt with in accordance with the directions of the court that made the relevant Preservation order,**

29. Under Section 83 of POCAMLA, notice of the preservation order is issued to all persons known to the agency to have an interest in the property which is subject to the order and any person interested in the property may issue notice to the Director of the agency of his or her intention to oppose the making of the forfeiture order or to apply for an order excluding his interest in the property concerned from the

operation thereof.

30. However, section 84 of POCAMLA provides a span of 90 days for the preservation orders issued under section 82 unless, there is an application for forfeiture order pending before the court in respect to the preservation order; there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or the order is rescinded before the expiry of the period.

31. In the instant case, there is no order for forfeiture in place and also the impugned preservation order is due to expire after 90 days. What is pending determination is whether there is justification on the grounds advanced by the respondent to vacate, review or rescind the orders of 8/10/2019.

32. For a court to vary or rescind the preservation orders, section 89 of the POCAMLA has set out conditions precedent as hereunder; Sub-section (1)- a court which makes preservation order;

**a) May, on application by a person affected by that order, vary or rescind the preservation order or an order authorizing the seizure of the property concerned or other ancillary order if it is satisfied -**

**i. The operation of the order 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 the 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.**

33. It is therefore clear from the wording of section 82(2) that a court issuing preservation orders is persuaded by reasonable grounds to believe that the property concerned was intended for use in the commission of the offence or it amounts to proceeds of crime. What constitutes reasonable suspicion is for the individual judge or Jury to determine depending on the circumstances and or merits of each case. The same must be founded on existence of factual foundation and not mere imagination or malice. See *Timothy Isaac Bryant and others vs. inspector of police and 7 others and Emmanuel Suipenu Siyanga vs.* (supra) where the court stated that “... a suspicion cannot be held reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion.

34. It is therefore incumbent upon the respondent/applicant to prove that the applicant/respondent does not deserve the orders sought on the account that the orders will deprive him the means to provide for his reasonable living expenses and cause him unnecessary hardship and, that his suffering outweighs the risk that the property will be destroyed, lost, damaged concealed or transferred. See **Assets Recovery Agency vs. Pamela Aboob (supra)**

35. Forfeiture proceedings under POCAMLA is not depended upon the existence or non existence of criminal proceedings in relation to the property sought to be forfeited. Civil proceedings under POCAMLA are either conviction or non conviction based proceedings hence the respondent’s proceedings at JKIA and the doctrine of being presumed innocent until proved guilty is immaterial in the circumstances.

36. In the case of *Assets Recovery Agency v Quorum Limited & 2 others* (2018)eKLR making reference to *Teckla Nandjila Lameck vs. President of Namibia (2012)(1) NR 255 (HC)* the court had this to say;

***‘Assets forfeiture is, as is stated in 50 POCA a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are further more not necessary related to a prosecution of an accused. Those proceedings are open to the state to invoke Whether or not there is a criminal prosecution. Similar position was cited in the case of Director Assets Recovery Agency and Others v . Green and Others [2005] EWHC where the court stated that;***

***“in the civil proceedings, for recovery under part 5 of the Act, the Director need not allege the commission of specific offence but must set out the matters that are alleged to constitute the particular kinds of unlawful conduct by or in return for which the property was obtained.”***

37. In the instant case, the proceedings herein were triggered by the arrest of the respondent for alleged drug trafficking. The charges preferred against her jointly with her children are still pending at JKIA Magistrate’s Court. The Agency alleged that following investigations, they received evidence revealing massive deposits in the respondent’s accounts which proceeds were used to buy matatus to conceal the source of that income and by extension, clean or launder the illicit income. There is no dispute that the respondent is facing drug trafficking charges. The question is whether the motor vehicle and the proceeds in the bank accounts are as a result of illegal income. That the amounts deposited were huge sums below 1 million which was made to avoid declaration of the source of income.

38. I have perused annexure FM 7B being bank statement account no. 01001018088 Sidian Bank for the period of 25/11/11 and 2/09/2019. The only huge credits into the respondent’s account are 3.7 million being a loan disbursement made on 3/04/2014, 3 million being a loan disbursement made on 19/03/2015, 2.8million loan disbursement made on 27/11/2018, 300,000/- cheque deposit made on 25/06/2019and 28/06/2019. The rest of the deposits are smaller amounts which do not reflect the below 1 million deposit made to avoid declaration to Central Bank as alleged by the applicant.

39. Equally, in account no. 01001010008803 marked “RM 7a”by the applicant in support of the preservation order application there are no deposits close to one million with the intention to avoid disclosure to the Central Bank. Similar position applies to the Diamond Trust Bank account no. 032561000.

40. From the account deposits, it is clear that the regular deposits made are reflective of some business being done by the respondent which is attributed to matatu business. However, the claims by the respondent that she was engaged in the sale of second hand clothes is not supported by any evidence. I will therefore assume that all the monies in the two subject accounts were either out of illicit trade or genuine income.

41. The asset recovery has connected the finances of the preserved accounts with illicit dealings based on the arrest of the respondent with some drugs (heroin). However, did the respondent acquire the subject motor vehicles through illicit proceeds. To answer this, I will address the issue of each motor vehicle separately.

**a) MOTOR VEHICLE REGISTRATION NUMBER KCM 465 X**

42. According to the applicant, this motor vehicle was acquired through proceeds of crime. The respondent did not offer any explanation as to how the money used to acquire the motor vehicle was obtained. She only stated that the motor vehicle is a subject of court proceedings at JKIA and that it is pending an application for its release. Considering the condition under which it was impounded during investigations for drug trafficking, there is reasonable suspicion that it was most likely acquired as a result of proceeds suspected to be out of drug trafficking. Whereas the respondent has not been found guilty or not, mere arrest with the alleged drug is sufficient ground to reasonably suspect that the motor vehicle may have been acquired using drug trafficking related proceeds. At this stage the agency is not supposed to prove on a balance of probability but rather prima facie basis. In the absence of any explanation to the contrary, the only reasonable conclusion is that the preservation orders were properly issued.

**Motor Vehicle Registration No. KCR 297A Isuzu**

43. The respondent claims that the said motor vehicle was acquired through a loan from Sidian Bank (interested party) which loan is still due and owing. According to the interested party, the motor vehicle was acquired in their joint names with the respondent. This fact is vindicated by the logbook attached to the interested party's affidavits at page 21. A swift transfer of 2.8 million is clear from the bank statement in respect of account held at Sidian Bank attached to the preservation application and transfer of funds by the interested party on 20/07/2018 attached at page 20 of the supporting affidavit.

44. From the said evidence, it is apparent that motor vehicle registration no. KCR 297A was lawfully acquired through a loan facility provided by the interested party hence that money cannot be said to be proceeds of crime. To that extent, it is my finding that the interested party has a genuine interest in the motor vehicle to which they stand to lose if the property is preserved and loan repayment stopped. It is therefore crystal clear that unless the orders preserving this motor vehicle are rescinded, the respondent will be subjected to unnecessary hardship in terms of accruing penalty in loan repayment.

45. It is common knowledge that a person engaged in illicit trade can engage in legal business as well. To hold otherwise would be tantamount to placing an omnibus condemnation on all the property acquired by the respondent regardless of the time when it was acquired and the source of income. Even a livestock thief can have genuinely acquired livestock in the midst of stolen ones hence the need to separate the genuine from the illicit. In the circumstances of this case, motor vehicle Registration no. KCR 297A having been obtained through a loan facility, it should be excluded from the preservation order.

**Motor Vehicle Registration KBT 692W Isuzu Bus Coach.**

46. To justify the legal acquisition of this motor vehicle, the respondent stated that she acquired a loan from Equity Bank at Kshs. 4.3 Million. That the motor vehicle got stolen and it has never been recovered to date. Since the motor vehicle is claimed to have been stolen, and no evidence of any report made to the police, I will make a finding that the motor vehicle should be preserved with orders that it be impounded by the agency wherever it is found for purposes of forfeiture proceedings.

**Motor Vehicle KBY 184H Isuzu Bus Coach**

47. According to the respondent, the motor vehicle was purchased out of Kshs. 1.6 million being proceeds realized from the insurance claim in compensation of the stolen motor vehicle registration No. KBT 692W. That with 1.6 million as a deposit and a joint loan by Central Farmers Garage, and Sidian Bank, she bought the motor vehicle and later transferred it to Thomas Odhiambo Konduti after clearing the loan. According to the NTSA records attached to the preservation application, the said motor vehicle was originally obtained through a joint loan with Sidian Bank and later transferred to Thomas Odhiambo Konduti.

48. It is not clear whether a sum of Kshs. 1.6 million was from compensation by insurance company in respect of motor vehicle KBT 692W so as to realize Kshs. 1.6million deposit for KBY 184H. However, there is proof that the said motor vehicle was jointly held by the Sidian Bank which financed its purchase and later transferred it to Thomas Odhiambo Konduti. Thomas Odhiambo was not enjoined as an interested party nor was he served with the order. He cannot be condemned unheard with his property being the subject of forfeiture proceedings without his knowledge. He was not served with the preservation order hence it will be unconstitutional to include his property in the preservation order.

**Motor Vehicle KCH 179N Isuzu Bus Coach**

49. According to the respondent, this motor vehicle was bought through a loan facility at Kshs. 4.5 million and that he raised a deposit of 1.2 million being proceeds from the sale of KBQ 281U and 2.2 Million being proceeds from the sale of KCC 646D. There was no evidence that a sum of 1.2 million was raised from the sale of KBQ 281U and 2.2 million from the sale of KCC 646D. There was no proof that Margaret Wambui the current owner did contribute any money towards the acquisition of the motor vehicle as claimed in paragraph 20 of the Respondent's replying affidavit. Although Margaret was not enjoined as an interested party, the claim that she was a joint purchaser with the respondent and later transferred to her is questionable. Accordingly, the transfer of the motor vehicle to Wambui is suspect from the word go. There is therefore reasonable suspicion that part of the money used to purchase the motor vehicle was obtained from suspicious sources

among them drug trafficking. Consequently, the motor vehicle shall remain preserved as per the impugned orders.

**Motor Vehicle Registration No. KCC 646 D Isuzu**

50. It is the respondent's evidence that she bought motor vehicle KBQ 281U through proceeds realized from the sale of land in Kitale, and later obtained a loan from Nyeri Motors which she later sold and deposited the money with Sidian Bank who in turn gave her a loan. That after clearing the loan, she sold the motor vehicle. She attached as proof a loan agreement with Nyeri Motors. According to the log book, the motor vehicle was obtained jointly with Sidian Bank and later transferred to Wallmas and Sons Co. Ltd as the current owners. The said company was not enjoined as an interested party. The source of the money being a loan from Nyeri Motors for the first loan, and later Sidian bank is not in question nor controverted. I am satisfied with the explanation given. Obviously, the money loaned cannot be said proceeds of crime. To that extent the preservation orders in respect of motor vehicle KCC 646 D are hereby set aside.

**CASH in Account No. 010010100088 in Sidian Bank Kangemi Branch and Account No. 0325610001 Diamond Trust Bank held in the name of Monyani Rose Musanda**

51. I have perused the statements in respect of the two accounts. They have mixed deposits which have not been explained fully by the respondent as to their sources. There are some deposits which needs to be accounted for. Faced with drug trafficking charges, there is every reasonable ground to suspect that part of the deposits would be proceeds of crime in this case. Since this is not a full trial, the threshold is on the basis of a prima facie case based on reasonable suspicion.

52. Since it is hard to separate the genuine from the illicit income at this stage, it is safe to preserve the two accounts. Accordingly, the preservation orders in respect of these two accounts shall be retained.

53. As to whether the Sidian Bank will suffer loss in recovery of its loan, the respondent can open a new account and continue repaying the loan using from proceeds from the subject motor vehicle for which the loan was acquired (KCR 297A) which has been ordered excluded and released from the preservation orders.

54. Regarding the orders depriving the respondent her means of survival, the same is not applicable as she has other sources of income as reflected from the unfrozen accounts and the continued income accruing from motor vehicle KCR 297A now discharged from preservation orders.

55. As to the prayer that the respondent was in contempt of court orders, the respondent did give an explanation that the motor vehicle's log books are deposited in JKIA Magistrate's court as security for the release of the respondent and her co-accused persons hence did not disobey the order for surrender of log books which are in lawful custody. I do not find any good reason to conclude that the respondent did act in contempt of court order.

56. Having held as above, it is my finding that the respondent has partially proved her case to the required degree to discharge part of the preservation orders and therefore make orders as follows;

- a) That the exparte preservation orders made in respect of motor vehicles KCR 297 A Isuzu Bus Coach, KCC 646D Isuzu Bus Coach and KBY 184 H be and are hereby set aside and /or rescinded.
- b) That the motor vehicles and log books being held in respect of motor vehicles named in (a) above be released to the registered owners.
- c) That log books in respect of motor vehicles KCM 465X Toyota Axio, KBT 692W Isuzu Bus Coach and KCH 179N Isuzu bus coach be surrendered to the Applicant/Respondent (Asset Recovery Agency).
- d) In the event that the log books for motor vehicles named in (c) above are being held at the JKIA Magistrate's Court as security, the affected accused persons to make alternative security/surety arrangements with the lower court to enable the release of the said log books so held as security to the applicant/Agency within 14 days from the date of delivery of this ruling, in default the affected accused persons shall stand exposed to being remanded in custody for lack of surety/security in the criminal case number 88/2019 JKIA law courts.
- e) Each party to bear own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JANUARY, 2020.**

.....

**J. N. ONYIEGO**

**JUDGE**