REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPLICATION NO. 195 OF 2017

ASSETS RECOVERY AGENCY……APPLICANT

VERSUS

STEPHEN VICKER MANGIRA……..……1ST RESPONDENT

NABIL LOO MOHAMED……..……2ND RESPONDENT

BAKARI KILA BAKARI……...……3RD RESPONDENT

AKI MOTORS…….....……....……1ST INTERESTED PARTY

ALI CARS LIMITED…….....……..2ND INTERESTED PARTY

RULING

1. By a Notice of Motion application dated 10th December, 2019, brought under **Section 81, 82, 86, 087 and 89** of the **Proceeds of Crime and Anti-Money Laundering Act, Order 45 Rule 2 of the Civil Procedure Rules**, the Applicant (Assets Recovery Agency) seeks the following orders:

> **a) Spent**
>
> **b) That the preservation order granted to the Applicant by the Honourable Court on 13th July, 2017 be varied by substituting the name Central Bank of Kenya with Kenya Commercial Bank Account Number […] in the name of Assets Recovery Agency in order7.**

2. The application is premised on the 16 grounds on its face and further supported by an affidavit sworn by Gitiri Jennifer, a Senior State Counsel on the 10th December, 2019.

3. The application is opposed by the 1st Respondent vide a replying affidavit sworn by his advocate Kinyua Kamundi on 20th December, 2019 and filed on 15th January, 2020.

4. By consent of the parties, on 20.1.2020 this court directed that the application be disposed by way of written submissions which were highlighted on 19th February 2020 wherein M/s Gitiri appeared for the Applicant whilst the learned counsel for the 1st Respondent was M/s Muyaa.

The Applicant's case

5. In the affidavit sworn in support of the application it is averred that the Applicant is established under Section 53 of the Proceeds of Crimes and Anti-Money Laundering Act(POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. Part VIII of POCAMLA especially Sections 81-89 the Applicant can institute Civil forfeiture proceedings against any person

6. Following the arrest of the Respondents herein on suspected drug related offences the Applicant's officers together with their colleagues from the Anti Narcotic Unit embarked on investigations under POCAMLA in respect of financial crimes and identification of proceeds of crime. The Respondents were then prosecuted vide Shanzu Criminal Case Number 257 of 2017. Some assets were also traced and identified to belong to the Respondents.

7. On 13th July, 2017, the Applicant then obtained preservation orders prohibiting the Respondents and their agents from transferring or dealing in any manner with the assets which orders were gazetted on 1/8/2017 vide gazette Notice number 7407. The assets and cash recovered from the Respondents were produced as exhibits in the criminal charge against them and on 12/4/2019 the Senior Principal Magistrate's Court in Shanzu Cr. Case No.257 of 2017 ordered that the monies be deposited in the depositors account by the accountant in Shanzu Law Courts and the deposit slip be surrendered to court as an exhibit.

8. The Applicant then wrote to the Senior Principal Magistrate Court requesting that the money be deposited in the Assets Recovery Agency Account Number 1240221339 held at the Kenya Commercial Bank. It is averred that the Applicant holds its account at the Kenya Commercial bank and not the Central bank hence the need to vary order 7 of the Preservation Order by substituting the name Central Bank of Kenya with Kenya Commercial Bank Account Number […] in the name of the Assets Recovery Agency. The Applicant argues that the court in order 7 of the preservation order ordered that the monies be deposited into the Assets Recovery Account held at the Central Bank of Kenya. It is averred that if the court does not vary the orders as sought then the preservation orders will be rendered nugatory.

9. In her submissions M/s Gatiri submitted that the court can review the orders as sought by virtue of Order 45 Rule 2 of the Civil Procedure Rules which confers power upon the court to review a decree or an order on discovery of grounds *inter alia*, discovery of new important, existence of clerical or arithmetical mistake or error apparent on the face of the decree. The variation order therefore falls squarely within the ambit of Order 45 Rule 2. She further argued that the court should not issue its orders in vain as the application for variation is to ensure the preservation order is enforceable and may be rendered nugatory if the orders sought are not granted.

10. The learned counsel further submitted that the outcome of the criminal proceedings will not affect any order made under POCAMLA, and as such the Applicant has instituted proceedings for forfeiture and the Respondents will be accorded an opportunity to argue its case on whether their money and vehicles are proceeds of crime or not. The counsel relied on the case of ***Teckla Nandjila Lameck-vs-President of Namibia 2012 (1) NR 255 (HC)***, where the court held that assets forfeiture is a civil remedy directed at the confiscation of the proceeds of crime and not punishing the accused. The court went ahead and stated that even if there is prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is therefore directed at the proceeds and instrumentalities of crime and not the person having possession of them.

11. Lastly, the learned counsel submitted that there will be no prejudice occasioned on the Respondent if the orders are granted since the Respondents will be accorded an opportunity to argue his case in the forfeiture application and if he succeeds then he can have the money back. She argued that the provisions of POCAMLA have not been declared unconstitutional and the interest of justice only command that the preservation order be varied to facilitate the preservation of proceeds of crime by the Assets Recovery Agency in accordance with the orders issued by this court on 13/7/2017.

The 1st Respondent's Case

12. Learned counsel for the 1st Applicant, Mr. Kinyua Kamundi retorted that the 1st Respondent is opposed to the release of the monies held as exhibit in the magistrate's court. Further that the 1st and 2nd Respondent filed a Constitutional Petition No. 4 of 2019 in this court challenging the constitutionality of most of provisions in POCAMLA including the provision in which the criminal case is brought, and if the application succeeds then the forfeiture application will stand dismissed.

13. That the prosecution has closed its case in Shanzu SPM'S Criminal Case No. 257 of 2017 and the parties are in the process of filing submissions on a no case to answer. He deponed that the money produced as exhibit was brought to court by a prosecution witness who had retained that money in his possession from February 2017 and officers from the Director of Criminal Investigation, Anti-narcotic unit of the DCI, ODPP and the 1st Respondent participated in proceedings which led to the deposit of the money in court.

14. Further, it was his case that there are no forfeiture orders in force and to demand the funds that are subject to preservation orders and in the criminal case, be surrendered to the Applicant would amount to asking the court to make a presumption of guilt of charges of money laundering or drug trafficking before the criminal case is concluded and before any forfeiture order is made. He is of the view that the property and the money can only be handed over to the Applicant in the event that a forfeiture order is made or after the accused persons are convicted of the offences and thereby violating the Constitutional presumption of innocence under Article 50(2). This cause would impede a fair trial.

15. The learned counsel also argued that the sum of Kshs.18,500,000/= taken from the 1st Respondent was deposited as an exhibit in the criminal case with regard to Count XII thereof. Senior principal magistrate at Shanzu also considered the Applicant's letter dated 18.11.2019 and directed its officers to appear before the court and explain why money produced as exhibit in the criminal case should be moved from the depository account and moved to the Applicant's account. The Applicant's officers however failed to show up. The substantive issue in this application is therefore an issue pending before the magistrate's court and it submitted that this court lacks jurisdiction to deal with the issue least the court be said to be interfering with the independence of the magistrate in the criminal proceedings.

16. According to Mr. Kinyua, the instant application is a violation to and designed to defeat Section 177(a) of the Criminal Procedure Code. By virtue of Section 177(a) aforementioned, the Trial Magistrate court in the Criminal case has power to release the money to either the Applicant or the 1st Respondent as the case may be. Therefore the instant application ought to have been made before the funds were placed under the control of the SPM in the Criminal case and as such the application has been overtaken by events. Further, it is his argument why that no explanation has been tendered in explanation as to why the applicant raises concern to have the money moved to its account when it has for two years been in the custody of the police and no such application was made. In the view of the learned counsel, the Applicant seems to have undisclosed interest in those funds and there might be a miscarriage of justice if the funds are released to its account.

17. In the submissions filed on behalf of the 1St Respondent and orally argued in court, it was submitted that the application was filed by an unqualified person and should be struck out. The reason is that the Applicant agency is not a law firm or an advocate and does not hold any practicing certificate and cannot draw or file any document in court. The Applicant is likened to Matatu Owners Sacco or a Limited liability

Company which can only institute a suit after the proper authority is conferred to it. In support of this, the counsel cited the Supreme Court decision in Petition No. 36 of 2014, ***National Bank Of Kenya Limited –versus-Anaj Warehousing Limited***.

18. The counsel went ahead and submitted that the office of the Attorney General is the only one mandated to represent the National Government in court. On the foregoing the counsel argued that POCAMLA is an illegal and fraudulent Act by taking away the power of the Attorney General. In any event its board of directors must authorize the filing of a suit prior to its commencement. The Act (POCAMLA) is further faulted for the provision under Section 54A(6) where the agency is not obliged to surrender any money it recovers to the consolidated fund. The counsel was thus apprehensive of the possibility of the Applicant misusing the 1st Respondent's funds and alleges that the Applicant is a fraudulent entity established for the purposes of robbing the country. The Advocate from the Asset Recovery Agency, Gitiri Jennifer is also not a state counsel as she alleges since she is not an employee of the Attorney General and the affidavits signed by her are a null and void.

19. The crux of the foregoing submissions is that it would be inequitable and unconstitutional to seize property alleged to be proceeds of crime without any prove of the main element of proceeds of crime committed in relation to the property. It would be against the finding of the court of appeal that equity should be a national value and principle of governance binding every state officer in the case of ***Willy Kitili – versus-Michael Kibet [2018] eKLR.***

Analysis and Determination

20. I have considered the pleadings, together with the submissions by counsel both oral and written. I have also considered the authorities relied on by the parties. A lot of issues have risen from the **pleadings** and counsels' submissions. The constitutionality of the Provisions of POCAMLA and whether the suit has been correctly presented before this court; to wit, whether there is the requisite jurisdiction are issues to be determined in totally different forum. Counsel for the 1st Respondent could file an application challenging the competency of the suit, if need be.

21. The counsel further expressed his discomfort with the circumstances in which the preservation orders were issued. He knows better than anyone that the correct avenue to go about this is by filing an appeal and not arguing his grievances over this via a replying affidavit. With that said, this court is of the considered view that the only issue for consideration with regard to the instant application is whether the Applicant has made a case to warrant the grant of review orders as sought.

22. After considering the motion and the submissions filed together with the entire court record, there is no dispute that this court granted preservation orders on the 13th July, 2017 prohibiting the Respondents' from transferring or dealing in any manner with motor vehicles and money allegedly suspected to be proceeds of crimes. The Applicant had requested that the monies be deposited in its "undisclosed" account held at the Central Bank of Kenya and the order was granted.

23. There is also no dispute that the subject monies were never deposited in the said account and had been in the custody of a police officer who testified against the Respondents in a criminal case they (the Respondents) were charged with among other charges, the offence of drug trafficking and money laundering vide Shanzu Criminal Case No. 257 of 2017. The monies were then produced as exhibits in the said criminal case and on 12/4/2019 the trial magistrate directed that the monies be deposited in the court's depository account and the deposit slip be surrendered to court as an exhibit. As averred by the counsel for the 1st Respondent, officers from the offices of the DCI, Anti-narcotic Drug unit and the ODPP participated in the proceedings that led to the depositing of the subject monies.

24. Now by this application, the Applicant avers that there is need to review the Orders issued on 13th July, 2017 by substituting the word Central Bank Under order 7 thereof with Kenya Commercial Bank Account Number […] in the name of Assets Recovery Agency. The applicant avers that it hold an account in Kenya Commercial Bank for operations of its mandate under POCAMLA and if the orders are not granted then the preservation orders granted on 13th July, 2017 will be rendered nugatory. It is also averred that the court cannot issue orders in vain and to ensure that the preservation orders are obeyed then the word Central Bank under order 7 of the orders issued 13th July, 2017 must be replaced as sought.

25. This court is puzzled just like the 1st Respondent's counsel was as to why it took more than two years for the applicant to notice the need of having the orders reviewed to replace "Central Bank" with Kenya Commercial Bank Account Number [….]. The Applicant seems to have been in a comfort zone with the orders until the monies were deposited in the court's depository account.

26. Nonetheless, it is prudent that the court does consider the law governing review of orders before making its decision. The pertinent provisions are Section **80** of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Needless to say, this court must exercise its power of review only within the scope and ambit of Section **80** of the Civil Procedure Act and Order **45** Rule **1** of the Civil Procedure Rules, 2010.

27. Section **80** of the Civil Procedure Act provides as follows:-

> ***80.*** *Any person who considers himself aggrieved-*
>
> ***(a)****by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> ***(b)****by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

28. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

***45** Rule **1 (1)** any person considering himself aggrieved-*

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."

29. Section **80** above, gives the power of review while Order **45** sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They envisages three situations in which such an application for review may successfully be made:-

***a)** Upon the discovery of new and important matters or evidence which, after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time the decree was passed or order made.*

***b)** On account of some mistake or error apparent on the face of the record.*

***c)** For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay*

30. In the case of **Rose Kaiza v Angelo Mpanju Kaiza Civil Appeal 225 of 2008[2009] eKLR,** the court of Appeal stated:

'An application for review under Order 44 Rule 1(now Order 45 Rule 1) must be clear and specific on the basis upon which it is made. The motion before the Superior Court was based on discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed'

31. Therefore one cannot use a Review application as a basis for supplementing evidence or introducing new evidence. The reason is Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45, Rule 1. Any other attempt, except on grounds falling within the ambit of the above rule, would amount to an abuse of the liberty given to the Court under the Act to review its judgment or order.

32. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

33. Applying those rules to the instant application, the Applicant has not shown whether its account held at the Kenya Commercial Bank was not within its knowledge at the time the preservation orders were made. For lack of an alternative explanation, this court is of the view that the Applicant seeks to supplement its evidence by introducing new evidence which it failed to adduce at the time of hearing the application for preservation orders. The same is outside the ambit on the first limb of the grounds of review.

34. The second limb of Order 45 Rule 1 refers to an error apparent on the face of the record. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. In the case of ***National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)***, the Court of Appeal held:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established.

35. The Indian Supreme Court made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. In the case of ***Attorney General & O'rs v Boniface Byanyima***, the court citing the case of ***Levi Outa v Uganda Transport Company,*** held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear, that no court would permit such an error to remain on the record.

36. A close look at the preservation orders issued on 13th July, 2017, the court did not commit any error by directing the funds be deposited at the Applicant's account held in the Central Bank since the Applicant's account Number […] held in Kenya Commercial Bank was not pleaded anywhere in the subject application. The order has not been complied with for more than two years yet the preservation orders have not been rendered nugatory. I am not therefore persuaded that the Applicant has offered grounds within the meaning of the provisions of Section **80** of the Civil Procedure Act or the Order **45** Rule **1** of the Civil Procedure Rules, 2010. In addition a delay of more than two years before making such application is inordinate and unexplained. The motion must therefore fail as justice delayed without explanation is justice denied and delay defeats equity.

37. In view of my analysis and conclusions above, I find that the application dated **10th December, 2019** is totally unmerited and

misconceived. Accordingly, the application is dismissed with costs to the 1st Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 2nd day of June, 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY