



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**MISC. APPLICATION NO. 16 OF 2016**

**IN THE MATTER OF: AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR ORDERS UNDER SECTIONS 81, 90, 92 AND 100 OF THE PROCEEDS OF CRIME AND ANTI MONEY LAUNDERING ACT READ TOGETHER WITH ORDERS 51 OF THE CIVIL PROCEDURE RULES.**

**IN THE MATTER OF: ARTICLES 2(5) & (6) OF THE CONSTITUTION OF KENYA AND FINANCIAL ACTION TASKFORCE (FATF) RECOMMENDATIONS, 2012**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS FOR FORFEITURE TO THE GOVERNMENT OF KENYA AGAINST MOTOR VEHICLE REGISTRATION NUMBER KCD 241Q JEEP CHEROKEE**

**BETWEEN**

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

**VS**

**CHARITY WANGUI GETHI.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 3<sup>rd</sup> December 2018 the Plaintiff/Applicant sought an order of stay of execution of this court's judgment of 20<sup>th</sup> November 2018 pending the hearing and determination of an intended appeal in the Court of Appeal.
2. The main ground is that following the delivery of the judgment herein the Respondent is now demanding for the release of the motor vehicle KCD 241Q which is in the Applicant's custody. It is feared that if the motor vehicle is released and the appeal succeeds then the same will be rendered nugatory.
3. In his supporting and further affidavits No 75821 Cpl Sautet Jeremiah Matipei averred that it was in public interest that the motor vehicle in question remains in the Applicant's custody pending the hearing and determination of the intended appeal. He confirmed that following the judgment a decree has already been extracted and a demand for release made by the Respondent.
4. In his further affidavit Cpl Sautet averred that to insulate against further depreciation of the subject motor vehicle, the same could be disposed of by public auction and the funds deposited into a joint account pending the hearing and determination of the appeal.
5. One of the issues orally argued by Mr. Githinji of the Applicant was that of substantial loss if the subject motor vehicle is released. He submitted that if the motor vehicle is released it would be subject to wear and tear which would be a loss in the event of a successful appeal. He referred the court to the cases of:-

**(i) Amal Hauliers Ltd vs Abdulnasir Abukar Hassan [2017] eKLR and**

**(ii) Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR.**

He urged this court to find that any release before the Appeal is heard and determined would amount to substantial loss.

6. He submitted that the Applicant had filed the Notice of Appeal within a very short time. He referred to section 97 of the Proceeds of Corruption and Money Laundering Act (POCAMLA) which expresses the intention of the framers of the Act in respect to preservation of property pending the outcome of the case.

7. He argued that the Respondent had relied on some newspaper cutting (CWG1) and wondered what its evidential and probative value was in the absence of the editor. He submitted that the evidence in the cutting amounted to hearsay evidence. He cited the case of **IEBC vs NASA [2017] eKLR** in support of this submission.

8. The Application was opposed by the Respondent who filed a replying affidavit sworn on 10<sup>th</sup> January 20-19. She averred that it was not true that the release of the motor vehicle KCD 241Q would render the intended Appeal nugatory. She states that her vehicle has been wasting at the Directorate of Criminal Investigations head quarter's yard for the last four (4) years. She referred to some newspaper cutting (CWG1) to confirm that her vehicle continues to waste away and lose value.

9. The Respondent averred that she was entitled to the fruits of her judgment in as much as the Applicant's Appeal should not be rendered nugatory. She therefore asks the court to balance the two competing rights equitably. She wants the Application dismissed or in the alternative the motor vehicle be released to her and she be allowed to deposit the log book with the Applicant.

10. Mr Muriungi in his reply submitted that the application having been brought under Order 42 Rule 6 Civil Procedure Rules had to comply with the conditions set thereunder. It was the Respondent's case that the motor vehicle in question is wasting and that is what is in the newspaper cutting. Referring to the case of Machira t/a **Machira & co Advocates vs East African Standard [2002] eKLR** he submitted that the Respondent should be allowed to enjoy the fruits of the judgment unless there are exceptional circumstances prohibiting the same.

11. While still referring to the **Machira case** counsel submitted that the Applicant has failed to show the loss to be suffered by it in case the vehicle was released. That the Respondent has even suggested that she was ready to surrender the logbook to the Applicant pending the hearing and determination of the Appeal.

12. In a rejoinder Mr. Githinji submitted that release of the motor vehicle would increase depreciation. To him the better option would be disposing of the vehicle and the proceeds deposited in a joint account.

### **Determination**

13. I have considered the application, affidavits, submissions and the cited authorities. The judgment appealed against by the Applicant was delivered on 20<sup>th</sup> November 2018. A notice of Appeal was lodged in the High Court on 22<sup>nd</sup> November 2018. The application seeking stay of execution dated 3<sup>rd</sup> December 2018 was filed on the same day. I therefore find that the Notice of Appeal and the Application for stay were filed without unreasonable delay.

14. Order 42 Rule 6 (2) Civil Procedure Rules sets down the conditions to be fulfilled before stay of execution pending appeal is granted. These are:

**2) No order for stay of execution shall be made under sub rule (1) unless—**

**(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.**

15. On the first condition it has been confirmed that the Applicant acted without unreasonable delay. Has it however demonstrated that it will suffer substantial loss unless the stay is granted? Has any security been offered by the Applicant as required in the second condition?

16. As was held in the case of **Butt vs Rent Restriction Tribunal [1982] KLR** the order of stay of execution is a discretionary one. It must therefore be exercised judiciously so as not to render the Appeal nugatory. All circumstances of the case must be put into perspective.

17. Under the same breath the court must remind itself that there is a Respondent who has a judgment in his/her favour and therefore has a legitimate expectation. All these must be weighed together and a balance made by the court.

18. The Applicant herein filed the original case under POCAMLA seeking a forfeiture order in respect of the motor vehicle KCD 241Q which it believed was a proceed of crime. This court found that the Applicant had not established its claim to warrant the issuance of the order sought. The Applicant is challenging this finding through an intended Appeal. There is no evidence confirming the filing of an Appeal. Section 92(6) of POCAMLA provides:

**(6) A forfeiture order shall not take effect—**

**(a) before the period allowed for an application under section 89 or an appeal under section 96 has expired; or**

**(b) before such an application or appeal has been disposed of.**

19. It is therefore evident that the process of appeal must be first exhausted before a forfeiture order is confirmed. It follows that even in cases of release of property the court must ensure that the aggrieved party is protected in the event of a successful Appeal.

20. The motor vehicle the subject of this case was seized vide an order of this court dated 5<sup>th</sup> February 2015 and gazetted on 19<sup>th</sup> February

2015. The said vehicle has been in the Applicant's custody since then. There is no doubt that it is worn out. It is the Applicant's application that the motor vehicle be sold at a public auction and the proceeds be deposited in the parties' joint names, as releasing it would cause more depreciation.

21. On the other hand, the Respondent requests for release of the motor vehicle to her on condition that she deposits with the Applicant the logbook and all other documents.

22. It should be noted that this court has not seen this vehicle and can't imagine the state in which it is in. Secondly the Applicant has not conducted any evaluation of the vehicle for the court to appreciate how much it would fetch considering the claim against the Respondent.

23. This court made a determination and would not be in a position to re-evaluate the evidence and determine whether the appeal has chances of success or not. In as much as the Respondent is seeking for release of the motor vehicle to her at this point, I think it is important that the Applicant has its day in the Court of Appeal

24. After weighing all the issues before me, I find this to be a case where limited stay will be granted. That should enable the Applicant to eventually file its Appeal and any appropriate application before the Court of Appeal.

25. In the circumstances I allow the application for stay of execution limited to **60** days only. Costs in the cause.

The Applicant will thereafter be at liberty to move to the Court of Appeal for substantive orders of stay.

Orders accordingly.

**Delivered, signed and dated this 1<sup>st</sup> day of February 2019 in open court at Nairobi.**

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**HEDWIG I. ONG'UDI**

**JUDGE**