



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION
APPLICATION NO 58 OF 2018

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

LILIAN WANJA MUTHONI T/A

SAHARA CONSULTANTS.....1ST RESPONDENT

LIDI HOLDINGS LIMITED.....2ND RESPONDENT

LIDI ESTTES LIMITED.....3RD RESPONDENT

STEPHANIE MARIGU MBOGO.....4TH RESPONDENT

SHEELA W MBOGO.....5TH RESPONDENT

SHALOM MALAIKA KAMWETI.....6TH RESPONDENT

RULING

1. The applicant/respondent in this matter, the Asset Recovery Agency, lodged the application dated 24th December 2018 against all the respondents under the provisions of the Proceeds of Crime and Anti-Money laundering Act. The applicant seeks to recover a sum of USD 105,293.70 and Kshs 22,445,487.74 held in bank account numbers [...] in the names of the respondents. These sums were said to be held in the respondents' accounts in Equity Bank Limited, Community Branch Nairobi and Diamond Trust Bank Limited, Capital Centre and Villages Market Branches.

2. The application came up for directions on 8th April 2019 and directions were given on the filing of responses by the respondents and for the filing of written submissions on the substantive application.

3. However, the respondents, the applicants in the application the subject of this ruling, did not comply with the directions for filing of responses and submissions. Instead, the respondents filed the application dated 1st July 2019 in which they sought an order that the court directs the Deputy Registrar of the High Court or the Deputy Registrar of the High Court in Siaya to visit the respondents' farm in Uyoma, Siaya County, and table a report before the court. They also sought leave to file additional affidavits and submissions subsequent to such visit.

4. The basis on which the application is lodged is that proceedings in this matter are concerned with the 1st respondent's financial ability and her income generating ventures. She had therefore brought evidence of her agribusiness ventures conducted over the years in her expansive family farm in Uyoma, Siaya. The applicant had cast aspersions and doubts about the existence of the farm and its production capacity. It had also informed newspapers about its allegations about the farm, and the situation was therefore one of the applicant's word against that of the 1st respondent. The 1st respondent was therefore praying that the court orders a site visit to break the impasse between the applicant and the respondents with regard to the existence of the farm and its income generating capacity.

5. The respondents further allege that the court itself risks acting unjustly, unfairly, capriciously and on mere assumptions should it make an order of forfeiture without having had a site visit conducted to ascertain for itself and make its own objective findings on the 1st respondent's agribusiness venture and its income-generating capacity.

6. The application is supported by an affidavit sworn by the 1st respondent, Lilian Wanja Muthoni Mbogo on 1st July 2019. She reiterates in the said affidavit the grounds on which her application is based, annexing in support a newspaper cutting which she alleges casts doubts on the existence of the farm. She also makes reference to the averments set out in the affidavit of Isaac Nakitare sworn on behalf of the applicant on 30th May 2019. It is her case that the interests of justice require that the court visits the site to satisfy itself as to the existence of the farm and its income-generating capacity. A second affidavit in support of the application was sworn by Nam Oneko, the 1st respondent's brother in law.

7. In submissions on her behalf made by her Advocate, Mr. Ligunya, it was argued that the respondents are facing the likelihood of forfeiture of monies held in various accounts, and they were entitled to their day in court. They were therefore asking the court to visit a farm that is ran by the applicant and her husband in Uyoma, Siaya county. This was on the basis that the issue of the farm has been integral to the pending application. The 1st respondent had told the applicant about the existence of a farm from which she derived an income, but that she was not informed of what documents to take with her when she was summoned to the offices of the applicant. She had attended the meeting with the applicant, had been interviewed and she had said that she had a farm.

8. It was further submitted that in her replying affidavit sworn on 5th April 2019 in reply to the application for forfeiture, the 1st applicant had sworn at paragraph 29 and annexed documents all of which were centred on the farm and its operations. The applicant had then, on its own motion, and without notice or order or direction from anyone, sent two of its agents to the farm as was deposed to in the affidavit of Isaac Nakitare sworn on 27th May 2019. The averments of Nakitare that they went to the farm and can confirm that no farm exists, that there are shrubs and minimal activities on the farm, and that the activities belong to the respondent's brother in law were what had prompted the present application.

9. Mr. Ligunya submitted that the averments from the applicant and the respondents raised the possibility that one of the parties was lying on oath; that perjury was not an offence to be taken lightly; and the site visit was therefore critical. It was the respondents' case that no prejudice would be caused by the visit and it would give the court an opportunity to judge the 1st respondent's source of income, which would pave the way for the hearing of the forfeiture application.

10. In his submissions for the applicant, Mr. Adow opposed the application in reliance on the affidavit of Fredrick Musyoki sworn on 8th July 2019 and submissions dated 23rd July 2019. Mr. Adow observed that the court had on 8th April 2019 given directions to the parties to file submissions and replies to the application for forfeiture. The respondents had filed an affidavit in reply to the application dated 5th April 2019 to which the applicant had responded with an affidavit sworn on 27th May 2019 and had thereafter filed submissions. However, instead of filing submissions on the application for forfeiture preparatory to the hearing, the respondents had filed the present application seeking a site visit.

11. Mr. Adow submitted that parties are bound by their pleadings; that it is the duty of the parties to pursue their cases, and the court should not be invited to the arena of what the parties seek to prove.

12. According to Mr. Adow, the issue in the main application is the source of certain funds which are in specific accounts, and whether the funds are the proceeds of crime. The issue before the court was not the question of the ownership of land; that what the applicant was saying is that the funds identified are suspected to be proceeds of crime; that the 1st respondent had been given a chance to explain the source and her explanation was that the funds are from a certain farm, and the other from her husband's business entity.

13. Mr. Adow observed that while the 1st respondent alleged that the funds were from a farm, she had not produced any evidence of existence of the farm or business permits or licences, tax returns on the business income or any evidence to show production and sale of farm produce. It was his submission that the agency had visited the farm to verify whether what she said was correct or not, and it had filed an affidavit in that regard.

14. Mr. Adow submitted that the preservation order in the matter was granted on 29th October 2018, and since then, no evidence had been brought to court to disprove the evidence of the investigator. Mr. Adow noted that while the farm is in Uyoma, there was no evidence of banking there, the banking from the farm alleged to be done in Nairobi. In his view, it would not add value to the matter for the court to order a site visit to the farm as there is no proof of any linkage between the funds and the farm. He submitted that the present application is a delaying tactic and a waste of time and should be dismissed and the respondents directed to comply with the court orders. However, in the event that the court ordered that the site visit should be undertaken, the cost thereof should be borne by the respondents.

15. In his submissions in reply, Mr. Ligunya argued that the question whether there is a link between the farm and the funds in the accounts would be tested at the hearing of the substantive application. Further, that the 1st respondent had, at paragraph 29 of her affidavit sworn on 5th April 2019, shown more than sufficient evidence of the existence of the farm. Mr. Ligunya reiterated that the 1st respondent had not been asked to produce any documents on the existence of the farm. It was his contention that the respondents are asking the court to determine who is lying with respect to the existence of the farm; that the legitimacy of the sources of the funds is what is at issue; that the respondents' case is that the source of funds is from the farm, which they maintain exists while the applicant argues does not. They were willing to pay their own costs of the site visit and defray the costs of the court while the applicant meets its own costs of the visit.

16. I have considered the application and the affidavits in support. I have also considered the written submissions of the respondents in support of the application for a site visit, and the submissions by the applicant in opposition, both of which are dated 23rd July 2019.

17. The substantive application before the court is the applicant's application seeking to recover USD 105,293.70 and Kshs 22,445,487.74 held in various accounts operated by the respondents. The present application asks the court to visit a site in Uyoma, Siaya, for the court to satisfy itself that the sources of the above funds is legitimate, and that the said source is a farm that the 1st respondent and her husband have been operating for a number of years.

18. I have read and noted the contents of the affidavit of Nam Oneko, the 1st respondent's brother in law, sworn in support of the application for the court to order a site visit. In the said affidavit, he goes into great detail with respect to what is on the 1st respondent's farm, which she runs with her husband while Nam Oneko, her brother in law, is the farm manager, and what the applicant's officers saw or did not see when they paid a visit to the farm.

19. The question that comes to mind is this: how does a visit to the farm assist the court in determining that the amount that the applicant seeks forfeiture of is from the farm in Siaya? The court might see the 'green houses with the high level hydroponic farm system', but this begs the question: how is the farm and the systems on the farm and the green houses translate into the funds held in the bank accounts in contention?

20. I have noted that the 1st respondent avers that she was not asked to produce documents in relation to the farm when she was invited to the offices of the applicant to respond to questions regarding the funds in the above accounts. However, I note that the 1st respondent had the opportunity, both in the present application and in her reply to the substantive application, to present such documents as would demonstrate the source of funds in the bank accounts. She does not produce documents that demonstrate ownership of the farm, or that show the returns from the farm and the sales thereof. In truth, other than to respond to the alleged article in the media that the farm does not exist, there does not seem to be any point or purpose to a site visit to the farm.

21. I have also read and considered the decision relied on by the respondents in support of their application for a site visit. The decision in **Republic v National Environmental Tribunal & 4 others exparte China Road and Bridge Corporation (2016) eKLR** relates to a site visit by the court dealing with an environmental claim relating to sand harvesting by the *ex parte* applicant. With respect to the respondents in this matter, the decision is clearly distinguishable, on its facts, from the present case. A site visit to the locus of alleged environmental damage is clearly not only eminently desirable but necessary. Further, as the court observed in that case, a visit to the *locus in quo* would enable the court to clarify the evidence which parties have placed before it and form impressions and findings.

22. I note further that in the above case, the court went on to cite the decision in **Zziwa Ssalongo & Another v Kafumbe High Court Kampala Civil Appeal No. 33 of 2012** in which it was held that a visit to the *locus in quo* is not mandatory and depends on the circumstances of each case. The question is whether the circumstances of this case require that the court visits the farm that the 1st respondent contends is the source of the funds that are held in the accounts and which are the subject of the forfeiture application.

23. In my view, a site visit to a farm to establish whether or not such farm can be the source of large sums of money deposited in bank accounts kilometers away would really be to chase after a mirage. There is no evidence before the court that the 1st respondent owns the farm. There is no evidence of the earnings from the farm, or that the substantial deposits in the accounts have been made from the earnings from the farm. Other than establishing that a parcel of land exists, it is my view that such a site visit would not in any way advance the application before the court by way of demonstrating the source of the funds in the subject accounts in any way. It would only result in a further delay of the hearing of the application for the recovery of the said funds.

24. I accordingly decline to grant the prayers sought in the application dated 1st July 2019. The application is hereby dismissed with costs to the applicant, the Asset Recovery Agency. The respondents are hereby directed to comply with the directions issued on 8th April 2019 with a view to proceeding with the hearing of the substantive application for forfeiture of the funds in contention.

Dated and Signed at Nairobi this 7th day of October 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Nairobi this 9th day of October 2019

J. N. ONYIEGO

JUDGE