



Assets Recovery Agency v Ilunga & another (Anti-Corruption and Economic Crimes Civil Suit E023 of 2023) [2025] KEHC 14628 (KLR) (Anti-Corruption and Economic Crimes) (15 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14628 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E023 OF 2023
LM NJUGUNA, J
OCTOBER 15, 2025

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

FUMBISHA YVES ILUNGA 1ST RESPONDENT

POSTBANK BANK LIMITED 2ND RESPONDENT

RULING

1. What is before the court for determination is the application dated the 24th July, 2025 brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the Law. The application is premised on the grounds set out on its face and it is supported by the annexed affidavit of the applicant sworn on even date. Through the application, the applicant has sought the following Orders;
 - a. Spent.
 - b. This Honourable Court be pleased to order the Assets Recovery Agency to forthwith and unconditionally release the passport belonging to the 1st Respondent/Applicant.
 - c. Costs be provided for.
2. The applicant avers that pursuant to the ruling delivered on the 17th October, 2024 by Honourable Justice Maina, the 1st Respondent was ordered to refund a sum of Ksh.3,729,052.96 and in default, the Assets Recovery Agency was permitted to recover the said amount directly from Postbank Limited.



3. The applicant states that following the court's earlier Orders issued on the 31st July, 2024, the 1st respondent deposited his passport with the Assets Recovery Agency as part of his compliance with the said Orders and as a demonstration of good faith and willingness to submit to the jurisdiction and authority of the Court.
4. That the 1st respondent is a foreign national who has since lawfully secured a valid Class "D" Work Permit issued by the relevant authorities in Kenya but he is presently unable to proceed with the endorsement and activation of the said Class "D" Work Permit because the passport, which is an indispensable requirement for such endorsement remains in the custody of Assets Recovery Agency.
5. The applicant avers that the endorsement and activation of the said Class "D" work permit is not a mere procedural formality but a legal prerequisite for the applicant's lawful engagement in gainful employment in Kenya, and that, it is only upon endorsement that the applicant can take up formal employment and begin to generate income necessary for the compliance with the court Order.
6. That in a letter dated the 7th January, 2025, the Assets Recovery Agency formally acknowledged the impecuniosity of the applicant and pursuant to Order 4 of the court's ruling, opted to initiate recovery proceedings against Postbank Limited for purposes of satisfying the Decree. That the continued withholding of the applicant's passport by the Assets Recovery Agency in circumstances where there are no pending investigations or trial, is unnecessary and unduly punitive as it serves no legitimate prosecutorial or enforcement objective.
7. The applicant states that he has at all material times exhibited full and unquestioned compliance with every court Order and has not interfered with the recovery process, and has never attempted to abscond or violate the conditions set. That he remains available and committed to full compliance with any further directions of the court and has no history or profile of being a flight risk.
8. The respondent (Assets Recovery Agency) opposed the application vide a replying affidavit sworn by Bernard Gitonga, on the 12th August, 2025. Through the deponent, the applicant has averred that, on the 14th September, 2023, the Agency filed a forfeiture application vide HCACEC Civil Suit No. E023 of 2023 against the applicant herein seeking for forfeiture Orders against the funds subject to the preservation Order dated the 5th June, 2023 issued in ACEC Misc. E011 of 2023 seeking preservation of Ksh. 3,732, 199.84cts held in account No. 0785040012175 in the name of Postbank.
9. The respondent states that on the 15th July, 2024, the court delivered a judgement of forfeiture application declaring the funds as proceeds of crime and ordered that the funds be transferred to the applicant's account for forfeited funds. However, as the Order was still in force, the funds were released and upon consulting the bank, the respondent established that the applicant got access to his account on the 11th September, 2023, which was in breach of the Court Order.
10. That on the 15th April, 2024, the respondent had filed an application citing the applicant and Post bank (2nd respondent) for contempt of court with respect to the funds that had been withdrawn during the pendency of the preservation and forfeiture proceedings.
11. The respondent further states that on the 17th October, 2024, in determining the application for contempt of court, the court found the applicant and the 2nd respondent to be in contempt of court and directed the 1st respondent be held personally liable to refund the funds within 21 days of date of the ruling. Further that, in the event of default by the applicant herein, the 1st respondent will be at liberty to execute against his property.



12. That the court further directed that if the 1st respondent finds it completely impossible to recover the funds from the applicant, the 2nd respondent would be required to refund the funds to the 1st respondent and thereafter recover from George Onyango, head of securities, whose misconduct led to dissipation of the funds.
13. The 1st respondent contends that it has made all reasonable efforts to recover the funds from the applicant but has been unsuccessful as he is a foreigner with no source of income or assets in the country. That on the 7th January, 2025, the applicant wrote to the 2nd respondent demanding refund of the funds as per the court ruling delivered on the 7th November, 2024 but the 2nd respondent has totally ignored the 1st respondent's letters despite numerous reminders.
14. The 1st respondent contends that it still has an obligation to recover the funds and the release of the applicant's passport will be detrimental to its quest, as by releasing the same it will lose the collateral to ensure the payment of the funds that were unlawfully withdrawn.
15. The applicant filed a further affidavit that he swore on the 26th September, 2025. He states that the 1st respondent has expressly confirmed and acknowledged his impecunious financial status and lack of Assets in Kenya a fact that has already been admitted by the Agency in its letter dated the 7th January, 2025. That accordingly, there is no dispute that he is presently unable to settle the decretal sum.
16. That his present application is not intended to re-litigate the issue of impecuniosity, but rather to ensure that the lawful and practical effect of the court's ruling of 17th October, 2024 is not frustrated by the continued detention of his passport which the respondents is wrongly portraying as a "collateral security" for the decretal sum.
17. The applicant avers that there is no provision in the POCAMLA or any Order of this court that has ever designated a foreigner's passport as a form of collateral and that the order requiring him to deposit his passport was solely as a measure to secure attendance and co-operation during the pendency of the proceedings and not as a substitute for property or financial security. That the only outstanding practical outstanding issue is the endorsement of his valid class "D" work permit, which under the law required physical presentation of his original passport without which he remains unable to lawfully engage in formal employment in Kenya, which not only undermines his constitutional right to livelihood but also directly frustrates his ability to contribute towards satisfaction of the decretal sum.
18. He avers that he is not a flight risk and reiterates his earlier undertaking to provide periodic reports to the court or the Agency as directed by the court and to furnish the court and the Agency with a copy of the endorsed Work Permit once the same is issued. That contrary to the assertions made in the respondents' replying affidavits, the continued withholding of the passport serves no legitimate purpose as recovery proceedings are already directed against the 2nd respondent and there is no pending trial or investigations requiring his custodial restriction.
19. That the Court's Orders were never intended to operate as a perpetual restraint on his freedom of movement, dignity, and economic rights but rather, they were aimed at ensuring compliance with the law and protection of public funds, both of which remains safeguarded by the fallback liability imposed upon the 2nd respondent.
20. The application was disposed of by way of written submissions.

Applicant's Submissions

21. The applicant identified two issues for determination as follows;



- a. Whether the continued detention of the applicant's passport is justified in law and whether the applicant has demonstrated sufficient cause to warrant the release of the passport.
 - b. Who should bear the costs of the application.
22. On the 1st issue, the applicant submitted that under Article 39 of *the Constitution*, every person has a right to freedom of movement and to leave Kenya and that any limitation on a constitutional right must satisfy the test in Article 24 of *the Constitution* of being reasonable and justifiable in an open and democratic society. That it is equally settled by the courts that depositing or surrendering a passport may legitimately be imposed as a bail condition to secure attendance but such an arrangement remains a bail condition which must be proportionate to the legitimate aim of securing attendance, not a permanent punitive measure or an improvised form of security for a decretal sum.
23. The applicant submitted that he has obtained a valid Class 'D' Work permit but it cannot be endorsed without presentation of the original passport in line with Immigration practice and process that require presentation of the original passport for endorsement and stamping of the permit. That the endorsement is a legal pre-requisite to lawfully accept employment so that he can contribute to repaying of the decretal sum and to enjoy the dignity of lawful work and therefore, the continued withholding of the applicant's passport which prevents him from lawfully earning an income to meet the debt is self-defeating and it undermines the court's own order.
24. That in its letter dated the 7th January, 2025, the 1st respondent admitted that the applicant is impecunious and commenced recovery of the decretal sum from the 2nd respondent which has the necessary means to satisfy the decree in compliance with the court order. That the 1st respondent is lawfully executing the decree against the 2nd respondent and there is no reason why the applicant's passport should not be released to enable him earn a lawful living.
25. The applicant submitted that the respondents submission of framing the passport as the only collateral to secure payment of the decretal sum is legally and practically unsound as a passport is a travel document which remains Government property and must remain in the holder's possession unless lawfully suspended or confiscated, and that a bail deposit of a passport is a condition to secure attendance and not a security interest over property recoverable under Civil enforcement or forfeiture processes.
26. That the applicant has shown sufficient cause for the release of his passport as he has demonstrated compliance with the bond terms and that the respondents have failed to show compelling reasons for the continued retention of the document.

The 1st Respondent's Submissions

27. The 1st respondent identified two issues for determination as follows;
- a. Whether the passport should be released to the applicant
 - b. Who should bear the costs of the application.
28. On the 1st issue, it was submitted that the applicant has not shown any attempt in settling the decretal amount almost one year since the judgement was delivered and that the release of the passport will make it impossible for the applicant to make any effort towards settling the decretal sum.
29. That despite the court order giving an option of recovering the decretal sum from the 2nd respondent, this did not in any way indicate that the applicant is off the hook as he was the subject of the preservation and forfeiture order and therefore, ought to be compelled to settle the amount before the passport is



released. Further, that he has not provided sufficient reasons to justify the release of the passport and has not provided any security to warrant the release of the same and if the passport is not released, he will be highly prejudiced.

Analysis and Determination

30. The court has considered the application and the materials placed before the court in support of, and in opposition to the same including the submissions. The only issue for determination is whether the applicant has demonstrated sufficient cause to warrant the release of her passport.
31. On 5th June, 2023, the 1st respondent filed for preservation Orders vide Misc. application No. E011 of 2023 seeking preservation Orders for Ksh.3, 732,199.84 held in account No. 0785040012175 in the name of the applicant herein and the order was served upon all the persons known to have interest.
32. The 1st respondent filed a forfeiture application Vide HCACEC Civil Suit No. E023 of 2023 seeking forfeiture orders against the funds subject of the preservation Order dated the 5th June,2023. However, notwithstanding the subsistence of the court order, the applicant got access to his bank account on the 11th September, 2023 and there was no order that was issued to the bank to facilitate the release of the funds. This is not denied by the applicant and the 2nd respondent.
33. On the 17th October, 2024, the court delivered a ruling on an application for contempt of court following the release of the funds to the applicant and found the respondents to be in contempt of court and directed the applicant to refund the funds within 21 days of the date of the ruling and in default, 1st respondent would be at liberty to execute against his property but if the 1st respondent is completely unable to recover the funds from the applicant, the 2nd respondent would be required to refund the funds to the 1st respondent and thereafter recover from one George Onyango whose misconduct lead to the dissipation of the funds.
34. Todate, the decree has not been satisfied and the applicant has moved the court to have his passport released by the 1st respondent who is holding the same pursuant to a court Order which had been issued on the 31st July, 2024 when the proceedings were still ongoing.
35. The applicant avers that he is a foreign National who has secured a valid Class “D” Work permit but he is presently unable to proceed with the endorsement and activation of the said permit because the passport which is indispensable requirement for such endorsement remains in the custody of the 1st respondent.
36. Though the 1st respondent has opposed the application mainly on the ground that if the passport is released to the applicant, it will lose the collateral to ensure the payment of the funds that were unlawfully withdrawn, through its replying affidavit sworn by Bernard Gitonga, at paragraph 17 it has admitted that it has made all reasonable efforts to recover the funds from the applicant but the same has not been successful as he is a foreigner with no known source of income or Assets in the country.
37. In view of that admission and disposition by the 1st respondent, the continued withholding of the applicant’s passport is not serving any useful purpose as the same is not being held as “security” for the decree. In any event, the order that was issued on the 17th October, 2024 permitted the 1st respondent to proceed with recovery against the 2nd respondent as the depository institution.
38. In view of the foregoing and for the reasons that I have given in this ruling, I find that the application has merits and I hereby allow Prayer (2) of the same.
39. The applicant to bear the costs of the application.



SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 15TH DAY OF OCTOBER 2024

.....

L. M. NJUGUNA

JUDGE

In the presence of :

Miss Amadi for the Applicant/Respondent

Mr. Nthei for the 1st Respondent

Mr. Ndumo holding brief for Mr. Ochieng for the 2nd Respondent

Court Assistant – Adan

