Kundu v Assets Recovery Agency (Civil Appeal (Application) E521 of 2022) [2025] KECA 76 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 76 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E521 OF 2022

F SICHALE, F TUIYOTT & FA OCHIENG, JJA

JANUARY 24, 2025

BETWEEN

EVANS WAFULA KUNDU ..... APPLICANT

AND

ASSETS RECOVERY AGENCY ..... RESPONDENT

(Being an application for stay of execution against the judgment of the High Court Anti-Corruption and Economic Crimes at Nairobi (E.N. Maina, J.) delivered on 31st March 2022 in ACEC Civil Suit No. 09 of 2020)

RULING

1. In a judgment dated 31st March 2022 the High Court (E. N. Maina, J.) made a forfeiture order under section 92 of the *Proceeds of Crime and Anti-money Laundering Act* (Cap 59A)(the Act) over various properties owned by or said to be held by proxies of Evans Wafula Kundu (the applicant).

2. Aggrieved by that judgment, the applicant has preferred this appeal against the decision, an appeal which is pending hearing and determination. In the meantime, the applicant has moved this Court through a notice of motion dated 29th May 2024 seeking stay of execution of the said judgment and decree or orders therefrom. This is what we are asked to determine.

3. The applicant asserts that Assets Recovery Agency (the respondent) has purported to take over the management of the land assets whereas it does not have in place a scheme/structure enabling it to properly manage the said property. He is apprehensive that the property will dissipate and/or waste away if not properly managed and he will suffer irreparable harm and immense prejudice if stay is not granted. His intention in seeking stay, he avows, is that the subject matter of the appeal be preserved.

4. The applicant pointed to his memorandum of appeal to make the argument that his appeal has high chances of success. In his written submissions dated 29th July 2024, highlighted in plenary by learned

counsel Mr. Okubasu representing him, he contends, inter alia, that: the learned trial judge fell into error by excluding critical evidence that demonstrated legitimate sources of income used to acquire the forfeited assets; the learned judge is faulted for purportedly relying on the applicant's none compliance with tax returns as a basis of finding illegitimacy in the acquisition of the assets when tax legislation has a raft of measures in sanctioning a person who does not declare taxes; and that the learned judge ignored the legitimate interest of third parties as owners of some of the properties and found them to be only beneficial owners.

5. At the plenary hearing, learned Counsel Mr. Okubasu took up a novel argument that, by dint of subsection 6 of section 92 of the Act, an appeal operates as an automatic stay once a forfeiture order has been challenged by way of an appeal.

6. In response, the respondent filed an affidavit sworn by Samwel Wambua on 11th September 2024. He is an advocate in conduct of this matter on behalf of the respondent. The substantial dispositions he makes are really hearsay which would not be admissible and we disregard the contents of the entire affidavit. So, too, is for disregarding the grounds of opposition dated 11th September 2024 as the Court of Appeal Rules 2022 do not contemplate this as a way of answering an application filed before the Court.

7. But what does the respondent say in submissions? The judgment of the learned judge is defended; that the evidence produced shows that the applicant's earnings between 2013 and 2017 only amounted to Kshs.259,550.00 and there was no evidence to support an allegation that he earned Kshs.200,000,000 from maize farming; that audited records and bank accounts could not account for Kshs.65,000,000 and Kshs.175,000,000 allegedly earned from the sale of maize; and that no annual returns or tax returns had been filed by the applicant or his business.

8. Mr. Wambua who also represented the respondent at plenary retorted to the argument regarding the effect of section 92(6) of the Act. That it applies only in respect to two specific instances; one when an application has been made under section 89 of the Act and the other when an appeal has been made under section 96 of the Act, neither of which were present in the matter before us.

9. It is the question whether section 92(6) of the Act grants an automatic stay to the impugned judgment because of the pendency of this appeal that we must first determine. This is because if the answer is in the affirmative then we need not consider the Rule 5(2)(b) application because all the applicant will need to do is to return to the High Court for lifting of the vesting order so as to yield to the provisions of section 92(6) of the Act.

10. Section 92 of the Act under which the impugned forfeiture order was made reads:

> " 92. Making of forfeiture order
>
> 1. The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities 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.
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> 2. The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating

the transfer to the Government of property forfeited to it under such an order.

3. The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.

4. The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

5. The Registrar of the High Court making a forfeiture order shall publish a notice thereof in the Gazette as soon as practicable but not more than thirty days after the order is made.

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."

11. Under the provisions of subsection (6), a forfeiture order will not take effect in four instances: before the period allowed for an application under section 89 of the Act has expired; before such application is disposed of; before the period allowed for an appeal under section 96 of the Act has expired; and before such appeal is disposed of.

12. Learned counsel Mr. Okubasu posited that the appeal referred to in subsection 6(a) and (b), or at least subsection 6(b), is not defined and would include an appeal such as the one before us, an appeal against a forfeiture order made under section 92.

13. We think not. For starters, the appeal contemplated under subsection 6(a), as is clear from the express words of the provision, is an appeal under section 96. Again, the appeal referred to in subsection 6(b) is an appeal under section 96 by dint of the word 'such' appeal in subsection 92(6)(b). The appeal protected by subsection (b) is not an appeal of any kind but specifically an appeal under section 96. So is this such appeal?

14. Section 96 of the Act reads:

" 96. Exclusion of interests in forfeited property

1. A person affected by a forfeiture order who was entitled to receive notice of the application for the order under section 91(2), but did not receive such notice, may, within forty five days after the notice is published in the Gazette, apply to the High Court for an order excluding his interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property.

2. The hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within thirty days of the filing of the application.

3. The High Court may make an order under subsection (1) if it finds on a balance of probabilities that the applicant for the order falls within the provisions of subsections (2) or para_3 of section 91. 3. The provisions of section 94(4) and (5) shall apply to any proceedings under this section."

15. These provisions are intended to give remedy to a person affected by a forfeiture order and who is entitled to receive notice of the application for the order under section 91(a), and has not done so, to seek relief by way of exclusion of his interest in the property or a variation of the order. The proceedings which are the subject matter of the application before us is are in respect to a person who received notice of the forfeiture application, answered the application, participated in its hearing and which application was ultimately determined in a judgment. Section 96 is inapplicable and the applicant cannot call in aid the provisions of section 92(6) of the Act to rally for automatic stay.

16. On the merit of the motion before us, it is not our remit, now, to make a determinative call on the strength of each ground of appeal. That is the preserve of the Court that will hear the appeal. But if we were to say that there is at least one arguable point sufficient to make the intended appeal an arguable appeal then it is found in the argument around third party interests in some of the forfeited assets. While the learned trial judge interrogated the evidence before her and reached a conclusion that the interested parties were proxies of the applicant, whether that conclusion is in tandem with the evidence is a matter worthy of further scrutiny by an appellate court. And even if the argument will eventually be found to be without merit, it is not a frivolity.

17. Still the application fails because it was brought over two (2) years after the vesting order took effect without any explanation whatsoever for the inordinate lateness. Such lengthy and unexplained delay is perhaps evidence that the application is simply an afterthought and the fear that the appeal will be rendered nugatory if not protected by stay is not well founded. It is also not explained why the applicant doubts the capacity of the respondent to manage the properties now when no such apprehension was raised at the time the vesting order took effect. Moreover, there is no evidence placed before us of mismanagement or dissipation of any of the property which the respondent agency has taken over.

18. In a word, we are not persuaded that the appeal will be rendered nugatory if we do not grant stay. At any rate, any loss suffered through mismanagement of the properties can be compensated by an award of damages.

19. We trust we have considered this matter within the parameters set out in *Stanley Ng'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, for grant or refusal of stay. The notice of motion dated 29th May, 2024 is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

F. SICHALE

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.