Saina v Assets Recovery Agency & 9 others (Civil Appeal 473 of 2018) [2024] KECA 878 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KECA 878 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 473 OF 2018

KI LAIBUTA, HA OMONDI & A ALI-ARONI, JJA

JULY 31, 2024

BETWEEN

NELSON RIANTO SAINA ..... APPELLANT

AND

ASSETS RECOVERY AGENCY ..... 1ST RESPONDENT

SAMUEL WACHENJE ALIAS SAM NWADIME ..... 2ND RESPONDENT

SUSAN MKIWA MNDANYI ..... 3RD RESPONDENT

VANDAME JOHN ..... 4TH RESPONDENT

ANTHONY KIHARA GETHI ..... 5TH RESPONDENT

CHARITY WANGUI GETHI ..... 6TH RESPONDENT

NDUNGU JOHN ..... 7TH RESPONDENT

GACHOKA PAUL ..... 8TH RESPONDENT

JAMES KISINGO ..... 9TH RESPONDENT

LABULAX SUPPLIES LIMITED ..... 10TH RESPONDENT

(An appeal against the Ruling of the High Court of Kenya at Nairobi (Achode, J.) dated 2nd May 2018 and delivered on 14th May 2018 in ACEC Misc. Application No. 3 of 2016)

JUDGMENT

1. The appellant, Nelson Rianto Saina, is the current registered owner of motor vehicle registration number KCE 852T, which was previously owned by Ndungu John, the 7th respondent, and which the appellant bought at a public auction.

2. }The 1st respondent, the Asset Recovery Agency (the Agency), is a semi-autonomous body, under the Office of the Honourable the Attorney General, created under Sections 53 and 54 of the *Proceeds of Crime and Anti-Money Laundering Act* (Pocamla), with the mandate of implementing the provisions of Parts VII to XII of Pocamla.

3. The other respondents, though not relevant to the matter before us, were all mentioned by the 1st respondent in the trial before the High Court as having been recipients of proceeds of crime alongside the 7th respondent.

4. This appeal arises from the ruling and subsequent orders of the High Court dated 2nd May 2018 (Achode, J.) (as she then was) dismissing the appellant's application dated 15th March 2017. The application sought for the following orders:

    a. Spent

    b. That the Honourable Court be pleased to order a stay of execution of the orders dated 31st December 2015 and any, or all consequential orders emanating therefrom relating to the subject motor vehicle pending the hearing and determination of the application.

    c. That the Honourable Court be pleased to lift, vacate, and or discharge any orders relating to and or affecting ownership, use, and possession of the motor vehicle KCE 852T.

    d. That the Honourable Court be pleased to declare that the motor vehicle KCE 852T belongs to the appellant and should not be part of the proceedings and or orders sought by the Assets Recovery Agency, the 1st respondent.

    e. That the costs of the application be provided for.

5. The application is predicated on the grounds that: the appellant saw an advert for the sale of motor vehicles; that, on 30th September 2016, he attended an auction by Auckland Agencies Auctioneers, which took place at Tripple One Motors along Ngong Road; that he made a bid for vehicle Reg. No. KCT 852T; that he was the highest bidder at Kshs. 4 million, which he paid in cash; that, on 4th October 2016, he was issued with a certificate of sale after which he obtained the logbook for the said vehicle in his name as lawful owner thereof; that, accordingly, the 1st respondent had no right to seize the vehicle; that he stood to suffer irreparable loss if the vehicle was impounded; and that, further, no prejudice would be suffered by the 1st respondent if favourable orders were made.

6. In an affidavit sworn by the applicant of even date in support of the application, he rehashed the foregoing grounds and, in addition, averred that since the logbook was in his name, the 1st respondent had no right to seize it in the execution of an order against a third party not known to the appellant. He averred further that, sometime in 2017, he was contacted by one Musyoki, an officer with the 1st respondent, who informed him that he had an order to seize and attach the subject motor vehicle for reasons that it was bought with money obtained from the National Youth Service (NYS); that, upon receipt of that information, the appellant's counsel conducted due diligence and found that the court had, on 31st December 2015, issued an order for surrender and seizure of the said motor vehicle.

7. Sgt. Fredrick Musyoki sworn a replying affidavit dated 24th April 2024 in opposition to the application on behalf of the 1st respondent. He deposed that the 1st respondent applied for preservation and surrender orders by way of a notice of motion dated 30th December 2015 in Miscellaneous Application No. 601 of 2015, which orders were granted under Section 90 of the Pocamla against several properties and assets, including the subject motor vehicle pending hearing and determination of an intended forfeiture application; that the court also ordered that the subject motor vehicle and other assets be

seized and surrendered to investigation officer No. 75821 Corporal Sautet Jeremiah Matipei, and that the same be detained by the Directorate of Criminal Investigations (DCI) until further orders of the court; that, subsequently, the 1st respondent gazetted the preservation orders vide Kenya Gazette No. 325 dated 22nd January 2016; and that, pursuant to Section 83 (1) and (2) of Pocamla, the subject motor vehicle was presumed to have been procured using funds stolen from NYS, and could not constitute genuine property or asset. He deposed further that, at the time of hearing, he was still searching for the whereabouts of the subject motor vehicle, which the appellant had refused to surrender, but had instead hidden it.

8. }Upon hearing the application, the learned judge was of the view that: the appellant had failed to demonstrate that he relied on the subject motor vehicle for his daily reasonable use other than that he is the legal and registered owner of the subject motor vehicle; that it was not enough to claim ownership of the subject motor vehicle; and that the appellant ought to have shown that the orders operated to his detriment.

9. On the issue of ownership of the subject motor vehicle, the appellant had the obligation to demonstrate that he lawfully acquired the motor vehicle, having conducted due diligence. The judge further observed that, at the time the appellant alleged to have purchased the vehicle, the preservation orders were still in force; and that, under Section 84 of Pocamla, they could not lapse during the pendency of a forfeiture application.

10. Further, the learned judge was of the view that, at the time the preservation orders were issued, the subject motor vehicle was owned by the 7th respondent, and that, in issue, was whether the appellant lawfully purchased the subject motor vehicle given the fact that the preservation orders prohibited such dealings therewith. Further, the learned judge observed that Section 3 of Pocamla provides that one is guilty of money laundering if they engage in a transaction with property which they know or ought to have reasonably known were procured from proceeds of crime, or to disguise the source and ownership thereof. In these circumstances, the 7th respondent, in this instant, knew that the subject motor vehicle was believed to have been obtained from proceeds of crime, and should not have had dealings therewith until the determination of the forfeiture application. Therefore, at the time the applicant purported to have purchased the said motor vehicle, transferrable ownership was already under a caveat.

11. The learned judge made a finding that the appellant had failed to meet the threshold required under Section 89 of Pocamla for the court to grant the orders sought; that the application was made one year and six months after the orders; that the delay was unreasonable; and that it would not be in the interest of justice to grant the orders sought. In the end, the application was dismissed.

12. Aggrieved by the court's decision, the appellant preferred this appeal on 10 grounds, which are substantially repetitive. In his submission, learned counsel for the appellant clustered them into four, namely:

    a. The learned judge erred by dismissing the appellant's application on the grounds that he could not have lawfully purchased the subject motor vehicle since there were in force orders prohibiting any dealings with the same.

    b. Whether the learned judge erred in failing to consider that the subject motor vehicle having been offered as a security it became a commercial commodity.

    c. The learned judge erred in law and fact by ignoring the applicable law and the evidence before the court.

    d. The learned judge erred by failing to consider the appellant's submissions.

13. Counsel rehashed the averments in the appellant's affidavit and urged that the appellant lawfully purchased the vehicle unaware of the orders of 31st December 2015; that the said order had not been registered or served upon the National Transport & Safety Authority to cancel the road license and insurance of the subject motor vehicle; that when the vehicle was advertised by Auckland Agencies Auctioneers, no objection was raised by the 1st respondent; and that the appellant was a bona fide purchaser, who bought the vehicle from an auction, and not from the 7th respondent. In support of his assertion, counsel relied on the case of Earnest Orima Mwai vs. Abdul S. Hashid & Another [1995] where the court was of the view that a purchaser for value in an auction was a bona fide purchaser who obtains title when the sale was concluded.

14. Counsel contended further that all that was required of the appellant in the objection proceedings was to prove that he had a legal and/or equitable interest in the subject matter, which he did by producing a logbook that was not contested. In this regard, counsel referred the court to the case of Trans-Africa Assurance Company vs. National Social Security Fund [1991] EA, where the court held that in such proceedings, the objector need not prove ownership conclusively. Further, learned counsel stated that the trial judge relied on Order 42 rule 6 of the Civil Procedure Rules that deals with stay orders, thus misapplying the law.

15. It was also learned counsel's contention that when the motor vehicle was charged to Mwananchi Credit by the 7th respondent as he obtained a loan, it became a commercial commodity realizable through a public auction if he defaulted on repayment of the loan. In support of his assertion, learned counsel cited the case of Mukua Tutuma vs. Cooperative Bank of Kenya Limited [2008] eKLR where the court held that a property charged to acquire a loan becomes a commodity liable for sale. Learned counsel further asserted that there was no finding that the appellant committed fraud with the 7th respondent and/or Mwananchi Credit to disguise the sale of the motor vehicle.

16. Learned counsel submitted further that the trial court failed to consider submissions made on account of the appellant on how he acquired the vehicle, which facts remain uncontested. To buttress his contention, counsel relied on the case of Dr. Michael Kwena vs. Raza Property Limited [2008] eKLR, where the court was of the view that a transfer evidenced by a logbook can only be upset upon being set aside.

17. }On their part, learned counsel for the 1st respondent filed submissions dated 31st August 2020, submitting that the motor vehicle subject matter was not available for sale and could not be transferred as the 1st respondent had, on 30th December 2015, obtained preservation orders pending filing of a forfeiture application under Section 90 of the *Proceeds of Crime and Anti-Money Laundering Act* (Pocamla) in Misc. Application No. 601 of 2015; that the said orders were gazetted under Section 83(1) of Pocamla in Kenya Gazette No. 325 of the 25th January 2016; and that, at the time of issuing of the preservation order and the gazettement of the said order, the motor vehicle in question was owned by the 7th respondent. Counsel argued that the fact of gazettement was to inform the general public, including the appellant, that the asset gazetted was not available for sale or transfer to any third party, including the appellant.

18. Counsel submitted further that the trial court was right in its findings as the preservation order remained in force under Section 84 of Pocamla, and that the issue was not whether the applicant was the registered owner of the motor vehicle subject matter, but whether he lawfully acquired it.

19. Counsel contended that the burden of proof under Section 89 of Pocamla on variation or rescission of preservation orders was upon the appellant, who failed to prove any of the conditions necessary as rightly observed by the trial judge.

20. We have considered the record and the rival submissions by the parties, the cited authorities, and the law, and identify two issues for our determination:

    i. Whether the trial judge erred by shifting the burden of proof to the appellant.

    ii. Whether the trial judge erred by failing to find that the appellant was the lawfully registered owner of motor vehicle Reg. No KCE 852 T

21. An ex parte application was made by the 1st respondent to the High Court on 30th December 2018 under Order 51 rule 1, Sections 61, 81, 82, 86, and 87 of Pocamla under which it sought orders prohibiting the sale, transfer, mortgage, attachment, disposal off or any other dealings with several assets, including motor vehicle registration No. KCE 852T, and that, in the event the vehicle was not surrendered, the National Transport & Safety Authority (NTSA) be directed to cancel the road license and insurance.

22. The said application was based on grounds that Section 54 of Pocamla gives the 1st respondent the mandate to implement the provisions of Part VII to XII of the said Act for recovery, preservation, and forfeiture of assets; that the Director of Criminal Investigations in the cause of investigating fraud at the National Youth Service (NYS) established that funds embezzled from NYS were used to procure assets listed in the application, including the motor vehicle subject of this appeal; and that it was in the interest of justice that the assets be preserved and an order issued to prohibit sale, transfer, disposal, dissipation or loss of the said assets so as to defeat the application for recovery thereof.

23. In the supporting affidavits sworn by Muthoni Kimani, the director of the 1st respondent, and Cpl. Sautet Jeremiah Matipei, an investigating officer, both deponents rehashed the grounds on the face of the application and, in addition, averred that the respondents were beneficiaries of stolen funds, and had used the said funds to buy properties subject of the application and that the said assets needed to be preserved pending the application for forfeiture.

24. On the 31st of December 2015, the High Court (Mbogholi, J.) (as he then was) issued an order prohibiting the sale, transfer, mortgage, attachment, disposal of, or in any other dealings with the properties named therein, including the subject motor vehicle.

25. In a Gazette Notice No. 321 of 22nd January 2016, the order issued by the High Court in Misc. Application No. 601 of 2015

    was published. The Gazette Notice reproduced the court order as follows:

    " It is hereby ordered:

    1. That the application be certified urgent and be heard during the vacation.

    2. That an order be and is hereby issued prohibiting the sale, transfer, mortgage, attachment, disposal off, or any other dealings with the following properties for a period of 90 days from the date of preservation order to avoid dissipation, disposal or loss of the properties and assets:

        (i) ...

        ii. ...

        iii. Motor vehicle Toyota Prado Registration No. KCE 852T.

        iv. ...

v. ...

3. That the motor vehicle registration No. KCE 582T and ..., be seized and surrendered to Cpl. No. 75821 Sautet Jeremiah Matipei, the investigating officer into NYS fraud and embezzlement and be detained by the Director of Criminal Investigations until further orders are made by the court.

4. That in the event the vehicles are not surrendered to Cpl. No. 75821 Sautet Jeremiah Matipei the National Transport & Safety Authority (NTSA) be and is hereby directed to cancel the road licences and insurances of the said motor vehicle...."

26. The effect of the published notice in the Kenya Gazette was to inform all and sundry that the assets mentioned therein were preserved pending further orders of the court. It was and is deemed that the previous owner of the subject motor vehicle, Mwananchi Credit Company, the auctioneer, and, more particularly, the applicant, were aware of the orders of the court.

27. In a notice of motion filed on 15th January 2016, Vandame John and Gachoka Paul sought orders to vary and/or rescind the order authorizing seizure of Toyota Prado KCD 536P and KCE 852T on the grounds that the applicants stood to be deprived of their means of necessary transport in executing their business; that they would suffer hardship, which would outweigh the risk of transfer of the said vehicles; and that they undertook not to alienate, waste, destroy, or transfer the vehicles until the proceedings were concluded.

28. Relevant to the matter before us is a receipt marked as annexure GP1 showing that the 7th respondent had bought the two vehicles from one John Kago Ndungu for Kshs. 10,000,000/- on 20th May 2015. The witness to the agreement was John Hope Vandame. However, the statement (exhibit GP2) does not show any payments made to John Kago Ndungu.

29. In a replying affidavit filed in opposition to the said application and sworn on 11th July 2016 by Muthoni Kimani, the director of the 1st respondent, the deponent informed the court that the agency had filed an application for forfeiture of the assets in Misc. Application HCC No. 171 of 2016, which was then pending hearing, and that the orders of preservation could not be varied while the application for forfeiture was pending determination.

30. In a ruling dated 28th November 2016, the High Court (Achode, J.) (as she then was) declined to vary the orders. She opined that, whether or not the motor vehicles were born out of proceeds of crime, could only be canvassed at the hearing of the forfeiture application.

31. We have enumerated the sequence of events above to put this matter into perspective. What followed the two applications mentioned above was that the appellant filed a notice of objection under Order 29 rule 51(1), (2) & (3) of the *Civil Procedure Act*, and an application by way of notice of motion, both dated 15th March 2017 where he sought for an order of stay of execution of the orders of 31st December 2015 and any consequential orders relating to motor vehicle registration No. KCE 852T pending hearing of the application; that the court be pleased to lift, vacate, and or discharge any orders relating to and/or affecting ownership, use, and possession of the motor vehicle registration No. KCE 852T; and for a declaration that the said motor vehicle belongs to the appellant and should not be subject to the proceedings and any orders sought by the 1st respondent.

32. The application was predicated on the grounds that the applicant purchased the vehicle from Auckland Agencies Auctioneers upon payment of Kshs. 4 million and was issued with a certificate of sale on 4th October 2016.

33. In the affidavit in support of the application dated 15th March 2017 sworn by the applicant, and a further affidavit dated 23rd August 1017, he rehashed the grounds on the face of the application and, in addition, averred that, upon purchase of the subject motor vehicle, he successfully procured a logbook; that sometime in 2017 he was approached by one Musyoki, who claimed to be an officer with the 1st respondent, and who informed him of the court order; that he instructed his counsel, who confirmed the order of 31st December 2015; that he is now the lawful owner of the motor vehicle, and that the 1st respondent has no right to seize the vehicle since the 7th respondent is a stranger to him; and that, should the vehicle be seized, he will suffer irreparable loss and damage.

34. Section 82 of Pocamla allows the 1st respondent to apply to the court ex parte for preservation. The section provides that:

> 82. Preservation orders
>
> 1. The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
>
> 2. The court shall make an order under subsection (1) if there are reasonable grounds to believe 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.
>
> 3. A court making a preservation order shall at the same time make an order authorising the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.
>
> 4. Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

35. Further, Section 83 provides that the director will, within 25 days, provide a notice to all persons known to the director to have an interest in the property which is subject to the order and publish a notice of the order in the gazette. The only obligation of notifying persons interested in the property was by publication of the order as did the 1st respondent.

36. }Once the notice was published, it was deemed to have notified the public of the order. The predecessor in title knew of the order and could not deal in the property. If Mwananchi Credit Company had advanced a loan as alleged, they ought to have known about the preservation order. We note that no evidence was provided to establish that a loan had been obtained as alleged, or the involvement or connection of Mwananchi Credit in the sale of the motor vehicle.

At the hearing before us, we were informed, which information was not disputed, that the forfeiture orders were already issued.

37. Section 84 of the Act provides that a preservation order shall expire 90 days after the date on which notice of the making of the order is published in the gazette, unless there is an application for forfeiture pending, or unless there is an unsatisfied forfeiture order in force, or the order is rescinded. In the instant case, there was pending an application for forfeiture when the purported sale is said to have been made.

38. The Supreme Court in the case of Jamaica, Asset Recovery Agency vs. Fisher Rohar & Muler Doleres, Claim No. 2007 HCV 003259, held:

> " ... Even though the proceedings are quasi- criminal in nature, there is an evidential burden of proof on the defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized."

39. This Court in the case of Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission [2019] eKLR explained as follows on evidential burden under the Anti-Corruption & Economic Crimes Act (ACECA) with similar provisions:

> " 79. Under Section 55 (2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired."

In this instance, the evidentiary burden of proof was upon the appellant yet he failed to prove that he lawfully acquired the vehicle.

40. In all the affidavits sworn by the appellant, he has not stated or laid evidence that his predecessor in title borrowed funds from Mwananchi Credit Finance, failed to pay, and, consequently, the vehicle was advertised for sale. This information is seen in learned counsel's submissions. There was no agreement, contract, advertisement, etc. to prove that the auction was placed before the court to show that indeed the auction took place.

41. Apart from the fact that no property could pass given the orders issued on the 31st of December 2015, we find that the averments of the appellant are a cheap ploy in cahoots with the 7th respondent whose earlier attempt to vary the order failed, and in an attempt to hoodwink the court into believing that an innocent individual walked into an auction with 4 million cash and bought a vehicle. Assuming that this happened, what was the source of the cash? This was not explained. Indeed, not even a bank statement was made available to show that the appellant had the funds with which he purportedly purchased the vehicle.

42. The evidentiary burden of proof had shifted to the appellant. In Assets Recovery Agency vs. Ali Adbi Ibrahim [2022] eKLR, in a similar situation where the respondent merely gave a general statement with no particular specifics, the court rejected the general statement. We find nothing to fault the learned judge for the impugned decision.

43. In conclusion, we find that the appeal has no merit and the same is hereby dismissed with costs to the 1st respondent. Consequently, the ruling and orders of the High Court of Kenya at Nairobi (Achode, J.) dated 2nd May 2018 and delivered on 14th May 2018 are hereby upheld.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA, C.Arb, FCIArb.

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.