



REPUBLIC OF KENYA



**Ethics & Anti-Corruption Commission v Aboo & another (Civil Application SUP E613 & SUP E005 of 2023 (Consolidated)) [2024] KECA 1671 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1671 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION SUP E613 & SUP E005 OF 2023 (CONSOLIDATED)  
MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA  
NOVEMBER 22, 2024**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... APPLICANT**

**AND**

**PAMELA ABOO ..... 1<sup>ST</sup> RESPONDENT**

**ASSET RECOVERY AGENCY ..... 2<sup>ND</sup> RESPONDENT**

*(Application for certificate to appeal to the Supreme Court from the Judgment of the Court of Appeal at Nairobi (Okwengu, Warsame & Mativo, JJ.A.) dated 15th December 2023 in CA No. 452 of 2018)*

**RULING**

1. Before the Court are two consolidated applications that seek a certificate that a matter of general public importance is involved in two intended appeals from the judgment of this Court, as a prelude to appealing to the Supreme Court pursuant to Article 163(4) (b) of the *Constitution*. The applicants also seek an order of stay of execution pending the hearing and determination of the intended appeal by the Supreme Court.
2. The first application, Civil Application No. Sup. E613 of 2023, is by the Ethics and Anti-Corruption Commission (EACC). The respondents to that application are Pamela Aboo (Pamela) and the Asset Recovery Agency (ARA). The second application, Civil Application No. Sup. E005 of 2023 is by the ARA with Pamela and the EACC as the respondents.
3. Upon consolidation Application No. Sup. E613 of 2023 was designated the running file. Therefore, for the purposes of this ruling, the EACC is the applicant, Pamela the 1<sup>st</sup> respondent and the ARA the 2<sup>nd</sup> respondent.



4. The intended appeal arises from the majority decision of this Court (Okwengu and Warsame, JJ.A; Mativo, JA. dissenting) dated 15<sup>th</sup> December 2023. The judgment of the Court allowed an appeal by Pamela and reversed an order of forfeiture by the High Court, which found that a sum of Kshs. 19,688,152.35 held in three bank accounts in Pamela’s name were proceeds of crime.
5. The short background to the appeal is as follows. On or about 31<sup>st</sup> October 2017, the ARA took out an originating motion in the High Court primarily under the Proceeds of Crime and Anti-Money Laundering Act for a declaration that the sum of Kshs. 19,688,152.35 held in Pamela’s three bank accounts in Equity Bank were proceeds of crime, and a further order for forfeiture of the same. The ARA pleaded that the said sum of money constituted cash deposits made in Mombasa in Pamela’s accounts by third parties on behalf of her husband, Alex Mukhwana Kisa, who at the material time was an officer at the Customs Department, Kenya Revenue Authority and that investigations indicated that there was no legitimate reason or justification for the said payments and deposits in favour of Pamela.
6. In opposition to the originating motion, Pamela swore a replying affidavit on 11<sup>th</sup> July 2018 and a supplementary affidavit on 30<sup>th</sup> July 2018 in which she deposed that the ARA had not adduced any evidence to show that the money was deposited on behalf of her husband or that it was proceeds of crime.
7. Ong’undi, J. heard the motion and by a judgment dated 13<sup>th</sup> November 2018, allowed the application and forfeited the moneys in question. The learned judge found that Pamela’s explanation of the source of the money, namely proceeds from her transport, banana and sugarcane business as well as trading in cereals in Busia, did not add up and that on average the daily deposits in her account were over Kshs. 100,000.00, sometimes over Kshs 400,000.00. Further, for the period in question, there were no withdraws from the said accounts. Accordingly, the learned judge concluded that in the absence of satisfactory explanation by Pamela regarding the source of the funds, the court must conclude that the funds were not lawfully obtained.
8. The court further noted that forfeiture proceedings were civil in nature and that proof was on a balance of probabilities. The trial court reasoned thus:
 

“Where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means what has been presented is not challenged. In this case there is no explanation of the source of the huge deposits into the Respondent’s accounts. Even a glance at the cash deposits made at Donholm branch of Equity Bank would call for an explanation by the respondent (Pamela) as to who was making the deposits and for what purpose. The moment the applicant established through the bank statements that there were huge cash deposits, the burden shifted to the respondent to explain the source.”
9. Pamela was aggrieved and moved to this Court. By the judgment that the ARA seeks to challenge in the Supreme Court, the majority held that the ARA had the legal burden to prove a prima facie case on a balance of probabilities that the moneys were proceeds of crime; that the ARA had not discharged its burden of proving that the money in Pamela’s accounts was proceeds of crime; that Pamela had adequately explained the source of the money; that it was fatal for ARA to fail to join Pamela’s husband in the case; and that the civil forfeiture proceedings under the *Anti-Corruption and Economic Crimes Act* and the *Proceeds of Crime and Anti-Money Laundering Act* are distinct and different.
10. The minority took the view that the ARA had proved on a balance of probabilities that the funds in question were reasonably suspected to be proceeds of crime and that Pamela had not sufficiently



- demonstrated that she had earned the money lawfully and legitimately. Being unlawfully acquired property, the same did not enjoy constitutional protection.
11. Both EACC and ARA were aggrieved and filed the consolidated applications for certificate to proceed to the Supreme Court. The two institutions contend that the issue of forfeiture of funds and assets suspected to be proceeds of crime or unlawfully acquired are intertwined with corruption and are therefore matters of general public importance. They wish the apex Court to state the correct approach in determining the issues of onus and standard of proof in civil forfeiture arising from such cases.
  12. In their opinion this Court erred fundamentally in the circumstances of this application by holding that ARA had not discharged its burden of proof and that Pamela had explained the sources of the funds in the three bank accounts. They also contend that the Court ignored or failed to pay due regard to the public policy considerations that underpin the *Proceeds of Crime and Anti-money Laundering Act* and as a result, the unintended consequence of the judgment is to inhibit or cripple the country's fight against corruption, economic crimes, organised crime and money laundering. It is also contended that the judgment placed a unrealistically high burden of proof on the two institutions, which is not founded on the law and which ignores the labyrinthine and clandestine nature of corruption and economic crimes.
  13. It is also the view of ARA and EACC that the Supreme Court needs to settle whether the concept of "unexplained assets" in civil forfeiture under the *Anti-Corruption and Economic Crimes Act* has application in civil forfeiture under the *Proceeds of Crime and Anti-money Laundering Act*.
  14. Relying on submissions dated 24th and 28th March 2024 as well as the decisions of the Supreme Court in *Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscone* [2013] eKLR, and *Peter Odour Ngoge v. Francis ole Kaparo & 5 Others* [2012] eKLR, Ms. Jemutai, learned counsel for EACC, and Mr. Adow, learned counsel for ARA submitted that the issues to be raised in the intended appeal satisfy the definition of a matter of general public importance. Counsel further submitted that there was a compelling reason for the Supreme Court to pronounce itself on the matter and give guidance in view of the divided opinion of this Court.
  15. The prayer for stay of execution was abandoned.
  16. Pamela opposed the application through a replying affidavit sworn on 22<sup>nd</sup> January 2024 and submissions date 30<sup>th</sup> January 2024. Her learned counsel, Mr. Obuli, submitted that the intended appeal does not raise any substantial point of law with significant bearing on public interest and transcending the interest of the parties to the application.
  17. Counsel added that the intended appeal involves private issues of bank accounts belonging to an individual which has nothing to do with public interest. It was also counsel's view that this Court properly expounded the law and that there was nothing novel that the Supreme Court would be called upon to determine. He cited *Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscone* (*supra*) and *Kenya Plantation & Agricultural Workers Union v. Kenya Export, Floriculture, Horticulture & Allied Workers Union & 9 Others* [2018] eKLR and submitted that the application had failed to meet the test for certification.
  18. We have considered this application, the parties's submissions and the authorities they cited. To entitle the EACC and ARA to the certificate sought, they must satisfy us that a matter of general public importance is involved in its intended appeal. That is demanded by Article 163(4)(b) of the



Constitution. The reasons why there has to be certification, as explained by this Court in Robert Mutiso Lelli v. Kenya Medical Training College & 2 Others, CA No. Sup 023 of 2022, is that:

“In philosophy, orientation and design, the Constitution did not create the Supreme Court as an additional appellate tier in our judicial system where routine disputes would ultimately end for correction of what parties perceive to be errors in the interpretation or application of the law by courts below the Supreme Court.”

19. In Hermanus Phillipus Steyn v. Giovanni Gneccchi- Ruscone (*supra*) the Supreme Court set out a comprehensive list of the considerations that should guide courts in determining whether an intended appeal to the Supreme Court involves a matter of general public importance. Among the considerations are that the applicant must satisfy the certifying Court that the issues to be canvassed in the Supreme Court transcend the circumstances of his or her particular case and have a significant bearing on the public interest; that the point of law involved is a substantial one whose determination will have a significant bearing on the public interest; that mere apprehension of a miscarriage of justice is not sufficient reason for certification; and that determination of contested facts between the parties is equally not a sufficient basis for certification.
20. We have no doubt in our minds that the issues involved in the intended appeal are not private matters relevant and important only to Pamela, ARA and EACC. They involve the correct interpretation and application of statutes that have been enacted specifically to deal with special categories of offences which by their nature are clandestine, complex, international, and defy the standard investigation and prosecution approaches and processes.
21. Issues of corruption, economic crimes and money laundering pose existential threat to many nations and ours is not an exemption. We are satisfied that the ARA and EACC have demonstrated that the issues they wish to be considered by the apex Court transcend the circumstances of the parties herein and have a significant bearing on the public interest.
22. Nor do we think the issues that the Supreme Court is being asked to resolve are frivolous or idle. How to draw the correct balance between protecting the rights and freedoms of the individual and at the same time facilitating the detection and prosecution of debilitating crimes, in our view, deserves the benefit of the guidelines of the apex Court. In particular, we bear in mind that the legislation in question is relatively new and is based on or informed by an international convention, thus raising the issues to matters of global interest. In addition, there is clearly divided opinion of this Court on the correct interpretation and application of the statute.
23. As regards the prayer for stay of execution, the same was abandoned in light of clear and consistent decisions of the Court that it has no jurisdiction to issue such orders.
24. For the foregoing reasons, we are satisfied that this application has merit. We allow the same and grant a certificate to enable the ARA and the EACC appeal to the Supreme Court in terms of Article 163(4) (b) of the Constitution. Costs of this application will abide the outcome of the intended appeal in the Supreme Court. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**



.....

**JUDGE OF APPEAL MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

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

*signed*

**DEPUTY REGISTRAR**

