



REPUBLIC OF KENYA



Assets Recovery Agency v Boru & 3 others (Civil Application E441 of 2022) [2023] KECA 1570 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KECA 1570 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E441 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
JUNE 22, 2023**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

BARAK ABDULLAHI BORU 1ST RESPONDENT

MOMANYI MAKORI DENNIS 2ND RESPONDENT

EQUITY BANK (KENYA) LIMITED 3RD RESPONDENT

FIRST COMMUNITY BANK LIMITED 4TH RESPONDENT

(An Application for stay of execution of the Judgment and Order made in ACEC at Nairobi (E. Maina, J.) delivered on 10th November 2022 in HCACEC Misc No. E006 of 2021)

RULING

1. By a Notice of Motion dated 23rd November 2022, brought pursuant to sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), rules 4, 5 and 77 of the [Court of Appeal Rules](#), sections 53, 53A and 82(2) (b) of the [Proceeds of Crime and Anti-money Laundering Act](#), the applicant seeks orders to stay execution of the Judgment and Orders made on 10th November 2022 (E. Maina, J) in High Court Anti- Corruption & Economic Crimes Court Miscellaneous Application No E006 of 2021; and an order of injunction restraining the 2nd and 3rd respondents by themselves, their advocates, servants, agents or any person acting on their authority from proceeding with the execution process.
2. The applicant filed an Originating Summons in the High Court ACEC Case No E006 of 2021 dated 25th March 2021, seeking a preservation order in respect of motor vehicle KBL 804V Toyota Prado in which the 1st respondent had been arrested while ferrying 101.28 Kg of cannabis along Merti- Isiolo, and road registered in the names of the 2nd and 3rd respondents. Additionally, the Summons sought an order declaring that motor vehicles registration numbers KBL 804V Toyota Prado and KCW 553H



- were proceeds of crime and, therefore, liable to forfeiture to the Government; an order of forfeiture of the said motor vehicles; and an order directing the director National Transport Safety Authority (NTSA) to transfer ownership of the motor vehicles in favour of the applicant.
3. In its judgment dated 10th November 2022, the court held that the issue as to whether or not motor vehicle registration numbers KBL 804V was an instrumentality of crime was best left to the court trying the offence in which the vehicle was alleged to have been ferrying the cannabis; and that the preservation orders issued by the Court would subsist for 14 days only so as to avail the applicant time to make the appropriate application in the trial court through the office of the Director of Public Prosecutions (ODPP).
 4. The applicant was aggrieved by the order of the High Court and filed the instant application, which is supported by an affidavit sworn by CPL Jeremiah Sautet, a police officer attached to the applicant as an investigator. He deposed that the Court erred in its interpretation of section 82(2) of the *Proceeds of Crime and Anti-money Laundering Act (POCAMLA)* as it was tying the proceedings in a civil forfeiture to the outcome of the criminal trial. He stated that civil forfeiture of proceeds and instrumentalities of crime is a process distinct from the criminal trial of the offender or asset owner, and that the Court erred in directing an entity (ODPP) which was not party to the suit to take a positive action whereas the criminal trial was still ongoing. He contended that if stay was not granted, the intended appeal if successful, would be tantamount to an academic exercise and, thus, rendered nugatory. For this reason, justice tilted towards the grant of the application. In his view, the order as issued by the High Court would adversely curtail the statutory mandate of the applicant and the application of the rule of law and public interest, which ensure that proceeds and instrumentalities of crime are forfeited to the State.
 5. The application was opposed by the 2nd respondent vide his replying affidavit sworn on 15th February 2023. He averred that the prayers sought cannot be granted as the High Court issued a negative order incapable of execution and, therefore, there was nothing to stay; and that the Court having disallowed the applicant's application meant that the application is misconceived, bad in law, unmerited and should be dismissed with costs.
 6. The application was heard before us on 20th February 2023. Learned counsel, Ms. Irari and Mr. Mburu represented the applicant and the 2nd respondent respectively. The other parties, though duly served, were not represented.
 7. Ms. Irari relied on written submissions dated 5th November 2022, submitting that the intended appeal is arguable and not frivolous; that if the application is not allowed the appeal would be rendered nugatory as the 2nd and 3rd respondents will have unfettered access to the proceeds and/or instrumentalities of crime contrary to the provisions of section 82(2) of *POCAMLA*; that the orders sought to be appealed have far reaching consequences on the statutory mandate of the applicant as the intended appeal is hinged on the interpretation of section 82(2) of *POCAMLA*, which goes into the core function of the applicant; and that, if the application is not granted, the applicant would greatly be prejudiced. We were therefore urged to allow the application.
 8. On a query from the Court as to the status of the subject motor vehicles, counsel stated that motor vehicle registration number KBL 804V was under the custody of DCI at Isiolo Police Station, and that motor vehicle KCW 553H was already forfeited to the State. She conceded that the applicant had filed a similar application which was dismissed for non- attendance.
 9. In a brief response, Mr. Mburu submitted that the High Court disallowed the application, which in effect meant that that was a negative order incapable of being stayed. Explaining what this meant, he submitted that the application having been disallowed, there was nothing to stay. He termed the



application as incompetent and bad in law. Reliance was placed on the cases of *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR and *East African Excavation Co. Ltd v Nutech System & Trading Co. Ltd* [2021] eKLR in this regard.

10. We have considered the pleadings and submissions by the parties. To our minds, only one issue arises for determination, namely: whether the applicant has met the threshold for grant of stay of execution. The principles for our consideration in exercise of our unfettered discretion under rule 5 (2) (b) of this Court's Rules to grant an order of stay of execution or injunction are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. This is not to say that it must be an appeal that will necessarily succeed, but one that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that, unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR.
11. In the Motion before us, we note that the applicant is seeking an order of stay of execution of the High Court's ruling and orders dated 10th November 2022 in which the court rendered itself, inter alia, that; "the issue of whether or not motor vehicle KBL 804V Toyota Prado is an instrumentality of crime and any interest the 4th respondent may have in the said vehicle is left to the court trying the offence with which the vehicle is alleged to have been used." In our view, this is akin to a dismissal or negative order incapable of being stayed. Neither the applicant nor the respondent was ordered to do anything or refrain from doing anything. In *Kanwal Sarjit Singh Dhimažl v Keshavji Juvraj Shab* [2008] eKLR, this Court stated:

"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & others* [1976] KLR 63 at page 66 paragraph C)".
12. This Court has no power to stay a negative order of dismissal as was held in the case of *Oliver Collins Wanyama v Engineers Board of Kenya* [2019] eKLR thus:

"An order of stay is not available to the applicant if his application for judicial review having been dismissed, giving rise to a negative order that is incapable of being stayed"
13. It is trite that, where there is no positive order made in favor of the respondent which is capable of execution, there can be no stay of execution of such an order. In the premises, it is clear that there is no order of the High Court in the judgment dated 10th November 2022 that is capable of execution. Further, the High Court, in the interest of justice, did direct the applicant to file the application in the court that had the onus of determining the criminal case and, as such, the applicant was accorded an avenue for recourse.
14. The applicant also seeks an injunction order restraining the 2nd and 3rd respondents by themselves, their advocates, servants, agents or any person acting on their authority, from proceeding with the execution process. While this Court has the power to grant injunctive orders, the prayer as phrased by the applicant is untenable. It seeks an order of injunction restraining the 2nd and 3rd respondents by themselves, their advocates, servants, agents or any person acting on their authority 'from proceeding with the execution process.' (Emphasis ours)



15. From the framing of the prayer, it is clear that the applicant is seeking to stop the execution process. As already stated above, the High Court did not order the respondent to refrain from, or act in, any manner, and as such, it is not evident what exactly the respondent would be proceeding with. It would have been feasible if the applicant sought to stop the respondents from selling, disposing or transferring the motor vehicle. Unfortunately, the instant application has not sought such a prayer. To that extent, we emphasize the obvious household rule that, parties are bound by their pleading, and it is not the duty of the court to infer or speculate on what a party intend or intended to seek. Consequently, the Court cannot award a relief which has not been sought by the applicant. This was well articulated in the case of *Galaxy Paints Co. Ltd v Falcon Guards Ltd* [2002] 2EA 385, which was cited with approval in *Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 others* [2018] eKLR as follows:

“...that parties are bound by their pleadings and that the court will not grant a relief which has not been sought.”

16. From the foregoing, we arrive at the inescapable conclusion that the application is misconceived and incompetent. It has not met the twin principles for grant of either a stay of execution or injunctive relief. It lacks merit and we accordingly dismiss it with orders that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

