**Hardy Enterprises Limited & 3 others v Assets Recovery Agency (Civil Appeal E297 of 2020) [2022] KECA 587 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 587 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL E297 OF 2020**

**MSA MAKHANDIA, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA**

**JULY 8, 2022**

**BETWEEN**

**HARDY ENTERPRISES LIMITED ..... 1ST APPELLANT**

**TODDY CIVIL ENGINEERING COMPANY LIMITED ..... 2ND APPELLANT**

**ANTHONY NG'ANG'A MWAURA ..... 3RD APPELLANT**

**ROSE NJERI NG'ANG'A ..... 4TH APPELLANT**

**AND**

**ASSETS RECOVERY AGENCY ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nairobi Anti-Corruption and Economic Crimes Court (Mumbi Ngugi, J.) dated 10th July, 2020 In Misc. Civil Application No. 8 of 2020)***

## JUDGMENT

1. The genesis of this appeal is the Miscellaneous Civil Application No. 8 of 2020 dated 20th February, 2020 by the respondent against the 4 appellants. The respondent had moved the court by way of an *ex-parte* application under Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) seeking preservation and seizure orders of movable assets belonging to the appellants herein.

2. The respondent alleged that the appellants had been awarded tenders by the Nairobi City County Government irregularly and received proceeds which were used to acquire the motor vehicles subject to the preservation orders. The respondent alleged that those were proceeds of crime. On 24th February, 2020 Mumbi Ngugi J (as she then was) issued ex-parte orders against all the appellants preserving, prohibiting and seizing bank accounts and motor vehicles said to be operated and owned by the appellants jointly and severally.

3. Upon service of those orders, the appellants moved the court by way of Notice of Motion dated 2nd March, 2020 seeking orders to vary or rescind the preservation and seizure orders aforesaid. There was another application by the appellants dated 23rd March,2020 seeking the same orders on the same grounds which however was stuck out by the learned judge for being unnecessary. After hearing the parties, on 10th July, 2020 Mumbi Ngugi J (as she then was) gave a ruling dismissing the appellants' application thereby giving rise to the present appeal

4. When this appeal was called out for hearing virtually on 22nd March,2022 only Mr. Githinji, learned counsel for the respondent was present while Professor Ojienda, learned counsel for the appellant was absent. Mr. Githinji applied to have the appeal dismissed under Rule 102 of the *Court of Appeal Rules*, or in the alternative be determined by way of written submissions already filed by the parties, opting to rely on his submissions without any oral highlighting. The Court directed that the appeal shall be heard by way of the submissions and reserved the judgment for 24th June,2022.

5. Later on the same date, that is 22nd March,2022, Professor Ojienda wrote to the Court requesting to be allowed to highlight his submissions as he had experienced technological challenges during the virtual hearing. The Court considered the request and declined the same for reasons given in the order made on 12th April,2022.

6. There are fifteen grounds set out in the memorandum of appeal, which essentially revolve around the trial court's powers under sections 82 and 89 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) upon which the actions of the respondent were predicated.

7. The fifteen grounds of appeal can be collapsed into two. First, whether or not the learned trial judge erred in fact and law in her ruling of 10th July, 2020 as relates to the application of section 82 of *POCAMLA*, and two, whether the appellants have met the threshold set out in section 89 of *POCAMLA*aforesaid. Both parties have filed submissions and cited several authorities.

8. The supporting affidavit in the application that was considered by the trial judge was sworn by Antony Ng'ang'a Mwaura the 3rd appellant in this appeal. It dwelt at length on the fact that most of the payments, if not all, were made before the tender/tenders were awarded and contracts formalised. In fact, it is his position that only three of the motor vehicles listed in the application were acquired and registered subsequent to the tender payment.

9. Further, apart from most of the vehicles being acquired outside the contested period, they are tools of trade necessary for execution of the tenders and other projects undertaken by the appellants. In effect, the contested orders have compromised the performance of the said projects which need to be completed expeditiously. Further, the hardship the appellants were undergoing far outweighed the risk that the property may be destroyed, lost, damaged, concealed or transferred and, therefore, there was need for the application to be allowed.

10. The response to the said averments came by way of an affidavit sworn by S/Sgt Fredrick Musyoki sworn on 2nd April, 2020 in which he reiterated the contents of his affidavit sworn on 21st Febuary,2020 in support of the application that led to the preservation orders. S/Sgt Musyoki is the police officer in charge of investigations at the Assets Recovery Agency (the Respondent). The thrust of his response was that, he was assigned the task to investigate a case of money laundering and tracing proceeds of crime from funds stolen from the Nairobi City County Government.

11. He instructed a fellow Police Officer by the name Corporal Isaac Nakitare to file an application for search and seizure warrants under section 118 and 120 (1) of the Criminal Procedure Code, and section 180 of the *Evidence Act* which he did. It is noted that the respondent is allowed to do so under section

53 (A) of *POCAMLA*. The orders for search and seizure were granted under Misc. Application No. 4477 of 2019 by the Chief Magistrate to last for 14 days.

12. The court in making the orders of 24th February, 2020 proceeded under section 82 of *POCAMLA*. It is clear from the provisions thereof that, the court was exercising a discretion provided therein. We consider it necessary to set out section 82 of the Act which provides as follows,

> " '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."

13. The appellants' application dated 2nd March, 2020 relied on the provisions of section 89 (1) of *POCAMLA* which provides as follows,

> " '89. Variation and rescission of orders
>
> (1) A court which makes a preservation order—
>
> (a) may, on application by a person affected by that order, vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—
>
> (i) that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and
>
> (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
>
> (b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded."

14. This being the first appeal, we are bound to consider the entire record which includes all the material presented, re- evaluate the same and make our own conclusions. We must be cautious however to avoid interfering with the findings of fact by the trial court unless such findings were not based on evidence or were based on mis-apprehension of the evidence or if the judge acted on wrong principles in reaching such findings.

15. In the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR this Court stated as follows,

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-
>
> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

16. The respondent is the institution mandated under the Act to take the action or actions complained of by the appellants. It is important to note at this point that, there are crucial steps before a dispute of this nature may be determined either way. The first step is the consideration of an ex parte application such as the one dated 20th February,2020 lodged by the respondent leading to the orders of 24th February, 2020.

17. The second step is the challenge that the appellants made of the said orders by the application dated 2nd March, 2020. The decision of the court following that application leads to either an appeal, such as the one before us, or an application for forfeiture of the seized properties.

18. The appellants may either lodge the appeal, as they have done in this case, or wait for the prosecution of the application for forfeiture lodged by the respondent. The record before us shows that there is indeed an application for forfeiture, being Civil Application No. 17 of 2020, between the respondent as the applicant, and the appellants as respondents. This application is pending hearing and determination in the High Court Anti-Corruption Economic Crimes Division.

19. It is in the application for forfeiture that the operation of sections 90 and 92 of the Act come into effect. Whereas the making of ex parte orders is based on reasonable grounds, the consideration and determination of an application for forfeiture shall she based on a balance of probabilities. It is our view that such a standard of proof envisages the hearing of both sides to the dispute.

20. S/Sgt Musyoki made an analysis of all bank accounts held by the 1st and 2nd appellants between the periods of the years 2017 to 2020 and noted suspicious large cash deposits that pointed to money laundering activities. It was also established that the 3rd and 4th appellants were signatories to the said accounts. There was also evidence of interbank transfers.

21. In the end it was established that, within the period of interest, the first appellant's account No. 001027 3735777 at Equity Bank had received a sum of Kshs.175,582,014 from Nairobi City County Government on two dates, to wit 15th October, 2018 and 25th November, 2018. These funds were deposited in 8 split transactions. The first appellant also received a sum of Kshs.102,414,130.55 in five tranches on 22nd November, 2018. The 1st appellant then transferred some of these funds to the 2nd appellant. The 2nd and 3rd appellants deposited some funds into the account of the County Governor.

22. The 3rd appellant, who it is noted is a director of the 1st and 2nd appellants, and also one of the signatories to the accounts, purchased several vehicles in quick succession which, it was noted, were

not of commercial use. The respondent was then persuaded there was sufficient reason to have all those assets and the bank accounts seized and preserved under the relevant provisions of law.

23. What comes out from the record is that, the cited bank accounts are not the main accounts of the 1st and 2nd appellants. It has also not been seriously disputed that the motor vehicles that were seized and ordered to be preserved were not tools of trade, but luxury vehicles registered in the name of the 3rd appellant. In fact, S/Sgt Musyoki had identified specific vehicles deemed to be tools of trade and excluded them from the application for seizure and preservation.

24. The appellants, in their answer and submissions to the respondent's application dated 20th February,2020, in their application dated 2nd March,2020 and submissions that followed in this appeal, have laid emphasis on their claim that the money and assets seized and preserved are not proceeds of crime. They cited *Assets Recovery Agency v Rose Monyani Musanda and Sidian Bank Limited (Interested Party)* [2020] eKLR where the court stated as follows,

> "'33. It is therefore clear from the wording of section 82(2) that a court issuing preservation orders is persuaded by reasonable grounds to believe that the property concerned was intended for use in the commission of the offence or it amounts to proceeds of crime. What constitutes reasonable suspicion is for the individual judge or Jury to determine depending on the circumstances and or merits of each case. The same must be founded on existence of factual foundation and not mere imagination or malice. See Timothy Isaac Bryant and others vs. inspector of police and 7 others and Emmanuel Suipenu Siyanga vs. (supra) where the court stated that "... a suspicion cannot be held reasonable if it is founded on non- existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion."

25. When the appellants moved the court under section 89 (1) of the POCAMLA, they were obliged to demonstrate that the orders issued would deprive them of means of living and cause undue hardship, and how that outweighed the risk of the property seized and preserved being lost, damaged, destroyed, concealed or transferred.

26. The law places on the appellants the onus to demonstrate that the orders issued by the court have negatively impacted their living in such a way that, the hardship brought about thereby is unsustainable, and therefore variation of the said orders has proved necessary. -see *Asset Recovery Agency v. Samuel Wachanje alias Sam Mwadime & 7 others* [2016] eKLR.

27. The learned trial Judge therefore, correctly observed that in an application under section 89 of *POCAMLA*, the appellants were supposed to demonstrate hardship that they faced as a result of the preservation orders. However, the court found as follows,

> ''They did not, in my view, show how the orders will deprive them of the means to provide for their reasonable living expenses and cause undue hardship to them, and how such hardship outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. The applicants have instead argued to a great extent about whether or not the assets and funds the subject of the preservation orders are proceeds of crime.

However, these arguments must wait for the hearing of the substantive application for forfeiture. As the court in the Asset Recovery Agency v Samuel Wachenje case observed:

> " 43. Whether or not the subject motor vehicles were born out of proceeds of crime, can only be canvassed at the hearing of the forfeiture application. The rival arguments placed before this court in this application cannot enable the court to make a finding on that issue one way or the other, with any degree of certainty."

28. It is not difficult to conclude that the allegations raised by the appellants in the application dated 2nd March, 2020 were premature. We say so because at that stage, not sufficient interrogation may be made to reach the standard of proof envisaged under section 92 (1) of *POCAMLA*. To that extent we agree with the learned judge.

29. The affidavits in support of and in opposition to the application dated 2nd March, 2020 together with the submissions in this appeal point to arguments related to the application for forfeiture which is pending hearing. In her determination, the trial Judge addressed, and we believe rightly so, all the facts placed before her, and we have no room to interfere with such findings. We are also satisfied that the findings of law were informed by the provisions of POCAMLA and cited authorities and therefore, the learned judge may not be faulted in that regard. In any case, the appellants have not shown that, the hardship outweighs the risk cited in the applicable law.

30. In the event the appellants believe the orders were misplaced, or that they are causing hardship as stated, the best avenue is for them to submit to the hearing of the forfeiture application so that a decision may be made appropriately. For now, it is our view that the trial judge properly addressed her mind to the provisions of sections 82 and 89 of *POCAMLA* and we have no reason whatsoever to interfere with that discretion.

31. It follows that the appeal is without merit and therefore the same is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**.....**

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**