Aboo v Assests Recovery Agency & another (Application E034 of 2024) [2025] KESC 38 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KESC 38 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION E034 OF 2024

MK KOOME, CJ & P, PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU & W OUKO, SCJJ

MAY 30, 2025

BETWEEN

PAMELA ABOO ..... APPLICANT

AND

ASSESTS RECOVERY AGENCY ..... 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2ND RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal (Makhandia, M'Inoti & M. Ngugi, JJ.A.) dated 22nd November, 2024 in Civil Applic. Sup. No. 613 & E005 of 2023 (consolidated) granting certification to appeal against the Judgment of the Court of Appeal (Okwengu, Warsame & Mativo, JJ.A) dated 15th December, 2023 in Civil Appeal No. 452 of 2018)

RULING

Representation:

Mr. Victor Obuli & Akude Jura for the applicant (Oringe Waswa & Opany Advocates)

Mr. Mohamed Adow for the 1st respondent

(The Assets Recovery Agency)

Ms. Regina Jemutai for the 2nd respondent (Ethics & Anti-Corruption Commission)

1. UPON CONSIDERING the Originating Motion dated 6th December, 2024 and filed on 23rd January, 2025 by Pamela Aboo, the applicant, pursuant to Article 163(5) of the Constitution and Rule 33(2) & (5) of the Supreme Court Rules, 2020 seeks determination of the following questions:

    a. Whether the respondents intended appeals met the threshold set out in the case of Hermanus Steyn as a matter of general public importance.

b. Whether the Court of Appeal in granting a certificate to appeal relied on extraneous issues that were not part of the matters for determination.

c. Whether the Assets Recovery Agency ought to have allowed the applicant to access her frozen money given that there is no order of stay.

2. COGNISANT of the pertinent facts which culminated in this Motion, to wit; that sometime in March 2017, the Assets Recovery Agency (ARA) received information that money totalling to Kshs. 19,688,152.35 held by the applicant in three bank accounts at Equity Bank, Donholm Branch was suspected to be proceeds of crime; the basis of such suspicion being linked to allegations that Alex Mukhwana Khisa, the applicant's husband, an officer of the Kenya Revenue Authority, Customs Department, was soliciting and receiving bribes from clearing and forwarding agents to undervalue tax payable on imports. It was therefore suspected that the applicant was the conduit for moneys solicited as bribes by her husband.

3. CONSEQUENTLY, ARA vide Misc. Applic. No. 58 of 2017 obtained warrants to investigate and an order of preservation against the bank accounts; according to ARA, the investigations revealed that the said bank accounts were opened by the applicant between 17th November, 2015 and 24th February, 2017 at the Donholm Branch; the money therein consisted of substantial cash deposits made in a span of two years between 2015 and 2017 at two branches of Equity Bank in Mombasa, that is, the Kenya Ports Authority Branch and Mombasa Supreme Centre Branch (which is near the Kenya Ports Authority) as well as Equity Bank Agents based in Mombasa; and no withdrawals had been made from the said accounts.

4. FURTHER, upon investigations, ARA was not satisfied with the explanation given by the applicant and her husband as to the source of the money; therefore, ARA lodged an application by way of an Originating Motion dated 31st October, 2017 in the High Court being; ACECA Misc. Applic. No. 73 of 2017, premised on Sections 81, 82, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), seeking *inter alia*; a declaration that the money in the three bank accounts are proceeds of crime; and forfeiture of the said money to the Government; subsequently, the Ethics and Anti-Corruption Commission (EACC), which was carrying out parallel investigations, was joined to the said proceedings as an interested party. The position taken by ARA and EACC was that the applicant's bank accounts were conduits for depositing and transferring bribes received by her husband. In turn, the applicant reiterated her explanation to the effect that the money in her accounts was from a number of businesses she was undertaking. In particular, she maintained that she carried out a transport business in Mombasa in partnership with Mr. Samson Waweru. That she also sold bananas and sugarcane in Mombasa with another business partner, Jonathan Kimindu and traded in cereals and perfume.

5. COGNIZANT that at the High Court (*Ong'undi, J.*) by a judgment dated 13th November, 2018 found that the matter turned on whether ARA and EACC had established a case for forfeiture of the money under POCAMLA and/or Anti- Corruption and Economic Crimes Act (ACECA); that the forfeiture proceedings were civil in nature and an action *in rem* (against property); and once ARA had established on a balance of probabilities that the accounts contained huge cash deposits suspected to be proceeds of crime, the burden shifted to the applicant to explain the source thereof. Nonetheless, the court was not satisfied with the explanation proffered by the applicant since she failed to provide evidence to substantiate her claim, like business licenses, permits and how she met her business costs. In the end, the court issued the orders sought with costs to ARA.

6. DISATISTIED, the applicant lodged an appeal against the High Court decision in the Court of Appeal, Civil Appeal No. 452 of 2018, premised on the grounds that the learned Judge erred by,

holding that the funds in issue were proceeds of crime in the absence of evidence; failing to find that ARA had not discharged the burden of proof under Sections 107 and 108 of the Evidence Act; and wrongly shifting the burden of proof to the applicant and thereby arriving at an erroneous conclusion. The appeal was allowed by a majority judgment (*Okwengu & Warsame, JJ.A*) dated 15th December, 2022 with *Mativo, J.A* dissenting. The orders issued in the High Court were therefore set aside.

7. NOTING that as a result of the above outcome, ARA and EACC by two separate applications lodged before the Court of Appeal being; Civil Application No. Sup. E005 of 2023 and Civil Application No. Sup. E613 of 2023, respectively, which were later consolidated, sought leave to appeal to the Supreme Court on the ground that their intended appeals raise issues of general public importance. In that regard, the Court of Appeal (*Makhandia, M'Inoti and Mumbi Ngugi, JJ.A*) by a ruling dated 22nd November, 2024 granted the leave sought, the subject matter of the current Motion before us.

8. UPON CONSIDERING the supporting affidavit sworn by the applicant on 6th December, 2024 as well as her submissions dated 16th January 2025, the gist of which is that; the matter revolves around the burden and standard of proof in forfeiture proceedings under POCAMLA as opposed to ACECA; that the law is clear on the standard of proof pertaining to the forfeiture proceedings in question, which is on a balance of probabilities; that ARA was required to prove their case on a balance of probabilities and not establish a *prima facie* case as they did; that it is an elementary principle as espoused under Section 112 of the Evidence Act, that he who alleges, in this case ARA, must prove; and there is nothing novel that this Court is being called upon to determine. In the applicant's view, this was a matter of shoddy investigations, and a court has no business in aiding a party to prove their case; that the certification application was lodged in bad faith and meant to frustrate the applicant from enjoying the fruits of her appeal; that the Court of Appeal was influenced by extraneous issues like the fight against corruption and that POCAMLA was a relatively new statute in certifying the intended appeal; that although the Court of Appeal was not unanimous in their decision does not *ipso facto* render the same a matter of general public importance. Accordingly, the applicant urged this Court to review the certification by the Court of Appeal and substitute it with an order dismissing the consolidated application for certification.

9. TAKING INTO ACCOUNT ARA's replying affidavit sworn by Cpl Isaac Nakitare on 23rd December, 2024 and its written submissions dated 14th February, 2025 to the effect that, the applicant does not disclose any grounds for reviewing the certification issued by the Court of Appeal; that she is merely re-litigating the same issues she had raised before the Court of Appeal while considering the application for certification; and whether ARA's appeal, SC Petition No. E046 of 2024, which has since been lodged before this Court, is meritorious can only be canvassed at the hearing.

10. UPON EXAMINING EACC's replying affidavit sworn by Regina Jemutai on 7th February, 2025 and written submissions of even date, the totality of which is that; contrary to the applicant's assertion, its appeal, SC Petition No. E044 of 2024, raises issues of general public importance concerning forfeiture of unexplained assets and proceeds of crime which require this Court's input. More so, because in EACC's view, the Court of Appeal, by its majority and minority decision, were divided on those issues. Besides, EACC argues that the majority decision of the Court of Appeal not only requires ARA to prove on a balance of probabilities that the money in issue are proceeds of crime but also conclusively demonstrate the origin of the money; that the decision will have the effect of making the fight against corruption difficult and the country a haven for illicit financing.

11. APPRECIATING that the Motion before this Court substantially revolves around our jurisdiction under Article 163(5) of the Constitution and Rule 33 (2) of the Supreme Court Rules; in other words, this Court is being called upon to review the certification by the Court of Appeal that the intended appeals, which have since been filed, raise matters of general public importance; and that the test/

guiding principles for such review are well settled in the *locus classicus* case of *Steyn Vs Ruscone* [2013] KESC 11 (KLR); and

12. THEREFORE AND UPON DELIBERATIONS on the Motion and the rival arguments, WE OPINE as follows:

i. To begin with, the guiding parameters of this Court's jurisdiction to review the Court of Appeal's decision on certification is explicitly spelt out under Article 163(5) of the Constitution in the following terms:

> *"A certification by the Court of Appeal under clause 4(b) may be reviewed by the Supreme Court and either affirmed, varied or overturned."* Emphasis added.

It follows therefore, that the third issue put forth by the applicant namely, *whether the Assets Recovery Agency ought to have allowed the applicant to access her frozen money given that there is no stay order*, falls outside the scope of this Court's jurisdiction under Article 163(5). In any event, save for setting out the said issue, the applicant did not make any submissions on the same. Therefore, we decline to express ourselves on that issue which was not argued and falls outside the domain of this application.

ii. On the merits of the Motion, the nub of ARA and EACC's applications for certification before the Court of Appeal was that the issue of forfeiture of funds and assets suspected to be proceeds of crime or unlawfully acquired money is intertwined with corruption and therefore a matter of general public importance. Further that, the apex court should pronounce itself on firstly, the correct approach in determining the issues of onus and standard of proof in civil forfeiture arising from such cases. Secondly, whether the concept of "unexplained assets" in civil forfeiture under the ACECA can be given the same application or interpretation under the POCAMLA.

iii. The applicant sustained the same opposition to the applications on more or less the same grounds as she has raised before us; that the law is clear on civil forfeitures, that the standard of proof is on a balance of probabilities and therefore there is nothing novel for this Court to settle.

iv. We have taken into account what the Court of Appeal stated in their ruling issued dated 22nd November, 2024 while certifying this matter which is as follows:

> "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."

v. Did the Court of Appeal consider extraneous matters in granting the certification in issue? We do not think so and explain why below. It is trite that a matter(s) of general public importance which would warrant the exercise of this Court's appellate jurisdiction under Article 163(4)(b) of the Constitution should transcend the dispute between the parties, and have a significant bearing upon public interest. Further, the onus lay with the ARA and EACC to demonstrate that the matters in question carry specific elements of real public interest and concern.

vi. It is ARA and EACC's position that one of the matters of general public importance is the correct approach to be adopted by courts when dealing with the issue of onus and standard of proof in civil forfeiture proceedings. Section 92 (1) of POCAMLA prescribes the applicable standard of proof in civil forfeiture proceedings thereunder in the following terms:

"92

1) The High Court shall, subject to section 94, make an order applied for under section 90(1) (an order forfeiting property or any part thereof to the Government) 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." Emphasis added

vii. Based on the foregoing, the applicable standard of proof in forfeiture proceedings under POCAMLA is in black and white, that is, on a balance of probabilities. However, we cannot help but note from our perusal of the impugned judgment of the Court of Appeal that there are divergent approaches taken by the superior court below on forfeitures. Our observation is not solely based on the fact that there was a dissent by Mativo, J.A. It is settled, that even where there is a dissenting opinion, the judgment of the court remains the majority decision. Therefore, as correctly submitted by the applicant, a dissenting opinion by itself does not render a matter of general public importance. See MNK alias MNP Vs POM [2021] KESC 46 (KLR). Nonetheless, the divergent approaches are also apparent in the majority judgment. More particularly, with regard to how the standard of proof is to be met, and at what particular point in time the evidentiary burden, if at all, shifts; and whether the concept of "unexplained assets" in civil forfeiture under the ACECA can be given the same application or interpretation under the POCAMLA.

viii. By the majority judgment, on one hand, Warsame, J.A noted that, pursuant to Section 92 of POCAMLA, the burden lay with ARA to establish a *prima facie* case on a balance of probabilities that the money in the applicant's accounts were proceeds of crime; in that, ARA was required to demonstrate a causal connection between the said money and the offence; towards that end, ARA discharged its legal and evidentiary burden when it demonstrated that huge amounts of money had been deposited in the applicant's accounts, which were suspected to be bribes received by her husband; and therefore, the evidentiary burden shifted to the applicant to explain the source of the money. The learned Judge of Appeal went on to find that since the applicant gave details of her businesses and business partners, the evidentiary burden shifted back to ARA to investigate the same and demonstrate that the business partners and businesses were illegitimate, which it failed to do. In any event, *Warsame, J.A*, held that since

no allegations of corruption were levelled against the applicant, the failure by ARA to join the applicant's husband to the forfeiture proceedings was fatal as he was the link to the allegations of corruption. Be that as it may, he also found that ARA had a duty to establish a connection between the applicant's husband and the deposits made in the bank accounts.

ix. On the other hand, *Okwengu, J.A* held that, since the forfeiture proceedings in question were premised on POCAMLA, the burden of proof remained with ARA to establish that the origin/source of the money in the applicant's accounts were unlawful; and the aforementioned burden could neither be discharged merely on suspicion nor shifted by requiring the applicant to prove that the funds were not proceeds of crime. As far as the learned Judge of Appeal was concerned, the High Court erred in treating the money as unexplained assets under ACECA and applying the standards thereunder by shifting the evidentiary burden to the applicant to explain the source of the money. Towards that end, she found that the High Court had conflated forfeiture proceedings under POCAMLA and ACECA, which are distinct and anchored on different premises. She held that Section 94 as read with Section 92 of POCAMLA empowers the court to issue an order of forfeiture of proceeds of crime if it is proved on a balance of probability that the property has been used or is intended for use in the commission of an offence or is proceeds of crime. Whilst ACECA provides under Section 55 for forfeiture of unexplained assets which is concerned with disproportion between the assets concerned and the known legitimate sources of income of the person found with the assets.

x. To compound the issue, there seems to be a third approach propounded by the *Mativo, J.A* in his dissent. In that, he found that ARA was only required to demonstrate on a balance of probabilities that the money in the accounts is reasonably suspected to be proceeds of crime; and it was not essential for ARA to establish the precise form of unlawful conduct as a result of which the property in question was acquired. He also found that the evidentiary burden shifted to the applicant to demonstrate that the money is not proceeds of crime since she possessed the knowledge of the source thereof. Towards that end, *Mativo, J.A* went on to find that the applicant was required to provide satisfactory evidence in the form of affidavits by her alleged business partners, supporting contracts, invoices to her clients amongst other documents to substantiate that she was carrying out the businesses she alluded to. Ultimately, he found that the applicant's failure to do so left gaps in her explanation of the source of the money in her accounts hence the High Court could not be faulted for issuing the orders it did.

xi. In light of the foregoing, we reject the applicant's contention that issues raised in ARA and EACC's appeals are not novel. Clearly as demonstrated above, those issues have not been settled either by the Court of Appeal or this Court. More importantly, we concur with the Court of Appeal that the overarching objective of forfeiture proceedings in relation to combating corruption, economic crimes and money laundering is a matter that transcends the dispute between the parties in a matter and affect a cross section of the society. Equally, we are not persuaded by the applicant's contention that the Court of Appeal, in considering the foregoing, took into account extraneous issues. Rather, we find that the contextual considerations thereof demonstrate that the intended appeals raise matters of general public importance that warrant this Court's pronouncement. Accordingly, we see no reason to review the certification by the Court of Appeal as urged by the applicant.

xii. Before issuing our final orders, we note that, while the Court of Appeal certified ARA and EACC's intended appeals to this Court, it failed to specifically delineate the issues of general public importance. Time without number, this Court has emphasised the importance of formulation of specific issues of general public importance to be determined by this Court as

this will not only guide litigants from going off on a tangent in urging their appeal but will also act as an indicator of whether an appeal lodged pursuant to certification exceeds the parameters pursuant to which it was admitted. See *Stanbic Bank Kenya Limited Vs Santowels Limited* [2024] KESC 31 (KLR).

xiii. It is common ground ARA and EACC have since lodged their appeals, SC Petition No. E046 of 2024 and SC Petition No. E046 of 2024, respectively, which were consolidated by a consent order dated 4th February, 2025 with SC Petition No. E046 of 2024 being designated as the lead file. For proper order and guidance to the parties, we delineate the issues for consideration in the consolidated appeal as follows:

a) Whether it is incumbent upon EACC or ARA to prove establish connection between the crime and money/property sought to be forfeited under civil forfeiture proceedings.

b) Whether the evidentiary burden shifts to a person in possession of property suspected to be proceeds of crime or unlawfully acquired to explain the source/origin of the property; and if so, at what point in time?

c) Under what circumstances is a person considered to have provided reasonable explanation for the origin/source of his/her property?

d) What reliefs should issue?

xiv. Taking into account the nature of this matter and this Court's decision in *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR), we deem it just to order that each party bears their own costs.

13. CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

i. The Originating Motion dated 6th December, 2024 and filed on 23rd January, 2025 is hereby dismissed.

ii. Each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY, 2025.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

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