Assets Recovery Authority v Virtual Financials International Limited (Anti-Corruption and Economic Crimes Case E001 of 2024) [2025] KEHC 1060 (KLR) (Anti-Corruption and Economic Crimes) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CASE E001 OF 2024

BM MUSYOKI, J

FEBRUARY 28, 2025

BETWEEN

ASSETS RECOVERY AUTHORITY ..... APPLICANT

AND

VIRTUAL FINANCIALS INTERNATIONAL LIMITED ..... RESPONDENT

RULING

1. On 26th July 2024, Honourable Justice F. Gikonyo M delivered judgment in this matter in which he allowed the originating summons dated 22-12-2023 in the following terms;

    i. That the sum of USD 16,661.75 held in account No. 1330XXXXXX352 at Equity Bank Limited, in the name of Virtual Financials International Limited is proceeds of crime and is hereby forfeited to the State.

    ii. That the sum of Kshs 60,789,500.05 held in account No. 13302XXXXXX559 at Equity Bank Limited, in the name of Virtual Financials International Limited is proceeds of crime and is hereby forfeited to the State.

    iii. That it is hereby ordered that the funds in the said accounts shall be transferred to the applicant.

    iv. That the respondent shall bear the costs of this Originating Motion.

2. The matter underwent a full hearing where the parties were represented by advocates of the High Court of Kenya throughout the proceedings. The respondent had opposed the originating motion through a comprehensive replying affidavit sworn by one David Morema Obangi on 19th March 2024 who described himself as one of the directors of the respondent.

3. By a notice of motion dated 20-08-2024 which is the subject of this ruling, the respondent sought the following orders;

   a. This application be certified urgent and heard ex-parte in the first instance.

   b. The honourable court be pleased to further stay the execution of the judgment delivered on 26th July 2024 pending inter-partes hearing and determination of this application.

   c. The honourable court be pleased to review the judgment delivered on 26th July 2024.

   d. The costs of this application be provided for.

4. Prayers 1 and 2 of the application are spent. The application is supported by affidavit of the same deponent who swore the replying affidavit in opposition to the originating motion. The application has listed 40 grounds on which it is based but the bottom line of all is that the respondent has discovered a new and important matter which it could not by exercise of due diligence make available to court at the time of hearing and that there is an error or mistake apparent on the face of the record.

5. The deponent of the supporting affidavit begins by explaining the incorporation of the respondent in which he is one of the declared and registered beneficial owners. He annexed the respondent's certificate of incorporation and statutory forms filed pursuant to Section 93A of the *Companies Act*. He then proceeds to give his academic, professional and career experience, history and qualifications and adds that among his business vehicles is Valsen Fiduciaries (Seychelles) Limited which he incorporated in January 2015 and exhibits certificate of registration and trading licence for the company in Seychelles.

6. He adds that he also incorporated Virtual Pay International Limited which is authorised by the Central Bank of Kenya to carry out business of payment services provider and to support that, he exhibits its certificate of incorporation and directory of the Central Bank of Kenya showing that the company was licenced as at 3rd October 2023.

7. It is the respondent's position that the business of Virtual Pay International Limited goes beyond Kenya to Rwanda, Tanzania, Mauritius, Dubai, Uganda, Hong Kong and Sri Lanka. The deponent has annexed copies of licenses and certificates in proof the respondent's presence in the in the mentioned countries.

8. According to the respondent, all the businesses mentioned in the supporting affidavit are licenced in their respective countries of presence and none of the companies has been investigated for any crime or impropriety before the applicant came in to investigate the transactions in question. At paragraphs 9, 10 and 11 of the supporting affidavit, the deponent gives details of the respective licences of the companies mentioned and how they are regulated in their host countries. He states that all the mentioned companies run legitimate businesses from which he receives legitimate benefits and emoluments as a shareholder director.

9. The respondent goes on to state that after it was served with the pleadings in this matter, it engaged the firm of C.G. Ndirangu & Co. Advocates to represent it following which it filed a replying affidavit in consultation and under guidance of the said former of advocates. The said firm, according to the respondent, advised it to take a defence strategy of failing to disclose all material evidence to show how the funds in question were acquired because the onus always rested on the applicant to prove the element of money laundering.

10. The affidavit further states that the respondent has throughout its operations maintained proper records of pertinent transactions which show that the sources of its funds are legitimate and the

questioned transfers of money by its affiliates are not a laundering scheme. It contents that it relied on the advice of its counsel which has turned out to be an incorrect legal position. The deponent states that had the applicant received proper and effective counsel, it would have produced any and all material of evidence required and necessary to satisfactorily explain and demonstrate that the funds were from legitimate sources. In its opinion, the discovery that the approach was not correct is a new and important matter that justifies orders for review.

11. The respondent adds that there is a mistake or error apparent on the face of the record in that the funds in account number 1330XXXXXX352 with Kshs 6,288,025.00 received on 21-08-2023 emanated from the Government of Kenya on account of matured government bonds whose purchase was funded from a loan of Kshs 100,000,000.00 from Equity Bank of Kenya details and evidence of which was provided. In support of this, it has exhibited loan application and agreement forms which were used by the applicant in the application for preservation and forfeiture applications.

12. The applicant did not file any replying affidavit but filed submissions dated 21-11-2024 in opposition to the application. The respondent also filed submissions dated 15-11-2024. I have read the application, supporting affidavit and the submissions by the parties.

13. It is admitted by the respondent that the information and facts it relies on in the current application was available to it as at the time of the hearing. Actually, all the documents the respondent has exhibited are dated various dates before the originating motion was filed. By their nature, the documents are those which would be ordinarily either at the reach of the owner of the businesses or are kept in the normal course of business.

14. The respondent argues that the discovery it relies on is the fact that the then advocates did not advise it of the importance and necessity of producing the documents as according to them, the onus rested on the applicant to prove the illegitimacy of the funds and the elements of money laundering. In essence, the respondent is telling this court that it was ignorant of the position in law on matters of this nature in so far as burden of proof is concerned. Can ignorance of the law be a reason for review? I do not think so. It is said that ignorance of the law is not a defence and I would paraphrase that and state that ignorance of the law is not a ground for review or setting aside a court decision.

15. Order 45 Ruel 1 is explicit that the new matter or evidence on which basis a review is sought must not only have been unavailable to the applicant but also could not be obtained the applicant's exercise of due diligence. It is not in doubt that the documents and information the respondent is relying on in this application were in the hands of the respondent but it deliberately sought to keep them away from the court. Reading through the judgement of the court, it is clear that the Honourable Judge addressed the issues raised in the current application although it appears that some of the documents were not exhibited in the affidavit in reply to the originating motion. In Paul Mwaniki v National Insurance Fund Board of Management (2020) KEHC 7414 (KLR) it was held that;

> For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court as the time of making the decision. Differently stated, the material presented by the applicant does not qualify to be new evidence.'

16. In my view, the matters and evidence exhibited in the application are not even important as matter of review because all what the applicant has stated in the supporting affidavit is the relationship between the companies which were the sources of the funds and the respondent. The respondent has not made any attempt to explain the source of the funds by its said affiliates. When faced with a forfeiture

application, a respondent should give a detailed explanation of what the payments were for and what business initially generated the funds and not the transfers only.

17. Showing a source of a transfer without disclosure of the seed business is what the anti-money laundering laws seek to nip. The issue is not the transfer per se but the primary source of the funds. In any case, the respondent has not told me anything new or different from what it told the trial judge. Paragraphs 42 to 60 of the judgment of Honourable Justice Gikonyo captures what the applicant depones in the current application meaning that the issues were placed before him and he determined against the respondent. This court cannot relook into that finding as in my opinion that would be a matter of appeal.

18. The applicant has also submitted that there is an error apparent on the face of the record because some of the forfeited money came from government bonds. That alone does not qualify that there is an error apparent on the face of the record. What constitutes an error apparent on the face of the record has been described in many judicial pronouncements as a slip of the pen or error of figure or an obvious departure which id irreconcilable with what was intended in the court's decision. It cannot be an error apparent on the face of the record if the applicant claims that the court erred or made a mistake in analysing the evidence and reaching a wrong conclusion. That is a matter for appeal and not review as the issues would require long drawn arguments calling into question the trial judge's interpretation of the law and evidence. I find guidance in Solacher v Romantic Hotels Limited & Another (2022) KECA 771 (KLR) where the Court of Appeal cited Abasi Belinda v Frederick Kangwamu & Another (1963) E.A. 557 thus;

> " To buttress this fact further, in Abasi Belinda v Frederick Kangwamu and another [1963] E.A. 557 the court held that:
>
> > a point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.'"

19. Based on the above analysis, this court finds that the respondent's application dated August 23, 2024 lacks merit and the same is hereby dismissed with costs to the applicant.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Miss Amadi holding brief for Mr. Adow for the applicant and Mr. Etemere for the respondent.