



**Asset Recovery Agency v Mohamed & another; Premier Bank Kenya Limited  
(Formerly First Community Bank Limited) & 2 others (Interested Parties)  
(Miscellaneous Civil Application E042 of 2024) [2025] KEHC 9195 (KLR)  
(Anti-Corruption and Economic Crimes) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
MISCELLANEOUS CIVIL APPLICATION E042 OF 2024**

**LM NJUGUNA, J  
JUNE 25, 2025**

**BETWEEN**

**ASSET RECOVERY AGENCY ..... APPLICANT**

**AND**

**ADAN BISHAR MOHAMED ..... 1<sup>ST</sup> RESPONDENT**

**AL - SIDDIQUE MOTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PREMIER BANK KENYA LIMITED (FORMERLY FIRST COMMUNITY BANK LIMITED) ..... INTERESTED PARTY**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY . INTERESTED PARTY**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... INTERESTED PARTY**

**RULING**

1. The application for determination is the one dated the 7<sup>th</sup> March, 2025 by the interested party, Premier Bank Limited (formerly First Community Bank Limited) brought under Sections 1A, 1B, 3A, 63 & 80 of the [Civil Procedure Act](#) and Order 9, 51 of the [Civil Procedure Rules](#) and Sections 81 and 82 of the Proceeds of Crime and Anti- Money Laundering Act 2009 seeking the following Orders;
  1. Spent
  2. That the 1<sup>st</sup> and 3<sup>rd</sup> intended interested parties/applicants be enjoined in the suit as interested parties/applicants



3. That leave be granted to the firm of m/s Abdikadir & Abdikadir Company Advocates to come on record on behalf of the 1<sup>st</sup> interested party/applicant herein
  4. That this Honorable court be pleased to rescind, set aside, vary and/or review the exparte preservation orders issued on the 27<sup>th</sup> August 2024 by Lady Justice D. Kavedza
  5. That this Honorable court be pleased to issue an Order directing the applicant and 3<sup>rd</sup> interested party to unconditionally release the motor Vehicle make FUSO xx 6xx, registration number KDB 2xxx together with the keys, which is currently being held at Muthaiga police station to the 1<sup>st</sup> interested party to enable it exercise its statutory power of sale with all the caveats /restrictions against it being lifted by the 2<sup>nd</sup> interested party within seven days.
  6. That this Honourable court be pleased to stay all the proceedings in Nairobi, High court ACEC suit No. E003 of 2025- *Assets Recovery Agency v Adan Bishar Mohamed and Al-Siddique Motors Limited* pending the hearing and determination of the application
  7. That in the alternative to prayer 5 above, the Exparte Ruling/Order issued by the Honourable Court on the 27<sup>th</sup> August, 2024 be deemed to have lapsed
  8. That the Honourable court be pleased to make such other orders as will guarantee the 1<sup>st</sup> interested party/applicant's right to the subject motor vehicle or as may meet the ends of justice.
  9. That the costs of the application be provided for.
2. The application is premised on the grounds set out on its body and its supported by the annexed affidavit sworn by Claris Ogombo, on the 7<sup>th</sup> March, 2025. He avers that the court on the 27<sup>th</sup> August, 2024, issued preservation Orders for motor vehicles KDB 2xxx and KDN 8xxx registered jointly in the names of the 1<sup>st</sup> and 2<sup>nd</sup> interested party, and the 2<sup>nd</sup> respondents respectively, for a period of 90 days.
  3. THAT further to the preservation Orders, the court ordered the 1<sup>st</sup> and 2<sup>nd</sup> respondents to surrender the logbooks for the aforesaid motor vehicles to NTSA within seven days from the 27/08/2024 for safe custody and registration of a caveat. That the applicant has on the lapse of the preservation orders preferred Forfeiture Proceedings to have the two motor vehicles forfeited to the Government in ACEC suit No. E003 of 2025.
  4. That the 1<sup>st</sup> interested party/applicant is the beneficial owner of motor vehicle KDB 2xxx by virtue of Chattel mortgage from the financial accommodation offered to the 1<sup>st</sup> respondent to the tune of Ksh. 8,320,000, and the said motor vehicle was used as security as the funds were utilized towards the purchase of the same vehicle which is currently detained at Muthaiga police station on instructions of the applicant/respondent.
  5. The applicant has averred that following default by the 1<sup>st</sup> respondent to service the loan, the interested party engaged Auctioneers to proclaim and attach the same, and the Auctioneer was able to trace the vehicle at Muthaiga police station and efforts to have the same restored back to the applicant/1<sup>st</sup> Interested Party and/or his agents to exercise its statutory power of sale have proven futile and impossible.
  6. That the interested party has sufficiently explained its interest in the motor vehicle KDB 2xxx as a financier, beneficial owner and source of funds utilized towards the purchase of the vehicle thereby debunking the myth that the motor vehicle was acquired with proceeds of crime and/or anti money laundering.



7. The application is opposed vide a replying affidavit sworn by Zachariah Lekishon an investigator with the applicant/respondent (ARA) who has deponed that the facility that was extended to the 1<sup>st</sup> respondent was to be paid within a period of 48 months from 14<sup>th</sup> January,2021 and the last instalment was to be paid by January, 2025. That by the time the motor vehicle was seized on the 7<sup>th</sup> February,2024, when it was found illegally ferrying 18 Eritreans in a modified compartment, the interested party had never tried to repossess the same to recover the alleged defaulted amounts by the 1<sup>st</sup> respondent.
8. The applicant/respondent (ARA) states that in obtaining the preservation Orders, it moved the court under Sections 81, 82, 86, 87 and 90 of the [Proceeds of Crime and Anti- Money Laundering Act](#) and at the close of investigations, it was satisfied that the motor vehicle is a proceed of crime and hence, filed forfeiture proceedings vide ACEC No. E003 of 2025. That the copies of records obtained from NTSA on the 27<sup>th</sup> August, 2024 do not show the ownership of the motor vehicle as co-owned by the applicant/1<sup>st</sup> Interested Party and the 1<sup>st</sup> respondent. It shows the 1<sup>st</sup> respondent as the sole owner of the same.
9. That upon perusal at the collateral Registry, the alleged Chattel Mortgage was not registered there either and there was no way of the Agency or any other lenders to be notified of the applicant's interest, and as such, it does not fall under chattel mortgage. That there is no notice of default by the applicant on record to show efforts used to try and repossess the vehicle before preservation Order was issued.
10. The applicant/respondent (ARA) contends that the 1<sup>st</sup> respondent has already paid to the applicant a total of Ksh. 5,174,417 which is believed to be proceeds of human trafficking, therefore, making it a proceed of crime, and the applicant has not sufficiently demonstrated any reasonable evidence to warrant the setting aside or varying of the preservation order.
11. That the applicant has not met the threshold set out under Section 89 of the [Proceeds of Crime and Anti-Money Laundering Act](#) 2009 and they have not proved or demonstrated that it will suffer hardship as a result of the preservation order or that the hardship the applicant will suffer outweighs the risk of the motor vehicle subject to the preservation order will be destroyed, lost, damaged, concealed or transferred.
12. That the motor vehicle is in the custody of the Agency, which has the responsibility of preserving the value of the vehicle during the subsistence of the proceedings and setting aside the orders shall render the forfeiture application nugatory.
13. The 2<sup>nd</sup> respondent/Al-Siddique Motors limited filed a replying affidavit sworn by Ali Bin Ijiaz who is it's director, in which he depones that the 2<sup>nd</sup> respondent is in the business of selling motor vehicles and had sold motor vehicle registration number KDN 8xxx to the 1<sup>st</sup> respondent, Adan Bishar Mohammed .That the vehicle is still registered in the name of the 2<sup>nd</sup> respondent and therefore, annexure "ZL3a" produced in the supporting affidavit is clear evidence of fraud by both the 1<sup>st</sup> respondent and the applicant as the vehicle is still registered in the name of the 2<sup>nd</sup> respondent since the 1<sup>st</sup> respondent is yet to pay the entire purchase price.
14. That the said motor vehicle has an outstanding of Ksh. 1,396,500.00 and the claim that the interested party is the beneficial owner as stated in the grounds in support of the application is vehemently disputed by the 2<sup>nd</sup> respondent. Consequently, the applicant has no locus standi to move this court and seek, let alone, be granted the prayers sought in this application.
15. The applicant filed a further affidavit dated the 2<sup>nd</sup> April, 2025 in which it has reiterated the contents of the supporting affidavit to the Notice of Motion. In addition, the deponent has averred that even



though the last instalment was to be paid by January, 2025, Adan Bishar Mohammed has defaulted, making the instant application necessary.

16. The applicant filed a further affidavit stating that it's sole interest is that of a financier and that it only came to learn of the detention of the vehicle from it's Auctioneers whom it had instructed to repossess the same after Adan Bishar defaulted in payment and that it has on several occasions instructed Auctioneers to repossess the vehicle whenever Adan Bishar was in arrears.
17. The applicant averred that it was not given notice of the preservation Orders which is contrary to the provisions of Sections 83, 89 and 93 of the POCAMLA being an entity that had interest in the said vehicle. That the continued existence of the preservation Orders has hindered its right to repossess the motor vehicle and offer the same for sale towards satisfaction of the debt obligations owing to the bank by Adan Mohammed and as such, there's need to have the vehicle exempted from the forfeiture proceedings pursuant to Section 94 (1) of the POCAMLA.
18. The applicant avers that the assertion that the payments of Ksh. 5,174,417 made by the 1<sup>st</sup> respondent are proceeds of crime is denied, and contrary to the assertions that Adan Bishar has shares amounting to Ksh.2,000,000, his account is in fact overdrawn to the tune of Ksh.2,915,583.46 as at 21<sup>st</sup> February, 2025, and which, in any case cannot be used to settle any outstanding debt making the instant application necessary to have the motor vehicle excluded from preservation order and it be released to the interested party for sale.
19. The applicant contended that the log book of the said motor vehicle having been jointly registered in the joint names of the applicant and Adan Mohammed, the same is in the safe custody of the Bank as a security measure of the facility advanced to him and that suspicion alone is insufficient to prove an asset is a proceed of crime. That the applicant as a secured creditor, has no knowledge or involvement in any alleged criminal activity and therefore, the applicant's legal right to recover the debt through repossession and sale of the same is not invalidated by unproven allegations of criminality.
20. That the applicant has clearly explained it's interest in the motor vehicle and how the same was purchased through financing and as such, suspicion alone is not enough to establish that the motor vehicle is a proceed of crime. Further, that no direct evidence has been adduced by the respondent (ARA) to demonstrate that the acquisition of the same or the repayment thereof is tied to an illegal activity and as such, the applicant should not be deprived of its collateral on the basis of unsubstantiated allegations.
21. The application was disposed of by way of written submissions.

#### **applicant's /1<sup>st</sup> interested party's submissions**

22. The 1<sup>st</sup> interested party/applicant identified three issues for determination as follows;
  - a. Whether the motor vehicle KDB 2xxx was purchased by proceeds of crime.
  - b. Whether the Orders of 27<sup>th</sup> August, 2025 were properly issued
  - c. Whether the 1<sup>st</sup> interested party / applicant has met the threshold for Discharge of the Orders made on the 27<sup>th</sup> August, 2024.
23. On the 1<sup>st</sup> issue, it was submitted that the applicant offered Adan Bishar a financing facility which funds were utilized towards the purchase of the motor vehicle, and as a security measure for the facility, the vehicle was jointly registered in the joint names of Dan Bishar and Premier bank limited and not through proceeds of crime as alleged by the applicant.



24. It was submitted that the interested party was not served with the notice of the preservation Order as required under Section 83 of the [POCAML](#) and that the interested party has explained how the motor vehicle was acquired and has exhibited a trail of Ksh. 8,320,000 advanced to Adan Mohammed vide a statement of accounts for account number 0011111302 and in particular, on the 28<sup>th</sup> January, 2012 when the financed sums were credited into his account, and on the same day he credited the funds to Crater Automobiles Limited's Account No. 3000008917 held at Prime bank limited.
25. That though the applicant had registered a caveat on the motor vehicle and that the same was jointly registered in it's name and that of Adan Mohammed, the Asset Recovery in failing to inform the court of its interest in the said motor vehicle as a financier, denied it an opportunity to present its case as no service of the preservation Order was done through a Kenya Gazette as required under the [POCAML](#). Reliance was placed on the case of [The King v The General Commissioner for the purposes of income Tax Act for the District of Kensington Exparte Princess Edmond De Pligac](#) ( 1917) 1 KB 486 and that of [Kenya Electricity Transmission Company Limited v Kubota Limited](#) (2019) on the need to make full disclosure of material facts in a case.
26. The applicant further contended that, at all material times Adan Mohammed had been behind in the payment of his facility with the bank and that he was a serial defaulter, and as at 25<sup>th</sup> January, 2025 his account was overdrawn making recovery of the vehicle difficult leaving the bank with repossession and sale of the vehicle as the only option.

#### **2<sup>nd</sup> respondent's/3<sup>rd</sup> respondent's submissions**

27. It is submitted that the applicant has not met the threshold set out in Section 89 of the [POCAML](#). Reliance was placed on the case of [Asset Recovery Agency v Rose Monyani Musanda & 2 others](#) (2021) eKLR. That the interested party has not established its individual interest in the motor vehicle to warrant the Orders sought.

#### **Respondent's/applicant's written submissions**

28. The respondent identified three issues for determination as follows;
  - a. Whether the subject motor vehicle was purchased with a Chattel Mortgage to warrant release to the Financier.
  - b. Whether the preservation Orders deprive the 1<sup>st</sup> interested party/ applicant of means to provide for its reasonable living expenses and cause undue hardship.
  - c. Whether 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.
29. On the 1<sup>st</sup> issue, the respondent/applicant submitted on the key considerations in enforcing a Chattel mortgage against a third party as follows;
  - a. A Chattel mortgage must be registered in the collateral registry created under the [Movable Property Securities Rights Act](#) (MPSRA) for priority and enforceability.
  - b. Notice of default – the Lender must give the borrower a notice of default before repossession.
  - c. Possession and sale- After notice, the Lender may seize and sell the assets.
30. The respondent/applicant submitted that the vehicle in question is not registered in the Collateral Registry which is the most important prerequisite and therefore, fails to be a chattel mortgage. The bank therefore cannot demand first priority as the Financier for failure to meet the prerequisite of



a Chattel mortgage. Further, that the loan extended to the Adan Mohammed was payable within a period of 48 months from 14<sup>th</sup> January, 2021 to January, 2025.

31. That the 1<sup>st</sup> interested party has never tried to repossess the motor vehicle to recover the alleged default amount by the 1<sup>st</sup> respondent, but only got interested in the motor vehicle after the Agency obtained preservation Orders against the motor vehicle. Further, that in the notices of default to the 1<sup>st</sup> respondent referred to, by the 1<sup>st</sup> interested party, there is no indication on whether the same were sent and were received by the 1<sup>st</sup> respondent.
32. On the 2<sup>nd</sup> Issue, it referred to Section 88 of the [POCAMLA](#) and submitted on the guiding principles in an application for variation/ review of preservation Orders. Reliance was placed on the case of [Asset Recovery Agency v Pamela Aboo](#) (2018) and that of [Assets Recovery Agency v James Thuita Nderitu & Others](#) ACEC Civil Suit No. 2 of 2019. It averred that the issuance of the Order sought by the interested party will be detrimental to the Agency's case and not workable because the motor vehicle was seized on suspicion of being a proceed of crime. That the interested party has not satisfied the burden of proof that the operation of the Orders will deprive it of means to provide for its reasonable living expenses and cause undue hardship.
33. On the 3<sup>rd</sup> issue, it was submitted that if the preservation Orders are varied, the forfeiture application will be an academic exercise and the proceedings will be rendered nugatory. It urged the court to preserve and safeguard the substratum of the forfeiture proceedings and made reference to the case of [Assets Recovery Agency v Charity Wangui Getbi](#) (2017) eKLR.

### **Analysis and Determination**

34. The court has considered the application and the supporting affidavit, the replying affidavits, further affidavit, and the Submissions filed herein. The interested party has sought inter alia, to rescind, set aside, vary and/or review the exparte preservation orders issued on the 27<sup>th</sup> August, 2024 and an order directing respondent/applicant to unconditionally release the motor vehicle KDB 2xxx currently held at Muthaiga Police Station. In my considered view, the only issue for determination is;

### **Whether the court should rescind, set aside/vary or review its Orders issued on the 27<sup>th</sup> August, 2024.**

35. The power of this court to vary or set side a preservation Order derives from Section 89(1) of the [POCAMLA](#) which states;

“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 authorizing 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...”



36. Therefore, for the applicant to succeed they must meet the following conditions;
- a. Demonstrate that the order deprives the applicant of their reasonable living and causes undue hardship to them;
  - b. Demonstrate that the hardship suffered outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.
37. Section 108 of the Evidence Act provides that he who alleges must prove. As stated previously, the applicant bears the burden of demonstrating that the requirements have been satisfied, and the standard of proof is based on the balance of probability.
38. In the case of Assets Recovery v Pamela Aboo the court held;
- “It was the duty of the applicants to demonstrate their grievance about the order of preservation.” Further, in par 17, the court stated that. “ the burden of proof articulated under Section 89 of the POCAMLA lies with the party seeking to discharge preservation orders. The applicant/ respondent must therefore prove or demonstrate that the order concerned will deprive her of the means to provide for reasonable daily living expenses. Secondly, that he will suffer undue hardship as a result of the preservation order which outweighs the risk that the concerned property may be concealed or transferred.”
39. I am further guided by the case of Assets Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (interested party) where the court held;
- “It is therefore incumbent upon the respondent/applicant to prove that the applicant/ respondent does not deserve the orders sought on the account that the orders will deprive him the means to provide for his reasonable living expenses and cause him unnecessary hardship and, that his suffering outweighs the risk that the property will be destroyed, lost, damaged, concealed or transferred”.
40. While the variation of the orders rests in the discretion of the court, the court must be satisfied that the applicant is unable to provide for himself or his kin, and is therefore suffering undue hardship as a direct result of the order.
41. It is important for this court to point out that what is before me, is an application to set aside preservation Orders. In dealing with this application, am guided by the provision of Section 89(1) of the POCAMLA. The interested party avers that it is being deprived it’s right to exercise it’s statutory power of sale by public auction and recover its outstanding facility amounts owing to it by the 1<sup>st</sup> respondent. The interested party is apprehensive that unless the motor vehicle is released to it, it may lose its investment of the sums of Ksh.8,320,000 advanced to the 1<sup>st</sup> respondent towards the purchase of the motor vehicle.
42. The court has noted the averments by the interested party and the claim that it has laid on the said motor vehicle. However, the applicant’s position is that the same is a proceed of crime. The respective party’s positions can only be established after the forfeiture proceedings are heard and determined. Weighing those rights against the provision of Section 89(1) I find that the hardship that the interested party may suffer cannot outweigh the risk of preserving the subject motor vehicle.
43. In the end, the court makes the following Orders;
- a. Prayers 2 and 3 are allowed



b. Prayers 4 and 5 are disallowed

c. No orders are made on costs.

44. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25<sup>TH</sup> DAY OF JUNE, 2025**

.....

**L.M. NJUGUNA**

**JUDGE**

In the presence of

Miss Amadi for the Applicant/1<sup>st</sup> Respondent

No appearance for the Respondent

No appearance for the Interested parties

Court Assistant Adan/Dyphna

