Assets Recovery Agency v Burugu (Anti Corruption and Economics Crime Miscellaneous Application E005 of 2024) [2024] KEHC 8031 (KLR) (Anti-Corruption and Economic Crimes) (28 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI CORRUPTION AND ECONOMICS CRIME MISCELLANEOUS APPLICATION E005 OF 2024

EN MAINA, J

JUNE 28, 2024

BETWEEN

ASSETS RECOVERY AGENCY ..... PLAINTIFF

AND

JACKSON MBUGUA BURUGU ..... RESPONDENT

RULING

1. Before me is the Notice of Motion dated March 15, 2024 filed herein on March 18, 2024. The same seeks orders to firstly set aside the preservation order herein, which was issued by Diana Kavedza J, on February 28, 2024 and secondly to stay these proceedings pending hearing and determination of Nanyuki CMCRC No. E2189 of 2021 *Republic v Jackson Mbugua Burugu*.

2. The application is expressed to be brought under Order 51 Rule 1 and 3 of the *Civil Procedure Rules* Sections 63(|e), 1A, 1B and 3A of the *Civil Procedure Act*.

3. The gravamen of the application is that the ARA/Respondent obtained the impugned orders exparte; that the court did not hear the Respondent/Applicant before granting the order; that at the time of obtaining the order it did not disclose that there was an ongoing case against the Respondent/Applicant in Nanyuki and that in that case the court had ordered the prosecution to return the motor vehicle, the subject of the impugned order, to the Respondent/Applicant; that the impugned order was obtained so as to defeat the order made by the magistrate trying the case in Nanyuki; that this is a case of forum shopping and hence the Respondent/Applicant's quest to set aside the impugned exparte order.

4. The application is supported by the affidavit of Jackson Mbugua Burugu sworn on March 15, 2024, Annexed to the affidavit are, a copy of the charge sheet of the criminal case at the Nanyuki Law Courts and the order of Hon. B. Moraro, Principal Magistrate dated March 9, 2024. It is further supported by the Respondent/Applicant's supplementary affidavit sworn on June 6, 2024. If the affidavits the Respondent/Applicant impugns the preservation order for being obtained *exparte* and for being issued without taking into account that there were criminal proceedings going on against the Respondent/Applicant before a magistrate in Nanyuki Law Courts and for being issued despite an order by the Magistrate's Court directing that the vehicle be returned to the Respondent/Applicant. The Applicant deposes that he used the motor vehicle for his personal and family's benefit and its continued confiscation is therefore greatly prejudicial; that the ARA/Respondent will suffer no prejudice if he (the Respondent/Applicant) is allowed to access the motor vehicle; that the impounded accounts have no substantial amounts to warrant suspicion of illegal activities as alleged by the ARA/Respondent and that the monies are from the Respondent/Applicant's businesses.

5. The ARA/Respondent opposed the application through an affidavit sworn on April 12, 2024.

6. The application was canvassed by way of written submissions. Learned Counsel for the Respondent/Applicant invoked the provisions of Section 89(1) of the *POCAMLA* and contended that this case falls within the conditions set out in the Section in that the Respondent/Applicant did state that the continued confiscation of his motor vehicle will greatly prejudice him and his family who have no other means of mobility during these perilous rainy times and further that the *caveat* placed on the vehicle by the Nanyuki court is sufficient bearing in mind that now the Applicant is required to attend the Nanyuki court and this court and he has no means to move. Learned Counsel also submitted that the ARA/Respondent did not demonstrate a prima facie case to warrant the order being granted.

7. Relying on the case of *The King v The General Commissioner* for the purposes of the *Income Tax Act* for the District of Kensington [1917] 1KB 486, Counsel contended that as the ARA/Respondent did not make a full disclosure of material facts it was not entitled to the *exparte* order; that had the ARA/Respondent disclosed that the vehicle had been released to the Respondent/Applicant this court would have had to consider that fact. Counsel also placed reliance on the case of *D. Bank Mellat v Nikpour* [1985] FSR 87, 92, Donalson J; the case of *Uhuru Highway Development Limited v Central Bank of Kenya & Others* [1995] eKLR and the case of *Standard Limited v Alfred Mincha Ndubi* [2018] eKLR in support of his argument that once it is demonstrated that a party is guilty of material non-disclosure the court need not go into the merits of the impugned order.

8. Counsel also faulted the ARA/Respondent for instituting the Application for a preservation order in this court rather than the High Court in Nanyuki. To buttress this argument, he relied on Section 15 of the *Civil Procedure Act* and contended that the right to a fair trial is guaranteed by Article 50(1) of the *Constitution* which adverts to "a fair, speedy and public hearing before an independent and impartial court or tribunal established by law". Counsel cited the case of *Stanley Muia Makau v Republic* [2020] eKLR which he submitted dissuades party from forum shopping by stating: -

> " The act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in ones favour. Such an action would be subversion of justice with a resultant undermining in the principle of equal protection of law."

Counsel urged this court to set aside the preservation order and release the motor vehicle to the Applicant as it is the just thing to do.

9. On its part the ARA/Respondent urged this court not to set aside the preservation order for reasons that it is in the process of filing a forfeiture application in respect to the motor vehicle and because the Respondent/Applicant has not brought himself within the provisions of Section 89(1) of the *Proceeds of Crime and Anti-Money Laundering Act* hence the application is not merited at this stage. Counsel for the ARA/Respondent urged this court to dismiss the application with costs.

Analysis and Determination

10. I have carefully considered the Notice of Motion, the grounds thereof, the affidavits of the parties, the rival submissions, the cases cited and the law and my findings are as set out below.

11. Firstly, there is nothing untoward in instituting this case in this court as this accords with the Hon. Chief Justice's Practice Guidelines gazetted on June 26, 2018 vide *Gazette Notice No. 7262* which states that: -

> " In exercise of the powers under Section 5 of the *Judicial Service Act*, No. 1 of 2011, and Section 16 of the *High Court (Organization and Administration) Act*, No. 27 of 2015, it is notified for the information of the general public that in the interest of the effective case management and expeditious disposal of cases in the Anti-Corruption and Economic Crimes Division of the High Court, the Chief Justice makes the following Directions:-
>
> Application
>
> 1. These Directions shall apply to Anti-Corruption and Economic Crimes Division, established in the High Court of Kenya.
>
> 2. All new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination."

12. Secondly there is nothing irregular in the preservation order having been granted exparte as it is a requirement under Section 82(1) of the *Proceeds of Crime and Anti-Money Laundering Act* that the order be granted *exparte*. The only fetter is that before making the order the court must be satisfied that there are reasonable grounds to believe that the property concerned has been used or is intended for use in the commission of an offence; or is a proceeds of crime. The court that granted the order was aware of the conditions upon which it could grant the order and must have been satisfied they were met. The argument that the order must be set aside merely on the ground that it was made exparte is misconceived and has no basis at all.

13. It is instructive that the power of the ARA/Respondent to apply for such orders accrues to it by operation of the law – Section 82(1) of the *Proceeds of Crime and Anti-Money Laundering Act* and whereas the proceedings are civil in nature the same are to a large extent governed by the *Proceeds of Crime and Anti-Money Laundering Act* itself but not by the *Civil Procedure Rules*. That is why the argument that instituting the application for the preservation order in this court amounts to forum shopping and that the Respondent/Applicant ought to have been notified or served with the application cannot hold.

14. Once issued the preservation order can only be set aside as provided under Section 89(1) of the *POCAMLA* which states:-

> " 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 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."

15. This court need not look further than the above section to determine whether it should set aside the preservation order. The gist of the Respondent/Applicant's case is that the motor vehicle which is the subject of the preservation order is his and his family's only means of transportation therefore they have been unduly inconvenienced by the order. It is my finding that that reason does not satisfy the criteria set out in Section 89(1) of the *Proceeds of Crime and Anti-Money Laundering Act*. Whereas a private means of transportation is ideal and desirable the Respondent/Applicant and his family can easily obtain alternative means of transportation. Using alternative means of transportation may be inconvenient but it is certainly not life threatening. It does not deprive the Applicant of the means to provide for his reasonable living expenses and is not cause for undue hardship. Further the hardship he is likely to suffer as a result of the order does not outweigh the risk that the motor vehicle may be destroyed, lost, damaged, concealed or transferred should, in the end, an order for its forfeiture be granted. Accordingly, the application even on the merits cannot stand.

16. As to the order granted by the learned Magistrate in the Criminal Proceedings in the court in Nanyuki, my finding is that a disclosure of the same would have not made any difference or influence the court that granted the preservation order. To begin with the order made to vest custody of the motor vehicle in the Respondent/Applicant is a temporary one – pending hearing and determination of the criminal case. It is not a judgment in rem as is envisaged in Section 44 of the *Evidence Act*. It is not therefore binding on this court. Moreover, these proceedings which are in the realm of civil forfeiture are non-conviction based. They are independent of the criminal case. It is trite that the same can run concurrently with the criminal proceedings – See Section 193A of the *Criminal Procedure Code* and the case of *Kidero v Ethics and Anti-Corruption Commission and 11 Others (Civil Application E003 of 2022*) [2023] KECA 62 (KLR) (3 February 2023 (Ruling) where the Court of Appeal stated: -

"28. In short, courts will not ordinarily grant a stay of proceedings simply by virtue of the existence of parallel criminal proceedings arising out of the same events or subject matter. This is the import of Section 193A of the *Criminal Procedure Code* which expressly permits criminal and civil proceedings. …."

17. That there are criminal proceedings in a Nanyuki court does not therefore bar the ARA/Respondent from instituting civil forfeiture proceedings on the same subject matter.

18. The upshot is that this application is not merited. It is dismissed with costs to the ARA/Respondent.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 28TH DAY OF JUNE 2024.

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E.N. MAINA

JUDGE