



**G4S Kenya Limited v Assets Recovery Agency (Civil Application E021 of 2022)  
[2024] KEHC 8029 (KLR) (Anti-Corruption and Economic Crimes) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8029 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
CIVIL APPLICATION E021 OF 2022**

**EN MAINA, J**

**JUNE 28, 2024**

**BETWEEN**

**G4S KENYA LIMITED ..... APPLICANT**

**AND**

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

**RULING**

1. This is a Ruling on the 1<sup>st</sup> Respondent's application dated 3<sup>rd</sup> May 2024 which seeks orders to stay execution of the Judgment delivered by this court on 23<sup>rd</sup> November 2003, pending appeal. The application is premised to be brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*.

**The Parties**

2. The Applicant/Respondent (hereinafter referred to as "the Agency") is the Asset Recovery Agency established under Section 53 of the Proceeds of Crime and Anti Money Laundering Act (the POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. The Agency has authority to institute civil proceedings for the recovery of proceeds of crime and seek orders for forfeiture of assets to the government where there are reasonable grounds to believe that such assets are proceeds of crime. The agency also has policing powers under Section 53A of the *Proceeds of Crime and Anti-Money Laundering Act* to investigate, identify, trace, freeze and recover proceeds of crime.
3. The Respondents were the accused persons in criminal case: Mombasa CMCRC No. 857 of 2010: Republic v Sylvester Mbisi Mutua & 7 others (hereinafter referred to as "the Criminal Case") and Respondents in the instant suit.



4. The Applicant herein was the Interested Party in this suit and claimed proprietary interest over the suit/forfeited funds.

### **The Applicant's Case**

5. The application is based on the grounds that: -
  - “ 1. The Interested Party is aggrieved by the judgment of the court and has since filed an appeal before the Court of Appeal, being Civil Appeal No. E141 of 2024- G4S Kenya Limited vs Assets Recovery Agency & 4 Others. The Interested Party filed and served a record of appeal on 26<sup>th</sup> February 2024.
  2. The Interested Party has an arguable appeal with good prospects of success and has raised several grounds of appeal highlighting the fundamental errors of facts and law which are evident in the impugned Judgment including that;
    - a. The learned judge erred in holding that the sum of 200,000 Euros, Kshs.2,000,000/- USD 5,700, 4,000 Great Britain Pounds and Kshs.685,000 ("hereinafter funds) held by the Appellant in various safe deposits is liable for forfeiture to the Government of Kenya.
    - b. The learned judge erred in holding that the Appellant had not proved that it was the owner of the funds, and that the Appellant did not prove the source of the funds having acknowledged that the funds were stolen while in the custody of the appellant and white being transported by the Appellant on behalf of its clients.
    - c. The Honorable learned judge erred in her interpretation of the proprietary rights of a special owner.
    - d. The learned judge erred in ignoring the judgment of the trial court in Mombasa Criminal Case No. 857 of 2010; Republic versus Sylvester Mbisi Mutua & 7 Others which settled the question of ownership of the funds.
  3. The Applicant has commenced execution of the judgment dated 23<sup>rd</sup> November 2023. On May 2024, the Applicant served the Interested Party with a letter dated 25<sup>th</sup> April 2024 in which the Applicant has demanded that the Interested Party complies with the judgment.
  4. Unless a stay of execution is granted, the Interested Party will be prejudiced as it will be forced to forfeit the sums set out in the judgment, which are approximately Ksh. 300,000,000/- based on current exchange rates, to the government pursuant to a decision that the Interested Party has challenged on appeal.
  5. The Interested Party believes that its appeal has high chances of success and it should be given an opportunity to argue the appeal before execution of the judgment of 23<sup>rd</sup> November 2023. It is therefore in the interests of justice that a stay of execution of the Judgment and the consequential Decree be granted pending the hearing and determination of this application and the appeal.



6. Any execution of the impugned judgment would render the Interested Party/Applicant's appeal will nugatory.
  7. The application has been made without unreasonable delay.
  8. The Interested Party is ready and willing to abide by any order that this court may issue as a condition for grant of stay.
  9. It is fair and just and in the public interest for this application to be allowed."
6. The application is supported by the affidavit of Nickson Chege, the Finance Director of the Applicant, sworn on 3<sup>rd</sup> May 2024, which reiterates the grounds upon which the application is brought and deposes further that the funds in question were recovered from the 1<sup>st</sup> to 4<sup>th</sup> Respondents as part of funds stolen from the Applicant while in transit; that the Respondents in this suit were together with two employees of the Applicant were jointly charged with offences relating to the theft of the money and that whereas the Respondents were acquitted, the Applicant's employees were convicted. Further that the Agency did not satisfy the requirements for the grant of the forfeiture orders as it did not prove that the funds were proceeds of crime vis a vis the claim by the Interested Party given that no unlawful conduct was proven against the Interested party; that there was consensus that the funds were indeed stolen while in the possession of the Interested Party and that unless the orders sought are granted, the Applicant will be greatly prejudiced as the Agency has already commenced execution of the decree, and the appeal shall be rendered nugatory.

### **The Respondent's case**

7. The Agency opposed the application through a replying affidavit, sworn by Fredrick Muriuki on 23<sup>rd</sup> May 2024. He deposes that the outcome of criminal proceedings does not affect proceedings under the [Proceeds of Crime and Anti-Money Laundering Act](#) (the POCAMLA) in any way; that the Applicant has no arguable appeal, that the Applicant is not likely to suffer substantial loss should the stay not be granted; that the application has been made with undue delay as it was brought six months after delivery of the Judgment. That the application was only prompted by a letter from the Agency asking for transfer of the suit funds to its account. He deposes that this application is a delaying tactic, is made in bad faith, is misconceived, incompetent, an abuse of court process and is lacking in merit and it ought to be dismissed with costs. He deposes that the application is an afterthought intended to prevent the Agency from carrying out its mandate which is to recover proceeds of crime.
8. The deponent explains that the funds shall be deposited in the Agency's respective currency accounts and shall not therefore be affected by the exchange rates; that the funds have been in the Applicant's custody since preservation orders were issued in 2022 but that despite the judgment and without seeking the leave of this court, the Applicant has moved the funds into its ABSA accounts and has not disclosed to the bank that there is a preservation order affecting those funds in order to facilitate the freezing of the accounts by the bank; that he has been informed that the Applicant has been trading with the preserved funds and the stay sought is intended to aid the Applicant to continue to benefit from the funds which this court has already declared to be proceeds of crime. Further that there is a high risk that the funds may be lost or moved during the subsistence of the appeal, as there are no orders preserving the accounts in which the funds are now being held and the Agency would thus suffer irreparable loss should the appeal not to succeed.
9. He asserted that the Applicant does not stand to suffer any loss as the funds are under preservation and shall not to be dealt with by either party during the pendency of the appeal. He contended that moreover, the Applicant has not satisfied the conditions for stay of execution pending appeal as it has



not demonstrated that it will suffer substantial loss should the application be rejected and the appeal succeeds.

### **Applicant's Response**

10. Through a Supplementary Affidavit sworn by NICKSON CHEGE on 27<sup>th</sup> May 2024 the Applicant contends that once the Agency executes the judgement, the funds shall become public property and should the appeal succeed, the recovery of the same shall be difficult; that the Applicant promptly filed an appeal against the judgement of this court and is pursuing an expedited conclusion of it, thus the allegation of delaying tactics is baseless; that the Applicant has not traded with the suit funds and the Agency has not presented any evidence to prove that allegation; that the Applicant is a well-established and known company in Kenya, and in the event that the appeal succeeds, it will release the said funds to the Agency; that the Agency has not alleged any difficulty in recovering the funds from the Applicant should the appeal fail; that the delay in filing this application is not unreasonable as the Agency was served with the appeal and there had been no threat of execution and further that the Applicant honestly believed that the parties would await the outcome of the appeal before execution and that should the orders sought issue, the Agency shall not suffer prejudice that would not be compensated by way of interest and costs.

### **Submissions**

11. The Application was canvassed by way of written submissions.
12. Learned Counsel for the Applicant submitted that the principles to be considered by the Court, in an application for stay of execution were settled as follows, in the cases of *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *Felix Mochiemo Oindi -v- Gutonya Newton Mbogo* [2018] eKLR:-
  - i. The power of the Court to grant or refuse an application for stay is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  - ii. The general principle . . . is: if there's no other overwhelming hinderance, a stay must be granted so that an Appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion.
  - iii. The judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
  - iv. The Court . . . will consider the special circumstances of the case and unique requirements.
  - v. The Court . . . can order security upon application by either party or its own motion. Failure to put security of costs as ordered will cause the order of stay of execution to lapse.”
13. Counsel submitted that based on the above criteria, the Applicant has met the conditions for a grant of the orders sought.
14. On the question of substantial loss, Counsel stated that should the Agency proceed with execution, the Applicant will suffer substantial and irreparable loss and damage because once the Agency executes the judgement, the funds shall become public property and shall be remitted to the National Treasury, thereby removing them from the reach of the parties. Counsel stated that the forfeited sum, which is approximately Kshs. 33 million, is substantial, hence warrants the protection of this court.



15. Counsel contended that the appeal was filed promptly, barely two months after the date of the judgement; the appeal discloses triable issues and that this court should exercise its discretion, so as not to render the appeal nugatory. Counsel explained that the five-months delay in filing this application arose from the fact that there was no threat of execution.
16. On the question of security, Counsel submitted that this Court has unfettered discretion to order that security be provided.
17. To support his submissions Counsel placed reliance on the following authorities: *-Assets Recovery Agency v Olaiwon (ACEC Misc. E034 of 2021)*, Antoine Ndianye v Africa Virtual University [2015] eKLR, New Nairobi United Services Limited & Anor v Simon Mburu Kiiru [2021] eKLR, Assets Recovery Agency v Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 Others [2020] eKLR, Assets Recovery Agency v Charity Wangui Gethi [2019] eKLR, Elijah Muriithi & Another v Peter Christopher Kahoro Mbogo [2020] eKLR, HGE v SM [2020] eKLR, Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR, Focin Motorcycle Co. Ltd v Ann Wambui Wangui & anor [2018] eKLR.
18. Learned Counsel for the Respondent submitted that Order 42 Rule 6 (1) of the Civil Procedure Rules allows a Court to issue a stay of execution after filing of an appeal. He contended that an appeal does not however guarantee automatic stay. That Order 42 Rule 6(2) sets out conditions for a stay to be: -
  - “i. That the Application has been made without unreasonable delay;
  - ii. The Applicant satisfies the Court that he/she stands to suffer substantial loss if the order for stay is not made;
  - iii. There is a provision for security, as the Court may order, for the due performance of the decree.”
19. Counsel contended that the delay of six months in bringing this application is inordinate. He stated that the Notice of Appeal was filed on 7<sup>th</sup> December 2023, but the current application was not filed until 3<sup>rd</sup> May 2024. Counsel averred that this application is an afterthought and must fail.
20. On the question of substantial loss, Counsel submitted that the Applicant has not demonstrated any substantial loss that it is likely to suffer if the funds are transferred to the Respondent’s account. He explained that the Applicant defied the preservation orders by moving the suit funds to its ABSA accounts without informing the court or notifying the bank of the existence of the preservation order and hence is in contempt of the judgment of this court. He contended that the funds are at a risk of dissipation and there is imminent danger of losing the funds should the application for stay be granted; that there is no guarantee that should the appeal fail the funds will be available and hence irreparable loss shall be occasioned to the Respondent. Counsel asserted that the Applicant’s intention is to earn a profit from the suit funds during the subsistence of the appeal; that the Respondent is a government entity whose solvency is guaranteed thus the funds would still be available should the appeal succeed. Counsel further submitted that forfeiture proceedings under the POCAMLA are civil in nature and the standard of proof is on a balance of probabilities and that, the proceedings are meant to determine the criminal origins of the property in issue thus the outcome is not dependent on the criminal proceedings. He concluded by stating that the Applicant has not satisfied the conditions for a grant of a stay of execution pending appeal and the application should be dismissed with costs.
21. Counsel placed reliance on the following cases:-Director of Assets Recovery and Others, Republic v Green & Others [2005] EWHC 3168



## The Issue for determination

### i. Whether the Applicant has satisfied the conditions for grant of an order for stay of execution pending appeal.

#### Analysis and determination

22. In the Civil Procedure Rules, the conditions for grant of a stay of execution pending appeal are set out in Order 42 Rule 6(2) of the Civil Procedure Rules which states:-

“No order for stay of execution shall be made under sub rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

23. The above conditions have been restated in numerous cases including those cited by learned Counsel for the Applicant and it is my finding that the Applicant has not met any of those conditions. Firstly, on the issue of substantial loss, learned Counsel for the Applicant submitted that the suit amount is approximately Kshs. 33 million, and should the same be transferred to the Respondent, it will become public funds whose recovery will be difficult should its appeal be successful. For the Respondent it was submitted that being a government Agency, its solvency is guaranteed and the Applicant is assured of recovery of the suit funds should the appeal be successful. That however, should the stay be granted, given that the funds have been moved to the Applicant’s accounts at ABSA Bank, without leave of this court, and the said bank is not aware of the preservation orders, nothing stops the Applicant from spending the funds hence exposing the same to dissipation and substantial loss to the Agency were the appeal to be dismissed.

24. In a decision rendered on 9<sup>th</sup> May 2024 in the case of *Amek v Ethics & Anti-Corruption Commission (Civil Application E620 of 2023)* [2024] KECA 481 (KLR) 9<sup>th</sup> May 2024 (Ruling), the Court of Appeal dealing with a similar issue held as follows:-

“ 15. We now turn to the second issue for consideration which is whether the appeal will be rendered nugatory if stay is not granted. In making this determination, we need to consider and balance the interests of both parties. The subject issue before us is a money decree. The learned Judge found that the applicant together with others who are not participants in this appeal, are culpable to jointly and severally refund Kshs. 47,075,978/= which was allegedly and unlawfully siphoned from the coffers of Homabay County Government.

....

20. It has not been demonstrated that the respondent, being a public body, is incapable of refunding the decretal sum should the appeal be successful. Indeed, Ms. Getrude Sielei had deponed to this fact, which averment has not been rebutted by the applicant.

21. Accordingly, we are not convinced that the applicant has satisfied both limbs for grant of stay of execution under rule 5 (2) (b). We hereby find and hold that



the Notice of Motion dated 21<sup>st</sup> December 2023 is unmerited. We dismiss it with costs to abide the outcome of the appeal.” (Emphasis mine)

25. Similarly, it is my finding that the Applicant herein has not demonstrated that the Agency is incapable of refunding the funds were the appeal to be decided in tis (Applicant’s) favour. To the contrary it is the Agency and by extension the public that is likely to suffer substantial loss were the funds to be dissipated and the appeal fails. Moreover, Section 92(6) and 97 of the POCAMLA provide that the funds remain preserved until the Appeal is heard and determined. The funds shall therefore be available to the Applicant should its appeal succeed.
26. On the second condition, that the application has been made without unreasonable delay, it is indeed correct that the Applicant waited for almost six months after the judgement was delivered to file the current application ostensibly for reason that the Applicant was under the mistaken belief that the Agency, having been served with the Notice of Appeal, would await the outcome of the appeal before commencing execution. The letter from the Agency/Respondent to ABSA Bank is dated 25<sup>th</sup> April 2024 while the current application was filed on 3<sup>rd</sup> May 2024 meaning that the application was filed as soon as the Respondent commenced execution. I find no merit in the explanation given for the delay and find it inordinate and hence the application should also fail on that ground.
27. On the issue of security, I note that the Applicant has not offered any security despite admitting that the suit sum is substantial and that it is currently in a bank where there are no preservation orders in place. A party must demonstrate its bona fides by offering security. It is not sufficient for a party to assert that it is ready and willing to abide by any condition as shall be granted by the court.
28. As I have come to the conclusion that the Applicant is not likely to suffer substantial loss if the stay orders are not granted, I find no merit in this application and the same is dismissed with costs to the ARA/Respondent.
29. As there is an allegation that the Applicant moved the forfeited funds to ABSA Bank without informing ARA and without seeking the leave of this court, and has been spending the funds, albeit not proved, this court hereby directs that all the forfeited funds shall be moved to the ARA/Respondent Account forthwith or in any event not later than 7 days from the date of this ruling.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28<sup>TH</sup> DAY OF JUNE 2024.**

.....

**E.N. MAINA**  
**JUDGE**

