REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 4 OF 2016

ASSET RECOVERY AGENCY ……APPLICANT

VERSUS

CHARITY WANGUI GETHI ……RESPONDENT

RULING

1. The Application before me is the Notice of Motion dated 25th February, 2016. It is brought under Section 89 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. The Respondent/Applicant prays for an Order varying, modifying and/or rescinding the Order authorizing the seizure of moveable properly known as ***Motor Vehicle Registration No. particulars withheld*** registered in the name of Respondent herein on such terms as it may deem fit.

3. The grounds she relies on, which are on the face of the Application are as follows;

i. That the orders of preservation have deprived her of transport in execution of her business. This has caused her hardship which outweighs the risks of transfer of the vehicle. She is however, willing to undertake not to transfer, destroy or waste the motor vehicle.

ii. The court was misled by the Applicant/Respondent into issuing the said orders. The Deponent of the Supporting Affidavit of the Application CPL No. 75821 Saulet Jeremiah Matipei has compromised the investigations.

iii. The Respondent/Applicant has not in any way been summoned, interrogated or charged in any court of law in regards to embezzlement of public funds.

4. In addition to the grounds, the Applicant in her Supporting Affidavit states that there was no evidence to show that the vehicle the subject of this matter was a product of stolen public funds. That ***CPL Sautet Matipei*** and ***Mr. Magwanja*** of the Banking Fraud Unit had been negatively mentioned in respect to the investigations herein in another case. That she had filed a formal complaint against the two officers to the Independent Police Oversight Authority (IPOA), and the Inspector General for investigations.

5. The Applicant/Respondent filed a Replying Affidavit on 8th April, 2016 sworn by the Director of Assets Recovery Agency ***M/s Muthoni Kimani*** opposing the application.

It's her contention that financial investigations into the theft of Kshs.791,385,000/- from the National Youth Service (NYS) established that motor vehicle *particulars withheld* owned by the Respondent/Applicant was procured using part of the stolen funds. As a result of the investigations, the Applicant and others have been charged with offences under the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) in Criminal Case No. 301 of 2016 ("MKL").

THE RESPONDENT'S/APPLICANT'S CASE

6. ***Mr. Oonge*** for the Respondent/Applicant in his submissions set out the law in Section 82 and Section 89 (1) (a) of POCAMLA. He submitted that under Article 40 of the Constitution, the Applicant has a right to own property of any description within Kenya and the said right can only be derogated in very clear cases with clear reasons. It was his argument that in the present case, what the Court was told were mere allegations based on suspicions.

7. He contends that the Respondent/Applicant was denied the right to be heard before the issuance of the Orders. He referred to the case of ***JSC –vs- Mbalu Mutava & Another 2015 eKLR*** and ***Attorney General –vs- Ryath (1980) AC 718*** where in the latter case, ***Lord Diplock*** stated at page 730;

"It has long been settled that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority."

8. He submitted that the allegations forming the basis of the Orders the Respondent/Applicant seeks to vary are criminal in nature and are the subject of ongoing criminal proceedings. He referred to Article 50 (2) (a) of the Constitution which provides that one is presumed innocent until proved guilty. That no Court of law had found that the motor vehicle in question was a proceed of crime. Further, it is only the Court hearing the criminal case that can make a finding on that.

9. He asked the Court to vary the Orders since the deprivation had caused the Respondent/Applicant undue hardship, in that she is unable to move around and conduct her day to day activities. Further, that the suffering to the Respondent/Applicant outweighs the risk that the property concerned may be destroyed, lost or damaged, concealed or transferred.

10. He finally submitted that the motor vehicle was wasting away at the C.I.D yard as it was not being maintained. That if given the vehicle, the Respondent/Applicant would undertake proper care of it and surrender it to the authorities when required.

THE APPLICANT/RESPONDENT'S CASE

11. **M/s Muchiri** for the Applicant/Respondent submitted that the Application filed by the Applicant/Respondent was filed in accordance with Sections 81, 82, 86 and 87 of POCAMLA. Section 82 of POCAMLA provides for the filing of the application exparte which they did. This provision she submitted is similar to Sections 118 and 118A Criminal Procedure Code which were discussed in the case of ***Mape Building & General Engineering –vs- Attorney General & Others***.

12. She contended that the Applicant/Respondent's Application for Preservation Orders had met the threshold under Section 82 (2) POCAMLA and that there were reasonable grounds and evidence

showing that motor vehicle *particulars withheld* is a proceed of crime. She cited the case of ***Martin Shalli –vs- Attorney General of Namibia & Others*** ***High Court of Namibia Case No. POCA 9/2011*** where the court said;

"….. in terms of this section, this court must make a preservation order if the application is supported by evidence which discloses reasonable grounds to believe that the property in question is an instrumentality of an offence referred to in schedule 1 or the proceeds of unlawful activities as defined."

13. It was her submissions that the Respondent/Applicant did not comply with Section 83 (3) of POCAMLA which requires her to issue a notice. On that note, she could not be heard to complain of being denied a right to be heard.

14. On the issue of right to property, she submitted that such right was not absolute, and that the limitations, under Article 24 (1) applied to her as the acquisition of the vehicle was questionable. The said Article provides:

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual freedoms of others;

She further submitted that the subject vehicle having been bought with stolen funds could not be protected by the Constitution. She referred to Article 40 (6) of the Constitution which provides;

"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

15. She also cited the case of ***Martin Shalli –vs- Attorney General of Namibia*** *(supra)* where it was stated;

"…..that the proceeds of unlawful activity would not constitute property in respect of which constitutional protection is available (28). This court in that matter further held (29) that the protection of property under Article 16 is in any event not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate purpose …..

….. I accordingly conclude that Chapter 6 does not violate the right to property under Article 16 of the Constitution because Article 16 does not protect the ownership or possession of the proceeds of crime. I further reiterate the approach of the court in Lameck that even in Chapter 6, then it would in my view be a proportionate response to the fundamental problem which it addresses namely that no one should be allowed to benefit from their wrong doing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose ….."

16. She referred to Section 2 of POCAMLA and submitted that the motor vehicle in issue falls within the said provision. She cited the case of ***William –vs- Republic [2013] EWCA Criminal 1262 (18th July, 2013)*** where this issue was also discussed.

17. It was her submission that the Respondent/Applicant had not demonstrated how the operation of the concerned order would occasion her hardship which outweighs the risk that the property will be destroyed, lost, damaged, concealed or transferred. On this, she referred to the cases of ***Gulamhusein Mulla Kivanji & Another –vs- Ebrahim Mula Jevanji & Another (1929 – 30) 12 KLR 41*** and ***International Bank of Kenya Ltd. –vs- Ndungu Njau Nairobi CA Civil Appeal No. 211 of 1996.***

18. Finally, she submitted that the said Orders cannot be varied in light of the fact that the Applicant/Respondent has already filed an Application for forfeiture under Sections 81, 90, 92 and 100 POCAMLA vide Misc. Application No. 221 of 2016. It was therefore, the Applicant/Respondent's case that the Preservation Orders do remain in force as varying them would defeat the course of justice.

ISSUE FOR DETERMINATION

19. Having considered the Application, Affidavits, Annextures and Submissions, I do find the following to be the only issue for determination;

(i) Whether the application satisfies the threshold set out in section 89 of POCAMLA.

20. The Respondent has submitted that in issuing the impugned orders ex parte, the court denied her the right to be heard. Section 82 of POCAMLA provides the procedure of seeking an Order of Preservation of property. It provides that;

"1. The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

2. The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned –

(a) has been used or intended for use in the commission of an offence; or

(b) is proceeds of crime.

3. A court making a preservation order shall at the same time make an order authorizing the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

4. Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that makes the relevant preservation order."

21. The above Section provides that an application seeking Preservation to property should be made ex parte. This action is therefore supported by the law and it's exactly what the Applicant/Respondent did. The reason behind this is to safeguard the suspect property while forensic investigations are ongoing. In the case of ***Mape Building & General Engineering*** *(supra),* the court dealt with an issue arising from Section 118 and Section 118A Criminal Procedure Code. These provisions also deal with Preservation of seized property and I find them to be applicable herein. This is what the court said in the ***Mape case*** paragraph 73 – 76

"….. the 2nd Respondent moved the court. Statute Law under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act allowed them to do so. The application

could be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence.

To avoid arbitrary infringement of a citizen's privacy or property through entries or searches or services, the Criminal Procedure Code provides a simple yet effective mode of obtaining authority thought the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. The order or warrant is never to be granted as a matter of course.

It can thus be clearly understood why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24 (1) of the Constitution.

In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purpose of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations, the 2nd Respondent was, in my view, justified in making the application for both warrants and freezing order ex parte ….."

22. The Respondent/Applicant cannot therefore claim to have been denied the right to be heard. The ex parte application is allowed by the law for reasons explained in the case above. Section 89 of POCAMLA under which the Respondent/Applicant moved the Court provides that:

(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.

(2) When a court orders the rescission of an order authorizing the seizure of property under paragraph (a) of subsection (1), the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation order concerned.

23. ***Mr. Oonge*** for the Respondent/Applicant submitted that the Applicant's right to property has been violated by the Applicant/Respondent and that the motor vehicle, the subject of this application should be returned to her for safe custody.

24. The Applicant/Respondent's take on this is that their investigations have revealed that the motor vehicle was bought using money stolen through the NYS fraudulent transactions. Besides stating that she was not involved in the NYS scandals the Respondent/Applicant has not explained how she bought the vehicle in question. Yes it's her property but how did she acquire it" She has not mentioned anything about the acquisition.

25. The Applicant/Respondent through their forensic investigations believe that the motor vehicle in issue was bought using stolen money. Until that issue is determined by the trial court, the Respondent/Applicant cannot claim an absolute right over that property.

It has also been confirmed that the Respondent/Applicant and others are already facing criminal charges of money laundering vide Nairobi Chief Magistrate's ACC No. 301 of 2016. The trial court will hear her and the others and make a determination.

26. The Respondent/Applicant has submitted that she uses this motor vehicle in running her business and so its continued detention is causing her undue suffering which outweighs the risk that the property concerned may be destroyed, lost or damaged, concealed or transferred. Again, I wish to reiterate that the Respondent/Applicant has not presented to this Court any materials to show that she is incurring any losses as a result of the detention of the vehicle. In addition, this vehicle is the subject of count No. 2 in the charge sheet in Nairobi CM's ACC No. 301 of 2016. It will still be required by that court as an exhibit.

27. It has also been confirmed that the Applicant/Respondent did file an Application No. 221 of 2016 for forfeiture of the motor vehicle before the expiry of ninety days as required by law. The said application is pending hearing.

28. From the foregoing, I do find that the Application does not meet the threshold set out in Section 89 of POCAMLA to warrant the grant of the orders sought. It would not be in the interest of justice to grant the said orders.

29. The Application dated 25th February, 2016 is therefore dismissed with costs.

Signed, date and delivered this 12th day of January 2017 at NAIROBI

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE

In the presence of:

…….Advocate for the Applicant

…….Advocate for the Respondent