



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

APPLICATION NO 49 OF 2018

**IN THE MATTER: AN APPLICATION FOR ORDERS UNDER
SECTIONS 81 & 82 OF THE PROCEEDS OF CRIME AND ANTI MONEY
LAUNDERING ACT (POCAMLA) AS READ TOGETHER WITH
ORDER 51 OF THE CIVIL PROCEDURE RULES.**

AND

**IN THE MATTER OF: PRESERVATION ORDERS FOR A TOTAL OF
USD 105,293.70 AND KSHS 22,445,487.74 HELD IN BANK ACCOUNTS
NUMBERS 0180272692383, 0180273781178, 0180273781104, 0180273780467,
0180273780412, 0180290930598, 0806061000, 5225803001,
7041746001 AND 7825846007**

**IN THE NAME OF LILIAN WANJA MUTHONI MBOGO T/A SAHARA
CONSULTANTS, LIDI HOLDINGS LIMITED, LIDI ESTATES LIMITED,
STEPHANIE MARIGU MBOGO, SHEELA WANGARI MBOGO AND SHALOM
MALAIKA**

**KAMWETI AT EQUITY BANK LIMITED, COMMUNITY BRANCH
NAIROBI AND DIAMOND TRUST BANK LIMITED, CAPITAL**

CENTRE AND VILLAGES MARKET BRANCHES.

BETWEEN

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

LILIAN WANJA MUTHONI T/A

SAHARA CONSULTANTS.....1ST RESPONDENT

LIDI HOLDINGS LIMITED.....2ND RESPONDENT

LIDI ESTTES LIMITED.....3RD RESPONDENT

STEPHANIE MARIGU MBOGO.....4TH RESPONDENT

SHEELA W MBOGO.....5TH RESPONDENT

SHALOM MALAIKA KAMWETI.....6TH RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion dated 18th December 2018 filed by the Respondent/Applicant. The same is brought under sections 88 and 89 of the Proceeds of Crime and Anti Money Laundering Act (POCAMLA), Article 53(b) and (c) of the Constitution.

It seeks the following orders:

(1) spent

(2) spent

(3) This Honorable court be pleased and do hereby enjoin Diamond trust bank limited and Equity bank limited as interested parties to Miscellaneous Application No. 49 of 2018.

(4) This Honorable court be pleased and do hereby direct that the Interested parties release the sum of Kshs 6,863,359.54 being quarterly annual payment towards:

(a) servicing of a loan facility in IKCB bank Limited Khs 150,000

(b) school fees for the 4th-6th Respondents/Applicants as well as their siblings namely EOO, RO and RO Khs 5,293,480.

(c) School fees for 3 dependent children Kshs 139,800

(d) Payment for 6 domestic workers Kshs 219,000

(e) *Upkeep for the elderly parents Kshs 150,000*

(f) *Offsetting utility bills (electricity, water Wi-Fi, telephone, DSTV and security Kshs 102,079.54.*

(g) *Vehicle fuel, maintenance and insurance Kshs 449,000*

(h) *Food Ksh 150,000*

(i) *Incidental kshs 210,000-*

(5) *This Honorable court be pleased to grant this matter the earliest inter partes hearing date for the current application.*

(6) *The Honorable court be pleased and do hereby modify and vary the orders dated and issued on 28th October 2018 to provide for reasonable living expenses of the Respondent/Applicants.*

(7) *The Honorable court be pleased and do hereby grant leave to the Respondents/Applicants to file similar applications in future as and when the need arises.*

(8) *Costs of this application.*

(9) *Any other or further relief that this Honorable court may deem fit to grant.*

2. The application is premised on the grounds on the face of the application and the supporting and further affidavits by the 1st Applicant Lilian Wanja Muthoni. In the grounds it is stated that the orders of 29th October 2018 have deprived the Applicants of the basic means of living, causing them undue hardship. She further states that the 4th-6th Applicants right to free and compulsory basic education is affected as their fees can't be paid. The 1st Applicant alleges she is unable to repay a KCB bank loan with increased rates. Finally she says the criminal trial will take a long time before it is finalized hence causing more suffering.

3. In her supporting affidavit she has simply expanded on the grounds already raised. She avers that her loan repayment with KVB is 390,496/- per month yet her current monthly pay is Kshs 340,000/- (LWM-4). She is also unable to meet school fees for the 4th-6th Applicants. Their fee requirements total over Kshs 5 Million (LWM 2 & 3). The pending fees for her dependant children, pay for domestic workers and all other bills and utilities amount to about Kshs 7M every three months. That is what she wants released to her on a quarterly basis (LWM 5-14).

4. In her further affidavit sworn on 25th January 2019 she discounted para 18(i) & (ii) of the replying affidavit by stating that her accounts Nos 01143421143900 (Co-op Bank Ltd – Co-op Hse branch) is still frozen (LWN-1). Further that account No 1178347184 (KCB Ltd Moi Avenue branch) is in an arrears of Kshs - 132,932/- (LWM-2) as at 10th December 2018 since several payments were made from the said account (LWM 2-7).

5. She has given a breakdown of each of her accounts showing the credit balances (LWM8-13). She deponed that the Respondent has also obtained a preservation order in respect to account no 0180272803019 Equity Bank Ltd in the name of Dick Achieng Oneko who is her husband, (LWM 15) which further cripples her operations. She contends that in view of all the above the Applicants have no means with which to provide for a reasonable living in terms of basic expenses.

6. In their written submissions counsel for the Respondents/Applicants identified three (3) issues as falling for determination. These are :

(a) Whether this Court has the jurisdiction to modify and vary the preservation orders dated 28th October, 2018 and order for reasonable provisions for the Applicants;

(b) Whether the Applicants have satisfied the threshold for issuance of an order for reasonable provisions; and

(c) Whether the Applicants have satisfied the threshold for variation and or rescission of preservation orders.

7. Mr Ligunya for the Applicants submitted that this court has jurisdiction to grant the orders sought under sections 88 and 89 of POCAMLA. He relied on the case of Asset Recovery Agency v Stephen Vicker Mangira & 4 Others [2018] eKLR. He dismissed the Respondent's contention at paragraph 23 of the replying affidavit to the effect that a preservation order cannot expire while there is an application for forfeiture pending. He urged that section 84 of POCAMLA does not prohibit this court from modifying, varying or rescinding the said preservation order vide section 89 of POCAMLA.

8. It was his submission that under section 88(1) of POCAMLA there is provision for reasonable living expenses which must come from the very asset/property/ funds preserved. He argued that the issue of the funds being suspected proceeds of crime has not been proved by a court of law or otherwise.

9. He referred to the case of EACC v Jimmy Mutuku Kiamba Misc/Civil Application No 804 of 2014. Where it was held:

"I appreciate that investigations are an ongoing process, but that should not be used to block a desiring party from accessing his property just because investigations have not revealed the source. At most, the Applicant can only say the source is suspect. However, suspicion alone, however strong, is not evidence."

10. Mr Ligunya urged that the criteria for issuance of an order for reasonable provision is outlined under section 88(2) of POCAMLA which provides as follows:

2) A court shall not make provisions for any expenses under subsection (1) unless it is satisfied that—

(a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and

(b) the person has disclosed under oath all his interest in the property."

He argues that the 1st Applicant is the mother of the 4th-6th Applicants who are school going children and depend on her. That from her averments she is not able to meet her needs and those of the children.

11. On the final issue as to whether the Applicants had met the threshold for variation/rescission of preservation orders he argued in the affirmative relying on the case of Asset Recovery Agency vs Samuel Wachenje & 9 Others 2018 eKLR where the court stated:

"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 satisfied that:

(i) That the operation of the order concerned will deprive he Applicant of the means to provide for his reasonable living expenses and cause undue hardship of the Applicant;

(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.

12. He thus submitted that the hardship occasioned to the Applicants outweighs the risk that the funds concerned may be destroyed, lost, damaged concealed or transferred.

13. The Application was opposed by the Applicant/Respondent through the replying affidavit of senior sergeant Fredrick Musyoki an investigator with the Applicant/Respondent. He has outlined the mandate of the Respondent under sections 54, 81, 82, 86 & 87 of POCAMLA. He averred that following the arrest and charging of the 1st Applicant with a criminal offence, he applied for search

warrants vide Misc. criminal Application No 1839/2018. Upon receipt of the orders (FMI) he embarked on investigating the 1st Applicant's accounts. When the 90 days given expired a further application was made before the High court vide Misc. Application No 36 of 2018 and preservation orders lasting 90 days were issued (FM2).

14. He deponed that upon analyzing the named 1st Applicant's accounts he established that there were huge cash deposits, withdrawals, and intra transfers of funds within the said accounts. He again received information that the 1st Applicant had accounts at Diamond Trust Bank. He sought another search warrant through Misc Cr Application No 2814/18 which enable him investigate four(4) other accounts (FM3). A further order was issued vide High Court Misc. Application no 34/18.

15. Later, on 29th October 2018 the Respondent obtained preservation orders vide Misc Application No 49 of 2018 (FM5). The said orders were gazetted on 9th November 2018 vide gazette notice No 11570, under section 83(1) of POCAMLA (FM6). He denied preserving funds in the 1st Applicant's accounts No 01143421143900 Coop Bank, Coop House branch holding Kshs 703,142/32; and No 1178347184 KCB Ltd Moi Avenue holding Kshs. 9,102,284/50.

16. He further averred that there was nothing to show that any of the alleged expenses by the 1st Applicant were met through the money in the preserved accounts. That under section 84 of POCAMLA the preservation order cannot expire where there is a pending forfeiture application before the High Court. He also deponed that the greater public interest outweighs the purported inconvenience to be suffered if the preservation order is not lifted/discharged.

17. Mr Adow for the Applicant/Respondent submitted that the main issue for determination is whether the application meets the threshold of section 89 of POCAMLA and order 45 Rule 1 of the Civil Procedure Rules. He submitted that for the court to grant variation/review orders, the Applicants must show the following:-

- Deprivation of reasonable living expenses
- Suffering of undue hardship
- The hardship outweighs the risk of preserving the subject property.
- An error apparent on the face of the record.
- A cognizable mistake or,
- Any other sufficient reasons.

18. Referring to the cases of Asset Recovery Agency v Pamella Aboo [2018] eKLR & Gulamhusein Mulla Jivanji & Another v Ebrahim Mulla Jevanji & another (1929-30) 12 KLR 41 he submitted that it was the duty of the Applicants to demonstrate their grievance about the order of preservation. More so they have failed to show how the preserved funds were acquired. That from the preliminary investigations carried out it was found that the money in the Applicants' accounts is proceeds of crime.

19. Counsel submitted that under section 84 of POCAMLA preservation or surrender orders cannot be varied/discharged if:

(a) there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order;

(b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or

(c) the order is rescinded before the expiry of that period.

He argued that any arguments about the lawful acquisition of the funds can only be properly argued during the trial of the pending forfeiture Misc Application No 58 of 2018 which was filed before the expiry of the 90 days as prescribed by the law.

20. He argued saying that the Applicants had failed to meet the threshold for review of the preservation orders. He referred to the finding by the Court of Appeal in National Bank of Kenya Ltd v Ndungu Njau Nairobi CA Civil appeal No 211 of 1996 where the court stated:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

21. Finally, he contended that the Applicant/Respondent only needed to make a prima facie case for the issuance of the said orders and that was done. That there are two accounts which are not frozen together with a farm from where the 1st Applicant draws income.

22. In a rejoinder Mr. Ligunya submitted that section 84 POCAMLA does not stop this court from varying the preservation orders. He asked the court to make reasonable provisions for this family.

Analysis and determination

23. First of all prayer No (3) of the Application dated 18th December 2018 is seeking to enjoin Diamond Trust Bank and Equity bank and is not opposed. It is therefore allowed and they are enjoined as interested parties. The Asset Recovery Agency (Applicant/Respondent) on 29th October 2018 filed an originating motion under section 81 and 82 of POCAMLA seeking preservation orders in respect of funds held in various accounts belonging to the 1st Applicant. Section 82 of POCAMLA provides:

(1) The Agency Director may, by way of an *ex parte* application (emphasis added) 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 is 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 authorising 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 made the relevant preservation order.”

24. Two things come out clear in this provision of the law as far as this application is concerned. These are:

(i) The application is made **ex parte**

(ii) The court will grant the orders of prohibition if it is satisfied that there are **reasonable grounds** to believe that the concerned property has been used or is intended for use in the commission of an offence or that the property is proceeds of crime.

25. On 29th October 2018 this court after considering all that was filed herein was satisfied that there were reasonable grounds to believe that the funds in the 1st Applicant's accounts were proceeds of crime. It therefore granted the orders preserving the said funds. There is no dispute that a forfeiture suit vide Misc Application No 58 of 2018 has been filed and served on the Respondents/Applicants. It is in that suit that evidence will be led for the court to determine whether indeed the said funds are

proceeds of crime or not.

26. The application before me seeks to have the orders issued on 29th October 2018 modified/varied to make provision for the Applicants' living expenses and;

(ii) Leave for the Applicants to make similar applications in future.

The application is brought under sections 88 and 89 of POCAMLA and Article 53 (b) and (c) which provide as follows:

Section 88

(1) A preservation order may make such provision as the court deems fit for reasonable living expenses of a person holding an interest in property subject to a preservation order and his family or household.

(2) A court shall not make provisions for any expenses under subsection (1) unless it is satisfied that—

(a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and

(b) the person has disclosed under oath all his interest in the property and has submitted to that court an affidavit.

Section 89

(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 authorising 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 authorising 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.

Article 53(1)(b)

(1) Every child has the right—

(b) to free and compulsory basic education;

(c) to basic nutrition, shelter and health care;

27. The Applicant/Respondent has submitted that two accounts namely:

(i) A/c No 01143421143900 at Co-op bank – Co-op House Branch holding Kshs 703,142.32 and;

(ii) A/C 1178347184 at KCB – Moi Avenue branch NRB holding Kshs 9,102,284.50 were not affected by the preservation orders. I have also confirmed from the court record that the said two accounts are not affected by the preservation orders. The two Banks i.e. Co-operative Bank and KCB have therefore no reason whatsoever to deny the 1st Applicant access to the money in those accounts.

28. It is also confirmed that the 1st Applicant's salary is housed at KCB which had Kshs 9,102,284.50 as at 29th October 2018, and there has never been any interference with it. As held in the case of Asset Recovery Agency V Pamela Aoo (supra) it is the duty of the person who seeks to have a preservation order varied/or modified to demonstrate that he/she is deprived of reasonable daily living by virtue of the preservation orders.

29. I have taken note of the several commitments in terms of finances that the 1st Applicant has stated in her affidavit. She wants the court to order that she receives about Kshs 7M quarterly to cater for these expenses. That is not workable because the money in issue has been frozen on suspicion of being proceeds of crime. If the money is released as she wants, will there be anything in the event of the forfeiture suit being successful"

30. Reasonable living expenses are the expenses a person necessarily incurs in achieving a reasonable standard of living. This is a standard that meets a person's physical, psychological and social needs. Is the 1st Applicant able to meet this with the funds in the unfrozen accounts"

31. In all fairness the 1st Applicant must understand that things are not the way they were before her being charged and she has to adjust her expenditure. There is provision in the Banks for adjustment of mortgage repayments. Giving her money the way she has proposed would not serve the purpose for which the preservation orders were made.

32. The interest of both the State and the Applicants must be taken care of by this court as it considers this application. There is a high public interest in the money the subject of the criminal cases facing the 1st Applicant which cannot just be wished away.

33. Having considered all the material before me, I find for a fact that not all the 1st Applicant's accounts have been frozen by the Respondent.

(i) There is a lot of room for the 1st Applicant to adjust her lifestyle to fit into her current financial status.

(ii) A forfeiture suit has been filed and its up to the parties to fast tract it for an early determination.

(iii) The Farm the 1st Applicant owns can be productive enough to assist her if she has the funds to operate it. For that reason I hereby grant her leave to withdraw Kshs 2,000,000/-(2M) only from A/C No 0806061000 Diamond Trust Bank Ltd Capital Centre Branch Nairobi to help her meet her living expenses. The rest of the funds will remain frozen to await the determination of ACEC Misc Application No 58/18.

34. The prayer for leave to file similar applications in future is declined, since it's a blanket limitless request.

35. Prayer No. 3 for enjoinder is allowed. Each party to bear its own costs.

Signed and dated this 19th day of February 2019.

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HEDWIG I. ONG'UDI

JUDGE

Delivered by Justice Onyiego this 21st day of February 2019.

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J. N. ONYIEGO

JUDGE



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