



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBLINGUGLI

MISCELLANEOUS CIVIL APPLICATION. NO. 8 OF 2020

ASSETS RECOVERY AGENCY..... APPLICANT/ RESPONDENT

-VERSUS-

HARDI ENTERPRISES LIMITED.....1ST RESPONDENT/ APPLICANT

TODDY CIVIL ENGINEERING

COMPANY LIMITED.....2ND RESPONDENT/ APPLICANT

ANTHONY NG'ANG'A MWAURA.....3RD RESPONDENT/ APPLICANT

ROSE NJERI NG'ANG'A.....4TH RESPONDENT/ APPLICANT

RULING

1. There are pending before this court two applications by the respondents in this matter, dated 2nd March 2020 and 23rd March 2020 respectively. Both are supported by affidavits sworn by the 3rd respondent, Anthony Ng'ang'a Mwaura. The only difference between the two applications appears to be that they are filed by two different firms of Advocates, Prof. Tom Ojienda & Associates Advocates and Migos Ogamba & Waudo Advocates. This latter firm did not appear at the hearing of the application, though a Notice of Appointment of Advocates dated 23rd March 2020 indicates that the firm was appointed by the applicants to appear for them alongside the firm of Prof. Tom Ojienda & Associates Advocates. For reasons that will become obvious later in this judgment, I will address myself only to the merits of the application dated 2nd March 2020.

2. In the application, the respondents seek the following orders:

1. (spent)

2. (spent)

3. This Honorable court be pleased and do hereby vary and/or rescind the preservative and seizure orders issued by Lady Justice Mumbi Ngugi on 24th February, 2020 pending the hearing and determination of this suit.

4. Any other or further relief which this honourable court deems fit and just to grant.

5. The costs of this application be provided for.

3. The application is expressed to be brought under the provisions of section 89 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMALA), Articles 22 and 23 of the Constitution of Kenya 2010, Order 51 Rules 1 and 4 of the Civil Procedure Rules 2010, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (CPC) and all enabling provisions of the Law. It is supported by an affidavit sworn by Anthony Ng'ang'a Mwaura, the 3rd applicant/3rd respondent, and is based on the grounds set out on the face of the application. For the purposes of this application and for the sake of convenience, I shall refer to the respondents, the present applicants, as the applicants, and the original applicant, the Assets Recovery Agency, as the respondent.

4. The applicants state in the grounds in support of the application that the respondent had, on 24th February 2020, obtained preservation orders and orders for seizure of movable assets under sections 82 of POCAMLA. The basis of the application and the issuance of the preservation orders was tender no. NCC/WEFE & NR/DP/276/2017-2018- for hire of vehicles and equipment which had been awarded to the 1st applicant by the Nairobi City County Government. They state that the respondent alleges that the said tender was irregularly awarded and any proceeds therefrom are proceeds of crime.

5. The applicants further state that the respondent misled the court that the payments under the said contract were used to acquire all the motor vehicles listed in the respondent's application which were the subject of the preservation orders. They assert that the tender to the 1st applicant was awarded and a formal written contract entered into between the 1st applicant and the County Government of Nairobi on 5th July 2018 in compliance with section 104 (d) of the Public Procurement and Asset Disposal Act, 2015. The County Government made its first payment to the 1st applicant on 15th October 2018.

6. According to the applicants, only three of the motor vehicles listed in the application by the respondent were acquired and registered subsequent to the said tender and payment. These are KCV 969Q, KCV 577S and KCV 577X. The remaining six vehicles were acquired by the applicants before the subject tender and before the receipt of payment from the County Government and cannot therefore be the subject of these proceedings. The applicants further state that the motor vehicles in contention, apart from most of them having been acquired outside the period of interest, are tools of trade necessary for execution of not only the subject tender but also other tenders being executed by the applicants.

7. The applicants argue that pursuant to the provisions of section 89 (1) of POCAMLA, this court has the power to vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order. That this power is exercised if the court is satisfied that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause him undue hardship, and 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.

8. It is the applicants' case that they are businessmen who undertake several big projects for both county and national governments providing essential services to the citizens, most of which are ongoing. They illustrate this by setting out various projects which they state that the 1st and 2nd applicant have undertaken and completed. They state that all the named projects are funded with taxpayers' money to offer essential services to the public and there is therefore a need for them to be completed expeditiously in order for the public to receive value for money.

9. The applicants further state that the performance of the projects requires intense capital. They contend that their accounts were, however, frozen by the orders of the court, thereby making the performance of the projects impossible and necessitating the rescinding of the preservation orders.

10. The applicants argue that the hardship that they would undergo, and the public interest at stake, far outweigh any risk that the property concerned may be destroyed, lost, damaged, concealed or transferred hence the need to rescind the impugned orders. They contend that in any event, the respondent has been abusing the court processes at its own pleasure and convenience. In this regard, the applicants contend that on 10th December 2019, the respondent had moved the Chief Magistrates Court in Nairobi Misc. Criminal Application No. 4477 of 2019 and had obtained orders restricting any withdrawals or debits from the applicants' accounts.

11. However, in another application in the same cause dated 17th January 2020, the respondent had moved the court to lift the orders restricting any withdrawals or debits from the applicants' accounts. They state that the reason advanced by the respondent for seeking the lifting of the restrictions was that the applicants were then performing projects of national interest, which the applicants have cited in this application. The orders restricting debits were vacated on 21st January 2020. According to the applicants, it is therefore an abuse of the court process for the respondent to again move this court, after briefly lifting the previous orders, to obtain

orders of a similar nature for the same reason- that any monies in the applicants' accounts are proceeds of crime.

12. The applicants contend that at the time of lifting of the initial orders, the respondent was in possession of all the applicants' accounts statements which it had accessed pursuant to orders obtained in Nairobi Misc. Criminal Application No. 4477 of 2019 on 10th December 2019. It is their contention that the allegations of money laundering based on the transfers between the accounts of the 1st and the 2nd applicants should have been considered at the time of lifting the initial orders by the respondent since it was already in possession of these account statements. They argue that unless the orders that they seek are granted, they are likely to face hardship in performing tenders of national interest, to the extreme detriment of the public.

13. In his affidavit, Mr. Anthony Ng'ang'a Mwaura, the 3rd applicant, states that he is a director, with the 4th applicant, of the 1st and 2nd applicants. He reiterates the grounds in support of the application which I have set out above in brief. Attached to his affidavit as annexure ANM 4 is a bundle of copies of the records of the listed motor vehicles indicating the dates of their registration in favour of the applicants. He also sets out the various projects that the 1st and 2nd applicants have undertaken and successfully completed, being upgrading of 2 km of Mugo-Kibiru Road in section 9 in Thika Municipality to bituminous standards under Tender No. LHPP/MAUD/KUSP/TKA/003/2018/20 by the 1st applicant and rehabilitation and extension of Mombasa water supply works –Lot 2/1 under Tender No. CWSB/WaSSIP-AF/W/12/2012 by the 2nd applicant.

14. The 3rd applicant avers that the 1st and 2nd applicants have several projects of essential services that are ongoing, and he sets out a list of six projects being undertaken by the 1st applicant for the County governments of Kiambu, Tharaka Nithi and Nairobi. A list of projects being undertaken by the 2nd applicant is also set out. It includes, amongst others, a road project in Kapenguria, Kinoru stadium, stadium works for Chuka-Tharaka Nithi County, an irrigation project with Kerio Valley Development Authority, a sewerage project for Tana Water Services Board and a water project with the Coast Water Services Board.

15. Mr. Mwaura avers that these projects are funded with taxpayers' money to offer essential services to the public and there is therefore a need for them to be expeditiously concluded so that the public can get value for money. It is the applicants' case that the performance of these projects require intense capital but their accounts were frozen by the court making performance of the projects impossible and necessitating the rescission of the preservation orders.

16. The 3rd applicant reiterates that the motor vehicles the subject of the preservation orders, apart from the fact that most of them were acquired outside the period of interest, are tools of trade necessary for execution of all the tenders that the applicants are in the process of executing.

The Response

17. The respondent opposes the application and has filed an affidavit sworn on 2nd April 2020 by No. 60040 S/SGT Fredrick Musyoki, a police officer in charge of investigations at the Assets Recovery Agency. Musyoki reiterates the contents of his affidavit sworn on 21st February 2020 in support of the application dated 20th February 2020 on the basis of which the preservation orders sought to be rescinded were made.

18. He avers that on 5th October, 2019, he was assigned the task of investigating a case of money laundering and tracing proceeds of crime derived from funds stolen from the Nairobi City County Government. On 10th December 2019, he instructed Corporal Isaac Nakitare to file an application for search and seizure warrants under sections 118 and 121 (1) of the Criminal Procedure Code and section 180 of the Evidence Act pursuant to the policing powers granted to the respondent by section 53 (A) of POCAMLA. Orders were granted in Chief Magistrates Misc. Application Number 4477 of 2019 for a period of 14 days.

19. These orders restricted debits for a period of 14 days in respect of all the bank accounts held in the names of the 1st applicant at Equity Bank Limited, I&M Bank Limited and KCB Bank Limited; and in respect of the 2nd applicant at Bank of Africa Limited, Equity Bank Limited, KCB Bank Limited and Sidian Bank Limited.

20. S/SGT Musyoki avers further that on 14th January 2020, the 3rd applicant reported to his office and informed him that the 2nd applicant was his company but had not received any funds from the Nairobi City County Government, and that it had valid existing contracts with other government agencies and entities. He had also informed Musyoki that the funds received by the 2nd applicant were legitimate and required for the execution of other contracts. It is his deposition that his preliminary analysis of the bank accounts statements of the 2nd applicant, in particular for account number 0010272809303 held at Equity Bank, did not reveal any

funds received from the Nairobi City County Government. He therefore acceded to the request of the 3rd applicant to have the orders against the 2nd applicant's bank accounts vacated. They were vacated on 21st January 2020.

21. According to S/SGT Musyoki, an analysis of the accounts opening forms and statements of accounts established that there were massive suspicious cash deposits, withdrawals, and intra and inter bank transfers to accounts within the same banks and other banks. He noted in particular that the two accounts referred to above were opened and operated by the 1st and 2nd applicants. These accounts, especially for the periods 2017, 2018, 2019 and 2020, received suspicious large cash deposits that indicate money laundering activities.

22. S/SGT Musyoki had further analyzed the bank opening documents and the bank statements of the 1st and 2nd applicants and had established that the 3rd and 4th applicants are the signatories to the said accounts. He had also established that the accounts are holding funds which there are reasonable cause to believe were acquired through proceeds of crime by the applicants. These were Kshs. 1,582,677.80 in account number 0010273735777 in the name of the 1st applicant, Hardi Enterprises Limited held at Equity Bank, Corporate Branch and Kshs. 6,995,427.05 in account number 0105215000897 in the name of the 2nd applicant, Toddy Civil Engineering Company, held at Sidian Bank, River Road Branch.

23. It is further averred on behalf of the respondent that investigations established that the 1st applicant's account No. 0010273735777 at Equity Bank received a total of Kshs 175,582,014 from the Nairobi City County Government between 15th October 2018 to 22nd November 2018 in eight (8) suspicious split transactions. The amount, received in these two days, was in three payments on 15th October 2018 of Kshs 22,546,702.70; Kshs 23,238,807.25; and Kshs 27,382,373.70. On 22nd November 2018, the 1st applicant had received from the Nairobi City County Government five payments of Kshs 5,156,118.95; Kshs 48,651,988.85; Kshs 26,154,700.40; Kshs 18,063,443.05; and Kshs 4,387,879.30.

24. According to S/SGT Musyoki, an analysis of the 1st and 2nd applicants' bank statements revealed several suspicious transactions by the applicants designed to conceal, disguise and hide the nature, source, movement and disposition of the funds fraudulently acquired from the City County Government of Nairobi. S/SGT Musyoki avers that on 22nd November 2018, the 1st applicant, Hardi Enterprises Limited, received suspicious payments from the Nairobi City County Government through its account number 0010273735777 held at Equity Bank Limited amounting to Kshs 102, 414,130.55 split into five (5) tranches of Kshs 5,156, 118.95, Kshs 48, 651, 988.85, Kshs 26, 154, 700.40, Kshs 18, 063, 443.05 and Kshs 4,387, 879.30.

25. The respondent notes that on the same day, the 1st applicant, Hardi Enterprises Limited, suspiciously transferred Kshs 2,000,000 from the said account to the 2nd applicant, Toddy Civil Engineering Company Limited, through its account number 00102272809303 held at Equity Bank Limited. On 23rd November 2018, the 1st applicant suspiciously transferred Kshs 10, 000,000 to the 2nd applicant's account number 0105215000897 held at Sidian Bank Limited. S/SGT Musyoki avers that prior to this transfer the account had a paltry balance of Kshs 2,450 only.

26. S/SGT Musyoki avers further that on 23rd November 2018, the 1st applicant suspiciously transferred Kshs 5,000,000 from its account number 0010273735777 held at Equity Bank Limited to the 2nd applicant's account number 00102272809303 held at Equity Bank Limited. The following day, on 24th November 2018, the 1st applicant again suspiciously transferred Kshs 8,000,000 from its account 0010273735777 held at Equity Bank Limited to the 2nd applicant's account number 00102272809303 held at Equity Bank Limited. It further suspiciously transferred, on the same day, through its account Number 00102272809303 held at Equity Bank Limited, Kshs 8,000,000 to a company called ROG Security Limited. S/SGT Musyoki states that this company is owned 60% by one Antony Otieno Ombok who is charged together with the applicants.

27. On 15th October 2018, the 1st applicant received suspicious payments from the Nairobi City County Government through its account number 0010273735777 held at Equity Bank Limited amounting to Kshs 73, 167, 883.65 split into three tranches, Kshs, 22, 546, 702.70, Kshs 23, 238, 807.25, and Kshs 27, 382, 373.70. The 1st applicant then, on various dates, suspiciously transferred or withdrew cash from the above account and distributed the funds in what the respondent terms an effort designed to conceal, disguise and hide the nature, source, movement and disposition of the funds stolen from the City County Government of Nairobi.

28. S/SGT Musyoki avers in this regard that on 16th October 2018, a total Kshs 3,800,000 was transferred from account number 0010273735777 in the name of the 1st applicant, Hardi Enterprises Limited held at Equity Bank Limited to Toddy Civil Engineering Company Limited, the 2nd applicant, through its account number 00102272809303 held at Equity Bank Limited. On 17th October 2018, the 1st applicant had transferred Kshs 1,000,000 from its account number 0010273735777 held at Equity Bank Limited to the 2nd applicant's account number 00102272809303 held at Equity Bank Limited.

29. S/SGT Musyoki avers that the acts of the applicants set out above constitute smurfing and layering of funds in a money laundering scheme designed by the applicants to conceal and disguise the source of the funds and proceeds of crime. It is also the respondent's averment that its investigations established that the deposits were mainly made in tranches below Kshs1,000,000/= to evade the reporting threshold set by section 44 and the 4th Schedule of POCAMLA, regulation 34 of the POCAMLA Regulations 2013 and the Central Bank of Kenya Prudential Guidelines For Account Holders to declare the source of the money. The respondent deposes that its investigations have revealed that the funds and motor vehicles in issue were unlawfully acquired and were therefore proceeds of crime as defined under the provisions of POCAMLA.

30. With regard to the 2nd applicant, the respondent avers that on 17th December 2018, it transferred Kshs. 3,000,000 from its account number 0010272809303 held at Equity Bank, Corporate branch to account number 0020264389109 held in the name of Mike Sonko Mbuvi Gidion Kioko, the Governor of the Nairobi City County Government, domiciled at the same Bank. The respondent's further analysis of the bank statements established that the 2nd and 3rd applicants, during the period April to May 2017, made deposits totaling to Kshs 3,600,000 into account number 1132250323 held at Kenya Commercial Bank in the name of the said Mike Sonko Mbuvi Gidion Kioko. According to S/SGT Musyoki, on 7th April 2017, the 2nd applicant transferred Kshs 600,000 to the account of the Governor of Nairobi City County. On both 19th April 2017 and 5th May 2017, the 3rd applicant transferred Kshs 1,000,000 to the Governor's account. The 3rd applicant further transferred a sum of Kshs 500,000 twice on 17th May 2017 to the same account to make the total deposit of Kshs 3,600,000.

31. It is the respondent's averment that its investigations established that the 1st and 3rd applicants are conduits used by Mike Sonko Mbuvi Gidion Kioko and that they jointly embezzled or stole funds from the coffers of the Nairobi City County Government. As a result, the applicants have been charged with Mike Sonko Mbuvi Gidion Kioko and others in Nairobi Anti-Corruption Court Chief Magistrates' Court (Milimani) Criminal Case No. ACC 31 of 2019 and ACC 32 of 2019 with various offences, including corruption and money laundering contrary to section 3 (b) (i) as read together with section 16 of POCAMLA, and acquisition of proceeds of crime contrary to section 4 of POCAMLA, as well as embezzlement of public funds in the sum of Kenya Shillings 357, 390, 229.95 from Nairobi City County Government.

32. The respondent asserts that the suspicious transactions in the 1st and 2nd applicants' bank accounts of funds fraudulently obtained from Nairobi City County Government clearly demonstrate a complex scheme of money laundering, and there are reasonable grounds to believe that the applicants' accounts were used as conduits for money laundering contrary to sections 3, 4 and 7 as read with section 16 of POCAMLA in an effort to conceal and disguise the nature, source, disposition or movement of the fraudulent funds.

33. S/SGT Musyoki deposes that in the course of his investigations, he established that the 3rd applicant, Anthony Ng'ang'a Mwaura, had acquired nine (9) motor vehicles which were procured during the period under investigations, from 7th April 2017 – to date as follows:

- a. **KCV 969Q, Nissan Qashqai registered on 19th July 2019;**
- b. **KCV 577S, Mercedes-Benz registered on 29th July 2019;**
- c. **KCV 577X, Nissan Navara registered on 6th August 2019;**
- d. **KCR 058V, Toyota Hilux registered on 17th September 2018;**
- e. **KCQ 078D, Lexus LX 450 registered on 24th April 2018;**
- f. **KCQ 088H, Toyota Hilux registered on 27th April 2018;**
- g. **KCL 015U, Toyota Hilux registered on 19th May 2017;**
- h. **KCM 502Q, Toyota Vanguard registered on 14th August 2017;**
- i. **KCD 577H, Toyota Land Cruiser.**

34. It is his averment that there are reasonable grounds to believe that the vehicles are proceeds of crime as they were purchased during the period when the fraud at the Nairobi City County Government occurred and during which the 1st and 2nd applicants made the suspicious funds transactions in an effort to conceal the nature, source and movement of the said funds. The respondent states that from its investigations, the 3rd applicant is a director and the beneficial owner of the 1st and 2nd applicants whose bank accounts were used to launder funds stolen from the Nairobi City County Government and is reasonably believed to have used the proceeds to procure the motor vehicles. The respondent avers that there are reasonable grounds to believe that the assets and funds in issue are proceeds of crime and are part of funds stolen from the Nairobi City County Government by the applicants. It is its case that the applicants have not given a reasonable explanation to show a legitimate source of the funds.

35. According to the respondent, its investigations seek to establish a case of money laundering and to trace, identify and forfeit proceeds of crime. Such investigations, according to S/SGT Musyoki, are not limited to tender no. NCC/WEFE and NR/DP/276/2017-2018-Hire of vehicles and equipment awarded to the 1st applicant by the Nairobi City County Government. The respondent asserts that the motor vehicles the subject of the preservation order were acquired during the period of investigations, from 7th April 2017 – to date.

36. It is his deposition that the investigations are justified as the 2nd and 3rd applicants had deposited funds into account number 1132250323 held at Kenya Commercial Bank in the name of Mike Sonko Mbuvi Gidion Kioko in the period during which the suspicious transactions set out in his affidavit occurred. Further, that the motor vehicles the subject of the preservation orders are private or personal vehicles and do not constitute tools of trade as alleged by the 3rd applicant. The respondent had established in its investigations that there are other vehicles that are registered in the name of the 3rd applicant which S/SGT Musyoki was of the opinion are tools of trade and they are therefore not the subject of the preservation order. He sets out in a list some seventeen vehicles, including, *inter alia*, a crane, excavator, a roller, a caterpillar and a roller grader registered on diverse dates between 2009 and 2015 as evidenced in documents from the National Transport and Safety Authority attached to his affidavit.

37. With regard to the averment by the 3rd applicant that the 1st and 2nd applicants will not be able to perform their contracts on public projects as their accounts have been frozen, the respondent avers that the 2nd applicant's bank account number 0105215000897 held at Sidian Bank is not the 2nd applicant's main business account. Its main business account is account number 0010272809303 held at Equity Bank, which account is not affected by the preservation order. Accordingly, the preservation orders do not curtail the commercial business of the 2nd applicant as alleged. He further states that the 2nd applicant's bank account number 0105215000897 held at Sidian Bank received Kshs. 10,000,000 on 23rd November 2018 directly from the 1st applicant's account number 0010273735777 held at Equity Bank Limited after it received funds on 22nd November 2018 from the Nairobi City County Government.

38. It is the respondent's case that the applicants have not demonstrated that they have been deprived of a means to provide for reasonable living expenses nor have they shown the hardship suffered as a result of the preservation orders as required by section 89(1) of POCAMLA to warrant the variation of the preservation orders. They have also not demonstrated that the motor vehicles, the subject matter of the preservation order issued on 24th February 2020 are tools of trade.

The Submissions

39. Both parties filed written submissions in support of their respective cases. In their submissions, the applicants concede that the respondent is empowered under section 82 of POCAMLA to move the court and obtain *ex parte* preservation or seizure orders if 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 proceeds of crime. They submit, however, that there must be reasonable grounds for issuance of such orders, founded on the existence of a factual foundation, and not mere imagination or malice. They cite in support of this submission the decision in **Assets Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (Interested Party) [2020] eKLR**.

40. The applicants submit that the respondent's case is that tender no. NCC/WEFE & NR/DP/276/2017-2018-Hire of Vehicles and Equipment was irregularly awarded to the 1st applicant by the Nairobi City County Government, and that any proceeds therefrom are proceeds of crime and subject to preservation. They submit that the issues that this court should determine is whether the said tender was irregularly awarded to the 1st applicant; whether the amounts in the subject bank accounts in the names of the 1st and 2nd applicants are proceeds of crime; whether the motor vehicles the subject of the preservation order are proceeds of crime; and whether the 2nd to 4th applicants should suffer prejudice for a tender awarded to the 1st applicant.

41. On the first issue, the applicants submit that section 92 of the Public Procurement and Asset Disposal Act, 2015 allows a

procurement entity to use direct procurement for procurement of goods and services amongst other methods. Further, that section 103 provides for the circumstances under which direct procurement may be used and that section 104 provides the procedure for direct procurement. The applicants go on to make submissions with respect to the process leading up to the award of the tender to the 1st applicant. They submit that all the procurement laws were followed in the process leading up to the award of the tender to them, and that the proceeds of the tender to the benefit of the 1st applicant cannot therefore be proceeds of crime. It is their submission that the mere fact that the applicants have been charged with the offence of money laundering is not sufficient reason for issuance of the impugned preservation and seizure orders. They submit that the respondent had a duty to demonstrate that affected assets were acquired from the proceeds of crime, which it has not done.

42. As a necessary corollary to their submissions that the subject tender was lawful, the applicants submit that the funds in the 1st and 2nd applicant's accounts are not proceeds of crime. They submit that the last time that the Nairobi City County Government ever paid the 1st applicant was on 24th May 2019 when it paid a total of Kshs. 3,413,793.00. That at the time, the 1st applicant had a negative balance of Kshs.3,087.80. They submit that as at 31st May 2019, the 1st applicant had almost entirely expended this amount and was only remaining with a balance of Kshs. 60,240. It had thereafter received payments from other third parties on 13th June 2019. Their submission therefore is that any funds remaining thereafter, including at the time of the impugned orders, was not obtained from the Nairobi City County Government over the subject tender and therefore the funds should not have been the subject of the preservation order. It is their submission further that under section 82 of POCAMLA, only funds reasonably suspected to be proceeds of crime should be the subject of preservation orders. The respondent had a duty to prove that the funds at issue were proceeds of crime, which it had not done.

43. Similar arguments are made with respect to the funds in the 2nd applicant's account. The applicants submit that the 2nd applicant was not a bidder and was therefore not part of the subject tender. They assert that while the respondent argues that some money was transferred from the 1st applicant's account to the 2nd applicant's account from the proceeds of the subject tender, it had not provided proof that the subject tender was illegal.

44. The applicants further submit that the respondent had a duty to prove that the money paid to the 2nd applicant by the 1st applicant were proceeds from the subject tender, which it had again failed to do. They submit that the last time the 1st applicant sent money to the 2nd applicant was on 15th March 2019 when the 2nd applicant only had Kshs. 36,913.65 in its account. The 1st applicant had sent only Kshs.303,610.00 to the 2nd applicant on the said date, which amount was fully utilized by 21st March 2019. They assert that the amount the subject of the preservation order was neither obtained from the 1st applicant nor from the impugned tender. Accordingly, preserving it through a court order defeats the whole purpose and object of the POCAMLA.

45. The applicants further submit that only three motor vehicles, namely KCV 969Q, KCV 577S and KCV 577X out of the list the subject of the preservation order were acquired and registered subsequent to the said tender and payment. The rest were acquired by the 3rd applicant before the subject tender or any payment from the County Government. They ought not, therefore, have been preserved and seized. They submit that the vehicles were acquired and registered on 19th May 2017, 14th August 2017, 24th April 2018, 27th April 2018, 17th September 2018 respectively, and on a date that is not indicated in respect of the sixth vehicle.

46. The applicants further submit that the impugned tender was entered into between the Nairobi City County Government and the 1st applicant on 5th July 2018. The 1st applicant received its first ever payment from the Nairobi City County Government in respect of the impugned tender on 15th October 2018. They submit that the six vehicles were therefore acquired and registered in the name of the 3rd applicant prior to the impugned tender and the payments in respect of the tender.

47. They submit that the remaining vehicles, which were acquired within the period of interest, are contract vehicles acquired on behalf of the 2nd applicant for the sole purpose of performing the contract awarded to the 2nd applicant in respect of the Nairobi Satellite Towns Water and Sanitation Development Programme; Phase 1, under contract No. AWSB/KFW/NST/W/01/2018 with Athi Water Works Development Agency. It is their submission that whereas the three vehicles are registered in the name of the 3rd applicant, they are contract vehicles acquired for the performance of the donor funded public contract being undertaken by the 2nd applicant. The applicants contend that in any event, it was the duty of the respondent to prove that the three motor vehicles registered within the period of investigation by the respondent were acquired by monies obtained from the impugned tender, which the respondent had failed to do.

48. In submissions on the final issue that they identified, that is whether the 2nd to the 4th applicants should suffer prejudice for a

tender awarded to the 1st applicant, the applicants reiterate that the respondent's case originates from the tender which was allegedly irregularly and illegally awarded to the 1st applicant by the Nairobi City County Government, and that therefore any proceeds therefrom are proceeds of crime. They submit that the 1st applicant is a legal entity separate from its shareholders and other companies owned by its shareholders. It is therefore wrong, in their view, for the respondent to make the 2nd to 4th applicants suffer for the alleged actions of the 1st applicant. They submit that these applicants did not have a contractual relationship with the Nairobi City County Government and they did not receive any payments from the County Government.

49. The applicants further contend that the transfer of funds from the 1st applicant to the 2nd applicant was neither suspicious nor fraudulent as alleged. Further, that the transfer between two sister companies to shore up their capital in order to be able to undertake certain projects and tenders is a normal business practice. It is also their submission that the 2nd applicant has also lent money to the 1st applicant as can be discerned from the 1st applicant's bank statements. They assert that they have other legitimate sources of income over the period of investigation, including bank loans from commercial banks, which they used to acquire their assets.

50. The applicants further submit that the payment by the 2nd applicant to the Governor of Nairobi City County, Mike Sonko Mbuvi Gidion Kioko, were unconnected to the aforesaid tenders and contracts. It is their case that the payment relates to a business transaction that the 2nd applicant had with the Governor for the leasing of property. They maintain that the payments could not possibly have had any connection to the aforesaid tender as they relate to a period before Mike Sonko Mbuvi Gidion Kioko became the Governor of Nairobi City County.

51. It is also the applicants' submission that the allegation that they were conduits for stealing public funds from Nairobi City County is in any event unsupported by evidence. They maintain that the respondent has not adduced any evidence to demonstrate that the 1st applicant transferred any money or proceeds from the impugned tender to the 3rd and 4th applicants. It is their submission therefore that preserving and seizing properties belonging to the 3rd applicant was not justifiable.

52. The applicants submit that they are businessmen whose livelihood depends on the performance of the tenders they are currently undertaking. They continue to experience tremendous hardships due to the preservation orders as they have made it impossible for them to provide for their needs and to perform tenders of national interest, some of which are donor funded. It is also their case that the public interest at stake far outweighs any risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.

Submissions by the Respondent

53. The respondent submits that the issues that the court is called upon to determine are whether the applicants have met the threshold for variation or rescission of the preservation orders under section 89 of the POCAMLA, and whether the application dated 23rd March 2020 is *sub-judice* pursuant to section 6 of the CPC.

54. It is the respondent's case that section 89 (1) (a) (i) and (ii) sets out the grounds upon which the court can vary or rescind a preservation order. That the section places the onus on the applicants to demonstrate the deprivation of means to provide for reasonable living expenses, or the undue hardship suffered to warrant the variation and or rescission of the preservation orders. The respondent relies for this submission on the case of **Asset Recovery Agency v Samuel Wachenje alias Sam Mwadime & 7 others [2016] eKLR**.

55. The respondent notes that the applicants have, in the affidavits in support of their applications, alleged that the preserved motor vehicles are tools of trade necessary for the execution of alleged contracts. They have not, however, demonstrated the undue hardship suffered in the performance of the alleged contracts as a result of the preservation orders. They have also not demonstrated that they have obligations under the alleged contracts which they have failed to honour due to the existence of the preservation orders.

56. The respondent submits that the motor vehicles the subject of the preservation orders are luxury vehicles and not tools of trade as alleged. It is its case that the vehicles which can be deemed to be tools of trade and which are not subject of the preservation order are the vehicles it has identified in the affidavit of S/SGT Musyoki.

57. With respect to the amount of Kshs. 1,582,677.80 held in account number 0010273735777 at Equity Bank in the name of the 1st

applicant, the respondent submits that the amount preserved *vis a vis* the amount the account received and transacted through the said account is in the tune of Kshs. 175,582,014. As for the amount of Kshs 6,995,427.05 held in account number 0105215000897 at Sidian Bank in the name of the 2nd applicant, the respondent submits that it has demonstrated that the account received Kshs. 10,000,000 from the 1st applicant on 23rd November 2018, which was after the 1st applicant had received in its account No. 0010273735777 a sum of Kshs 102,414,130.15 in five transactions within the same day.

58. The respondent submits that it has established a nexus between the account held at Sidian Bank and the funds received in the 1st applicant's account from the Nairobi City County Government. It is also its case that account number 0105215000897 held at Sidian Bank in the name of the 2nd applicant is not the 2nd applicant's main business account. Its main business account is number 0010272809303 held at Equity Bank, which account is not the subject of the preservation orders. The respondent submits therefore that the 2nd applicant has not demonstrated the undue hardship that it has suffered as a result of the preservation orders to warrant a review of the said orders.

59. According to the respondent, the risk that the preserved property may be destroyed, lost or transferred outweighs the hardship suffered by the applicants. It notes that the total funds preserved by the court in its order issued on 25th February 2020 is Kshs. 8,578,104.85 in respect of the two bank accounts held at Equity and Sidian Bank. It again relies on the case of **Asset Recovery Agency v Samuel Wachenje alias Sam Mwadime & 7 others** (supra) in which the court held that the undue hardship to an applicant should be such as outweighs the risk that the property concerned may be destroyed, lost or transferred.

60. It is its submission that the question whether the funds held in the two bank accounts and the motor vehicles constitute proceeds of crime are matters that have to be determined at the forfeiture application. Support for this submission is sought in the **Asset Recovery Agency v Samuel Wachenje** case.

61. Finally, the respondent submits that the application dated 23rd March 2020 is *sub-judice* pursuant to section 6 of the CPC, relying in this regard on its preliminary objection filed in response to the application. The respondent urges the court to find that the application dated 2nd March 2020 and 23rd March 2020 are without merit and ought to be dismissed.

Analysis and Determination

62. Before entering into an analysis of the issues raised in the application dated 2nd March 2020, I need to dispose of the second application dated 23rd March 2020. As argued by the respondent in its grounds of opposition filed in response thereto, the application dated 23rd March 2020 offends the provisions of section 6 of the Civil Procedure Act. This is because the matters in issue in the said application are directly and substantially in issue in the application dated 2nd March 2020 which was pending hearing at the time the second application was filed. Indeed, a reading of the application and the affidavit in support shows that it is virtually word for word in every respect, and seeks the same orders as the application dated 2nd March 2020.

63. It is not clear why the applicants deemed it necessary to replicate the application dated 2nd March 2020. Directions with respect to the hearing *inter partes* of the application had been given on 10th March 2020 and the application scheduled for hearing on 25th March 2020. The application dated 23rd March 2020 was therefore unnecessary, why it was filed during the pendency of an earlier application raising exactly the same issues is unclear, and it is hereby struck out with costs.

64. The application dated 2nd March 2020 is brought under the provisions of section 89 of POCAMLA. This section, which provides for variation and rescission of preservation orders, states as follows:

(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.

65. The key issue for determination in the application therefore is whether the applicants have placed before the court material that satisfies it that the operation of the preservation orders issued on 24th February 2020 will deprive them of the means to provide for their reasonable living expenses and will cause them undue hardship, and whether such hardship outweighs the risk that the property in question may be destroyed, lost, damaged, concealed or transferred.

66. I note from the averments and submissions of the applicants that they have focused on establishing that the funds and assets that are the subject of the preservation orders are not proceeds of crime, or that there was no factual foundation on the basis of which the court could issue the preservation orders. On this latter point, they have cited in support the decision in **Assets Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (Interested Party) [2020] eKLR** in which the court stated as follows:

“33. It is therefore clear from the wording of section 82(2) that a court issuing preservation orders is persuaded by reasonable grounds to believe that the property concerned was intended for use in the commission of the offence or it amounts to proceeds of crime. What constitutes reasonable suspicion is for the individual judge or Jury to determine depending on the circumstances and or merits of each case. The same must be founded on existence of factual foundation and not mere imagination or malice. See Timothy Isaac Bryant and others vs. inspector of police and 7 others and Emmanuel Suipenu Siyanga vs. (supra) where the court stated that “... a suspicion cannot be held reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion.

34. 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. See Assets Recovery Agency vs. Pamela Aboo(supra)”

67. In support of the application for the issuance of the preservation orders, and in their maintenance, the respondent filed an affidavit sworn on 21st February 2020 and 2nd April 2020, the latter being in opposition to the application dated 2nd March 2020. What emerges from these affidavits is, first, that the 1st applicant’s account No. 0010273735777 at Equity Bank received a total of Kshs 175,582,014 from the Nairobi City County Government on two dates, 15th October 2018 and 22nd November 2018. These funds were deposited in eight (8) split transactions. The 1st applicant had also, on 22nd November 2018, received Kshs. 102,414,130.55 in five (5) branches.

68. The 1st applicant transferred some of these funds to the 2nd applicant. The 2nd and 3rd applicants deposited funds to the account of the Governor of the County. In a short space of time, the 3rd applicant, a director of the 1st and 2nd applicants and one of the signatories to their accounts, purchased motor vehicles KCV 969Q, Nissan Qashqai registered on 19th July 2019; KCV 577S Mercedes-Benz registered on 29th July 2019; KCV 577X Nissan Navara registered on 6th August 2019; KCR 058V Toyota Hilux registered on 17th September 2018; KCQ 078D Lexus LX 450 registered on 24th April 2018; KCQ 088H Toyota Hilux registered on 27th April 2018; KCL 015U Toyota Hilux registered on 19 May 2017; KCM 502Q Toyota Vanguard registered on 14th August 2017. The date of registration of a final vehicle, KCD 577H Toyota Land Cruiser, is not indicated. The court notes from the motor vehicle records that none of these vehicles is a commercial vehicle.

69. According to the respondent, therefore, in the period of its investigations running from April 2017 during which the 1st applicant received Kshs 175,582,014 and 102,414,130.55 from the Nairobi City County Government and intra-transferred the funds between the applicants and the Governor of the County, the 3rd applicant purchased at least 10 luxury vehicles. Thus, even had this application been about the factual basis for the grant of the preservation orders, it cannot be disputed that the respondent had established such a factual foundation.

70. However, the application before me seeks rescission of the preservation orders issued on 24th February 2020 under section 89 of POCAMLA. The court in **Asset Recovery Agency v Samuel Wachenje alias Sam Mwadime & 7 others [2016] eKLR** stated as follows with respect to the operation of this section:

“34. The foregoing section therefore gives the court power to vary a preservation order, where it can be sufficiently proven that the operation of the order will deprive the applicant of the means to provide for his reasonable living expenses, causing him undue hardship. Further the said undue hardship should be such as outweighs the risk that the property concerned may be

destroyed, lost or transferred.” (Emphasis added)

71. The respondent contends, and this has not been disputed by the applicants, that the accounts that are the subject of the freezing orders, are not the 1st and 2nd applicant’s main accounts. It further avers, and this again was not controverted by the applicants, that the motor vehicles the subject of the freezing orders are not tools of trade but luxury vehicles registered in the name of the 3rd applicant. It sets out the specific vehicles that it deemed tools of trade, which it had not included in its application for preservation orders.

72. It is noteworthy that the applicants argued only in passing with respect to the requirement under section 89 of POCAMLA that they demonstrate the hardship that they faced as a result of the preservation orders. They did not, in my view, show how the orders will deprive them of the means to provide for their reasonable living expenses and cause undue hardship to them, and how such hardship outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. The applicants have instead argued to a great extent about whether or not the assets and funds the subject of the preservation orders are proceeds of crime. However, these arguments must wait for the hearing of the substantive application for forfeiture. As the court in the **Asset Recovery Agency v Samuel Wachenje** case observed:

“43. Whether or not the subject motor vehicles were born out of proceeds of crime, can only be canvassed at the hearing of the forfeiture application. The rival arguments placed before this court in this application cannot enable the court to make a finding on that issue one way or the other, with any degree of certainty.”

73. In the circumstances, therefore, it is my finding that the application dated 2nd March 2020 is without merit. It is accordingly dismissed with costs to the respondent.

Dated Delivered and Signed at Nairobi this 10th day of July 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE



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