REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISC. APPL. NO. E035 OF 2020

MUAZU BALA.....APPLICANT/RESPONDENT

VERSUS

ASSET RECOVERY AGENCY.....RESPONDENT/APPLICANT

CHIEF EXECUTIVE OFFICER,

KENYA AIRWAYS .....INTERESTED PARTY

RULING

1. The applicant by a Notice of Motion dated 10th day of December, 2020, sought the following orders:

a) That the Honourable court be pleased to discharge, vary and or set aside its orders of 8th December 2020 directing the preservation and seizure of the applicant's funds/cash by the respondent. B) that upon granting of prayer number A above, the court be pleased to direct that the funds/cash be released to the Applicant or his representative.

2. The application was predicated upon the grounds set out on the application, which for the purposes of this ruling can be summarized as follows: -

1) The Respondent failed to disclose to the court the fact that it had filed and prosecuted a similar application being MISC. CRIMINAL APPLICATION NUMBER E028 of 2020 ASSET RECOVERY v MUAZU BALA & ANOTHER before the Chief Magistrate's Court at Jomo Kenyatta International Airport

2) That the information presented to the court by the respondent which substantially contributed to the ruling was not accurate and was intentionally intended to mislead the court.

3) That the respondent had intentionally filed two applications seeking similar orders before any of them could be adjudicated upon and did not care to inform any of the courts of its intention only choosing to explain its schemes by saying that the ruling was not ready.

4) That the respondent's application discloses no crime that warrants such harsh treatment on the part of the applicant.

3. The application was supported by the affidavit sworn by the applicant in which he disposed that the applicant/respondent on the 7th day of December, 2020 filed an application before the Chief Magistrate's Court at JKIA seeking orders of preservation and seizure of funds which were found in the possession of the respondent/applicant and to transfer the same to the interested party.

4. It was contended that on the same day at 2.30 pm the application was set down for hearing before the CM when his Advocates raised an objection on the trial court's jurisdiction, with the court's ruling being reserved for 8th December 2020 at 9.00am, when the respondent's Advocate requested that the ruling be delivered at 2.00 pm as he will be engaged at the High Court, without informing the court that details of the matter which was before the High Court.

5. That to demonstrate malice, connivance and bad faith, the respondent as the ruling before the CM was pending had moved to this court seeking the same orders it had sought, and in blatant move only informing the court that the ruling before the CM was not ready, leading to the court issuing the impugned order.

6. That immidedietly the CM delivered His ruling striking out the respondent's application, his Advocate was served with the order from this court. It was contended that it was an abuse of process for the Respondent to conceal material facts from the court, which if it had disclosed the court would not have arrived at the decision made herein and therefore the said orders should be set aside.

7. On the issue of non-declaration of funds at the custom, he deposed that he was a passenger in transit to Dubai from Lagos Nigeria and declared the currency and was cleared by the customs to travel at Murtala Muhammed International Airport, with his next point of declaration being Dubai International Airport.

8. He contended that he was surprised during his lay-over at the Jomo Kenyatta International Airport, when police officers called upon him despite the fact that the interested party had cleared him to travel aboard their aircraft with the undeclared currency, only to be pounced on in Nairobi, with the intention of depriving him of his money.

9. He deposed that it was disturbing and surprising how someone knew that he had checked in the money unless some people went through the luggage's of the passengers during the lay over contrary to regulations and international practises. He stated further that when he was detained, he could not communicate effectively with the officers, who confiscated all his documents, including his passport, custom declaration clearance form from Lagos and a declaration form from Shah Jewellery Trading LLC

10. He stated further that the issue of failing to make declaration was not mentioned before the CM court and that no charges had been preferred an against him, with the respondent's main concern being to confiscated his money and to deport him having not disclosed any offence against him.

11. In response to the application herein, the respondent file a replying affidavit through SGT FREDRICK MUSYOKI, in which it was deposed that the application before the court was to brought under sections 88 and 89 of the proceeds of crime and anti-money launder Act and that the applicant had not met the threshold set there under for variation and or recession of a preservation orders.

12. It was contended that the respondent had disclosed before the court that it had filed an application before the lower court for search and seizure warrants to investigate and take into custody the cash which was found with the applicant in a suitcase, who was unable to satisfactory explain the source as the same did not avail proof of declaration of being in possession of cash from his point of origin to support the source and purpose or movement of the cash and why he could not use the financial systems and institutions.

13. It was stated that the documents annexed to the applicant's application where suspect as some were dated a day after the same had been intercepted at JKIA and the applicant was only indicated as courier and not the owner of the funds. It was stated that investigations on the subject matter was still on going to establish the authenticity of the documents, as there were reasonable grounds to believe that the funds were proceeds of crime.

SUBMISSIONS

14. The application was certified urgent and set down for hearing by way of written submissions. On behalf of the Applicant, it was submitted that the Respondent had file two applications in two "different courts but failed to disclose to this court material particulers at the ex-parte stage, the end result of which is that the court ought to set aside the orders which were obtained as a result of material non-disclosure. In support of this contention, reference was made to the case of **The king vs. The General Commissioners for the purpose of income Tax forth District of Kingston [1917] 1 K.B 486** where the court held that:-

"It is perfectly well settled that a person who makes an ex-parte application to the court that is to say in the absence of the person who will be affected by that which the court is ask to do is under obligation to the court to make the fullest disclosure

possible of all material facts within his knowledge, and if he does not make the fullest possible disclosure , then he cannot obtain any advantage from the said proceedings and will be deprived of any advantage he may have already obtained by means of an order which h has thus wrongly been obtained"

15. It was submitted that an unfairly obtained ex-parte order should not be allowed to stand once an applicant has demonstrated lack of disclosure of material facts or having not been a party to the suit in which adverse orders had been issued without it being aware as was stated in the cases of **AVIATION AND AIRPORT SERVISES WORKERS UNION vs. KENYA AIRPORT AUTHORITIES [2014] eKLR, RUEDA CONCRET CO LTD etal v. PARAMOUNT UNIVERSAL BANK LTD et al HCCC No. 430 of 2002 and ABRAHAM MUTAI & 5 OTHERS v PAUL M . MUTWII & 34 OTHERS [2015] eKLR**

16. It was further submitted that the respondent advertently failed to disclose to the court the fact that the applicant did present to them documents proving that he had declared the currency in Nigeria and that all they had were doubt as to the authenticity of the documents. It was contended that the alleged seizure of the applicant's cash was done contrary to the provisions of Section 12(5) of The Proceeds of Crime and Anti- Money Laundering Act 2009.

17. The court was therefore urged to set aside its order and replaced the same with an order directing that the money in question be realised to the applicant and to set the same free to continue with his journey to Dubai.

18. On behalf of the respondent it was submitted that the same applied the civil forfeiture mode of asset recovery of the proceeds of crime which can be determined on the basis of conduct in relation to property without identification of any particular unlawful conduct as was stated in the cases of **ASSET RECOVERY AGENCY vs. PAMELA ABOO [2018] eKLR and KENYA ANTI-CORRUPTION COMMISSION v STANLEY MOMBO AMUTI [2017] eKLR.**

19. It was submitted that the application before the court was incompetent on the ground that the applicant had not revoked the provisions of section 89 of PROCAMLA, which gives the court the jurisdiction to entertain the application seeking to vary a preservation order, as was stated in the case of **ASSET RECOVERY AGENCY v STEPHEN VICKWE MUNGIRA & 4 others [2018] eKLR.**

20. It was submitted further that the provisions of the Civil Procedure Act and the rules thereunder are not applicable as the applicant should have invoked the correct provisions under the PROCAMLA as was held in the case of **ASSET RECOVERY AGENCY v MIKE SONKO MBUVI [2020] eKLR.**

21. It was submitted that the Applicant had not met the threshold for the variation/rescission of the preservation order issued under the provisions of Section 89 of the PROCAMLA which sets out the grounds upon which the court can vary or rescind a preservation order, which puts the onus upon the applicant to demonstrate the deprivation of means to provide for reasonable living expenses or undue hardship suffered to warrant the variation and or rescission of the preservation order issued by the court. In support of the submissions, reference was placed on the case of **ASSET RECOVERY AGENCY v SAMUEL WACHENJE alias SAM MWADIME & 7 others [2016] eKLR** where the court held that the same is given powers to vary a preservation order, where the undue hardship are such as outweighs the risk that the property concerned may be destroyed, lost or transferred.

22. It was therefore submitted that the applicant had not demonstrated the undue hardship suffered as a result of the order and it was contended that the cash, the subject of this application were subject to ongoing investigation and there was a risk that if any variation was granted the same will be removed from the court's jurisdiction and to be dissipated by the applicant, before the forfeiture application is determined.

23. It was finally submitted that the Respondent had made full disclosure to this court and was not an abuse of the court process since the application before the chief magistrate was made under the provisions of Sections 118,118A 119 and 121(1) of the Criminal Procedure Code as read with Section 53 A (5) of PROCAMLA for search and seizure warrants to investigate and take custody of the cash, which application was struck out on 8th December, 2020 for lack of jurisdiction. It was contended that those are two different jurisdictions and therefore the applicant had not disclosed what was no disclosed to this court.

DETERMINATION.

24. For the purposes of this application, I must state for record purpose that the application which was filed before this court, was

brought under the provisions of Sections 81 and 82 of the PROCAMLA and Order 51 of the Civil Procedure Rules which is an ex-parte application filed by the Agency against the proceeds of crime, which is Known as proceeds in rem against the property as opposed to proceeds against the person.

The proceeds of this nature are independent of any criminal proceeding which may be instituted or ongoing against the person and is not dependent upon conviction. The agency need not prove any predicate offense so as to succeed at the civil forfeiture stage. The applicant is only supposed to satisfy the court that there are reasonable grounds to believe that the property in question is a proceeds of crime and or is to be used in a criminal activity. This was the position of the court in the case of **ASSET RECOVERY AGENCY vs. PAMELA ABOO & ANO (supra)** where the court had this to say:-

"63. Forfeiture proceedings are Civil in nature and that is why the standard of proof is on a balance of probabilities. See section 92(1) of POCAMLA. In the case of Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168 the court stated as follows:

"In civil proceedings for recovery under part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained."

64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 the Court of Appeal stated:

"....that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof.,.."

see also Phillips v The United Kingdom [2001] ECHR 437; Techla Nandjila Lameck v President of Namibia 2012 (1) NR 255 (HC)'

25. The application which was before the court was for preservation of the cash the subject matter of this application, which the respondent believed were proceeds of crime and in support of that application was an affidavit sworn by SGT FREDRICK MUSYOKI in which at paragraph 3 thereof it was stated as follows;

"THAT on 7th December 2020 I filed an application before the Chief Magistrate Court pursuant to sections 118, 118A 119 and 121 (1) of the Criminal Procedure Code, Section 180 of the Evidence Act and Section 53A(5) of the Proceeds of Crime and Anti-Money Laundering Act for search and seizure warrants to investigate and take into custody of the cash vide MISC. CRIMINAL APPLICATION NO. E028 of 2020 ASSET RECOVERY AGENCY v. MUAZU BALA AND KENYA AIRWAYS "

26. The issue therefore which the court is called upon to determine is whether the orders granted were issued based on the material non-disclosure, of the existence of the case which had been filed before the lower court. From the affidavit which was before the court, it is clear to me that the respondent had made an adequate disclosure to the court of the existence of the case before the Chief Magistrates Court and therefore applicant's contention on the material non-disclosure is devoid of merit.

27. It has been submitted by the respondent that the application before the court is fatally defective, since the applicant did not follow the procedure provided to under Sections 83 and 90 and 92 of the PROCAMLA, I take the view and hold that whereas the Act provides for an elaborate procedure and steps to be followed once a preservation order has been made and as confirmed by the authorities supplied by the Respondent which are all persuasive: **ASSET RECOVERY AGENCY v STEPHEN VICKER MANGIRA & 4 OTHERS [2018] eKLR, ASSET RECOVERY AGENCY v SAMUEL WACHENJE (SUPRA), ASSET RECOVERY AGENCY v MIKE SONKO (SUPRA),** there is no bar to the applicant who is a foreigner approaching the court for variation of the ex-parte order issued, if the same was obtained through concealment of material facts and/or for fast-tracking the operation of Section 83 of the Act .

28. I must also state that the application before the court was not brought under the operations of Sections 83 of the Act and therefore the applicant was not under any obligation to prove any hardship suffered as a result of the preservation orders issued by

the court, as required under the provisions of Sections 87 and 88 of the Act. The application was therefore properly before the court contrary to the Respondent's submissions.

29. I must however point out that where the law or statute provides for an elaborate alternative procedure, parties to a litigation should always follow strictly the same as was stated in the **SPEAKER OF THE NATIONAL ASSEMBLY v KARUME (2008)1KLR and as followed in the case of Asset Recovery Agency v Stephen Vickers Mangira & others (supra).**

30. From the material placed before me, I find and hold that the applicant contention that the order was obtained on the basis of material non-disclosure lacks merit, as the court would still have issued the preservation orders even if the proceeds before the chief magistrate's court were ongoing, as the proceedings herein are civil in nature. The issue of whether or not the applicant had made the required declaration is not relevant at this stage, as the application which was before the court was for preservation of the subject matter herein, the source and legality thereof shall be the subject of forfeiture proceedings if and when the same is filed by the Respondent.

31. In the final analysis, I find no merit in the application for variation of the orders herein at this stage, which I hereby dismiss with cost in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21st DAY OF DECEMBER 2020

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J. WAKIAGA

JUDGE