



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

MISCELLANEOUS APPLICATION NO 2 OF 2020

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

ROSE MONYANI MUSANDA.....1ST RESPONDENT

THOMAS ODHIAMBO KONDU...2ND RESPONENT

MARGARET WAMBUI MUGO.....3RD RESPONDENT

WILMA & SONS COMPANY LIMITED.....INTERESTED PARTY

RULING NO. 2

1. By an application dated 6th October 2020, the applicant, Wilma & Sons Company Limited sought to be enjoined in the proceedings as the 4th respondent. It asserted that it has an interest in motor vehicle registration number KCC 646 D, one of the assets the subject of the forfeiture orders in the judgment of this court dated 21st September 2020. The application is brought under Articles 10(2), 24, 27, 28, 40 and 50 of the Constitution and seeks the following orders:

i. Reinstatement of the suit for hearing and determination of the Interested Party's case

ii. Stay of execution of the judgment delivered on 21st September 2020 and all consequential orders therefrom with respect to motor vehicle registration number [Particulars Withheld]

iii. Unconditional release of the said motor vehicle to the interested party

iv. The court be pleased to set aside, vary or vacate the judgment delivered on 21st September 2020 and all other consequential orders therein authorising the seizure and forfeiture of motor vehicle registration number [Particulars Withheld]

2. The applicant was joined to the proceedings as an Interested Party on 5th November 2020.

3. The respondent opposes the application. It has filed an affidavit in reply sworn by Cpl. Fredrick Muriuki on 11th January 2021.

4. The parties filed written submissions in support of their respective cases which were highlighted on 10th February 2021.

The Applicant's Case

5. The application is supported by an affidavit sworn by John Githinji Kamau. Mr. Kamau describes himself as one of the directors of the Intended 4th respondent (now the Interested Party). He avers that the Interested Party is the registered owner of motor vehicle registration number **[Particulars Withheld]**. The vehicle had been purchased by one William Kamau Githinji, a director of the Interested Party, who had entered into an agreement for sale of the said motor vehicle with the 1st respondent on or about 15th November 2018. The purchase price for the vehicle was Ksh. 2,200,000/- which was to be paid in a one-off payment directly to the bank account of the seller. The amount had been paid on 16th November 2018 by the said William Kamau Githinji's banker, Equity Bank Limited, directly to the account of the 1st respondent in Sidian Bank account number **[Particulars Withheld]**.

6. Upon payment of the purchase price, possession of the motor vehicle was given to the purchaser. He incorporated it into a Sacco and started earning from it. Prior to paying the full purchase price, the purchaser had done a search at the National Transport and Safety Authority (NTSA) to ascertain ownership of the motor vehicle. He had established that the motor vehicle was in the names of the 1st respondent and Sidian Bank. The purchaser had been informed by the seller that she had taken a loan with the motor vehicle and guaranteed the purchaser that upon payment of the purchase price she would be able to have the bank discharge its interest in the motor vehicle as she would utilize the funds from the purchase price to pay the loan. It had taken time for Sidian Bank Limited to discharge its interest over the motor vehicle.

7. Mr. Kamau avers that upon incorporation of the Interested Party, a resolution was made by its directors to have all motor vehicles individually owned registered in the name of the company. The Interested Party was incorporated on 4th April, 2019 and William Kamau Githinji therefore required the 1st respondent to deliver the original log book for purposes of transfer to the name of the Interested Party. The transfer was effected on 29th April, 2019.

8. Mr. Kamau avers that the Interested Party has been in quiet possession of the suit motor vehicle since the date it purchased it and has been peacefully utilizing it until around September, 2020 when the said motor vehicle was seized by the applicant. That was when the Interested Party learnt that it had been seized pursuant to an order that the 1st respondent's properties be forfeited to the government of Kenya as proceeds of crime. The Interested Party asserts that the vehicle is not part of the assets of the 1st respondent. At the time of purchase of the vehicle, the Interested Party was not aware that the 1st respondent was being investigated or that the motor vehicle was acquired by the 1st respondent through proceeds of crime. The director of the Interested Party was a *bona fide* purchaser who purchased the vehicle in good faith and legally transferred it to the Interested Party who should be allowed to utilise it.

9. The Interested Party asks the court to stay execution of the judgement delivered on 21st September, 2020 and all the other consequential orders therein authorizing the seizure and forfeiture of the motor vehicle. He asserts that the judgment of the court is prejudicial to the Interested Party's constitutional rights to property yet it was not given an opportunity to be heard. The Interested Party should be given an opportunity to be heard to protect its property. It therefore seeks release of the said motor vehicle to enable it return to work to enable it continue to generate income for itself, its agents and or employees.

10. In its submissions filed on 9th February 2021, the Interested Party states that its interest in the case only extends to motor vehicle registration number **[Particulars Withheld]**. The said motor vehicle should not have been part of the current proceedings, and it invites the court to consider whether it was entitled to be enjoined in this suit. It notes that the respondent's main argument as set out in the affidavit in reply sworn by Cpl. Frederick Muriuki is that the Interested Party was aware of the forfeiture application and the orders issued therein yet no evidence has been presented to demonstrate that the Interested Party did indeed have such knowledge. The Interested Party argues that no attempts to serve it was made yet the respondent knew that the vehicle was registered in its name. It further argues that its contacts and address details were readily available in accordance with section 13 of the Companies Act, so the respondent had the means to locate it.

11. The Interested Party submits that its application is merited, premised on sections 89 and 93 of POCAMLA and that its application should be allowed as prayed to avert injustice being occasioned to it. The Interested Party was not served by the respondent nor was it investigated. As evidenced by the NTSA records, it was the registered owner of the subject vehicle prior to the

commencement of this matter.

12. According to the Interested Party, the court should have been made aware of this fact during the respondent's application for seizure and forfeiture. The failure to inform the court resulted in the Interested Party being denied the opportunity to present its case contrary to the rules of natural justice. The Interested Party relied in support of this submission on **Republic v National Land Commission & Another ex parte Farmers Choice Limited (2020) eKLR** and **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**.

13. The Interested Party submits further that the respondent made the application for forfeiture pursuant to Order 51 of the Civil Procedure Rules. It submits that under Rule 3 thereof, notice of such application is required to be served on the parties affected thereby. It argues that service through a Kenya Gazette notice was insufficient as orders sought adversely affected it but it was not enjoined in the suit. It had only learned of the application to seize and forfeit the vehicle after the proceedings had been concluded and the vehicle was confiscated along the road.

14. The Interested Party cites section 56(2) of POCAMLA which it submits dictates that the rules of evidence applicable in civil proceedings are applicable to the current proceedings. It is its case that the respondent was under a duty to serve it with all pleadings and documentation pertaining to this suit in accordance with the Civil Procedure Rules.

15. With regard to the motor vehicle at issue, it is its submission that the sale of the motor vehicle was sound and does not fit the definition of "proceed of crime." It had purchased the vehicle pursuant to a sale agreement dated 15th November 2018 at a price of Kshs.2.2 million. Pursuant to the sale agreement, the purchase price was transferred to the 1st respondent on 16th November 2018 as shown in the RTGS copy and account statement annexed to the Interested Party's affidavit in support of its application. Its submission was therefore that the requirement in section 3 of POCAMLA that a party has to reasonably know that he is handling proceeds of crime has not been met in its case and the vehicle is not a realizable property under section 57 of POCAMLA.

16. It contends, further that the fact that the vehicle was not a gift as valuable consideration was paid for it in accordance with its market price has not been controverted by the respondent. It contends, finally, that the procedure in sections 83, 91 and 93 of POCAMLA that the respondent argues it should have followed are not applicable to it as it was not informed of the proceedings.

17. The Interested Party further argues that the respondent is guilty of material non-disclosure by concealing the court's previous ruling against it with respect to motor vehicle registration number **[Particulars Withheld]**. It refers the court to the ruling of Onyiego J in **Asset Recovery Agency vs Rose Monyani Musanda; Sidian Bank Limited (Interested Party) (2020) eKLR** (Misc. Application No. 43 of 2019). It submits that in the said ruling, Onyiego J. set aside preservation orders in respect of the said motor vehicle, having found that the vehicle was jointly obtained with Sidian Bank and later transferred to the applicant company which at the time had not been enjoined in the case as an interested party. It is its case that in the ruling, the court ordered that the vehicle and its log book be released to its registered owner.

18. The Interested Party contends that the respondent blatantly ignored the orders of Onyiego J and failed to disclose them to this court, which resulted in a flawed judgment with respect to the suit vehicle. The said ruling had not been set aside, reviewed or appealed against. Consequently, this court did not have jurisdiction to entertain any issues touching on the said motor vehicle in making its orders in the judgment of 21st September 2020 as the subject was *res judicata*.

19. The Interested Party submits, on the basis of the ruling by Onyiego J and the fact that the orders of the court were disobeyed and concealed by the respondent, that it is entitled to the orders that it seeks. It submits that this court should give it an opportunity to demonstrate how its jurisdictional integrity was abused by the respondent resulting in an abuse of process. It cites the decision of the court in **Teachers Service Commission vs Kenya National Union of Teachers & 2 Others (2013) eKLR** and the Scottish case of **Stewart Robertson vs Her Majesty's Advocate, 2007 HCAC63** on the rationale of contempt of court being to safeguard the rule of law.

20. Further reliance is placed on the case of **Canadian Metal Co. Ltd vs Canadian Broadcasting Corp (No. 2)(1975)48 D.LR(30)** cited with approval in **Kenya Human Rights Commission vs the Attorney General & Another (2018) eKLR** in which it was stated that:

“To allow court orders to be disobeyed would be to tread the road towards anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn...if the remedies that the court grants to correct...wrongs can be ignored, then there will be nothing left for each person but to take the law into their own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

21. The Interested Party further quotes the case of **Refrigeration and Kitchen Utensils Limited vs Gulab Chandpopatlal Shah & Another, Civil Application No.39 of 1990** in which the court stated that:

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It should be most dangerous to hold that the suitors, or their solicitors could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take it upon themselves to determine such a question...he should apply to the court that it might be discharged. As long as it exists, it must not be disobeyed.”

22. The Interested Party further relies on Article 40 of the Constitution that prohibits arbitrary deprivation of property.

23. With regard to the respondent’s assertion that its application is not anchored on relevant provisions of POCAMLA, the Interested Party submits that this is a mere technicality that should not be used to defeat the ends of justice. Reliance for this submission is placed on the case of **Anchor Limited vs Sports Kenya (2017) eKLR Civil Appeal No. 19 of 2016**.

24. To the respondent’s contention that the sale agreement relied on by the Interested Party is an afterthought as the bank that allegedly financed the sale was not a party, the Interested Party submits that in practice, the bank would not have featured unless a discharge was required. Its submission was that the sale agreement was exhibited to show the transfer of the purchase price of Kshs. 2.2 million and was therefore not an afterthought.

The Respondent’s Case

25. The respondent opposed the application and filed an affidavit in opposition thereto sworn by Cpl. Frederick Muriuki on 11th January 2021. The averments by Cpl. Muriuki are echoed in the submissions of the respondent in which it condenses its case against the Interested Party into three issues. These are, first, what recourse is available to an interested party after a preservation order is gazetted or a forfeiture order is made. The second is whether the Interested Party’s application meets the thresholds of sections 83, 89 and 92 of POCAMLA, and thirdly, if the prayers sought are merited or not.

26. With regard to the first issue, the respondent lists the properties with respect to which a preservation order was obtained on 8th October 2019. These properties included the motor vehicle the subject of the Interested Party’s application namely KCC 646D Isuzu Bus Coach. The preservation order was gazetted on 18th October 2019 vide Gazette Notice No. 9949 pursuant to section 83(1) of POCAMLA. This, according to the respondent, was sufficient notice to the general public, inclusive of the Interested Party.

27. It is the respondent’s position that the Interested Party should have taken advantage of section 83(3) thereof which permits any person who has an interest in the property subject of the preservation order to give notice of his intention to oppose the making of the forfeiture order; or to apply for an order excluding his interest in the property concerned from the operation of the order. The said notice is to be served on the respondent’s Director and is to comply with the requirements of section 83(5) of the Act. The respondent avers that it did not receive such notice from the Interested Party.

28. It is the respondent’s case further that another avenue open to the Interested Party which he did not take up was section 91(1) of POCAMLA that permits late service of the notice within 14 days of the Interested Party becoming aware of the preservation order by applying to the court before judgment for leave to serve the notice out of time. The respondent submits that the Interested Party is not entitled to orders sought as it was or ought to have been aware of the proceedings and opted not to oppose the same. The respondent submits that the court rightly arrived at its decision in making the forfeiture order and no evidence has been placed before it warranting review of its orders. In its view, the application should not be about whether the vehicle is owned by the Interested Party as that issue was already determined by the court in its judgment. The respondent submits that the assets in issue were owned by the 1st respondent in the main suit and the rest of the parties were her conduits or proxies.

29. The respondent submits, with regard to the second issue, that the Interested Party’s application is not anchored on the relevant

provisions of POCAMLA. It is its case that the alleged purchase of the vehicle in issue appears to be fictional and a scheme of money laundering activities as the alleged financier and co-owner bank did not feature in the sale agreement produced by the Interested Party despite a loan pending. The respondent argues that the vehicle's purported acquisition and change of ownership to William Kamau Githinji who subsequently transferred it to the Interested Party was designed to defeat investigations and to circumvent the forfeiture process.

30. Finally, the respondent submits that the Interested Party's application does not disclose how constitutional and statutory provisions on which it is anchored have been violated by the judgment of this court. They submit that the judgment of a court of competent jurisdiction cannot form the basis of constitutional violation. They observe that the Interested Party admits non-compliance with the provisions of POCAMLA but dismisses it as a mere technicality. In the respondent's view, however, non-conformity with substantive provisions of a statute cannot be cured by Article 159(2) (d) of the Constitution. In its view, the Article was not intended to provide refuge for all cases where there has been flagrant breach.

31. With regard to Miscellaneous Application No. 43 of 2019, the respondent submits that the ruling releasing various vehicles was pursuant to an application for variation under section 89 of POCAMLA. That the application was not a substantive application to determine the ownership of assets under preservation. The respondent conceded, however, that while it had released some motor vehicles where the owners were not parties to the suit then pursuant to the ruling of the court, the vehicle the subject of this application was not released.

Analysis and Determination

32. The main issue for determination in this matter is whether the Interested Party is entitled to the orders that it seeks. Specifically, whether it is entitled to release of motor vehicle registration number KCC 646D. It is, I believe, common ground that an order was made by Onyiego J varying the preservation orders issued to the respondent and directing that various motor vehicles, including the motor vehicle the subject of this application, be released. At the time the application the subject of the judgment dated 21st September 2021 was argued and the decision made, the decision of Onyiego J was still valid. It had not been appealed from, nor was there an order varying it in any way.

33. The question, then, is what the effect of the variation order issued by Onyiego J in **ACEC No. 43 of 2019** is. Counsel for the respondent conceded, upon inquiry from the court, that following the orders of Onyiego J, that it had released some motor vehicles whose owners were not parties to the suit. He conceded that the subject vehicle was not released. The Interested Party did not dispute this, so the court accepts as common ground that the vehicle the subject of this application is in the custody of the respondent.

34. Under the provisions of POCAMLA, the respondent is required to obtain preservation orders under section 83 in respect of assets believed to be proceeds of crime. Thereafter, it can, as was done in this case, file an application for forfeiture of the preserved assets. However, under section 89 of POCAMLA, a party is entitled to make an application for a variation order. Section 89 provides as follows:

89. Variation and rescission of orders

(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.

35. In the application that was the subject of the ruling of Onyiego J in ACEC No. 43 of 2019- **Asset Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (Interested Party)** as set out in the ruling of the court, the 1st respondent, Rose Monyani Musanda who was the applicant in the matter, sought the following substantive orders:

a. The ex parte orders of 8/10/2019 be discharged.

b. Pending hearing and determination of the application, a conservatory order to issue releasing the motor vehicle [Particulars Withheld] to the Respondents/Applicants.

c. An order of injunction to issue directed at the interested party herein (Sidian Bank Kawangware Branch) to unflag the Applicant's bank account No. [Particulars Withheld] and Account No. [Particulars Withheld] for resumption of normal operations in the processing of loan and other bank related activities.

d. That the orders issued on the 8th October, 2019 against the Applicant's motor vehicles in prayers 3 and 4 above be rescinded and the applicant be allowed to operate the said vehicles and bank accounts normally.

36. The vehicle the subject matter of this application, [Particulars Withheld] Isuzu Bus Coach, was not the subject of the variation application dated 29th October 2019 that was the subject of the ruling in ACEC No. 43 of 2019. It was, however, the subject of the preservation orders sought in the application for preservation orders dated 8th October 2019.

37. Under section 89 of POCAMLA set out above, on an application for variation of the preservation orders, a court may make such variation 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; ...

38. In the ruling of the court in the matter, the court identified the issue for determination as follows:

“41. The asset recovery (sic) has connected the finances of the preserved accounts with illicit dealings based on the arrest of the respondent with some drugs (heroin). However, did the respondent acquire the subject motor vehicles through illicit proceeds. To answer this, I will address the issue of each motor vehicle separately.”

39. The court then went on to consider the situation with respect to each of the vehicles. Of relevance to the present application with regard to the vehicle the subject of this application are paragraphs 49, 50 and 56 of the ruling in which the court stated as follows:

“Motor Vehicle [Particulars Withheld] Isuzu Bus Coach

49. According to the respondent, this motor vehicle was bought through a loan facility at Kshs. 4.5 million and that he raised a deposit of 1.2 million being proceeds from the sale of [Particulars Withheld] and 2.2 Million being proceeds from the sale of [Particulars Withheld]. There was no evidence that a sum of 1.2 million was raised from the sale of [Particulars Withheld] and 2.2 million from the sale of [Particulars Withheld]. ...

Motor Vehicle Registration No. [Particulars Withheld] Isuzu.

“50. It is the respondent's evidence that she bought motor vehicle [Particulars Withheld] through proceeds realized from the sale of land in Kitale, and later obtained a loan from Nyeri Motors which she later sold and deposited the money with Sidian

Bank who in turn gave her a loan. That after clearing the loan, she sold the motor vehicle. She attached as proof a loan agreement with Nyeri Motors. According to the log book, the motor vehicle was obtained jointly with Sidian Bank and later transferred to Wallmas and Sons Co. Ltd as the current owners. The said company was not enjoined as an interested party. The source of the money being a loan from Nyeri Motors for the first loan, and later Sidian bank is not in question nor controverted. I am satisfied with the explanation given. Obviously, the money loaned cannot be said (sic) proceeds of crime. To that extent the preservation orders in respect of motor vehicle [Particulars Withheld] are hereby set aside.

...

56. Having held as above, it is my finding that the respondent has partially proved her case to the required degree to discharge part of the preservation orders and therefore make orders as follows;

a) That the *ex parte* preservation orders made in respect of motor vehicles [Particulars Withheld] Isuzu Bus Coach, [Particulars Withheld] Isuzu Bus Coach and [Particulars Withheld] be and are hereby set aside and /or rescinded

b) That the motor vehicles and log books being held in respect of motor vehicles named in (a) above be released to the registered owners.” (Emphasis added)

40. Prior to the hearing of the forfeiture application the subject of the decision dated 21st September 2020 therefore, a substantive order had been made by a court of competent jurisdiction, directing the release of the said motor vehicle pursuant to the variation application made by the 1st respondent. The order was made by the court on 15th January 2020. Although the order for the release of the vehicle was made pursuant to a variation application in which the 1st respondent had not sought its release, the ruling of the court was not reviewed or appealed against. It was, in itself, sufficient for the release of the subject motor vehicle.

41. That being the case, and this court being a court of concurrent jurisdiction as the court that made the order for release of the motor vehicle, this court lacked the jurisdiction to determine whether or not the motor vehicle was a proceed of crime as that issue had been addressed in the variation application in ACEC 43 of 2019. This is a fact that should have been brought to the attention of the court at the hearing of the forfeiture application.

42. At the hearing of the present application, Counsel for the respondent informed the court that the vehicle the subject of the application had not been released pursuant to the orders of Onyiego J of 15th January 2020. The Interested Party did not dispute this, so the court accepts it as common ground that the vehicle is still in the possession of the respondent. Which begs the question: If the vehicle had been in the custody of the respondent pursuant to the preservation orders issued on 8th October 2019, are the averments by the Interested Party that it was unaware of the pendency of this matter until the vehicle was seized by the respondent following the judgment of the court on 21st September 2020 truthful"

43. A second, related, question is whether the Interested Party had a claim to the vehicle, as it alleges, and should therefore have been notified of the proceedings. In the ruling of Onyiego J dated 15th January 2020, the court noted that the 1st respondent had alleged that she had sold the vehicle to **“Wallmas and Sons Co. Ltd as the current owners.”**

44. It seems to me that while the respondent was in violation of the orders of Onyiego J in failing to release the subject vehicle, the Interested Party is not entitled to the orders that it seeks in this matter. I say this for two reasons. First, should it be the party known as “Wallmas and Sons Co. Ltd” identified in the ruling of Onyiego J as the registered owner of the subject vehicle, then it was and still is entitled to pursue obedience of the court orders issued in the ruling for the release of the motor vehicle. Secondly, if it is the party referred to as Wallmas and Sons Co. Ltd, then it cannot truthfully claim not to have known of the proceedings before this court involving the subject vehicle until after the judgment of the court.

45. In the result, I decline to issue orders re-opening the present proceedings to enable the Interested Party participate in the proceedings. I am also not satisfied that the Interested Party is entitled to the orders sought in the present proceedings for the release of the subject motor vehicle to it.

46. However, in view of the ruling of Onyiego J dated 15th January 2020 in **Miscellaneous Application No. 43 of 2019**, the subject motor vehicle should not have been the subject of the forfeiture proceedings, unless an order varying the said orders on review or

appeal was in force.

47. I accordingly dismiss the Interested Party's application. However, I hereby vary the orders made in the judgment dated 21st September 2020 and lift the forfeiture orders in respect of motor vehicle registration number [**Particulars Withheld**].

48. There shall be no order as to costs.

DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 14TH DAY OF APRIL 2021

MUMBI NGUGI

JUDGE



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