



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC CIVIL SUIT NO. 1 OF 2019**

**ASSET RECOVERY AGENCY.....PLAINTIFF**

**VERSUS**

**PHYLLIS NJERI NGIRITA.....1<sup>ST</sup> DEFENDANT**

**LUCY WAMBUI NGIRITA.....2<sup>ND</sup> DEFENDANT**

**JEREMIAH GICHINA & OTHERS.....3<sup>RD</sup> DEFENDANT**

**AND**

**PLATINUM CREDIT LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**OPPORTUNITY INTERNATIONAL WEDCO LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**Introduction**

1. Martin Amwayi Obimbo, the 3<sup>rd</sup> Interested Party/Applicant, filed the Notice of Motion dated 3<sup>rd</sup> November 2020 under **Sections 93 and 96** of the **Proceeds of Crime and Anti- Money Laundering Act**, **Sections 1A,1B and 3A** of the **Civil Procedure Act** and **Order 51(1)** of the **Civil Procedure Rules** seeking the following orders:

*“1) Spent*

*2) Spent*

*3) Spent*

*4) THAT the forfeiture orders issued on 26<sup>th</sup> August 2020 be varied and/or set aside*

5) ***THAT the interest in PROPERTY LAND TITLE NO. WAITULUK/MABONDE BLOCK 12/SIRENDE/410, REGISTERED IN THE NAME OF MARTIN AMWAYI OBIMBO be excluded from the operation of the forfeiture orders issued herein.***

6) ***THAT declaration be made that MARTIN AMWAYI OBIMBO has an interest in PROPERTY LAND TITLE NO. WAITULUK/MABONDE BLOCK 12/SIRENDE/410 as the rightful owner.***

7) ***THAT this Honourable Court be pleased to grant an (sic) mandatory injunction directing the Land's Registrar Kitale, to remove the restriction placed by the Asset and Recovery Agency on PROPERTY LAND TITLE NO. WAITULUK/MABONDE BLOCK 12/SIRENDE/410, REGISTERED IN THE NAME OF MARTIN AMWAYI OBIMBO.***

8) ***Costs of this Application be provided for.***

2. The Application is supported by the affidavit of the 3<sup>rd</sup> Interested Party sworn on 3<sup>rd</sup> November 2021 and on grounds that the 3<sup>rd</sup> Interested Party was not involved in the commission of any offence in relation to the matter culminating in the forfeiture proceedings herein or any other matter; that the property **Title No. Waituluk/Mabonde Block 12/Sirende/410** registered in the name of Martin Amwayi Obimbo has been erroneously confused with property Land Title number Waituluk/Mabonde Block 13/Sirende/410 which was owned by Sylvia Ajiambo Ongoro and sold to the 2<sup>nd</sup> Respondent; that it is unconscionable and unequitable to the 3<sup>rd</sup> Interested party for the property to be forfeited to the state without him being heard and that this application has been brought without undue delay and no prejudice will be occasioned to the Respondents should it be allowed.

3. The Applicant/Respondent vehemently opposed the application vide an affidavit sworn on 17<sup>th</sup> May 2021 by SSgt Fredrick Musyoki an investigator with the Agency. SSgt Musyoki deposes that during his investigation into the bank accounts and transactions of the Respondents in the forfeiture proceedings, he obtained a sale agreement dated 2<sup>nd</sup> June 2016 between Sylvia Ajiambo Ongoro and Lucy Wambui Ngirita (the 2<sup>nd</sup> Respondent) from Kenya Commercial Bank which the said Lucy Wambui Ngirita had provided to the bank as evidence and justification for her transactions and that the said sale agreement pertained to Land parcel No. LR Waituluk/Mabonde Block 2/Sirende/410 to which the applicant is laying claim. Ssgt. Musyoki deposes that he also obtained a letter from M/s Kidiavai & Co. Advocates pertaining to that sale agreement dated 2<sup>nd</sup> June 2016 in which the said firm made a demand to the 2<sup>nd</sup> Respondent in the forfeiture application for payment of a sum of Kshs.15,500,000 for the parcel of land. SSgt. Musyoki also contended that the respondents in the forfeiture application have appealed the judgment and filed an application for stay of execution of the orders of forfeiture and laid claim to the parcel of land LR No. Waituluk/Mabonde Block 12/Sirende/410.

4. The record shows that the 3<sup>rd</sup> Interested Party was joined as a party to the forfeiture proceedings by an order of this court made on 11<sup>th</sup> November 2020.

5. By consent of the parties this application was canvassed through written submissions.

#### **Submissions of the 3<sup>rd</sup> Interested Party**

6. Learned Counsel for the 3<sup>rd</sup> Interested Party relied on the grounds stated on the face of the application, the 3<sup>rd</sup> Interested Party's supporting affidavit, the 3<sup>rd</sup> Interested party's supplementary affidavit dated 11<sup>th</sup> June 2021 and the written submissions dated 15<sup>th</sup> June 2021.

7. Counsel framed the issue for determination as whether the forfeiture orders for property LR No. Waituluk/Mabonde Block 12/Sirende/410 should be lifted or reversed. Counsel submitted that the gist of the 3<sup>rd</sup> Interested Party's application is that the property belongs to him but not to the 2<sup>nd</sup> Respondent and hence the forfeiture order made on 26<sup>th</sup> August 2020 in regard to the property should be lifted. Counsel submitted that there was a confusion in the title numbers and that the property belonging to the 2<sup>nd</sup> Respondent is Waituluk/Mabonde Block 13/Sirende/410 and not Waituluk/Mabonde Block 12/Sirende/410 which belongs to the 3<sup>rd</sup> Interested Party. Counsel submitted that the order for forfeiture was therefore erroneous. Counsel referred to a copy of the title deed for parcel LR Waituluk/Mabonde Block 12/Sirende/410 issued on 24<sup>th</sup> August 2016 in the name of the 3<sup>rd</sup> Interested Party, an Agreement for Sale dated 8<sup>th</sup> January 2015 between the 3<sup>rd</sup> Interested Party and one Evans W Kundu, a certificate of official search for the property dated 27<sup>th</sup> November 2018 and correspondence between the Director General Assets Recovery Agency and the firm of Kidiavai & Co. Advocates in relation to the property all of which are annexed to the supporting affidavit. It is Counsel's

submission that the 3<sup>rd</sup> Interested Party through his Advocate on record informed the Agency of the error when it registered a prohibition against the property but the Agency ignored the plea and did not respond and that the property Waituluk/Mabonde Block 13/Sirende/410 belonging to the 2<sup>nd</sup> Respondent was identified correctly on the ground during a site visit by Isaac Nakitare, an investigator with the Agency, sometimes in the year 2020. Counsel further submitted that the 3<sup>rd</sup> Interested party only became aware of the forfeiture orders when he conducted the official search on the property. Counsel submitted that **Section 93** of the **Proceeds of Crime and Anti-Money Laundering Act** foresaw a situation where a third party could lay claim to a property that had been forfeited and that this application was made well within the 12 months' limitation period provided in the section and is properly on record. Counsel contended that there is no order from the Court of Appeal staying these proceedings and this court therefore has jurisdiction to determine the application and grant the orders sought.

8. In response to the Agency's contention that the property belongs to the 2<sup>nd</sup> Respondent Learned Counsel for the Interested Party submitted that this is an incorrect assertion based solely on the first letter to the Agency by Ms Kidiavai & Co. Advocates which is dated 4<sup>th</sup> July 2016 but that this letter was subsequently clarified by the same Advocates in its subsequent letter to the Agency dated 6<sup>th</sup> January 2020. Counsel stated that the said firm confirmed that there was an error in the title number and that the property which was liable to forfeiture was the property belonging to the 2<sup>nd</sup> Respondent which is Waituluk/Mabonde Block 13/Sirende/410 but not Waituluk/Mabonde Block 12/Sirende/410. Counsel for the 3<sup>rd</sup> Interested Party/Applicant reiterated that **Section 93 (2) of the Proceeds of Crime and Anti-Money Laundering Act** vests this court with jurisdiction to hear and determine this application, that the 3<sup>rd</sup> Interested Party is not a party to the appeal and hence cannot raise these issues in the appeal and that this court ought to allow the application.

#### **Submissions by the Applicant/Respondent**

9. The Agency/Respondent relied on the replying affidavit of Ssgt. Musyoki and the written submissions dated 15<sup>th</sup> October 2021. Learned Counsel for the Applicant submitted that the forfeiture orders in this case were granted on 6<sup>th</sup> August 2020 against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents. That the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties exercised their rights under **Section 94** of the **Proceeds of Crime and Anti-Money Laundering Act** at the opportune time and the court excluded their properties but the 3<sup>rd</sup> Interested Party failed to participate in the forfeiture application and only brought this application after the forfeiture orders had been made. Counsel submitted that in respect to the property in issue the Agency/Respondent obtained a sale agreement from the Kenya Commercial Bank executed by the 2<sup>nd</sup> Respondent and one Sylvia Ongoro which the 2<sup>nd</sup> Respondent had submitted to support her payment to Sylvia Ongoro. Counsel submitted that the agreement for sale was for the property which the 3<sup>rd</sup> Interested Party/Applicant lays claim to. Counsel stated that the Agency also exhibited a letter from Kidiavai & Co. Advocates where the firm made a demand to the 2<sup>nd</sup> Respondent for Kshs. 15.5 million for the subject property. Counsel submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have filed an application dated 19<sup>th</sup> October, 2020 in the Court of Appeal for stay of the forfeiture order and a Memorandum of Appeal dated 4<sup>th</sup> October 2020 in which the Respondents have laid claim to that very property and given that they are not parties in this application the orders sought herein cannot be granted. Counsel submitted that the forfeiture orders were properly granted by Hon. Judge Mumbi (as she then was) and that this court is now functus officio and should refrain from dealing with a matter that is before the Court of Appeal and the 3<sup>rd</sup> Interested Party's application should be dismissed with costs.

#### **Issues for determination**

10. From a review of the record, the application, the response and submissions filed by the parties, the issue for determination is *whether the 3<sup>rd</sup> Interested Party has met the threshold for discharge of the subject property as provided in Section 93 of the Proceeds of Crime and Anti-Money Laundering Act*

#### **Analysis**

11. From a review of the circumstances surrounding this application, it is common ground that by a judgment dated 26<sup>th</sup> August, 2020 this court forfeited certain properties held in the names of or held beneficially by the Respondents, including property land title No. Waituluk/Mabonde Block 12/Sirende/410 that is the subject of this Application. It is also evident from the record that the Respondents did file in this court a Notice of Appeal dated 7<sup>th</sup> September 2020 and subsequently an appeal viz *Nairobi Civil Appeal No. E319 of 2020 Phyllis Njeri Ngirita and 2 others v Assets Recovery Agency and 2 others* in which they have filed an application for stay of execution dated 19<sup>th</sup> October 2020 in respect to the property in issue. It is also clear that the 3<sup>rd</sup> Interested Party did not participate in the forfeiture proceedings and is not a party to the appeal.

12. The law on the protection of third-party interests is provide under **Sections 93** of the **Proceeds of Crime and Anti-Money Laundering Act** which states:

*“93. Protection of third parties*

*(1) Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—*

*(a) that the person was not in any way involved in the commission of the offence; and*

*(b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—*

*(i) for sufficient consideration; and*

*(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property, the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person’s interest.*

*(2) Subject to subsection (3), where a forfeiture order has already been made directing the forfeiture of property, a person who claims an interest in the property may, before the end of the period of twelve months commencing on the day on which the forfeiture order is made, apply under this subsection to the court for an order under subsection (1).*

*(3) A person who—*

*(a) had knowledge of the application for the forfeiture order before the order was made; or*

*(b) appeared at the hearing of that application, shall not be permitted to make an application under subsection (2), except with leave of the court.”*

13. The 3<sup>rd</sup> Interested Party has in his affidavit deposed that he acquired property title No. Waituluk/Mabonde Block 12/Sirende/410 pursuant to a lawful agreement for sale made on 8<sup>th</sup> January 2015 between him and one Evans W. Kundu. He has also produced a copy of the Title Deed issued in his name on 27<sup>th</sup> August 2016 together with an official search confirming the ownership. He has denied ever interacting with the Respondents and is empathic that he lawfully acquired the property at Kshs. 15 million, as stated in the Agreement for Sale. He has also produced correspondence between his Advocates on record, the law firm of Ms Kidiavai & Co. Advocates and the Director Assets Recovery Agency clarifying that there was an error on the reference number of the property that was forfeited and explaining that the property purchased by the 2<sup>nd</sup> Respondent was land LR No. Waituluk/Mabonde Block 13/Sirende/410 but not land LR No. Waituluk/Mabonde Block 12/Sirende/410. The decree issued in this matter on 11<sup>th</sup> September 2020 lists land title No. Waituluk/Mabonde Block 12/Sirende/410 as amongst the properties to be forfeited to the State. It is the 3<sup>rd</sup> Interested Party’s case that he was not aware of the forfeiture proceedings, nor did he participate in the proceedings as would warrant this court to decline to hear his application. He asserts that before the commencement of the forfeiture proceedings he communicated to the Agency his concerns on the erroneous caution registered against his property to the Agency but his concerns were not addressed.

14. **Section 93(3)** of the **Proceeds of Crime and Anti-Money Laundering Act** provides that a third party application can be heard after a forfeiture order has been granted provided it is made within twelve months of the making of the order and provided the person applying was not aware of the forfeiture order. The forfeiture order in this case was made on 26<sup>th</sup> August 2020 and this application was filed on 2<sup>nd</sup> November hence before the end of 12 months. The record also shows that on 9<sup>th</sup> June 2020, after the order for preservation was made and after the Agency placed a caveat on the parcel of land the Applicant wrote a letter to the Director Assets Recovery Agency through the firm of Ndegwa & Co. Advocates laying claim to property LR Waituluk/Mabonde Block 12/Sirende/410. There was no response to his letters. After the order for forfeiture was made he moved this court by way of application and one of his prayers was to be enjoined to the proceedings. The application was brought barely weeks after the forfeiture orders. **Section 93(2)** of the **Proceeds of Crime and Anti-Money Laundering Act** requires that the application be made

within 12 months so his application was made within time. There is no proof that he was aware of the forfeiture proceedings and hence it would be unjust to reject his application on that ground. Indeed, it was for that reason that directions were given for hearing of this application.

15. A reading of the sale agreement which the 3<sup>rd</sup> Interested Party/Applicant has annexed to his affidavit sworn on 3<sup>rd</sup> November, 2020 indicates that the same was in regard to LR Waitaluk/Mabonde Block 12/Sirende/410 and was between him and one Evans W Kundu ID No. (withheld). That agreement was drawn on 8<sup>th</sup> January, 2015 by Ms Kidiavai & Co. Advocates which is the same firm that drew the sale agreement between James Kariuki Kinyanjui and Waluko Investments Ltd on 27<sup>th</sup> October, 2016 (See Annexure 000295 in the Assets Recovery Agency bundle of documents) which parcel was the subject of the sale agreement, between Ngirita and Sylvia Ongoro. I have seen the letter dated 6<sup>th</sup> January, 2020 written by the firm of Kidiavai & Co. Advocates to the Assets Recovery Agency in which Kidiavai & Co. Advocates clarify that there was an error in the description of the parcels of land in the agreement between Evans Kundu and Sylvia Ongoro that would warrant this court to come to the conclusion that there was a confusion of the 3<sup>rd</sup> Interested party/Applicants land with Mabonde Block 13/Sirende/410.

16. That letter reads:

*“Our Ref: A/37            Your Ref:CID/ARA/SEC/4/4/1/vol.11/172*

*Date:6<sup>th</sup> January, 2020*

*The in Charge*

*Investigation Unit,*

*Office of the Attorney General*

*Assets Recovery Agency*

*Co-operative Bank House*

*Haille Sellasie Avenue*

*P.O. Box 52420-00100*

**NAIROBI**

**Attn: Mr. Fredrick Musyoki**

*Dear Sir,*

**RE: PURCHASE OF LAND AT WAITALUK BY NGIRITAS FAMILY**

*We refer to your letter of 19<sup>th</sup> December 2019 and wish to reply as hereinunder.*

*We did prepare a sale agreement for TITLE NO. WAITALUK/MABONDE BLOCK 12/SIRENDE/410 dated 20<sup>th</sup> June, 2016 on instructions of EVANS KUNDU and SYLVIA AJIAMBO ONGURU and which agreement was executed by both parties.*

*At a later date the parties advised that the correct title number was WAITALUK/MABONDE BLOCK 13/15 and given that the earlier title number was in fact in respect of a different property sold to one MARTIN AMWAYI OBIMBO. The mix-up was not noticed at the time of preparation and drawing of the agreement. Therefore we were to prepare an amended agreement for the*

*parties to sign but they have never turned up for the same. A copy of the title deed for the correct parcel is enclosed.*

*We enclose herein a copy of the sale agreement and a copy of the title deed for the correct parcel for your attention.*

*The payments of the purchase price that were received by us were meant for their property was part of the payment of M/S Kagwimi Kangethe and Company Advocates for the purchase of L.R No. 7785/822 (RUNDA ESTATE- NAIROBI) as evidenced by the copies of the RTGS advice enclosed.*

*Yours faithfully,*

*For Kidiavai & Company Advocates*

*Signed.*

*Aggrey Kidiavai*

*Managing Partner*

*Encl.*

*ALK/sc”*

17. The sale agreement, copies of title deed and certificate of search for Parcel No. LR Waitaluk/Mabonde Block 12/Sirende/410 all attest to the parcel being the property of the 3<sup>rd</sup> Interested Party. In the letter dated 6<sup>th</sup> January 2020 the firm of Kidiavai & Co. Advocates clarified that the parcel of land purchased by the Ngiritas was LR Waitaluk/Mabonde Block 13/Sirende/410. The letter has the rubber stamp of the Assets Recovery Agency with the dated 7<sup>th</sup> January 2020 meaning that the Assets Recovery Agency received the communication. There were two other letters one dated 9<sup>th</sup> June 2020 and the other dated 26<sup>th</sup> June 2020 sent to it by the firm of Ndegwa Kiarie & Co. Advocates regarding the restriction it had placed on the parcel of land even prior to filing of the Originating Motion for forfeiture. The letters have the Agency's rubber stamp acknowledging receipt of the same. It therefore had sufficient opportunity to carry out investigations to confirm whether indeed the claim by the 3<sup>rd</sup> Respondent that there was a mistake or error or confusion in the description of his land and the one that was liable to forfeiture was true. In his Replying affidavit sworn on 17<sup>th</sup> May 2021 SSgt. Musyoki makes no mention of the letters from Ndegwa Kiarie & Company Advocates or even letter from Ms Kidiavai & Co. Advocates to Assets Recovery Agency clarifying the issue but only refers to the appeal filed by the Respondents. His non action as the investigator in the proceedings despite being put on notice should not be allowed to do injustice to an innocent party.

18. I do not agree that I shall be meddling in a matter before the Court of Appeal if I grant the order sought firstly because Section 93 of the **Proceeds of Crime and Anti-Money Laundering Act** empowers this court to grant the orders, secondly because there is no stay of the proceedings herein and thirdly because the Agency/Respondent can always file a cross appeal against the decision of this court as opposed to the 3<sup>rd</sup> Interested Party/Applicant who would have no recourse as he is not a party in the Appeal. Lastly Section 93 of the **Proceeds of Crime and Anti-Money Laundering Act** was enacted to guard against such errors and to ensure fairness to third parties.

19. In the upshot I find that the 3<sup>rd</sup> Interested Party has proved his claim on a balance of probabilities orders are granted as follows:  
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1) *THAT the forfeiture Orders issued on 26<sup>th</sup> August, 2020 be and are hereby varied and/or set aside.*

2) *THAT the interest in **PROPERTY LAND TITLE NO. WAITALUK/MABONDE BLOCK 12/SIRENDE/410, REGISTERED***

*IN THE NAME OF MARTIN AMWAYI OBIMBO be and is hereby excluded from the operation of the Forfeiture Orders issued herein.*

*3) THAT declaration be and is hereby made that MARTIN AMWAYI OBIMBO has an interest in PROPERTY LAND TITLE NO. WAITALUK/MABOMBE BLOCK 12/SIRENDE/410 as the rightful owner.*

*4) THAT a mandatory injunction directing the Land's Registrar Kitale, to remove the Restriction placed by the Assets and Recovery Agency on PROPERTY LAND TITLE NO. WAITALUK/MABOMBE BLOCK 12/SIRENDE/410, REGISTERED IN THE NAME OF MARTIN AMWAYI OBIMBO be and is hereby issued.*

*5) There shall be no orders for costs given the circumstances.*

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF MARCH, 2022**

**E.N. MAINA**

**JUDGE**

***In the presence of:-***

*Miss Gitiri for the ARA/Respondent*

*Mr. Oketch for 3<sup>rd</sup> Interested Party/Applicant*

*Mr. Otieno for Ochieng for the 1<sup>st</sup> Interested Party*

*Court Assistant – Potishoi*



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