Case Number:	Miscellaneous Criminal Application 62 of 2015 & 37 of 2016
Date Delivered:	30 Sep 2016
Case Class:	Criminal
Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	Patrick J. Okwaro Otieno
Citation:	Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Dismissed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 62 OF 2015

CONSOLIDATED WITH NO. 37 OF 2016

ABDULRAHMAN MAHMOUD SHEIKH (alias SAID JUMA SAID)

SHEIKH MAHMOUD LITYD ABDULRAHMAN

MAHMOUD ABDULRAHMAN SHEIKH

MUSA JACOB LITHARE

NICHOLAS WAWERU JEFWA

POTENTIAL QUALITY SUPPLIES LIMITED

SAMUEL MBOTE MUNIDA ……APPLICANTS

AND

ATTORNEY GENERAL……1ST INTERESTED PARTY

ASSETS RECOVERY AGENCY……2ND INTERESTED PARTY

VERSUS

REPUBLIC (THR' DPP)……RESPONDENT

R U L I N G

Outline

1. On 20/4/2016 by an application by way of Notice of Motion dated the same day, the Applicants sought from the court orders that:-

i. THAT the matter be certified as URGENT.

ii. THAT the earlier Application dated 11th February,

2016, is hereby withdrawn.

iii. THAT this Honourable Court be pleased to order and direct that the orders made on 4th

December 2015 be varied in the following Manner:-

a) THAT the motor vehicles Reg. No. KCB 400H, Toyota Land Cruiser registered in the names of Abdulrahman Mahmoud Sheikh (1st Respondent) and motor vehicle Reg. No. KCA 907R, Toyota 1ST Pearl Station Wagon registered in the names of Agemate Enterprises Ltd and specially owned by Abdulrahman Mahmoud Sheikh the 1st Applicant be released to the 1st Applicant.

b) THAT the money in the 1st, 2nd and 3rd Applicants bank accounts numbers; Standard Chartered Bank Ltd, Account no. 0100303908700- Account Holder Abdulrahman Mahmoud Sheikh (1st Applicant), Barclays Bank of Kenya Ltd, Account No. 2024422839 Account Holder Abdulrahman Mahmoud Sheikh (1st Applicant), 1 & M Bank Account Number 00500500512410 Account Holder Sheikh Mahmoud Abdulrahman (2nd applicant), Kenya Commercial Bank Ltd, Account Number 1136277849 Account Holder Sheikh Mahmoud Abdulrahman (2nd Applicant) and Co-operative Bank of Kenya Ltd, Account No. 01109135338300 account Holder Mahmoud Abdulrahman Sheikh (3rd Applicant) and Kenya Commercial Bank Ltd, Account No. 1115903128 account holder Sheikh Mahmoud Abdurahman be released to the 1st, 2nd and 3rd Applicants respectively on condition that the said Applicants deposit with the Court before such release takes place an original Title Deed of all that plot of land known as MOMBASA/BLOCK XVI/1009-MAJENGO on the strict condition that the release of the said property to the 1st, 2nd and 3rd Applicants will be subject to the determination of the Chief Magistrate's Court in Mombasa Criminal Case No. 1132 of 2015.

iv. THAT the Court be pleased to make any further Order that may deem fit.

2. As at the date when the matter came before court for hearing prayers 1 & 2 had been spent and what now remain for determination is prayer 3(a) and (b) and the omnibus prayer fashioned as "orders deemed fit by the court". The only purpose of the application and its prayers is for the variation of the court orders made on the 4/12/2015. That order as extracted on the same day tinkered with the restraint orders made on the 25.8.2015 to the extent that it allowed the Applicants access to the bank accounts for purposes of their reasonable living expenses the sum of Kshs.300,000/- each making an aggregate of Kshs.900,000/- for the 1st, 2nd & 3rd applicant per month.

3. It is to be noted that the application giving rise to the orders of 4/12/2015 was intended to vary or review the orders of 25/8/2015 by lifting the restraint order against four (4) motor vehicles, KCD 400H Toyota Land Cruiser, KCA 907R Toyota Station Wagon, KBY 883M Toyota Station Wagon and KCB 500T Toyota Land Cruiser as well as the effect of restraint order on some 6 accounts disclosed in the application.

4. Muya J, having heard the application dated 21/9/2015 did determine that application by a ruling dated 4/12/2016 and made the orders now sought to be varied. That application beyond being grounded on the Provisions of Article 159(2) 165, 40, 28 and 3(1) of the constitution was equally made pursuant to the provisions of sections 68(9) and 89 of the Proceeds of Crime And Anti Money Laundering Act, Cap 59B(henceforth, called the Act).

5. From the onset, it must be pointed out that the orders made on 25/8/2015 were restraint orders made pursuant to criminal proceedings under section 68 of the Act and not a preservation order made under part VIII of the Act. I will therefore treat the orders now sought to be varied to have been made pursuant to section 68(9) and not Section 89.

6. Now the application dated 20/4/2016 is expressed to invoke the provisions of Article 10, 47, 50 and 159 of the Constitution as well as section 364 of the Criminal Procedure Code. My instant view is that

section 364 of the Criminal Procedure Code has no application before me in so far as the order sought to be varied are orders by this court and not by a subordinate court. Only orders made by a Surbodinate Court are susceptible to revision under that provision. That, however notwithstanding, I will treat the application as one made pursuant to the provisions of section 68 of the Proceeds of Crime And Anti-Money Laundering Act as read with the Article 159 of the Constitution.

Facts as pleaded by parties

7. The factual foundation of the application as disclosed in the grounds on the face of the application and the affidavit in support can be summarized as that having failed to get an order for the release of the motor vehicles, the said motor vehicles have been subjected to depreciation due to adverse weather and lack of service and that the applicants are prepared to avail a substitute property being a developed immovable property value at Kshs.50,000,000/- which surpasses the value of the frozen accounts and motor vehicles put together. It is equally contended that the money in the six accounts continue to be depleted at the rate of Kshs.600,000/- per month (I think Kshs.900,000/-) per month and therefore granting the application will ensure that whoever is entitled to the restrained asset does not lose at the end of trial whether it results in acquittal or conviction. To bolster their assertion as to the ownership and value of the proposed substitute security, the applicants exhibited not only a copy of the title but also a valuation report by one, Value Consult Limited, giving market value as Kshs.50,000,000/-.

8. That application was opposed by the Respondents who filed different pleadings against it. The 1st Interested Party, the Attorney General filed Grounds of opposition in which it is asserted that the court has no jurisdiction to grant orders sought; that other than the 3rd applicant, none of the other persons have offered security; that the applicants have concealed material facts from the court and that the orders of 25/8/2015 have never been reviewed appealed from or set aside and cannot be interfered with by this court.

9. The 2nd interested party, the Asset Recovery Agency on its part also filed grounds opposition which fault the application on several fronts among them for being premised on falsehood; for seeking to persuade the court to expand its jurisdiction by judicial craft; that it amounts to appeal against the decision of 4/12/2015 against the set and known practices in law; that there having been filed a Notice of Appeal, the orders of 4/12/2015 stand automatically stayed by dint of operation of the law and last that the property sought to be substituted for the frozen assets is not appropriate being not part of the proceeds of crime and that the application is not supported by any provision of the law.

10. The Respondent; the Directorate of Public Prosecution opposed the application by a replying affidavit sworn by on one, No. 23186 C.I. JAMES GITHINJI, a Police Officer and member of special joint investigations team who depones that contrary to court orders of 4/12/2016 the 1st and 2nd Applicant have todate failed to surrender two motorvehicle, KBY 883M Toyota Station Wagon and KCB 500F Toyota Landcruiser; that the process of investigation and authentication of the property MOMBASA/BLOCK XVI/1009 Majengo is ongoing but concedes that the two motor vehicles KCB 400T and KCA 907R are exposed to depreciation in value expected of stored motorvehicles and contends that in public interest the value of the motor vehicles be preserved by lawful procedures as the same are kept at a police station. The deponent however contends that to release the frozen assets as sought by the applicants would defeat the purpose letter and spirit of the Act, Proceeds of Crime and anti-money Laundering Act which has definite provisions of how to manage and deal with seized assets by appointment of managers by the court under section 72. The deponent concludes his affidavit by the assertion that the frozen/restrained assets are part of the realizable property forming part of probable proceeds of crime and cannot be seen as depreciating by virtue of the court orders providing reasonable living expenses; that value of proceeds of crime is ascertainable and realizable from all sources including

legitimate sources and that the court risks being entangled in the dispute between the parties in an awkward position as a litigant.

11. It should not be lost sight of that the applicants equally filed what they called a preliminary objection and by which they give notice that at the hearing it would be urged that sections 55, 56, 57, 68, 99, 71, 73, 82 and 85 of the Proceeds of Crime And Anti-money Laundering Act be declared unconstitutional.

12. All the parties filed written submissions on various dates after this matter was adjourned on several occasions to enable the parties have the restrained motor vehicles valued and the proposed substitute security verified authenticated and equally valued in order to evaluate its suitability as such substitute and also for the interested parties to establish to court, the act being relatively new in this country, if substitution of a restrained asset is possible from jurisdiction where tracing and asset recovery has taken root by being practiced over a longer period of time. Pursuant to those directions given on 20/5/2016, the applicant obtained and filed in court bank statements of the affected/frozen accounts and the statement reveal the following:-

Account No. & Bank	**Account Holder**	**Balance as at 3/5/2016**
1. 0100303908700	**Abdul Rahman**	**2,609,617.70**
Standard Chartered	**Mahmood Sheikh**	
2. 2024422839	**“**	**14,171.85**
Barclays		
3. 1115903128	**Sheikh Mahmood**	
KCB	**Abdulrahman**	**2,292,544.00**
4. 1136227849	**“**	**53,540.00**
KCB		
5. 00500500512410	**“**	
I & M Bank		**4,923,717.00**
6. 01109135338300	**Mahmoud**	**16,645,534.00**
Co-operative Bank	**Abdulrahman Sheikh**	_____
	TOTAL	**26,839,120.00**

13. There was however no valuation of the motor vehicles while the proposed substitute security had been valued and a copy of title and valuation report filed with the application.

14. Basically those are the sources and sets of facts that I am called upon to evaluate, understand and apply to the law and determine whether or not the application has any merit or indeed any foundation in law.

Submissions by the applicant

15. From the documents filed and submission made, even though there are 8 persons named as applicants, I deem the application to be by three first applicants being the only person whose assets have been frozen, and the person who have approached court and obtained orders for reasonable living expenses.

16. In the submissions filed the applicants have laid quite some premium on the attack on constitutionality of the cited sections of Cap 59B. It is submitted that those sections are unconstitutional as they affront on the applicant's right to the presumption of innocence prior to conviction under Article 50(2). Having not brought a formal application to declare those provisions unconstitutional the applicants take the earliest opportunity to cite the decisions in *Ngui vs Republic [1985] KLR 268* and *Dr. Ann Kinyua vs Attorney General* and *Others [2012] eKLR* for the proposition that there is no prescribed form for approaching the court to declare a statutory provision unconstitutional.

17. To the applicant, the restraining order is a punishment prior to conviction and therefore the provision which allows it and upon which it was ordered is unconstitutional and therefore amenable to being so declared. It is equally submitted that the same provisions infringe on Articles 10 and 47a, in so far as it infringes on the principle of good governance, transparency accountability and right to a fair administrative action. For those reasons it submitted that the provisions be declared unconstitutional and the restraint order made pursuant to them be discharged.

18. In the alternative, and only if the court doesn't declare the provisions unconstitutional, the applicants submit that the purpose of the Act, is to ensure that nobody derives a benefit from criminal activities which principle should be weighed against equally important principle that nobody should be punished prior to conviction.

19. The court is then invited to be persuaded that the state does not need the motor vehicle registered in the names of private individuals nor has it any use for money in private bank accounts prior to sale of the motor vehicles and withdrawal of such monies. There is a contention that the aggregate total of the money in the accounts and vehicles is at most Kshs.36,000,000 while the proposed substitute security is worth Kshs.50,000,000/- and therefore should confiscation proceedings take place ultimately then it would beneficial to get hold of the immovable property hence the court needs to ask itself what is the fair order to be made. In their submissions to grant the orders would be the fair way to go as no side stand to suffer any prejudice.

20. The applicants equally took time to respond to the assertion by the Respondent and interested parties that the matter is *res-judicate* and submission were therefore made that there had never been any application to substitute the frozen asset with any other as in the present application.

21. On the assertion that the Applicants have failed to obey the court order the applicants contend that no evidence has been offered to prove that assertion.

Submissions by the Respondent

22. Having set out the factual background of the application the Respondent starts from the premise that by law it is mandated to prosecute and pursue further related proceedings towards recovery and forfeiture order.

23. It is further contended that the purpose of a restraint order is to secure any property connected to

crime in order to meet the needs of confiscation order once made and that the amount realized upon confiscation is deposited with the consolidated funds. It is contended that the net effect of the prayers if granted is to totally upset the restraint order which are injunctive in nature and the Respondent cites the decision in *Thiongo Gerald Kanyingi vs Equity Bank* and *Another [2015] eKLR* for the proposition that such should be sparingly be used. The respondent then takes the position that the application as crafted and filed is *res judicata* the court having considered and decided on an earlier application which considered the restraint orders and granted reasonable living expenses but declined to release the motor vehicles and accounts hence the only avenue available to the applicants was an appeal and not otherwise.

24. The Respondent then delves into the provisions of the Act to the effect that there ought not to be differentiation of the applicants assets between what is suspected proceed of crime and legitimate assets as the law considers all assets of the Applicants as realizable should there be need for confiscation. It was lastly submitted that a balance ought to be struck between the individual right and the right of the public with the public interest being given more weight.

Submissions by interested parties

25. The 1st Respondent in the main reiterates that the application currently under consideration was considered by the ruling of 4/12/2015 and adds that for purposes of the wildlife management Act it would be for the court trying the criminal case to determine whether the two motor vehicles were connected to the commission of an offence and may order their forfeiture. The submission emphases that it is unlikely that the applicants will comply with any future order having ignored orders of the court to avail the two motor vehicles.

26. On the allegation of depreciation the Respondent submits that the applicants fears may be well addressed by the court resorting to the provisions of section 86(1) of the Act.

27. On proposed substitute security, it is submitted that the same Property falls under what is termed realizable property and cannot be used as security for the release of the motor vehicle and money in the accounts. The 1st interested party then concludes its submissions on the high note that the orders sought cannot be issued so as to interfere with the court orders of 4/12/2015 because there is an appeal filed challenging that ruling. Section 70 was cited to support the position that an appeal once filed protects and sustain an order of restraint till the appeal is determined.

28. On those points the said interested party faulted the applicants for coming to court with unclean hands, that the application does not fall within the permitted parameters for rescission of restraint orders which limit the extent of variation to necessary living expenses and hardship that far outweigh the need to protect the property from destruction, damage, loss concealment or transfer. It is contended that similar application having been considered and determined, the current application is an evident abuse of court process and relies on the Supreme Court decision, in *Charo Hussan Nyange vs Mwashetani Hatibu & 3 Others[2014]eKLR* to support that submission.

29. On depreciation of the property the 2nd interested party takes common position that the courts recourse is to appoint a manager of run such assets if depreciation is proved.

30. The 2nd interested party appreciates these proceedings as civil in nature and that the remedies sought are equally equitable in nature. For that reason submission are made that the applicants had sworn in their affidavit in support of the Notice of motion dated 21/9/2015 that they did not own any other property other than the listed motor vehicle disclosed. Those applicants are therefore accused of perjury

in that the property is deponed to have been recently acquired while the exhibited copy of title shows it was transferred to the 3rd Applicant on 23/11/2011. It is then added that the proposed substituted security being a property belonging to the 3rd respondent cannot be security and that there is no evidence to prove that the motor vehicles are getting depreciated.

31. To the respective submission, the parties have cited decided cases and provisions of the law all of which I have had the benefit to read and I may rely on in making my determination of the matter.

Analysis and Determination

32. The volume of papers filed herein notwithstanding, the issues for determination is largely whether or not this court can revisit the court orders made on 4/12/2015 by which it varied the restraint orders of 25/8/2015 but declined to order release of the restrained assets.

33. However prior to that determination there are points of law raised against the application which I need to determine first.

a) Constitutionality of the provisions of Proceeds of Crime And Anti-Money Laundering Act

34. Under the Provisions of Article 165 2(d) it is the duty of this court to determine whether or not parliament in enacting any statute acted within its powers and if the law so enacted is constitutional.

35. Indeed there ought to be no shackles on the mode of bringing such a question for determination before the court. However to this court the right to a fair hearing is fundamental and an important value in the constitution so that a party against whom an action or question is brought before the court for determination need to be notified well in advance so that it prepares to respond to the accusation or allegations in a manner that even the court is able to determine the question fairly. It is therefore desirable that such a question is pleaded and isolated in a concise and unambiguous manner by the person approaching the court.

36. In the matter before this court now, the application dated 20/4/2016 concisely and precisely sought from court two orders none of which touches on the constitutionality of the act of parliament. The applicant then rethinks the application and files what it calls a Notice of Preliminary Objection dated 4/6/2016 and filed in court on 29/6/2016. I am of the opinion that for the right to a fair hearing, with is the very substratum of the principle of proportionate determination of legal disputes to be met, a party who challenges the constitutionality of a provision in a statute ought to raise the issue at the institution of the proceedings and must place before the court all the information relevant for the determination of impugned provisions see PRINCE -VS- PRESIDENT, CAPE LAW SOCIETY AND OTHERS [2001]2, SA 388.

37. To this court, a Preliminary Objection as it is called and known in law, is a demurer, and targets a cause taken by one side and designed to stop the opposing party from proceeding with a court proceeding in a particular way impugned to be against the law and so against the law in an evident manner that doesn't require minute scrutiny of facts other than those pleaded by one side and acknowledged by the other. To the extent that it is the Applicant who originating the Proceedings is the same person who filed and urged the objection without attacking the pleadings by the Respondent and interested parties, I find that the procedure adopted is, to me, strange and undesirable. In this case the objection is being used as an originator of the action and not as objection as known and appreciated by the court. What was the applicant objecting to in these proceedings is what was never explained to the court nor did it become evident upto the time of preparing this ruling.

38. The alleged Preliminary Objection was equally filed fairly late and when all the responses have been filed and I entertain doubt if the Respondents and the interested parties have been accorded the right to respond to it and therefore if they were indeed accorded the right to a fair hearing. I would stop at that and say that I refrain from determining the application before me on the basis of that objection which I hold was most inappropriately taken. It is however noted that by virtue of the doctrine of separation of powers the court, even with its statutory mandate, needs to be extremely circumspect before declaring a statute unconstitutional so that only deserving and proven cases get consideration of such orders. I make this observation noting that the fight against crime and organized crime in particular is the kind that needs new and novel tools. Organised crime be it money laundering or trade in game trophies or terrorism, are in themselves well designed and keenly knitted underground acts which the civilized communities and world governments are yet to fully address and design appropriate counteractions. As they say extraordinary situations call for extraordinary actions. I hold the view that on behalf of the Kenya Public, Parliament has enacted the Proceeds of Crime and Anti-Money Laundering Act to tackle the extra ordinary situation for the public good. The Court of Appeal has had a chance to consider such extraordinary situations and observed as follows:-

In the United Kingdom and the United States of America for example, terrorism is an extremely emotive issue and the Labour Government in the United Kingdom sought from parliament the extension of the period of (detention). Parliament gave the prosecuting authorities 29 days and invariably that is complied with and if sufficient evidence to charge the accused is not availed the police will dutifully release the accused person. In the United States of America the current Government has sought to evade the issue by detaining terrorism subjects in Guatamano Bay, far away from the middlesome hands of the Supreme Court. There is no reason why the courts in Kenya should act differently.

(PAUL MWANGI MURUNGA –VS- REP NKU CALR. APPEAL NO. 35 OF 2006)

39. I understand the Court of Appeal to be saying that the fight against organized crime is a fight for the society and nobody is excluded from contribution to curb it.

Is the application *Res-judicata*"

40. It is not in doubt that once a court delivers itself on a matter on the merit that matter should not be revisited by that court unless by an application for review where the law allows. In the matter before me there is an order of 4/12/2016 which varied the earlier orders of 25/8/2016. In effect the orders of 4/12/2015 reviewed those of 25/8/2015 although the word used is varied. Noting that for purposes of section 56 of the Act, make the proceedings under part VII of the Act to be civil in nature, I hold the view that the civil procedure principles apply to such proceeding and therefore by dint of section 80 of the Civil Procedure Act one cannot seek to review an order made on review. If the orders by Muya J which varied the restraint order of 25/8/2015 are viewed as being orders on review then I hold the view that no further review is available on then unless the applicants appeal to a higher court. This court is not such higher court and cannot purport to sit on appeal from that decision.

41. I however do not agree that the question of whether or not the frozen or restrained property should be substituted by security is *res-judicata* having not been an issue before the court earlier. That line of resistance to the application was equally inappropriately taken and it lacks merit.

Disobedience of Court Orders

42. A heavy premium has been laid on the accusation that the applicant have disobeyed court orders

commanding them to avail to the authorities, possession of motor vehicles KBY 883M and KCB 500F. In the words of C.I. JAMES GITHINJI, the orders of 25.8.2015 authorized the Director of Criminal Investigation to seize the motor vehicles. In fact, to the court that order by the court was *gratis* for the court need not direct the Directorate of Criminal Investigations to do their work permitted by law. I have in mind the provisions of section 71 of the Proceeds of Crime and Anti-Money Laundering Act which give the power to any police officer to seized any property deemed realizable property if the officer believes that the property shall be disposed of or removed by a suspect.

43. In this case there is, over and above the statutory enactment, a court order. One wonders if the entire Directorate of Criminal Investigations is that powerless that even if it is unable to perform its statutory functions it is equally unable to enforce court orders. I entertain the view that the court has not been told all why the motor vehicle are not in the possession of the police. For that reason I do not agree that the failure by the police should be the basis upon which to refuse the applicants' application. I equally do not agree that the Asset Recovery Agency has done all it ought to have done in this matter.

Should the applicant be given an order to substitute the frozen or restrained asset"

44. The letter, spirit purpose, and gravamen of the Proceeds of Crime and Anti-Money Laundering Act is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after due process, to the state, on behalf of the public which is deemed to have suffered some injury by the criminal conduct.

45. The application before the court therefore calls upon this court to ensure that the intention of parliament in enacting that statute are met. For that reasons the court should strive to ensure that the applicants being suspects of a criminal conduct do not benefit from any proceeds the law enforcement agency reasonably believed to be a proceed of crime even as the criminal trial proceeds. It is not that the property is finally taken from the applicants. It is that they are reasonably suspected to have engaged in criminal conduct and there is the need to restrict their use of that asset and to preserve any property thereby obtained so that the same is not dissipated even as the criminal trial proceeds.

46. From the wording of the application it is indeed a great attempt by the applicant who must be commended for owing up to say, "should we be found to have benefited from criminal conduct we are prepared to forfeit to the state sums as the relevant agency estimates to have been the benefit or advantage of such criminal conduct". They are in fact saying that the continued withdrawal of reasonable living expenses from the accounts and the idleness of the motor vehicles in the hands of the police without maintenance when put in the context of the adverse Mombasa whether conditions will not be of benefit to the Agency even if forfeiture was to be made.

47. That truly must be the natural and logical outcome of the orders remaining in force for a prolonged time as the trial drags on. It is therefore, indeed a very attractive argument and position to take if the only consideration was that of recovery at the end of criminal trial and if forfeiture proceedings may be pursued. However the need to make recovery is a consideration but I consider it to be the second consideration. The first and most cardinal consideration is that nobody should benefit from the proceeds of criminal conduct. For this case, to allow the application and therefore unrestricted access to the money held in the accounts and the use of the motor vehicles without proof that the restraint order was undeserved, would be to negate the purpose of the statute. It would also be an act beyond the courts duty to apply the law. The law as I understand it is that the Proceeds of Crime and Anti-Money Laundering Act seeks to disable criminal networks and there may be no better way to achieve that goal otherwise than by financial starvation.

48. Having said that I also appreciate that the courts mandate in applying the law is not to invent the objects beyond the plain meaning of the statute save in cases of ambiguity. When parties urged the application before court no ambiguity nor uncertainty was alleged nor proved and I remain to go by what the statute says. It allows restraining orders to be made with enough safeguards regarding service and right to vary or even rescind the restraint orders which are by law given *exparte*.

49. In arguing the application I was never guided by any provision in the statute or indeed any decision even from other jurisdictions where the procedure on asset tracing and recovery could be more developed which allow for substitution of frozen asset. While I appreciate that in our jurisdiction this is indeed nascent, I am equally minded that being a court of law, the powers the court exercises must be founded in law and cannot be exercised beyond the boundaries set. I find that there is no jurisdiction in our law, as it stands today, permitting a court to substitute a frozen asset with another so that the frozen asset is placed at the disposal and unrestricted use of the suspect.

50. I have taken time with this determination seeking to lay my hands on a decision or a statute in *para materia* that would permit issuance of the orders sought but I was unable to lay my hand on any. I could have squandered the chance to develop the law but I refrain from anything that may border on judicial adventure or craft beyond the acceptable limits. I have done so as the words of Supreme Court in *Samuel Khan Macharia vs Kenya Commercial Bank [2012]* kept ringing on my ears. The words are that jurisdiction of a court of law is created by the constitution or statute and never by judicial craft. The court said :-

“A courts’ jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. We agree with the counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings”.

51. Having said so, the application fails and it is dismissed. I however order that each party bears own costs for reasons that the application was not that totally misconceived and could as well have been intended towards the development of the law.

Dated at Mombasa this 30th day of September 2016.

HON P.J.O. OTIENO

JUDGE