



Case Number:	Anti Corruption and Economic Crimes Miscellaneous 50 of 2019
Date Delivered:	22 Apr 2020
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Mumbi Ngugi
Citation:	Assets Recovery Agency v Josphat Kamau [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC MISC NO 50 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

JOSPHAT KAMAU.....RESPONDENT

RULING

1. By an application dated 16th December 2019 filed under certificate of urgency and based on section 81 and 82 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), the applicant, the Assets Recovery Agency

(hereafter referred to as the agency) sought the following orders:

1. THAT this Application be certified urgent and the same be heard ex-parte on priority basis in the first instance.

2. THAT this Honourable Court be pleased to issue preservation orders prohibiting the Respondent and/or her agents or representatives from transacting, transferring and/or any other dealings with funds held in the following bank accounts;

i. USD 16,344.80 in account number 0310176621397 held at Equity Bank

ii. Kshs. 389,780.00, in account number 1460178607712 held at Equity Bank

iii. KSHS. 43,122,454.92, in account number 0130190481767 held at Equity Bank

3. THAT the Honourable Court makes any other ancillary order it may deem fit for the proper, fair effective execution of these orders.

2. The application was supported by an affidavit sworn by Senior Sergeant Fredrick Musyoki, an Investigating Officer attached to the Agency and was based on several grounds set out on the face of the application. The Agency stated in the said grounds that it was established under section 53 of POCAMLA and has the mandate of identifying, tracing, freezing, seizing and recovering proceeds of crime. Pursuant to sections 81-89 in Part VIII of POCAMLA, it is mandated to institute civil forfeiture proceedings and seek orders prohibiting any person, subject to such conditions as the court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime.

3. On 5th November 2019, the Agency had obtained information from the Directorate of Criminal Investigations (DCI) in respect to Equity Bank Account numbers [...], [...], [...] and [...] held in the name of the respondent, Josphat Kamau, which were suspected to have received proceeds of crime and / or benefits resulting from tax evasion. It had opened an inquiry file No. 56/2019 to investigate the activities of the alleged offences and other offences contrary to section 3(a) of POCAMLA relating to the said bank accounts held in the name of the respondent, Josphat Kamau. Its preliminary investigations had established that on 26th October 2019 the respondent's motor vehicles registration numbers KBY 556E hauling trailer registration number ZC5883 and KCQ 156B were impounded while smuggling 240 cartons and 150 cartons respectively of Supermatch cigarettes made in Uganda with a combined dutiable value of Kshs. 9,750,000 which had been concealed in a disguised place adapted for smuggling of goods.

4. The respondent had thereafter been charged jointly with another with, among others, the offence of smuggling of goods and importing of restricted goods contrary to sections 199(a), 200(a) (ii) as read with section 210 of the East African Community Customs Management Act 2004 in Eldoret Chief Magistrates Court, vide Criminal Case Number 3288 of 2019. The preliminary investigations had further established that there are reasonable grounds to believe that the funds in the above accounts were obtained through the illegitimate trade in smuggling of goods.

5. The Agency contended that there are reasonable grounds to believe that the accounts are holding proceeds of crime and are used as conduits for money laundering contrary to sections 3, 4, 7 and 16 of POCAMLA. The Agency therefore sought preservative orders prohibiting the respondent, his agents or representatives from dealing in any manner with the funds in the said accounts.

6. The application was placed before the court on 17th December 2019. Upon considering the application, the grounds on which it was based and the averments in the supporting affidavit and the annexures, and being satisfied that the orders sought were merited, the court granted orders in terms of prayer 2 of the said application.

7. The respondent was dissatisfied with the said orders and he therefore filed an application dated 19th December 2019, filed under certificate of urgency, in which he sought the following orders:

1. (spent)

2. The Honourable Court be pleased to set aside the ex parte orders of 17th December 2019 pending the hearing of this application inter partes.

3. The Honourable Court be pleased to vary and/or set aside and/ or review its orders of 17th December 2019 to the effect that the ruling of Justice S. M. Githinji of the High Court of Eldoret reinstating the orders of the Chief Magistrate Eldoret law Court allowing the applicant to access Kenya Shillings eight million only (Kshs 8,000,000/=) be and is hereby reinstated pending the hearing and determination of this application inter partes.

4. The Honourable Court be pleased to vary/review and/or set aside its orders of 17th December 2019 and grant the applicant access to at least one account or limited access to the accounts pending the hearing of this application inter partes.

5. The Honourable Court be pleased to and hereby do stay, set aside or varies its orders issued n 17th December 2019 preserving and restricting debits on the applicant's Equity Bank account no. held in the name of Josphat Kamau.

6. That the Honourable Court be pleased to and hereby finds that and orders that the orders being sought herein have already been granted and confirmed by a court in Eldoret and the said orders are still in existence to date and that the current application is res judicata and an abuse of the court process.

7. The Honourable Court be pleased to and hereby grant other orders and reliefs it deems fit including an order of costs of this application.

8. This ruling relates to the respondent's application dated 19th December 2019. For clarity and convenience, Josphat Kamau, the respondent in the main application and the applicant in the application the subject of this ruling, shall be referred to as the applicant.

9. The application was expressed to be brought under section 43 of the Tax Procedure (sic), section (9) 68(5) (sic) of POCAMLA, section 118 and 121 of the Criminal Procedure Code, section 1A, 1B, 3, 3A, 6, 7, 80 and 63 of the Civil Procedure Act, Order 51 of the Civil Procedure Code section 180 of the Evidence Act and all other enabling provisions of the law.

10. The application was based on twelve grounds set out on the face of the application and was supported by an affidavit in support sworn by the applicant, Josphat Kamau, on 19th December 2019. The applicant states in the said grounds that he is the account holder in the subject accounts, and that the orders at issue in the present application were obtained by the Agency through deliberate misrepresentation of facts as no proof was placed before the court that the applicant was involved in money laundering or tax evasion.

11. The applicant further states that he has been paying all taxes and has obtained tax compliance certificates from the Kenya Revenue Authority (KRA), which is proof that he has paid all his taxes. He asserts that it is not true that the Agency has opened an inquiry to investigate proceeds of crime under section 3 of POCAMLA. Further, that he is only a suspect in Criminal Case No. 3368 of 2019 as the matter has not been heard and determined.

12. The applicant notes that the Agency had applied to the Chief Magistrate's Court in Eldoret on 7th November 2019 and had been granted orders restricting the applicant's accounts for a period of six months. The applicant had then made an application dated 3rd December 2019 for review of the order by the Chief Magistrate's Court. In its ruling, the Magistrate's Court had granted the applicant access to Kshs 8,000,000, part of the amount in one of his accounts, upon being satisfied with the reasons given by the applicant.

13. Dissatisfied with the said orders, the Agency had filed an application for revision, being Eldoret High Court Revision No. 173 of 2019. The Court (Githinji J), upon hearing the parties, had upheld the ruling of the Magistrate's Court and had stated that the order allowing the applicant access to Kshs 8,000,000 was sound and in line with the law. The applicant notes that the Agency has not appealed the said ruling but has instead filed the present matter seeking orders that are already in existence.

14. The applicant contends that he had been allowed to partially access his account in order to pay legal fees and settle the debts of those who used their money to pay bail for him and his driver. Further, that the order was not meant to open the whole account nor did it affect the other accounts.

15. In his affidavit in support of his application, the applicant avers that he is the holder of the accounts the subject of the main application which were restricted by the court in Eldoret. He is a businessman living and working for gain in Nakuru Town and engaged in various businesses including but not limited to supply of foodstuffs, and that he has invested in both moveable and immovable property. He avers that he has not deposited the money in his accounts once but that the said funds have been deposited in his accounts by the clients to whom he supplies goods. The applicant asserts that he has not been charged with any offence regarding money laundering and he remains innocent until proven guilty.

16. According to the applicant, he is the registered owner of motor vehicles registration numbers KCQ156B Mitsubishi Fuso and KBY 556E/ZC 5883 Mercedes Benz Actross as well as a Toyota Land Cruiser V8 registration number KCP 870A which he utilizes in in his cereal business. The first two vehicles are held at the Eldoret Police Station, while the last is in his custody. He avers that these vehicles are of a higher value than the monies in his accounts, and should the court find that the monies in his accounts are proceeds of money laundering the vehicles would be sufficient security should he have spent the money in the accounts.

17. It is his averment that he supplies his customers and issues invoices, and he is then paid through his account at Equity Bank. He had been engaged in the cereals business since 2014 without interference until he was arrested on 26th October 2019 on the allegation that his motor vehicles had been detained for transporting restricted goods.

18. The applicant confirms that the Agency had obtained orders in the Chief Magistrate's Court on 7th November 2019 restricting his access to the bank accounts for a period of six months. He has never been served with the order but learnt of its existence when he visited his bank. He had instructed his Advocate to file an application to allow him access some of the money, which order was granted. He further states that upon being served with the order, the Agency filed an application for revision, which application was dismissed on 11th December 2019 after an *inter partes* hearing.

19. The applicant avers that though he was charged on 31st October 2019 with offences related to smuggling of restricted goods and tax evasion, the charges are not true as he is a law abiding citizen and has paid all his taxes and been given a tax compliance certificate. Further, that there is no complaint from KRA to the Agency. The applicant avers that as there is in force an order issued by a court of competent jurisdiction relating to the funds in his account, this court should not entertain an application which is *res judicata*.

20. The applicant avers that the dealings with his customers are commercial dealings regulated by the law of contract and do not involve dealing with restricted products. He asserts that his constitutional rights have been violated as he relies on the accounts to run his day to day business and to source his livelihood. According to the applicant, under section 68 of POCAMLA, the court can vary the orders restricting his accounts if it is found that the said restriction is causing more hardship than anticipated which is the position in his case as he cannot provide for his family. He avers that he has incurred Advocates fees of Kshs 2,000,000 and further that there are individuals who contributed Kshs 4,000,000 to pay his bail, which amount continues to attract interest.

21. In his submissions on behalf of the applicant, Mr. Akenga submitted, in reliance on the grounds set out in summary above and the affidavit sworn by the applicant, that this court had been moved to make orders that had already been issued and were still in force. These orders had been made by the Chief Magistrate's Court on 7th November 2019 and were affirmed by Githinji J on 11th December 2019.

22. It was also his submission that the applicant had never been served with the order of the Magistrate's Court and only became aware of it when he went to his bank. He had then made an application under section 68 of POCAMLA asking the court for access to at least one account or a limited amount of money to enable him refund the amount of cash bail he had borrowed for himself and his driver, as well as for his subsistence. The Chief Magistrate's Court had allowed him access to Kshs 8,000,000 provided he deposited his title or vehicle.

23. Mr. Akenga reiterated the applicant's averment that the Agency had then gone to the High Court to challenge the fact that the applicant had been given access to Kshs 8,000,000, but its application was dismissed by Githinji J who stated that the reasons for the order were reasonable. The High Court did not, however, vacate the orders preserving the applicant's account for 6 months.

24. According to Mr. Akenga, the application filed by the Agency in this matter is a replica of what it had obtained in Eldoret. The Agency had failed to mention to the court that the applicant had been allowed to get a part of the money in his account, which account had an amount in excess of Kshs 43 million.

25. Mr. Akenga submitted further that he had not been served with the order issued by this court on 17th December 2019. He had learnt of the said order when he went to his bank, Equity Bank, Nakuru Branch, with the order from Githinji J, and his bank was unable to tell which order to obey. Mr. Akenga's submission was that the Agency obtained orders from this court on 17th December 2019 by misleading the court and failing to make a material disclosure. He therefore urged the court to grant the order that the applicant was seeking to allow him to access the amount of Kshs 8,000,000 as granted by Githinji J in Eldoret.

26. In opposing the application, the Agency relied on the affidavit sworn by No 6040 S/SGT Frederick Musyoki on 16th December 2019 in support of its application as well as an affidavit, also sworn by S/SGT Musyoki, on 15th January 2020 in opposition to the application dated 19th December 2019.

27. In his affidavit in support of the Agency's application dated 16th December 2019, S/SGT Musyoki avers that on 5th November 2019, the applicant had obtained information from the Directorate of Criminal Investigations (DCI) in respect to Equity Bank Account numbers [...], [...], [...] and [...] held in the name of the applicant. The information was that these accounts were suspected to have received proceeds of crime or benefits resulting from tax evasion. The applicant had opened an inquiry file No. 56/2019 to investigate and inquire into the activities of the alleged offences and other offences contrary to section 3(a) of POCAMLA.

28. The preliminary investigations established that on 26th October 2019 the applicant's motor vehicles registration numbers KBY 556E hauling trailer registration number ZC5883 and KCQ 156B were impounded while smuggling 240 cartons and 150 cartons respectively of Supermatch cigarettes made in Uganda with a combined dutiable value of Kshs. 9,750,000 which had been concealed in a disguised place adapted for smuggling of goods. At the time motor vehicle registration number KCQ 156B was impounded, its driver, Moses Muriithi Waweru, was also arrested and he recorded a statement with the police. In the statement dated 27th October 2019, he had stated that on 25th October 2019 after delivering building blocks to Eldoret Huruma open ground, he had proceeded to Uganda, Kampala to purchase cigarettes from the local shops in Kampala in cash.

29. Documents from the Kenya Revenue Authority (KRA) Border and Customs Department established that on 26th October 2019, the date of return from Uganda, Mr. Moses Muriithi Waweru had declared at the border point that the subject motor vehicle was empty. According to S/SGT Musyoki, the applicant's preliminary investigations also established that on 22nd June 2019, 10th July 2019, 5th September 2019, 18th September 2019 and 26th October 2019, the subject motor vehicles were also declared empty while crossing the Kenya-Uganda border. He avers that the applicant, Josphat Kamau, has been charged jointly with another with offences *inter alia* of smuggling of goods and importing of restricted goods contrary to sections 199(a), 200(a) (ii) as read with section 210 of the East African Community Customs Management Act 2004 in Eldoret Chief Magistrates Court, vide Criminal Case Number 3288 of 2019.

30. It is his averment that there are reasonable grounds to believe that the funds in the above accounts are obtained through the illegitimate trade in smuggling of goods as this was not an isolated event but orchestrated syndicate that has been operating for a while. He further avers that there is a court order freezing the funds in the bank accounts the subject matter of this application in

Eldoret Misc Criminal Application No. 444 of 2019 filed under the police powers provided under sections 118 and 121(1) of the Criminal Procedure Code. He further deposes that the applicant has filed an application in Eldoret Miscellaneous Criminal Application No. 444 of 2019 seeking to vary the orders granted to the Agency under police powers. S/SGT Musyoki averred that there is imminent risk that the respondent may withdraw, transfer and conceal the funds in the identified accounts if the court did not issue the orders sought in the application.

31. With regard to the application dated 19th December 2019, S/SGT Musyoki, in the affidavit sworn on 15th January 2020, reiterates the contents of his affidavit sworn in support of the main application and the powers of the Agency under section 53A (5) of POCAMLA with regard to investigating money laundering and recover proceeds of crime. He further avers that the Agency had, in exercise of police powers under sections 118, 118A and 121(1) of the CPC, applied for and was issued with warrants to investigate the applicant's accounts the subject of this application. It had also obtained an order restricting debits for 6 months on 7th November 2019 vide Eldoret Miscellaneous Application Number 444 of 2019. The purpose of the warrants was to enable the Agency investigate the applicant's accounts which were suspected to have received proceeds of crime and/or benefits resulting from tax evasion.

32. S/SGT Musyoki notes that while the applicant states at paragraph 2 of his affidavit in support of his application that he is "*a businessman engaged in business including but not limited to supply of food stuff and grains,*" he had not provided proof of a registered company or the name and style under which he operates the alleged business. S/SGT Musyoki further observes that in his statement recorded at the Agency's offices on 13th December 2019, the applicant had stated that he is the proprietor of "*Tiphat Transporters operating without an office and without a KRA PIN*". S/SGT Musyoki observes that this is evidence that the applicant has no known source of legitimate business.

33. S/SGT Musyoki further avers that in his recorded statement, the applicant had stated that he buys his cereals from one Abdi Osman and that he places the orders by phone and the cereals are delivered in lorries at the Nakuru free ground. Further, that the cereals are dried in the sun at the Nakuru free ground and loaded in the applicant's lorries. He notes that the applicant alleges in his statement that he sells his product to his main customers whom he identifies in his statement. The applicant was not, however, aware of or able to identify the shop, building or street where his main customers operate from.

34. S/SGT Musyoki also observed that the applicant only raises invoices but does not have delivery notes nor does he issue payment receipts in respect of the goods purchased by his clients. S/SGT Musyoki avers that in an accountable and legal business, a businessman keeps records of the order the customer has made, what was supplied with delivery notes, the date and time of delivery and the evidence of payment and the receipts issued. His averment was that the applicant had not supplied any of the accountable documents, and in his view, an invoice of itself cannot account for the supply, delivery and payment for the alleged goods.

35. In any event, according to S/SGT Musyoki, an analysis of the invoices furnished by the applicant, which he sets out in his affidavit in a table, reveals glaring discrepancies on the dates *vis-a-vis* the sequence of the invoice numbers. It was his averment that this raises reasonable suspicion that the invoices relied on by the applicant are forgeries made in a belated attempt to explain the funds in his accounts.

36. With regard to the applicant's averment that he had been issued with tax compliance certificates by KRA, the Agency's position as expressed by S/SGT Musyoki is that such a certificate does not immunize the applicant from investigations and does not amount to an acquittal of the applicant. S/SGT Musyoki notes that the tax compliance certificate contains a disclaimer to the effect that it is issued on the basis of information available with the KRA at the date of the certificate and the KRA reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status.

37. According to the Agency, the investigations that it is undertaking is for purposes of asset tracing, identification and forfeiture of proceeds of crime gained from tax evasion. It has requested for information from KRA with regard to the applicant's tax status vide a letter dated 24th December 2019, and the information sought from the KRA may reveal information which the applicant had not disclosed to KRA.

38. It is S/SGT Musyoki's averment further that the present application is a non- starter in law and frivolous. It has been brought under section 68 (5) of POCAMLA which is under Part VII which deals with criminal forfeiture and not civil forfeiture. The applicant has therefore invoked the wrong provisions of the law and the application is therefore incompetent.

39. S/SGT Musyoki further avers that the applicant has not demonstrated that he has been deprived of the means to provide for his

reasonable living expenses, nor has he demonstrated the undue hardship caused to him to justify the variation or rescission of the preservation orders issued on 17th December 2019 as provided under section 89 of POCAMLA. According to the Agency, the assets preserved are funds held in commercial bank accounts which, if the applicant is allowed access thereto, there is a risk that the funds will be withdrawn, transferred or dissipated which shall jeopardise the ongoing investigations and the asset recovery process.

40. The Agency denies that its application is an abuse of the court process. S/SGT Musyoki gives the chronology of events leading to the filing of the main application in this matter. It had filed and obtained warrants together with an order restricting debits for 6 months on 7th November 2019 in Eldoret Misc Criminal Application No.444 of 2019 under sections 118, 118A and 121(1) of the Criminal Procedure Code. It had served the applicant with the application in the said matter and he had filed a replying affidavit on 25th November 2019. While the matter had been scheduled for inter-parties hearing on 9th December 2019, the applicant filed an application on 3rd December 2019 seeking to vary the orders issued on 7th November 2019. On 4th December 2019, the Eldoret Chief Magistrate's Court granted an order for the applicant to access account number 0130190481767 to obtain the sum of Kshs 8,000,000 in the absence of a representative from the Agency.

41. Upon being served with the order of 4th December 2019, the Agency filed an application for revision on 6th December 2019, being Eldoret High Court Criminal Revision No. 173 of 2019 seeking an order to recall and determine the legality, correctness or propriety of the orders issued on 4th December 2019. The application was premised on the fact that the order of 4th December 2019 were issued *ex parte* rather than *inter partes* as the Agency had neither been served nor was it represented at the hearing of the application. On 6th December 2019, the High Court granted an order in Eldoret Criminal Revision No. 173 of 2019 staying execution of the orders issued on 4th December 2019, and directed inter-parties hearing on 10th December 2019. In its ruling on 11th December 2019, the High Court dismissed the Agency's application.

42. The Agency further avers that while the proceedings in Eldoret were ongoing, the applicant filed Nakuru Judicial Review Application No. 29 of 2019 on 21st November 2019 seeking to quash the orders issued on 7th November 2019 and for leave to operate as stay. The application came up for hearing on the issue of whether leave should operate as a stay on 2nd December 2019, and the Court declined to issue the said order and directed that the hearing of the substantive prayers proceeds on 13th January 2020, which hearing was further deferred to 9th of March 2020. It is the Agency's averment therefore that its actions have been in good faith and premised on the law.

43. In his submissions on behalf of the Agency, Learned Counsel, Mr. Githinji, noted that in the affidavit sworn on 17th December 2019, the applicant had set out the reasonable grounds which warranted the issuance of preservation orders against the applicant's account. The preservation orders had been granted on the basis that the applicant was smuggling contraband goods, namely cigarettes, using motor vehicles registered in his name as set out in the charge sheet (annexure FM 5). The goods at issue were valued at Kshs 9,750,000.

44. Mr Githinji confirmed that the Agency had made an application before the Chief Magistrate's Court in Eldoret, being Misc Criminal Application No 444 of 2019. It was seeking in that application orders to investigate the applicant's accounts and an order to restrain debits for a period of 6 months. The Agency had obtained the said orders, which had been sought under section 118 and 121 of the CPC, and had served the bank. The applicant had filed a replying affidavit to the application.

45. Mr. Githinji submitted that while the matter was supposed to come for *inter partes* hearing on 9th December 2019, the applicant had rushed to court *ex parte* with an application seeking variation of the orders and access to the accounts to the tune of Kshs 8,000,000, which orders were granted. Mr. Githinji submitted that the orders were granted *ex parte*, though the prosecutor of the court was present.

46. Mr. Githinji also confirmed that the Agency, when served with the order of 4th December 2019, filed High Court Criminal Revision No 173 of 2019 in Eldoret under section 362 and 364 of the CPC, which was heard and dismissed. His submission was that the orders of the High Court dismissing the application for revision was not a positive order as it dismissed the Agency's application as could be discerned from paragraphs 10 and 14 of the ruling of Githinji J. What is currently in force, according to Mr. Githinji, is the Chief Magistrate's order of 4th December 2019 and the order of this court issued on 17th December 2019.

47. According to Mr. Githinji, in order for the applicant to be given access to the funds in the account, he should have awaited the *inter partes* hearing of the application before the Chief Magistrate's Court. Mr. Githinji reiterated that the Agency was not represented when the lower court varied its order, as the prosecutor present was from the office of the DPP, and the office of the DPP does not represent the Agency.

48. Mr. Githinji submitted further that the application before this court dated 19th December 2019 has been brought under section 68 of POCAMLA, and his submission was that the applicant has invoked the wrong provision of law. Accordingly, the application is devoid of merit as the applicant should have invoked sections 89 of POCAMLA, and he urged the court to dismiss the application, noting that in any event, the applicant bears the burden of proof if the court is to vary the preservation orders, which has not been demonstrated in the present application. He further observed that there was no evidence that the cash bail of Kshs 4 million was paid with borrowed funds, the only evidence placed before the court being in respect of the advocate's fees. He therefore urged the court to dismiss the application.

49. In his submissions in response, Mr. Akenga stated that with regard to the application being premised on section 68 instead of 89 of POCAMLA, his client had not been served with the order made on 17th December 2019 or with the application by the Agency. The application dated 19th December 2019 was therefore not premised on the application by the respondent dated 17th December 2019. His submission was that the applicant was in court to '*correct the order of events*' as they have been since the matter started in Eldoret.

50. Mr. Akenga urged the court to consider paragraph 14 and 15 of the ruling of Githinji J. He noted that there was in essence no positive order, but that the High Court had mentioned the 8 million granted by the lower court as having been based on reasonable grounds, which is what the High Court had upheld.

51. Mr. Akenga further submitted that the High Court had addressed itself to the issue of representation of the Agency by someone from the office of the DPP and had made a finding on the issue. If the Agency was not satisfied with the court's decision on the issue, it should have sought review or filed an appeal against the order if its case was that the presence of a prosecutor from the DPP does not mean there was representation for the Agency.

Analysis and Determination

52. Having considered the pleadings and submissions of the parties, I believe that this application raises one sole issue. This is whether the application dated 19th December 2019 is merited, and if it is, whether the court should grant the orders sought at prayers 2-7 of the applicant. I have set out in some detail the averments and submissions of the parties as I take the view that the determination of the issue will turn on the procedural history leading up to the filing of the present application.

53. I note, first, that the application the subject of this ruling is somewhat a hodge podge, brought as it is both under criminal and civil procedure. It is expressed to be brought under section 43 of the Tax Procedure (sic), section (9) 68(5) (sic) of POCAMLA, section 118 and 121 of the Criminal Procedure Code, section 1A, 1B, 3, 3A, 6, 7, 80 and 63 of the Civil Procedure Act, Order 51 of the Civil Procedure Code as well as section 180 of the Evidence Act. Its intended purpose, however, as expressed in the orders that the applicant seeks, is to review the preservatory orders that this court issued on 17th December 2019 and reinstate, in effect, the orders of the Magistrate's Court issued on 4th December 2019 allowing the applicant access to an amount of Kshs 8,000,000 being part of the amount held in Equity Bank account number [...].

54. Both parties have made substantial submissions that go to determination of the main issue in the application dated 16th December 2019, which I need not address at this point. I observe, however, that the applicant has not directly responded to that application, his position seeming to be that the application is *res judicata* as the Chief Magistrate's Court had issued orders restricting debits from his accounts, and that application, according to Mr. Akenga, is still pending.

55. In its application in Eldoret Chief Magistrate's Court Misc. Criminal Application No. 444 of 2019, the Agency had made an application under sections 118, 118A and 121 of the CPC for orders to restrict debits in the applicant's accounts, the same accounts that are the subject of the main application in this matter, for a period of 6 months. The court issued the orders on 7th November 2019. While the applicant avers that he was not served with the order, the court notes that he did file an affidavit sworn on 25th November 2019 in reply to the application.

56. From the averments before me, it appears that the Agency's application dated 7th November 2019 was scheduled to be heard *inter partes* on 9th December, 2019. However, the applicant made an application on 3rd December 2019 seeking review of the orders of 7th November 2019. An order was issued on 4th December 2019 which allowed the applicant to access Kshs 8,000,000 from the Equity Bank account aforesaid.

57. The applicant contends that in lodging its application dated 17th December 2019, the Agency was guilty of material non-disclosure in that it had not disclosed to this court that it had obtained similar orders from another court. I note that at paragraph 13 and 14 of his affidavit sworn on 16th December 2019, S/SGT Musyoki avers as follows:

“13. THAT there exists a court order freezing the funds in the identified bank accounts the subject matter of this application in Eldoret Misc Criminal Application No. 444 of 2019 filed under the Police Powers as provided under Sections 118 and 121(1) of the Criminal Procedure Code. Annexed herewith and marked as FM6 is Eldoret Miscellaneous Application Number 444 of 2019.

14. THAT the Respondent has filed an application in Eldoret Miscellaneous Criminal Application No. 444 of 2019 seeking to vary the orders granted to the Agency under Police powers.”

58. It is not disclosed in the said affidavit, however, that an order had been issued on 4th December 2019 allowing the applicant access to Kshs 8,000,000 in one of the accounts. Further, the Agency did not disclose that it had made an application for revision of the Chief Magistrate’s Court order allowing the applicant access, nor that the application had been heard and dismissed. To that extent therefore, the Agency failed to disclose material that may well have made a difference to the nature of the orders issued by this court on 17th December 2019. Whether this omission was inadvertent or deliberate was not addressed by the Agency, either in its affidavit in reply to the application dated 19th December 2019 or by its Counsel in submissions at the hearing of the application.

59. The Agency argues that the orders reviewing the Chief Magistrate’s Court on 3rd December 2019 were made *ex parte*. This is because its Counsel was not present in court, the person then present being a prosecutor from the Office of the Director of Public Prosecutions, who does not represent the Agency. The applicant counters that this issue was raised before Githinji J in the application for revision, and that the court considered it and still upheld the order of the Chief Magistrate allowing the applicant access to Kshs 8,000,000.

60. I have considered the issue of representation of the Agency when the order for review was made on 4th December 2019. I note that in his ruling rejecting the application for revision, Githinji J observed that the prosecutor was in court, and that it was incorrect for the Agency to argue that the order was issued by the Chief Magistrate’s court in its absence. He further noted that in criminal cases, the State is represented by the prosecutor who falls under the Office of the Director of Public Prosecutions. He further noted that the prosecutor came in handy at the time the applicant appeared in court for plea taking.

61. As this is a court of concurrent jurisdiction, I cannot purport to inquire into this finding, which the Agency could have, as argued by the applicant, challenged by way of an Appeal to the Court of Appeal. What I do observe is that in my view, the Chief Magistrate’s Court did review the orders of 7th November 2019 essentially in the absence of the Agency. This is because the application before the Court had been brought by the Assets Recovery Agency, a body established under the POCAMLA. The Agency does not fall under the office of the Director of Public Prosecutions, and a prosecutor from the ODPP cannot be deemed to be representing the Agency in a matter such as was before the Chief Magistrate’s Court.

62. That notwithstanding, the fact is that the Agency did fail to disclose before this court in its application dated 16th December 2019 that there was already an order in force; an order that it had applied, unsuccessfully, for revision of, allowing the applicant access to Kshs 8,000,000 in his account held in Equity Bank account no. [...]. Had this information been placed before the court, and bearing in mind that this court cannot properly sit on appeal on a decision of a court of concurrent jurisdiction, this court would have given orders different from the orders issued on 17th December 2019.

63. Accordingly, I will allow the application dated 19th December 2019 to a limited extent. I hereby review the orders issued on 17th December 2019 to the extent of allowing the applicant access to Kenya Shillings Eight Million (Kshs 8,000,000) only out of the amount held in his account number [...] at Equity Bank.

64. For the avoidance of doubt, the other orders issued in this matter on 17th December 2019 which, from the material placed before the court then were merited, shall remain in force.

65. Orders accordingly.

Dated Signed and Delivered at Nairobi this 22nd day of April 2020

MUMBI NGUGI


JUDGE

ORDER

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

MUMBI NGUGI

JUDGE

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