Case Number:	Civil Application 58 of 2018
Date Delivered:	10 Jun 2020
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Mumbi Ngugi
Citation:	Assets Recovery Agency v Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

CIVIL APPLICATION NO. 58 OF 2018

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

LILIAN WANJA MUTHONI MBOGO T/A SAHARA CSULTANTS.....1ST RESPONDENT

LIDI HOLDINGS LIMITED.....2ND RESPONDENT

LIDI ESTATES LIMITED.....3RD RESPONDENT

STEPHANIE MARIGU MBOGO.....4TH RESPONDENT

SHEELA WANGARI MBOGO.....5TH RESPONDENT

SHALOM MALAIKA KAMWETI.....6TH RESPONDENT

RULING

1. In its judgment dated 15 April 2020, this court found that the funds the subject of the judgment held in various accounts by the applicants/respondents were proceeds of crime. It therefore issued the following substantive orders:

1. A declaration be and is hereby issued that a total of USD 105,293.7 and Kshs 22, 445, 487.74 held in bank accounts Numbers 0180272692383, 0180273781178, 0180273781104, 0180273780467, 0180273780412, 0180290930598, 0806061000, 5225803001, 7041746001 and 7825846007 in the name of Lilian Wanja Muthoni Mbogo T/A Sahara Consultants, Lidi Holdings Limited, Lidi Estates Limited, Stephanie Marigu Mbogo, Sheela Wangari Mbogo and Shalom Malaika Kamweti at Equity Bank Limited, Community Branch Nairobi and Diamond Trust Bank Limited, Capital Centre and Villages Market Branches are proceeds of crime and therefore liable for forfeiture to the State.

2. An order be and is hereby issued forfeiting the following funds to the government and transferring the said funds to the applicant:

i. USD 67, 331.9 held in Account number 0180272692383 in the name of Lilian Wanja Muthoni Mbogo trading in the business name of Sahara Consultants held at Equity Bank Limited, Community Branch, Nairobi;

ii. USD 28, 981.97 held in account number 0180273781178 in the name of LIDI Estates Limited held at Equity Bank Limited Community Branch, Nairobi;

iii. Kshs 2,297,495.00 held in account number 0180273781104 in the name of LIDI Estates Limited at Equity Bank Limited, Community Branch, Nairobi;

iv. Kshs 257,220 held in account number 0180273780467 in the name of LIDI Holdings Limited held at Equity Bank Limited, Community Branch, Nairobi;

v. USD 8,979.83 held in account number 0180273780412 in the name of LIDI Holdings Limited held at Equity Bank Limited Community Branch, Nairobi;

vi. Kshs 1,685,430.84 held in Account number 0180290930598 in the name of Lilian Wanja Muthoni Mbogo trading in the business name of Sahara Consultants held at Equity Bank Limited, Community, Branch Nairobi;

vii. Kshs 5,653,431.89 held in Account number 0806061000 in the name Lilian Wanja Muthoni Mbogo trading in the business name Sahara Consultants held at Diamond Trust Bank Limited, Capital Centre Branch Nairobi;

viii. Kshs 2, 903, 996.71 held in Account number 5225803001 in the name of Stephanie Marigu Mbogo held at Diamond Trust Bank Limited, Village Market Branch Nairobi;

ix. Kshs 4, 788,763.59 held in account number 7041746001 in the name of Shalom Malaika Kamweti held at Diamond Trust Bank Limited, Village Market Branch, Nairobi;

x. Kshs 4, 859,169.71 held in account number 7825846007 in the name of Sheela Wangari Mbogo held at Diamond Trust Bank Limited Capital Centre Branch, Limited.

2. The applicants were aggrieved by the judgment and have indicated their intention to appeal to the Court of Appeal against the said judgment in its entirety. They have also lodged a notice of appeal and applied for certified copies of the proceedings.

3. In their application dated 27th April 2020, the applicants seek the following orders from the court:

1. (spent).

2. (spent).

3. THAT the Honorable Court be pleased to order stay of execution pending appeal to the Court of Appeal from the judgment and resultant decree and any consequential order(s) issued from the judgment of the Hon. Lady Justice Mumbi Ngugi given herein on 15 April 2020.

4. THAT the costs of this application be provided for.

4. The application is premised on section 92 (6) of the Proceeds of Crime and Anti Money Laundering Act (POCAMLA); Order 42 Rule 6 of the Civil Procedure Rules; and Practice Direction 11 of Gazette Notice No. 3137 dated 20th March 2020. In the grounds in support of the application, the applicants state that they are aggrieved with the decision of the court that the funds in their accounts are proceeds of crime which should be forfeited to the state. They therefore intend to appeal against the decision and have lodged their notice of appeal and applied for certified proceedings from this court.

5. They argue that the respondent/applicant may at any time commence the process of execution against them to appropriate the funds in their accounts and gazettement of the forfeiture order as contemplated by section 92 (5) of POCAMLA. They state that they have filed their application for stay of execution pending appeal without any delay, less than ten (10) calendar days since e-delivery of the impugned judgment.

6. They further state that due to administrative exigencies related to timelines for typing of the High Court proceedings for use in

the intended appeal, they are apprehensive that execution may be finalized soon after gazettement within the 30 days' period provided by section 92 (5) of POCAMLA aforesaid, and their monies lost into the hands of government. It is also their contention that their application is merited as they stand to suffer substantial loss unless stay of execution pending appeal to the Court of Appeal is ordered. They are also entitled to their day in the Court of Appeal without the undue duress of having their monies forfeited to the state.

7. The applicants further argue that should the sums be appropriated in the absence of orders staying execution, they would be plagued by the all-too-familiar administrative and legal expenses, significant time engagement, rigidly-structured governmental bureaucracy and administrative complexity when they attempt to enforce orders for reimbursement from the government should the appeal succeed.

8. It is also their case that the balance of convenience lies with preserving the monies in their accounts by an order staying execution. This is because, while they stand to contend with the costly and infinitesimally bureaucratic, procedurally intensive and time-consuming task of executing against government for restitution should their appeal succeed, the respondent will suffer no prejudice whatsoever as the funds will be secured in place since the preservation orders will remain in place throughout the pendency of the appeal in light of the provisions of section 97 of POCAMLA.

9. The applicants further argue that the intended appeal is arguable and not frivolous as is captured in the grounds of appeal set out in the Draft Memorandum of Appeal.

10. The application is supported by an affidavit sworn on 27th April 2020 by the 1st applicant/1st respondent, Lilian Wanja Muthoni Mbogo. She avers in the said affidavit that the applicants are dissatisfied with the judgment of the court in this matter and intend to appeal against it. They have filed a notice of appeal and have also applied for the certified typed proceedings. She reiterates the applicants' apprehension that the respondent may commence execution against them. She argues that due to the administrative exigencies related to timelines for typing of the High Court proceedings for use in the intended appeal, the respondents are apprehensive that execution may be finalized soon after gazettement within the 30 days period provided by section 92 (5) of POCAMLA and their monies lost into the hands of government. She further sets out in her affidavit the grounds cited in support of the application and reiterates the reasons cited in the said grounds in support of their argument that the funds in question should be left in their accounts.

11. The respondent opposes the application and has filed grounds of opposition dated 11th May 2020. It argues in these grounds that the present application does not meet the threshold of section 92 (6) of POCAMLA and Order 42 Rule 6 of the Civil Procedure Rules. It argues further that the applicants have not disclosed any imminent threat that it poses to them through the judgment of the court. It is its case therefore that the application is misconceived and the orders sought unmerited.

12. The application was prosecuted by way of written submissions pursuant to directions given on 28th April 2020.

13. In their submissions, the applicants urge the court to determine two issues. First, whether they have satisfied the test for grant of an order of stay pending appeal under section 92 of POCAMLA having filed an appeal against the judgment of this court. They rely on Order 42 Rule 6 (4) of the Civil Procedure Rules to submit that the filing of the notice of appeal is sufficient institution of appeal for purposes of stay of execution. They further cite section 92 (6) of POCAMLA to submit that Parliament in its wisdom provided that a forfeiture order shall not take effect pending disposition of an appeal challenging such forfeiture order.

14. It is their case that the provisions of POCAMLA support their application for stay of execution pending disposition of their appeal which they have already instituted in the Court of Appeal. They had already lodged and served a notice of appeal under Rule 75 of the Court of Appeal Rules, and they had annexed to their application a Draft Memorandum of Appeal which shows their nine (9) principal grounds of appeal which demonstrates that their appeal is both arguable and with high likelihood of success on both legal and factual grounds.

15. The respondents further submit that they are not mere busybodies and should be allowed to canvass their appeal without any fetters imposed by premature execution. Reliance is placed on the decision in **Assets Recovery Agency v Charity Wangui Gethi [2019] eKLR** in which Ong'udi J, while applying section 92 (6) of POCAMLA held that the aggrieved applicant is entitled to be protected in the event of a successful appeal.

16. The applicants submit that this court is not in a position to reopen the forfeiture judgment, re-evaluate the evidence and determine whether the appeal has chances of success or not. Their submission is that what the court should do is ensure that the applicants have their day in the Court of Appeal without any fetters imposed by wanton execution of the impugned judgment and decree.

17. The second issue that the applicants raise is whether their application satisfies the test for grant of orders of stay of execution pending appeal. Their submission is that the court has discretion to issue such orders in order to give effect to the principal consideration that the discretion should be exercised in such a way as not to prevent an appeal. The applicants rely on the case of **Butt v Rent Restriction Tribunal, Civil Appl. NAI 6 of 1979, [1979] eKLR** in which the Court of Appeal held that:

"The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judges decision.

A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceeding. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order of stay of execution to lapse."

18. The applicants argue that granting the orders sought will not prejudice the respondent. They submit that the application for stay arrested the maturity of the forfeiture order within the meaning of section 92 (6) of POCAMLA. It is their submission that once the notice of appeal was expeditiously lodged and served, POCAMLA forestalled the maturation of the forfeiture orders until such time as their appeal is disposed of. They further submit that the forfeiture order had not been gazetted by the Court Registrar as required by section 92 (5) of POCAMLA, and that gazettement is a condition precedent, a statutory imperative, that cannot be waived or bypassed for any reason.

19. The applicants further submit that there is no risk of loss of the funds in their accounts as they remain the subject of the preservation orders issued earlier by this court pursuant to section 97 POCAMLA. It is their case that the funds will remain wholly secured awaiting outcome of the respondent's appeal to the Court of Appeal. They argue that they have demonstrated in their application the prejudice and substantial loss that they stand to suffer if stay of execution pending appeal is not granted. They ask the court, in the interests of justice, to balance the competing interests of the parties before it and order stay of execution thereby maintaining the funds under the preservation orders awaiting disposal of their appeal.

20. According to the applicants, the respondent cannot demonstrate its ability to refund monies should their appeal succeed. They term as farfetched and speculative the assertion by the respondent that it can reimburse the respondents out of other monies from other forfeiture cases. The applicants assert that actual ability to repay must be demonstrated, reliance for this submission being placed on the decision in **National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another [2006] eKLR** in which the Court of Appeal held that:

"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya."

21. It is their submission that they are not able to estimate the financial capacity of the respondent. It did not file a replying affidavit to demonstrate its financial capacity to pay back the decretal sum should the applicants succeed in their appeal, and it is not enough, in their view, for it to assert that it is a government entity.

22. The applicants submit that an order staying execution pending appeal will maintain the parties at equal footing as they advance to the Court of Appeal in line with the twin principles of proportionality and equality of arms. They ask the court to opt for the lower rather than the higher risk of injustice facing the applicants should the respondent proceed with forfeiture without regard to section 92 (6) of POCAMLA that halts any such forfeiture until disposal of preferred appeals.

23. The applicants further rely on the case of **Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR** to submit that it is unjust and inequitable to undermine their unfettered right to appeal to the Court of Appeal by exposing it to wanton execution. They cite the words of the court in that matter in which it was stated:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…

…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

24. The applicants distinguish the decision relied on by the respondent- **Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee) [2019]eKLR**- which they submit is irrelevant to the present proceedings. They argue that the case was decided strictly within the exclusionary ambit of the Arbitration Act which is a special Act of Parliament with its own regime and a party thereto cannot invoke the provisions of the Civil Procedure Act. The applicants submit that the special law governing arbitration cannot be exported to the present matter either, which is under POCAMLA, and the decision was therefore not relevant to the present application. They urge the court to exercise discretion in their favour and order stay of execution pending appeal.

25. In its submissions in response, the respondent argues that in order for the court to exercise its direction to grant stay of execution in favour of the applicants, they have to prove three things. First, that there is sufficient cause to grant the orders; that there must be apparent substantial loss if stay is not granted; that if the appeal succeeds, the respondent shall not be in a position to refund the funds in issue. A fourth requirement, according to the respondent, is that the applicant must furnish security.

26. The respondent relies on the case of **Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (supra)** in which it was stated, in reliance on the case of **Doudoladova Korir –vs-Kenyatta University [2014]eKLR** that:

"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another –vsThornton & Turpin Ltd where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- sufficient cause, substantial loss would ensure from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay."

27. The respondent submits that the onus of proving the above conditions lies with the applicant, but they have not met the threshold set in the cases cited and their application should be dismissed with costs.

28. The respondent notes that the application is brought under section 92 (6) of POCAMLA but that it does not meet the requirements of the section. It is its case also that the application does not meet the threshold of Order 42 Rule 6 of the Civil Procedure Rules. In its view, the application is devoid of merit and should be dismissed.

Analysis and Determination

29. I have considered the respective pleadings and submissions of the parties in this matter. Before entering into an analysis of the respective arguments, I need to observe that contrary to the contentions of the applicants that there are 'administrative exigencies

related to timelines for typing of the High Court proceedings' that may delay the filing of their appeal, the contrary is the case. The proceedings before the High Court have been typed and have been readily accessible to the applicants as and when they require them.

30. With regard to the substantive issues raised in the application, the court notes that the application is premised on the provisions of section 92(6) of POCAMLA which states that:

(6) A forfeiture order shall not take effect—

(a) before the period allowed for an application under section 89 or an appeal under section 96 has expired; or

(b) before such an application or appeal has been disposed of.

31. There appears to be a problem with the provisions of section 92(6) with regard to the reference to an appeal under section 96 of the Act. A perusal of the Act shows that section 96 provides for the making of an application for exclusion of interests in forfeited property. Section 97 titled ***'Appeal against forfeiture order'*** contains the provision relating to appeals as follows:

97. Any preservation order and any order authorizing the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under section 92(1) shall remain in force pending the outcome of any appeal against the decision concerned.

32. The applicants also rely on order 42(6) of the Civil Procedure Rules which provides with respect to an application for stay pending appeal that:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

33. The applicants in this case filed their notice of appeal and the present application for stay of execution within 10 days or so from the date of the judgment. There is therefore no argument that they failed to file the application in time or that there was unreasonable delay in filing the application. The critical question is whether the applicants have satisfied the court that substantial loss may result if the orders sought are not granted.

34. The argument advanced by the applicants is that they will suffer substantial loss since, should their appeal succeed, they will contend with the *'costly and infinitesimally bureaucratic, procedurally intensive, and time-consuming task of executing against government for restitution'*. They further argue that the respondent has not placed material before the court to show that it is capable of paying back the funds at issue in the event that the appeal is successful. The applicants have relied on the decision of Ong'udi J in **Assets Recovery Agency v Charity Wangui Gethi (supra)** in which the Learned Judge stated as follows:

"19. It is therefore evident that the process of appeal must be first exhausted before a forfeiture order is confirmed. It follows that even in cases of release of property the court must ensure that the aggrieved party is protected in the event of a successful

Appeal.

…

23. This court made a determination and would not be in a position to re-evaluate the evidence and determine whether the appeal has chances of success or not. In as much as the Respondent is seeking for release of the motor vehicle to her at this point, I think it is important that the Applicant has its day in the Court of Appeal.

35. An important distinction between the above case and the present case is that the appellant was the Assets Recovery Agency (ARA) which had sought forfeiture of a vehicle that the ARA believed was proceeds of crime. The court had found this not to be the case. The application for stay was granted, as the ruling indicates, so that the vehicle would still be available should the appellate court find that the High Court had erred in reaching the conclusion that the vehicle was not proceeds of crime.

36. I have noted the decisions relied on by the applicants with regard to the argument that the respondent will not be in a position to refund the sums at issue should the appeal succeed. They rely on the cases of **Samvir Trustee Limited v Guardian Bank Limited (supra)** and **National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (supra)**. These cases, I believe, correctly represent the law with respect to stay of execution in matters relating to private commercial disputes between parties. The position, however, in my view is different when the matter relates to a judgment for forfeiture between a state entity such as the ARA and a party found to have in its possession funds or assets which are proceeds of crime.

37. The present case, in my view, is more in keeping with the facts and circumstances in **Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) [2019] eKLR** in which the court observed that:

"it is not enough to say that money will not be refunded. It's key to explain what the Applicant knows about the Respondent's financial status that makes him/her to come to the conclusion that the Respondent would not be in a position to refund any money paid out to it.

30 The Applicant referred to the case of Vulcan Equipment (supra) which was handled by this court and stay of execution pending appeal was granted. That case can be distinguished from this present one because in the Vulcan Equipment case the decree holder was a private company which failed to prove its liquidity. In the present case the decree holder is a body corporate and an Agency under the Attorney General's office tasked with tracing, freezing and recovering proceeds of crime. All the recovered proceeds are in the Agency's escrow account. Several forfeitures have been made and the Respondent cannot be said to have no money without solid proof."

38. It must be borne in mind that in a matter such as this, the contestation is not between two private entities who have had a commercial dispute and the court has made a determination in favour of one side or the other. It is a matter in which the respondent seeks to recover funds believed to be proceeds of crime. Should such funds, then, be held in the accounts of the party believed to have obtained the funds unlawfully, or in the hands of the state entity responsible for recovering unlawfully acquired assets and proceeds of crime" Is there any material before this court that shows that the ARA will not be able to refund the funds should the applicants succeed in their appeal, and that they will, as a result, suffer substantial loss" Taking all matters into consideration, I am not satisfied that the applicants have met the criteria for grant of orders of stay pending appeal. They have not demonstrated, as required under Order 42(6), that they will suffer substantial loss should their appeal succeed. To that extent therefore, their application is without merit.

39. The court, however, has to take into consideration the provisions of section 92(6) of POCAMLA which states that a forfeiture order shall not take effect before expiry of the period for an application under section 89 or an appeal under section 96 has expired, or before the disposition of such appeal or application. The purpose of this section, in my view, was to preserve the assets the subject of a forfeiture application in the event that the respondent in such application is successful on appeal.

40. Regrettably, the respondent, the ARA, did not place before the court any material that explains its administrative arrangements with respect to funds the subject of forfeiture such as is the case in this matter. Is there an 'escrow account' operated by the respondent into which the funds are placed, as the court in **Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission** (supra) alluded to" With such information, the court would be in a better position to make a determination on the

placement of the funds in issue in this case.

41. In the absence of such information, the court is constrained to find that the forfeiture orders shall not take effect pending determination of the applicants' appeal as provided under section 92(6) of POCAMLA. For the avoidance of doubt, however, this does not give the applicants access to the subject accounts or the funds therein. In accordance with section 97 of POCAMLA, the preservation orders issued against the funds in the applicants' account shall remain in force pending the outcome of their appeal against the decision of this court.

Dated Delivered and Signed at Nairobi this 10th day of June 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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having 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