



Case Number:	Application 12 of 2020
Date Delivered:	15 Jun 2020
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	John Nyabuto Onyiego
Citation:	Asset Recovery Agency v Ali Abdi Ibrahim [2020] eKLR
Advocates:	-
Case Summary:	<p>Factors to be considered in rescinding or lifting of preservation orders against assets suspected to be proceeds of crime.</p> <p>Asset Recovery Agency v Ali Abdi Ibrahim</p> <p>Application No 12 of 2020</p> <p>High Court at Nairobi</p> <p>Anti-Corruption and Economic Crimes Division</p> <p>J N Onyiego, J</p> <p>June 15, 2020</p> <p>Reported by Sharon Sang & Kakai Toili</p> <p><i>Civil Practice and Procedure – civil forfeitures – recovery and preservation of property - preservation orders – lifting of preservation orders – where a bank account containing money suspected to be from proceeds of crime was</i></p>

frozen - factors to be considered in lifting of preservation orders - Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009, sections 82, 83 and 84.

Civil Practice and Procedure – *civil forfeitures – recovery and preservation of property – preservation orders – factors to be considered before issuing preservatory orders - where a court issued preservatory orders freezing a bank account containing money suspected to be from proceeds of crime was frozen - what was the procedure to be followed after a court had issued an order to preserve assets suspected to be proceeds of crime - Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009, sections 82, 83 and 84.*

Civil Practice and Procedure – *civil forfeitures - forfeiture proceedings – nature of - what was the nature of forfeiture proceedings.*

Brief facts

Through an originating summon, the respondent sought for orders that the court issue orders prohibiting the applicant from accessing the funds held in the accounts in question. The court granted the respondent the orders as prayed. The applicant then filed the instant application upon gazettelement of the said orders seeking orders that pending *inter-partes* hearing of the application, the court does not grant the respondent partial and reasonable access to the accounts and the funds. He also sought orders that the freezing and preservation orders against the applicants' bank accounts be lifted and/or quashed.

Issues

- i. What were the factors to be considered in lifting of preservation orders against assets suspected to be proceeds of crime?
- ii. What was the procedure to be followed after a court had issued an order to preserve assets suspected to be proceeds

of crime?

- iii. What were the factors to be considered before issuing preservative orders?
- iv. What was the nature of forfeiture proceedings?

Relevant provisions of law

Proceeds of Crime and Anti- Money Laundering Act, No 9 of 2009

Section 82 – Preservation orders

1. The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
2. The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned -
 - a. *Has been used or is intended for use in the commission of an offence; or*
 - b. *is proceeds of crime*
3. *A court making a preservation order shall at the same time make an order authorizing the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.*
4. *Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.*

Section 89 (1) – Variation and rescission of orders

1. *A court which makes a preservation order –*
 - a. *may, on application by a person affected by that order, vary or rescind the*

preservation order or an order authorizing the seizure of the property concerned or other ancillary order if it is satisfied –

- i. that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and*
 - ii. that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and*
- b. shall rescind the preservation order when the proceedings against the defendant concerned are concluded.*

Held

1. The impugned orders were issued *ex parte* on April 3, 2020 pursuant to an originating motion dated April 2, 2020. The said orders were issued in accordance with section 82 of the Proceeds of Crime and Anti- Money Laundering Act (POCAML A). Section 83 of POCAML A went further to provide for gazette ment of the preservation orders pursuant to section 84 of POCAML A. Upon gazette ment of preservation orders, the same were bound to expire after 90 days unless there was an application for a forfeiture order pending before the court in respect of the property subject of the preservation order.
2. Before a preservation order was made, the court making such order had to be satisfied that there were reasonable grounds to do so. Having issued the orders, it was presumed that the court having perused material placed before it was satisfied that there was *prima facie* evidence or reasonable ground to believe that the property in question was obtained as a result of proceeds of crime or through money laundering. The court was therefore bestowed with wide discretionary powers

to decide on whether to grant preservation orders or not.

3. As to whether eventually the preserved property was to be forfeited or not was a matter of evidence upon filing a forfeiture application or suit. The allegation that it was unconstitutional to issue *ex parte* orders could not therefore apply as the orders were issued pursuant to a statutory provision, which provided a remedy under section 89(1) of POCAMLA for revision or variation of the orders if found not deserving. The issue of being condemned unheard was not sustainable.
4. The burden to prove that the applicant deserved the orders of rescission and variation of the preservation orders in accordance with section 89(1) of POCAMLA lay with the applicant. It was not enough to state that so and so was trading with so and so without proving that the business transacted was lawful and therefore the money generated therefrom was legitimate. Although the applicant had tried to connect the source of money as being proceeds out of construction works in completing Mandera County Government headquarters, which was subject to proof, the same amount had been mixed with other unexplained sources of income suspected to be proceeds out of money laundering.
5. The allegation that some money in terms of millions was from informal loan facilities without any evidence backing that allegation was not enough. That was a mere statement which required validation by way of cogent evidence. In the absence of any proof that such monies were obtained from legitimate sources of income, which was a matter of fact, the same had to be deemed money obtained through illegitimate means, which could be a crime by way of money laundering or fraud.
6. Since the applicant had not rendered a satisfactory account justifying receipt of the impugned deposits, the respondent had established a *prima facie* case that the preservation orders were based on

reasonable grounds. The argument that similar orders were issued and vacated by the trial court was not a bar to the applicant from instituting forfeiture proceedings, which was an independent civil remedy as opposed to investigative proceedings before the trial court. The suit could not be declared *res judicata* on that account and therefore there was no need to appeal or seek review as the purpose for obtaining those orders was achieved by accessing and obtaining the intended bank related documents.

7. According to the replying affidavit and affidavit in support of the application for lifting the order, the applicant was a businessman. He was definitely going on with his normal business. The orders therein did not stop him from doing further business. Although the applicant claimed that the money in the account was being used for family survival and doing business, the same was the subject of litigation, which if proved could be forfeited. Therefore, it would defeat the very purpose of preservation orders if courts were to release such monies for further expenditure unless proven purely on humanitarian grounds that the frozen amounts were the only source of income relied upon by the family to survive hence the need to make provision for reasonable daily upkeep. The applicant had not endeavored to prove that fact.
8. The applicant did not state how much on average his family required for daily upkeep so as to persuade the court. He did not also tell the court whether the money in the account was the only source of income he had. The court was not convinced that the orders should be lifted on that ground.
9. If the orders were lifted, the applicant would withdraw, transfer or spend the money. Taking into account the amount involved, it was unlikely that such monies could be recovered easily without incurring unnecessary tax-payer's money to recover the transferred or spent amount. It would be prejudicial to the public interest if the orders were to be lifted and money

	<p>withdrawn and spent.</p> <p>10. To order withdrawals or transfer of the money would be tantamount to perpetuating an illegality which was being addressed by the applicant. The essence of instituting preservation of assets and forfeiture proceedings was not to benefit the State but to protect public money, and discourage reliance on illegitimate sources of income as a source of wealth. Therefore, the risk of lifting the order was higher than the hardship likely to be suffered by the applicant which in any event was short lived as the money was save pending expiry of the 90 days since gazettelement or institution of forfeiture proceeding which had to be proven on a balance of probability. At that stage the respondent's property was safe hence no cause to worry.</p> <p>11. The society had legitimate expectation that courts would reasonably balance individual interest with public interest, which in any event was superior unless proved that the application for preservation was extremely malicious, founded on bad faith and amounted to an abuse of power or court process.</p> <p><i>Application dismissed with no order as to costs.</i></p>
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:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

APPLICATION NO. 12 OF 2020

IN THE MATTER OF : AN APPLICATION FOR ORERS UDNER

**SECTION 81 AND 82 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT 2009 (POCAMLA) AS
READ TOGETHER WITH ORER 51 OF THE CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF : PRESERVATION ORDERS IN THE BANK

ACCOUNT NUMBERS [.....] AND [.....] EQUITY

BANK MANDERA BRANCH IN THE NAMEO F ALI ABDI IBRAHIM

BETWEEN

ASSET RECOVERY AGENCY APPLICANT/RESPONDENT

V E R S U S

ALI ABDI IBRAHIM RESPONDENT/APPLICANT

RULING

1. Through an Originating Summons dated 2nd April 2020 and filed on 2nd April 2020 pursuant to Sections 81 and 82 of the Proceeds of Crime and Anti-Money Laundering Act(POCAMLA) and Order 51 rule 1 of the civil procedure rules, the applicant/respondent sought for orders that;

- (i) **This Honourable Court be pleased to certify this application urgent and to be heard exparte on priority basis.**
- (ii) **This Honourable Court be pleased to issue orders prohibiting the respondent and/or their agents or representatives from transacting, withdrawing, transferring, using and any other dealings in respect of funds held in the following accounts;**
 - (a) **Kshs. 39,647,426.00 held at Equity Bank, Mandera Branch Account No. [.....] in the name of Ali Abdi Ibrahim.**
 - (b) **Kshs. 3,857,943.02 held at Equity Bank, Mandera Branch Account No. [.....] in the name of Ali Abdi Ibrahim.**
- (iii) **This court do make any other ancillary orders it may deem appropriate for the proper, fair and effective execution of the preservation order.**
- (iv) **Costs be in the cause.**

2. Having perused the application which was filed under Certificate of Urgency, the Court granted orders as prayed.
3. Upon gazettelement of the said orders and service upon the respondent, the respondent moved with speed and filed the instant Notice of Motion dated 7th April 2020 seeking;

(i) That this Honourable Court be pleased to certify this application as urgent and be heard ex-parte in the first instance.

(ii) That pending inter-partes hearing of this application the Honourable Court does grant the Applicant herein partial and reasonable access to the accounts and funds the subject of this application.

(iii) That the freezing and preservation orders against the applicants' bank accounts issued by the Honourable Court on 3rd April 2020 be lifted and/or quashed for failing to meet the test required for their granting under Section 82 of the Act and for causing unnecessary hardship to the Applicant, and/or be varied in line with Section 89(1) of POCAMLA.

(iv) Such other / further order(s) the Honourable Court may deem fit and just in the circumstances.

(v) That the costs of this application be provided for.

4. Further, the respondent/applicant filed a replying affidavit sworn on 4th May 2020 in response to the applicant's/respondent's Originating Summons dated 2nd April 2020. On 11th May 2020, he again filed a further affidavit sworn on 8th May 2020.

5. In response to the respondent's/applicant's application dated 7th April 2020 seeking to rescind the preservation orders in place, the applicant/respondent through Senior Sergeant Fredrick Musyoki swore an affidavit on 18th May 2020 opposing the application.

6. Subsequently, parties filed their respective submissions and highlighted on the same on 17th June 2020.

Applicant's /Respondent's Case

7. The applicant's / respondent's Originating Motion and the prayers thereof is based on the grounds set out on the face of it and the averments contained in the affidavit of Ssgt Fredrick Musyoki sworn on 2nd April 2020. According to Ssgt Musyoki the investigating officer Asset Recovery Agency assigned to investigate this case, he received information on money laundering and proceeds of crime in Mandera County Government and opened an inquiry file No. 13/20 leading to his investigations to two of the respondent's / applicant's accounts.

8. That on 20th May 2020 he filed an ex parte application at Milimani Chief Magistrate's Court seeking orders to investigate, search, inspect, seize documents and restrict debits funds in bank accounts Nos. 1000176315716 and 100093921283 in the name of the respondent/applicant. Subsequently, the court granted the prayers and allowed investigation and freezing of accounts temporarily to preserve funds suspected to be proceeds of crime.

9. As a consequence, the two accounts were frozen and a sum of Kshs. 39,647,426 held at Equity Bank Mandera Branch account No. 1000176315716 and Kshs. 3,857,943.02 in Equity Account No. 1000193921283 preserved. However, on 31st March 2020 the said orders were set aside by the CM's court on grounds that the freezing and restricting debit orders against the respondent/applicant did not meet the test required for granting the orders under Section 82 of the Act and for causing unnecessary hardship to the applicant in line with Section 89(1) of POCAMLA.

10. He averred that, after analysis of the statements of the two accounts, it revealed several transactions of deposits into the accounts from several companies which received funds from Mandera County in a scheme of money laundering to hide and conceal proceeds of crime.

11. That account No.1000193921283 Equity Bank received suspicious payments totaling to Kshs. 75,461,000/- from Bami Investments Ltd a company to which the respondent is a Director and which was under investigations for receiving fraudulent

payments from Mandera County as follows;

- (a) 14th August 2018 – Kshs. 1,000,000/-
 - (b) 16th August 2018 – Kshs. 3,000,000/-
 - (c) 21st September 2018 – Kshs. 300,000/-
 - (d) 15th May 2019 – Kshs. 42,490,000/-
 - (e) 1st July 2019 – Kshs. 20,000,000/-
 - (f) 8th January 2020 – Kshs. 10,000,000/-
- TOTAL – Kshs. 75,461,000/-**

12. Further, that the same account, received a total of Kshs. 23,980,000/- from Kurte Supplies and General Construction Company Ltd a company under investigation for receiving fraudulent payments from Mandera County Government as follows;

- (a) 17th October 2015 – Kshs. 3,300,000/-
 - (b) 21st April 2016 – Kshs. 2,000,000/-
 - (c) 22nd April 2016 – Kshs. 3,900,000/-
 - (d) 21st June 2016 – Kshs. 1,000,000/-
 - (e) 16th September 2016 – Kshs. 8,000,000/-
 - (f) 28th March 2018 – Kshs. 5,780,000/-
- Total – Kshs. 23,980,000/-**

13. He went further to state that, the same account received Kshs. 3,250,000/- from Risala General Contractors Ltd to which the respondent is a Director a company under investigations for receiving fraudulent payments from Mandera County Government as follows;

- (a) 16th January 2018 – Kshs. 2,300,000/-
 - (b) 19th March 2018 – Kshs. 950,000/-
- Total – Kshs. 3,250,000/-**

14. Equally, further analysis revealed receipt of a total of Kshs. 11,000,000/- from Frontier Engineering Ltd a company under investigation as well for engaging in fraudulent acquisition of funds from Mandera County Government. The amount was broken down as follows;

- (a) 10th September 2016 – Kshs. 3,000,000/-

(b) 31st May 2018 – Kshs. 5,000,000/-

(c) 5th March 2019 – Kshs. 3,000,000/-

Similarly, a sum of Kshs. 6,659,000/- was allegedly received from Bluesky General Construction Ltd a company under investigation for receiving fraudulent payments from Mandera County Government. The said amount was also broken down into;

(a) 12th February 2020 – Kshs. 459,000/-

(b) 27th February 2020 – Kshs. 6,200,000/-

Total – Kshs. 6,659,000/-

15. It was further deposed that the same account received Kshs. 5,000,000/- from Green County Construction Company Ltd. That a sum of Kshs. 124,750,000/- was also received from various companies under investigation. A copy of the bank statement marked FM3 was attached as proof. That the funds deposited in the said accounts were later transferred to various accounts in a scheme of money laundering.

16. He further deposed that in the financial years 2016 to 2020 the respondent made suspicious cash withdrawals and transfers in split transactions to evade the reporting threshold as per Section 44 and 4th Schedule of POCAMLA 2009 Regulation 34 of POCAMLA Regulations 2013.

17. Turning to funds in account No. 100017631576 Equity Bank, Mandera Branch, he averred that suspicious deposits of Kshs. 134,940,000/- were received from Bami Investments a company under investigations. The sum of money received was broken into;

(a) 7th November 2018 – Kshs. 35,960,000/-

(b) 10th December 2018 – Kshs. 11,500,000/-

(c) 2nd March 2020 – Kshs. 45,800,000/-

(d) 5th March 2020 – Kshs. 41,680,000/-

Total – Kshs. 134,940,000/-

18. It was contended that Kshs. 24,500,000/ was on 3rd December 2018 transferred to various persons and entities through various transactions. A copy of the bank statement was attached and marked as annexure FM4.

19. Mr. Musyoki concluded that, the two bank accounts were holding proceeds of crime and or were used as conduits of money laundering contrary to Sections 3, 4, 7 and 16 of POCAMLA.

Respondent's/Applicant's Case

20. Although the law under which preservation orders are issued exparte does not envisage the victim of the said orders to file a replying affidavit, the respondent/applicant filed one on 4th May 2020. However, this replying affidavit is annexed to the supporting affidavit in respect of his Notice of Motion dated 7th August 2020 seeking lifting or rescission of the said orders.

21. In his grounds in support of the application and affidavit sworn on 7th April 2020, the respondent/applicant averred that; the preservation orders in place heavily deprives the applicant means of reasonable living expenses and causing undue hardship for his family; freezing of accounts has greatly prejudiced his business, family and personal affairs thus subjecting him to excessive

financial embarrassment; his life and business have stalled owing to his inability to meet his urgent obligations in discharging his business and life obligations which are due.

22. He further averred that the applicants have not availed or demonstrated any reasonable grounds to believe that the preserved funds have either been used / are intended for use in the commission of an offence or are proceeds of crime hence does not meet the threshold under Section 82 of POCAMLA. He further deposed that the orders were obtained based on falsehood, exaggeration, conjecture, bad faith and complete misapprehension of facts relating to the funds and bank accounts of the applicant.

23. That obtaining orders against the applicant for a non-specified period, the orders in force are extremely prejudicial, unfair and unjust thus jeopardizing the applicant's business and personal affairs. He further stated that similar orders having been issued by the Magistrate's Court and later vacated, the applicants should have appealed or sought review.

24. He stated that there was no evidence linking the applicant with illegal activities as alleged by the respondent who are relying on suspicion and conjecture. The applicant deposed that he has reasonable explanation of the sources of the funds/money flowing into his accounts as evidenced by regular deposits from business and contract works which are lawful and legitimate. He claimed that the money in question was cogent and legitimate earnings from his clients through trading activities with his customers.

25. To prove his assertion, the respondent/applicant annexed a contract agreement (undated) between Bami Investments Ltd and Mandera County Government being construction works for proposed completion of county headquarters by March 2018 (see annexure AD1-4).

26. He contended that there was no proof of any preliminary investigations having been conducted before seeking preservation orders. That the continued preservation orders were exposed him to great risks and hardship thus causing him and his family great anguish and suffering, loss of business and that the suffering he is undergoing far outweighs the risks of lifting the orders. Lastly, he deposed that as a citizen, he has the right to do any business and save money.

27. In his replying affidavit at paragraph 10, he attached a bundle of contract agreements between Risala General Contractors Ltd and Bami Investments Ltd for a sum of Kshs. 364 million (annexure AA1 4). At paragraph 11, he further averred that the 43 million being questioned was out of a contractual sum of Kshs 455 million being a sub-contract between Bami Investment Ltd and Risala General Contractors dated 26th April 2016 for the supply of labour, materials, tools and equipment, power, water and transportation fee for completion of Mandera County Government headquarters.

28. He further attached various payment vouchers and requests for payments dated 1st November 2018 for a sum of Kshs. 35,900,000/-, 20th November 2019 for a sum of Kshs. 11,500,000/-, 20th February 2019 for a sum of Kshs. 42,490,000/-, 11th June 2019 for a sum of Kshs. 20,725,000, 17th December 2019 for a sum of Kshs. 10,646,000/-, 10th February 2020 for a sum of Kshs. 41,680,000, and finally photographs of the Mandera headquarters project under construction (See Ex. No. 1.5 in support of replying affidavit).

29. Regarding monies flowing from companies among them Frontiers Engineering Ltd, Bluesky General Construction Ltd and Green Construction, he stated that those are lawful entities with whom he has associated and does business in informal financing (loan) arrangements in accordance with Somalia culture and Sharia law. He admitted being a Director of Kurte Supplies and General Construction Co. Ltd and Risala General Contractors but not Bami.

Applicant's / Respondent's response to the application dated 7th April 2020

30. In his replying affidavit sworn on 18th May, 2020, Snr. Sgt Musyoki averred that the alleged sub-contract between Bami Investment Ltd on 26th April 2018 and Risala General Contractors Ltd is not true because, payment invoices addressed to Bami Investment were raised by the respondent in person not Risala as a company. That it was illogical for monies raised from a sub-contract to be paid into a personal account operated by the respondent alone yet the company has two Directors.

31. He further averred that Risala Investment Company could not have been sub-contracted to perform construction works as the company had not received its registration. That further investigations at the National Construction Authority revealed that Risala General Contractors had been registered under category NCA 4 in 2017 whose maximum limit for building contractors was Kshs.

200,000,000/-; Kshs. 100m for specialist contractors and 800m for roads and other civil works.

32. He went further to state that Risala Construction Company only declared tax income for the period 2018 amounting to Kshs. 34,987,067/- and Kshs. 16,168,770/- as net assets and nothing for the year 2019. It was also deponed that there was no documentary proof that a sum of Kshs. 364,283,617 was paid by Bami Investment to Risala Co.

33. Touching on Kshs. 23,980 received from Kurte Suppliers and General Construction Company, Sgt Musyoka stated that the company had four Directors among them the respondent and not two as stated by the respondent. A copy of CR. 12 from BRS annexed as FM.9 confirmed the position that the company has four Directors.

34. On the allegation that the money in question was raised out of construction of Kulolo road in 2014-2015, Mr. Musyoka deposed that there was no proof of such contract and how payment was made.

35. As to Kshs. 11m received from Frontier Engineering Ltd between September 2016 and March 2019, he deposed that the same was money concealed through fraudulent payments from Mandera County Government. Regarding the sum of 15.4 million allegedly lent by the applicant to Abdi Kamir, Khalif and Hassan Khalif, Mr. Musyoka deponed that there was no proof of such loan transaction. That Frontier Company has three Directors according to form CR. 12 from the Companies Registry (Ex. FM-10) and not two as claimed by the respondent/applicant.

36. Concerning the sum of Kshs. 6,200,000/- from Bluesky General Construction, he averred that there was no evidence that the same was a refund from Ali Ibrahim of Bluesky General Construction Co. Ltd whom the respondent/applicant had allegedly lent money.

37. He further stated that all the monies received from Green County Construction Company was unsubstantiated and that it was money fraudulently obtained from Mandera County Government.

38. He maintained that the application does not meet the threshold for lifting preservation orders as required under Section 89(1) of POCAMLA. That greater public interest outweighs purported personal inconvenience and that the applicant will not suffer any prejudice by not lifting the order.

Respondent's / Applicant's Submissions

39. Through his submissions dated 18th march 2020, Mr. Asembo for the respondent/applicant submitted that there was no proof that all the monies traced to the respondent's accounts were proceeds of crime or money laundering or obtained through fraud from Mandera County Government. Counsel literally adopted the averments contained in the replying affidavit to the Originating Summons and an affidavit in support of his application dated 7th April 2020. He contended that the exparte preservation order is unconstitutional as it condemns the respondent unheard and that it is an act in breach of Fair Administrative Action Act.

40. Learned Counsel asserted that the suit herein is tainted with malice as the sources of income of the impugned amount have been explained and that preservation orders fall short of the threshold as provided under Section 82 of POCAMLA.

Applicant's / Respondent's Submissions

41. On their part, M/s Gitiri appearing for the applicant/respondent filed submissions dated 2nd June 2020. Counsel submitted that the burden of proof lies upon the applicant to prove that; the operation of the order concerned will deprive him of the means to provide for his reasonable living expenses and cause undue hardship to him and his family, that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. In support of this proposition, counsel referred the court to the decision in the case of **Assets Recovery Agency vs. Pamela Aboo (2018)eKLR**.

42. Learned counsel literally adopted the averments contained in the affidavit in support of the Originating Summons and the replying affidavit to the respondent's/applicant's application.

43. She contended that the respondent/applicant has failed to show how the money from Mandera County Government got its way to his accounts. That the source of cash deposits other than those from companies have not been explained. To support this position, counsel referred the court to the holding in the case of Asset Recovery Agency vs James Thuita Nderitu and others Civil Suit No. 2/2019 where the court held that;

“If I understand the respondents correctly, their business involves the transfer of funds from one entity to another. Fair enough. But two questions come to mind. First, apart from banking institutions, I do not know of any entities whose business involves “the transfer of funds from one entity to another.” Secondly, in order for funds to be transferred from one entity’s account to another’s account, the entities must have legitimate businesses from which they obtain the money that they transfer between themselves.”

44. Regarding the risk of lifting the orders vis a vis the hardship likely to be suffered by the respondent/applicant, counsel opined that lifting the orders will jeopardize the intended recovery proceedings as the funds may be withdrawn, transferred or spent.

45. In her view, the court should preserve the sub strum of the forfeiture proceedings where evidence shall be adduced to prove that the said amount was as a result of either proceeds of crime or money laundering. To fortify this argument, reliance was placed on the decision in the case of Assets Recovery Agency vs Charity Wangui Gethi (2017)eKLR where the court held that:-

“Until that issue is determined by the trial court, the respondent/applicant cannot claim an absolute right over that property.”

46. Lastly, M/s Gitiri contended that the funds in question fall within the definition of what constitutes proceeds of crime as defined under Section 2 of POCAMLA.

Analysis and determination

47. I have considered the application herein, responses thereto and rival submissions by both counsel. The only issue that arise for determination is whether the application herein meets the threshold for rescinding or lifting of the preservation orders herein in compliance with Section 89 of POCAMLA.

48. The impugned orders were issued *ex parte* on 3rd April 2020 pursuant to an Originating Motion dated 2nd April 2020. The said orders were issued in accordance with Section 82 of the POCAMLA which provides that;

Sub-Sec. 1 - The Agency Director may, by way of an *ex parte* application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with the property.

Sub-Sec. 2 - The court shall make an order under Subsection (1) if there are reasonable grounds to believe that the property concerned-

(a) has been used or is intended for use in the commission of an offence; or

(b) is proceeds of crime.

Sub-Sec. 3 - A court making a preservation order shall at the same time make an order authorizing the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

Sub-Sec. 4 - Property seized under sub-section (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

49. Section 83 goes further to provide for gazettelement of the preservation orders pursuant to Section 84 of POCAMLA. Upon gazettelement of preservation orders, the same are bound to expire after 90 days unless there is an application for a forfeiture order pending before the court in respect of the property subject of the preservation order.

50. Before a preservation order is made, the court making such order must be satisfied that there are reasonable grounds to do so. Having issued the said orders, it is presumed that the court having perused material placed before it was satisfied that there was prima facie evidence or reasonable ground to believe that the property in question was obtained as a result of proceeds of crime or through money laundering.

51. The court is therefore bestowed with wide discretionary powers to decide on whether to grant preservation orders or not. As to whether eventually the preserved property is to be forfeited or not is a matter of evidence upon filing a forfeiture application or suit. In the case of **Asset Recovery Agency v Lilian Wanja Muthoni T/A Sahara Consultants and 2 Others Application No. 49/2018** Anti-Corruption and Economic Crimes Division Nairobi the court had this to say;

“On 29th October 2018 this court after considering all that was filed herein was satisfied that there were reasonable grounds to believe that the funds in the 1st Applicant’s accounts were proceeds of crime. It therefore granted the orders preserving the said funds. There is no dispute that a forfeiture suit vide Misc Application No 58 of 2018 has been filed and served on the Respondents/Applicants. It is in that suit that evidence will be led for the court to determine whether indeed the said funds are proceeds of crime or not.”

52. The allegation by Mr. Asembo that it was unconstitutional to issue exparte orders cannot therefore apply as the orders were issued pursuant to a statutory provision which provides a remedy under Section 89(1) for revision or variation of the orders if found not deserving. The issue of being condemned unheard is not sustainable.

53. The instant application has been brought under Section 89(1) of POCAMLA seeking to rescind or vary the orders on grounds that;

(i) The operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and

(ii) The hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.

54. As stated in the case of **Assets Recovery Agency vs Pamela Aboo (supra)**, the burden to prove that the respondent/applicant deserves the orders of rescission and variation of the preservation orders in accordance with Section 89(1) of POCAMLA lies with the respondent/applicant.

55. Similar position was held in the case of **Asset Recovery Agency vs Samuel Wachenje and 9 Others (2018)eKLR** where the court held that a party seeking to have preservation orders reviewed or varied must prove the requirements under Section 89(1) of POCAMLA.

56. The gist of the application herein is that the applicant received information that the respondent/applicant was operating two bank accounts suspected of receiving proceeds of crime and or funds obtained through money laundering. According to the agency, some of the monies was from the County Government of Manderu which was fraudulently acquired and direct deposits from unknown sources and therefore suspected to be proceeds of crime.

57. Under Section 2 of the POCAMLA, proceeds of crime has been defined as;

“Proceeds of crime means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the

time the offence was committed"

58. In the instant case, the applicant/respondent received huge sums of monies deposited in his two accounts namely; Account No. 1000176315716 and 1000193921283 at Equity Bank Manderu Branch. The applicant/respondent gave a breakdown of suspicious sums of money;

(i) Kshs. 75,461,000 received into the respondent's account No. 100019321283 from Bami Investments Company under investigation for obtaining money fraudulently.

(ii) Kshs.23,980,000 from Kurte Supplies and General Construction Company deposited in the respondent's/applicant's said account on various days.

(iii) Kshs11 million from Frontier Engineering Ltd which is also under investigation for obtaining money fraudulently from Manderu County.

(iv) Kshs. 6,659,000/- from Bluesky General Construction Company.

(v) Kshs. 5 million from Green County Construction Company.

(vi) Kshs. 131,940 from Bami Investments.

(vii) Kshs. 124,750,000/- from other companies.

59. According to the respondent/applicant, most of these monies were coming from funds loaned on Islamic Sharia, or Somalia culture or from contracts and sub-contracts relating to construction works at Manderu County Government Headquarters.

60. The respondent/applicant attached to his replying affidavit evidence of a sub-contract between Risala Company Ltd to which he was a Director and Bami Investments for completion of proposed Manderu County headquarters. The agreement whose copies are contradictory with one undated and another dated March 2018 discloses that the contract was for a sum of Kshs. 455,354.32.

61. Attached to it are invoices drawn in the respondent's/applicant's personal capacity and money deposited to his own personal account No. 1000193921283 instead of the company account which has more than one Director.

62. Besides, in the same suspect account there are several direct personal deposits in terms of millions which have not been explained an indication of possible money laundering. This will be a matter of evidence if forfeiture proceedings are eventually filed in which case proof on a balance of probability will be required. The respondent has attempted to explain part of the monies as having been received from companies with whom he was transacting business. He only attached contractual documents between Risala Company and Bami Investment.

63. He has not explained why he was receiving money from Frontier Engineering, Bluesky General Construction and Green Construction Company. He has only given a general statement that he was trading with this companies. He does not specifically state the nature of the business or trade he was conducting or carrying out fetching how much.

64. It was not enough to state that so and so was trading with so and so without proving that the business transacted was lawful and therefore the money generated therefrom was legitimate. Although he has tried to connect the source of money as being proceeds out of construction works in completing Manderu County Government headquarters which is subject to proof, the same amount has been mixed with other unexplained sources of income suspected to be proceeds out of money laundering.

65. The allegation that some money in terms of millions was from informal loan facilities without any evidence backing that allegation is not enough. That is a mere statement which requires validation by way of cogent evidence. In the absence of any proof that such monies were obtained from legitimate sources of income which is a matter of fact, the same shall be deemed to be money

obtained through illegitimate means which could be a crime by way of money laundering or fraud.

66. Since the respondent / applicant has not rendered a satisfactory account justifying receipt of the impugned deposits, this court is left with one logical conclusion that the applicant has established a prima facie case that the preservation orders were based on reasonable grounds. The argument that similar orders were issued and vacated by the magistrate's court is not a bar to the applicant from instituting forfeiture proceedings which is an independent civil remedy as opposed to investigative proceedings before the magistrate's court. The suit cannot be declared resjudicata on that account and therefore no need to appeal or seek review as the purpose for obtaining those orders was achieved by accessing and obtaining the intended bank related documents.

67. Has the respondent/applicant been deprived of the means to provide for his reasonable living expenses and suffered any hardship as a result" According to the replying affidavit and affidavit in support of the application for lifting the order, the respondent/applicant is a business man. He is definitely going on with his normal business. The orders herein do not stop him from doing further business.

68. Although he claimed that the money in the account was being used for family survival and doing business, the same is the subject of litigation which if proved can be forfeited. Therefore, it will defeat the very purpose of preservation orders if courts were to release such monies for further expenditure unless proved purely on humanitarian grounds that the frozen amounts are the only source of income relied upon by the family to survive hence the need to make provision for reasonable daily upkeep. The applicant has not endeavoured to prove that fact

69. Besides, he did not state how much on average his family requires for daily upkeep so as to persuade the court. He did not also tell the court whether the money in the account is the only source of income he has. For those reasons, I am not convinced that the orders should be lifted on that ground.

70. Does the hardship the applicant is likely to suffer outweigh the risks that the property could be destroyed, lost, damaged, concealed or transferred" It is obvious that, if the orders are lifted, the respondent/applicant will withdraw, transfer or spend the money. Taking into account the amount involved, it is unlikely that such monies can be recovered easily without incurring unnecessary tax-payer's money to recover the transferred or spent amount. It will be prejudicial to the public interest if the orders were to be lifted and money withdrawn and spent.

71. To order such withdrawals or transfer will be tantamount to perpetuating an illegality which is being addressed by the applicant. The essence of instituting preservation of assets and forfeiture proceedings is not to benefit the state but to protect public money, and discourage reliance on illegitimate sources of income as a source of wealth. Therefore, the risk of lifting the order is higher than the hardship likely to be suffered by the respondent/applicant which in any event is short lived as the money is save pending expiry of the 90 days since gazettment or institution of forfeiture proceeding which must then be proved on a balance of probability. At this stage the respondent's property is save hence no cause to worry.

72. Society has legitimate expectation that courts shall reasonably balance individual interest with public interest which in any event is superior unless proved that the application for preservation is extremely malicious, founded on bad faith and amounts to an abuse of power or court process.

73. Having held as such, it is my holding that the respondent / applicant has not proved to the satisfaction of the court that the impugned orders should be rescinded or reviewed. Accordingly, application is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15th DAY OF JUNE, 2020.

.....

J. N. ONYIEGO

JUDGE



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](http://kenyalaw.org) under a [Creative Commons](https://creativecommons.org/licenses/by/4.0/)

[Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions.
Read our [Privacy Policy](#) | [Disclaimer](#)