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Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	John Nyabuto Onyiego
Citation:	Assets Recovery Agency v Abdi Mohamed Ali & another [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
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Docket Number:	-
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Case Outcome:	-
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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 & ECONOMIC CRIMES DIVISION

MISC. APPLICATION NO. 11 OF 2020

IN THE MATTER OF : AN APPLICATION FOR ORDERS UNDER

SECTIONS 81 & 82 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT (POCAMLA) AS READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES

BETWEEN

ASSETS RECOVERY AGENCY.....APPLICANT/RESPONDENT

V E R S U S

ABDI MOHAMED ALL.....1ST RESPONDENT/APPLICANT

SAADIA SHEIKH OSMAN.....2ND RESPONDENTRESPONDENT

RULING

Introduction

1. The Asset Recovery Agency (hereinafter the “applicant”) moved this court on 19th March 2020 vide an Originating Summons of even date pursuant to Sections 81 and 82 of the Proceeds of Crime and Anti-Money Laundering Act (hereinafter referred to as “POCAMLA”), seeking orders that;

(1) The application be certified urgent and to be heard exparte;

(2) This Honourable Court be pleased to issue preservation orders prohibiting the respondents and or their agents or representatives from transacting, withdrawing, transferring, using and any other dealings in respect of funds held in the following accounts;

(i) Kshs. 40,806,532.00 held at Equity Bank, Mandera Branch Account No. [xxxx] in the name of Abdi Mohamed Ali;

(ii) Kshs. 21,448,100.00 held at Equity Bank, Mandera Branch Account No. [xxxx] in the joint names of Abdi Mohamed Ali and Saadia Sheikh Osman;

(3) This court to make any other ancillary orders it may deem appropriate for the proper, fair and effective execution of the preservation order.

2. The application was certified urgent the same day it was filed and prayers one and two granted. Aggrieved by the grant of the aforesaid exparte orders, the respondent lodged a Notice of Motion application dated 7th April 2020 and filed on 9th April 2020 in accordance with Section 89(1) of POCAMLA, Sections 3 and 3A of the Civil Procedure Act and Order 51 seeking orders as hereunder;

- (1) That this Honourable Court be pleased to certify this application as urgent and be heard *ex parte* in the first instance.
- (2) That pending *inter partes* hearing of this application the Honourable Court does grant the applicants herein partial and reasonable access to the accounts and funds the subject of this application.
- (3) That the freezing and preservation orders against the applicant's bank accounts issued by the Honourable Court on 19th March 2020 be lifted and/or quashed immediately for failing to meet the test required for their granting under Section 82 of the Act and for causing unnecessary hardship to the applicants in line with Section 89(1) of POCAMLA.
- (4) Such other / further order (s) the Honourable Court may deem fit and just in the circumstances.
- (5) That the costs for this application be provided for.

3. The application is predicated upon grounds advanced on the face of it and an affidavit sworn jointly on 17th April 2020 by Abdi Mohamed Ali and Saadia Sheikh Osman. In response, the applicant/respondent filed a replying affidavit sworn on 6th May 2020 by Senior Sergeant Fredrick Musyoki a Police Investigator attached to the Asset Recovery Agency.

Applicant's / Respondent's Case

4. The genesis of the applicant's/respondent's prayer for preservation orders freezing the respondent's/applicant's account emanate from an inquiry instituted to investigate activities in the said accounts for purposes of ascertaining whether they were holding proceeds of crime. Consequently, the applicant/respondent filed *ex parte* **Misc. Cr. Application Number 685/2020** Milimani Chief Magistrate's Court seeking orders to search, inspect, seize, freeze and or preserve funds in the said accounts owned and or controlled by the respondents which orders were granted for a period of 14 days.

5. According to Senior Sgt Fredrick Musyoki's averment in his affidavit sworn on 19th March 2020, after receiving the *ex parte* orders, he proceeded to obtain statements of the affected bank accounts which revealed receipt of huge sums of money suspected to be proceeds of crime or obtained through money laundering.

6. That the deposits in question were in tranches of Kshs. 1,000,000 to evade reporting threshold as per Section 44 and 4th Schedule of POCAMLA 2009 and Regulation 34 of POCAMLA 2013. He further averred that, further investigations revealed that there was reasonable cause to believe that the accounts were holding proceeds of crime obtained from illegitimate sources by the respondents as follows;

- (i) **Kshs. 40,806,532.00 held at Equity Bank, Mandera Branch Account No. [xxxx], in the name of Abdi Mohamed Ali.**
- (ii) **Kshs. 21,448,100.00 held at Equity Bank, Mandera Branch Account NO. [xxxx] in the joint names of Abdi Mohamed Ali and Saadia Sheikh Osman.**

7. The officer went on to depose that the said accounts received massive suspicious cash deposits made from different locations such as Garissa, Mandera, Moyale, Eastleigh, Westlands among others. That Equity Bank Mandera Branch Account No. [xxxx], held in the name of Abdi Mohamed Ali received suspicious cash deposits of Kshs. 51,413,493.50 on diverse dates reflected as follows;

- | | | | |
|-----|---------------------------------|---|-----------------|
| (a) | 10 th July 2014 | - | Kshs. 800,000/- |
| (b) | 29 th September 2014 | - | Kshs. 300,000/- |
| (c) | 24 th December 2014 | - | Kshs. 400,000/- |
| (d) | 11 th June 2015 | - | Kshs. 500,000/- |

- (e) 7th August 2015 - Kshs. 200,000/-
- (f) 4th September 2015 - Kshs. 200,000/-
- (g) 23rd February 2016 - Kshs. 250,000/-
- (h) 21st June 2016 - Kshs. 1,900,000/-
- (i) 23rd June 2016 - Kshs. 2,140,000/-
- (j) 23rd June 2016 - Kshs. 250,000/-
- (k) 1st July 2016 - Kshs. 376,000/-
- (l) 22nd July 2016 - Kshs. 250,000/-
- (m) 23rd July 2016 - Kshs. 140,000/-
- (n) 14th March 2017 - Kshs. 300,000/-
- (o) 6th June 2017 - Kshs. 500,000/-
- (p) 9th June 2017 - Kshs. 500,000/-

8. He went further to state that in Mander Branch Account No. [xxxx] in the joint names of Abdi Mohamed Ali and Saadia Osman received suspicious cash deposits totaling to Kshs. 21,450,000/- on diverse dates with no withdrawal as indicated hereafter;

- (1) 27th July 2018 - Kshs. 2,000,000/-
- (2) 27th July 2018 - Kshs. 2,000,000/-
- (3) 27th July 2018 - Kshs. 2,000,000/-
- (4) 29th July 2018 - Kshs. 900,000/-
- (5) 17th October 2018 - Kshs. 900,000/-
- (6) 26th October 2018 - Kshs. 800,000/-
- (7) 20th November 2018 - Kshs. 900,000/-
- (8) 26th November 2018 - Kshs. 300,000/-
- (9) 6th December 2018 - Kshs. 200,000/-
- (10) 15th December 2018 - Kshs. 900,000/-
- (11) 23rd January 2019 - Kshs. 700,000/-

- | | | | |
|------|---------------------------------|---|-----------------|
| (12) | 16 th February 2019 | - | Kshs. 150,000/- |
| (13) | 2 nd March 2019 | - | Kshs. 500,000/- |
| (14) | 7 th March 2019 | - | Kshs. 600,000/- |
| (15) | 29 th March 2019 | - | Kshs. 700,000/- |
| (16) | 6 th April 2019 | - | Kshs. 600,000/- |
| (17) | 15 th April 2019 | - | Kshs. 900,000/- |
| (18) | 28 th May 2019 | - | Kshs. 700,000/- |
| (19) | 12 th August 2019 | - | Kshs. 400,000/- |
| (20) | 6 th August 2019 | - | Kshs. 800,000/- |
| (21) | 7 th August 2019 | - | Kshs. 400,000/- |
| (22) | 19 th August 2019 | - | Kshs. 800,000/- |
| (23) | 31 st August 2019 | - | Kshs. 700,000/- |
| (24) | 2 nd September 2019 | - | Kshs. 500,000/- |
| (25) | 12 th September 2019 | - | Kshs. 900,000/- |
| (26) | 13 th September 2019 | - | Kshs. 600,000/- |
| (27) | 18 th September 2019 | - | Kshs. 300,000/- |
| (28) | 8 th February 2020 | - | Kshs. 700,000/- |

10. It was further averred that the said amount was reasonably suspected to be proceeds of crime obtained from illegitimate sources of income hence the need to be preserved pending filing and hearing of an intended forfeiture application. That it is in the greater public interest that the funds be preserved.

Respondents' / Applicants' Case

11. As stated, the respondents/applicants challenged the preservation orders obtained ex parte through their application dated 7th April 2020. Among the grounds cited for the court to rescind and or vary the orders are that; the impugned orders have deprived and continue to deprive the applicants and their dependants of means to provide for reasonable living expenses and cause undue hardship; freezing the accounts has greatly prejudiced the applicants' business and personal affairs thus subjecting them to excessive financial embarrassment; the hardship the applicants continue to suffer does outweigh the risk that the funds involved may be concealed, lost or transferred; Applicants' business have stalled owing to inability to meet routine and urgent business obligations since the accounts frozen contain only deposits made which were honest payments made by clients from the respondents'/applicants' legitimate savings/lawful trading activities and that there is no evidence of the applicants/ respondents having conducted any preliminary investigations prior to seeking the impugned preservation orders.

12. It is the respondents' / applicants' averment that similar preservation orders were sought and issued in **Milimani Magistrate's Court Misc. Appl. 685/2020** Nairobi on 26th February 2020 which orders lapsed on 11th March 2020. That the application dated 10th March 2020 seeking to extend the said orders was disallowed and the freezing order naturally died.

13. In the respondents'/applicants' view, the accounts in question have been the subject of freezing and preservation orders without any merit and or benefit of hearing them. They contended that the applicant/ respondent should have challenged the orders lifting the freezing orders before the lower court through Revision or Appeal to this Court.

14. They further deposed that the large deposits reflected in the two accounts are clearly supported by evidence of regular income resulting from trading in large scale livestock, fresh farm produce, clothing and jewellery as well as savings spanning over a period of 35 years. In their view, the applicant/respondent did not prove any connection of the amount deposited with money laundering nor proceeds of crime.

15. To prove that they were engaged in livestock business, they attached letters from County Government of Marsabit dated 1st November 2017 addressed to whom it may concern stating that one Markoni Abdi Mohamed ID No. [xxxx] was a member of a livestock trade Moyale Branch, Livestock Marketing Association (Annexure"4").

16. They contended that, the applicant/respondent has not placed any evidence before the court to suggest that the money was obtained through money laundering or any criminal activities. That the allegations of money laundering are malicious and an abuse of the court process by various State Agencies with a view to frustrating innocent citizens.

Reply by the Applicant/Respondent

17. In response to the respondents'/applicants' application, the applicant/respondent (ARA) filed its replying affidavit on 7th May 2020 sworn by Ssgt. Fredrick Musyoki. They reiterated their averments in the affidavit in support of the application for preservation orders issued on 19th March 2020. The applicant/respondent stated that monies deposited in the two accounts were not from legitimate sources of income. Sgt Musyoki averred that, between 27th July 2018 and 8th February 2020 a total of Kshs. 21,448,000/- was deposited with no single withdrawal being made. That this is proof that the money was not for purposes of conducting livestock business as alleged.

18. As to whether the 1st applicant is suffering on account of having been deprived his living expenses, it was deposed that he is an employee of Mandera County Government hence has a salary which is not affected by the preservation orders.

19. That the huge sources of income which are unexplained are suspected to be sources of crime hence public interest demands that the money be preserved.

Rejoinder by the Respondents/Applicants

20. In their rejoinder to the applicant's/respondent's reply to their application, the respondents/applicants swore a joint supplementary affidavit on 19th June 2020 elaborating on how the 1st respondent/applicant being the County Director livestock Mandera County drew a salary through his Account No. [xxxx] starting from 2014 to January 2020 amounting to Kshs. 10,816,226. He attached a letter of appointment and pay slip reflecting the 1st respondent's gross salary of Kshs. 246,110/- and net income of Kshs. 169,400/- as at January 2020 (see annexure AMA-1).

21. The 1st respondent/applicant further claimed that he was a livestock trader. He attached some letters addressed to "whom it may concern" that the 1st respondent/1st applicant was /is a livestock trader. The letters dated 4th July 2016 (AMA-2), 1st April 2020 (AMA-3), 13th June 2017 (AMA-4), 13th October 2018 (AMA-5), 13th August 2018 (AMA-6) were attached.

22. He also attached letters from Garissa St. Peters Primary School dated 23rd May 2020 addressed to "whom it may concern" to confirm that the 1st respondent is a parent in the said school and was owing the school Kshs. 150,000/- (AMA-3).

23. In justifying their sources of income, the 1st respondent/ applicant listed the sources of income as, sale of camels, cereals,

honey, cattle, goats and Kshs. 6m in Account No. [xxxx] as an inheritance from the 2nd respondent's father being 60 camels sold at Kshs 100,000 each.

24. They averred that the 1st respondent was suffering from High Cholesterol, High Blood Pressure and Diabetes all of which requires money for medication. They also attached letters from Munara Primary School Garissa and St. Peters Garissa primary school amounting to Kshs. 240,000/- being outstanding school fees for their children which they are unable to pay due to the frozen accounts.

Applicant's / Respondent's Submissions

25. Ms. Gitari appearing for the applicant/respondent filed their submissions on 18th June 2020. Counsel submitted on three issues listed as follows;

(a) Whether the operation of the impugned preservation order will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and

(b) 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.

26. Before submitting on the two issues aforesaid, learned counsel raised concern with the manner in which the affidavit in support of the respondents' /applicants' application dated 7th April 2020 was sworn jointly by two deponents thus contravening Order 4 Rules 1 & 2 and Order 19 rule 5 of the Civil Procedure Rules which provides that where there are several plaintiffs, one of them with written authority may swear a replying affidavit on behalf of the others and that an affidavit must be sworn by the first person on behalf of the others. She therefore urged the court to dismiss the application as being fatally defective. In support of this proposition, counsel made reference to the holding in the case of **Duncan Gakuna Kionga and 2 Others v. Timboroa Hotels Limited (2008)eKLR** where the court held that an affidavit sworn by more than one person is incompetent.

27. Further reliance was placed in the decision of **Nicholas Kiptoo Arap Korir Salat v IEBC and Others (2003)eKLR** where Kiage J held that parties cannot circumvent rules of evidence and procedure while hiding under the cover of Article 159 of the Constitution.

28. Concerning whether the respondents/applicants have discharged their burden under Section 89(1) of POCAMLA, counsel submitted that they have not established that the sources of income in question were legitimate. That the burden of proving existence of the factors stated under Section 89(1) have not been discharged. To fortify that argument, counsel relied on the decision in the case of **Assets Recovery Agency v Pamela Aboo (2018)eKLR and Mombasa High Court Petition No. 4/2009** between **Stephen Vicker Mangira and Another v The Assets Recovery Agency and Others Petition N. 4 of 2019 Mombasa High Court** where the Court held that the evidentiary burden lies with applicant.

29. Concerning the allegation that the preservation orders deprives the respondents/applicants their living expenses, Ms. Gitari submitted that, out of Kshs 51,413,495/- received in the 1st respondent's/applicant's bank Account No. [xxxx] from August 2013, only Kshs. 10,558,843/- accounts for the 1st respondent's salary and other emoluments leaving a balance of over Kshs. 35,969,000/- unexplained.

30. Learned counsel submitted that the explanation given by the respondents justifying the sources of income is not supported by any evidence. Mrs. Gitari opined that, failure to attach evidence on the sources of income is sufficient proof that the money was not legitimate. In support of this argument, counsel relied on the holding in the case of **ACEC Civil Suit No. 2 of 2019 Assets Recovery Agency v. James Thuita Nderitu and Others (2020)eKLR** where the court held that failure to give evidence to show how the suspect funds from NYS were received in their accounts and for what purpose, the respondents were deemed to be beneficiaries of proceeds of crime.

31. Turning to deposits in Account No. [xxxx] amounting to Kshs. 21,450,000/- for the period between 27th July 2018 and 8th February 2020 without any single withdrawal, counsel submitted that the respondents/applicants cannot justify receipt of such money as they have no known registered business name nor have they been paying tax out of the alleged businesses. As to the 2nd

respondent's/applicant's claim that she is a business lady engaged in sale of livestock and clothing, there was no proof of such business as required in the holding in the case of **Pamella Aboo** (supra). To further strengthen her submission, counsel referred to the decision in the case of **Asset Recovery Agency v Lilian Wanja Muthoni Mbogo and Others v ACEC Misc. Appl. No. 58/2018** where the court emphasized on the need for proof of existence of business by production of stock registers, local purchase orders, delivery notes etc which is lacking in this case.

32. As regards the respondents'/applicants' claim that the impugned orders have subjected them to undue hardship and suffering which outweighs the risk that the property may be lost, destroyed, damaged or concealed, counsel submitted that the intended forfeiture proceedings will be rendered nugatory if the orders sought are granted and the money withdrawn.

Respondents' / Applicants' Submissions

33. The firm of Allamano Associates appearing for the respondents/appellants filed their submissions on 11th June 2020. Mr. Ongudi who argued the application broke down the issues for determination as follows;

(a) Whether Accounts N0. [xxxx] and [xxxx] hold proceeds of crime.

(b) Whether the operation of the preservation order deprives the applicant of means to provide for his reasonable living expenses and;

(c) Whether the hardship the applicant is suffering or likely to suffer outweighs the risk that the property concerned will be lost, concealed or transferred.

34. According to the respondents, there is no proof that the sources of income in question were as a result of money laundering or proceeds of crime. To support this claim, counsel referred to the decision in the case of **Asset Recovery Agency v. Jared Kiasa Otiemo (2019)eKLR** where the court held that the applicant (Agency) must prove existence of reasonable suspicion that the money in question has a nexus with money laundering or criminal activity and that there has to be a causal link.

35. Learned counsel contended that there is no good reason to continue preserving the frozen accounts as the respondents have explained their sources of income. Counsel opined that the applicant/respondent has not established a prima facie case to prove that the property in question has been the subject of some corrupt dealings. To fortify this proposition, counsel referred to the decision in the case of **Ethics and Anti-Corruption Commission v. Ministry of Medical Services and Another (2012)eKLR** where J. Odunga held that;

“A prima facie case must be presented before court that the property in question has been the subject of some corrupt dealings.”

36. On whether the operation of the preservation orders deprives the appellant of means to provide for his reasonable living expenses, counsel submitted that the appellants who are husband and wife cannot meet the living expenses, medical and school fees expenses hence depending on relatives. Learned counsel further submitted that account No. [xxxx] has the 1st respondent's/applicant's money being his salary which should not be held in this account as he suffers with his family. That a sum of Kshs. 10,816,226/- belongs to his salary which cannot be proceeds of crime nor money laundering.

37. On the issue whether the applicants are suffering hardship which outweighs the risk of the property being concealed, lost or transferred, counsel submitted that the applicant is suffering from Diabetes, High Blood Pressure and Cholesterol. According to counsel, the first applicant's life is at risk as a result of these orders hence the need to rescind the same.

Analysis and Determination

38. I have considered the application herein and the response thereto. I have also considered written submissions of both counsel and the authorities cited. There is no dispute that ex parte preservation orders were issued against the respondents/ applicants on 19th March 2020 freezing their two bank accounts pursuant to Sections 81 and 82 of POCAMLA. The respondents / applicants have

moved this court seeking to rescind or lift the said preservation orders citing various grounds as provided under Section 89(1) of POCAMLA.

39. There are two issues for determination. Firstly, whether the respondents/applicants have satisfied the criteria set out for grant of rescission or varying of the impugned orders. Secondly, whether the application by the respondents/applicants is defective by virtue of the supporting affidavit being sworn by the respondents jointly.

40. Before I deal with the first issue which is key to determination of this application, I would like to first address the second issue. The applicant /respondent claimed that the application is defective as the supporting affidavit is sworn by two deponents instead of one thus offending Order 19 Rule 5 of the Civil Procedure rules. Indeed, the impugned affidavit is jointly sworn by the two respondents/applicants. However, the affidavit is sworn in plural by the two by stating “**We, ABDI MOHAMED ALI & SAADIA SHEIKH OSMAN**”

41. The expression “**WE**” implies that the deponents are taking oath each confirming the information contained in the affidavit as true and correct information. This is different from where the oath is taken in singular meaning that only one of the deponents is taking oath. In this case the joint affidavit is in sworn in plural hence nothing irregular. See SAMWEL CHACHA RIOBA & another v HEADLINK PUBLISHERS LIMITED & another (2011) Eklr where Justice Waweru distinguished affidavits sworn jointly in plural as being properly sworn. The judge went further to state that;

“There is absolutely nothing wrong with the supporting affidavit jointly sworn as it is by the plaintiffs. It is drawn in the first person (Albeit plural) as required by rule 5 Order XVIII”

42. For the above reasons stated, I do not find merit in submission by the applicant’s counsel hence the application can be said to be defective.

43. Turning to the first issue which is critical, preservation orders herein were issued pursuant to Section 82 of 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.

44. The underlying factor for consideration by a court before issuing preservation orders under Section 82 of POCAMLA is the conviction by such court that there are reasonable grounds to warrant issuance of such orders: See Assets Recovery Agency v Lilian Wanja Muthoni T/A Sahara Consultants and Others (supra).

45. There is no doubt that the expression reasonable grounds is subjective. What may sound to be reasonable ground to somebody may not necessarily be reasonable to another person. The court must be satisfied when looking at the facts at hand from the lense of an ordinary person given the set of facts or material presented before it, that any ordinary person would arrive at the conclusion that the monies in the frozen accounts could be as a result of money laundering or proceeds of crime. Although the Act does not state or define what constitutes ‘reasonable ground’ Concise Oxford English Dictionary 9th Edition defines the word reasonable to mean

“fair and sensible; able to reason logically; as much as is appropriate or fair; fairly good.”

46. It therefore follows that despite the law not providing for interpartes hearing upon hearing an ex parte application for preservation orders, the court must adequately assess the material or evidential facts presented before it to be convinced that they lay a factual basis for such orders to issue. See **Ethics and Anti-Corruption Commission v. National Bank of Kenya and Another (2013)eKLR** where the court stated that:-

“Provided that there are some evidential facts at the ex-parte stage to enable the court in the exercise of its discretion, to find that reasonable grounds have been established there are no other valid preconditions to the grant of the ex-parte order. At the ex-parte stage the evidential facts need not answer the description of any specific offences of corrupt conduct provided they point to that probability.”

47. By the court issuing the impugned ex parte order herein, the presumption is that, it was satisfied that from the material before it, there was sufficient reason to so grant. The court has jurisdiction to grant the prayers sought or refuse if satisfied that there is no sufficient ground to do so. Although on the face of it the respondent may appear to have been condemned unheard, there is a remedy under Section 89(1) of POCAMLA where the applicant can move the court to rescind or vary the orders in question. With this provision, the respondent cannot argue that he was condemned unheard and that his constitutional rights were trampled upon.

48. In this case, the respondents were aggrieved with the order and moved with speed to exercise their right to be heard by seeking the court to rescind the orders. Section 89(1) of POCAMLA thus provide for that remedy by stating that;

Sub-Section 1 – A court which makes a preservation order;

(a) may, on application by a person affected by that order, vary or rescind the prohibition 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 causes 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.

49. It is incumbent upon the applicant to prove existence of these factors before a court can properly exercise its discretion to set aside those orders. Before the court could exercise those powers, the applicant (Agency) must establish a prima facie case that the subject property is as a result of money laundering or proceeds of crime as required under POCAMLA.

50. Proceeds of crime is defined under Section 2 of the POCAMLA which states that;

“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”

51. From the definition of the word ‘proceeds of crime’ the applicant/respondent must endeavor to connect the alleged proceeds of crime with some offence or criminal activity directly or indirectly. In other words, there must be a nexus between the money in question or property involved whether acquired directly or indirectly or even converted into some form of assets through some criminal activity. The applicant/respondent cannot rise up one morning and decide to brand somebody’s property as proceeds of crime without any evidence or proof that the money or property the subject of investigation has a relationship with a crime of some kind.

52. However, unlike the limb of proceeds of crime, there is a catch on the other limb of money laundering which is too wide and all-encompassing in casting the net wider towards realization of property generally and reasonably suspected to be obtained out of illegitimate sources of income. Section 3 of POCAMLA defines money laundering as an offence under Section 3, 4 and 7 of POCAMLA. Section 3 goes further to provide that;

“A person who knows or who ought to have reasonably known that property is or forms part of the proceeds of crime and -

a. Enters into any agreement or engages in any arrangement or transaction with any one in connection with that property whether that agreement, arrangement or transaction is legally enforceable or not, or

b. Performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to;

i. Conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which any one may have in respect- thereof; or

ii. Enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or

iii. Remove or diminish any property acquired directly or indirectly as a result of the commission of an offence, commits an offence.”

53. From the bank statements presented before court, it is clear that there are huge deposits made in the two impugned accounts which are held by the respondents who are husband and wife. The applicant/respondent claimed that the respondents/applicants were receiving suspicious huge transactions mostly deposited in tranches of below 1 million to avoid detection and explanation by Central Bank and seek explanation as to the source of such money. The duty imposed upon the applicant/respondent is reasonable suspicion on grounds that the money in the accounts was either as a result of crime or money laundering. From the evidence on record, prima facie the money in question has no direct or indirect link to a specific criminal activity.

54. Can the same be deemed to be proceeds of crime if the respondent knew or ought to have known that the money was being concealed or disguised so as to convert it from being illegally acquired to some clean money before eyes of an ordinary person. Is there reasonable ground to suspect that money in the respondents' accounts is not legitimate or legitimately acquired" Once the applicant/respondent has information disclosed or not that there are some suspicious deposits which on the face of it is not explainable, it has a duty to preserve that money before the same could be disposed of. It is upon the respondent to explain how he got that money and that it does not qualify to be proceeds of crime or money laundering.

55. The 1st respondent/applicant has in his supplementary affidavit attached letters addressed “to whom it may concern” indicating that the 1st respondent/applicant is a livestock dealer. He also explained against each questioned deposit the source of income as either salary, proceeds from sale of camel, goats, cattle, or honey.

56. In all these alleged transactions, only entries for salary were proved to the tune of about 10 million. The rest of the deposits have not been proved by way of documentary evidence say the source of the camels, goats, cattle which are being sold, purchase order, invoices, delivery notes, cess receipts from County Government, or generally business transaction documents. It is not enough to say such and a such account or deposit was out of sale of camel the source of which is not known or supported. Anybody can imagine a figure and even business.

57. The respondents' explanation given is quite casual and cosmetic with no tangible evidence or proof of the existence of any business being undertaken by the 1st respondent. Further, the respondents claimed that the second respondent is a business lady in Garissa dealing with livestock, sale of clothes and an agent for beef export. There was nothing attached to prove that she does such business.

58. I am in agreement with the holding in the case of **ACEC Civil Suit No. 2/2019 Assets Recovery Agency v James Thuita**

Nderitu and Others (supra) where the court held that;

“In my view, the respondents needed to go beyond the allegation that they have wide ranging businesses and show how these businesses translated to the credits of millions from the State Department of Public Service and Youth, under which the NYS falls, into their accounts.”

59. Under POCAMLA, the burden of proof shifts to the person alleged to have possession of what cannot reasonably be justified as legitimate sources of income. It is upon the respondent to discharge that burden to the satisfaction of the court given that there is no explanation offered to support the huge deposits. The only reasonable conclusion or inference is that the money was not obtained through legitimate sources of income hence likely to be the subject of money laundering whether from a known source or not. Without rendering any explanation to the satisfaction of the court it is reasonable to conclude that the respondents ought to have known that the money deposited in their account was not legitimate and therefore obtained or retained illegally for purposes of cleansing which is an offence.

60. As to whether the money includes the 1st respondent's salary, the same has been mixed as there were withdrawals and deposits. At this stage the court cannot be able to separate the two. It is during the hearing of the forfeiture proceedings when the same can be done.

61. Having held as above, the next thing the court has to consider is whether the respondents/applicants have been deprived of their means to provide for their reasonable living expenses and therefore suffered undue hardship. Are the consequences to be suffered or likely to be suffered by the respondents/applicants outweigh the risk of the property concerned being lost, damaged or transferred"

62. The burden to prove existence of these factors lie with the respondents/applicants. It is a basic principle of evidence under Section 107 of the Evidence Act that whoever desires any court to grant judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those factors do exist. See the case of Assets Recovery Agency v Pamela Aboo (supra).

63. According to the respondents/applicants, they depend on the monies in their accounts to take care of their daily upkeep, payment of school fees and medication for the 1st respondent who is suffering from high blood pressure, cholesterol and diabetes. Both parties are in agreement that the 1st respondent is a Civil Servant working with Mandera County Government as a Livestock County Director. His salary has not been affected. He can open a separate account and continue with his normal life using his salary which for a normal average civil servant is sufficient to take care of their daily upkeep and payment of school fees. As to sickness, I take judicial notice of the fact that as a civil servant he has a medical cover which will take care of the conditions he is suffering.

64. In any event, the respondents/ applicants can continue with their business although on a low base to at least support the salary earned by the 1st respondent pending further orders from the court. From the bank statement attached, from May 2019, the respondents did not make any withdrawal from Account No.[xxxx]implying that, they have other sources of income relied on.

65. As to whether the hardship the applicant will suffer far outweighs the risk of the property being disposed or transferred, it is clear that, lifting the orders will subject the money in question to greater risk in recovery in the event the same is transferred and the intended forfeiture proceedings succeeds. It will be difficult and costly to trace such huge sums of money if transferred to third parties or spent. It will also render the intended forfeiture proceedings nugatory if the same succeeds. In short, lifting the orders will not serve the purpose for obtaining preservation orders (see Assets Recovery Agency v Lilian Wanja Muthoni and Others (supra)).

66. The money in question is in safe custody. If at the end of the day the applicant does not institute forfeiture proceedings or prove their forfeiture claim if filed, the money will be released to the respondents together with the accrued interest. Public interest will best be served by preserving the funds which is actually a reasonable balancing act as no party takes undue advantage over the other.

67. However, on humanitarian grounds and taking into account that a huge sum of the 1st respondents' salary is in the account that has been frozen, I will make a provision for him to withdraw Kshs. 3,000,000/- only from Account No. [xxxx] held at Equity Mandera Branch in the name of Abdi Mohamed Ali. This will enable him meet some immediate expenses like payment of school

fees arrears and other medical expenses.

68. Accordingly, it is my holding that the respondents/applicants have failed to prove their application for grant of the prayers sought to the required degree and therefore dismissed with orders that;

(a) The 1st respondent/applicant be and is hereby allowed to withdraw Kshs.3,000,000/- from Account No. [xxxx] Equity Bank Mandera Branch in the name of Abdi Mohamed Ali.

(b) Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF AUGUST 2020.

.....

J. N. ONYIEGO

JUDGE



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