Case Number:	Miscellaneous Application 2 of 2020
Date Delivered:	14 Apr 2021
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Mumbi Ngugi
Citation:	Assets Recovery Agency v Rose Monyani Musanda & 2 others [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

MISCELLANEOUS APPLICATION NO 2 OF 2020

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

ROSE MONYANI MUSANDA.....1ST RESPONDENT

THOMAS ODHIAMBO KONDUTI.....2ND RESPONENT

MARGARET WAMBUI MUGO.....3RD RESPONDENT

RULING NO 1

1. In the judgment dated 21st September 2020, I found that the assets the subject of this suit were proceeds of crime and I issued orders for their forfeiture to the state as prayed in the application.

2. The respondents/applicants were dissatisfied with the judgment of the court and have indicated that they have filed an appeal against the said judgment in its entirety. They also filed two separate applications in which they seek orders of stay of the judgment. Filed by way of Notice of Motion dated 29th September 2020 and 25th September 2020 by the 1st and the 2nd and 3rd respondents respectively, the applications are expressed to be premised on Article 159(2) of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The applicants ask the court to issue orders of stay of its judgment and for the costs of the applications.

3. The applicants argue that they are apprehensive that their appeal to the Court of Appeal against the judgment of this court, being Civil Appeal No. E349 of 2020, will be rendered nugatory should stay of the judgement not be granted. Their applications were canvassed by their Learned Counsel, Ms. Kathurima.

4. In their submissions dated 20th January 2021, the applicants ask the court to determine two issues. The first is whether they have met the threshold to obtain orders staying execution of the judgment and decree of this court. Their submission is that the duty of the court at this stage is to preserve the subject matter of the appeal. They rely on the decision of the Supreme Court in **The Board of Governors Moi Girls High School Kabarak & Another vs Malcolm Bell and Another (2013) eKLR** in which the court stated that the purpose of an order of stay is ***"to safeguard the character and integrity of the subject matter of appeal, pending resolution of contested issues."*** They also cite the case of **Butt vs. Rent Restriction Tribunal (1982) eKLR** where the Court of Appeal held that:

"if there is no overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be rendered nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings."

5. The applicants submit that they bear the burden of satisfying the threshold set in order 42 rule (6) (2) of the Civil Procedure Rules 2010 which is to satisfy the court that substantial loss may result if the orders sought are not granted. They contend that their right of appeal includes the right to have issues determined, and in their view, the question for determination is whether those issues would be rendered nugatory if stay is not granted and substantial loss occasioned.

6. The applicants further rely on the case of **Antoine Ndiaye v Africa Virtual University (2015) eKLR** in which the court cited the case of **Sewankambo Dickson vs Ziwa Abby HHCT-OO-CC MA 0178 of 2005** where the court stated, with regard to what amounts to substantial loss, that:

"Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth of value as distinguished from loss without value or loss that is merely nominal insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals especially in a commercial court such as ours where the underlying transactions typically tend to lead to colossal decretal amounts."

7. The applicants submit that if the respondent proceeds to effect forfeiture within the statutory timelines pursuant to the judgment of this court, the subject matter will be predetermined causing hardship to them in recovery proceedings should their appeal be successful. It is their case that they will also suffer substantial loss by losing motor vehicles and funds held in various bank accounts which they will be unlikely to recover.

8. In response to the respondent's assertion that the applications should be dismissed as they had not been brought under any provision of law, the applicants submit that the Court should be guided by Article 159(2) (d) of the Constitution which requires that disputes should be resolved without undue regard to technicalities.

9. In opposing the application, the respondent relied on Grounds of Opposition dated 19th October 2020 and submissions dated 5th February 2021. Its case was presented by Learned Counsel, Mr. Adow.

10. The respondent submits that no appeal has been filed and served by the applicants, and their application is not anchored on any law. It is its submission further that for the court to exercise its discretion in granting orders of stay of execution, the applicants need to prove, first, that there is sufficient cause to grant the orders; second, that apparent substantial loss will result if stay is not granted. Further, the applicants must furnish security and finally, they must demonstrate that if their appeal succeeds, the respondent shall not be in a position to return the motor vehicles in issue.

11. The respondent relies on the case of **Congress Rental South Africa v Kenyatta International Convention Centre; Cooperative Bank of Kenya Limited & another (Garnishee) (2019) eKLR** 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–vs Thornton & 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."

12. The respondent submits that the onus of proving the above conditions lies with the applicants but they have failed to meet the requisite threshold. Consequently, their applications should be dismissed with costs.

13. The respondent further observes that the applicants had not brought their applications under any provisions of the Proceeds of Crime and Anti Money Laundering Act (POCAMLA), and the applications are strange to the proceedings and processes encapsulated under the Act. It argues, further, that in the event that an appeal is filed, section 97 of POCAMLA saves preservation orders in existence at the time of making a forfeiture order, and the applicants will have no access to the assets preserved and seized.

Analysis and determination

14. I have considered the applications, the response and the submissions thereon, and in my view, two issues arise for determination. The first is whether the present applications are bad in law for failure by the applicants to cite the statutory provisions on which they are anchored. I note that the application dated 25th September 2020 by the 2nd and 3rd respondents is expressed to be brought under Article 159(2) (d) of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of law. The application by the 1st respondent dated 29th September 2020 does not indicate the provisions under which it is filed. The question is whether, as argued by the respondent, this is a sufficient basis for dismissal of the applications.

15. Order 51 rule 10 of the Civil Procedure Rules which is applicable to matters under Part VIII of POCAMLA provides as follows:

(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the Application.

16. Thus, while it is good practice to cite the order, rule or other statutory provision under which an application is brought before the court and on the basis of which the court is to exercise its jurisdiction, a failure to do so is not sufficient to render the application subject to dismissal. The court is under an obligation to deal with the substance of the matter before it, and in this case, the orders that the applicants seek from the court are clear.

17. The second issue is whether the applicants have satisfied the threshold for grant of orders of stay of execution of the judgment in this matter. Applications for stay of execution pending appeal are governed by Order 42 rule 6(2) of the Civil Procedure Rules which provides that:

"(2) No order for stay of execution shall be made under sub rule (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."

18. From the material placed before me by the applicants, a notice of appeal and the application for stay were filed within 10 days of the judgment. There was therefore no delay in taking the requisite steps post-judgment. Further, I note from the applicants' averments that they have filed an appeal, being Civil Appeal No. E349 of 2020.

19. The applicants are required to show, and they have so pleaded, that they will suffer substantial loss if the orders are not granted. If I understand the applicants correctly, their argument is that if the orders of stay are not granted and their appeal ultimately succeeds, they will suffer substantial loss as the respondent will have proceeded with its statutory mandate of effecting forfeiture within the statutory timelines and they would suffer hardship in subsequent recovery proceedings against the respondent.

20. I have considered the authorities cited by the applicants in support of their application for stay. The authorities relied on relate to applications for stay of execution of judgments between private parties in commercial disputes. The proceedings before me, brought under the provisions of POCAMLA, relate to forfeiture proceedings between a state entity and a party in possession of assets adjudged to be proceeds of crime. The procedural hardships in seeking restitution should the applicants succeed in their appeal that the applicants cite do not, in my view, amount to substantial loss as contemplated under Order 42. The applicants have not demonstrated that the respondent will not be in a position to refund the assets and monies the subject of the judgment.

21. In determining a similar application in **Assets Recovery Agency v Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others [2020] eKLR**, this court held as follows:

"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."

22. I take a similar view of the present matter. Additionally, as provided under section 92(6) of POCAMLA:

(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.

23. Section 97 of POCAMLA titled "Appeal against forfeiture order" provides that:

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.

24. In **Assets Recovery Agency v Lilian Wanja Muthoni Mbogo t/a Sahara Consultants & 5 others** (supra), I observed as follows:

"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."

(Emphasis added)

25. A similar situation obtains in this case. The preservation orders issued in respect of the funds and assets the subject of the judgment dated 21st September 2020, save for motor vehicle registration number KCC 646D orders in respect of which have been lifted in the ruling delivered simultaneously with the present ruling, shall remain in force pending the hearing and determination of the appeal by the applicants.

DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 14TH DAY OF APRIL 2021

MUMBI NGUGI

JUDGE