

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)**

**CRIMINAL APPEAL NO. 284 OF 2017**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

**VERSUS**

**1. MUHARAMI MOHAMED ABDALLAH @ CHONJI  
2. MWALIBORA AMOS NYANGURI } ..... RESPONDENTS**

**(Appeal from the Ruling of the High Court of Tanzania, at Dar es Salaam)**

**(Dyansobera, J.)**

**dated the 13<sup>th</sup> day of March, 2017**

**in**

**Criminal Application No. 120 of 2015**

**.....**

**JUDGMENT OF THE COURT**

19<sup>th</sup> June, 2020 & 12<sup>th</sup> March, 2021

**MWAMBEGELE, J.A.:**

The first and second respondents, Muharami Mohamed Abdallah @ Chonji and Mwalibora Amos Nyanguri are, respectively, husband and wife. The first respondent is in remand prison facing charges of trafficking in drugs together with four others not parties to this appeal. The second respondent is a free agent.

While the proceedings against the first respondent and his co-accused were still pending for committal proceedings in the Court of the

Resident Magistrate of Dar es Salaam at Kisutu, the Director of Public Prosecutions (the DPP); the appellant herein, lodged an application in the High Court under section 38 (1) of the Proceeds of Crime Act, Cap. 256 of the Revised Edition, 2002 (the POCA) and section 46 (1) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 of the Revised Edition, 2009 (Cap. 95) seeking a number of orders as follows:

1. A restraint order prohibiting the first Defendant, his agents and all other persons acting on his behalf from disposing of, transferring ownership, renting, and or lending/mortgaging the following properties:
  - a) A house comprised in Certificate of Title No. 95280, situated at Plot No. 43 Block "O" Magomeni Area within Kinondoni Municipality in Dar es Salaam Region;
  - b) A house with comprised in Certificate of Title No. 90292, situated at Plot No. 66, Block "P" Magomeni Area within Kinondoni Municipality in Dar es Salaam;
  - c) A house situated at Plot No. 42, Block "O" Magomeni area within Kinondoni Municipality in Dar es Salaam Region;

- d) A house situated at Plot No. 68 Block "X" Magomeni Area/ MXI/MWK/196, Mwinyimkuu Street, Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam;
  - e) A house situated at Tandale Ziota, with LUKU Meter No. DRN43001304757, Magomeni area, within Kinondoni Municipality in Dar es Salaam Region;
  - f) A house at Ndumbwi Street Mbezi Juu Area, with LUKU Meter No. 04215118664 adjacent to National Examination Council building, within Kinondoni Municipality in Dar es Salaam region;
  - g) Motor Vehicle Make Mitsubishi Canter with Registration No. T 376 BYY; and
  - h) All properties in the name of or owned by Mumask Investment Company Limited.
2. A restraint order prohibiting the 2<sup>nd</sup> Defendant, her agents and all other persons acting on her behalf from disposing of, transferring ownership, renting, and or lending a motor vehicle Make Toyota Model Verossa with Registration No. T 326 BXF;

3. An order directing the Director of Kinondoni Municipal Council and Area (Mtaa) Executive officers not to approve any disposition or transfer of the land/houses described in paragraphs 1 above until when this court orders otherwise;
4. An order directing the Registrar of Land to register encumbrance restraint order against the properties with Title Deed No. 95280, situated at Plot No. 43 Block "O" Magomeni Area and Title Deed No. 90292, situated at Plot No. 66, Block "P" Magomeni Area both within Kinondoni Municipality in Dar es Salaam Region or any others property mentioned in paragraph 1(a) - (f) above;
5. A restraint order prohibiting the first defendant, his agents and all other persons acting on his behalf or any authority from dealing with otherwise the seized cash that is USD 24,001, EURO 50 and Tshs. 900,000/=;
6. An order to all persons with knowledge of properties mentioned in paragraphs 1 and 2 above be restrained from interfering with the said properties or diminishing the value thereof in any way for the duration of the order; and

7. Any other orders the Honourable Court may deem fit and just to grant.

After hearing the parties, the High Court (Dyansobera, J.) granted only the prayer under para 1 (a) above. That is, an interdict was granted in respect of a house with Title Deed No. 95280, situated at Plot No. 43 Block "O" Magomeni area within Kinondoni Municipality in Dar es Salaam Region and the first respondent, his agents or all other persons acting on his behalf were prohibited from disposing of, transferring ownership, renting and/or lending/mortgaging it. The rest of the prayers; that is, prayers under paragraphs 1 (b) to (h), 3, 4, 5 and 6 of the Chamber Summons, were refused.

The decision of the High Court aggrieved the DPP, hence this appeal. The appeal was initially predicated on five grounds but at the hearing of the appeal, the first ground was amended and the fifth one was abandoned thus remaining with the following four grounds:

1. That, the learned Honourable Judge erred in law and facts for declining to grant restraint orders to properties mentioned in paragraph 1 (c), (d) and (g) of the chamber summons;

2. That, the learned Honourable Judge erred in law and facts for holding that the affidavit affirmed by Salimini Shelimoh did not set out the grounds of his belief that the respondents committed the offence for the court to issue restraint order against the properties;
3. That, the learned Honourable Judge erred in law and facts for failure to apply the principles of reasonable ground to believe that the properties to be restrained are tainted; and
4. That, the learned Honourable Judge erred in law and facts for holding that there is no evidence showing the value of properties to be restrained and the extent of the involvement of the property in the commission of the offence, thus declined to grant restraint orders;

Likewise, the respondent filed a memorandum of cross-appeal with the following two grounds:

1. That the learned Judge of the High Court erred in law and fact in granting interdict order against the appellant over Plot No. 43 Block "O" Magomeni area Kinondoni Municipality Dar es Salaam contrary to

section 39 (3) (a) (b), (5) (a) (i) (ii) (b) (9) of the Proceeds of the Crime Act, Cap 256 R.E. 2002; and

2. That the learned Judge of the High Court erred in law and fact in granting interdict order against the appellant over Plot No. 43 Block "O" Magomeni area Kinondoni Municipality Dar es Salaam without giving any reasons for the grant.

When the appeal was called on for hearing, Mr. Shadrack Kimaro, learned Principal State Attorney, Ms. Mkunde Mshanga, learned Senior State Attorney and Ms. Sylvia Mitanto, learned State Attorney, joined forces to represent the appellant. The respondents had the services of Mr. Juma Nassoro, learned advocate, who also represented them in the High Court. Both respondents also appeared - while the second respondent appeared in Court physically, the first one appeared remotely; he was linked to the Court from a remand prison through a video conference, a facility of the Judiciary of Tanzania.

We wish to point out at this stage, that before we went into the hearing of the appeal in earnest, Mr. Kimaro objected to the memorandum of cross-appeal arguing that no notice of appeal thereof was lodged. He

argued that that was improper as a cross-appeal is supposed to follow the same procedures as a normal appeal would. For lack of a notice of appeal, Mr. Kimaro urged us to strike out the memorandum of cross-appeal.

On the other hand, Mr. Nassoro resisted the prayer by Mr. Kimaro. He submitted that the cross-appeal was properly before the Court as it depended on the existence of the appeal. There is no time limit within which to file a memorandum of cross-appeal, he argued. Mr. Nassoro argued further that he was served with the memorandum of appeal on 26.05.2020 and filed the memorandum of cross-appeal on 01.06.2020 which was quite timely.

We resolved that the parties should argue the appeal as well as the cross-appeal and when we retreat to compose the judgment, we would deal with the propriety or otherwise of the cross-appeal and in case we found it appropriate, we would consider their arguments and make a decision thereon along with the appeal. However, if we found it inappropriate, we would strike it out and proceed to compose the judgment on the appeal. We are now set to resolve the arguments as promised.



We have considered the rival arguments by Mr. Kimaro and Mr. Nassoro. Indeed, as Mr. Nassoro argued and conceded by Mr. Kimaro, the Tanzania Court of Appeal Rules (the Rules) have no provisions regarding cross-appeals in criminal appeals. In civil appeals, the Rules provide that a respondent who wishes to assail the decision of the High Court at the hearing of the appeal must lodge a notice of cross-appeal specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make [rule 94 (1)] and such cross-appeal shall be substantially in the Form G in the First Schedule to the Rules [rule 94 (3)]. A copy of such notice shall be served by the respondent on the appellant and persons directly affected by the cross-appeal [rule 101 (1)]. The respondent shall also serve copies of the notice of cross-appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint [rule 101 (2)].

As already pointed out above, no such provisions exist in the Rules in respect of criminal appeals. That is perhaps the reason why Mr. Nassoro predicated his memorandum of cross-appeal on the provisions of rule 4 (1) and (2) (a) of the Rules on the general powers of the Court. We need to

state here that even though the Rules do not provide for cross-appeals in criminal appeals, the same is not unknown to criminal procedure – see: **William Rajabu Mallya and Two Others v. Republic** [1991] T.L.R. 83, **Mussa Alobogast Mtalemwa v. Republic** [1992] T.L.R. 177 and **Mbushuu alias Dominic Mnyaroje and Another v. Republic** [1995] T.L.R. 97; the decisions of the Court and **Yesaya v. Republic** [1970] 1 E.A. 667 and **Rashidi v. Republic** (1971) H.C.D. n. 219; the decisions of the High Court to which we subscribe. As good luck would have it, the trained minds for the parties in this appeal are at one on this position. What is at issue is the procedure adopted by Mr. Nassoro; of lodging a memorandum of cross appeal purporting to assail the decision of the High Court. We understood Mr. Kimaro as being of the strong contention that Mr. Nassoro ought to have preceded his memorandum of cross-appeal by a notice of cross-appeal. Having deliberated on the matter at some considerable length, we think, in resolving this issue, we will have to take inspiration from the procedure obtaining in civil appeals. In the premises, we think the respondents ought to have lodged a notice of cross-appeal which would, *mutatis mutandis*, be substantially in the Form G in the First Schedule to the Rules as provided by rule 94 (3) applicable to civil appeals.

In that notice of cross-appeal, the applicant's counsel would specify the grounds of his contention and the nature of the order which he propose to ask the Court to make. Lodging a memorandum of cross-appeal as he did was, in our considered view, inappropriate, for, that memorandum of cross-appeal, lacked legs on which to stand. We are of this view because, as a notice of appeal institutes a criminal appeal in terms of rule 68 (1) of the Rules, we think, by the same token, a cross-appeal should be instituted by lodging a notice of cross-appeal to that effect. The respondent's right to challenge a criminal appeal accrues after a notice of appeal is lodged, for, as already stated, it is a notice of appeal which institutes a criminal appeal.

In some jurisdictions, the law provides in no uncertain terms provisions relating to a notice of cross-appeal in criminal appeals, the manner in which it should be lodged, the time-frame within which it should be lodged and the contents thereof. We came across many in the course of researching for this judgment but the Canadian model impressed us most. In Canada, they have the following provision:

**"Cross-appeal**

*91. 11 -(1) A respondent may cross-appeal by filing a notice of cross-appeal.*

*(2) The notice of cross-appeal must be entitled "Notice of Cross-Appeal", be dated and signed, and include all of the following:*

*(a) the same file number as the notice of appeal and a heading with the names of the cross-appellant and cross-respondent;*

*(b) a notice that the respondent cross-appeals from a judgment, including the nature of the judgment, the names of the judge and court whose judgment is being appealed from, and the date of the judgment;*

*(c) an application for leave to cross-appeal referred to in Rule 91.08, if leave is required;*

*(d) a reference to the statutory authority for the cross-appeal, a concise statement of the grounds of cross-appeal, and a concise description of the order to be sought at the conclusion of the appeal;*

*(e) if there is only one respondent who cross-appeals, an address for delivery of documents to the appellant and, if there is more than one*

*appellant, a designation of a single address for all or separate addresses for each;*

*(f) an acknowledgment that documents delivered to the designated addresses are considered received by the respondent, and a statement that further contact information is available from the registrar.”*

[accessed through <https://laws-lois.justice.gc.ca/eng/regulations/S1-2009-3/page-1.html>].

In our jurisdiction, in order to dispel any confusion as to how a notice of cross-appeal should be lodged, what it contains, the time-frame within which it should be lodged, *et cetera*, we recommend that it is high time the maker of the Rules makes provisions of cross-appeals on criminal appeal in the Rules.

In view of our discussion above, we wish to recap that it was not appropriate for Mr. Nassoro to lodge a memorandum of cross-appeal. He should have lodged a notice of cross-appeal in its stead in which he would put his grounds on which he would assail the impugned judgment. We thus agree with Mr. Kimaro that the memorandum of cross-appeal is misconceived. We strike it out.

We also wish to state, as already hinted above, that in the course of arguing the appeal, Mr. Kimaro, **first**, withdrew the appeal in respect of the property under para 1 (a) as the restraint order was given in its respect as appearing at p. 330 of the record of appeal. **Secondly**, the appeal in respect of the property under paras 1 (b), (e) and (f) was withdrawn because the properties under the sub-paras did not fall within the cutoff point of three years as per section 47 (3) of the POCA. **Thirdly**, the first ground of appeal was amended to include a house described under para 1 (c) of the chamber summons. **Fourthly**, the fifth ground of appeal was abandoned.

The above said and done, we now turn to the appeal by the DPP.

Arguing in support of the appeal on ground one which seeks to challenge the High Court for declining to grant restraint orders to properties mentioned in para 1 (c), (d) and (g) of the Chamber Summons, Mr. Kimaro submitted that under para 1 (c) of the chamber summons is a house standing on Plot No. 42 Block "O" Magomeni area within Kinondoni District in Dar es Salaam Region. He submitted that as per para 8 of the affidavit of Christopher John Msigwa at p. 8 of the record of appeal, the

first respondent together with his accomplices (Abdul Abdallah Chumbi, Rehani Norsad Umande, Tanaka Adam Mwakasagule and Maliki Zuberi Maunda) were found in that house in possession of narcotic drugs and some special instruments used in narcotic business; that is, a special weighing machine, one stove, one gas pot and one cooking pot. He contended that the house is an instrument of the offence prone to be restrained. He contended further that it is a tainted property in terms of section 9 (1) of the POCA as it was used in the commission of the offence as per the definition of tainted property under section 3 of the POCA. The learned Principal State Attorney thus submitted that the High Court erred in refusing to issue a restraint order in respect of this house and implored us to so find.

In respect of the house standing on Plot No. 68 block "X" Magomeni area/MZI/MWK/196, Mwinyimkuu Street Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam Region, the subject of para 1 (d) of the Chamber Summons, Mr. Kimaro submitted that it is also subject to restraint in that it was built within the cutoff point of three years before the commission of the offence with which the first respondent is charged. He added that the evidence to support this assertion is found in the statement

of Zena Mbaraka Magoma which was appended to the affidavit of Salimoh Salimoh as annexure AG 8 and was an integral part of the said affidavit. In that statement, he submitted, Zena Mbaraka Magoma stated that the first appellant built the house on the same plot in which his father Mohamed Kibwana built. It was on the rear part of the plot. So, the plot comprised two houses; he submitted, the one built by Mohamed Kibwana on the front part of the plot and the other one built by the first respondent on the rear part of the plot in which he lived. That house, he submitted, was built within two years before the commission of the offence and therefore falling within the ambit of properties subject of restraint. Mr. Kimaro submitted further that under section 16 (8) of the POCA, interested parties to the tainted properties must be excluded and that the law allows cash to be taken in respect of the tainted property. He clarified that if a house is built on both legal and illegal proceeds, the same may be apportioned so as to exclude the interests of the innocent and forfeit the tainted part of the property. The learned Principal State Attorney urged us to do the same in respect of the property standing on Plot No. 68 block "X" Magomeni area/MZI/MWK/196, Mwinyimkuu Street Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam Region.



As regards the property the subject of para 1 (g) of the chamber summons which is a motor vehicle make Mitsubishi Canter with Registration No. T376 BYY, Mr. Kimaro submitted that the same, as per the print-out from the Tanzania Revenue Authority (TRA) at p. 143 of the record of appeal, was first registered on 02.03.2012 in the name of Abdul Masanga Fakhi but was transferred to the first respondent on 28.03.2012. In the premises, this property falls within the three years' cutoff point referred to by section 47 (3) of the POCA, he argued. It should therefore be restrained as well.

Arguing in support of the second ground of appeal which seeks to challenge the High Court for holding that the affidavit affirmed by Salimini Shelimoh did not set out the grounds of his belief that the respondents committed the offence for the court to issue a restraint order against the properties, Mr. Kimaro submitted that Salimini Shelimoh deposed that he believed that the first respondent committed the offence and set out the grounds for that belief.

On ground three; a complaint that the High Court failed to apply the principle of reasonable ground to believe that the properties to be

restrained are tainted, Mr. Kimaro argued that even though the trial Judge granted a restraint order in respect of one house, he did not consider the principle of reasonable ground to believe in terms of section 39 (3) (a) and (b) of the POCA. The learned Principal State Attorney relied on the decision of the South African Supreme Court in the case of **The NDPP v. Van Staden & Others** (730/2011) [2012] ZASCA 171 (at pp. 5 to 6) to buttress this point.

Arguing in support of the fourth ground of appeal which challenges the High Court for holding that there is no evidence showing the value of properties to be restrained and the extent of the involvement of the property in the commission of the offence, thus declined to grant restraint orders in respect of some properties, the Principal State Attorney contended that the law does not require the value of the property thus the High Court erred in law in holding at p. 329 that there was no evidence of showing the value of the properties and the extent of involvement of the property in the commission of the offence.

Responding, Mr. Nassoro started his onslaught by stating that the Court should warn itself and make sure that the first respondent is not

convicted before the judgment in line with article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). He argued that under section 38 of the POCA, there must be established that the first respondent acquired the property. He argued further that the section has a rebuttable presumption that ownership of the listed property has no dispute. He thus argued that ownership of the properties is in dispute thus the Court cannot issue a restraint order. He argued that the property under para 1 (c) of the chamber summons as mentioned under para 8 of the affidavit of Christopher John Msigwa, the words used are "at his house" and at para 15 of the same affidavit, Plot No. 42 is not mentioned. Thus, he submitted, there was no evidence that the first respondent owned or acquired the house standing on Plot No. 42 Block "O" Magomeni.

Arguing against the house the complaint under para 1 (d) of the Chamber Summons, Mr. Nassoro submitted that there was no document brought to show ownership of the property. It was just the statement of Zena Mbaraka Magoma which could not be sufficient to show that the first respondent added value to the family plot. The learned counsel added that the statement of Zena Mbaraka Magoma was tendered under section 34B

of the Evidence Act, Cap. 6 of the Revised Edition, 2002 but that it was not an affidavit to prove the case. He insisted that ownership in respect of the property ought to have been established.

As regards an appeal in respect of para 1 (g) of the Chamber Summons, Mr. Nassoro admitted that the motor vehicle in question belongs to the first respondent. However, the learned counsel was quick to state that the trial Judge was right in refusing to issue a restraint order in respect of the property because section 39 (3) (a) of the POCA provides that there must be belief that the defendant committed the offence and such belief must be accompanied by reasonable grounds and that evidence was lacking.

Mr. Nassoro thus finalized by stating that the Court should not give restraint orders on properties of strangers as that would be tantamount to condemning them unheard.

In a short rejoinder, Mr. Kimaro, despite conceding on the presumption of innocence under article 13 (6) of the Constitution and the right to own property under article 24 of the same Constitution, he submitted that there is no provision in the POCA regarding the court

warning itself. With regard to Salimini Shelimoh's affidavit, the learned Principle State Attorney contended that at para 27, he deposed that the properties were derived from illegal drugs business and that one house was instrumental in the commission of the offence. He added that as evident at paras 5 – 7 of Salimini Shelimoh's affidavit, the first respondent and his accomplices were arrested therein red-handed in possession of flourish substances which were diagnosed by the Government Chemist to be cocaine and heroin. That meant that Salimini Shelimoh believed and had grounds to so believe that an offence has been committed.

We will determine this appeal by discussing the grounds of appeal in the order they appear.

The first ground challenges the High Court for not granting restraint orders in respect of properties mentioned at para 1 (c), (d) and (g) of the Chamber Summons. The property under reference in para 1 (c) is a house situate at Plot No. 42, Block "O" Magomeni area within Kinondoni Municipality in Dar es Salaam Region. There was ample evidence from the depositions in the affidavits of Christopher John Msigwa and Superintendent Salimini Shelimoh that the first respondent and his

accomplices were arrested red-handed in that house in possession of powder later identified to be cocaine and heroin as well as three special weighing machines, one stove, one gas pot and one cooking pot. They were also found in possession of some cash; Tshs. 900,000/=, US\$ 24,001.00 and Euro 50.00. That house was surely an instrumentality in the commission of the offence. What the term instrumentality of the offence entails was articulated by the Supreme Court of South Africa in **Simon Prophet v. National Director of Public Prosecution**, Case No. 502/04. In that case, the Supreme Court of South Africa relied on its previous decision in **National Director of Public Prosecutions v. R O Cook Properties (Pty) Ltd**, 2004 (8) BCLR 844 (SCA), to articulate at para 26 that:

*"In **Cook Properties** this Court held that to constitute an instrumentality of an offence the property sought to be forfeited must in a 'real or substantial sense . . . facilitate or make possible the commission of the offence' and that it 'must be instrumental in, and not merely incidental to, the commission of the offence'. As to immovable property the Court held that the mere fact that an offence was committed at a particular place did not*

*by itself make the premises concerned an instrumentality of the offence and that some closer connection than mere presence on the property would ordinarily be required. Further, that either 'in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence'. Where premises are used to manufacture, package or distribute drugs, or where any part of the premises has been adapted or equipped to facilitate drug-dealing (which in terms of s 1(1) of the Drugs Act includes 'manufacturing') they will in all probability constitute an instrumentality of an offence committed on them."*  
[Footnotes omitted].

[Also quoted by the Constitutional Court of South Africa in **Simon Prophet v. National Director of Public Prosecution**, CCT 56/05 at footnote 11].

We subscribe to the above definition. In the case at hand, the High Court, at p. 325 of the record of appeal, considered whether this house was an instrumentality of the offence and made a finding and held that the narcotics as well as the equipment for drying, storing and distribution of narcotics were found in this house. The High Court observed:

*"In the present matter, it is amply demonstrated through the affidavital evidence of Christopher John Msigwa, learned Senior State Attorney and that of Superintendent Saiimini Sheimoh that the 1<sup>st</sup> defendant was caught red handed in the house situated on Plot No. 42. Block O, Makanya Street, Magomeni area within the District of Kinondoni in Dar es Salaam Region. During that arrest the 1<sup>st</sup> defendant was found in that house with three special weighing machines, one stove, one gas pot, one cooking pot and US\$ 24,001, Tshs. 900,000/= and Euro 50 the property said to be an instrumentality - a tainted property that is the property used in which the offence of trafficking in drugs was committed. It is a facilitating property to the commission of the offence which were found at different places in the house. It is in this house the 1<sup>st</sup> defendant was red-handed apprehended and also where those instruments were seized. These instruments were scattered everywhere.*

*Referring this court to the Constitutional Court of South Africa in the case of **Simon Prophet v. the National Director of Public Prosecutions**, CCT 56/05, learned State Attorney, on the definition of the term instrumentality said that it must play a*



*reasonably direct role in the commission of the offence, the employment of that property must be functional to the commission of the crime. It must facilitate or make possible the commission of the offence. It is Mr. Mutakyawa's assertion that from the evidence of the investigator, it is in that house from which all narcotic drugs as well as the equipment for drying, storing and distribution were seized."*

Given the above observations, and in the light of what constitutes an instrumentality of crime above, we think, the High Court ought to have found that this house was an instrumentality of crime and thus subject of restraint. In fact, the discussion at p. 325 and the conclusion at p. 330 are not commensurate. We highly think it could be a *lapsus calami*. We say so because the discussion at p. 325 was about House No. 42 Block O, Makanya Street, Magomeni area; the subject of para 1 (c) of the Chamber Summons. This is the house in respect of which a restraint order should have been given. However, in a bizarre twist of things, the conclusion at p. 330 divorced itself from that discussion at p. 325 for it gave a restraint order in respect of a house standing on plot No. 43 Block "O" Magomeni Area in Kinondoni District; the subject of the prayer in para 1 (a) of the

Chamber Summons. Be that as it may, we see merit in this limb of the first ground of appeal. We find and hold that the first respondent and his colleagues having been caught red-handed in the house standing on Plot No. 42 Block "O", Makanya Street Magomeni area within Kinondoni District, Dar es Salaam Region with narcotic drugs and instruments used in that business as well as cash, the High Court ought to have found that this house was an instrumentality of crime and should therefore have given a restraint order in its respect. We thus allow this limb of the first ground of appeal.

We now turn to determine the complaint in respect of the house described under para 1 (d) of the Chamber Summons; a house situated at Plot No. 68 Block "X" Magomeni Area/MXI/MWK/196, Mwinyimkuu Street, Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam. The evidence brought by the appellant in support of this ground was the statement of Zena Mbaraka Magoma (Annexure AG8) appended to the affidavit of Christopher John Msigwa. It was also deposed at para 15 (c) of the affidavit of the said Christopher John Msigwa that the first respondent owned the house. Mr. Nassoro resisted at the hearing that Zena Mbaraka Magoma did not state that the house she was referring to was the one

under reference at para 1 (d) of the Chamber Summons. With unfeigned respect to Mr. Nassoro, we do not find any purchase in his argument. We can glean in the counter affidavit of the second respondent that he deposed that the house belongs to the family. In addition, at p. 290, Mr. Nassoro argued at the hearing of the application, that the second respondent deposed that the house belonged to the late Mohamed Abdallah Kitwana but then belonged to the family. We are satisfied therefore that the house under reference in the statement of Zena Mbaraka Magoma is the very house under reference at para 1 (d) of the Chamber Summons and the very one deposed by the second respondent that it belonged to the family. We are settled in our mind that there was ample evidence that the first respondent added value to Plot No. 68 Block "X" Magomeni Area/MXI/MWK/196, Mwinyimkuu Street, Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam by building a house in the rear part of the plot in which he lived. We also are settled in our mind that, as per the statement of Zena Mbaraka Magoma, the same was constructed two years prior to the arraignment of the first respondent.

The basic question that pops up here is how can such a property be subject of restraint while the same is built in the plot not belonging to the

first respondent? Mr. Nassoro warned us of not engaging ourselves in dealing with properties of strangers. We must admit that this question has exercised our mind greatly. We say so because in dealing with tainted property of this nature, there is a danger of giving a restraint order in respect of the tainted property to the detriment of innocent stakeholders who have interest in the property. We, however, are also alive to the statement by Lord Steyn that:

*"It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential."*

[cited in a paper titled The Proceeds of Crime in Tanzania as Explained by the Proceeds of Crime Act, 2007 (Cap.256) (June 30, 2018) by Asherry Magalla. Available at <https://ssrn.com/abstract=3205864> or <http://dx.doi.org/10.2139/ssrn.3205864>].

Our reading between the lines of the POCA and a thorough research on the point, has made us certain that property capable of being restrained need not necessarily belong to an accused person. It could be property

owned by a third party but one in which the accused person has an interest or derives benefit. Discussing about restraint orders in actions against assets in criminal cases with particular emphasis on defendant's interest held with third parties in the English Proceeds of Crime Act, 2002 it is observed:

*"Under PoCA02 the defendant is said to hold any property in which he/she has an interest. This applies even where a third party may have a legitimate and even greater interest in that property, such as where the third party is the sole legal owner of a property ..."*

[Avalied through [www.CAS.gov.uk7.files](http://www.CAS.gov.uk7.files)]

We also find support in this position in the definition of the term "property" in the POCA which defines it to include third party property. It defines the word "property" as meaning:

*"... real or personal property of every description, whether situated in the United Republic or elsewhere and whether tangible or intangible **and includes an interest in any such real or personal property**".*

[Emphasis supplied].

Given the above, we are satisfied that it was amply established in evidence that the first respondent had interest in the property standing on Plot No. 68 Block "X" Magomeni Area/MXI/MWK/196, Mwinyimkuu Street, Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam and therefore prone to being issued a restraining order against it. We therefore find and hold that the High Court ought to have given a restraining order in respect of the property standing on Plot No. 68 Block "X" Magomeni Area/MXI/MWK/196, Mwinyimkuu Street, Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam Region.

We only wish to put an anecdote here that the above conclusion does not mean that third party interests are completely ignored in proceedings of this nature. They are taken care of at the conclusion of the proceedings. The practice obtaining in England under the Proceeds of Crime Act, 2002 is that:

*"The third party interest is only taken into account following the conviction of the defendant as part of the hearing for confiscation order. The value of the defendant's interest in the third party must then be decided by the court as part of the confiscation proceedings."*

[See: [www.CAS.gov.uk7.files](http://www.CAS.gov.uk7.files)]

The same is the position in our POCA under sections 14 – 16. We do not find as correct Mr. Kimaro's contention to the effect that third party interest can be taken care of at this stage in terms of section 16 (8) of the POCA. The wording of sections 14 and 16 whose marginal notes are, respectively, "forfeiture orders" and "effect of forfeiture order on third parties", presuppose finalization of the case; upon conviction of an accused person. Be that as it may, in view of the foregoing discussion, we find this limb of the first ground of appeal meritorious as well.

We now turn to consider the limb respecting the motor vehicle make Mitsubishi Canter with Registration No. T 376 BYY. The evidence on this property was given through the deposition of Mr. Christopher John Msigwa at para 15 (f) of his affidavit. At that para 15, a print-out from Tanzania Revenue Authority (TRA) which was marked as AG12 was appended to the affidavit to form part of it. The contents of paragraph 15 (f) of the affidavit of Christopher John Msigwa were just noted in the counter affidavit of the first respondent and deposed further that he was a seaman and later a commission agent for selling cars and engaged in agricultural

products business. Likewise, the second respondent admitted that the motor vehicle was a matrimonial property.

The motor vehicle owner history from TRA whose print-out appears at p. 143, as rightly submitted by Mr. Kimaro, shows that the motor vehicle was first owned by a certain Abdul Masanga Fakhi of P. O. Box 15420 Dar es Salaam. That was on 02.03.2012. The document shows that the motor vehicle was transferred to the first respondent and registered in his name by 28.03.2012. That was within the cutoff point in terms of section 47 (3) of the POCA. The High Court thus ought to have given a restraint order in its respect. This limb of the first ground of appeal is allowed as well.

Having answered the three limbs of the first ground of appeal in the affirmative, we think to consider and determine the remaining three grounds will be but an academic exercise and superfluous. As seen above, the second ground of appeal challenges the High Court Judge for holding that the affidavit affirmed by Salimini Shelimoh did not set out the grounds of his belief that the respondents committed the offence for the court to issue a restraint order against the properties. The third ground assails the High Court for failure to apply the principles of reasonable ground to



believe that the properties to be restrained are tainted. Lastly, the fourth ground challenges the High court for holding that there is no evidence showing the value of properties to be restrained and the extent of the involvement of the property in the commission of the offence. Determination of the first ground of appeal in the manner done above disposes of the appeal and we so find and hold.

In view of the above discussion, we find and hold that in addition to giving a restraint order in respect of the property standing on Plot No. 43 Block "O" Magomeni area within Kinondoni Municipality in Dar es Salaam Region, the High Court should have done the same in respect of:

1. A house situated at Plot No. 42, Block "O" Magomeni area within Kinondoni Municipality in Dar es Salaam region;
2. A house situated at Plot No. 68 Block "X" Magomeni Area/ MXI/MWK/196, Mwinyimkuu Street, Magomeni Mapipa area within Kinondoni Municipality in Dar es Salaam; and
3. Motor Vehicle Make Mitsubishi Canter with Registration No. T 376 BYY;

On the basis of the above reasons, we allow the appeal, vary the decision of the High Court and give restraint orders in respect of the properties in 1, 2 and 3 above. That is, an interdict is given in respect of the named properties as well and the first respondent, his agents or all other persons acting on his behalf are prohibited from disposing of, transferring ownership, renting and/or lending/mortgaging these properties.

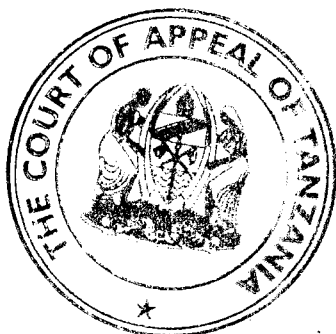
**DATED at DAR ES SALAAM** this 10<sup>th</sup> day of March, 2021.

A. G. MWARJA  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The judgment delivered this 12<sup>th</sup> day of March, 2021 in the presence of Ms. Estazia Wilson, learned State Attorney for the Appellant/Republic and Mr. Juma Nassoro, learned, counsel for the Respondents is hereby certified as a true copy of the original.



*S. J. Kainda*  
S. J. Kainda  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**