

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBIA DISTRICT REGISTRY

CRIMINAL APPLICATION NO. 84 OF 2020

*(Arising from RM. Criminal Cases No.12 of 2020 in the Resident Magistrate Court of
Bukoba at Bukoba)*

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

FRANCISE IZAYAS MAKAKA@ FRANCISE

ISAYA MAKAKA@ BUDUGU.....RESPONDENT

RULING

09/02/2022 & 09/03/2022

NGIGWANA, J.

This is an ex-parte application made under section 30 (1) (a) and (6) of the Proceeds of Crimes Act [Cap 256 R: E 2019] as amended), supported by two separate affidavits; one by of Adolf Chundu Ulaya, learned State Attorney and the other one by Thomas Kandi Fussi, Senior Superintendent of Immigration (SSI).

The applicant herein. The Director of Public Prosecutions (DPP), substantially seeks for an order declaring the following properties forfeited to the Government of the United Republic of Tanzania: -

- (i) A fully finished house built on Plot No. 17, Block B at Biharamulo Township area, within Biharamulo District in Kagera Region.*
- (ii) A semi-finished house built on un-surveyed plot of land Located at Ng'ambo Street within Biharamulo District in Kagera Region.*

- (iii) *A 143 acres farm located at Kisumo Village, Katahoka Ward within Biharamulo District in Kagera Region, including the structures developed and attached thereon being three (3) houses and four (4) huts.*
- (iv) *A 132.54 acres farm located at Kitwechembogo Village, Ruziba Ward within Biharamulo District in Kagera Region, including the trees planted and maintained thereon.*

On the date of the hearing, the applicant was represented by Mr. Wankyo Simon, Senior State Attorney.

A brief summary of facts giving raise to this application as discerned from the affidavits before the court is that; on 13th day of September, 2019, the respondent was arrested by the Tanzania Immigration Officers for representing himself as being **Fransice Izayas Makaka** to whom Certificate of Naturalization **DN 191822 with serial No. 4716** relates, and for unlawful for presence in the United Republic of Tanzania. That the investigation proceeded and eventually revealed that the respondent's true names are **Budugu Ludagali Sekalomba**, a Tutsi by tribe and Rwandese by Nationality and that he came in Tanzania with his parents when he was of tender age. That, after the death of his parents, the Respondent continued to reside at various places at the Region of Kigoma in Tanzania involving himself in various economic activities including farming and herding. That, throughout his stay in Tanzania, the Respondent had never acquired a status of Citizenship of the United Republic of Tanzania.

That, in 1990's one **Fransice Izayas Makaka**, decided to return his country of origin to wit; the Republic of Rwanda, but before he left, he handed over his Certificate of Naturalization **DN 191822 with Serial No. 4716** to the Respondent for a consideration of Tanzanian Shillings One hundred thousand (**TZS. 100,000/=**)

That, since he was handed over with the said Certificate of Naturalization, the Respondent has been introducing himself as **Fransice Izayas Makaka**, a name which appears on the Certificate of Naturalization **DN 191822 with serial No. 4716** for the purpose of attaining recognition and status of Citizenship of the United Republic of Tanzania by Naturalization.

That, basing on the outcome of the said investigation, the Respondent on 25th day of September, 2019 was arraigned before the Resident Magistrates Court of Bukoba at Bukoba with the following four offences; Representing himself as being a person to whom the Certificate of Naturalization **DN191822 with serial No. 4716** relates contrary to section 27 (1) (c) of the Citizenship Act, No. 6 Cap. 357 R:E 2002, Use of regular certificate of Citizenship irregularly contrary to section 27 (1) (d) of the Citizenship Act, Cap. 357 R:E 2002, Possession of regular certificate of Citizenship irregularly contrary to section 27 (1) (d) of the Citizenship Act, Cap. 357 R:E 2002 and, Unlawful presence in the United Republic of Tanzania contrary to section 45(1) (i) of the Immigration Act, Cap. 54 R:E 2016.

That the charge was read over and explained to the respondent and he pleaded guilty to all four counts. That, having pleaded guilty, the respondent was convicted upon his own plea of guilty and sentenced to pay a fine of

TZS. 100,000/= or to serve two years imprisonment in each count save for the 4th count. As regard the 4th count, the respondent was sentenced to pay a fine of TZS. 500,000/= or to serve a term of three (3) years imprisonment. That, the Respondent paid a fine amounting to TZS. 800,000/= and immediately, he was released from prison.

That, on 28th day of September, 2019, the Regional Commissioner for Kagera Region formed a team of experts to trace the Respondents properties and inspecting their ownership status the exercise which was done in the presence of the Respondent whereas after completion of its task, the team prepared a report which revealed the following properties, were acquired by the respondent.

- (i) *A fully finished house built on Plot No.17, Block B at Biharamulo Township area, within Biharamulo District in Kagera Region.*
- (ii) *A semi-finished house built on unsurveyed plot of land Located at Ng'ambo Street within Biharamulo District in Kagera Region.*
- (iii) *A 143 acres farm located at Kisumo Village, Katahoka Ward within Biharamulo District in Kagera Region, including the structures developed and attached thereon being three (3) houses and four (4) huts.*
- (iv) *A 132.54 acres farm located at Kitwechembogo Village, Ruziba Ward within Biharamulo District in Kagera Region, with natural and planted trees. (A report on inspection of the Respondent's properties together with the statements of witnesses are*

collectly marked ISD2 and attached to form part of the affidavit)

That, on 1st October, 2019 a Notice to Prohibited Immigrant No. 0069710 was issued against the Respondent and he was immediately deported to the Republic of Rwanda as his country of origin. (***Notice to Prohibited Immigrant No. 0069710 marked ISD4 is attached to form part of the affidavits.)***

That despite the payment of the fine, the Respondent through the services of his Advocate appealed to the High Court against the said conviction and sentences meted against him. That the matter was registered as Criminal Appeal No. 63 of 2019 and upon hearing both parties, the High Court nullified the proceedings, quashed conviction and set aside the sentences meted against the Respondent and left the relevant authorities with the option to re-initiate criminal proceedings against the Respondent on similar offences as soon as he resurfaces the land of Tanzania due to the availability of evidence.

That, on 17th day of January, 2020, similar complaints were re-instituted against the Respondent at the Resident Magistrates Court of Bukoba at Bukoba. The case was registered as RM Criminal case No. 12 of 2020, and on 20th day of January, 2020 a Warrant of Arrest was issued by the said court against the respondent. That notwithstanding the publication of the said Warrant of Arrest on two consecutive dates vide the National Newspapers; Daily News ISSN 0856-3812 No. 12649 dated 07/08/2020 and ISSN 0858-3807 No. 2100 dated 08/08/2020, Habari Leo; ISSN 1821-570X No. 4843

dated 08/08/2020 and ISSN 1821-570X No. 4842 dated 07/08/2020, the Respondent had not appeared to answer the charges facing him.

That, in August 2020, it was further discovered that the Respondent is currently holding passport No. 537033 bearing the name of **Budugu Ludagali** issued by the Republic of Rwanda which signifies his true allegiance and citizenship of the Republic of Rwanda. (***A copy of the Passport marked ISD 6 is attached to form part of the affidavits.***)

That, considering that the presence of the Respondent in the Republic of Rwanda, the relevant authorities of the United Republic of Tanzania cannot physically act on the issued Warrant of Arrest to compel the respondent to face justice in Tanzania, and considering the nature of the offences the respondents stand charged, extradition proceedings could not be and were never instituted against the Respondent.

That, by holding and using a certificate of Naturalization, **DN 191822 with Serial No. 4716**, the Respondent managed to occupy, possess and developed land within the United Republic of Tanzania the herein above listed properties which have been in possession, ownership and effective control of the Respondent from the moment he owned them to the time of arrest and recovery.

That, the properties mentioned herein above have generated from the Respondent's possession and use of the illegally obtained Certificate of Naturalization **DN 191822 with Serial No. 4716** which entitled him the status of Citizenship of the United Republic of Tanzania by naturalization,

hence are tainted properties. It follows therefore that; this application has been grounded in that premise.

It is worth noting that the purpose of a forfeiture order is normally either to deprive the accused of the fruits of his crime or to remove from his/her possession instruments or materials as would aid in further commission of crimes.

In this matter, I have carefully gone through the founding affidavits supporting the application and found that the High Court had nullified the proceedings, quashed conviction and set aside the sentences imposed by the Resident Magistrate Court of Bukoba against the Respondent, therefore, it is apparent that it cannot be said that the Respondent was arraigned, prosecuted, and finally convicted and sentenced. It is as good as he was never prosecuted on the said offences. In that premise, there is a core and critical issue that calls for determination; **whether or not a person's property can be forfeited to the United Republic of Tanzania without being arraigned and prosecuted for a criminal conduct under any of the laws of Tanzania vis-à-vis the application of Articles 24 and 13 (6) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time which guarantee the right to fair trial and the protection of property.**

The instant application was made under section 30 (1) (a) and (6) of the Proceeds of Crimes Act Cap. 256 R: E 2019 as amended by the Written Laws (Miscellaneous Amendments) Act (No. 4) Act, 2019 which provides that;

"Where the Director of Public Prosecutions suspects on reasonable grounds that any person has acquired, holds or is dealing with tainted property and it is not possible;

- (a) *for any person to bring the person before a court; on a charge of any serious offence; he may apply to the High Court for an order to declare the property forfeited to the United Republic.*
- (6) *Where the High Court is satisfied that a tainted property which is the subject of the application is the property referred to in subsection (1), the Court shall order that the property be forfeited to the United Republic.*

From the herein provisions of the law, it is apparent that where it is impracticable to bring a person in court who is reasonably suspected to have acquired, or to have been possessing or dealing with tainted property, to face the charge, the Director of Public Prosecutions may lodge an application to the High Court for an order to declare the property forfeited to the United Republic, and where the court is satisfied that the property subject of the application is a tainted property, the court shall have no option but to order the property be forfeited to the United Republic.

In that premise, it is apparent that in our jurisdiction, non-conviction-based forfeiture is possible where the court is satisfied that the property sought to be forfeited is a tainted property.

In the matter at hand, the issue for determination is whether the properties sought to be forfeited are tainted properties, hence capable of being forfeited. When this application came for hearing, Mr. Wankyo Simon,

learned Senior State Attorney prayed to the court to adopt the two founding affidavits to form part of his submission. Submitting in support of the application, Wankyo submitted that, the properties sought to be forfeited to the United Republic have generated from the Respondent's possession and use of the illegally obtained Certificate of Naturalization **DN 191822 with Serial No. 4716** which entitled him the status of Citizenship of the United Republic of Tanzania by naturalization, hence tainted properties. In support of his argument, Waknyo referred this court to these cases; **The Director of Public Prosecutions versus Muharami Mohamed Abdallah@ Chonji and Another**, Criminal Appeal No. 284 of 2017 CAT (Unreported), **The National Director of Public Prosecutions versus Magdalena Elizabeth Parker, Case No.624/2004 of the Supreme Court of South Africa**, **The National Director of Public Prosecutions and Another versus Yasien Mac Mohamed N.O and 3 Others, Case CCT 44/02** and **Simon Prophet versus The National Director of Public Prosecutions, Case CCT 56/05**. He further argued the properties acquired by the respondents constitute instrumentalities and proceeds of the crime.

Describing what term instrumentality of the offence entails the Court of Appeal of Tanzania cited with approval the decision of the Supreme Court of South Africa in **Simon Prophet** (Supra) where 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:

"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 utilization, 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 term of s 1 (1) of the Drugs Act includes manufacturing) they will in all probability constitute an instrumentality of an offence committed on them."

Considering the nature of the application, it is also proper to know how these two terms; "**Serious offence**" and "**Tainted Property**" have been defined under section 3 of the Proceeds of Crime Act Cap. 256 as amended by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2019 as follows;

*"Serious offence means an **offence against provisions of any law in United Republic** or in a foreign state for a conduct which, had it occurred in United Republic would constitute a serious offence the punishment of which is either death or imprisonment for a period of not less than twelve months and **includes any offence in which property has been used or proceeds generated or benefit derived**"*

The term “**tainted property**” in relation to a serious offence, means (a) any property used in, or in connection with, the commission of the offence or (b) any proceeds of the offence.

Tainted property also refers to any property wholly or partly acquired as a result of; or directly or indirectly derived from a significant criminal activity.

Tainted property also refers to any property that has been obtained by way of unlawful act.

It is trite that in application proceedings, affidavits constitute not only the pleadings but also the evidence. Equally straight that the applicant must make out his case in his founding affidavit and that he must stand or fall depending on what is contained therein. It follows therefore that; the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought.

In the matter at hand, paragraphs **18 & 19** of the affidavit sworn by the State Attorney were coached as follows;

18. That, considering the Respondent's presence within the Republic of Rwanda, the relevant authorities of the United republic of Tanzania cannot physically act on the issued Warrant of Arrest to compel the respondent to face justice in Tanzania.

19. That, for the reasons stated in paragraphs 15,16,17,18 and 19 above, it is not possible to bring the Respondent at the Resident Magistrate's Court of Bukoba at Bukoba to face the charges instituted against him in Criminal Case No. 12 of 2020

Upon reading the two herein above paragraphs I asked myself two questions; one, why the applicant did not bother to explain why was it not possible to invoke the extradition Act or any other possible law to get the respondent back to face the charges considering that the respondent was issued with the **Prohibited Immigrant Notice** and ordered to leave the United Republic of Tanzania, and indeed, he left under escort? Two, why did the applicant decided to make Publication of the Warrant of Arrest vide Tanzania News Papers while knowing that there is no way the same can reach the respondent who was already in the Republic of Rwanda. In my view, the publication was immaterial and it amounted to wastage of time and resources. Having made those observations, I now turn to the reliefs sought in this application.

Paragraph 21 of the affidavit sworn Mr. Adolf Chundu Ulaya, learned State Attorney was coached as follows;

"That the properties named in paragraph 8 above have generated from the respondent's possession and use of the illegally obtained Certificate of Naturalization DN 191822 with Serial No. 4716 which entitled him the status of Citizenship of the United Republic of Tanzania by Naturalization hence are tainted properties."

The general rule in Tanzania is that a foreigner cannot own land under the Laws of Tanzania unless it is for investment purposes. In the matter at hand, the court, having carefully gone through the two affidavits, the submission by Mr. Wankyo, learned Senior State Attorney as well as the provisions of the law under which this application was brought, I am satisfied that the

properties subject of the application are tainted properties as they were generated from the respondent's possession and use of the illegally obtained Certificate of Naturalization **DN 191822 with Serial No. 4716** which entitled him the status of Citizenship of the United Republic of Tanzania by Naturalization, and that the same properties facilitated the Respondent to continue living in Tanzania comfortably though unlawfully until when he was deported to his country to wit; the Republic of Rwanda. It is therefore, apparent that the said properties were acquired by way of unlawful act. It is a principle of law recognized in our jurisdiction that a person should not be allowed to benefit from his own wrongful act.

In the event, I find merit in this application and I grant it accordingly. Consequently, the following properties are hereby forfeited to the United Republic of Tanzania;

- (i) *A fully finished house built on Plot No. 17, Block B at Biharamulo Township area, within Biharamulo District in Kagera Region.*
- (ii) *A semi-finished house built on unsurveyed plot of land Located at Ng'ambo Street within Biharamulo District in Kagera Region.*
- (iii) *A 143 acres farm located at Kisumo Village, Katahoka Ward within Biharamulo District in Kagera Region, including the structures developed and attached thereon being three (3) houses and four (4) huts and*
- (v) *A 132.54 acres farm located at Kitwechembogo Village, Ruziba Ward within Biharamulo District in Kagera Region, with natural and planted trees.*

It is so ordered.



E. L. NGIGWANA

JUDGE

09/03/2022

Ruling delivered this 9th day of March, 2022 in the presence of Mr. Grey Uhagile, learned State Attorney for the Director of Public Prosecutions (Applicant) Mr. E. M. Kamaleki, Judges Law Assistant, and Mr. Gosbert Rugaika, B/C. but in the absence of the Respondent.



E. L. NGIGWANA

JUDGE

09/03/2022