

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 78 OF 2022

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

VERSUS

CUTHBERT NAPENGWA KISHALULI 1ST RESPONDENT

JOHN HUGGO KINYAKI 2ND RESPONDENT

OBBY JOHN KINYAKI 3RD RESPONDENT

RULING

Date: 15 & 22/02/2023

NKWABI, J:

In the notice of application lodged in this Court on 1st July 2022, the applicant is craving for forfeiture of the following properties of the respondents:

- a. Motor vehicle make Toyota Noah with registration No. T. 550 DHW.
- b. Motor vehicle make Toyota Noah with registration No. T. 787 DJA.
- c. Motor vehicle make Toyota Noah with registration No. T. 481 DKQ.
- d. Motor vehicle make Toyota Noah with registration No. T. 242 DJM.
- e. Motor vehicle make Toyota RAV 4 with registration No. T. 660 CDA.
- f. Plot No. 63 and 65, block 11 Mwongozo area, Kigamboni Dar-es-Salaam.
- g. House Number KUR SHD 726 situated at Kurasini Shimo la Udongo, Temeke, Dar-es-Salaam.

h. House on Plot No. 172, 173 and 174 Block L Salasala area Dar-es-salaam.

Apart from forfeiture order for the above properties, the applicant is praying for other orders as hereunder:

- i. An order directing the Permanent Secretary Treasury to take effective control and ownership of the properties mentioned above immediately upon forfeiture order.
- j. An order directing whoever is responsible to effect registration of the mentioned properties in the name of the United Republic of Tanzania to do so immediately upon forfeiture order.
- k. Any other order(s) as the Court may deem fit.

It is unfortunate that the applicant failed or neglected to disclose that the respondents had been prosecuted by the applicant in the Resident Magistrate's Court of Dar-es-Salaam at Kisutu in criminal case No. 149 of 2017 between the **Republic v. John Hugo Kinyaki & 2 Others**. In its decision dated 25/10/2019, the trial court acquitted the respondents of the 1st, 2nd and 4th counts. It only convicted them of the 3rd count which was obtaining money at USD 2,045,400 by false pretences from **Jingsong Shao**. The respondents appealed to the High Court, where before his lordship Kakolaki, J. the conviction was quashed while the sentence and

compensation orders were set aside. That occurred on 11th March 2022 in consolidated Criminal Appeals No. 149 of 2020 and No. 15 of 2021. These facts were brought to light by the counter-affidavit of the respondents.

By way of notice of preliminary objection, nevertheless, the counsel of the respondents brought forward four limbs of preliminary objection against this application reiterated in submission in chief as follows:

1. That, the application is hopelessly out of time as it has been preferred in contravention of section 9 (1) and (2) of the Proceeds of Crime Act Cap. 256 R.E. 2019.
2. That, the court has no jurisdiction to entertain the matter i.e. the court is functus officio vide consolidated Criminal Appeal No. 149 of 2020 and No. 15 of 2021.
3. That, the application has been preferred contrary to section 4(3) of the Criminal Procedure Act Cap 20 R.E. 2019.
4. That, the application is incompetent and unmaintainable as affidavit in support of the application is fatally defective for containing an incurable defective verification clause; as the applicant did not verify the source of information in the affidavit.

The preliminary objection was disposed of by way of written submissions.

Mr. Nehemia Nkoko, learned advocate, submitted for the respondents

while, a Principal State Attorney from the office of the DPP drew the submission for the applicant but did not indicate his/her name.

I start my deliberation of the preliminary objection with the claim that this Court has no jurisdiction since the Court is functus officio which is preferred as the 2nd limb of the preliminary objection. The applicant argued that the contention is wrong because the High Court is clothed with powers to entertain the application under section 30 (2) of the Proceeds of Crime Act which states:

(2) The High Court may, on an application in terms of subsection (1), if it is satisfied that the property concerned is tainted property and that it is in the interests of justice that the property be forfeited to the United Republic, order accordingly.

It was further stressed that the application is not emanating from criminal case No. 149 of 2017 and its resultant consolidated criminal appeal number 15 of 2020. It was pointed out that in the criminal case and appeal, the issue of the respondents' property was neither at issue nor addressed by the trial court or the appellate court. The application is not flowing from either conviction or acquittal of the Respondents, thus the issue of functus officio does not crop up.

In rejoinder submission, the counsel for the respondents contended that the applicant is misleading the court by claiming that the application is not at issue with criminal cases as the properties were neither at issue nor the court was addressed. It is stressed that Jingsong Shao gave evidence that the respondents committed forgery and obtained money by false pretences but the respondents were acquitted. He insisted that the respondents were arrested, charged and acquitted of serious offences hence the court is functus officio to adjudicate the application.

I have painstakingly considered this limb of the preliminary object, I am inclined to accept the view of the counsel for the respondents. I fail to accept the view of the applicant that this application is not related to the criminal case as well as the consolidated appeals thereto. My view is that once the criminal case was decided in favour of the respondents by acquittal, the applicant ought to know that it is not a matter of suspicion of commission of an offence the DPP has on the properties rather it is certain that no offence was committed. In the circumstances, it is not suspicion that the properties are tainted by criminal acts of the respondents against Jingsong Shao, but rather the properties are certainly not tainted by criminal acts of the respondents, thus this Court is functus officio and therefore has no jurisdiction to entertain this application. By


way of analogy, I borrow the wisdom of Georges, C.J. as he then was, in **Jackson James v. R.** [1967] HCD no. 273, where he held:

"A conviction cannot be maintained under section 312 if the articles in question can be identified as the property of any known person. ... If the owner is identified, it is no longer a question of suspicion, and the charge should be laid under a section of the Penal Code dealing with stealing or possession or receiving stolen property. Citing R. v. Msengi s/o Abdallah (1952) 1T.L. R. (R) 107; R. v. Shabani Saidi, 1.T.L.R. (R) 77."

In the circumstances, the 2nd point of preliminary objection is sustained. Since I am of the view that this Court has no jurisdiction to entertain this application, then, this Court has no jurisdiction to consider the rest of the points of the preliminary objection. Consequently, the application is dismissed for want of jurisdiction.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 22nd day of February 2023.


J. F. NKWABI
JUDGE

