

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM

ECONOMIC APPLICATION NO. 1 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

Versus

1. MARGARETH KOBELO GONZAGA.....RESPONDENT
2. ALLOYCIOUS GONZAGA MANDAGO.....FIRST INTERESTED PARTY

RULING

29/04/2022 & 15/07/2022

E.B. LUVANDA, J.

The applicant above named filed this application by way of chamber summons under the enabling provisions of sections 4(1)(c), 9(1) and 14(1) and (2) of the Proceeds of Crime Act, Cap 256 R.E. 2002 as amended. The amended chamber summons is supported by affidavit deposed by Mr. Christopher John Msigwa learned Senior State Attorney. Principally, the applicant is seeking for forfeiture orders in respect of the following landed properties: Plot No. 1378, Block "E" Tegeta with certificate of title No. 41275; Plot No. 176, Block "B" Aman Gomvu with certificate of title No. 138598; Plot No. 191, Block "B" Aman Gomvu with certificate of

title No.132797; Plot No. 174, Block "B" Aman Gomvu with certificate of title No. 138597; Plot No. 199, Block "D" Tegeta with certificate of title No. 121302 and Plot No. 200, Block "D" Tegeta with certificate of title No. 39021.

In the affidavit in support of the application, it is grounded that Ms SFS illegally operated lending business without obtaining a valid licence from the Ministry of Industry, Trade and Investment, and its proceeds (including tax evasion) were deposited in account number 01J103428800 held at CRDB maintained by the respondent and interested party; Between 1/6/2011 to 30/6/2016 a total of Tsh 4,214,736,248 were deposited into the above account; Ms SFS operated its business by cash system to avoid detection by regulatory authorities including Tanzania Revenue Authority (TRA) and Bank of Tanzania (BOT); the respondent used to receive money generated from criminal activities carried out by Ms SFS, including collecting loans from individual borrowed from Ms SFS; the interested party and other shareholders of Ms SFS made false documents and forged returns of income; Ms. SFS evaded tax amounting to Tsh 2,983,310,039; to conceal the illicit origin of properties, the respondent laundered the proceeds of serious offences namely tax evasion, forgery and carrying on

lending business without licence by acquiring in her name the properties above mentioned subject for forfeiture order.

For appreciation, it is pertinent to recap some salient events in this application. This application was filed on 1/11/2019. However, there were some applications preferred by the interested parties seeking to join the proceedings herein and at a certain point there was an appeal to the Court of Appeal, which ended up being withdrawn at a later stage. Thereafter parties intimated and contemplated to settle out of court by way of plea bargain, which did not materialize either.

On 17/2/2021 the respondent presented a notice of preliminary objection, grounding that: one, the application is incompetent for want of conviction of the respondent for the offences of money laundering; two, the application is incompetent for want of conviction of any predicate offence against the respondent. Ruling for these preliminary objections was postponed to pave way for parties' negotiation by way of plea bargain following a request tabled by parties. However, due to prolonged and extended discussions, it was resolved for the main application to be argued by way of written submissions, in a sense that in the event settlement prove abortive, the preliminary objection will be disposed along with the

merit of the application. However negotiation were not progressive ended into impulse situation as stated above and did not yield any fruitful results. Hence this ruling.

May be I should put at the outset that, the two preliminary objections are overruled outrightly, for reasons to follow hereinbelow.

I will start by shading or cherry-picking some facts, emerging issues in the affidavit, affidavit in opposition and annexures thereof, while descending to the final verdict.

In essence the forfeiture order is directed or focused against the respondent solo. However, averments in the affidavit in support are hinged on the wicked activities and misdeed of Ms. Superior Financing Solution Ltd (acronym SFS) orchestrated remotely by the first interested party who is a spouse of the respondent. It is to be noted that, the respondent is neither director, proprietor nor shareholder of Ms. SFS, as reflected in paragraphs four and five of the affidavit in support of application.

Averments in the affidavit in support, suggest that the respondent was a mere beneficiary by virtue of her name found featuring in all the impugned properties. Seemingly even the respondent was not aware of some

properties and was taken by surprise on being exhibited some house drawings and title deeds bearing her name. This can be evidenced by the explanation of the respondents in a document annexure NPS 11 to the affidavit, at the opening statement of her supplementary statement dated 13/7/2016, on a rear page of sheet number one, the maker stated, I quote,

'Mimi na mume wangu Alloycious Gonzaga mbali na kumiliki nyumba ya Bahari Beach tu hatuna nyumba nyingine. Ila tunaviwanja Arusha, Dar es Salaam, Kisarawe ambavyo vimepimwa na vinahati za usajili wa Ardhi kutoka Wizara ya Ardhi. Viwanja hivyo hati zote zimetolewa kwa majina yangu MARGERETH KOBELI GONZAGA ambavyo viwanja vilivyopo Dar es Salaam na Kisarawe ni mume wangu amenunua na kuviandika majina katika usajili...'

At sheet number five of annexure NPS 11, the maker was recorded to have explained, I quote,

'Viwanja nilivyovieleza kuwa vipo Dar es Salaam, Kisarawe na Arusha maeneo ambayo (sic, ambapo) yapo (sic, vipo) sifahamu anayefahamu ni mume wangu na ndiye alikuwa analipia kodi ya ardhi. Ninakiri kuonyeshwa ramani za viwanja Na. 200 na 199 vilivyopo Tegeta Block D, ninakiri kuzitambua ramani hizo kwa sababu ni ramani ya nyumba

yetu ya Bahari Beach ambapo viwanja hivyo alinunua mume wangu (sic, kwa) Bw. Michael John Mpeka alinunua kwa Tsh 2,000,000/= tu. Na transfer hiyo ilishafanyika na kuandikwa majina yangu. Ninakiri kuonyeshwa certificate of occupancy yenye Title No. 138598 ya Plot No. 176 Block B ambacho kipo eneo la Gomvu katika Manispaa ya Temeke, pia ninakiri kuonyeshwa certificate of occupancy yenye Title No. 138597 ya Plot No. 174/B kilichopo eneo la Manispaa ya Temeke. Ninakiri kuvitambua viwanja hivyo kwa sababu vinausajili wa majina yangu na picha yangu na mimi ndiye niliyesaini hati hizo. Viwanja hivi alinunua mume wangu na vikaandikwa majina yao (sic, yangu). Vilevile mume wangu hajawahi nipeleka kuoneshwa hivyo viwanja. Vilevile ninakiri kuonyeshwa notification of a disposition ya nyumba yenye Plot No. 623/5/3, 4, 5 & 6 iliyopo Mlali Road kati ya Saleh Ally Sareh Buchasu mwenye anuani Na. 66... ambaye ni mmiliki wa kiwanja hicho na Alloycious Gonzaga wa S.L.P. 8545 Dar es Salaam ambaye ni mnunuzi wa nyumba'

The two passage above, suggest the respondent was aware of one house only and some plots, the rest houses she doesn't know even their location and whereabouts apart from seeing documentations. Again it is not clear in a statement annexure NPS 11, if the respondent was acknowledging seeing those title deeds being exhibited to her at that epoch of time when making

the statement or in the past. But strictly speaking, the wording portray an action that is currently going on.

Unfortunate a document (NPS 11) where these explanations are extracted is not even titled whether is a witness statement or caution statement and the maker is unknown as to have made and signed under a capacity of a state witness or suspect. Although at a declaration found on the front page or sheet, suggest is a statement for evidence. Another anomaly, the statement (NPS 11) at a certification, dates are at variance between the maker and recording officer, the maker signed a certification on 13/7/20**16** while the recording officer signed on 13/7/**10**.

Number two, averments in paragraph seventeen of affidavit does not mention the respondent as the one deposited a sum of four billion two hundred fourteen million seven hundred thirty six two hundred forty eight (4,214,736,248) alleged to have been deposited into bank account number 01J103428800 as per paragraph sixteen of affidavit. In lieu thereof says it was by large deposited by the first interested party. Annexure NPS11 does not support averments in paragraphs seventeen, in a sense that the alleged sum of money (two billion) does not feature anywhere therein. Even account number depicted in paragraph sixteen of affidavit is not

mentioned in NPS 11. Instead NPS 11 is couched on general terms that the respondent and first interested party they maintained a joint account at CRDB but it was not specific.

Above all, the issue of lending money illegally, tax evasion, false documents, forgery alleged to have been committed by Ms. SFS and her directors are remote, not specifically pleaded and was not stated on which terms can be said to be interwoven to the offence leveled against the respondent or any predicate offence. My undertaking is grounded on a fact that the offences of lending money illegally, tax evasion, false documents, forgery, occasioning loss to a specified authority, conspiracy, uttering false documents were leveled to the first interested party and his co-directors of Ms SFS, as pleaded in paragraph 27 of the affidavit in support. However, in a charge annexure NPS 22 to the affidavit the only charge laid to the respondent was money laundering. Admittedly, NPS 11 the maker concede receiving money from the first interested party and even collecting repayment of loans upon instructions of the first interested party. But still it was not specifically stated that the proceeds were invested in the impugned properties.

More important, account number 01J10**3**428800 mentioned in paragraphs eleven, sixteen, nineteen and twenty of affidavit including in annexure NPS 20 to the affidavit (that is a statement of Victoria Marandu who is a Senior Investigator at Prevention and Combatting Corruption Bureau-PCCB), is different with the one depicted in statements annexure NPS 12 to the affidavit, where a statement of Muzamil Mustafa Karamagi, Julius Lucas Tarimo and Norman Thomas Shayo mention to have deposited into account number 01J10**4**3428800.

In paragraphs twenty-seven and twentieth of affidavit, the alleged offenders who were indicted and convicted on plea bargain and whom the applicant said they admitted to the effects that some money from the criminal activities perpetuated by Ms. SFS was being deposited into account number 01J103428800 held at CRDB bank, but they were not impleaded herein. To this end, the application was about to doom into non-joinder, they are lucky to have Aloyce Gonzaga Mandago who later joined the proceedings as first interested party.

In opposition to the application, the first interested party in his counter affidavit denied each and every particulars of facts in the affidavit save for paragraphs one, two, three and thirty-seven to the affidavit. The first

interested party stated that, facts pleaded in the affidavit which are disputed, are subject to proof beyond reasonable doubt in Economic Case No. 5 of 2019 pending before this Court (but this case is no longer pending). That a mere fact that there was a plea bargain by Mohamed Mustafa Yusufu is not a proof of guilty against him and the respondent. That a mere fact that acquisition of the said properties was made between 2011 and 2016 does not necessarily mean that the said properties were from the proceeds of any crime.

In her supplementary counter affidavit, the respondent speaking through the first interested party stated that the matrimonial properties plot No. 199 Block "D" Tegeta with certificate of title No. 121302 and plot No. 200 Block D Tegeta with certificate of title No. 390291 were acquired in 1993 after the marriage between the first and second respondent (sic, respondent and first interested party).

In the reply to the supplementary affidavit, the applicant said nothing and did not counter a fact by the respondent that properties plot No. 199 Block D Tegeta and Plot No. 200 Block D Tegeta were acquired the way back in 1993 after the respondent and first interested party had contracted marriage. In similar vein, the respondent and first interested party, did not

dispute a fact that landed properties on Plot No. 1378, Block 'E' Tegeta; Plot No. 176, Block 'B' Aman Gomvu; Plot No. 191, Block 'B' Aman Gomvu; Plot No. 174, Block 'B' Aman Gomvu, were transferred and registered in the name of the respondent under false pretext of sale for failure to service loan.

It is elementary knowledge that facts not challenged are mounted to concession. In **Nyerere Nyague vs The Republic**, Criminal Appeal No. 67 of 2010, Court of Appeal Tanzania at Arusha (unreported), at page 5 last paragraph the Apex Court had this to say, I quote,

'As a matter of principal, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said'

Also in **The Hellenic Foundation of Tanzania LTD t/a ST. Constantine's International School vs Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 255 of 2020 Court of Appeal Tanzania at Dodoma (unreported), at pages five and six, the Court made the following obiter dictum,

'We think by noting the contents of the aforesaid paragraphs, the respondent did not dispute the appellant's assertion that it was a registered international school providing nursery, primary and secondary education; that the appellant was a registered charitable organization; and that its business was for the public good'

And as much the respondent made evasive denial to paragraphs 34, 35 and 36, which in totality are to the effect that she went in hiding to dodge and avoid appearance into criminal proceedings initiated and later instituted against her at the Resident Magistrate's Court of Dar es Salaam at Kisumu despite issuance of warrant of arrest and service through substituted service, as per annexure NPS 23. To my opinion in the circumstances of fact above, the respondent is taken to have been convicted of the offence of money laundering contrary to section 12(d) and 13(a) of the Anti-Money Laundering Act No. 12 of 2006, as per annexure NPS 22 to the affidavit. My verdict is premised on the law governing deemed conviction, in particular section 4(1)(c) of Cap 256 (supra), which provide, I quote,

- (1) *For the purpose of this Act a person shall be taken to be convicted of an offence if-*
 - (a) *...NA...*

(b)...NA...

(c) the person absconds in connection with the offence

The provision of section 5 of Cap 256 (supra) provide meaning of abscondment for purpose of deemed conviction, I quote,

For purpose of this Act, a person shall be taken to abscond in connection with an offence if and only if-

(a)An information is laid alleging the commission of the offence by the person;

(b)A warrant of the arrest of the person is issued in relation

to that information; and

(c)One of the following occurs, namely-

(i)...NA...

(ii)at the end of a period of six months from the date of issue of the warrant-

(aa)the person cannot be found; or

(bb)the person is, for any other reason, not amenable

to justice and, if the person is outside the United Republic, extradition proceedings are no instituted.

As I have stated above, herein a charge was laid against the respondent (as per annexure NPS 22 to affidavit), warrant of arrest was issued against

the respondent, substituted service was done as per annexure NPS 23 to the affidavit, but the respondent did not show up and six months expired counting from the date of issuance of warrant and service. Instead the respondent is operating or issuing directives remotely on how to pursue the application.

Instance, in the counter affidavit deposed by Alloycious Gonzaga Mandago, the deponent asserted that his wife Margreth Kobelo Gonzaga is currently abroad since mid January 2019 and she instructed the deponent to swear the counter affidavit and engage an advocate on her behalf.

Therefore, I rule that all the conditions for deemed conviction were met to a letter. In the circumstances a deemed conviction against the respondent is settled and deserving.

As such an argument by the first third party that the respondent has not been convicted for any predicate offence or money laundering, is untenable, as all conditions for a deemed conviction were taken on board. Equally the preliminary objections by the respondent are overruled on similar ground.

Now, so far the respondent did not dispel a fact into paragraph thirty seven that properties mentioned into paragraphs 29, 30, 31, and 32 belong to her (Margareth Gonzaga Kobelo).

And in view of above findings, the following landed properties: Plot No. 1378, Block "E" Tegeta with certificate of title No. 41275; Plot No. 176, Block "B" Aman Gomvu with certificate of title No. 138598; Plot No. 191, Block "B" Aman Gomvu with certificate of title No.132797; Plot No. 174, Block "B" Aman Gomvu with certificate of title No. 138597, mentioned in paragraphs 30 and 31 of affidavit, are all forfeited to the Government of the United Republic of Tanzania. Its acquisition was tainted by illegality and fraud, example loan agreements being converted into sale agreement and transfer deed. This can be evidenced by a statement of Betty Raphael Mwafyuma (annexure 19 to the affidavit), where she guaranteed her cousin Rose Sospeter Gibonge and mortgaged her landed property on Plot No. 1378 Block E to Ms SFS, where a mortgage was converted into a sale agreement coupled by transfer deed.

Properties on Plot No. 199, Block "D" Tegeta with certificate of title No. 121302 and Plot No. 200, Block "D" Tegeta with certificate of title No. 39021, are not amenable to forfeiture order. Because of concession that

they were acquired the way back in 1993; no solid foundation was laid to connect its acquisition with the alleged wicked deeds of Ms SFS pleaded in paragraph 32 of affidavit, including tax evasion, forgery and carrying on lending business without licence; banks accounts differ materially.

Appreciation to Mr. Christopher John Msigwa learned Senior State Attorney for the applicant, Mr. Juma Nassoro learned Advocate for the respondent and Mr. Jamhuri Johnson learned Counsel for the first interested party, for their labored submissions.

The application is granted to the extent adumbrated above.



E.B. Luvanda
Judge
15.07.2022