

**IN THE HIGH COURT OF TANZANIA**  
**CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**AT TANGA SUB REGISTRY**  
**ECONOMIC APPLICATION NO. 01 OF 2021**

**DIRECTOR OF PUBLIC PROSECUTIONS .....APPLICANT**

***VERSUS***

**YANGA OMARY YANGA..... RESPONDENT**

**RULING**

*20/12/2022 & 17/03/2023*

**E. B. LUVANDA, J.**

Yanga Omary Yanga the Respondent herein filed a notice of preliminary objection comprising three points: One, the application is hopelessly time barred; Two, the application is incompetent and un maintainable as affidavit in support of the application is fatally defective for containing speculation and an incurable defective verification clause, as the Applicant did not verify the source of information in the affidavit; Three, the court is *functus officio* lacks jurisdiction to entertain the application vide Economic Case No. 1/2020 and Criminal Appeal No. 133/2021 also Criminal Application No. 1/2021.

Mr. Nehemiah Geoffrey Nkoko learned Advocate for the Respondent abandoned the first ground, and argued the second and third ground.

Arguing for the third ground, the learned Counsel for Respondent submitted that a motor vehicle T 325 DJX Toyota Land Cruiser, was determined by this court in Economic Case No. 1/2020, it ordered the same to be handed over to its rightful owner Omary Yanga as it found out that there is no evidence to prove the same used as instrumentality for the drugs subject matter of the case. He submitted that it is wrong for the Applicant to apply to this court for a forfeiture order while the Applicant aggrieved by the decision of this court and filed Criminal Appeal No. 133/2021, but the Applicant on the 24<sup>th</sup> May, 2021 when the appeal was called for hearing at the Court of Appeal, the applicant informed the apex Court that they have no interest to pursue the appeal and they withdrew their appeal, which means the Applicant has conceded that the motor vehicle is not subject in any way involved with narcotic drugs nor purchased from proceeds derived from trafficking in narcotic drugs. He submitted that withdraw of appeal, is an indication the Applicant does not intend any more to pursue legal actions against the impugned motor vehicle and therefore, this Court has no jurisdiction. He cited the case of **Kigoma/Ujiji Municipal Council versus Nyakirang'ani Construction Limited**, Commercial Case No. 239/2015 (unreported); **Didacus Wilson Chacha versus Republic**, Misc. Criminal Application No. 168/2021, High Court of Tanzania at Dar

es Salaam; as to what entails *functus officio*, he cited **Kamundi versus Republic**, (1973) 1.E.A. 540; **International Airlines of the United Arab Emirates versus Nassor Nassor**, Civil Appeal No. 379/2019, C.A.T. at Dar es Salaam.

Regarding the second objection, the learned Counsel for the Respondent submitted that the affidavit is full of allegation, hearsay and is so scanty and skeletal. Above all, the affidavit is speculative because the deponent verified that the contents of paragraphs 3 to 22, inclusive are based on the information obtained from investigation file. He submitted that the alleged major development alleged to have been made within the period of ten years, were not explained as to how it involved the narcotic drugs. He cited **Said Sultan Ngalema versus Isack Boaz Ngiwanishi & 4 Others**, Civil Application No. 362/17 of 2021 C.A.T. Dar es Salaam.

In response, Mr. Christopher Msigwa learned Senior State Attorney for the Applicant, submitted that this court has jurisdiction to entertain this application as the same is not *functus officio*, because this court in Economic Case No. 1/2020 did not make a final determination in respect of the forfeiture of the motor vehicle in question. He submitted that, what the court said is that there is no enough evidence to warrant the

motor vehicle as an instrumentality of a crime, hence subject to an outright forfeiture. That the motor vehicle listed because is a proceed of crime as was acquired by the Respondent within ten years before the Respondent charged with the offence of trafficking in narcotic drugs, hence subject for forfeiture interms of the provision of the Proceeds of Crime Act, Cap 256 R.E. 2002, and section 49(4) of the Drugs Control and Enforcement Act, No. 5/2015. He distinguished cases cited by the Respondent in that the matter at hand the court has not have an opportunity of hearing and making a final determination over the fact that the said motor vehicle is a tainted property for being proceeds of a serious offence to which the Respondent convicted of.

To the second objection, the learned Senior State Attorney submitted that the affidavit in support of this application contains facts which are well supported by documents annexed therein, and they are in no way speculative. He submitted that contents of affidavit are facts which are subject to evidence and cannot be determined at this stage, as the matter is not at hearing stage. He submitted that mentioning the investigation file as the source of information in the respective paragraphs 3 to 22, inclusive, of the affidavit, was sufficient. He

distinguished a case of **Said Sultan** (*supra*) on that herein the application is for forfeiture orders in respect of tainted properties.

On rejoinder, the learned Counsel for the Respondent submitted that the court satisfied that the motor vehicle is not a property of the Respondent nor used as instrumentality in trafficking narcotic drugs, in other words this court is *functus officio* to adjudicate upon the motor vehicle. He submitted that by withdrawing Criminal Appeal No. 133/2021, the Applicant had satisfied herself that the motor vehicle had nothing to do with narcotic drugs.

To the second objection, the learned Counsel for the Respondent rejoined that the application is incompetent and un maintainable as affidavit in support is fatally defective for containing speculation and an incurable defective verification clause, as the Applicant did not verify sources of information.

There is no dispute that the motor vehicle T 325 DJX Toyota Land Cruiser was subject for litigation by this court in Economic Case No. 1/2020. The Respondent's Counsel stressed that it was conclusively determined by this court refusal to forfeit it. The Applicant's learned State Attorney, maintained a view that the court did not make a final

determination in respect to the forfeiture of the motor vehicle in question.

According to a judgment in Economic Case No. 1/2020 **Republic versus Yanga Omary Yanga** (Respondent herein) **& 2 Others**, The Corruption and Economic Crimes Division, at page 23, speaking through Hon. Banzi, J this Court made the following order,

*'... a motor vehicle makes Toyota Land Cruiser T 325 DJX I find no evidence to prove the same was used as instrumentality for the drugs subject matter of this case ... Had it been an instrumentality, yet still, the same could not have been confiscated without complying the provision of section 49 A (3) of the Drugs Control and Enforcement Act, as amended because the available evidence shows that it does not belong to the 1<sup>st</sup> Accused Person. **Thus, I order the same to be restored to its rightful owner, Omary Yanga Omary as shown on the evidence unless otherwise held for other lawful purpose'**[bold added]*

Arguably this order was subject to appeal in Criminal Appeal No. 133 of 2021 at the Court of Appeal of Tanzania, alleged withdrawn by the Applicant on 24/5/2021, at the last minute, when the same was due for hearing.

In his reply, the learned State Attorney for Applicant said nothing regarding steps taken to challenge and appeal against that order, neither existence of Criminal Appeal No. 133/2021 nor withdrawal of the same. This by implication implies concession to this factual argument.

Therefore, it goes without gain saying that this court is *functus officio* to entertain and adjudicate a question of forfeiture of the said motor vehicle. Therefore I find merit on the third ground of objection and I sustain it.

Regarding the second limb of objection, that the affidavit is speculative, for the deponent verified substantial paragraphs via information extracted from the investigation file, to my view this borders docket merit of the application. Therefore, the same will be deliberated along the merit of the application.

As to the relief and fate of the application, the Respondent's Counsel pleaded for the dismissed of the application in toto.

I have gone through the notice of application for forfeiture orders, paragraph 1 comprises unexhausted list of number of properties alleged to be tainted and subject for forfeiture, running from roman (i) up to

(xxiv). On the list, the impugned motor vehicle Toyota Land Cruiser with registration number T 325 DJX features at item number (xxi).

In this respect, it cannot be said, that a point of objection sustained above have the effects of rendering the entire application to flop.

To my view a proper remedy to the situation at hand, is to apply the doctrine of issue estoppel, as inaugurated in a famous case of **Issa Athuman Tojo versus Republic**, (2003) T.L.R. 199, at page 211, the apex Court had this to say,

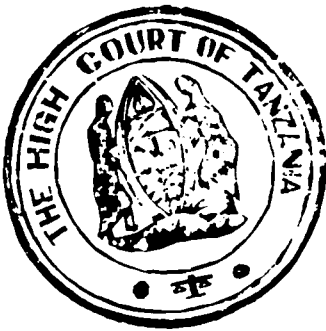
*'As regard the danger of the doctrine being applied in cases where it is in appropriate, we are content to observe that the doctrine should not be given a universal applicability. If its application in certain situation is likely to give rise to injustice, the solution is not to exclude its application entirely, but to limit it to cases in which it would promote fairness'*

The apex Court went on,

*'Accordingly, where an issue of fact has been tried by a competent court on a former occasion, and a finding has been reached in favour of the accused, such finding would constitute an estoppel against prosecution, and thus evidence to disturb that finding of fact when the accused is tried subsequently, even for a different offence, will not be received'*

In view of the foregoing, I limit the scope of a remedy to a sustained objection and make an order striking item (xxii) of paragraph 1 to a notice of application for forfeiture orders, chamber summons and sub paragraph (t) to paragraph 10 of the affidavit, on account of this Court being *functus officio*.

It is accordingly ordered.



E.B. LUVANDA

**JUDGE**

17/03/2023