

THE UNITED REPUBLIC OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM
ECONOMIC APPLICATION NO. 9 OF 2023
(Originating from the Economic Case No. 05 of 2022 at High Court CECD-
Dar es Salaam)

DIRECTOR OF PUBLIC PROSECUTIONS

Versus

ABDULMOHAMED SHABAN
ERASTO JOSEPH MTUMA

Date of Last order: 29th February, 2024

Date of Ruling: 13th May, 2024

ISAYA, J.:

R U L I N G

There is an application before this Court under **section 9 (1) (a) of the Proceeds of Crime Act, [Cap 256 R.E 2019]** in which the applicant is seeking orders that this Court be pleased to forfeit the alleged tainted property, namely a motor vehicle Toyota Noah chassis number SR400238319 and Engine no. 3S7987463 with registration No. T 300 DCS to the Government of the United Republic of Tanzania and any other orders the court may grant. The application is supported by an affidavit sworn by Mr. Grey Augustino Uhagile, a Learned State Attorney. The

respondents lodged their respective counter affidavits sworn by the respondents themselves whereby they strongly resisted the application at hand.

The arguments were made through written submissions, and both parties adhered to the scheduled order for submissions. The applicant was represented by Mr. Ditrick Filbert Mapunda, State Attorney while the respondents appeared unrepresented.

Basically, the Applicant in her submission is asking the court to issue an order of forfeiture of the Motor vehicle with registration **No. T 300 DCS, Toyota Noah** because it is a tainted property. A summary of facts giving rise to the present application can be extracted from the affidavit of the applicant. On 13th October 2018, at the Miembe Saba area within the Kibaha district, a Motor vehicle with registration **No. T 300 DCS, Toyota Noah** was apprehended by the police following the accident which involved the car. Upon the search conducted in the vehicle in question, two sulfate bags containing narcotic drugs, namely Cannabis Sativa (bhang) were retrieved from the vehicle. The first respondent who was driving the vehicle was charged, together with one Conrad Joseph Mtuma with the offence of **Trafficking in narcotic drugs contrary to section 15 (1) (a) of the Drugs Control and Enforcement Act, [**

Cap. 95 RE 2022] in the **Economic Case No. 05 of 2022** in this Court.

That upon the full trial, the first respondent was convicted of the offence and sentenced to 20 years imprisonment.

His argument in relation to the application is that the Motor vehicle with registration **No. T 300 DCS, Toyota Noah** is a tainted property because it was used in the commission of the offence that the first respondent was charged and convicted with. To buttress his point he cited Section 3(1) (a) of the Proceeds of Crime Act [Cap 256 R.E 2022] that tainted property includes property used in, or in connection with the commission of the offence. He attacked the averment by the second respondent that he is an innocent owner of the motor vehicle in question because he failed to prove that the same was used in the commission of the offence without his knowledge. He contended that the second accused who knew about the arrest of the first respondent who was driving the vehicle in question never appeared before the police station and before this court during the hearing of the Economic Case No. 05 of 2022. He never appeared in court to state what he alleged in his counter affidavit that he gave the vehicle to the driver. He had the view that the second respondent knew what was going on. He further cemented his point by citing the case of **THE DIRECTOR OF PUBLIC PROSECUTIONS VS. MIKULA MANDUNGU,**

Criminal Appeal No. 47 of 1989, CAT at Mbeya (Unreported) as cited with approval in **THE ATTORNEY GENERAL VS MUGESI ANTHONY AND 02 OTHERS, Criminal Appeal No. 220 of 2011, CAT at Mwanza** (unreported) in which it was held that since the owner did not prove that his motor vehicle was used in the commission of the offence without his knowledge or consent, it proceeded to forfeit the motor vehicle.

On the other hand, the first respondent is still struggling out of the reproach of the conviction of the offence in the main case. In his submissions he maintained that he was not a driver of the motor vehicle with registration No. T 300 DCS, Toyota Noah, nor was he found driving it while trafficking in narcotic drugs. Shortly, he wished to be separated away from the vehicle in question.

The second respondent's submission was to the effect that he is the owner of the motor vehicle with registration No. T 300 DCS, Toyota Noah. He defended that when his motor vehicle was apprehended trafficking in narcotic drugs while driven by the first respondent, it was in possession of one **Titus Fedeo** as custodian of the same. He further revealed in his submission that the 1st respondent hired the vehicle from the custodian so that he could use it to receive a guest at Kibaha. He argued that he

was not involved in the black business nor consented to the use of his motor vehicle by the 1st respondent. He submitted that he is an innocent owner of the motor vehicle who never consented nor involved in the commission of the offence. He also challenged that the motor vehicle in question is not a proceed of crime. He lastly prayed that the prayer for forfeiture should not be granted; instead, the motor vehicle should be handed back to him.

During rejoinder, Mr. Detrick came forming at the mouth. He attacked the submission by the 2nd Respondent that the motor vehicle was under the custody of TITUS FEDEO, annexures in the submission, and how he made correspondence to rescue the motor vehicle. He asserted that the 2nd Respondent did not depose them in his counter affidavit, and therefore he is estopped from introducing new matter. He reminded the court that his counter affidavit is a substitute for oral evidence. He buttressed his point by citing the case of **JACKSON SIFAEEL MTARES AND 3 OTHERS VS. REPUBLIC, Civil Appeal No. 180 of 2019, CAT at DSM, (Unreported)**

Another front and crushing moment in the rejoinder is when he attacked that the 2nd Respondent failed to prove on the balance of probability that he did not have knowledge about his motor vehicle being used in the

commission of crime. That he did not state what measure he used after the arrest of the 1st Respondent and seizure of the motor vehicle. There is no affidavit of TITUS FEDEO nor was he brought before the court in the main case to prove the same. He again reinforced his point by citing the case of **LUHUMBO INVESTMENT LTD V. NATIONAL BANK OF COMMERCE & 2OTHERS, Civil Appeal No. 503 of 2020 CAT at Shinyanga** (Unreported)

Having considered the submissions for and against the application, it is common knowledge that the application at hand comes into play upon completion of **Economic Case No. 05 of 2022** in this court, whereby the first respondent was convicted by this court via the decision of the said case as they were alleged to have been arrested while trafficking in narcotic drugs namely cannabis sativa. Before I dwell to consider the issues in this matter, I wish to find and make my observation that, though the respondent has defended that the vehicle in question is not a tainted property, I think the same should not be newsworthy in this matter because under **section 3 (1) (a) and (b) of the Proceeds of Crime Act, [Cap 256 R.E 2019]**, tainted property means any property that has been used in or in connection with the commission of a serious offence or that constitutes proceeds of a serious offence. It is again true

that the **Proceeds of Crime Act, [Cap 256 R.E 2019]** covers both types of properties, namely, proceeds and instrumentalities. After all, the enabling provision of section 9 (1) (a) has been cited from the law of the Proceeds of Crime Act, [Cap 256 R.E 2019].

Now, let us turn to the contested areas. I find three issues for determination; **firstly**, whether the motor vehicle with registration No. T 300 DCS, Toyota Noah is tainted property; **secondly**, whether the respondent is the owner of the motor vehicle subject matter of application; **thirdly**, whether the motor vehicle with registration No. T 300 DCS, Toyota Noah can be confiscated.

Starting with the first issue, whether the motor vehicle T 202 DNS Toyota IST is a tainted property, the applicant has asserted that the vehicle in question ought to be forfeited because it was used in trafficking in narcotic drugs, hence a tainted property of crime. The 2nd respondent, apart from admitting that it was used in the trafficking of narcotic drugs through his counter-affidavit and submission, has vigorously resisted that the same should not be forfeited since he never consented to be used by the 1st Respondent in the commission of offence rather it is incidental to the commission of an offence. The 1st respondent in his affidavit and submission is rejecting blatantly that he was not a driver of the said motor vehicle on the material date. In my opinion, no one in this matter has

disputed that the motor vehicle in question was used in trafficking narcotic drugs, which was the finding too in Economic Case No. 05 of 2022. The 1st accused was convicted and sentenced in the said case. As noted above, under section 3 (1) (a) of the Proceeds of Crime Act (supra):-

"Tainted property means any property that has been used in or in connection with the commission of a serious offence..."

Considering the submissions and facts deposed the respective affidavits by the parties, also the cited law above this court finds that the motor vehicle with registration No. T. 202 DNS Toyota IST is a tainted property

Coming to the second issue, it is the argument of the 2nd respondent that he is the owner of the motor vehicle in question. To prove this, he attached copies of the motor vehicle registration card. Further, the applicant has admitted in para 8 of his affidavit that the motor vehicle registration card bears the name of **Erasto Joseph Mtuma** as the owner of the same. I think this issue should not waste our time since even the 1st respondent has not challenged the ownership of the motor vehicle by the 2nd respondent. This issue is answered affirmatively.

The third issue examines, whether the motor vehicle with registration No. T 300 DCS, Toyota Noah can be forfeited. Having found that this motor vehicle is a tainted property having been involved in the

commission of the offence, and that the same is owned by the 2nd respondent, the important question at this juncture in respect of the this issue is whether the 2nd respondent had no knowledge of his motor vehicle being used in the commission of the crime, albeit trafficking in narcotic drugs. The second respondent had defended that when his motor vehicle was apprehended trafficking in narcotic drugs while driven by the first respondent, it was in possession of one **Titus Fedeo** as custodian of the same. That he had not consented to his motor vehicle to be used in the commission of the crime. He asserted that he was an innocent owner. The applicant has dismissed his assertion basically because, according to him the 2nd respondent failed to prove on the balance of probability that he did not have knowledge about his motor vehicle being used in the commission of the crime. He did not state what measure he used after the arrest of the 1st Respondent and the seizure of the motor vehicle. Again, there is no affidavit of TITUS FEDEO nor was he brought before the court in the main case to prove the same.

I have very dutifully and carefully considered this question. Maybe, at this juncture, I should start with the assertion of the 2nd respondent that the motor vehicle in question was in the possession of one **Titus Fedeo** as custodian when the same was apprehended and involved in the commission of the offence. Further that the 1st respondent hired the

vehicle from the custodian so that he could use it to receive a guest at Kibaha. The learned State Attorney responding to the submission state that the 2nd respondent did not depose those facts in his counter affidavit, therefore he is estopped from bringing them during the hearing. I took time to revisit the counter affidavit of the 2nd respondent. It is true as submitted by the applicant, those facts are not in his counter affidavit. In the cited case of **JACKSON SIFAEEL MTARES AND 3 OTHERS VS. REPUBLIC**, (Supra), it was stated on page 16 as follows:-

"...the disposition contained in the respective affidavit were indeed pleadings and it is settled law that parties are bound by their pleadings and no party should be allowed to depart from his pleadings with the effect of changing his case from what he/she originally pleaded"

I agree with the Applicant that, as stated in the above-cited case, the parties are bound by their pleadings. They should not introduce new matters which were not pleaded before. In the present matter, the alleged fact that the motor vehicle was in the custody of the said Titus Fedeo during the commission of the offence, and the 1st respondent to hire the vehicle from the custodian to receive a guest at Kibaha are new matters not originally in his counter affidavit.

Secondly, the 2nd respondent has submitted that he made a follow-up of his motor vehicle at Kibaha police station. He had attached the two letters as proof of his follow-ups of his property. The letter requesting the handing over of the motor vehicle was written after the delivery of the judgment in the main case on 13.07.2023. The judgment was delivered on 30.06.2023. The police replied his request in the letter annexed on 21.07.2023. This does not give a proof that he made a follow-up just after he knew his motor vehicle was involved in the commission of the offence because what we see in the two letters is that they were made after the delivery of the judgment. After all, the two letters were required to be annexed in the pleadings and not in the written submission. I agree with the position in the cited case of **LUHUMBO INVESTMENT LTD V. NATIONAL BANK OF COMMERCE & 20THERS** (Supra) that;-

"It is trite law that parties are bound by their pleadings at any standard written submissions and its annexures do not form part of pleadings and the same are not intended to submit new facts or evidence but only elaborate on the facts and or evidence already indicated in pleadings"

In light of the principle in the above-cited case, I choose to disregard the two letters. Now, is the 2nd respondent an innocent owner who had no knowledge nor consented to his property being used in the commission

of the crime? In my view, there is no proof so far. As submitted by the Applicant a lot can be desired in his disposition because, first, if he made a follow-up at the police station and stated that the so called **Titus Fedeo** was a custodian who handed the motor vehicle in question to the 1st respondent, I think the alleged custodian could make a very good prosecution witness. There is no any proof, as an innocent owner to have assisted the police in their investigation, at least to make a statement at the police station. I have in my mind that an innocent owner should be protected as far as his property is concerned. In the case of **THE ATTORNEY GENERAL VS. MUGESI ANTHONY AND 2 OTHERS, Criminal Appeal No. 220 of 2011, CAT (Unreported)**. It was stated inter alia that:-

"...it was never the intention of the parliament nor is it in the general interest of our society, that the Proceeds of Crime Act, be applied indiscriminately to innocent property owners in all cases. We are not going to reinvent the wheel here...such a strict approach, in our opinion, would lead to grave injustice in respect of innocent third parties than the attainment of just and legitimate objectives of the Acts, and the reasonable expectations of the community of deterring the offender and protecting the innocent, at all costs"

In this present matter, the 2nd respondent has failed to prove that he is an innocent owner. He does not deserve the protection of the law.

The third issue ought to be answered affirmatively too, and I so find and hold.

Consequently, the motor vehicle with registration **No. T 300 DCS, Toyota Noah** is hereby forfeited to the United Republic of Tanzania. It is so ordered



**G.N ISAYA
JUDGE
13/05/2024**

Court: Ruling delivered in open court this 13th May 2024 in the presence of Mr. Ditrick Mapunda, the Learned State Attorneys, the first respondent, and the second respondent Mr. Mubaraka, B/C, and Hon. Kisaka (JLA).



**G.N ISAYA
JUDGE
13/05/2024**