IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 136 OF 2021

SAMO ALLY ISSACK .....1ST APPELLANT

MWINYI RAMADHANI MAGWIRA .....2ND APPELLANT

PETER ODONGO KITIWA .....3RD APPELLANT

REGIONAL LOGISTICS LTD .....4TH APPELLANT

ILOVO SUGAR KIGALI LTD .....5TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the ruling of the High Court of Tanzania at Dodoma)

(Masaju, J.)

dated the 12th February, 2021

in

Miscellaneous Criminal Application No. 107 of 2020

JUDGMENT OF THE COURT

27th October & 4th November, 2021

MWANDAMBO, J.A.:

Before us is an appeal against the ruling of the High Court sitting at Dodoma granting the respondent's application for restraining orders premised on section 38 (1) (2) and 43 (1) of the Proceeds of Crime Act [Cap. 256 R.E. 2019], henceforth, the POCA. The appellants have preferred their appeal through their advocate; Ms. Sophia George Gabriel, who prosecuted the appeal on their behalf.

Briefly, the application for restraining orders before the High Court was prompted by the arraignment of Samo Ally Issack and Mwinyi Ramadhani Magwira, the first and second appellants respectively, before the Resident Magistrate's Court of Dodoma in Economic Case No. 28 of 2019 (hereinafter to be referred to as the Economic Case). The first and second appellants are among the accused persons in that case charged with the offence of interfering with necessary service contrary to paragraph 12 of the First Schedule to, and section 57 (1), 60 (2) and (3) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2019] together with section 3 (d) of the National Security Act [Cap. 47 R.E. 2002]. The offence with which the two appellants are charged is a serious offence in terms of section 3 (1) of the POCA.

According to the affidavit annexed to the chamber summons, on which there is no dispute, the first and second appellants were at all material times employees of Regional Logistics Limited (the fourth appellant) in which Peter Odongo Kitiwa (the third appellant) is a director. By an agreement between the third and fourth appellants on the one hand and Ilovo Sugar Kigali Limited (the fifth appellant) on the other, the third and fourth appellants agreed to transport brown sugar for the latter from the Republic of Malawi to Kigali, Rwanda in motor vehicles with Registration Nos. AIB 6924 ZM with trailer No. T. 655 DDC and AIB 6938

with trailer No. T.768 DGE, the properties of the fourth appellant driven by the first and second appellants respectively. Whilst on transit to Rwanda from Malawi through Kasumulu Boarder, Mbeya, Makambako-Iringa and Dodoma roads, the two motor vehicles and their trailers were apprehended with overloaded consignment of brown sugar under the direct control and charge of the first and second appellants. The respondent, through the Director of Public Prosecutions formed an opinion that the two motor vehicles and their trailers together with the consignment facilitated and were used in the commission of the serious offence, thus they were tainted properties in terms of section 3(1) of the POCA. Consequently, it moved the High Court under section 38 (1), (2) and 43 (1) of POCA for interim remedies pending determination of the Economic Case, specifically:-

1. *A restraining order prohibiting the respondents, their agents and all other persons acting on their behalf from disposing of and interfering with the hereunder listed properties:*

(a) *Motor Vehicle with registration number AIB 6939 ZM and its trailer with registration number T 768 DGE.*

(b) *Motor Vehicle with registration number AIB 6924 ZM and its trailer with registration number T 665 DDC.*

(c) *55 Tons of Malawi Brown Sugar.*

2. *An order for sale of the 55 tones of Malawi Brown Sugar mentioned in paragraphs 1 (c) herein above with a view to preserve its value pending determination of the case against the respondents.*

3. *An order directing the proceeds from the sale of sugar mentioned in paragraph 1 (c) and 2 herein be deposited in account number 9921161271 maintained at* ***BANK OF TANZANIA*** *in the name of* ***ASSET FORFEITURE AND RECOVERY ACCOUNT (AFRA)*** *pending determination of the case against the respondents.*

4. *An order directing the Regional Crimes Officer of Dodoma Region to keep safe custody of the Motor Vehicles mentioned in paragraph 1 herein above pending determination of the case against the respondents.*

5. *Any other orders this honourable court may deem fit and just to grant."*

The appellants resisted the application through a joint counter-affidavit taken out on their behalf by their advocate but, the High Court granted that application vide ruling delivered on 12/02/2021. It did so upon being satisfied that the respondent had discharged its burden of proof in support of the orders sought on the balance of probabilities; a standard of proof required in such cases in terms of section 75 of the

POCA. The High Court gave three reasons for granting the application; **one**, the remedies sought were legally provided under the provisions of section 38 (1) (2) (7) (a) (b) 39 (1) (3) (b) (5) (6) (7) (10) and 43 (1) of the POCA; **two**, the order for the disposal of the brown sugar was consequential to the restraining order and legally provided for under section 38 (7) (a) (b) of the POCA considering that the sugar was prone to natural decay, decomposition and degradation; **three**, the order for the disposal of the sugar was beneficial to all parties pending the outcome of the Economic Case. The appeal is predicated on the following paraphrased grounds, namely:

1. *That the Hon. Judge erred in law and in fact by assuming that it was necessary to grant the retraining order as the appellants could apply for restitution of the property which was not supported by the proceedings.*
2. *That the High Court erred in deciding that the respondent was entitled to the disposal order under section 38 (7) (a) and (b) of the POCA in the absence of an application for forfeiture of properties concerned.*
3. *That the High Court erred in deciding that the restraint order was beneficial to both parties without regard to paragraph 20 of the counter-affidavit.*
4. *That the High Court erred in law and fact in issuing a blanket restraining order covering the 3rd, 4th and 5th appellants pending timely disposal of Economic Case No. 28 of 2019 before the*

Resident Magistrate's Court at Dodoma in which they were not charged.

We find it apposite to state at this juncture that for all intents and purposes, the appellants are inviting the Court to interfere with the exercise of discretion by the High Court to grant the application for restraining orders. Settled law is that when exercising discretion, the courts are enjoined to act judiciously and once that is done, superior courts such as ours will, as a matter of principle, reluctantly interfere with the lower courts or tribunal exercise of their discretion. To this end, we are mindful of what we have said in many of our previous decisions echoing the tests to be applied by superior courts before interfering with the lower courts/tribunals discretion. The statement of Sir Clement De Lestang, Vice President of the defunct Court for East Africa in **Mbogo & Another v. Shah [1968]** E.A. 93 features quite prominently in the Court's previous decisions which include, to mention, but a few, **Credo Siwale v. R.,** Criminal Appeal No. 417 of 2013, **The Commissioner General, Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 119 of 2019 and **Nyabazere Gora v. Charles Buya**, Civil Appeal No. 164 of 2016 (all unreported).

It is now settled from the above mentioned decisions that, an appellate court can only interfere with the discretion of the inferior court

or tribunal if it is satisfied that that such court or tribunal has acted in any of the following circumstances; **one**, if the inferior court misdirected itself, or; **two**, it has acted on matters on which it should not have acted, or; **three**, it has failed to take into consideration matters which it should have taken into consideration, thereby arriving at a wrong conclusion. In **Credo Siwale** (supra), the Court made reference to an American decision in **Pink Staff v. Black & Decktz (US) Inc;** 211 3.W. 361 (Court of Appeal 2009) on what would constitute an erroneous exercise of discretion. From that decision, an erroneous exercise of discretion is regarded as an abuse of it which occurs when the impugned decision was not based on facts, logic and reason but was arbitrary, unreasonable or unconscionable. We shall be guided by the above tests in determining whether the High Court wrongly exercised its discretion thereby arriving at a wrong conclusion; granting the application before it.

Ms. Sophia George Gabriel, learned advocate, represented the appellants during the hearing of the appeal. Mr. Harry Mbogoro, learned Senior State Attorney together with Ms. Estazia Wilson, learned State Attorney appeared for the respondent Republic resisting the appeal.

The appellants' learned advocate addressed us sequentially on the grounds of appeal but we find it convenient to start with ground three. In this ground, the High Court is faulted for holding that the restraining

order was beneficial to both parties. The learned advocate argued forcefully that contrary to the High Court, the restraining order was not beneficial to the appellants the more so because the learned judge did not have regard to the averments in paragraph 20 of the counter-affidavit to the contrary. Ms. Wilson countered the appellants' submission on this ground, and rightly so in our view that the High Court considered the averments in paragraph 20 of the counter-affidavit but it was not moved to find that that the sugar was not prone to natural decay and degradation and so its preservation was an overriding consideration in granting the disposal order for its sale.

Having examined the impugned ruling, we think that the criticism against the High Court is misplaced. We say so mindful of the fact that once the preconditions for the grant of a restraining order are met, the court need not be concerned with such considerations as to who stands to benefit from the order. The test in granting the order is whether the applicant has met the threshold under section 38 (1) (2) of the POCA rather than who will benefit from the order. We do not think the learned judge's remarks at page 104 of his ruling was in anyway a crucial and decisive factor in granting the application.

At any rate, contrary to the learned advocate's submission, we respectfully agree with Ms. Wilson that the learned judge had regard to

para 20 of the counter-affidavit but rejected the appellants' averments disputing that the sugar was not prone to natural decay and degradation. Accordingly, we dismiss ground three for being unmerited.

We shall now turn our attention to ground one. This ground criticizes the High Court for granting the application based on the assumption that such order was necessary to forestall the appellant from applying for restitution of the properties in the absence of anything to that effect in the proceedings. Ms. Gabriel was resolute that the order was made without regard to the fact that the first and second appellants were not yet convicted of the offence charged in the light of section 39 (3) (a) of the POCA and so it was an error on the part of the High Court to make the restraining order as it did. The learned advocate contended further that the order was uncalled for and irregular in so far as the properties were under the police custody.

Ms. Wilson submitted in rebuttal on this ground supporting the High Court for having acted within its jurisdiction in making the restraining order under section 38 of the POCA upon being satisfied of the existence of the conditions set out under section 39 of the same law. Amplifying, the learned State Attorney pointed out that there was no dispute that the first and second appellants were facing charges on a serious offence in the Economic Case before the Resident Magistrate's

Court at Dodoma, thus, the provisions of section 38 (1) of the POCA were fully complied with. Further, the learned State Attorney argued that the restraint order was not directed against the first and second appellants personally rather, the tainted properties of the third, fourth and fifth appellants, subject of the Economic Case. She downplayed the appellant's argument that the High Court made the restraining order because of the apprehension for an application for restitution under section 357 of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). On the contrary, she argued, the order was not made on the basis of the claimed apprehension, rather upon the High Court being satisfied that the respondent met the conditions for its grant.

In its ruling, the High Court took the view that the application before it was competently filed for remedies which are legally provided. It also reasoned that in the absence of a restraining order, the appellants would be legally entitled to apply for restitution of the properties claimed to be tainted properties and subject of a serious offence facing the first and second appellants in the Economic Case. Similarly, the High Court observed that, all respondents (now appellants) were necessary parties to the application under section 38 (1) (a) (b) and that the evidence through the affidavit in support, had established on balance of probabilities; an applicable standard of proof under section 75 of the POCA (at page 103

of the record of appeal). As to the order for disposal of the sugar, the High Court was alive that such order was consequential to the restraining order legally sanctioned by section 38 (7) read together with sections 38 (2) and section 39 of the POCA to forestall the damage to the sugar kept in the motor vehicles which was prone to natural decay and degradation.

From the foregoing considerations by the High Court we are satisfied, as submitted by the learned State Attorney, that the preconditions for the grant of the orders under section 38 and 39 of the POCA were all met and the High Court was properly seized of the matter. Apparently, there has been no complaint that the High Court acted without jurisdiction in granting the application. The only complaint in this ground is against the High Court taking into account the provisions of section 357 of the CPA. The learned advocate would have us hold that the High Court considered the provisions of section 357 of the CPA in relation to the apprehension of an application for restitution claimed to be unsupported by the proceedings. By that contention, the learned advocate appears to be suggesting that the order was a result of the High Court taking into account matters it should not have considered thereby arriving at a wrong conclusion. Was it so? Section 357 (a) of the CPA stipulates:

"357. Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order-

(a) that the property or part thereof be restored to the person who appears to the court to be entitled thereto and, if he is the person charged, that it be restored either to him or to such other person as he may direct;"

It is beyond peradventure from the above that the court before which the first and second appellants were arraigned had power to order the restoration of the properties subject of the charge or any part thereof to the third, fourth and fifth appellants upon their application. The reason behind the High Court alluding to section 357 of the CPA in its ruling is not far to seek. In his submissions before the High Court, Mr. Deus Nyabiri, learned advocate for the respondents resisted the application on the grounds, amongst others, that it was superfluous and a wastage of time since the respondents (now appellants) had not made any application for the release of the properties subject of the application (see page 88 of the record). In rejoinder, Mr. Chivanenda Luwongo, learned Senior State Attorney submitted (at page 91) thus:

".. It is not true that the Application is superfluous and want of merit. Section 357 (a) of the CPA, [Cap. 20] is on restitution of

property found on accused persons on apprehension. Therefore, in the absence of restraint order the court could order the restitution of the property to the Respondents, hence the essence of this Application."

The High Court sustained that part of the submissions and held that in the absence of a restraint order, the respondents (now appellants) were entitled to apply for restitution of their properties pursuant to section 357 of the CPA. The proceedings speak loudly that the issue was raised by the appellants' advocate and responded to by the respondent's counsel and taken into consideration by the High Court in determining the application. There is nothing to suggest that by taking into account the possibility of an application for restitution of the properties under section 357 of the CPA, the High Court wrongly exercised its discretion. The appellant's complaint is patently misconceived. In the upshot, we find no merit in this ground and dismiss it which takes us to ground two.

The appellants' complaint in ground two is that the High Court wrongly exercised its discretion by making an order for disposal of the sugar under section 38 (7) of the POCA in the absence of any application for forfeiture. We must confess our inability to appreciate the learned

advocate's argument on this ground as Ms. Gabriel was at great pains in supporting the complaint in her submissions.

Ms. Wilson argued, and indeed, rightly so, that the complaint was misconceived and a clear misapprehension of the law. The appellants' learned advocate argued before the High Court that the order for disposal could only be made under section 38 (7) of the POCA if there was an application for forfeiture following conviction. The submission by the respondent's counsel was that such order could be made under section 38 (7) of the POCA before conviction. The High Court took the view that the application before it was for a restraining order which was legally permissible before conviction. Before us, Ms. Wilson predicated her argument under section 9 of the POCA on the circumstances under which an application for forfeiture can be made; after conviction. She also relied on our decision in **Attorney General v. Mugesi Anthony & 2 Others**, Criminal Appeal No. 220 of 2011 (unreported) for the proposition that a forfeiture application is distinct from a restraint order which precedes conviction. We respectfully endorse the learned State Attorney's submissions being satisfied, as alluded to earlier, that the complaint in this ground was raised upon a clear misapprehension of the law and dismiss it.

Finally on ground four which faults the High Court for making a blanket restraining order covering the third, fourth and fifth appellants who are not charged in the Economic Case. Ms. Gabriel was adamant that the order was erroneously made against the third, fourth and fifth appellants because, according to her, such order could only be made against parties who are charged with a serious offence like the first and second appellants. Ms. Wilson's submission in reply was that the order was not made against the third, fourth and fifth appellants but against properties alleged to be instrumentalities of the crime in which they had interest. Once again we are inclined to endorse her submissions. The appellants' complaint in this ground was raised as a result of misapprehension of the law under section 38 (1) (b) read together with section 39 (1) and (2) of the POCA.

Section 38(1) (b) 39 (1) of the POCA empowers the court to make such an order against the property of any person not yet charged but has an interest in the property alleged to be tainted. That is exactly what happened before the High Court. Consequently, since the application was preferred within the confines of the law, the complaint in this ground is equally devoid of merit and we dismiss it.

In the event, we have not seen any reason justifying our interference with exercise of discretion by the High Court. The appeal lacks merit and is dismissed in its entirety.

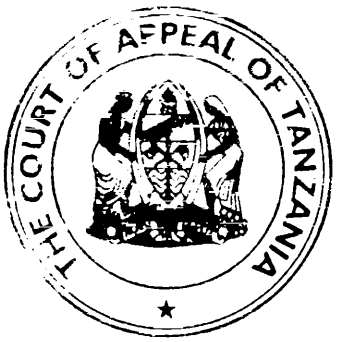
DATED at **DODOMA** this 4th day of November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2021 in the presence of Ms. Sophia George Gabriel, learned counsel for the appellants and Mr. Harry Mbogoro, learned Senior State Attorney for the respondent/Republic, is hereby certified as true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL