

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, FINANCIAL & ECONOMIC CRIME DIVISION 2 HELD IN ACCRA ON TUESDAY THE 12TH DAY OF JULY, 2022 BEFORE HER LADYSHIP JUSTICE AFIA SERWAH ASARE-BOTWE (MRS.)

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SUIT NO. FT/0040/2022

REGISTRAR
HIGH COURT 14-7-2022
GENERAL JURISDICTION, LCC-ACCRA

IN THE MATTER OF SECTIONS 38, 39 & 40 OF THE OFFICE OF THE SPECIAL PROSECUTOR ACT, 2017 (ACT 959)

IN THE MATTER OF REGULATION 19 OF THE OFFICE OF THE SPECIAL PROSECUTOR (OPERATIONS) REGULATIONS, 2018 (L.I. 2374)

IN THE MATTER OF THE ESTATE OF KWADWO OWUSU AFRIYIE ALIAS SIR JOHN (DECEASED)

IN THE MATTR OF AN APPLICATION FOR CONFIRMATION OF ORDER OF FREEZING OF SUSPECTED TAINTED PROPERTY

BETWEEN

**THE SPECIAL PROSECUTOR
OFFICE OF THE SPECIAL PROSECUTOR
6 HAILE SELASSIE AVENUE
SOUTH RIDGE, ACCRA**

APPLICANT

AND

**1. CHARLES OWUSU
ACCRA**

**2. NANA BOAKYE ACHEAMPONG
OLD TAFO, KUMASI**

RESPONDENTS

**(IN THE CAPACITIES AS THE EXECUTORS OF THE LAST WILL AND
TESTAMENT OF KWADWO OWUSU AFRIYIE ALIAS SIR JOHN)**

PARTIES: 1ST RESPONDENT PRESENT

OTHER PARTIES ABSENT

**COUNSEL: MR. EMMANUEL BASINTALE PRESENT HOLDING
THE BRIEF OF MR. KISSI AGYEBENG FOR THE
APPLICANT**

**MR. NANA OBIRI BOAHEN FOR THE RESPONDENT
PRESENT WITH MR. SETH AGYAPONG OWARE**

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RULING

This is an application for the confirmation of the order freezing suspected tainted property in respect of the estate of the late Kwadwo Owusu Afriyie alias Sir John, former Chief Executive of the Forestry Commission brought against the Respondents who are his Executors.

The facts of the case before the Court as can be gleaned from the motion paper, supporting affidavit and the affidavit in opposition are that the in May, 2022 certain matters pertaining to the Estate of the late Kwadwo Owusu Afriyie alias Sir John (hereafter also referred to as "the deceased" and "Sir John") came into the public domain by means of media reports to the effect that properties and assets listed in the Last Will and Testament of the late Kwadwo Owusu Afriyie alias Sir John and the circumstances of the acquisition of some major real property and the period of the acquisition caused the Applicant to commence preliminary investigations. In the course of the investigations, the Applicant has written directives to all heads of known domestic financial institutions with which the deceased kept accounts and investments and the Respondents, essentially freezing the estate of the deceased.

The Applicant has attached the Last Will and Testament of the deceased to his affidavit in support as **Exhibit OSP 1 (also herein referred to as "the Will")**.

The probable cause or preliminary findings listed at paragraph 11 of the affidavit in support are;

- a) That Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, was the Chief Executive Officer of Forestry Commission circa March 2017 to July, 2021, thus a **public officer at all material times.**
- b) That Exhibit "OSP 1" is being contested in the High Court as the last Will and Testament of Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra.
- c) That whether the veracity or otherwise of Exhibit "OSP1" is established in court, it appears that Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, acquired the real property and assets listed therein.
- d) That a substantial part of the real property and assets of Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, were acquired **during his tenure as the Chief Executive of the Forestry Commission.**
- e) That Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, **did not declare his assets as a public officer as required by law.**

- f) That a substantial part of the real property of Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, **appears to fall within the Achimota Forest Reserve.**
- g) That a large tract of the real property of Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, **appears to fall within the Sakumono Ramsar site.**
- h) That Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, appeared to operate a bank account domiciled at Guaranty Trust Bank **in the name of Ruth Korkor Odonkor.**
- i) That the estate of Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, appears to be tainted property-that is to say, used in the commission of an offence or derived, obtained or realized as a result of the commission of a corruption or corruption-related offence.
- j) That if so established that the estate of Kwadwo Owusu Afriyie alias Sir John, late of 10 ARS Lane, Ogbojo, Accra, is indeed tainted property, it is liable to be confiscated to the Republic.

(Emphases mine).

The Applicant brings this application pursuant to sections 38, 39 & 40 Of the Office of the Special Prosecutor Act, 2017 (Act 959) and Regulation 19 of the Office of the Special Prosecutor (Operations) Regulations, 2018 (L.I. 2374)

THE CASE OF THE RESPONDENTS

The Respondents were duly served with the instant application and have an affidavit in opposition deposed to by the 1st Respondent to be filed on their behalf.

In essence, the Respondents raise issues as follows;

1. That the instant procedure is a nullity and procedurally incompetent because the person who is alleged to have acquired the assets in issue is deceased. In other words, the deceased not having been informed of having committed any offences in his life time cannot have his assets frozen post his demise.
2. That the instant action is being mounted by the Applicant, a “busy body”, out of sheer hatred, envy and at the behest, instigation and with the support of Mrs. Agnes Owusu Afriyie.
3. That an institution like the Office of the Special Prosecutor cannot base an action on baseless newspaper publications and unsubstantiated pronouncements from individuals who have no

idea how the late Sir John came by his legal and proper self-acquired property.

4. That the properties were acquired by the deceased by dint of hard work, perseverance and commitment and that the late Sir John willed most of his properties to his family members because he (Sir John) was himself the beneficiary of a quantum of gold nuggets from his late maternal uncle, Nana Yaw Amoateng. In fact, the Respondents say, the deceased had benefitted from such a legacy that he could have constructed more buildings and acquired more immoveable properties than the ones causing the "unnecessary noise".
5. That a good number of Ghanaians have raped and looted the resources this country, with some still continuing to do so, who the Applicant has failed to "crack the whip" on and has rather embarked upon the present venture which is nothing less than witch hunting, and that the Applicant would be better off dealing with the suspicious amassing of wealth by some Ghanaians.
6. That the Applicant is put to strict proof to publish the names of all Ghanaians who have acquired or purported to acquire properties from the Ramsar Site and the Achimota Forest which was given to the Owoo Family.
7. That the deceased was a prominent lawyer who dutifully and properly declared his assets and that the allegation that he did

not is a palpable falsehood maliciously manufactured to throw dust into the eyes of the public.

8. That the authorities are to the effect that the law is on the side of the testator and that it is unfortunate for the Special Prosecutor to embark on this voyage of confiscation based on mere and whimsical suspicion, envy, unbridled hatred etc, and that this application has no leg to stand on and same must be dismissed.

THE LAW AND THIS CASE

As stated at the proceedings of 23rd June, 2022, this case is in unchartered waters and as such the court finds it fit to deliver a reasoned Ruling in the interest of building a body of decided cases in this area of law, i.e. dealing with alleged proceeds of crime in alleged corruption or corruption-related cases, especially where there is the unusual circumstance of the demise of the primary actor.

After having studied the cases of both parties, it is clear that certain issues have to be raised and determined.

These are whether, on a proper appreciation of the law the following can be established;

- a) The legal framework relevant to an application of this nature;

b) Whether the application in the light of the legal framework is merited. Under this head, the issues canvassed are;

i. Whether an action/investigation can survive a deceased person.

ii. Whether an investigation towards the possible end of confiscation can be founded on newspaper (or other) publications;

iii. Any other issues raised in the affidavit in opposition.

• **ON THE LEGAL FRAMEWORK**

The laws that are relevant to the determination of this preliminary and related matters would be;

1. Article 286 of the 1992 Constitution;

2. Sections 38, 39, 40 and 54 of the Office of the Special Prosecutor Act, 2017 (Act 959);

3. Regulations 1 and 19 of the Office of the Special Prosecutor (Operations) Regulations, 2018 (L.I. 2374);

4. Also of relevance, since this matter ultimately has to do with alleged proceeds of crime, to wit, corruption and corruption-related offences is the Anti-Money Laundering Act, 2020 (Act 1044) with particular reference to sections 1, 2 and 3 thereof. Under section 3 of Act 1044, where a person under investigation for money laundering is in possession or control of property which the person cannot account for and which is disproportionate to the income of that person from known sources, that person would be presumed to have committed the offence of money laundering. The new Anti-Money Laundering Act, quite different from the repealed one, introduces to our jurisprudence non-conviction-based asset confiscation and forfeiture.

The matters shall be dealt with in the following order;

- **ON WHETHER AN INVESTIGATION TOWARDS THE POSSIBLE END OF CONFISCATION CAN BE FOUNDED ON NEWSPAPER (OR OTHER) PUBLICATIONS**

Regulations 1(d), 2(b) and (c) of the Office of the Special Prosecutor (Operations) Regulations, 2018 (L.I. 2374) state quite specifically on initiation of action that;

1(d) *"The Office may act on an **investigative journalism report or source...**"*

2The Office may....

(b) *initiate an investigation into a corruption or corruption-related offence when facts or circumstances reasonably indicate that investigations may be conducted to prevent or prosecute such criminal activity; and*

(c) *on its own act on*

(i) *a corruption allegation or corruption-related allegation;* or

(ii) *reasonable suspicion of the commission of corruption or corruption-related offence.*

(Emphasis mine)

Clearly then, without going into any greater detail, it is unambiguous that the Office may act, not only on media reports, but upon any other sources, facts or circumstances at all which indicate that there might be reasonable grounds to initiate an investigation into a corruption or corruption-related allegation.

• **ON OTHER ISSUES RAISED IN THE AFFIDAVIT IN OPPOSITION.**

The court notes that the Respondents have indicated in their affidavit in opposition that the assets sought to be kept frozen were proceeds of hard work and diligence on the part of the deceased as well as having benefitted from his late maternal uncle, Nana Yaw Amoateng, who gave him “quantum of the gold nugget” [sic]. Further the court notes that the

Respondents say that the deceased did declare his assets and that the allegation that he did not is false.

In his address filed in opposition to the instant application, Nana Obiri-Boahen argues that once the Applicant did not file a supplementary affidavit denying what had been stated in the affidavit in opposition, that the late Sir John did declare his assets, the Applicant is deemed to have admitted that Sir John declared his assets.

Unfortunately, that is a misconception of the rules of procedure. The rule is quite well-known that once the court commences the hearing of the application, further affidavits may not be filed except with the leave of the court, and even then, under special circumstances.

See:

- **S. KWAMI TETTEH : CIVIL PROCEDURE, A PRACTICAL APPROACH @ PAGE 430,**
- **BIRD v. LAKE (1863) 1 Hem & M. 111@ 119,**
- **SMITH v. SWANSEA DOCK CO. (1852) 9 Hare, App 1 xxn.**
- **ANDERTON v. YATES (1850) 15 Jur 833**
- **EAST LANCASHIRE RLY CO. v. HAYYERSLEY (1849) 8 Hare 72@ 86.**

- **See also the Ruling of this Court in THE REPUBLIC v. DANIEL YAW DOMELEVO; EX PARTE YAW OSAFO MAAFO & 4 ORS (Suit No. CR 0407/2020) dated 12th May, 2020.**

In the circumstances of this case, the application was considered moved once the parties were directed to file any legal arguments they had and the matter fixed for Ruling. In any case, once an allegation had been made and same denied and vice versa in the affidavit in support and the affidavit in opposition, the issues were joined between the parties to be determined on the merits and not by an incessant filing of supplementary affidavits.

In the view of this Court, the matter of whether or not the late Sir John declared his assets upon assuming office and others raised would have to be established one way or the other by due investigations, and not to prevent the conduct of the investigation and the prevention of the dissipation of the assets allegedly being the proceeds of corruption and corruption-related offences once all other conditions are shown to be present.

The Court also notes that in the affidavit in opposition, the Respondents say that a good number of Ghanaians have raped and looted this country with some still continuing to dissipate the resources of this country, who the Applicant has failed to “crack the whip” on and has rather embarked upon the present venture which is nothing less than witch hunting, and that the Applicant would be better off dealing with the suspicious amassing of wealth by some Ghanaians. This matter of what a good number of unnamed and unspecified Ghanaians are doing

is irrelevant and tangential to the legal issues at hand and ought not to detract the court from its course of dealing with the law and the evidence laid before it by the affidavit in support.

In the same vein, I hold that a publication of the names of all Ghanaians who have acquired or purported to acquire properties from the Ramsar Site and the Achimota Forest which was given to the Owoo Family are irrelevant to the determination of this application but are matters whose rightness, legality or otherwise would have be established one way or the other by a proper investigation in the right circumstances.

- **ON WHETHER AN ACTION/INVESTIGATION CAN SURVIVE A DECEASED PERSON**

The Respondents, in their affidavit is opposition insist that assets that can be frozen are that of a living person upon reasonable suspicion, but that assets acquired by a deceased person cannot be frozen when the deceased had not been informed of having committed any offence during his life time. That argument will be assessed in the succeeding paragraphs.

Section 40 of Act 959 which is one of the relevant part of the legislation as far as the instant application and the position canvassed by the Respondent is concerned states;

40. (1) Where an application is made for a freezing order, the Court shall issue the order if it is satisfied that

(a) the respondent is being investigated for corruption or a corruption-related offence;

(b) the respondent is charged with corruption or a corruption-related offence;

(c) there are reasonable grounds to believe that the property is tainted property;

(d) the respondent derived benefit directly or indirectly from corruption or a corruption-related offence;

(e) the application seeks a freezing order against the property of a person other than the respondent because there are reasonable grounds to believe that the property is tainted property and that the property is subject to the effective control of the respondent; and

(f) there are reasonable grounds to believe that a confiscation order shall be made under this Act in respect of the property.

(2) The Court shall in the case of an incorporated entity, lift the veil of incorporation to determine if property is subject to the effective control of the respondent.

(3) A freezing order shall

(a) prohibit the respondent or another person from disposing of or dealing with the property or a part of the property or interest in the property that is specified in the order, except in a manner specified in the order;

(b) direct the Special Prosecutor to take custody and control of the property or a part of the property specified in the order and manage or deal with the property as directed by the Court; or

(c) require a person who has possession of the property to give possession to the Special Prosecutor to take custody and control of the property.

(4) A freezing order under this section may be made, subject to the conditions that the Court considers appropriate and, without limiting the scope of the order, provide for

(a) the reasonable living expenses of a person affected by the freezing order, including the reasonable living expenses of the dependants of the person, and reasonable business expenses of the person; and

(b) a specified public debt incurred in good faith by the person affected by the freezing order.

(5) When the application is made for the protection of third parties affected by the freezing order on the basis that a person is about to be

charged, the freezing order made by the Court shall lapse if the person is not charged within twelve months after the issue of the order.

(6) The procedure for the management of assets under this section shall be prescribed by Regulations made under this Act.

Section 54 of the Act also states in part;

Procedure against property where a person dies or absconds

54. (1) The Special Prosecutor shall apply to the Court for a confiscation order in respect of tainted property if the person from whom the property was seized;

*(a) dies **and** there is information alleging commission of corruption or a corruption related offence by that person **and** a warrant for the arrest of that person has been issued **before** the death of that person;.....*

(3) Where the Special Prosecutor applies for a confiscation order against tainted property under this section, the Court shall, before hearing the application for the confiscation order,

(a) require notice of the application to be given to the person who appears in the opinion of the Court to have an interest in the property; or

(b) direct notice of the application to be published in the Gazette or a daily newspaper of national circulation containing the particulars in three publications within three months.

(4) The provision on protection of third party interest provided under section 58 applies in relation to confiscation of tainted property of an accused person who dies.

(Empathized portions mine)

A proper reading of the legislation would clearly show that the position canvassed by the Respondents is misconceived. It is not in the case of the death *per se* of every person alleged to have committed a corruption or corruption-related offence that would put paid an investigation, confiscation or forfeiture proceedings. On the other hand, the Applicant also, has to show another condition envisaged by the Act, that the alleged tainted property which is sought to be frozen or confiscated was the subject of investigation or other proceedings for which reason a warrant was issued for the arrest of the person alleged to have committed the corruption or corruption-related offence before the death of that person.

The use of the word "and" is conjunctive and not disjunctive. The legislation does not use the word "or" which would have been interpreted to be disjunctive.

A similar provision exists in section 56 of the Economic and Organized Crimes Office Act, 2010 (Act 804) which states;

Confiscation where a person dies or absconds

56. The Court shall order property to be confiscated if

(a) the property is tainted,

(b) proceedings in respect of a serious offence committed in relation to that property have started, and

(c) the person charged with the serious offence dies or absconds.

Thus, in a decision of this Court dated the 1st of February, 2022 in **THE EXECUTIVE DIRECTOR, EOCO v. ALFRED KWAME AYIVOR (DECD.) (SUIT NO. FT 0049/2021)**, it was held that since the deceased had already been arrested and charged for a predicate offence of money laundering, being romance fraud, his successors-in-title were properly before the Court in confiscation or forfeiture proceedings.

There are indeed instances where the law envisages that the Respondent may not necessarily be the one under investigation for corruption or corruption-related offences (in which case being deceased would be a bar to the freezing of the asset) but, as the law has as its focus the suspected proceeds of crime (or assets) effectively being an action *in rem*, then same may be frozen in instances where;

- a) there are reasonable grounds to believe that the property is tainted property;
- b) the respondent derived benefit directly or indirectly from corruption or a corruption-related offence;
- c) the application seeks a freezing order against the property of a person other than the respondent because there are reasonable grounds to believe that the property is tainted property and that the property is subject to the effective control of the respondent; and

Under section 79 of the Act "**tainted property**" means property

(a) used in connection with the commission of an offence; or

(b) derived, obtained or realised as a result of the commission of a corruption or corruption-related offence.

In this case, the Applicant has stated, and same is borne out by the attachments to the affidavit in support, that there are issues relating to the assets sought to be frozen on the basis of matters including the non-declaration of assets in Exhibit OSP 1, as well as other circumstances of the very nature of the assets, including their location and timing which demand an investigation. The Respondents are the executors of the Will (Exhibit OSP 1) and are at this point, where there is no evidence of a vesting of the assets in the named beneficiaries the proper persons

to be cited would have been the Respondents under the right conditions and circumstances.

That said, however, the Applicant also ought to show in addition that the Special Prosecutor is applying to this Court for a confiscation or confirmation of a freezing order in respect of tainted property and that the person from whom the property is sought to be seized has died "and there is information alleging commission of corruption or a corruption related offence by that person and a warrant for the arrest of that person has been issued before the death of that person".

To conclude then on this limb, it is held that an investigation and everything ancillary to it, including confiscation and forfeiture of assets where appropriate, can survive the demise of a person alleged to have been involved in corruption or corruption-related offences. The one condition for the grant of such an application which is however absent here, is that no warrant was issued for the arrest of the late Sir John before his death. That one condition not being met is the bane of the case of the Applicant. The Applicant states that it was after the death of the late Sir John, and the matters of his Will came into the public domain that the Office commenced the investigation and the instant application. The Applicant says nothing about there having been a pending investigation or warrant for the arrest of the late Sir John for corruption or corruption-related offences before he passed on.

The Applicant is also, for the sake of future conduct of cases encouraged to pay attention to the matters of notices being given to any likely

holders of third-party interest. In this case, for instance, notice ought to have been given to the person named as Ruth Korkor Odonkor, who is alleged to have had an account in her name for the benefit of the late Sir John. In the same vein, the directors of the companies named in the Will ought to have been ascertained and notified of this application.

The application is accordingly refused as same does not meet the threshold of there having been a pending charge against, or warrant for the arrest of the late Kwadwo Owusu Afriyie alias Sir John before his demise.

(SGD)

**AFIA SERWAH ASARE-BOTWE (MRS)
(JUSTICE OF THE HIGH COURT)**

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HIGH COURT (14-7-2011)
GENERAL JURISDICTION, LCC-ACCRA