



**Assets Recovery Agency v Namunyu & 2 others (Civil Suit E044 of 2023)
[2024] KEHC 7954 (KLR) (Anti-Corruption and Economic Crimes) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES**

CIVIL SUIT E044 OF 2023

F GIKONYO, J

JUNE 24, 2024

**IN THE MATTER OF: AN APPLICATION FOR ORDERS UNDER SECTIONS 81,
90 & 92 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT
(POCAMLA) AS READ WITH ORDER 51 OF THE CIVIL PROCEDURE RULES.**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

SCOLA IMBITI NAMUNYU 1ST RESPONDENT

RANDY NGALA 2ND RESPONDENT

PETER MUTHUI WAMBUGU 3RD RESPONDENT

JUDGMENT

Forfeiture of proceeds of crime

1. The applicant received information about suspected cases of complex money laundering schemes and the proceeds of crime associated with the predicate offence of drug trafficking. The 1st respondent was arrested and charged at JKIA law courts vide court file no. CR 85 of 2019 with trafficking in narcotic drugs namely cocaine to wit 20.03 grams with market value of Kshs. 80,120 Contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 on 14th June 2019. The applicant established that the respondents are proxies and partners in the illicit trade of narcotic drugs.
2. The 1st respondent is the holder of account numbers;5017697001(KES) and 5017697002(USD)at Diamond Trust Bank and 01100005319200 at Cooperative Bank Limited. The 1st respondent is a joint account holder with the 2nd and 3rd respondents on account numbers 0122010002706 at Rafiki Bank Ltd, 0636966001 and 5637786001 at DTB, and 2043012145 at ABSA Bank.



3. The applicant's preliminary investigations established that the accounts specified herein are registered in the names of the respondents and their Kenyan national identification numbers are 111473016, 25101412, and 10976925 respectively.
4. The applicant established that between 2003 and 2023 the respondents' accounts had received a total of Kshs. 18 M. The suit accounts had mass deposits and withdrawals below the mandatory reporting threshold. The transactional activities in the accounts held by the respondents are inconsistent with the explanation and supporting documents provided by the respondents hence the reasonable belief that the funds are proceeds of crime and /or conduits of money laundering contrary to sections 3,4 and 7 as read with section 16 of the Proceeds of Crime and Anti Money Laundering Act (POCAMLA).
5. The applicant filed an application for preservation orders in respect of the accounts herein. They were granted the preservation orders.
6. The applicant filed the application herein seeking orders that the suspected funds be forfeited to the government.
7. The applicant vide the originating motion dated 22/12/2023 sought orders;
 1. That this honourable court be pleased to issue an order declaring that the funds held in the respondents' bank account as listed below are proceeds of crime liable for forfeiture to the applicant;
 - a. Kshs. 93,159.24 held in account No. 01100005319200 at Cooperative Bank Ltd, in the name of Scola Imbiti Namunyu.
 - b. Kshs. 41,753.63 held in account No. 5017697001 at Diamond Trust Bank Ltd, in the name of Scola Imbiti Namunyu.
 - c. Kshs. 469,712.49 held in account No. 55637786001 at Diamond Trust Bank Ltd, in the name of Scola Imbiti Namunyu.
 - d. Kshs. 3,739.10 held in account No. 012010002706 at Rafiki Bank Ltd, in the name of Scola Imbiti Namunyu.
 - e. Kshs. 697,047.20 held in account No. 2043012145 at ABSA Bank Ltd, in the name of Scola Imbiti Namunyu, Randy Ngala, and Peter Muthui Wambugu.
 2. That this honourable court be pleased to issue orders of forfeiture of the funds held in the account in prayer 1 above to the applicant on behalf of the government.
 3. That this honourable court to issue an order that the said funds be transferred to the applicant's deposit account for recovered criminal assets funds, account no. 1240221339 at Kenya Commercial Bank.
 4. That this court do make any other ancillary orders it deems fit and just for the proper execution of its orders.
8. The application is premised on sections 90 and 92 of the Proceeds of Crime and Anti Money Laundering Act as read together with Order 51 Rule 1 of the Civil Procedure Rules.
9. The application is based on the grounds set out on the face of the application and the supporting affidavit of PC Hussein Mohammed, an investigating officer attached to the applicant.



10. The applicant filed a supplementary affidavit sworn by Hussein Mohamed on 28/03/2024. The response was to the 2nd respondent's replying affidavit dated 12/02/2024. The deponent relied on his supplementary affidavit sworn on 26/03/2024 in opposition to the respondent's replying affidavit sworn on 18/12/2023.
11. The applicant filed a supplementary affidavit sworn by Hussein Mohamed on 28/03/2024. The response was to the 3rd respondent's replying affidavit dated 12/02/2024. The deponent relied on his supplementary affidavit sworn on 26/03/2024 in opposition to the respondent's replying affidavit sworn on 18/12/2023.
12. The applicant filed a supplementary affidavit sworn by Hussein Mohamed on 26/03/2024. The response was to the 2nd respondent's replying affidavit dated 18/12/2023.
13. The applicant filed a supplementary affidavit sworn by Hussein Mohamed on 28/03/2024. The response was to the 1st respondent's replying affidavit dated 12/02/2024. The deponent relied on his supplementary affidavit sworn on 26/03/2024 in opposition to the respondent's replying affidavit sworn on 18/12/2023.
14. The applicant filed a supplementary affidavit sworn by Hussein Mohamed on 26/03/2024. The response was to the 3rd respondent's replying affidavit dated 18/12/2023.
15. The applicant filed a supplementary affidavit dated 26/03/2024 sworn by Hussein Mohamed in response to the 1st respondent's replying affidavit dated 18/12/2023.
16. According to Hussein Mohamed, sometimes August, 2019 the Agency received information of suspected drug trafficking and money laundering involving the 1st Respondent.
17. The Multi-Agency Team acting on information that a suspicious parcel had been delivered by the 1st Respondent at Buscar booking office along Mombasa Road within Nairobi county interrogated the 1st Respondent where after the said suspected parcel was found to be suspected narcotic drugs by the government chemist. Report is annexed.
18. They searched his house and also submitted the parcel to examination to establish whether the handwriting on the parcel belonged to the 1st respondent, and it was confirmed to be his. Report is annexed.
19. The 1st Respondent was arrested and charged at JKIA Law Courts vide Court File 85 of 2019 with trafficking in narcotic drugs contrary to Section (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) No. 4 of 1994 on 14th June, 2019. Charges are annexed.
20. The Agency opened Inquiry File No. 34 of 2019 to investigate the activities of the Respondents which the Applicant reasonably believes are suspicious in nature.
21. He was part of the team of investigators investigating the Respondents who are beneficial owners of the funds suspected to be proceeds of crime.
22. The Applicant applied for, and obtained to search, inspect and investigate the suit accounts pursuant to Sections 118, 118A & 121 of the Criminal Procedure Code, Sections 180 (1) & (2) of the [Evidence Act](#) and Sections 53A of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAMLA).
23. The applicant also applied for, obtained and duly gazette preservation orders in respect of the suit accounts.



24. The Applicant reasonably believe that the 2nd and 3rd Respondents are proxies and partners of the 1st Respondent in the illicit trade in narcotic drugs and are joint account holders of the subject Accounts in this Application.
25. The Applicant's investigations and analysis of the Bank Accounts that are a subject of these proceedings, revealed that during the period under investigations, the Accounts frequently received funds mainly cash deposits and Inward Transfers which were largely unsupported thereby raising suspicions as to the legitimacy of the monies
26. He stated further, analysis on the Respondent's Bank Accounts revealed that after the said unsupported deposits had been made to the Respondents' accounts, it would then be withdrawn rapidly and in structured cash withdrawals in an attempt to hide the suspicious transactional activities of Respondent's Accounts.
27. Investigations also revealed that, i) the cash deposits were below the reporting threshold; ii) the transactional activities in the account held by the 1st Respondent are inconsistent with the declared nature of business; iii) some account transactions involved large amounts of cash withdrawals when cheques would be expected and would be more convenient.
28. The analysis of the accounts subject of these proceedings and the result of the investigations are set out in the affidavit and tables thereto.
29. Account activities clearly shows characteristics of money laundering as shown in the specific details of the suspicious transactions.
30. According to the applicant, the Respondents did not satisfactorily explain the source of the money and the Applicant reasonably believe that the funds are proceed of crime.
31. They seek the funds to be forfeited to the government in accordance with Section 92 of the POCAMLA.
32. That it is the public interest that the funds be forfeited to the Government.

The responses

33. The 1st respondent opposed the application vide her replying affidavit sworn on 12/02/2024. The 1st respondent relied on her replying affidavit sworn on 18/12/2023
34. The 2nd respondent opposed the application vide his replying affidavit sworn on 12/02/2024.
35. The 3rd respondent opposed the application vide his replying affidavit sworn on 18/12/2024.
36. Each of the respondents filed replying affidavits demonstrating that the funds in the subject accounts are not proceeds of crime and therefore not liable to forfeiture to the government under the Proceeds of Crime and Anti Money Laundering Act.

Directions of the court

37. The application was canvassed by way of written submissions. The applicant filed its submissions dated 05/04/2024. The respondents filed their submissions jointly dated 12/04/2024.
38. The applicant submitted that, this suit seeks a determination of the criminal origins of the funds and not a criminal prosecution of the respondents. Conviction is not a condition precedent to an application for civil forfeiture of assets reasonably believed to be proceeds of crime. Therefore, they urged that, whether or not the 1st respondent is ultimately acquitted in the alleged appeal no. 1002 of



2004 in Kibera does not have any bearing on this forfeiture application for recovery of the funds that are believed to be proceeds of crime;. They cited Assets Recovery Agency v Quorum Limited & 2 others [2018] eKLR, director of Assets Recovery and Others, Republic v Green & Others [2015] EWHC 3168, Section 92(4) Of POCAMLA, ARA & Others Vs Audrene Samantha Rowe & Others Civil Division Claim No. 2012 HCV 02120, Martin Shalli v Attorney General of Namibia 7 Others High Court Of Namibia(Supra) Tecka Nandjila Lameck v President Of Namibia(Supra), Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR, Abdulrahman Mahmoud Sheikh & 6 Others v Republic & Others[2016] eKLR, KACC v James Mwathethe Mulewa & Anor [2017] eKLR

39. The applicant also stated that, in order for the court to make orders of forfeiture under Sections 90 & 91 of the *Proceeds of Crime and Anti-Money Laundering Act*, the applicant need not establish the specific crime committed in relation to the property in issue. Contrary to the respondent's assertion, the Agency does not have to prove the actual crime committed. All it is required to prove is that there was unlawful conduct. Once the Applicant establishes, on a balance of probabilities as provided in Section 92(1)(b) of the *Proceeds of Crime and Anti-Money Laundering Act* that the assets in question are proceeds of crime, evidential duty is cast on the respondent to show that he obtained the funds lawfully. The evidential duty is only discharged by respondent's satisfactory explanation that he legitimately acquired the assets in question failing which the assets shall be declared to have been illegally acquired.
40. They cited the case of Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR the court held: -
41. According to the applicant, the respondents were accorded an opportunity to explain the activities and legitimate source of funds in the accounts in question. The court should find that, the respondent did not explain to the satisfaction of the court, that the funds were legitimate or their source was legitimate on the face of prima facie evidence adduced by the applicant that the funds were proceeds of crime. They failed to discharge the evidential burden.
42. According to the applicant, on the totality of evidence, proved, on a balance of probabilities, that, the subject funds in the name of the respondents constitute proceeds of crime and ought to be forfeited to the government. See section 92(3) of the POCAMLA, Kenya Anti-Corruption Commission v James Mwathethe Mulewa & amp; another [2017] eKLR, Asset Recovery Agency v Joseph Wanjohi & Others.
43. The applicant averred that the 2nd respondent has not demonstrated any evidence of a money trail and the legitimate source of funds that are the subject matter of this forfeiture application. The 2nd respondent has not adduced any money trail and legitimate source of the funds the 2nd respondent allegedly transferred from his savings account. The 1st respondent has not demonstrated a money trail and legitimate source of funds she withdrew from her personal account at DTB. The 2nd respondent has not provided evidence to support claims that the money was withdrawn for the purchase of business goods. The respondent has not demonstrated that the deposit of Kshs. 400,000 on 06/01/2023 was a return of withdrawal done 28/12/2022 and that of Kshs. 360,000 on 09/02/2023 was done on 17/02/2023.the 2nd respondent has not substantiated his purported business. The 2nd respondent has not demonstrated the source of funds in accounts the applicant seeks to forfeit.
44. The applicant averred that the 2nd respondent knew the criminal activities of the 1st respondent and that the accounts co-owned with the 1st respondent were beneficiary of the criminal activities of the 1st respondent. The 2nd respondent has not demonstrated the money trail and legitimate source of funds held in an account co-owned with the 1st respondent.



45. The applicant averred that the 1st respondent has not rebutted the evidence presented that there are reasonable grounds to believe that the preserved funds are proceeds of crime, the 1st respondent has not tendered any evidence to substantiate the legitimate source of funds and therefore it is the averment of the applicant that the funds are from her illicit trade in narcotic drugs.
46. The applicant averred that a conviction in criminal proceedings is not a condition precedent to civil forfeiture and the respondent has the onus to explain how they acquired the funds that are subject of this forfeiture application.
47. The applicant averred that the respondent has a history of trafficking in narcotics drugs having been charged with the same offence in various courts and criminal activities. The applicant cited JKIA MCCR No. 85 of 2019, KILIFI MCCR No. 1141 of 2011, KIBERA MCCR No. 3766 of 2016
48. The applicant averred that the case was not in any way instituted based on malicious claims.
49. The 1st respondent averred that no basis has been laid for the suspicion of the funds in the suit accounts to be proceeds of crime.
50. The 1st respondent averred that her acquittal in the criminal case should not be equated to guilt or her being a criminal. She has filed an appeal no. 1002 of 2004 at Kibera High Court which has a high chance of success and therefore favourable outcome will be overtaken by events. A ruling in Malindi High Court Misc. Criminal Application No. 33 of 2018 has nothing to do with this case. In Kilifi Criminal Case No. 2242 of 2011 and Kibera 3766 of 2016, she was found innocent and acquitted. She stated that she has no criminal trial pending in Kibera law courts.
51. The 2nd respondent averred that the mere fact that his aunt was charged does not make all her relatives and anybody interacting with her a suspect. he urged this court to find that there is no proof that the funds in the subject accounts are proceeds of crime and therefore no case for forfeiture.

Analysis And Determination

52. Borne out of the pleadings, affidavits and the respective parties' submissions is a single issue: -

Whether the funds in the Respondents' accounts subject of these proceedings, are proceeds of Crime liable to, and should be forfeited to the Government of Kenya in accordance with the law.

Preliminary niceties

53. Forfeiture proceedings especially non-conviction-based forfeiture, has been a subject of sustained litigation. Therefore, understanding threshold issues is important.

Nature of civil forfeiture proceedings and Terminologies

54. Understanding the nature of civil forfeiture proceedings is important because arguments around; it being akin to criminal indictment, deprivation of right to property, burden of proof, and standard of proof issues, have become persistent points of litigation.
55. The phraseology used in international jurisprudence and training to refer to civil forfeiture is 'Non-conviction-based asset forfeiture' (herein after NCB Asset forfeiture).
56. Kenya legislation does not use the phraseology 'Non-conviction-based asset forfeiture'; the law uses 'civil forfeiture' or 'civil proceeding' to refer to NCB asset forfeiture.



57. Therefore, NCB asset forfeiture is designated as ‘civil proceedings’, and the rules of evidence applicable in civil proceedings shall apply; and the judgment therefrom is executable as a civil judgment within the meaning in the CPA (s. 11 of EACC Act, s. 55 & 56 of ACECA, s. 81 of POCAMLA)
58. But the designation of ‘civil proceeding’ of ‘civil forfeiture’, does not diminish nor detract from the nature and core content of NCB asset forfeiture envisaged in the international instruments. Which, will help in requests for legal assistance and enforcement of foreign judgments.
59. However, courts in Kenya now use the phraseology ‘NBC forfeiture’ proceedings in their judgments, and has characterized civil forfeiture as follows;

‘Civil recovery proceedings are directed at the seizure of property and not the conviction of any individual and thus there was no reason to apply the criminal standard of proof’ (ARA v Quorum Limited & 2 others [2018] eKLR)
60. Civil forfeiture proceedings in Kenya are in respect of the property. Therefore, action in rem, helping a great deal to navigate great legal hurdles, especially where the defendant cannot be found, or has fled the jurisdiction of the court or enjoys immunity (POCAMLA, International instruments). The court may however, issue a personal or money judgment to be executed against other property of the defendant who is accused of a criminal conduct (Part VIII-X of POCAMLA, ACECA, EACC Act). Notably also, NCB forfeiture may be directed at a third party in the custody of the property. The guiding principle being the obligation to restore property that is proceeds of crime or unlawfully acquired. Which brings to bear the constitutional imperative in article 40(6) of *the Constitution* discussed below.

Constitutional underpinning

61. Article 40(6) of *the Constitution* provides that: -

The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
62. Article 40 is on ‘protection of right to property’.
63. The article emphasizes on the manner of acquisition of property as the basis for conferment of property rights and protection therefor. Thus, the article embodies the principle that a person cannot claim ownership of illicit assets or proceeds of crime.
64. The word found in the article connotes a determination with legal force made in a lawful judicial adjudication process. The proceeding could be criminal or civil or sui generis.
65. Courts have used this sub-article as a limitation to the right to acquire property (COA Petition No. 187 of 2018[2024] eKLR).
66. However, the Supreme Court provided the power and punch of the claw-back provision in the case of Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR), when it held that: -

Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser. We therefore agree with the appellate court that the appellant’s title is not protected under article 40 of *the Constitution*’



67. Nevertheless, the real purport and efficacy of this provision in relation to forfeiture of proceeds of crime is yet to be fully exploited.
68. Properly anchoring forfeiture of proceeds of crime in this article will eliminate any elusive elements of recovery of illicit property, and produce much more certain outcomes in jurisprudence and actual recovery of such property.
69. Faced with constitutional challenges by defendants in forfeiture proceedings, the correct question to ask is: What event or cause of action to which a claim of right can properly draw in proceeds of crime? Which, will help in the application of the principle of relation back to 'the root of the title', and restitution of illicit asset.

Proceeds of crime

70. In this case, the applicant must prove that the funds herein were proceeds of crime. See Pamela Aboov v ARA & Another, Civil Appeal Number 452 of 2018 where the Court held that:

“. . . the Respondent had the legal burden to prove a prima facie case on a balance of probability either of the two elements under Section 92 of POCAMLA, that the appellants either had assets that have been used or are intended for use in the Commission of an offence or the assets are proceeds of crime . . . a link must establish that certain benefits flowed directly or indirectly originating from the offence.”

71. Section 2 of the POCAMLA defines proceeds of crime as follows:

“proceeds of crime” means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender, and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.”

72. The definition of proceeds of crime is broadly cast. Making recoverable or realizable assets, to include, the actual illicit property or related property or comingled property. Related property refers to property into which or for which the illicit property was converted or exchanged, respectively. It also includes benefit or gain or income or profit arising from investment of the illicit property or related property. Comingled property refers to the mixing of illicit property and other property of the defendant or third parties (associated property).
73. Related property is also referred to as traceable products, restitution of which arises on the basis of the obligation created by law to surrender property that is unlawfully acquired or is proceed of crime. Related property is established through evidential process of tracing of property.
74. Similarly, on the basis of this very same obligation, a defendant who deliberately comingles illicit property with other property to conceal the identity of the forfeitable property, has the onus of disentangling the recoverable properties, lest the whole property becomes recoverable. Courts in Kenya has also traced this obligation to the rule of evidence that: -

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.



75. The rationale for the broad-cast definition is supplied in the case of Schabir Shaik & others v State case CCT 86/06 [2008] ZACC 7 where the court stated: -

“One of the reasons for the wide ambit of the definition of “proceeds of crime” is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of camouflage”

The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime.”

Standard of proof

76. In the case of Assets Recovery Agency v Pamela Aboo: EACC Interested party [2018] eKLR the court stated: -

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- “63. Forfeiture proceedings are Civil in nature and that is why the standard of proof is on a balance of probabilities. See section 92(1) of the *Proceeds of Crime and Anti-Money Laundering Act*. In the case of Director of Assets Recovery and Others, Republic v Green & Others [2005] EWHC 3168 the court stated as follows:

“In civil proceedings for recovery under part 5 of the Act, the Director need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 the Court of Appeal stated:

“....that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof...” (Emphasis mine)

In the case of Assets Recovery Agency v Fisher Rohan and Miller Delores, Supreme Court of Jamaica, Claim No. 2007 HCV 003259 it was held:-

“.....Even though these proceedings are quasi-criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized.”

Burden of proof

77. Arguments are made that NCB forfeiture provisions in Kenya shift the burden of proof-others call it reverse burden of proof- a tag that may misrepresent the problem statement.
78. In this area, there is sustained litigation on the issues. But, courts have pronounced themselves on, and found the provisions on civil forfeiture to only shift the evidential burden, making it necessary to discuss legal burden of proof and evidential burden.



79. The generic term ‘burden of proof’ entails the legal burden of proof and evidential burden.
80. Legal burden lies with the applicant or the person who alleges. Legal burden does not shift.
81. Evidential burden initially rests with the applicant. But as preponderant evidence is adduced, evidential burden shifts to the party who would fail without further evidence.
82. Where evidential burden has shifted to the defendant, he must discharge it lest he should fail. This is what is commonly known as rebuttal. Of importance, evidential burden is only discharged through evidence (s. 90(4), POCAMLA, s. 55(5), ACECA) and not through mere statements or allegations of the source or legitimacy of the money. The thread running through statutes on civil forfeiture require such testimony and other evidence as the court deems sufficient, to satisfy the court that the property is not proceeds of crime or unexplained assets.
83. Except, however, failure to offer rebuttal evidence does not necessarily mean forfeiture order will be issued as a matter of course. Forfeiture order is made because the applicant has proved its case to the required standard; after consideration of the evidence tendered by the applicant and any rebuttal evidence offered. Forfeiture order will be declined where the applicant has not proved the case on a balance of probabilities.
84. See *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR , where the Court found that where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof (the applicant) will lose, because the requisite standard will not have been attained.
85. Understanding this distinction helps in resolving arguments around shifting of burden of proof.

What to plead

86. For purposes of civil forfeiture under POCAMLA, the law talks of property ‘derived or realized, directly or indirectly, as a result of or in connection with an offence’
87. And ACECA talks of property obtained through “corrupt conduct” (e.g. s 55 of ACECA).
88. The use of such wide terms as property ‘derived or realized, directly or indirectly, as a result of or in connection with an offence’ or obtained through “corrupt conduct”, portend that, in civil forfeiture, the applicant need not prove or allege commission of a specific offence. The pleading must, however, set out matters that constitute the corrupt or criminal conduct. The test in the case of *Director of Assets Recovery Agency & others v Green & Others* [2005] EWHC 3168 has been adopted by our courts- see *Pamela Aboo* case (supra) where it was stated:

“In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

Whether civil forfeiture is criminal proceeding

89. Civil forfeiture is said to be quasi criminal because it is founded on criminal offence or conduct. Nevertheless, it is a civil proceeding directed at forfeiture of the illicit property rather than conviction of the defendant.
90. At this juncture it is worth noting that, criminal forfeiture or confiscation is different from, and should not be confused with, civil forfeiture. The former is done in a criminal trial and is based on the



conviction of the defendant; hence, it is referred to as conviction-based forfeiture. The two regimes are different and operate on different corpus of law, principles and legal requirements.

91. See the case of *Assets Recovery Agency v Pamela Aboo*: EACC Interested party [2018] eKLR where the court stated: -

“...The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable....

In the case of *Assets Recovery Agency v Fisher Rohan and Miller Delores*, Supreme Court of Jamaica, Claim No. 2007 HCV 003259 it was held:-

“.....Even though these proceedings are quasi-criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized.”

92. In the case of *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2019] eKLR the Court of Appeal explained it as follows in regard to the Anti-Corruption & Economic Crimes Act which has more or less similar provisions: -

“79. Under Section 55(2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to a known legitimate course of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired”

93. Likewise, in this case, the burden of proof lies upon the Applicant to prove that the funds in the Respondent’s accounts are proceeds of crime as alleged but should that burden be discharged the evidential burden shifts to the Respondent to explain the source of the funds given that such evidence is within his special knowledge. (See Sections 109 and 112 of the *Evidence Act*.)

94. What constitutes proof on a balance of probabilities was discussed in the case of *Kanyungu Njogu v Daniel Kimani Maingi* [200] eKLR. In the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 Denning MR stated: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; “We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are



equally (un)convincing, the party bearing the burden of proof will lost because the requisite standard will not have been attained.”

Applying the threshold

95. What does the evidence say and where does it lead the court?
96. This court will analyze the evidence and apply the relevant principles in this case and determine whether the funds in the accounts below are proceeds of crime.
- Account no. 01100005319200 held at cooperative bank in the name of the 1st respondent
97. The Applicant stated that, in the course of its investigations established that, the Account number 01100005319200 domiciled at Cooperative Bank was in the name of Scola Imbiti Namunyu, the 1st respondent. They carried out an analysis of transactions upon the said account for a period between 5th February, 2003 and 10th June, 2023 and it was revealed that;
- a. The account, during the period under review, transacted a total of Kshs. 1, 358, 940.43.
 - b. The Account is characterized with cash deposits by the 1st Respondent which is immediately withdrawn by the 1st Respondent.
 - c. That the Account activities clearly shows characteristics of money laundering as shown in a tabular form in the affidavit in support.
98. The applicant submitted that the 1st respondent has not discharged her evidential burden and has not explained the source of funds.
99. The 1st respondent averred that she has been running this Bank account since the year 2003, in compliance with the rules and regulations of the Central Bank of Kenya and no irregularity has ever been charged to the said account. Money in the said account was spent a long time ago. The same was going towards payment of school fees, rent, and utility bills with her then-partner and father of her children. The same account was also receiving dividends from AON Minet insurance for her niece Charlotte Lisa Lisaswa, sister to the 2nd respondent after the demise of their mother.
100. According to the applicant, the account activities show characteristics of money laundering. The deposits and withdrawals are structured and in quick succession which is a characteristic of money laundering.
101. The investigations by the applicant also established criminal cases in connection with the 1st and 2nd Respondents which relate to criminal activities or dealings in narcotics. See Annexure marked as “HM16 (a) & (b)”- copies of the judgment in reference to Kilifi Criminal Case No. 1141 of 2011 in reference to the 1st Respondent and Bail assessment Report dated 25th June, 2019 which at page 4 highlights that the 1st Respondent has a Criminal case ongoing at Kibera (Kibera Criminal case No. 3766 of 2016). Refer also to Annexure “HM10”
102. The analysis of the account shows structured deposits and withdrawals in quick succession, which is ordinarily characteristic of money laundering. The evidence adduced establishes on prima facie basis that the money was in connection of a crime, and therefore, proceeds of crime. There are reasons for the applicant to believe that the funds held in this Account are proceeds of crime.
103. The respondents were given an opportunity to explain the source of the money. Explanations.



104. The explanations by the 1st respondent that she has been running this Bank account since the year 2003, in compliance with the rules and regulations of the Central Bank of Kenya and no irregularity has ever been charged to the said account, do not suffice. The fact that there has been no irregularity charged upon the account does not mean it was not used as a channel of illicit funds. Ordinarily, money launders are known to be most keen to ‘observe’ all regulatory requirements and avoid any kind of default in order to thwart any scent of the illicit source or use of proceeds of crime. They pay taxes promptly. They register business entities and file statutory returns promptly. They also open bank accounts in accordance with the requirements of the bank; laying a seamless money laundering scheme through the lawful bank channel.
105. Similarly, the fact that the money in the said account was spent a long time ago; going towards payment of school fees, rent, and utility bills with her then-partner and father of her children; does not explain the source of the money or that it is legitimate.
106. The 1st respondent also stated that the same account was also receiving dividends from AON MINET insurance for her niece Charlotte Lisa Lisaswa, sister to the 2nd respondent after the demise of their mother. These required specific proof.
107. Accordingly, the 1st respondent did not explain the source of the money to the satisfaction of the court. Therefore, the evidential burden was not discharged.
108. According to the applicant, the account activities show characteristics of money laundering. The deposits and withdrawals are structured and in quick succession which is a characteristic of money laundering.
109. The applicant also made a connection with crimes on narcotic drugs and cited real cases in court. The connection as well as the analysis provided of the activities in the account, proves on balance of probabilities, that, the money in the account is proceeds of crime.
- Account no. 5017697001 held at Diamond Trust Bank in the name of the 1st respondent
110. The investigations established that the account received a total credit of Kshs. 14,231,209.25, most of which were characterized by cash deposits by the 1st respondent during the period under review which would be withdrawn immediately by the 1st respondent.
111. The investigations further established that the said account had received Kshs. 100,000 as an in-house cheque from Anwar Ali Omar an individual who had been charged in the case of trafficking in narcotic drugs in Criminal Case No. E424 of 2023 Rep Vs Anwar Ali Omar.
112. The 1st respondent averred that she has been a businesswoman for a long time and her sources of income were from her associates Diane Hawe and the man who used to stay with her. This, according to her, was the source of money that sustained the dollar account which is no longer active after he deserted.
113. The 1st respondent averred that she engaged in business and was trading through business ventures; Claudia and Hawadi beauty cosmetic shop which belonged to Hawa Diane. She produced the city council of Nairobi business permits and rent debit statistics.
114. The 1st respondent averred that account No. 507697001 at Diamond Trust Bank deposits were from her then business partner Hawa Diane and withdrawals by herself in pursuit of running their business that involved stocking and selling of beauty and cosmetic products. She was running a business that belonged to Hawa Diane and joined her at a later stage but Hawa Diane was a majority shareholder of the business. The business was called Hawadi Beauty Cosmetic Shop. She attached a certificate of registration. The business has been operational since 2012. She annexed copies of the city council of



Nairobi business permits, rent debit statistics, single business permit receipts, and goodwill. Hawa later followed her husband to Cameroon. She cited variance in the account statement issued by Diamond Trust Bank as some deposits stated therein were not made. She stated that Kshs. 2.7 million deposited was withdrawn from her other account a/c 5017697002 held at Diamond Trust Bank and the purpose of the deposit was to buy three banker's cheques used to pay NSSF to buy a plot of land. She added that the said money was sent to her by her boyfriend and partner Peter Ikwe Ebogha. Cheques were also made by her late brother's employer- airline leasing services and KEWISCO COOPERATIVES SAVINGS, a Sacco her late brother was a member. Additionally, Jubilee Insurance paid her upon maturity of a policy she had taken with them. She attached a maturity voucher. NSSF refunded the money deposited by her after it was determined that the value they had charged for the plots on sale was excessive. She attached a copy of a cheque from NSSF. Anwar Ali Omar transacted a reimbursement of a loan she had advanced to him. She argued that the said transaction is not proceeds of crime or basis for the narcotic-related offence that he was charged with, in 2023.

115. The applicant averred that the 1st respondent is not a proprietor of Hawadi Beauty Cosmetic Shop and has not adduced any evidence of the existence of any business partnership with the said Hawa Diane.
116. The applicant submitted that there is no evidence from Hawa Diane to corroborate her allegations. The 1st respondent has not produced agreements of the existence of such partnership or that she had acquired the said business. The city council of Nairobi business permits and rent debits statistics do not in any way show that she was conducting any legitimate business. The cash sale receipts dubbed 'hawker's pride' are forged and no evidence has been adduced from hawker's pride to corroborate the evidence of the 1st respondent that she was undertaking business. The registration of the business name does not prove that she engaged in legitimate business or explain the source of funds.
117. Upon consideration of the evidence adduced by the parties, the court finds that the 1st respondent is not the proprietor of Hawadi Beauty Cosmetic Shop. Hawa Dane is. Also, there is no evidence of any business partnership with the said Hawa Diane.
118. Investigations have revealed, and this has not been disputed, this account was in the name of the 1st respondent. It is not in the name of the business or that of the owner of the business, Hawa Dane. Yet, according to the 1st respondent, money for and from the business was deposited in the said account.
119. The business permits and rent statistic in themselves do not prove legitimate source of the money in question.
120. The cash sale receipts dubbed 'hawker's pride' have been challenged as forged and there is no evidence that was adduced from hawker's pride to corroborate the evidence of the 1st respondent that she was undertaking business. She alleged this and should have substantiated.
121. Explanations required are in relation to legitimate source of the funds. Evidence has been adduced of the funds in connecting of some criminal acts. Her explanations fall short of any satisfactory explanation of legitimate source of the funds in question.
122. The 1st respondent has not discharged her evidential burden as she has not explained the source of funds in this bank account. The applicant has proved on a balance of probabilities that, the funds are proceeds of crime. This court so finds.

Account no. 55637786001 at Diamond Trust Bank in the name of the 1st and 2nd respondents

123. The applicant established that the account received Kshs. 3,038,255.06 characterized mostly by cash deposits by the 1st respondent which would then mostly be withdrawn in cash, and the 1st and 2nd respondents could not explain the legitimate sources of the funds.



124. The applicant submitted that the 1st and 2nd respondents never proved the legitimate source of the funds in this account or adduced any evidence to corroborate their allegations.
125. The 1st respondent averred that Account No. 5637786001 held at Diamond Trust Bank Limited was opened by the 2nd respondent and the 1st respondent to pull funds for their aging and sickly mother to cater for her upkeep, renovate her house, and medical bills and needs. Since she left Hawa's business she went back to her earlier business(self-taught) of interior design Claudias Enterprises which has been operated since 2003 dealing with beauty products which helped her support her children hence the frequent deposits and withdrawals.
126. The 2nd respondent averred that the 2nd and 1st respondents opened a joint account No. 5637786001 at Diamond Trust Bank Limited. The account was opened to cater for his grandmother's medical expenses and ongoing house construction process. He made a cash transfer of Kshs. 700,000 from his savings account to the joint account being what he owed to his now deceased uncle Victor Namunyu. She witnessed the 1st respondent withdraw cash from her personal account with Diamond Trust Bank Limited to the joint account. He added that it was important that transactions prior to and after the dates between 24/02/2021 and 17/02/2023 were provided for useful interpretation. It was stated that, the 1st respondent borrowed Kshs. 400,000 and Kshs. 360,000 but the investigator selectively produced a statement of when it was returned.
127. The applicant averred that the 2nd respondent has not demonstrated the money trail and legitimate source of funds which is the subject matter of this forfeiture application. The 2nd respondent has not demonstrated the money trail and legitimate source of funds that the 2nd respondent alleged to have transferred from his savings account. No documentary evidence for the transaction of Kshs. 96,000 from the 1st respondent's personal account, to support; the withdrawal of Kshs 400,000 and its source; a deposit of Kshs. 260,000 was an advancement which she later repaid; his purported businesses; source of funds in account no. 0122020002706 held at Rafiki microfinance; source of funds in account no. 5637786001 at Diamond Trust Bank and source of the Kshs. 1 million transferred. The 2nd respondent was not a business partner of the 1st respondent.
128. The applicant averred that the invoices from Kenyatta Hospital are dated 26/10/2023 and preservation orders were obtained on 19/09/2023 hence the said money did not come from account no. 5637786001 as alleged by the 2nd respondent.
129. The 2nd respondent averred that Victor Namunyu and the 1st respondent are siblings and have been his guardians since he was a minor after his mother died. The late Victor was also taking care of his aging and ailing mother. When he started working, the deceased bought him a car which he paid in installments and at the time of his demise he had an outstanding balance of Kshs. 700,000/=.
130. The applicant averred that the 2nd respondent has not presented any evidence to corroborate his assertion of any loan advancement by the late victor.
131. Upon consideration of the evidence and explanations by the respondent, there is no evidence to support their claims on the transactions in the account. Withdrawals, transfer of money, loans and repayment of loans should be explained through bank paper trail which also carry reasons for the transactions. None was provided. This court, therefore, finds that the 1st and 2nd respondents have not discharged their burden of proof and have not explained the source of funds in this bank account. The applicant has proved on a balance of probabilities, that, the funds in the accounts are proceeds of crime.
- Account No. 012010002706 at Rafiki bank in the names of 1st and 2nd respondents



132. The analysis of the account established that the activities of the account were mainly characterized by cash deposits and cash withdrawals by the 1st respondent in a structured manner.
133. The applicant submitted that the 2nd respondent knew of the criminal activities of the 1st respondent, especially regarding this account. It is immaterial that the account was for the sole purpose of taking business loans. The 1st and 2nd respondents have not produced any evidence of such intended purpose and the source of the deposits.
134. On the one hand, the 1st respondent averred that Account No. 012010002706 at Rafiki Bank Limited was in the name of the 1st and 2nd respondents with blessings of the late Victor Namuyu for the purpose of taking care of the aging mother's ill health and also completed her house and demonstrated that all withdrawals were expended for those purposes.
135. On the other hand, the 2nd respondent averred that they opened Account No. 0122020002706 at Rafiki microfinance bank to attract a favourable loan offer from the deposits made. The deposits were made from the 1st respondent's personal accounts and his accounts. When the loan application did not materialize they withdrew the cash and injected it into 1st respondent's business at the time. The account has remained dormant since 2016 with a balance of Kshs. 3739.10.
136. The applicant averred that the 2nd respondent has not demonstrated the money trail and legitimate source of funds which is the subject matter of this forfeiture application. The 2nd respondent has not demonstrated the money trail and legitimate source of funds that the 2nd respondent alleged to have transferred from his savings account. No documentary evidence for the transaction of Kshs. 96,000 from the 1st respondent's personal account, to support the withdrawal of Kshs 400,000 and its source, a deposit of Kshs. 260,000 was an advancement which she later repaid, his purported businesses, source of funds in account no. 0122020002706 held at Rafiki microfinance, source of funds in account no. 5637786001 at Diamond Trust Bank and source of the Kshs. 1 million transferred. The 2nd respondent was not a business partner of the 1st respondent.
137. The 1st respondent averred that account No. 0122010002706 held at Rafiki microfinance bank was opened jointly by the respondents and made several deposits so that they could attract favourable loan offers. The deposits were withdrawn from her personal accounts in Diamond Trust Bank and Cooperative Bank Ltd. When the loan application did not materialize she withdrew the money and injected it into her cosmetics shop. The account has remained dormant since 2016 with a balance of Kshs. 3,739.10.
138. The evidence shows that, that the 2nd respondent knew of the criminal activities of the 1st respondent, especially regarding this account. The fact that the account may have been opened for the sole purpose of taking business loans has not been proved. But, most importantly, the purpose does not explain the source of the funds coming to the account. The source or origin of the funds is the target of forfeiture proceedings to which the respondents should speak. The 1st and 2nd respondents have not produced any evidence of the source of the funds deposited into this account which has been shown to be funds in connection with crime. Bank transactions have mistaken paper trail or foot prints replete with information of source and purpose of the money transacted through the account. No such evidence was adduced.
139. Thus, this court finds that the 1st and 2nd respondents have not discharged their evidential burden and have not explained the source of funds in this bank account. The court also finds that, the applicant has proved on a balance of probabilities that, the funds in the account are proceeds of crime.

Account No. 2043012145 at ABSA Bank in the name of the 1st, 2nd, and 3rd respondents



140. Investigations established that during the period under investigation, the account was characterized by cash deposits and cash withdrawals in a structured manner.
141. The respondents contend that this account was opened after the death of the late Victor (brother to the 1st respondent) and for the benefit of Ryan Caesar.
142. The applicant contends that the funds in this account have never benefitted Ryan. The withdrawals are inconsistent with the allegations of the respondents regarding the purpose of the account. No evidence has been adduced that the deposits were from the alleged funeral contribution. The respondents have not also provided evidence to corroborate their allegation that the deposits were from terminal benefits of the late victor.
143. The applicant submitted that the respondents have not presented any evidence to explain the legitimate source of the funds in this account.
144. The applicant averred that activities of Account No. 2043012145 held at ABSA bank are inconsistent with the allegations of the respondents that the account was for the sole benefit of Ryan Caesar. No evidence of withdrawals made in favour of Ryan has been adduced other than what the applicant by consent agreed upon while the matter was under investigations. The applicant contends that the Mpesa statements do not demonstrate a money trail with the origin being the ABSA account as the source of funds.
145. The applicant averred that the 3rd respondent has not adduced any evidence to support the allegations that the funds in question were from the funeral committee and the so-called Vimbelembele group. The applicant contends that the 3rd respondent has not substantiated the source of funds in ABSA account no. 2043012145.
146. The applicant averred that the 3rd respondent has not explained the source of funds held in ABSA bank Account no. 2043012145. The school leaving certificate does not explain the source of funds. Analysis of the said account does not support allegations that the account was for the maintenance of Ryan Caesar Namunyu. No evidence of withdrawal was done in favour of the said Ryan. No evidence has been attached by 3rd respondent to corroborate the allegations that the funds in the subject account were terminal payments., from the funeral committee and the so-called Vimbelembele group. There is no proof that the late Victor was an employee of airline leasing services. There is no evidence that the respondents were paying fees for the said Ryan. The student pass does not show that the account was for benefit of Ryan.
147. The 1st respondent averred that the funds in Account No. 2043012145 at ABSA Bank Ltd are for the estate of his school-going son. She is a co-administrator of her mother in her late brother's estate. She explained that its source is the deceased's terminal benefits and contributors from the funeral committee and friends. She added that there has been no deposit in the deposit in the account since September 2020.
148. The 1st respondent averred that account no. 2043012145 at ABSA bank, was a deposit account for contributions of her late brother's friends and workmates in a group called Vimbelembele less funeral expenses. The account was opened in the joint names of the respondents. Her late brother's Sacco insurance payment and terminal benefits from his employer ALS were also paid to this account. When Ryan Caesar Namunyu joined Kenya Aeronautical College they made an application for release of Kshs. 200,000 as admission expenses for the deceased's son and this court granted. The account withdrawals were for school fees, extra tuition by teacher Leah Mghendi, and schooling expenses for Ryan Caesar.



149. The 3rd respondent averred that she was a chair of the funeral committee which arranged and raised funds to meet the deceased's medical expenses, and burial expenses and to support his son Ryan Ceaser Namunyu and ailing mother who were both dependent on him. The balance realized from accounting for burial expenses together with terminal payments from the deceased's employer be deposited in a bank in the name of a member of the committee (3rd respondent) and two relatives (1st and 2nd respondent) and be used for purposes of meeting and two relatives and be used for purposes of meeting the deceased son's schooling expenses. The account was opened at ABSA Bank A/C No. 2043012145.
150. The late Victor Namunyu's employer airline leasing services issued a cheque of Kshs. 499,000/= in the names of Scola Imbiti Namunyu and a staff welfare contribution cheque of Kshs. 50,000/= which are reflected as deposits in the account statement analyzed by PC Mohammed Hussein.
151. It was argued that, the total sum of Kshs. 963,947/= deposited in the account came from the funeral committee contributions, vimbelebele welfare group, and the late Victor Namunyu's employer (terminal dues) and staff welfare contributions and has nothing to do with crime. That no deposits in this account after September 2020.
152. The 2nd respondent averred that the funds in Account No. 2043012145 at ABSA bank opened in the joint names of the respondents were from the balance of the money raised for funeral expenses, and terminal dues from the deceased's employer. The funds were to cater for Ryan Caesar's education expenses and the sustenance of his grandmother.
153. The analysis of the said account does not support allegations the allegations that the account was for the maintenance of Ryan Caesar Namunyu. They did not provide any evidence of withdrawal which was done in favour of or for purposes of the said Ryan. There is no evidence that the respondents were paying fees for the said Ryan. The student pass does not show that the account was for the benefit of Ryan.
154. In addition, the 3rd respondent ought to have provided evidence to corroborate the allegations that the funds in the subject account were terminal payments, from the funeral committee and the so-called Vimbelebele group. These are specific sources which require specific evidence.
155. Thus, this court finds that the 1st, 2nd, and 3rd respondents have not discharged their evidential burden and have not explained the source of funds in this bank account. This court also finds that, the applicant has proved on a balance of probabilities that, the funds in the accounts are proceeds of crime.
- USD account no. 5017697002 at Diamond Trust Bank in the name of the 1st respondent
156. The applicant's investigation of the account revealed activities which was characterized by suspicious cash deposits that were inconsistent with her indicated nature of business.
157. The applicant submitted that this account was a beneficiary of illicit funds.
158. The 1st respondent averred that Account No. 507697002 held at Diamond Trust Bank, her boyfriend Ebogha Ikwe Peter sent the monies to fulfill his promise of buying her a house to shelter her children and Omole Sandra M, Usmannuhu A, and Motunrayo were all deposits made on his behalf by his friends and relatives when he was not in a position to send her money in person. Her relationship with Peter broke down and closed the dollar account after withdrawing the remaining 900 USD on 06/06.
159. The investigations show that the dollar account was a beneficiary of illicit funds. The deposits and their origin was in connection with crime. The respondent did not explain to the satisfaction of the court that, the source of funds was legitimate. These requirements are aimed at fighting money laundering, terrorism finance, proliferation financing, illicit financial flows and transboundary crimes. These are



serious crimes and have been so taken at international and regional levels. Countries which has failed to put measures to fight these heinous crimes have been slapped with sanctions. For instance, Kenya is the latest country to be grey-listed for failure to meet FATF standards and measures aimed at fighting these crimes. Nations should fight these crimes with vigour within the context of sustainable development for the sake of the present and future prosperity, peace and harmony.

160. Thus, this court finds that the 1st respondent has not discharged the evidential burden and has not explained the source of funds in this bank account. The applicant has proved on a balance of probabilities that, the funds are proceeds of crime.

Conclusions and orders

161. In the upshot, having considered all the evidence and submissions presented, this court is satisfied that the applicant has proved on a balance of probabilities that the money in the Respondent's accounts Nos. 5017697001(KES) and 5017697002(USD) at Diamond Trust Bank, 01100005319200 at Cooperative Bank Limited, 0122010002706 at Rafiki Bank Ltd, 0636966001, 5637786001 at DTB, and 2043012145 at ABSA Bank is proceeds of crime as defined in Section 2 of the [Proceeds of Crime and Anti-Money Laundering Act](#).
162. Subject to Section 94 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAMLA), a finding that the assets or property of the Respondents are proceeds of crime, is the basis upon which the court makes an order for forfeiture. Properly situating of such finding that property is proceeds of crime, within the broader framework in article 40(6) of [the Constitution](#), completely routs any notion that an order of forfeiture made by a competent court, is a violation of the Respondent's right to property under Article 40 of [the Constitution](#).
163. Also, but, purely obiter, the fact that proceeds of crime have been consumed, is never a defense to a forfeiture proceeding or a foreclosure to the making of a forfeiture order, as forfeiture order may be made executable as a money decree against any other property of the defendant which in law, stands as a substitute for or in place of the proceeds of crime. This is provided in law, but, no such order was sought in these proceedings.
164. Accordingly, the application dated 22/12/2023 succeeds, and this court enters judgment for the applicant against the Respondents as follows: -
- i. That the sum of Kshs. 93,159.24 held in account No. 01100005319200 at Cooperative Bank Ltd, in the name of Scola Imbiti Namunyu is proceeds of crime and is hereby forfeited to the State.
 - ii. That the sum of Kshs. 41,753.63 held in account No. 5017697001 at Diamond Trust Bank Ltd, in the name of Scola Imbiti Namunyu is proceeds of crime and is hereby forfeited to the State.
 - iii. That the sum of Kshs. 469,712.49 held in account No. 55637786001 at Diamond Trust Bank Ltd, in the name of Scola Imbiti Namunyu is proceeds of crime and is hereby forfeited to the State.
 - iv. That the sum of Kshs. 3,739.10 held in account No. 012010002706 at Rafiki Bank Ltd, in the name of Scola Imbiti Namunyu is proceeds of crime and is hereby forfeited to the State.
 - v. That the sum of Kshs. 697,047.20 held in account No. 2043012145 at ABSA Bank Ltd, in the name of Scola Imbiti Namunyu, Randy Ngala, and Peter Muthui Wambugu is proceeds of crime and is hereby forfeited to the State.



- vi. That, subject to section 92(6) of *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA), it is hereby ordered that the funds in the said accounts shall be transferred to the applicant's account established for forfeited sums.
- vii. The forfeiture orders shall not take effect: -
 - a. Before the period allowed for an application under section 89 or an appeal under section 96 has expired of POCAMLA; or
 - b. Before such an application or appeal has been disposed of.
- viii. That the Respondent shall bear the costs of the Originating Motion.

165. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 24TH DAY OF JUNE, 2024

F. GIKONYO M

JUDGE

In the presence of-

1 Adan C/A

Kandie for Irari for applicant

3. Karoki for respondents

