



**Assets Recovery Agency v Roba (Civil Application E005 of 2024) [2024] KEHC 9139 (KLR)  
(Anti-Corruption and Economic Crimes) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
CIVIL APPLICATION E005 OF 2024**

**EN MAINA, J**

**JULY 25, 2024**

**BETWEEN**

**ASSETS RECOVERY AGENCY ..... APPLICANT**

**AND**

**RASHID ALI ROBA ..... RESPONDENT**

**JUDGMENT**

1. This Judgement pertains to the ARA/Applicant’s Originating Motion dated 3<sup>rd</sup> April 2024 which is brought under Sections 90 & 92 of the *Proceeds of Crime and Anti-Money Laundering Act* (the POCAMLA) and Order 51 Rule 1 of the Civil Procedure Rules, seeking orders as follows:-

- “1) That this Honourable Court do issue orders declaring the motor vehicle KCR 727K, Honda Insight as a proceed of crime liable for forfeiture to the Applicant.
2. The Honourable Court be pleased to issue orders of forfeiture of the motor vehicle in prayer 1 above to the Assets Recovery Agency on behalf of the Government.
3. That this Honourable Court be pleased to issue an order directing the Director General of National Transport and Safety Authority to register the motor vehicle specified in Order 1 above in the name of the Applicant, Assets Recovery Agency.
4. That the Honourable Court do make orders ancillary orders it deems fit and just for the proper execution of its order.



5. That costs be in the cause.”
2. The Originating Motion was canvassed by way of affidavits and written submissions. The ARA/Applicant was represented by Ms Amadi, State Counsel and the Respondent by the firm of Roba & associates.
3. The ARA/Applicant’s case is that on 17<sup>th</sup> June 2022, the Applicant received information of suspected human trafficking by the Respondent from the Directorate of Criminal Investigations (the DCI) more specifically the Transnational Organised Crime Unit that it instituted investigations which established that the Respondent is indeed involved in human trafficking and in promotion of trafficking and has been arrested and charged for the offence twice; that the Respondent used the illegally acquired funds to purchase the vehicle KCR 727K; that an operation was carried out by the police to rescue 13 Ethiopian nationals who were locked up in a house rented by the Respondent and who were being taken care of by his brother; that the Respondent escaped during the operation but was later arrested while in possession of the suit vehicle; that a search confirmed the motor vehicle was registered in his name; that investigations revealed he purchased the motor vehicle in the year 2020 which is the same year he was arrested along the Thika/Nairobi road while transporting 11 Ethiopians who he was reasonably believed to be trafficking; that the Respondent alleged to have acquired the vehicle through funds loaned to him by one Ms. Ayato Iribo Wato who in the year 2020 was also charged with the offence of smuggling 22 Ethiopian Nationals into the country without valid permits; that the Respondent claims to be a taxi driver but has not provided any documentation to prove it and further that investigations established that the suit vehicle was acquired through laundering of money acquired from human trafficking and it is therefore in the public interest that the orders sought are granted.
4. The application is supported by the affidavit sworn on 3<sup>rd</sup> April 2024 by Jackson Kimani, an investigator attached to the Applicant. He deposes that the Applicant started its investigations by applying for and obtaining warrants to investigate the Respondent’s bank and Mpesa accounts and those of his close associates through the Chief Magistrate ACC Miscellaneous Criminal Applications Numbers E150 of 2024, E151 of 2024 and E620 of 2023; that thereafter on 7<sup>th</sup> and 14<sup>th</sup> December 2023, the Applicant obtained a preservation order in High Court ACEC Misc. Application Number E044 of 2023 Asset Recovery Agency v Rashid Ali Roba, which prohibited the Respondent from dealing with the proposed motor vehicle in any manner which order was duly gazetted on 19<sup>th</sup> January 2024 through Gazette Notice Number 883.
5. He deposes further that on 19<sup>th</sup> January 2024 the Respondent was summoned by the ARA/Applicant for interrogation as to the source of funds used to purchase the suit vehicle, but the Respondent failed to give a satisfactory explanation; that his explanation was that he had worked in the Gulf and saved some of the money, and that he obtained a loan of Kshs. 200,000 from one Ayato Iribo to cover the difference. That the Respondent alleged that he heard the said Miss Ayato entered into a joint “Sale Agreement” with Driver’s Universe Motor Company Limited for the purchase of the motor vehicle at a price of Kshs. 900,000. A deposit of Kshs. 400,000 was paid to the seller by Ms. Ayato through RTGS and a credit facility of Kshs. 605,000, payable in 18 months was extended to Miss Ayato. Ms. Ayato proceeded to pay a second instalment through RTGS and the rest of the payments was made via Mpesa while only one instalment of Kshs. 38,074 was made by the Respondent.
6. That he later changed and stated that he purchased the motor vehicle with Kshs. 200,000 out of his Kshs. 400,000 savings from his employment in Saudi Arabia, Kshs. 200,000 loan from his cousin Ayato and Kshs. 300,000 from the sale of his land in Moyale; that the Respondent alleged that he had agreed with Ms. Ayato that he would include her name in the log book until the loan was repaid, and that he claimed to have given the consideration for the sale of the land to Ms. Ayato to pay the car dealer.



- He claimed to have sent Kshs. 200,000 to Ms. Ayato to repay the loan but that no evidence for these transactions was presented.
7. He deposed further, that Ms. Ayato does not appear on the vehicle's logbook or on the transfer documents and that a letter from the seller dated 17<sup>th</sup> November 2023 confirms that the seller got instructions from both the Respondent and Ms. Ayato to transfer the vehicle to the Respondent once the payment was complete. Further, that the indemnity letter dated 7<sup>th</sup> March 2022 indicates Ms. Ayato and the Respondent to be husband and wife.
  8. He deposed that on 28<sup>th</sup> August 2020, three months after the purchase of the suit vehicle, Ms. Ayato was charged with smuggling 22 Ethiopian nationals into Kenya without valid documentation, at the Kibera Law Courts; that on 17<sup>th</sup> December 2020, the Respondent was also charged with the offence of Trafficking In Persons after he was found transporting eleven Ethiopian nationals along Thika-Nairobi Highway and further that on 9<sup>th</sup> September 2021 Mohamed Ali Roba, the Respondent's brother, was also charged with trafficking and harboring 13 undocumented Ethiopian persons. Jackson Kimani also deposed that the Respondent had rented the house in which the trafficked persons stayed.
  9. It is the ARA/Applicant's case that the Respondent was arrested again on 22<sup>nd</sup> February 2022 and charged with the offense of promotion of trafficking in persons as the owner of the house that was harboring the 13 undocumented Ethiopian persons and that whereas the Respondent alleges to be running a taxi business, there is a letter dated 29<sup>th</sup> November 2023 from Kenya Revenue Authority indicating that he never filed tax returns since 31<sup>st</sup> December 2011 and that Ms Ayato has also not filed any tax returns since 31<sup>st</sup> December 2010.
  10. The Plaintiff therefore contends that the Respondent has not given a credible explanation of the source of the funds used to purchase the suit vehicle leading to the conclusion that the suit vehicle is a means of laundering money acquired from human trafficking and hence a proceed of crime that ought to be forfeited to the Government.

### **The Respondent's case**

11. The Respondent opposed the application through a Replying Affidavit, sworn by himself on 21<sup>st</sup> May 2024 where he deposed that he is indeed the registered and beneficial owner of the motor vehicle KCR 727K; that he uses the vehicle to carry on a taxi business; that the vehicle was confiscated during his arrest; that after the arrest he was charged with the offence of trafficking in persons; that he made an application to have the vehicle released to him, and the court allowed the application as the investigating officer in the case did not object and had indicated that the vehicle was not an exhibit in the proceedings. He deposed that after the motor vehicle was released, the Investigating Officer wrote to the ARA/Applicant informing it that the suit vehicle was used in the commission of the offence he was charged with and that is when the Applicant herein approached this court for a preservation order; that the Applicant did not disclose that there was an order of the trial court to have the vehicle released to him.
12. He contended that the statement made by him to the Applicant was obtained under duress and it cannot therefore be relied upon; that the Applicant did not present his Mpesa statements to substantiate the alleged inconsistencies in his recorded statement; that the suit vehicle was acquired through money loaned to him by Ms. Ayato who is yet to be convicted and linking the suit vehicle to those charges is therefore premature and speculative.
13. It is also the Respondent's case that the preservation order was obtained on the basis of suspicion and mere presumptions contrary to the tenets of law and natural justice, as no evidence was adduced to demonstrate a prima facie case.



14. He also deposed that his brother, Mohamed Ali Roba, was charged separately from him and reiterated that the issue of the return of the vehicle had already been adjudicated and determined conclusively in the magistrate's court and therefore this court has no jurisdiction unless moved by way of appeal or revision and hence the application should be dismissed with costs.

### **The Applicant's submissions**

15. Learned Counsel for the Applicant submitted that the claim that the Respondent is a subscribed Uber driver contradicts the statement he recorded with the Applicant where he stated that he was subscribed with Bolt. Counsel asserted that in any event, investigations proved that the Applicant was not subscribed to either of the two taxi companies; that the payments made in regard to the suit vehicle also contradicted the explanation offered by the Respondent as only one payment of Kshs. 38,074 was paid by the Respondent to the car dealer; that the Respondent did not present any documents to prove the purported sale of land that he allegedly funded the purchase of the suit vehicle. She asserted that both the Respondent and Ms. Ayato were charged with the offense of trafficking in humans and that the bulk of the funds used to purchase the suit vehicle were from Ms. Ayato and are proceeds from that criminal activity.
16. Counsel contended that the Respondent did not adduce any evidence to controvert the Applicant's evidence and cited the case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR where the Court held that:
- “where a party fails to produce certain evidence, a presumption arises that the evidence produced would be unfavourable to that party”.
17. Counsel submitted that the Respondent had a duty to adduce evidence of a legitimate business and as he had not done so, his allegations are false. Counsel stated that the Respondent had on two occasions been charged with the offense of trafficking in persons, making him a habitual offender. She asserted that the Respondent's wife and brother were also charged with similar offenses and the brother had been convicted and that the actions of the Respondent are a classic example of laundering of money gotten from trafficking in persons. Counsel relied on the case of *Schabir Shaik & Others v State Case CCT 86/06* [2008] ZAC 7 where the court stated:-
- “...a person who has benefitted through enrichment of a company as a result of a crime which that person has an interest, will have directly benefitted from that crime.”
18. Counsel submitted that the source of the funds with which the vehicle was acquired is unexplained; that the Respondent's explanation has been inconsistent and is not supported with evidence and hence the vehicle is a proceed of crime and should be forfeited to the government as provided in Section 90 of the POCAMLA.
19. Citing the case of *Director of Assets Recovery & Others, Republic v Green & Others* [2005] EWHC 3168 Counsel contended that the Applicant had discharged it's burden of proof which is on a balance of probabilities.
20. In support of her submissions, Counsel relied on the following other cases:-*KACC v James Mwathethe Mulewa & Anor* [2017] eKLR; *Nguku v Republic* [1985] KLR 412; *Abdulrahman Mahmoud Sheikh & 6 Others v Republic & Others* [2016] eKLR



## **The Respondent's submissions**

21. Learned Counsel for the Respondent submitted that there is no evidence to link the funds used for the purchase of the suit vehicle to any crime. Counsel contended that the Respondent presented a plausible explanation that the source of funds was a loan advanced by one Ms. Ayato who although she was charged with the offense of human trafficking is yet to be convicted. Counsel asserted that mere association of the vehicle to Ms Ayato does not automatically taint it. Counsel stated that the presumption of "Innocent until proven guilty" must apply.
22. Counsel placed reliance on the case of Stanley Munga Githunguri -v- Republic (1986) eKLR where protection of proprietary rights unless there is clear and convincing evidence to justify deprivation, was emphasized.
23. Counsel further submitted that the order for preservation of the impugned vehicle did not follow due process; that the Applicant did not disclose to this court that the trial court had granted an order for the release of the vehicle to the Respondent on ground that it was not connected to the criminal charges. Counsel stated that the material non-disclosure undermined the integrity of the judicial process. Counsel relied on the case on the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR where it was held that full and frank disclosure is mandatory when seeking exparte orders and failure to disclose material facts can lead to setting aside of the orders.
24. Counsel also submitted that the doctrine of res judicata prevents re-litigation over the suit vehicle. He contended that the issue of ownership and connection of the suit vehicle to the alleged crime was conclusively determined in the criminal case and that it was ruled that the vehicle was not related to the charges brought against the Respondent.
25. Counsel concluded by asserting that the Applicant had not proved that the vehicle is a proceed of crime. He reiterated that the preservation order is irregular; that this issue is res judicata and that the Respondent has given a satisfactory explanation of the source of the funds used to acquire the vehicle and hence this case should be dismissed with costs to the Respondent.
26. Counsel also placed reliance on the following cases:-John Florence Maritime Services Limited & Anor v Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR Asset Recovery Agency v Pamela Aboo [2018] eKLR

## **Issues for determination**

27. I have carefully considered the pleadings, the rival submissions of learned Counsel for the parties, the cases cited and the law and in my view the following issues arise for determination.
  - i. Whether the instant proceedings are res judicata.
  - ii. Whether the preservation order granted by this court on 15<sup>th</sup> December 2023 is flawed for lack of disclosure of material facts.
  - iii. Whether the motor vehicle Registration. No. KCR 727K constitutes a proceed of crime and whether the motor vehicle should be forfeited to the government.



## Analysis and Determination

### Issue (i): Whether the instant proceedings are res judicata

28. It is the Respondent's contention that the issue of whether or not the vehicle should be returned to him was determined by the trial court and for that reason this case is res judicata. That the only way this court can interfere with the decision of the trial court is in exercise of its appellate or supervisory jurisdiction but not otherwise.

29. The law on res judicata is found in Section 7 of the Civil Procedure Act which states: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

30. The Black's law Dictionary 10<sup>th</sup> Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

31. In the case of John Florence Maritime Services Limited & Another v Cabinet Secretary, Transport and Infrastructure & Others [2021] eKLR the Supreme Court expressed itself as follows in regard to the doctrine: \_

“81. We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position we borrow from the decision from India in Karam Chand another v Union Of India and others on 24 April, 2014 where it was restated the principles upon which the doctrine of res judicata is founded as follows:

“29. ....it is clear that the rule of res judicata is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of res judicata is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:(1)nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.(2)interest republicae ut sit finis litium: it is in



the interest of the State that there should be an end to a litigation; and(3)res judicata pro veritate occipitur: a judicial decision must be accepted as correct.....The doctrine of res judicata is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience.”

84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.....
86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
  - b) The Judgment or order was on merit;
  - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - d) There must be between the first and the second action identical parties, subject matter and cause of action....”
32. For a case to be res judicata therefore it must meet the test laid down by the Supreme Court in the John Florence Maritime case (Supra) and as exhorted by that court this court must consider the proceedings in the magistrate’s court in light of the following guidelines: -
- “ 58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads:
- i. the matter in issue is identical in both suits;
  - ii. the parties in the suit are the same;
  - iii. sameness of the title/claim;
  - iv. concurrence of jurisdiction; and (v) finality of the previous decision.”



33. I have perused the ruling of the learned magistrate who is in conduct of the criminal case where the accused is charged with the offence of human trafficking in light of the above principles. My reading of it is that the vehicle was released to the Respondent for reason that there was no dispute that it belonged to him and as it was not an exhibit in the case given that it was not the one which was used to commit the offence. In other words, there was no nexus between the vehicle and the offence with which the Respondent was charged.
34. In my view the issue before the trial magistrate and the issue before this court are totally different. In the magistrates court the issue was whether the vehicle belonged to the Respondent, a fact which was not disputed and whether the motor vehicle had been used in the commission of the offence and whether it was therefore an exhibit in that case. In this case the issue is whether or not the vehicle is a proceed of crime: whether its acquisition is connected to any unlawful activity or conduct. The legal issues raised are totally different from those raised in the magistrate's court. The argument that this case is res judicata therefore fails the first test.
35. Secondly the parties here are different from those in the magistrate's court: Here the Applicant is the Asset Recovery Agency whereas the state office involved in the magistrate's court is the office of the Director of Public Prosecutions. In effect therefore not only are the causes of action before the two courts substantially different but the parties are also different.
36. It is also instructive that the magistrates court has no jurisdiction to hear and determine civil forfeiture proceedings under the POCAMLA. It cannot therefore be said that the question or issue of the motor vehicle had been finally determined by a court of competent jurisdiction. For the foregoing reasons I am not persuaded that these proceedings are res judicata and the argument to that effect is rejected.

**Issue (ii): Whether the preservation order granted by this court on 15<sup>th</sup> December 2023 is fatal for reason of non-disclosure of material facts.**

37. The preservation order was granted under Section 82(1) and (2) of the POCAMLA which states:-

- “(1) The Agency Director may, by way of an ex parte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
- (2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—
- (a) has been used or is intended for use in the commission of an offence; or
- (b) is proceeds of crime.

38. As can be seen from the above section, such an application is made ex parte, meaning that the person of interest need not be given notice of the application. Also of note is that the court considers the application and it is only once it is satisfied that there are reasonable grounds to believe that the property constitutes proceeds of crime that it grants the application. As I have already stated there was no dispute at all that the vehicle belongs to the Respondent. The other facts which would have concerned the court were whether there was evidence upon which the court could reasonably come to the conclusion



that the vehicle constitutes proceeds of crime. As was held in the case of *Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188:

“The material facts are those which it is material for the Judge to know in dealing with the application as made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.” (emphasis mine).

What constituted material facts in the instant proceedings was to be decided by the court but not by the Respondent.

39. I also appreciate and I am fully in agreement with the finding of the court in the case of *Babadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997* that: -

“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained.”

40. However, in my considered view the ruling of the trial court would have been a material fact had the Applicant based the application for a preservation order on the grounds that the vehicle was used or was intended to be used to commit a crime. In the circumstances, the criminal court's finding that the suit vehicle had no connection to the offense, that the Respondent was charged with, would have been conclusive on the issue of the vehicle's ownership but not the manner of its acquisition. As the criminal court did not concern itself with the manner of acquisition of the vehicle. I find that the order made by the learned magistrate in the criminal proceedings was not a material fact to be disclosed by the Applicant in applying for the preservation order over the suit vehicle, and as such, the preservation order was properly obtained and is in order.

**Issue No. (iii): - Whether the motor vehicle registration no. KCR 727K constitutes a proceed of crime and whether it should be forfeited to the government.**

41. It is the Applicant's case that the Respondent acquired the motor vehicle with proceeds of human trafficking which is an offence in Kenya; that he together with one Ms Ayato have been charged with the said offence several times and that even though they are yet to be convicted there is evidence on a balance of probabilities that the source of the funds is that trade as the Respondent could not give a plausible explanation of how he got the money with which he acquired the vehicle. The Applicant invited this court to find that there were inconsistencies in the explanation given by the Respondent and hence find that its evidence had not been rebutted. On his part, the Respondent contended that he had given a satisfactory explanation on the source of the funds which the Applicant had not disproved. He recanted the statement he had recorded with the ARA/Applicant on the ground that it was recorded under duress. Further, the Respondent contended that Ms. Ayato, who is the source of some of the funds with which the vehicle was purchased is yet to be convicted and should be presumed innocent until proven guilty hence this application is pre-mature.

42. What constitutes proceeds of crime is defined in Section 2 of the POCAMLA to be:-

“..... 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”

43. The operative words are “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”. For the court to find that the vehicle constitutes proceeds of crime it must be satisfied on a balance of probabilities (Section 92(1) of the POCAMLA) that the vehicle was derived or realized as a result of or in connection with an offence, whether directly or indirectly.
44. The burden of proof first lies with the Applicant to prove its case on a balance of probabilities after which the evidential burden shifts to the Respondent and then to the party who would lose were the court not to believe that evidence.
45. In this case it is not disputed that both the Respondent and his alleged financier were arrested while transporting Ethiopian nationals whereupon they were charged with offences related to human trafficking. Whereas initially the Respondent alleged to have acquired the motor vehicle using his own funds he later changed to say that the funds used to acquire the vehicle were largely contributed by Ms Ayato. As stated in the definition of proceeds of crime the identity of the offender is not relevant as there are times when the owner of the property sought to be forfeited is not even known. In this case however, it is the Respondent who alleges that he purchased the vehicle together with Ms Ayato. His explanation of how he acquired the vehicle comes in very many versions and it is also very telling that he recanted the statement which he made with the ARA/Applicant. In my view that statement is so detailed that it could not have been made by a person acting under duress. That he and his alleged benefactor are involved in the illegal business of human smuggling and trafficking has been proved on a balance of probabilities through the fact that they were caught transporting a group of Ethiopians and were in fact arraigned in court with human trafficking related offences.
46. Section 92(4) of the POCAMLA provides that: -

“The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.”

It therefore matters not that any of them are yet to be found guilty of the offences.
47. In the case of *Assets Recovery Agency v James Thuita Nderitu & 6 others* [2020] eKLR it was held:-

“I agree with the sentiments expressed by the courts in the above decisions. A conviction in a criminal trial is not necessary before a suit for recovery of funds or other assets reasonably believed to be proceeds of crime is instituted.....As the outcome of criminal proceedings does not, under the law, have a bearing on forfeiture proceedings, the applicant does not have to await the conclusion of a criminal trial before instituting civil proceedings for recovery of funds or assets reasonably believed to be proceeds of crime.”
48. I associate myself fully with the above holding in finding that here the issue is the source of the funds with which the Applicant acquired the vehicle but not whether he committed the offence. In other words, his criminal culpability is not in issue.
49. I find that the Applicant has on a balance of probabilities, established a prima facie, that the motor vehicle was acquired using proceeds from the unlawful conduct. It has therefore discharged its legal burden of proof. As earlier stated, whereas the legal burden of proof remains with the Applicant



throughout the forfeiture proceedings, once it is discharged the evidential burden shifts to the Respondent and keeps shifting depending on the evidence adduced by the other party. (See the case of Pamela Aboo v Assets Recovery Agency & Another Civil Appeal No. 452 of 2018 [eKLR] ) and the case of ARA v Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica Claim No. 2007 HCV003259 where the court stated: -

“ Even though these proceedings are Quasi- Criminal in nature, there is an evidential burden of proof on the Defendant. It is incumbent to then to demonstrate evidentially how they lawfully came into possession of the assets seized. . . There is no indication of any work place or higglering or any enterprise on her part, the only reasonable and inescapable inference is that the property seized are obtained through unlawful conduct and are therefore recoverable properties.”

50. Whereas the Respondent claimed that he bought the motor vehicle with savings from his work in the Gulf, a loan from Ms. Ayato and the sale of his land in Moyale, he did not produce any evidence to support that averment. While I appreciate that a loan agreement may be entered into orally, the law requires that any sale of land be evidenced in writing (See Section 3 of the *Law of Contract Act*). Further, there must also have been some form of documents to evidence the employment and consequently the income earned in the Gulf. In my view the absence of a sale agreement and evidence of employment and hence proof of income is proof that there was no such agreement or employment.
51. The Respondent also claimed to be an Uber taxi driver but did not produce anything to prove a contract or registration with Uber or any statements of income obtained thereby as would convince this court that he worked or earned money from such a business. Moreover, the fact that neither Ayato nor himself has filed tax returns since the year 2011, is in my view proof on a balance of probabilities that they did not engage in any business through which they could have legitimately acquired the vehicle. It is therefore my finding that he has not adduced any evidence to rebut that of the Plaintiff. I am therefore satisfied that the ARA/Applicant has proved its case on a balance of probabilities. Section 91(1) of the POCAMLA therefore enjoins this court to declare it as such and thereby order its forfeiture to the government.
52. The upshot is that the Originating Motion is allowed and judgment is hereby entered for the ARA/ Applicant against the Respondent as follows: -
  1. That an order be and is hereby issued declaring the motor vehicle KCR 727K, Honda Insight as a proceed of crime liable for forfeiture to the Government of Kenya.
  2. That an order be and is hereby issued for forfeiture of the motor vehicle in Order (1) above to the Government of Kenya.
  3. That an order be and is hereby issued directing the Director General of National Transport and Safety Authority to register the motor vehicle specified in Order (1) above in the name of the Assets Recovery Agency/Applicant.
  4. That the costs of these proceedings shall be borne by the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

.....

**E. N. MAINA**

**JUDGE**

