



**Assets Recovery Agency v Omar (Civil Application E011 of 2024) [2024] KEHC 13496 (KLR)  
(Anti-Corruption and Economic Crimes) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13496 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
CIVIL APPLICATION E011 OF 2024  
EN MAINA, J  
OCTOBER 31, 2024**

**BETWEEN**

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

**AND**

**ANWAR ALI OMAR ..... RESPONDENT**

**JUDGMENT**

1. By the Originating Motion dated 7<sup>th</sup> May 2024, filed herein on even date, the ARA/Applicant seeks an order for forfeiture of the asset described as portion No. 13741 otherwise known as Casuarina Plaza, the development erected thereon as well as the rental income, benefits and profits accruing from the development. The property is situated in Shela area, in Malindi Sub-County of Kilifi County. The Applicant also prays for a vesting order of the property to itself. The Application is brought under Sections 81, 90 and 92 of the Proceeds of Crime and Money Laundering Act (the POCAMLA) and order 51 of the Civil Procedure Rules.

**The Applicant's Case.**

2. The gravamen of the application is that the property is reasonably suspected to be proceeds of crime.
3. The facts giving rise to the above suspicion, as set out in the grounds on the face of the application and the supporting affidavit sworn on 7<sup>th</sup> May 2024 by Isaac Nakitare, are that following a report received on 5<sup>th</sup> June 2023 that the Respondent was involved in the narcotic trade, the Applicant moved to court and obtained a warrant to investigate the Respondent's accounts and to search his residence.
4. Upon investigating four bank accounts belonging to the Respondent, the Applicant came to the conclusion that the same had received cash deposits in a manner giving rise to a reasonable suspicion that the accounts were being used for money laundering; that the sums were deposited in tranches of



less than a million shillings in order to evade the Central Bank of Kenya reporting threshold, and that the bank accounts were being used to disguise and conceal funds from the sale of narcotic drugs.

5. Further that on 30<sup>th</sup> June 2023 officers from the Directorate of Criminal Investigations (DCI) visited the Respondent's residence at Casuarina Plaza and recovered 464.46 grams of cocaine with a street value of Kshs.1.857.840/- and for that reason it was concluded that the property was acquired with proceeds of the illicit trade and hence the same is liable for forfeiture.
6. On 7<sup>th</sup> February 2024 the Applicant obtained an order for preservation of the property and the rental income from the apartments developed thereon and now seeks forfeiture of the same to the Government of Kenya.

### **The Respondent's Case**

7. The Respondent opposed the application through a replying affidavit sworn on 5<sup>th</sup> June 2024, where while conceding that he is facing drug related charges he denies that the impugned property constitutes proceeds of crime.
8. The Respondent has annexed documents which detail how he acquired the land on which the property stands in the year 2010 and how he subsequently developed it with residential apartments and business premises including a hospital.
9. The Respondent explains that the source of the funds used to acquire the land were soft loans from one Andrea Rubina Sala, an Italian. He has annexed two loan agreements dated 21<sup>st</sup> March 2010 and 30<sup>th</sup> May 2011 respectively (Annexures AAO-5) for Euro 65,000 and Euro 30,000.
10. The Respondent also avers that at the material time, he was employed by one Marco Vanci but that subsequently he started his own tour business known as Luna Transfer and Safari Ltd with two vehicles from which he made the money by which he developed the land; that the property now earns him a gross monthly income of between Kshs.270,000/- and Kshs.310,000/= a net monthly income of Kshs.40,000/. He has annexed schedules of his income and expenses from November 2022 to March 2024 as proof. (See annexure AAO – 6). He has also annexed account statements of Luna Transfer and Safari Ltd running from 5<sup>th</sup> September 2007 to 17<sup>th</sup> May 2010 as proof that the company was a running business. The statement of account has an Imperial Bank rubber stamp and shows that there were substantial sums transacted through the account.
11. In a handwritten statement which is also annexed to his replying affidavit he explains that he acquired the property in the year 2010 at a consideration of Kshs.1,000,000 from one Marco. He also mentions Luna Transfer and Safari Ltd and contends that apart from the funds advanced to Andrea Lubina Sala, he also borrowed from banks. Further that the asset has a manager who collects the rent which is then deposited in his bank account which he then moves to his mobile money wallet (M-pesa) to meet his expenses.
12. The Respondent also attached documents which evidence the conveyance of the land where the asset is situated. All of them show that the conveyance took place between the year 2013 and 2014. The Respondent disputed the Applicant's allegation that the asset is a proceed of crime.

### **Submissions**

13. In his submissions, Mr. Adow, learned Counsel for the Applicant, maintained that the asset was acquired through proceeds of the illegal narcotics trade. Counsel submitted that there is evidence that the Respondent is involved in the narcotics business; that the Respondent has not tendered evidence that he is involved in legitimate business; that like other money launderers, the Respondent created



a sophisticated scheme to camouflage and conceal the proceeds of his criminal activities and that the Respondent's statement did not explain the source of funds. Counsel asserted that the Applicant has discharged its legal burden of proof. Counsel averred that the Respondent has not discharged the evidential burden placed upon him by Section 112 of the *Evidence Act*. Counsel further argued that the impugned asset is not protected under Article 40 of *the Constitution* and hence this court should exercise its power under Section 92 of the POCAMLA to forfeit it.

14. On his part, Mr. Magolo, Learned Counsel for the Respondent submitted that there is no evidence that the asset is either a proceed of crime or that its acquisition is connected to some unlawful activity. Counsel contended that the asset was acquired way before the offences with which the Respondent is charged were allegedly committed and that in any event the charges are yet to be proved. Counsel contended therefore, that this application has not met the requisite threshold and should be dismissed with costs.

### **Issue for Determination**

15. The issue that arises for determination is whether the impugned asset is a proceed of crime liable for forfeiture to the Government of Kenya.

### **Analysis and Determination**

16. The burden to prove that the impugned asset is a proceed of crime lies with the Applicant. That legal burden of proof does not shift. Only once the Applicant has discharged the legal burden on a balance of probabilities, does the evidential burden shift to the Respondent. This is, as was restated by the Court of Appeal in the case of Pamela Aboo v ARA & Another, Civil Appeal No. 452 of 2018 where the court stated:-

“The legal burden lies only on one of the parties and does not shift to the other party throughout the length and breadth of the trial.

. . . On the other hand, evidential burden refers to the obligation on a party to adduce sufficient evidence of a particular contested fact in order to justify a decision on that fact in his favour . . . A litigant who fails to discharge the evidential burden carries the risk, he may lose the whole or some part of the case. . . Unlike the Legal burden, the evidential burden is not static, it keeps shifting.”

17. Similarly, in the case of ARA V Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica Claim No. 2007 HCV003259 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 for then to demonstrate evidentially how they lawfully came into possession of the assets seized . . .”

18. It is also trite that to succeed, the Applicant need not prove the commission of an offence. The reason for this is that the validity of a forfeiture order “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.” (See section 92(4) of the POCAMLA)
19. The Applicant must however 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 – see the case of



Director of Assets Recovery Agency & Others v Green & Others [2005] EWHC 3168 where the court 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.”

20. From the tests set out above the Applicant must of necessity prove a nexus between the impugned property/asset and the unlawful conduct and as stated earlier it must do so on a balance of probabilities.
21. The question in this case therefore, is whether the above test has been met in respect to the asset sought to be forfeited.
22. The main ground proffered by the applicant is that on 5<sup>th</sup> June 2023 it received information that the Respondent had assets acquired through trafficking of narcotics; that it obtained warrants from court and investigated his accounts and confirmed that there were suspicious transactions and that he in fact had a building which was reasonably suspected to have been acquired through the illicit proceeds. However, the Respondent’s position is that he acquired this property and developed it long before the accusation that he is involved in the unlawful business.
23. I have carefully considered the evidence and that includes the documentary evidence adduced by both sides. I have also considered the rival submissions, the cases cited and the law and in my considered opinion the Applicant has not proved its case on a balance of probabilities. It is my finding that the Applicant has not demonstrated a nexus between the illicit or unlawful activities it accuses the Respondent of and the property Portion No. LR 13741 otherwise known as Casuarina Plaza. The Respondent is alleged to have engaged in the unlawful activities in the year 2023 yet the Respondent has tendered documents that prove on a balance of probabilities that he acquired the property between 2010 and 2013; he also produced documents which, on a balance of probabilities, prove the source of the funds through which he acquired the property. The documents clearly show that he got funding of Euro 65,000 and 30,000 from one Andrea Rubina Sala between March and May 2010. There is also evidence that the business he was carrying on, Luna Transfer and Safari Ltd, was a going concern and it made good money. He has also attached handwritten schedules of the monthly rental income derived from the property and the expenses incurred. All the above evidence was not rebutted.
24. Taken as a whole, the Applicant’s own evidence demonstrates that the Casuarina Plaza had long been developed with residential and business premises from which the Respondent was collecting rent by the time the Applicant closed in on him.
25. There is absolutely no evidence that whatever activities the Respondent was engaged in in the year 2023, contributed to the acquisition and development of the property. The property does not therefore fit in the definition of proceeds of crime which is:-

“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.” (See Section 2 of the POCAMLA)

26. It is instructive that there is also no iota of evidence that the Respondent was involved in unlawful conduct either at the time he acquired the asset or at the time he developed it.



27. The upshot is that the Originating Motion fails and it is dismissed with costs to the Respondent.
28. It is hereby ordered that any rental income collected by the Applicant during the pendency of the preservation order issued by this court on February 7, 2024, shall be refunded to the Respondent in full. However, no interest shall be levied thereon as the Applicant was acting pursuant to a lawful court order and was lawfully undertaking its mandate under the POCAMLA.

Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**E. N. MAINA**

**JUDGE**

