



**Assets Recovery Agency v Tanui & 2 others; Sugut & 13 others (Interested Parties) (Civil Suit E009 of 2024) [2024] KEHC 14774 (KLR) (Anti-Corruption and Economic Crimes) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14774 (KLR)

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

**CIVIL SUIT E009 OF 2024**

**EN MAINA, J**

**NOVEMBER 22, 2024**

**BETWEEN**

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

**AND**

**LIVINGSTONE KIPTOO TANUI ..... 1<sup>ST</sup> RESPONDENT**

**VIOLA JELAGAT BUTIAH (BEING SUED ON BEHALF OF HERSELF AND AS A NEXT OF FRIEND OF L.C (MINOR) ..... 2<sup>ND</sup> RESPONDENT**

**DANIEL KIPTANUI CHELULE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**SALINA SUGUT ALSO KNOWN AS JEMWOLO KOBOT KIPLAMUI ..... INTERESTED PARTY**

**PETER KIMUTAI TUWEI & DAVID KIPKOSGEI SOIMO AS ADMINISTRATORS OF THE ESTATE OF KIPSOMO ARAP KOECH (DECEASED) ..... INTERESTED PARTY**

**CHEMWOK ARAP KIBWOEN ..... INTERESTED PARTY**

**CHEPNGOK KIPROP PATRICK ..... INTERESTED PARTY**

**JEPKEMBOI LETING BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE KIBIENGO ARAP KIPLETING ... INTERESTED PARTY**

**JOHANA KIPLETING KOSGEI ..... INTERESTED PARTY**

**ADMINISTRATOR OF THE ESTATE OF THE LATE KIBIENGO ARAP KIPLETING ..... INTERESTED PARTY**



**ADMINISTRATORS OF THE ESTATE OF THE LATE JEPSONGOK KOBOT  
KIRWA & THE LATE KIMETO ARAP TALAM ..... INTERESTED PARTY**  
**DAVID KIPCHUMBA KOGO ..... INTERESTED PARTY**  
**ADMINISTRATOR OF THE ESTATE OF MAINDI ARAP  
KAIGOI ..... INTERESTED PARTY**  
**JOHANA KIPLETING KOSGEI ..... INTERESTED PARTY**  
**ADMINISTRATOR OF THE ESTATE OF THE LATE SHEM KIPLAGAT ARAP  
BITTOK ..... INTERESTED PARTY**  
**JOSEPH KIPKOECH TANUI ..... INTERESTED PARTY**  
**BUSIENEI ARAP MAINA ..... INTERESTED PARTY**

## **JUDGMENT**

1. By its Originating Motion dated 17<sup>th</sup> April 2024 the Assets Recovery Agency/Applicant seeks a declaration that the following funds and assets belonging to the 1<sup>st</sup> Respondent, his spouse (the 2<sup>nd</sup> Respondent) and father (3<sup>rd</sup> Respondent) some of which are held in the names of the 1<sup>st</sup> to 14<sup>th</sup> Interested Parties are proceeds of crime liable for forfeiture to the Government of Kenya and an order forfeiting them to the Government of Kenya.
2. The impugned assets are listed as follows: -
  - a) Kshs. 429,883.19 held in Account 0350192187898 at Equity Bank in the name of the 1<sup>st</sup> Respondent, Livingstone Kiptoo Tanui.
  - b) Kshs. 1,511,782.29 held in Account Number Access 181852/510MSH00/1 (Former Transnational Bank) in the name of Livingstone Kiptoo Tanui.
  - c) Kshs. 852,377.20 held in Account number 1168650690 held at KCB Bank in the name of Livingstone Kiptoo Tanui.
  - d) Kshs. 135,502.85 held in Account number 1102077925 held at KCB Bank in the name of Violah Jelagat Butiah.
  - e) Kshs. 1,918.88 held in Account number 0300167286473 at Equity Bank in the name of Violah Jelagat Butiah.
  - f) Kshs. 26,693.11 held in Account Number 0115183328000 at co-operative Bank in the name of L.C. (Minor)
  - g) 3 Acres out of 18.0 Ha portion of land from Land Reference Number Nandi/Ngechek/414 registered in the name of Salina Sugut also known as Jemwolo Kobot Kiplamui.
  - h) 10 Acres out of 27 Ha Portion of Land from Land Reference number Nandi/Nechei/415 registered in the name of Kipsoimo Arap Koech (Deceased).
  - i) 0.8 Acres out of 13.6 Ha Portion of Land from Land Reference number Nandi/Ngechek/434 registered in the name of Chemwok Arap Kibwoen.



- j) 3.6 Ha of the Land Reference Number Nandi/Ngechek/446 registered in the name of Kibiego Arap Kiplating (Deceased).
- k) 0.8 Points out of 10.2 Ha of the Land Reference Number Nandi/Ngechek/447 registered in the name of Jepsongok Kobot Kirwa and Kimeto Arap Talam.
- l) 5.55 Acres out of 16.5 Ha portion of Land from Land Reference Number Nandi/Ngechek/448 registered in the name of Maindi Arap Kaigoi.
- m) 3.6 Ha of the Land Portion Reference Nandi/Ngechek/453 registered in the name of Livingstone Kiptoo Tanui.
- n) 0.10 Ha of the Land Portion Reference Nandi/Ndurio/907 registered in the name of Shem Kiplagat Arap Bittok.
- p) 5 Acres out of 24.92 Ha Portion of Land from Land Reference Number Nandi/Kilibwoni/1544 registered in the name of Busienei Arap Maina.
- q) 0.09 Ha of the Land Portion reference Pioneer/Ngeria block 1(EATEC)/12460 registered in the name of Livingstone Kiptoo Tanui.
- r) 0.09 Ha of the Land Portion Reference Pioneer/Ngeria Block 1(EATEC)/12461 Registered in the name of Livingstone Kiptoo Tanui.
- s) 0.09 Ha of the Land Portion Reference Pioneer/Ngeria Block 1(EATEC)/12462 Registered in the name of Livingstone Kiptoo Tanui.
- t) 0.092 Ha of the Land Reference LR No. Pioneer/Ngeria Block 1(EATEC)/14019 Registered in the name of Daniel Kiptanui Chelule.
- u) 0.092 Ha of the Land Reference LR No. Pioneer/Ngeria Block 1(EATEC)/14020 Registered in the name of Daniel Kiptanui Chelule.
- v) 0.092 Ha of the Land Reference LR No. Pioneer/Ngeria Block 1(EATEC)/14021 Registered in the name of Daniel Kiptanui Chelule.
- w) 0.092 Ha of the Land Reference LR No. Pioneer/Ngeria Block 1(EATEC)/14034 Registered in the name of Daniel Kiptanui Chelule.
- x) Parcel of Land Reference 1EATCA/1238 (more particularly 0.09 Ha Pioneer/Ngeria Block 1/EATEC 12459 in the name of Violah Jelagat Butiah.
- y) Motor vehicle Registration Number KCB 478J, Subaru Outback, Station Wagon, Chassis/Frame Number BPP9051864, Engine Number EJ250234752.
- z) Farm Tractor registration number KTCB 449t, Wheel Tractor, Chassis/Frame Number 1652817, Engine number Ym15148387.
- aa) Farm Tractor Registration Number KTCB 448T, Wheel Tractor, Chassis/Frame number 1652820.”

3. The other prayers in the Originating Motion are: -

- i. An order vesting the moveable and immovable properties to the Applicant.



- ii. An order forfeiting the profits accruing from the suit funds and properties to the Government of Kenya.
4. The Originating Motion was canvassed by way of affidavits and written submissions. The Applicant was represented by Ms Irari Principal Legal Counsel and the Respondents by Mr. Onyinkwa Advocate. The Interested Parties did not participate in the proceedings save for the 14<sup>th</sup> Interested Party who appeared but acted in person.

#### **The Applicant's case**

5. The Applicant's case is hinged on the Supporting Affidavit of Isaac Nakitare sworn on 17<sup>th</sup> April 2024 and Supplementary Affidavits sworn on 7<sup>th</sup> June 2024, 6<sup>th</sup> August 2024 and 2<sup>nd</sup> October 2024
6. In regard to the funds, it is alleged that sometimes in the year 2019 the ARA/Applicant obtained information from the Directorate of Criminal Investigations (DCI) that the 1<sup>st</sup> Respondent, who at the time was the Pay-Roll Manager for the County of Elgeyo Marakwet, had fraudulently manipulated, falsified and inflated his salary and paid the misappropriated sums of money into his own bank accounts at Equity Bank, Transnational Bank and KCB Bank and those of his spouse at Equity, Afya Cooperative Sacco and Co-operative Bank despite that she was not an employee of the County.
7. That the Applicant instituted investigations and confirmed that the 1<sup>st</sup> Respondent had indeed worked as the Payroll Manager for the County of Elgeyo Marakwet from February 2014 until 6<sup>th</sup> October 2017 when he was terminated; that his basic salary scale was Kshs. 77,527 – 103, 893 per month, a house allowance of Kshs. 40,000/- and other allowances amounting to Kshs.12,000/-.
8. It was established that as the payroll manager, the 1<sup>st</sup> Respondent's duties were, inter alia, managing the Integrated Personnel and Payroll Data System (IPPD) as well as processing of the monthly payroll. In other words, he was the person responsible for paying salaries to the employees of the County of Elgeyo Marakwet.
9. To carry out further investigations into the allegations against the 1<sup>st</sup> Respondent, the Applicant obtained warrants to freeze and investigate the bank accounts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by filing miscellaneous applications in the Magistrate's court under Sections 118A, 119 and 121(1) of the Criminal Procedure Code.
10. Investigations and analysis of the account statements obtained under the warrants established that the 1<sup>st</sup> Respondent willfully and knowingly manipulated and falsified the IPPD System by paying himself salaries that were higher than his due salary; his gross salary at the time in issue ranged between Kshs. 96,278/- and Kshs.103,278.00 and the net salary (after deductions) between Kshs.30,804.75 and Kshs.40,982/- but he would inflate the same to triple the amounts. As a result between April 2014 and February 2017 he had fraudulently misappropriated or embezzled approximately Kshs.12,533,982 from the County which he then paid into his bank accounts as summarized in the table below:-



Name of the beneficiary	Equity Bank Account No. 0350192187808	Transnational Bank Account No. 181852001	KCB Bank Account No. 1168650690	TOTAL
Livingstone Kiptoo Tanui	5,355,250.80	2,552,200.00	4,267,994.20	12,175,445.00

11. It is the Applicant's case that all the accounts through which the 1<sup>st</sup> Respondent paid himself inflated salaries were opened and operated by him between 2014 and 2017.
12. Investigations established that the 1<sup>st</sup> Respondent also manipulated the salaries of various other employees, which would then end up in his own accounts, without their knowledge.
13. The salaries alleged to have been unlawfully paid to the 2<sup>nd</sup> Respondent are alleged to be approximately Kshs. 20,828,391/45. The said fraudulent payments are said to have been received in the 2<sup>nd</sup> Respondent's accounts at the KCB Bank Limited, Equity Bank, Afya Sacco Cooperative Society Limited and the Co-operative Bank Limited as summarized below.

Name of the beneficiary	Equity Bank Account No. 300167286473	Transnational Bank Account No. 60XXXX001	KCB Bank Account No. 1102077925	FOSA ACCOUNT NO. 502-06-00XXXX000	COOPERATIVE BANK ACCOUNT NO. 01109XXXX11000	TOTAL
Viola Jelagat Butiah	3,960,625.20	339,559.20	3,805,202.00	7,507,693.70	5,215,366.35	20,828,392.45

14. She would then withdraw the funds and it is contended that she used the same to acquire properties in her name and that of the 1<sup>st</sup> Respondent. The said properties are the subject of this Originating Motion.
15. It is the Applicant's case that further investigations revealed that more specifically between 22<sup>nd</sup> March 2016 and 17<sup>th</sup> February 2017, the 2<sup>nd</sup> Respondent's account at Equity Bank received Kshs.4,030,625/- from the County of Elgeyo Marakwet; that in the month of December 2016 alone, the account received Kshs.767,521 as salary and her account at KCB Bank also received salary payments amounting to Kshs.3,644,110/- from Elgeyo Marakwet County.
16. It is averred that during the period of the investigation the 2<sup>nd</sup> Respondent opened an account No. 01105183328000 at the Co-operative Bank in the name of their minor child (Lara Chepkoech) for the purpose of transferring and withdrawing the illicit funds.
17. In total the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' accounts received Kshs.33,003,837/45. An investigation report of the County of Elgeyo Marakwet revealed that a sum of Kshs.38,585,958/45 had been misappropriated from the County by the 1<sup>st</sup> Respondent. The report is annexed to the Supplementary Affidavit of Isaac Nakitare sworn on 7<sup>th</sup> June 2024.



18. It is averred that the 1<sup>st</sup> Respondent used the fraudulently acquired money to purchase the following parcels of land:-3 acres of land from LR Nandi/Ngechek/414 purchased from the Estate of the late Chemaget Sugut. The said parcel of land was sold to him by Salina Sugut (1<sup>st</sup> Interested Party) at a consideration of Kshs.540,000/- paid in cash on 27<sup>th</sup> January 2021. The portion is yet to be transferred to the 1<sup>st</sup> Respondent.A portion of land measuring 8 acres from LR Nandi/Ngechek/415 which as a whole measures 27 hectares. He acquired the 8 acres at a consideration of Kshs.1,280,000/- paid to Cecilia Chepngetich widow of Kipsoimi Arap Koech, deceased, on 6<sup>th</sup> March 2015.On 15<sup>th</sup> October 2015 he purchased another 7 points out of LR Nandi/Ngechek/415 from the said Cecilia Chepngetich at a consideration of Kshs. 112,000/- which he paid in cash. There is a pending succession cause in respect to this parcel of land and hence the portion purchased by the 1<sup>st</sup> Respondent is yet to be transferred to him.
19. The other parcels of land purchased by the 1<sup>st</sup> Respondent during the period he is suspected to have corruptly acquired money from the County of Elgeyo Marakwet are: -0.8 acres from LR No. Nandi/Ngechek/434 at Kshs.128,000/- out of which a deposit of Kshs.118,000/- was paid to Chepngok Kiprop Patrick the 4<sup>th</sup> Interested Party.Nandi/Ngechek/446 measuring 3.6 Ha from Jepkemboi Leting (5<sup>th</sup> Interested Party) at a consideration of Kshs.1,275,000. This parcel is also yet to be transferred to the 1<sup>st</sup> Respondent. However he paid Kshs.935,000/- and the balance was to be paid at the time of the transfer.1.7 acres out of LR No. Nandi/Ngechek/447 which measures 10.2 hectares from David Kipchumba Kogo (9<sup>th</sup> Interested Party) and his cousin one Benjamin Kirwa both beneficiaries of Kimeto Arap Talam (8<sup>th</sup> Interested Party).A portion of 5.5 acres out of Nandi/Ngechek/448 in different portions and at different times and considerations from Johana Kipleting Kosgei (6<sup>th</sup> Interested Party).LR No. Nandi/Ngechek/453 measuring 3.0 hectares from David Kibore Sugut on 30<sup>th</sup> September 2015.LR No. Nandi/Ndurio/682 at Kshs. 500,000/- on 5<sup>th</sup> august 2016.LR No. Nandi/Ndurio/907 from the beneficiaries of Shem Kiplagat Arap Bitok (12<sup>th</sup> Interested Party) at Kshs. 460,000 on 30<sup>th</sup> September 2016.5 acres out of LR No. Nandi/Kilibwoni/1544 from Busienei Maina (14<sup>th</sup> Interested Party) at Kshs. 750,000 on 13<sup>th</sup> January 2017. He paid Kshs. 650,000 with the balance of Kshs. 100,000/- being payable at the time of transfer.LR No. Pioneer/Ngeria Block 1 (EATEC) 12460 measuring 0.09 ha; 12461; 12462 from Francis Kiptoo Tanui at Kshs. 1,000,000 on 13<sup>th</sup> May 2016.LR 14019, 14020, 14021, 14034 all from Optiven Limited at a total consideration of Kshs. 4,848,000/- on 7<sup>th</sup> March 2016.LR No. Pioneer/Ngeria Block 1/EATEC 12459 was purchased by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> November 2016 from Wilson Chumo Kipketer.
20. Investigations also established that during the period of interest the 1<sup>st</sup> Respondent acquired motor vehicles Regn. Nos KCB 478J Subaru Outback station wagon; Tractor KTCB 449T (registered in the name of the 3<sup>rd</sup> Respondent) and Tractor Regn. No. KTCB 448T (registered in 3<sup>rd</sup> Respondent's name).
21. The Applicant avers that whereas it invited the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to its offices to record statements in regard to the properties none of them appeared. The 3<sup>rd</sup> Respondent did however record a statement at his home on 2<sup>nd</sup> April 2024.
22. On 19<sup>th</sup> December 2023 the Applicant obtained an order for preservation of the assets from this court. It subsequently gazetted the order on 19<sup>th</sup> January 2024 vide Gazette Notice No. 549.
23. The Applicant implores this court to allow the Originating Motion so as to deter economic advantage derived from the commission of crimes.



## The Case for the Respondents

24. The 1<sup>st</sup> Respondent opposed the application through a Replying Affidavit sworn on 24<sup>th</sup> July 2024. He conceded that he is the 2<sup>nd</sup> Respondent's husband and the 3<sup>rd</sup> Respondent's son.
25. He contended that the instant application is improperly before court as it was filed after the lapse of the preservation order; that the Applicant did not involve him in its investigations hence the same are biased and the facts presented remain mere allegations; that with regards to property L.R Nandi/Ngecheck/414 the statement by the witness that money was paid in cash instalments, contradicts the sale agreement which states that it was paid in lumpsum; that none of the other acquisitions were proven to have been paid for in cash; that for properties where the Applicant did not obtain sale agreements, there was no proof that they had been acquired within the period of interest or in cash.
26. As for property L.R. No. Nandi/Ngecheck/446, he contended that the sale agreement is undated and thus there is no proof that the acquisition fell within the period of interest; that L.R No. Pioneer/Ngeria Block 1(EATEC)/12459 and 1268 were acquired before his employment at the County and that LR No. Pioneer/Ngeria 1268 is what after sub-division into three mutated to portions: LR No.s Pioneer/Ngeria Block 1(EATEC)/12459,12460, and 12461.
27. He asserted that the Applicant did not prove that the suit landed properties and motor vehicles were acquired with proceeds of crime.
28. He averred that the Respondents had multiple streams of income and the suit properties were obtained through that income. He asserted that the 2<sup>nd</sup> Respondent is also a civil servant on payroll and further that they grow maize on large scale and also rear livestock which they then sale. He averred that he sells forty heads of cattle at a price of Kshs. 150,000 each annually and about 280 bags of maize twice yearly, which business he is no longer able to do due to financial constraints. He contended that he also took loans which he serviced from his salary. He asserted that the above sources of income enabled him to purchase the suit properties prior to and after his employment with the County of Elgeyo Marakwet.
29. He urged this court to note that the figures impleaded by the Applicant include his legitimate salary earned between 2014 and 2017 and also that he and the 2<sup>nd</sup> Respondent have school going minor children who would be negatively affected if the Originating Motion is allowed. He urged this court to dismiss it with costs.
30. The 2<sup>nd</sup> Respondent opposed the application through a Replying Affidavit sworn on 31<sup>st</sup> July 2024. She conceded that she is the 1<sup>st</sup> Respondent's wife. She contended that the Applicant has not proved that the monies withdrawn from her account were used for the purpose of advancing crime. She deposed that some of the suit properties were acquired before the 1<sup>st</sup> Respondent was employed by the County and hence not liable for forfeiture.
31. She further deposed that she purchased L.R No Pioneer/Ngeria Block 1/1268 on 9<sup>th</sup> June 2011 long before the 1<sup>st</sup> Respondent became an Employee of the County; that she has been developing the property since she bought it and has obtained the necessary permits for the development. She also stated that the said parcel was sub-divided into three parcels, being L.R No Pioneer/Ngeria Block 1/12459,12460 and 12461. The new parcels are jointly registered in her name and that of the 1<sup>st</sup> Respondent.
32. She contended that the sale agreement for the land was in vehicle No. KCB 478J when it was seized by the Applicant but the Applicant maliciously avoided annexing it as evidence in this case.



33. She asserted that if the instant application is allowed, her right to property as guaranteed under Article 40 of *the Constitution* will be violated. She therefore urged this Court to dismiss the application with costs.
34. The 3<sup>rd</sup> Respondent did not file a replying affidavit.

### **Case for the Interested Parties**

35. Of the Interested Parties only the 14<sup>th</sup> Interested Party responded to the Originating Motion through a Replying Affidavit sworn on 13<sup>th</sup> September 2024. He admits having entered into an agreement with the 1<sup>st</sup> Respondent for sale of 5 acres of his land LR No. Nandi/Kilibwoni/1544 at a purchase price of Kshs.750,000/- but contended that only Kshs.650,000/- was paid leaving a balance of Kshs.100,000/-. He disputed that his agreement with the 1<sup>st</sup> Respondent was a means of money laundering and urged this court to discharge the rest of his land from the preservation order save for the 5 acres sold to the 1<sup>st</sup> Respondent.

### **Submissions**

36. Learned Counsel for the Applicant and for the Respondents duly filed written submissions. The 14<sup>th</sup> Interested Party who is self-represented also filed his submissions. The submissions have been fully considered alongside the evidence adduced by the parties.

### **Issue(s) for determination.**

37. After a careful consideration of all the material placed before this court and the law, I find the issues for determination to be:-
1. Whether the Originating Motion herein is properly before this court. If so:
  2. Whether the funds in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's accounts earlier stated and the impugned moveable and immoveable properties are proceeds of crime liable for forfeiture to the Government of Kenya and whether the same should be forfeited to the Government.
  3. Whether such forfeiture is a violation of the Respondents' right to property under Article 40 of *the Constitution*.
  4. Who should meet the costs of the Originating Motion.

### **Analysis and Determination**

#### **Issue (1):- Whether the Originating Motion herein is properly before this court.**

38. It is the Respondents' contention that firstly they were not heard or allowed to participate in the proceedings that preceded the preservation orders hence their right to fair trial was violated. Secondly, that these proceedings are fatally defective as the same were filed after the lapse of the preservation order hence in breach of Section 84 of the *Proceeds of Crime and Anti-Money Laundering Act* (The POCAMLA)
39. I have considered the submissions of learned Counsel for both sides. The argument that the Respondents ought to have been involved in the two applications that led to the freezing of their accounts and assets was put to rest by the Supreme Court in the case of *Ethics and Anti-Corruption Commission & Another v Tom Ojienda & Associates Advocates & 2 Others* (Petition 30 & 31 of 2019 (Consolidated) [2022] KESC 59 (KLR) (7 October 2022) (Judgment) where the court held



that investigative powers, when exercised, cannot be described as “administrative action” within the meaning of Article 47 but are special powers conferred by a specific legal regime, to be exercised for a special purpose. The court also held that the Ethics & Anti-Corruption Commission, which albeit it acts under the Anti-Corruption & Economic Crimes Act (the ACECA) which exercises the same powers as the Assets Recovery Agency under the POCAMLA, was not required to give prior notice to the target when carrying out a police operation or an intelligence gathering or asset tracing exercise. That was the finding of the Court of Appeal in the case of *Kidero v Attorney General & 6 Others* (Civil Appeal 413 of 2018) [2024] KECA 1192 (KLR) (20 September 2024) (Judgment).

40. The arguments raised in the above two cases are similar to those raised by the Respondents in this case and it is my finding that the holdings thereat also apply to this case albeit that the application is brought under the POCAMLA but not the ACECA. In applying for warrants and freezing orders so as to carry out investigations, the ARA/Applicant was exercising the same powers as does the Ethics & Anti-Corruption Commission under the ACECA. The cases cited by learned Counsel for the Respondents do not apply to the circumstances of this case. Further applications for preservation orders are granted under Section 82(1) of the POCAMLA which expressly provides that the application is made *ex parte*. Clearly therefore there was also no violation of the Respondents’ right to fair trial.
41. As for the application being defective for being filed after the preservation order had lapsed my finding is that the correct position is that the preservation order had not lapsed. This is given that by dint of Section 84 of the POCAMLA the duration of the order is predicated on the time of its gazettment and/or whether a forfeiture application has been filed. The ninety days therefore begun to run on 19<sup>th</sup> January 2024 but not from 20<sup>th</sup> December 2023. After excluding the Easter Weekend which is a public holiday the order would have lapsed on 22<sup>nd</sup> April 2024. This application was filed on 17<sup>th</sup> April 2024 hence before the lapse of the order and therefore the argument that it is fatally incompetent cannot hold.

**Issue No. (2) Whether the funds in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s accounts earlier stated and the impugned moveable and immoveable properties are proceeds of crime liable for forfeiture to the government of Kenya and whether the same should be forfeited.**

42. The POCAMLA defines proceeds of crime as “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 derived or realized from such property from the time the offence was committed.”
43. Property is defined to include all monetary instruments and an offence is defined as, *inter alia*, an offence against a provision of any law in Kenya.
44. In order to succeed the Applicant must prove on a balance of probabilities that the property sought to be forfeited were acquired as a result of the commission of an offence(s) or that they are instrumentalities of crime.
45. It is the Applicant’s contention that the monies in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s accounts and the assets sought to be forfeited were unlawfully acquired by the 1<sup>st</sup> Respondent between 2014 and February 2017 when he was the Payroll Manager of the County of Elgeyo Marakwet.
46. It is alleged that he manipulated and falsified the payroll and inflated his salaries at time to triple the sums he was entitled to, that at times he inflated salaries for his co-workers and then paid the monies



- into his own bank account without their knowledge. He is also accused of paying the 2<sup>nd</sup> Respondent, who is his wife, salaries to which she was not entitled as she was not an employee of the County of Elgeyo Marakwet.
47. The fact that the 1<sup>st</sup> Respondent was the Payroll Manager of the County of Elgeyo Marakwet is not disputed. Much that a fact which is admitted need not be proved, the Applicant annexed as exhibit pay slips of the 1<sup>st</sup> Respondent which indeed prove that he was an employee of the County of Elgeyo Marakwet.
  48. The Applicant also produced bank statements of the 1<sup>st</sup> Respondent which when juxtaposed with the pay slips of the Respondent reveal that he indeed received salaries that were over and above his entitlement.
  49. For instance in the month of December 2015 his net salary, which even he admits as he has also annexed the pay slip for that month to his affidavit, was Kshs.30,804/75 and which shows that salary was paid to the Transnational Bank in Kabarnet but what was credited to the account was Kshs.30,804/75. He however paid himself an allowance that was not reflected in the pay slip.
  50. For March 2016, his net payable salary was Kshs.31,412/40 yet his account received Kshs.251,412.40 paid on 31<sup>st</sup> March 2016. In that same month he also received a responsibility allowance of Kshs.11,998.89 which was not one of the allowances that were payable to him in his pay slip.
  51. For the month of January 2017 his net payable salary was Kshs. 40,982/- but his account received a sum of Kshs.260,982/- paid on 4<sup>th</sup> February 2017.
  52. Even going back to April 2016 his net salary for the month was Kshs.31,412/40 yet what was paid into his account was Kshs.251,412/40. The same applies for his salaries for the months of May 2016, August 2016, September 2016 and October 2016. All were inflated by more than triple his entitlements. This continued even in December 2016. In February 2017 he paid himself a salary for up to the month of September of Kshs.852,047/50 which is unusual.
  53. No explanation was forthcoming from the 1<sup>st</sup> Respondent for the overpayments amounting to Kshs.2,540,000/- between April 2014 and February 2017. He did not also explain the reason for the payments of the sum of Kshs. 3,675,284/- in his KCB Account No. 1168650690 and the sum of KShs.6,318,698 paid into his Equity Account No. 0350192187808, from the County of Elgeyo Marakwet some of which are also indicated to be salaries and hence double payments.
  54. The evidence by the Applicant that the 1<sup>st</sup> Respondent not only inflated his own salaries but that he also falsified the payroll and hence paid himself monies that were not due to him at all has not been rebutted. These were facts especially within his knowledge hence the evidential burden shifted to him under Section 112 of the *Evidence Act*.
  55. The Applicant has therefore proved on a balance of probabilities that the 1<sup>st</sup> Respondent unlawfully benefitted from monies siphoned from the County of Elgeyo Marakwet.
  56. There is also evidence that his spouse, the 2<sup>nd</sup> Respondent, also drew salaries from the County of Elgeyo Marakwet whereas she was not an employee there. She was to speak, 'a ghost worker'. The illegal payments are apparent from her bank statements for Account No.6300167296473 Equity Bank for the period 22<sup>nd</sup> March 2016 to 1<sup>st</sup> August 2023. Almost all the monies credited into that account were from Elgeyo Marakwet County and their narrations are 'salary'. It is instructive that the amounts are quite huge. They range between Kshs.312,587/- per month to Kshs.390,950/-. In total the 2<sup>nd</sup> Respondent received Kshs.3,619,189/- through her Equity Bank Account and Kshs.1,360,069/- through her KCB Account No. 1102077925. There is also evidence on a balance of probabilities that a



sum of Kshs.7,763,356.70 was credited into her account No. 5020600XXXX00 at Afya Co-operative Savings and Credit Society Limited from the County of Elgeyo Marakwet on various dates between April 2014 and February 2017.

57. Again there was no explanation, from either the 1<sup>st</sup> Respondent or the 2<sup>nd</sup> Respondent, for the payments made to the 2<sup>nd</sup> Respondent and the only reasonable conclusion that this court can draw is that this was also theft.
58. The embezzlement of funds from the County of Elgeyo Marakwet is also confirmed by the investigation carried out by the County, a report whereof is annexed as an exhibit in the Originating Motion. I am satisfied therefore, that the ARA/Applicant has demonstrated that the 1<sup>st</sup> Respondent in abuse of his office embezzled funds which benefitted him and the 2<sup>nd</sup> Respondent. Therefore, there is evidence on a balance of probabilities that the funds in the impugned accounts are proceeds of crime liable for forfeiture to the government.
59. From the bank statements it is evident that most of the money paid into the 2<sup>nd</sup> Respondent's account came from the County of Elgeyo Marakwet. The 2<sup>nd</sup> Respondent also received salaries from the County of Uasin Gishu but those were very small compared to what she drew from the County of Elgeyo Marakwet.
60. In this case, the fact in issue is not, as contended by the 2<sup>nd</sup> Respondent, whether the funds were used for purposes of advancing crimes, but that they were unlawfully acquired from the County of Elgeyo Marakwet. It is trite that the person of interest need not have been convicted of an offence. The funds herein fit squarely in the definition of proceeds of crime in the POCAMLA and I so find.
61. Turning to the impugned landed properties and vehicles there is evidence on a balance of probabilities that they were all acquired during the period it is suspected the 1<sup>st</sup> Respondent was engaged in corruption. The monies would be paid into the Respondents' accounts and be withdrawn in large amounts. The Applicant produced certified copies of the green cards for the impugned parcels of land and sale agreements in respect of some of the parcels, which all attest to the fact that they were acquired during the period of investigation.
62. The only properties the Respondents allege were acquired before the 1<sup>st</sup> Respondent was employed by the County of Elgeyo Marakwet are LR No. Nandi/Ndurio/861 which they aver was acquired in 2008 and LR No. Pioneer/Ngeria Block 1 (EATEC)/1268 which the 2<sup>nd</sup> Respondent avers she acquired on 9<sup>th</sup> June 2011 and which she alleges subsequently gave rise to LR No. 12459, 12460 and 12461.
63. LR No. Nandi/Ndurio/861 is not an issue in these proceedings and I shall not therefore make any findings on it.
64. For LR No. Pioneer/Ngeria Block 1 (EATEC)/1268 the 2<sup>nd</sup> Respondent's claim that she acquired it in 2011 is false. From the green card (Annexure "IN 49" to the Supporting Affidavit of Isaac Nakitare sworn on 17<sup>th</sup> April 2024), the register for that parcel was closed on 18<sup>th</sup> November 2009 following its subdivision into two parcels - 10293 and 10294. The then registered proprietor of the parcel was Wilson Chumo Kipketer. There is absolutely nothing to indicate that the 2<sup>nd</sup> Respondent subsequently purchased any of the two parcels that arose from the subdivision of parcel LR No. 1268. In any case that parcel had ceased to exist by the time she alleges she purchased it. It is also instructive that the company, Elite Ventures Ltd, from which she claims to have purchased the parcel has never been its registered proprietor. The sale agreements which she has annexed as evidence of the acquisition contradict the entries in the green cards for the parcels in issue. As between the sale agreements and the green card the best evidence is that in the green card as it is the green card which constitutes the true record in the Lands Registry.



65. Moreover, the green card for parcel No. Pioneer/Ngeria Block1(EATEC)/12459 indicates it was a subdivision of Plot No. 119666 and that the 2<sup>nd</sup> Respondent acquired it on 10<sup>th</sup> November 2016 which is within the period of interest. A title deed was issued to her on the same day.
66. Parcel LR No. Pioneer/Ngeria Block 1 (EATEC)/12460 which was also a subdivision of Plot No. 11966 was purchased by the 1<sup>st</sup> Respondent on the same day the 2<sup>nd</sup> Respondent acquired parcel LR No. Pioneer/Ngeria Block 1 (EATEC)/12459. A title deed was issued to him on the same day. The same applies to Parcel Nos 12461 and 12462 all of which were sub divisions of Plot No. 119666. None of those parcels ever belonged to Elite Ventures Limited as alleged by the 2<sup>nd</sup> Respondent. The green cards are duly certified by the Uasin Gishu Land Registry and this court therefore has no reason to doubt their genuineness. In any event Section 83 of the *Evidence Act* obliges this court to presume those green cards to be genuine unless otherwise proved. The Respondents have not disputed the genuineness of the green cards.
67. In respect of parcels LR Nos. 14019, 14020, 14021 and 14034 which are registered in the name of the 3<sup>rd</sup> Respondent, all purchased from Optiven Limited, the Applicant produced receipts evidencing that it is the 1<sup>st</sup> Respondent who paid a total of Kshs.4,848,000 for the four (4) parcels of land. (See Annexure IN44(a) to Isaac Nakitare's Supporting affidavit). All the parcels were purchased on 7<sup>th</sup> March 2016 which falls within the period of interest. There is no evidence at all that the 3<sup>rd</sup> Respondent paid for any of the parcels. In his statement recorded with the Applicant, he alluded to having sold a parcel of land at Kshs.1 million which he gave to the 1<sup>st</sup> Respondent. However, that Kshs. 1 million could not have afforded him even one of the four (4) parcels whose cost was Kshs.1,212,000/-. My finding is that the parcels were acquired by the 1<sup>st</sup> Respondent through monies fraudulently acquired from the County of Elgeyo Marakwet and that the purpose of registering them in the 3<sup>rd</sup> Respondent's (his father) name was just to conceal and disguise their source hence a means of laundering the illicitly acquired funds. These four (4) parcels are also proceeds of crime liable for forfeiture.
68. The Respondents allege that they were involved in farming and selling of cattle. However, there is no evidence at all that any money came into their accounts from such farming or cattle trade. They did not even bother to adduce evidence of the specific days they engaged in such business. On the other hand, the Applicant proved on a balance of probabilities that during the period of investigation they drew and benefitted unlawfully from monies belonging to the County of Elgeyo Marakwet. The Applicant also proved on a balance of probabilities that the Respondents acquired all the impugned landed properties during that period of interest. Those parcels of land are therefore proceeds of crime liable for forfeiture to the Government of Kenya save that for those acquired from the Interested Parties it is not the whole but only the portions purchased by the 1<sup>st</sup> Respondent that shall be liable for forfeiture. It is immaterial whether the land parcels were purchased in cash or otherwise.
69. From the material placed before this court it is apparent that none of the Interested Parties entered into the agreements for sale with knowledge that the consideration would be paid from proceeds of crime. There is nothing to suggest that they did so in order to conceal or disguise the source of the funds or in order to assist the Respondents to do so. It cannot therefore be said that they engaged in the offence of money laundering. In my view they were but victims of the Respondents who used them to launder their ill gotten money. It would be unjust therefore to forfeit their entire parcels of land and indeed that is not what was intended by the Applicant.
70. I further find that there is proof on a balance of probabilities that the impugned vehicles were acquired by the 1<sup>st</sup> Respondent using the money he corruptly acquired from the County of Elgeyo Marakwet. He however sought to conceal the source of the vehicles by registering them to his father. My so



saying finds support in the 3<sup>rd</sup> Respondent's statement recorded with the ARA/Applicant on 2<sup>nd</sup> April 2024, where he categorically stated that he has never owned a tractor. There are also money remittance receipts (RTGS) which confirm that the payments for the vehicles were made by the 1<sup>st</sup> Respondent but not the 3<sup>rd</sup> Respondent. I find that the vehicles are proceeds of crime liable for forfeiture to the State.

**Issue No. (3). Whether such forfeiture is a violation of the Respondents' right to property under Article 40 of *the Constitution*.**

71. Article 40(6) of *the Constitution* excludes property that is unlawfully acquired from the protection afforded by Article 40. Forfeiture of the properties found to be proceeds of crime would not therefore be a violation of the Respondent's right to property.
72. The impugned properties are accordingly forfeited to the Government of Kenya.

**Costs**

73. These follow the event and hence they shall be borne by the Respondents.

**Disposition**

74. The upshot is that this court finds in favour of the Applicant against the Respondents and the Interested Parties and judgment is entered for the Applicant for forfeiture and vesting orders in respect of the following properties: -
  1. Kshs. 429,883.19 held in Account 0350192187898 at Equity Bank in the name of the 1<sup>st</sup> Respondent, Livingstone Kiptoo Tanui.
  - 2) Kshs.1,511,782.29 held in Account Number Access 181852/510MSH00/1 (Former Transnational Bank) in the name of Livingstone Kiptoo Tanui.
  - 3) Kshs.852,377.20 held in Account number 1168650690 held at KCB Bank in the name of Livingstone Kiptoo Tanui.
  - 4) Kshs.135,502.85 held in Account number 1102077925 held at KCB Bank in the name of Violah Jelagat Butiah.
  - 5) Kshs.1,918.88 held in Account number 0300167286473 at Equity Bank in the name of Violah Jelagat Butiah.
  - 6) Kshs.26,693.11 held in Account Number 0115183328000 at Co-operative Bank in the name of L.C. (Minor).
  - 7) 3 Acres out of 18.0 Ha portion of land from Land Reference Number Nandi/Ngechek/414 registered in the name of Salina Sugut also known as Jemwolo Kobot Kiplamui.
  - 8) 10 Acres out of 27 Ha Portion of Land from Land Reference number Nandi/Ngechek/415 registered in the name of Kipsoimo Arap Koech (Deceased).
  - 9) 0.8 Acres out of 13.6 Ha Portion of Land from Land Reference number Nandi/Ngechek/434 registered in the name of Chemwok Arap Kibwoen.
  - 10) 3.6 Ha of the Land Reference Number Nandi/Ngechek/446 registered in the name of Kibiego Arap Kipleting (Deceased).
  - 11) 1.7 acres out of LR No. Nandi/Ngechek/447 measuring 10.2 Ha registered in the name of Jepsongok Kobot Kirwa and Kimeto Arap Talam.



- 12) 5.55 Acres out of 16.5 Ha portion of LR No. Nandi/Ngechek/448 registered in the name of Maindi Arap Kaigoi.
  - 13) 0.10 Ha of the LR No Nandi/Ndurio/907 registered in the name of Shem Kiplagat Arap Bittok.
  - 14) 5 Acres out of 24.92 Ha Portion of Land from LR No Nandi/Kilibwoni/1544 registered in the name of Busienci Arap Maina.
  - 15) 3.6 Ha of the land LR No. Nandi/Ngechek/453 registered in the name of Livingstone Kiptoo Tanui.
  - 16) LR No. Pioneer/Ngeria Block 1/EATEC 12459 in the name of Violah Jelagat Butiah.
  - 17) LR No Pioneer/Ngeria block 1(EATEC)/12460 registered in the name of Livingstone Kiptoo Tanui.
  - 18) LR No. Pioneer/Ngeria Block 1(EATEC)/12461 Registered in the name of Livingstone Kiptoo Tanui.
  - 19) LR No. Pioneer/Ngeria Block 1(EATEC)/12462 Registered in the name of Livingstone Kiptoo Tanui.
  - 20) LR No. Pioneer/Ngeria Block 1(EATEC)/14019 Registered in the name of Daniel Kiptanui Chelule.
  - 21) LR No. Pioneer/Ngeria Block 1(EATEC)/14020 Registered in the name of Daniel Kiptanui Chelule.
  - 22) LR No. Pioneer/Ngeria Block 1(EATEC)/14021 Registered in the name of Daniel Kiptanui Chelule.
  - 23) LR No. Pioneer/Ngeria Block 1(EATEC)/14034 Registered in the name of Daniel Kiptanui Chelule.
  - 24) Motor vehicle Registration Number KCB 478J, Subaru Outback, Station Wagon, Chassis/ Frame Number BPP9051864, Engine Number EJ250234752.
  - 25) Farm Tractor registration number KTCB 449t, Wheel Tractor, Chassis/Frame Number 1652817, Engine number Ym15148387.
  - 26) Farm Tractor Registration Number KTCB 448T, Wheel Tractor, Chassis/Frame number 1652820.”
75. The only rider shall be that should the Interested Parties wish to save the land parcels/portions sold to the 1<sup>st</sup> Respondent, from forfeiture, they shall be at liberty to refund to the Applicant the amounts paid to them by the 1<sup>st</sup> Respondent within sixty (60) days of this judgment. Should they fail to do so the said portions of land shall be forfeited to the Applicant and the Interested Parties shall be at liberty to pursue the 1<sup>st</sup> Respondent for the balances not paid.
76. The Respondents shall bear the costs of these proceedings.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**E. N MAINA**



**JUDGE**

