



**Assets Recovery Agency v Njoroge; Mesel (Interested Party) (Civil Application E006 of 2022)  
[2023] KEHC 17943 (KLR) (Anti-Corruption and Economic Crimes) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
CIVIL APPLICATION E006 OF 2022**

**EN MAINA, J**

**MAY 25, 2023**

**BETWEEN**

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

**AND**

**FELESTA NYAMATHIRA NJOROGE ..... RESPONDENT**

**AND**

**MARC FREDDY DE MESEL ..... INTERESTED PARTY**

**JUDGMENT**

1. By the Originating Motion dated 23<sup>rd</sup> February 2022 which is supported by the affidavit of Senior Sergeant Fredrick Musyoki sworn on even date and which is made under Sections 81, 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* and Order 51 Rule 1 of the Civil Procedure Rules the Assets Recovery Agency/Applicant seeks orders as follows:-

- “1) That this Court be pleased to declare funds held in the following bank accounts as proceeds of crime and therefore liable for forfeiture to the Government of Kenya:
- i. USD 914,967.60 Held In Account Number 021XXXXXXX At Co-operative Bank In The Name of Felesta Nyamathira Njoroge.
  - ii. Kshs 5,000,000 Held In Account Number 010XXXXXXX At Stanbic Bank Limited In The Name of Felesta Nyamathira Njoroge.



2. That this Honourable Court be pleased to issue an order of forfeiture of the following funds to the Government of Kenya;
    - i. USD914,967.60 Held In Account Number 021XXXXXX At Co-operative Bank In The Name of Felesta Nyamathira Njoroge.
    - ii. Kshs 5,000,000 Held In Account Number 010XXXXXX At Stanbic Bank Limited In The Name of Felesta Nyamathira Njoroge.
  3. That the Honourable Court do make any other ancillary orders it may deem fit and necessary for the proper and effective execution of its orders.
  4. That there be no orders as to costs.”
2. The Originating Motion is expressed to have been brought on the grounds stated on the face of it and the supporting affidavit as follows:
- “ 1) That the Applicant is the Assets Recovery Agency established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime.
  2. That pursuant to Part VIII of POCAMLA, Sections 81-89 of POCAMLA, the Agency is authorized to institute Civil Forfeiture proceedings and seek orders prohibiting any person, subject to such conditions as the Court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime.
  3. That Section 53A (5) of the Proceeds of Crime and Anti Money Laundering Act grants the staff of the Agency all the powers, privileges and immunities of a police officer while executing the mandate of the Applicant in the identification, tracing, seizure and recovery of proceeds of crime.
  4. That the Respondent is an adult, a Kenyan Citizen holder of a national identification card no. 38086014 the sole signatory and beneficial owner of bank account number 02100705531800 held at Co-Operative Bank and account number 0100008851268 held at Stanbic Bank Limited
  5. That in the month of August 2021, the Agency received information into a suspected case of money laundering schemes, and proceeds of crime involving multiple money transactions of approximately USD 914,967.60 from foreign jurisdiction whose source could not legitimately be established involving the Respondent herein.
  6. That the Respondent is suspected to be part of a syndicate involved in a complex money laundering scheme involving USD 914,967.60 made in four split transactions in the month of August 2021 with individuals drawn from various jurisdictions including Belgium on the pretense that the funds are “gifts made in favour of the Respondent.”
  7. That further the Kshs. 5,000,000 in the Respondent’s account number 0100008851268 held at Stanbic Bank Limited is suspected to be a direct or



indirect benefits, profits and/or proceeds of crime obtained from a complex money laundering scheme.

8. That investigations have established that the Respondent executed a complex scheme of money laundering designed to conceal, disguise the nature, source, disposition and movement of the illicit funds, suspected to constitute proceeds of crime and which are the subject matter of this application
9. That there are reasonable grounds and evidence demonstrating that the funds held by the Respondents in the specified bank accounts are direct or indirect benefits, profits and/or proceeds of crime obtained from a complex money laundering scheme and are liable to be forfeited to the Government of Kenya under the *Proceeds of Crime and Anti-Money Laundering Act* 2009.
10. That on 16th November 2021, the Applicant filed HCACEC Misc. No. E036 of 2021 Assets Recovery Agency v Felesta Nyamathira Njoroge and obtained Court Orders issued on 17th November 2021 preserving funds in respect to USD 914,967.60 held in account number 02100705531800 at Co-operative Bank and prohibiting the Respondent and/or his agents, representative from transacting, transferring and /or dealing in any manner with the funds held in the bank accounts.
11. That on 26th November 2021 the Applicant gazetted the Preservation orders pursuant to Section 83(1) of POCAMLA vide Gazette Notice No. 12943 of vol. CXXIII-No.241.
12. That on 14<sup>th</sup> December 2021, the Applicant filed HCACEC Misc. No. E043 of 2021 Assets Recovery Agency v Felesta Nyamathira Njoroge & Another and obtained Court Orders issued on 14th December 2021 preserving funds in respect to Kshs. 5,000,000, held in account number 010XXXXXX at Stanbic Bank limited and prohibiting the Respondent and/or his agents, representative from transacting, transferring and /or dealing in any manner with the funds held in the bank account.
13. That there are reasonable grounds to believe that the funds held in the Respondent's bank accounts are proceeds of crime liable for forfeiture to the Applicant under POCAMLA.
14. That it is in the interest of justice that the orders of forfeiture do issue forfeiting the above funds to the Applicant on behalf of the Government of Kenya.
15. That Section 90 of the POCAMLA provides that where a preservation order is in force, the Agency may apply to the High Court for an order of forfeiture to the Government all or any of the property that is subject to the preservation order.
16. That it is in the public interest that the orders sought are granted and the funds therein be forfeited to the Applicant.
17. That there are justifiable reasons and grounds to warrant the issuing of the orders sought.
18. That Unless this Honourable Court grants the orders sought, the Respondent will continue to enjoy the benefits derived from proceeds of crime.



19. That there are two pending applications dated 30<sup>th</sup> November 2021 and 24<sup>th</sup> December 2021 seeking to vary the preservation orders issued on 17<sup>th</sup> November 2021 filed by the Respondent herein which is pending inter-parte hearing.”
3. The Applicant also relied on a further affidavit sworn by Senior Sergeant Fredrick Musyoki on 19<sup>th</sup> January 2023 reiterating the aforesaid grounds and averring further that a dispute arose pertaining to the identity and representation of the Respondent in the preservation proceedings in ACEC Misc. Application No. E036 of 2021 and that the dispute was indicative of the Respondent’s connivance that she was the beneficial owner of the funds. The Applicant averred further that the Central Bank of Kenya vide a circular No. 14 of 2012 dated 18<sup>th</sup> December 2015 highlighted the risks of buying and trading in virtual currencies and cautioned all financial institutions from engaging with businesses that traded in virtual currencies such as bitcoin, which the Interested Party was involved in. Lastly, that the Interested Party’s actions of sending money to the Respondent and other individuals was suspicious and the mystery identity of the Respondent established reasonable grounds that the funds were proceeds of crime.

### **Response of the Respondent**

4. The Respondent and the Interested Party opposed the Originating Motion through replying affidavits sworn on 16<sup>th</sup> March 2022 and 7<sup>th</sup> November 2022 respectively.
5. The Respondent admits that she is the holder of the two bank accounts 021XXXXXX in Co-operative bank and 010XXXXXX in Stanbic Bank Limited that are subject of the forfeiture proceedings. She contended that no material evidence has been filed to show that funds in the two bank accounts are proceeds of crime as alleged. That she received the said funds from Marc Freddy De Messel (the Interested Party) who is her boyfriend and the father of her child; that no other person has credited any funds into those accounts apart from the Interested Party who allegedly is a known investor and philanthropist, with investments in bitcoin purchased in 2013 and Tesla in 2019; that he is famous online, in social media and YouTube where he makes market calls on stocks and cryptocurrencies, shares investment advice and gives lessons on investment and wealth management. Further, that there is no law or regulation stopping the Respondent from receiving a gift from her boyfriend with whom they have sired a child; that the purpose of the funds was to purchase a house and to enable her live comfortably with the Interested Party’s child; that the assertion that the Respondent is involved in a complex ring of money laundering is a false assertion as she provided all documents in respect of the funds to the Applicant; that the Applicant has prosecuted this matter on social media and the court of public opinion and published her bank accounts on the said social media to her detriment; that the reason for her being out of the country is that she was pregnant and that she had supplied the court with copies of her child’s birth certificate.
6. She averred that the Interested Party has a running account with the Interactive Brokerage through which he trades and which was the source of the funds. That documentation evidencing the trading was produced by the Interested Party; that there was no criminal activity either in the Respondent’s home country Belgium, or in Kenya; that there have been no inquiries or investigations for any criminal activity against the Respondent or the Interested Party; that the Applicant has not made any enquiries through the Belgian government but has only made false allegations in these proceedings and that the Interested Party has no criminal record, having never been accused or charged with any offences.
7. Lastly, that the impugned funds were for personal use and that she produced her bank account statements to show the expenditure; that these proceedings are a witch-hunt by which the Applicant



is seeking to acquire her funds illegally. She contends that the fact that she received a lot of money is not a cause for suspicion and that the proceedings are an embarrassment to investors and a waste of judicial resources.

### **Response of the Interested Party**

8. The Interested Party vehemently opposed the Originating Motion and contended that the allegations by the Applicant were falsehoods and made in bad faith with the intention of maligning his name and that of the Respondent. He confirmed that he was the benefactor of the Respondent with whom he has sired a child and that on diverse dates in the year 2021, he sent the funds to the Respondent's bank accounts. He also stated that he was in a relationship with two other ladies Tebby Wambuku Kago and Serah Wambui Kamande. He averred that there is no law that prohibits him from catering to the needs of his children and buying houses for their comfort and investing in their future; that the Applicants have tarnished his name and that of his family in the media to create wrong perceptions.
9. In regard to the source of funds, the Interested Party averred that he trades in cryptocurrency; that he has many different portfolios through which he has invested; that he holds an account with Interactive Brokerage, a reputable firm; that the funds were from legitimate trading and were sent to the Respondent and his other girlfriends from his Belgian account; that he is an internationally known investor famous for the trading in Bitcoin [2013], Tesla [2019] and for his social media and YouTube platforms in which he shares investment advice; that there is no criminal record or investigations against him in Belgium; that he has resided in Kenya on and off since 2018 and has valid permits, a Kenya Revenue Authority Pin certificate and a certificate of good conduct from the Kenya Police; that information in regard to his trade is well known and available publicly; that the brokerage firm is of international repute with accreditations from different jurisdictions as shown in an audit report by Deloitte and finally, that the fact of sending money to the Respondent was not a ground for suspicion as his source of income was explained, but was nevertheless ignored by the Applicant. Further that the Originating Motion is an embarrassment to him as an investor in Kenya.
10. The motion was canvassed by way of written submissions.

### **Submissions of the Applicant**

11. The Applicant relied on its written submissions dated 6<sup>th</sup> March 2023. The Applicant contends that the impugned funds are proceeds of crime; that the respondent received a sum of USD 914,967 in August 2021 from a foreign jurisdiction whose source could not be legitimately established; that the Applicant obtained search warrants to investigate the Respondent's accounts in Misc Criminal Application No. E2856/2021; that analysis of the subject accounts showed that the Respondent received from the Interested Party USD 914,967.60 in four transactions in a span of three days and Kshs 5,000,000 in the accounts held at Cooperative Bank and Stanbic Bank respectively. That the Respondent is a 21-year-old student at Nairobi Technical Training Institute who declared the source of funds as her boyfriend and the purpose as investment in land, projects and safaris.
12. The Applicant contended that the Respondent has not established legitimacy of the trading with Interactive Brokers, that the Central Bank in a circular No 14 of 2015 highlighted the risks of virtual currencies and cautioned banks from dealing with entities transacting in the said virtual currencies and that the Interested Party recruits, targets and/or exploits young adults aged between 19 to 26 years including the Respondent to execute suspect money laundering schemes.
13. The Applicant submitted further that Article 40(6) of *the Constitution* and Section 92(1) of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) grant the court the authority to make an order of forfeiture in respect of property that has been used or intended for use in the



commission of an offence or is a proceed of crime. Learned Counsel for the Applicant cited the following decisions; ARA and Others v Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120 Court of Appeal of Jamaica, Abdulrahman Mahmoud Sheikh & 6 Others v Republic & Others [2016] eKLR, Schabir Shaik and Others v State Case CCT 86/06[2008] ZACC and Revision of People v Laito (Appeal No 291/2014) [2015] ZMSC 26 in support of his submissions.

14. The Applicant submitted further that forfeiture proceedings are civil in nature and the standard of proof is on a balance of probabilities; reproducing Sections 2 and 92(4) of the POCAMLA Counsel submitted that the impugned funds are proceeds of crime as they were acquired, derived or realized from the offence of money laundering provided under Section 3 of the POCAMLA. That the Interested Party sent funds to four individuals in a scheme to circumvent the Central Bank of Kenya circular issued in December 2015. Counsel submitted that the articles annexed to the Respondent's affidavit as exhibit FNN6 and the Interested Party's affidavit as exhibit MDM6 constitute hearsay and therefore are inadmissible in evidence under Section 35 of the *Evidence Act*; Counsel cited the decision of the Court of Appeal in Independent Electoral and Boundaries Commission v National Super Alliance Kenya and 6 Others 2017 eKLR in support of that submission and submitted further that the Respondent has tax arrears with the Kenya Revenue Authority which she has not disputed and lastly that her reliance on the prenatal paternity test on the child was of no probative value.
15. Counsel for the Applicant framed one issue for determination: whether the funds in prayer no. 2 of the Originating Motion were proceeds of crime liable for forfeiture to the government

### **Submissions of the Respondent**

16. The Respondent and the Interested Party in opposing the Originating Motion relied on joint written submissions dated 22<sup>nd</sup> March 2023. They framed the issues for determination as follows: whether the Respondent and the Interested Party have provided proof of the legitimacy of the source of funds; to what extent must a party who is a foreigner prove they have legally acquired their wealth?; whether the assets recovery agency have a responsibility to investigate a foreigner's source of funds before commencing forfeiture proceedings under POCAMLA; whether this suit can stand after withdrawal of other related suits where the Interested Party sent monies to other parties from the same source; whether the Applicant has provided proof that the funds are proceeds of crime or from money laundering activities to warrant forfeiture.
17. Learned Counsel for the Respondent and Interested Party submitted that the Interested Party had in his affidavits demonstrated that the funds were sent from his brokerage account to his personal bank account; that he traded in stocks in Tesla and LPG companies through Interactive Brokerage, a well known international firm and that he had exhibited a letter and account statements and financial statements of the company. Counsel stated that the Interested Party is a well-known dollar millionaire in Europe and that they had provided a trade confirmation statement form Interactive Brokerage in the name of the Interested Party for the month of January 2021 in which the sale of LPG stocks was closed with proceeds of USD 1,529,509.74; that the Interested Party provided a certificate of confirmation of his identity as the account holder of the account in KBC Bank in Belgium through which he transferred the funds to the Respondent. Counsel referred the court to confirmations of electronic money transfers, declaration of gift acceptance and a letter to the bank explaining the source of income as investment in stocks, bonds, precious metals and an investment in Tesla. Counsel stated that the Interested Party produced a certificate of good conduct from both Belgium and the DCI in Kenya showing that he did not have any criminal record; that the Respondent and Interested Party were not involved in any criminal activity; that the trade in bitcoin and/or cryptocurrency is widely accepted globally and is not illegal in Kenya; that the Central Bank of Kenya only issued a caution on



the trade in cryptocurrency and as such the Interested Party was allowed to use his profits in Kenya; that the funds were sent to the Respondent and two other girlfriends of the Interested Party who have sired children with him, namely Tebby Wambuku Kago and Serah Wambui Kamanda.

18. Counsel argued that the Applicant had failed to prove that the funds were proceeds of crime; that no contact or investigations had been made in Belgium in respect of the Interested Party to confirm whether there subsists a criminal charge or investigation against him and that the Applicant's suspicions were mere conjecture and in bad faith. Counsel placed reliance on the case of *Assets Recovery Agency v Muazu Bala* [2022] eKLR and submitted that the Applicant had failed to discharge both the legal and evidential burden of proof.
19. On whether this suit can stand on account of the withdrawal of two related suits in being HCACECS No. E007 of 2022 and HCACECS No. E016 of 2022, Counsel contended that it cannot stand given that the source of funds was the same in all the suits and the claim of money laundering against the Respondent in this case is a witch hunt ostensibly for personal gain.
20. Counsel further submitted that the Applicant's allegation of money laundering is not supported by any evidence at all; that there was no concealment of the funds as they were sent directly to the Respondent's account; that there are no pending tax disputes against the Respondent with the Kenya Revenue Authority (KRA) as alleged by the Applicant as the dispute was resolved in favour of the Applicant and in any event the KRA has its own avenues for recovering taxes. On the identity of the Respondent and her representation, they submitted that the Respondent and the Interested Party appeared virtually in court on 24<sup>th</sup> January 2023 and further that she swore an affidavit dated 19<sup>th</sup> January 2023 confirming that she had not instructed any other firm to act on her behalf except Ndindi and Nadida Advocates and Owaga and Associates LLP.
21. Lastly, Counsel submitted that this court should not tolerate the Applicant's shoddy investigations and mere allegations as a basis of forfeiture of the Respondent's funds; that the court should not be led in a wild goose chase and should put to an end harassment and incompetence.

#### **Issues for determination:**

22. From the pleadings, responses and submissions filed in these proceedings, the following issues arise for determination:
  1. Whether the withdrawal by the Applicant of the related suits in HCACECS No. E007 of 2022 and HCACECS No. E016 of 2022 should result in the dismissal of this suit.
  2. Whether the USD 914,967.60 held in account number 021XXXXXX at Co-operative Bank Limited and Kshs 5,000,000 held in account number 010XXXXXX at Stanbic Bank Limited in the name of the Respondent are liable for forfeiture to the State.

#### **Analysis and determination**

Whether the withdrawal by the Applicant of the related suits HCACECS No. E007 of 2022 and HCACECS No. E016 of 2022 should result in the termination of this suit

23. The Respondent and the Interested Party contend that these proceedings cannot stand due to the Applicant's withdrawal of the related suits in E007 of 2022 and E016 of 2022; that the source of the



funds was the same as in this case and as such the allegation that the funds herein are proceeds of crime is without basis. The Applicant did not comment on this in its pleadings or in the submissions.

24. A court of law cannot compel an unwilling litigant to continue with an action given that even were the court to insist that they should proceed with the suit, they may very well decline to tender evidence or take any further steps in the action.
25. Even though the Interested Party and the Applicant were parties in the proceedings in the suits No. E007 of 2022 and No. E016 of 2022 and the Respondent and the Interested Party alleges that the source of the funds in all the three cases is the same, the Respondents are different persons not before this court and the funds/properties subject of forfeiture are distinct and separate. Further, the issues in dispute were not heard and determined by this court and as such no finding was made by this court on the legitimacy or otherwise of the funds subject of those two suits. Accordingly, it is my finding that unless otherwise withdrawn or resolved as between the Applicant and the Respondent, this suit cannot be terminated merely by virtue of the withdrawal by the Applicant of the HCACEC suit No. E007 of 2022 and HCACEC Suit No. E016 of 2022.

Whether the USD 914,967.60 held in account number 0210XXXXXX at Co-operative Bank Limited and Kshs 5,000,000 held in account number 010XXXXXXX at Stanbic Bank Limited in the name of the Respondent are proceeds of crime liable for forfeiture to the State

26. The Applicant has invoked the jurisdiction of this court under Sections 90 and 92(1) of the POCAMLA which state:-

“90(1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

....

92. Making of forfeiture order

- (1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities 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.”

27. The term “proceeds of crime” is defined under Section 2 of the Act 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 or benefits derived or realized from such property from the time the offence was committed”



28. In the case of *Schabir Shaik & Others v State* Case CCT 86/06[2008] ZACC 7 the court expressed itself as follows in regard to this wide ambit of the definition:

“...One of the reasons for the wide ambit of the definition of “proceeds of Crime” is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of “Camouflage. “The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime.”

29. The gravamen of the Applicant’s case is that the Interested Party has recruited the Respondent and four others who it names as Tebby Wambuku Kago, Jane Wangui Kago, Serah Wambui and Timothy Waigwa Maina who are all relatives of the Respondent, into a complex scheme of money laundering; that the deposit of large amounts of money into the Respondent’s accounts is a money laundering scheme and hence the funds are proceeds of crime.

30. It is trite that the burden of proof lies upon the Applicant to prove on a balance of probabilities that the impugned funds are proceeds of crime. However once this burden is discharged the evidential burden shifts to the Respondent to prove that the funds were lawfully acquired and are not proceeds of crime. See the case of *Assets Recovery Agency v Muazu Bala* [2022] KEHC 11829 KLR where this court cited with approval the case of *Assets Recovery Agency v Fischer Rohan & Miller Delores* Supreme Court of Jamaica Claim No. 2007 HCV 003259 where it was held:-

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

31. It is however instructive that as provided in Section 92(4) of the POCAMLA the Applicant need not prove the commission of a specific offence in regard to the funds. In the case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR where it was held that:-

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

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

32. It is not disputed that the Respondent, who at all times material to these proceedings was a student without any formal employment, received large amounts of cash in her bank accounts at the co-operative Bank of Kenya and the Stanbic Bank including the impugned deposits. The fact of these large deposits which put together add up to roughly Kshs.100,000,000, the fact that she had no source of income from which she could have earned this kind of money



and which facts are not disputed would certainly require an explanation from her as to the source of those funds. This is especially so because it was happening at a time when financial institutions bore an obligation under Section 44 of the POCAMLA to report any cash deposit above 1 million to the Financial Reporting Centre established under Section 21 of the Act, as part of its efforts to stem money laundering and other offences. It is my finding therefore that the huge cash deposits were suspicious in the circumstances and the evidential burden therefore properly shifted to the Respondent to prove not only the source of the funds but that the source of funds is a legitimate one. My so saying finds support in the case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* (supra) where the court stated:-

“61. Where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means what has been presented is not challenged. In this case there is no explanation of the source of the huge deposits into the Respondent’s accounts. Even a glance at the cash deposits made at Donholm branch of Equity Bank would call for an explanation by the Respondent as to who was making the deposits and for what purpose.

62. The moment the Applicant established through the bank statements that there were huge cash deposits, the burden shifted to the Respondent to explain the source. A lot has been said about the Respondent’s husband by both parties but this court is not using that information against the Respondent. The Respondent had a clear duty to explain the source or sources of these huge deposits into her account which she has failed to do.”

33. This finding also finds support in the case of *Assets Recovery Agency v Fisher Rohan & Miller Delores* Supreme Court of Jamaica Claim no. 2007 HCV 003259( supra) 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 on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousand of United States dollars without more.”

There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence, is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.

This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 14th August, 2007.

This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The money was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets...”



34. This is no way a contradiction of my finding in the case of *Assets Recovery Agency v Muazu Bala* [2022] KEHC 11829 KLR cited by learned Counsel for the Respondent, given that the legal burden of proof remains with the plaintiff throughout the proceedings and it is only once that burden is discharged on a balance of probabilities that the evidential burden shifts to the Defendant.
35. The explanation offered by the Respondent, who together with the Plaintiff are the principal parties in this case, is that the large deposits are gifts from her boyfriend, the Interested Party in this case. She did not however proffer any explanation on the source of the funds preferring instead to leave that to the Interested Party.
36. On his part the Interested Party's explanation was that the money came from a legitimate source; that he acquired the same from trading in stocks and bitcoins through a firm, in his home country Belgium, known as Interactive Brokers LLC; that he had no criminal record as demonstrated by certificates of good conduct obtained both in his country and here in Kenya; that he was an astute bitcoin trader of good repute as evidenced by the documents which he has annexed; that there was nothing untoward in trading in bitcoin/cryptocurrency; and that the Respondent was his girlfriend with whom he was expecting a child and the monies were a gift to her for her upkeep and that of the child and that there was nothing wrong with him gifting the money to the Respondent. He contended that the claim by the Applicant that he was using the Respondent to launder dirty money was malicious as the Applicant had refused to accept his documents explaining the source of the funds. Further that the allegation that the Respondent was involved in a money laundering scheme was not proven and this application ought therefore to be dismissed and the monies returned.
37. I entirely agree with the Interested Party that there is nothing untoward with a man gifting money to his girlfriend, more so one with whom he is expecting a child, for her upkeep and that of the child. However as I have already stated the deposit of large amounts of cash money into the Respondent's bank accounts came at a time when even a deposit of Kshs.1 million in cash required an explanation as to its source and purpose and the law placed an obligation upon financial institutions to monitor and report such deposits to the Financial Reporting Centre - (See section 44 of the POCAMLA). An explanation that the source of these large sums of money is a legitimate one and that the funds are not tainted is therefore the crux of the matter in these proceedings.
38. I have carefully and painstakingly perused the documents placed before this court by the Interested Party and my finding is that none of them demonstrate that the monies were from a legitimate source. The documents from Interactive Brokers LLC which include the audited accounts of that entity do not demonstrate how the funds, the subject of this case and which were deposited by the interested party into the Respondent's account were acquired. Whereas Interactive Brokers may be a reputable firm and the document shows that the Interested Party maintained an account with the Brokerage there is no evidence at all of the source of funds by which the Interested Party traded through the firm. The "Long full Text Version" of the interview annexed as exhibit MDM6 does not help either as it does not prove the source of the funds. This is but a conversation with an interviewer which is in any event hearsay as there is no affidavit by the person who recorded it. It is also not lost to this court that in a letter written by the Interested Party to the Co-operative Bank on 10<sup>th</sup> August 2021 the Interested Party's explanation was, and I quote: "As an investor my source of income is capital appreciation by investing in different assets such as stocks, bond, precious metals etc... I invested for example in Tesla past few years." There was no express mention of where or how the funds invested in



those portfolios is derived. It is also intriguing that although the Interested Party deposes that he has many different portfolios and he can show how he made the money (see paragraph 17 of the Replying affidavit) he did not avail any cogent evidence of the said portfolios and how he raised the money from the same.

39. In the case of *Assets Recovery Agency v Pamela Aboo: Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR the court observed and I agree that:-

“I have done an analysis of the deposits above and shown how much was being deposited in a day or so for the Respondent. Even with all this, the Respondent has not attempted to explain the source of this money either through the replying or supplementary affidavit. It could be true that she does business with Samson Waweru, Jonathan Kimindu and her own business but where is the evidence.

.....

One is at liberty to deposit even a billion shillings but the person must be ready to share the source of such huge deposits with the relevant authorities. When no satisfactory explanation is forthcoming the court will take it that the same was not lawfully acquired”.

40. Similarly, in this case the Interested Party, apart from alluding to the credibility of the brokerage firm through which he allegedly traded, has not sufficiently demonstrated the source of the funds, the subject of that trade as would be required of him under Section 112 of the [Evidence Act](#) which states:

“ 112. Proof of special knowledge in civil proceedings

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

41. The fact that the Interested Party has certificates of good conduct from his home country and from Kenya is of no probative value as civil forfeiture is not dependent on criminal culpability. Again I agree with the finding of Mumbi Ngugi J, as she then was, in the case of *Assets Recovery Agency v Lilian Wanja Muthoni t/a Sahara Consultants & 5 Others* [2020] eKLR where she observed: -

“ 134. The respondents have contended that the funds in the ten accounts were from various sources including savings from the 1<sup>st</sup> respondent’s employment salary and allowances part of which were deposited into the accounts; diverse activities in real estate, landholding and construction ventures, as well as mortgages and loans for investment in profit making ventures, the legitimate proceeds from which were directed into the subject bank accounts. As I have found above, there is no evidence that supports these contentions.

135. What I discern from the respondents’ submissions is that since the applicant has not shown a direct link between the funds in the said accounts and the funds alleged to have been stolen from the NYS, the said funds are not proceeds of crime, and should therefore not be forfeited to the State. I take the view, however, that POCAMLA



and the entire legal regime related to recovery of proceeds of crime and unexplained assets has the underlying premise that crime and corruption are undertaken in a labyrinthine, secretive manner; that funds and assets may not be directly traced to crime; that while investigations may be carried out, some alleged perpetrators charged and subjected to trial, a conviction may not result. Yet, the respondent may have in his or her possession substantial funds and assets, but is not able to show a legitimate source of the funds and assets.

136. The question is what, in such circumstances, should be the option? Is it to say, as the respondents ask the court to do, that there is no trail leading the funds to the suspected source, in this case the NYS funds? That the funds do not belong to the State just because the respondents cannot show a legitimate source? What would such a conclusion mean in relation to the tracing and recovery of, say, funds and assets derived from the narcotics trade, cyber-crime or piracy, or from trafficking in wildlife, or in persons?
137. I believe I would not be remiss if I asserted as an incontrovertible truth that money and assets are not plucked from the air or, like fruits, from trees. They can be traced to specific sources- salaries, businesses in which one sells specific items or goods, or provides professional services. There must be books of accounts, stock registers, local purchases orders and delivery notes showing to whom goods are sold, deliveries made and payment receipts showing from whom payment has been received.”
42. In the absence of evidence of a legitimate source this court is entitled to conclude that these funds were proceeds of crime hence liable for forfeiture.
43. It is my finding that the huge size and the frequency of the deposits and the fact that the Interested Party was also depositing similar accounts in her relatives’ accounts ought reasonably to have aroused the Respondent’s suspicion that something was amiss. She nevertheless went ahead and agreed to her account being used as a conduit to conceal those funds. The circumstances of this case make it clear that the Respondent was being used to launder the money. That is a crime under Section 3 of the POCAMLA and she is not entitled to benefit from the tainted funds. I am satisfied therefore that the Applicant has proved its case on a balance of probabilities and accordingly the Originating Motion dated 23<sup>rd</sup> February, 2022 succeeds and the following funds shall be forfeited to the State.
- i. USD 914, 967.60 held in Acc. No. 0210XXXXXXXX held at Co-operative Bank in the name of Felesta Nyamathia Njoroge.
  - ii. Kshs.5,000,000 held in Acc. No. 010XXXXXXXX at Stanbic Bank Limited in the name of Felesta Nyamathira Njoroge.
44. Costs follow the event and the Respondent and the Interested party shall therefore bear the costs of these proceedings
- Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF MAY, 2023**



**E N MAINA**

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**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

