



**Assets Recovery Agency v Kibirige & 2 others (Civil Suit
2 of 2021) [2023] KEHC 20480 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 2 OF 2021**

OA SEWE, J

JUNE 29, 2023

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

AND

**IN THE MATTER OF: FORFEITURE ORDERS FOR MOTOR VEHICLE
REGISTRATION NO. KCH 429W SUBARU STATION WAGON REGISTERED
IN THE NAME OF MUSA ATHMAN KIBIRIGE, AND KSH. 503,400/=
DEPOSITED IN SHANZU LAW COURTS KCB ACCOUNT NO. 1183564473.**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

MUSA ATHMAN KIBIRIGE 1ST RESPONDENT

SWALEH YUSSUF 2ND RESPONDENT

ASMAN ABDALA MOHAMED 3RD RESPONDENT

JUDGMENT

[1] By an Originating Motion dated 20th May 2021, the applicant, Asset Recovery Agency, moved the Court under Sections 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, for the following orders:

- (a) That the Court be pleased to issue orders declaring Motor Vehicle Registration No. KCH 429W, Subaru Station Wagon, registered in the name of the 1st respondent, Musa Athman Kibirige, and Kshs. 503,400/= deposited in Shanzu Law Courts KCB Account No. 118xxx473 are proceeds of crime;



- (b) That the Court do issue forfeiture orders forfeiting the said motor vehicle and the funds to the Government and transferred to the applicant;
 - (c) That the Court do make any other ancillary orders it may deem appropriate for the proper, fair and effective execution of the forfeiture order; and,
 - (d) That the costs of the application be in the cause.
- [2] The application was premised on the grounds that the applicant is established under Section 53 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) with the mandate of identifying, tracing, freezing and recovering any proceeds of crime; and that pursuant to Part VIII of the POCAMLA, it is authorized to institute civil forfeiture proceedings and seek forfeiture orders where there are reasonable grounds to believe that the funds/assets are proceeds of crime.
- [3] It was further the contention of the applicant that, on or about 7th July 2017, following intelligence reports, Anti-Narcotics Police Officers trailed suspects who were aboard Motor Vehicle Registration No. KCH 429W, Subaru Station Wagon, within Kikambala area of Kilifi County. The applicant explained that on realizing that they were being trailed, some of the suspects managed to escape, leaving behind the 2nd and 3rd respondents, Swaleh Yussuf and Asman Abdala Mohamed, from whom Kshs. 503,400/= in cash was recovered. The Police also recovered 201.1 grams of heroin from the two suspects, whereupon the motor vehicle was towed to Bamburi Police Station. The 2nd and 3rd respondents were consequently charged before the Chief Magistrate with trafficking in narcotic drugs vide Shanzu Criminal Case No. 988 of 2017. The applicant further averred that investigations thereafter revealed that Motor Vehicle Registration KCH 429W belonged to the 1st respondent.
- [4] It was further the contention of the applicant that, thereafter, on 17th July 2020, the 1st respondent and 3 others were arrested following a tip-off as they exited Jomo Kenyatta Airport in Motor Vehicle Registration No. KCW 179L. Upon search of the motor vehicle a package containing whitish powdery substance suspected to be narcotic drug was found hidden underneath the front left passenger seat. The substance was later sampled and tested and found to be 298.4 gms of heroin with a street value of Kshs. 895,200/=. The 1st respondent was consequently charged in that regard jointly with one Hassan Juma Khamisi vide Chief Magistrate's JKIA Criminal Case No. 31 of 2020: Republic v Hassan Juma Khamisi and Musa Athman Kibirige.
- [5] Accordingly, the applicant filed this suit following the conclusion of the Shanzu Criminal Case, positing that the subject motor vehicle, Registration No. KCH 429W, is an instrument used in the commission of an offence and is therefore liable to forfeiture; and that the sum of Kshs. 503,400/= recovered by the Anti-Narcotics Police officers and produces as an exhibit in Shanzu Criminal Case No. 988 of 2017 proceeds of crime and therefore ought to be forfeited in accordance with Sections 3, 4 and 7 as read with Section 16 of the POCAMLA.
- [6] The grounds aforesaid were amplified on by Cpl. Fredrick Muriuki in his Supporting Affidavit sworn on 20th May 2021. In particular, Cpl. Muriuki explained, at paragraph 4 of the Supporting Affidavit that, upon their arrest, the 2nd and 3rd respondents led officers from the Anti-Narcotics Unit to their house within Kikambala area where a search was conducted in their presence and a package of creamish powdery substance packed in a clear polythene paper and wrapped in an old used newspaper was recovered. The police officers also recovered a currency counting machine. An inventory of the recovered items was annexed to the Supporting Affidavit together with the Search Certificate as Annexures F.M.1 and F.M.2.



- [7] Cpl. Muriuki further averred that the recovered substance was taken to the Government Chemist for weighing and sampling and was found to be heroin. The report of the Government Analyst, the Certificate of Weighing, the Certificate of Sampling, the Report of Seized Substances and Certificate of Valuation were annexed to the Supporting Affidavit as Annexures F.M.3, F.M.4, F.M.5, F.M.6 and F.M.7, respectively. He added that the suspects were charged before the SPM's Court in Shanzu with the offence of trafficking in narcotic drugs vide Shanzu SPM's Criminal Case No. 988 of 2017 The Charge Sheet was likewise annexed as Annexure F.M.8 to the Supporting Affidavit.
- [8] At paragraph 7 of his affidavit, Cpl. Muriuki deposed that, further investigations in respect of Motor Vehicle Registration No. KCH 429W which had been towed to Bamburi Police Station upon its seizure, established that it was registered in the name of the 1st respondent. A copy of the log book was annexed to the Supporting Affidavit as Annexure F.M.9. Also exhibited were copies of the Search Certificate and Inventory of Recovered Items in respect of Motor Vehicle Registration No. KCW 179L together with copies of Certificate of Sampling, Certificate of Weighing and Certificate of Valuation in respect of the substance recovered on 17th July 2020 from the 1st respondent and 3 others while aboard Motor Vehicle Registration No. KCW 179L. They were marked Annexures F.M.10 to F.M.14.
- [9] Cpl. Muriuki also deposed that, on 25th February 2021, the applicant obtained Preservation Orders vide Mombasa High Court Miscellaneous Civil Application No. 01 of 2021: Assets Recovery Agency v Musa Athman Kibirige & 2 Others pursuant to Sections 81 and 82 of the POCAMLA prohibiting the respondents and their agents or representatives from transacting, selling, transferring, disposing off, using or otherwise dealing with Motor Vehicle Registration No. KCH 429W Subaru Station Wagon and Kshs. 503,400/= recovered from the respondents and deposited in Shanzu Law Courts KCB Account No. 118xxx473. A copy of the Preservation Order was similarly annexed to Cpl. Muriuki's Supporting Affidavit and marked Annexure F.M. 16 herein.
- [10] That the Preservation Order was published in the Kenya Gazette pursuant to Section 83 of the POCAMLA was demonstrated vide Annexure F.M.17, which confirms that on 12th March 2021, the Preservation Order was published vide Gazette Notice No. 2348. Accordingly, Cpl. Muriuki urged that the orders sought for by the applicant be granted; and that the prayers are in accord with Section 90 of the POCAMLA.
- [11] The Originating Motion was resisted by the 1st and 2nd respondents. In his Replying Affidavit sworn on 18th October 2021, the 1st respondent confirmed that he is the registered owner of Motor Vehicle Registration No. KCH 429W, Subaru Station Wagon. He explained that sometime in July 2017, he hired out the motor vehicle to Swaleh Yusuf, the 2nd respondent; the motor vehicle being his source of income. He also confirmed that around 26th July 2017, he was informed that the Police had arrested the 2nd respondent and his wife; and that the motor vehicle had been impounded and driven to Bamburi Police Station. He then proceeded to Bamburi Police Station and got to learn that the motor vehicle had been seized by the Anti-Narcotics Police Unit and that notices to that effect had been issued which he was given copies of. He annexed them to his affidavit as Annexures 'MAK-1', 'MAK-2' and 'MAK-3'.
- [12] The 1st respondent further explained that he was informed that the motor vehicle could only be released either upon conclusion of the case against the 2nd respondent and his wife or on production of a court order. He therefore opted to wait for the conclusion of the 2nd respondent's case and kept himself informed of the progress of the case. He further deposed that when he learnt, in August 2020, that judgment had been delivered in the matter and that the 2nd respondent had been acquitted, he went back to Bamburi Police Station and asked for the release of his motor vehicle. Instead he was served with a copy of an order prohibiting the release of the motor vehicle. He was then informed that the Office of the Director of Public Prosecutions had moved to court and obtained a Preservation Order.



- [13] The 1st respondent also conceded that when he went to Nairobi to check on his motor vehicle after the DPP's application was dismissed, he was arrested and charged in the Chief Magistrate's Court at JKIA yet he has no connection with drugs. He therefore averred that the instant application is an abuse of the court process and ought to be dismissed.
- [14] On his part, the 2nd respondent relied on his Replying Affidavit sworn on 19th October 2021. He confirmed that indeed he was arrested and charged jointly with his wife in Shanzu SPM's Criminal Case No. 988 of 2017. He further deposed that, at the time of his arrest, he had hired the 1st respondent's motor vehicle; and that he was later acquitted of the charges. He likewise averred that although the State made an attempt at the High Court to seek preservation and forfeiture of his money and the subject motor vehicle, the application was dismissed and the trial court ordered for the release of the money to him.
- [15] The Originating Motion was canvassed by way of written submissions, pursuant to the directions given herein on 29th June 2022. Thus, Ms. Gitiri for the applicant relied on her written submissions dated 30th May 2022 and proposed the following issues for determination:
- (a) Whether the sum of Kshs. 503,400/= in cash and the subject motor vehicle and are proceeds/ instruments of crime;
 - (b) If issue [a] above is in the affirmative, whether the motor vehicle and sum of Kshs. 503,400/= should be forfeited to the State;
 - (c) Whether the prosecution and/or acquittal in any criminal offence has any effect on the application for civil forfeiture under Part VIII of the POCAMLA;
 - (d) Whether the application for civil forfeiture amounts to a violation of right to property under Article 40 of the Constitution.
- [16] Ms. Gitiri made reference to Section 2 of the POCAMLA for the definition of "realizable property" and "proceed of crime" and urged the Court to find that there are reasonable grounds to believe that the respondents were involved in trafficking of narcotic drugs and therefore that the money recovered from them as well as the motor vehicle they were using at the time are liable to forfeiture to the Government. She urged the Court to note that the respondents have not offered any explanation as to the nature of their business or how the funds were acquired; and that no proof was availed to back up the respondents' assertion that the motor vehicle was hired out to the 2nd respondent by the 1st respondent, as alleged. She relied on Sections 107, 109 and 112 of the Evidence Act, Chapter 80 of the Laws of Kenya and the cases of ACEC Civil Suit No. 2 of 2019: Asset Recovery Agency v James Thuita & Others; Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) [2018] eKLR and Assets Recovery Agency v Lillian Wanja Muthoni Mbogo & Others, ACEC Miscellaneous Application No. 58 of 2018, among other authorities, to buttress her arguments. On that basis she urged for the forfeiture orders as prayed for in the Originating Summons.
- [17] Ms. Gitiri further submitted that, because this is an application brought under Part VIII of the POCAMLA, it is not conviction-based. She relied on Section 92(4) of POCAMLA and the cases of Assets Recovery Agency v Audrene Samantha Rowe & Others; ACEC Miscellaneous Application No. 46 of 2018: Assets Recovery Agency v Felix Obonsi Ongaga & 3 Others and Stephen v Mangira & Another v Senior Principal Magistrate, Shanzu & 9 Others [2020] eKLR, as some of the decisions in support of her submission that the application did not have to prove a specific relationship between the subject funds and a particular offence.



- [18] On whether the application amounts to a violation of the right to property under Article 40 of the Constitution, counsel relied on Sub-Article (6) which provides that the right to property does not extend to property which has been unlawfully acquired. She made reference to *Teckla Nandjila Lamech v President of Namibia 2012(1) NR 255 (HC)* and *Martin Shalli v Attorney General of Namibia* to underscore her submission that proceeds of unlawful activity does not constitute property in respect of which protection is available. Accordingly, Ms. Gitiri prayed that the application be allowed and the orders sought granted.
- [19] On behalf of the respondents, Mr. Magolo relied on his written submissions filed on 19th October 2021. He took issue with the fact that the applicant did not disclose that a similar application had been filed vide High Court Miscellaneous Criminal Application No. 31 of 2020 and dismissed by Hon. Ong'injo, J.; and therefore that the instant Originating Motion is *res judicata*. He relied on *Nguruman Limited v Jan Bonde Nielsen & Another [2017] eKLR* in urging the Court to find that the subject matter hereof has already been conclusively dealt with by Hon. Ong'injo, J.
- [20] Mr. Magolo further submitted that, since the motor vehicle and the sum of Kshs. 503,400/= were exhibits before the lower court, the lower court had a duty to deal with their release or forfeiture under the Criminal Procedure Code, Chapter 75 of the Laws of Kenya; and that the applicant was therefore at liberty to join the proceedings and obtain from the lower court the orders it is now seeking from this Court. He further submitted that similar provisions exist in the Narcotic Drugs and Psychotropic Substances Control Act, in particular under Section 77, on the disposal of seized items.
- [21] Accordingly, Mr. Magolo posited that the applicant is overreaching its mandate by purporting to supervise the Courts, the ODPP and the Inspector General in matters that have been dealt with to conclusion in accordance with the applicable law. He relied on High Court Miscellaneous Criminal Application No. 407 of 2019: *Africa Spirits Ltd v DPP & Another* in which government agencies were cautioned against jurisdictional overreach. He added that, in any event, the plaintiff failed to prove that the motor vehicle and the money were obtained through criminal activities. In his view, a plausible explanation was proffered by the respondents. He urged the Court to take judicial notice of the fact that brokers exist and that some of them do not keep records or file tax returns. He accordingly prayed for the dismissal of the Originating Motion dated 20th May 2021 with costs.
- [22] I have given careful consideration to the said application as well as the averments set out in the parties' respective affidavits. I have similarly taken into account the written submissions filed by learned counsel, including the authorities cited by them. The background facts are not in dispute, namely, that on the 7th July 2017, Anti-Narcotics Police Officers trailed Motor Vehicle Registration No. KCH 429W, Subaru Station Wagon, within Kikambala area within Kilifi County and arrested some of the occupants, namely, the 2nd and 3rd respondents, Swaleh Yussuf and Asman Abdala Mohamed, who are husband and wife. The police recovered from them Kshs. 503,400/= in cash at the scene which they suspected to be proceeds of crime. The Police thereafter conducted a search of their house and allegedly recovered 201.1 grams of heroin in respect of which the 2nd and 3rd respondents were jointly charged before the Senior Principal Magistrate's Court at Shanzu with trafficking in narcotic drugs vide Criminal Case No. 988 of 2017.
- [23] It is common ground that, at all material times, Motor Vehicle Registration No. KCH 429W belonged to the 1st respondent, whose assertion it was that he had given it out on hire to the 2nd respondent. He explained that the motor vehicle was one of his sources of income; and that when he went to Bamburi Police Station to have it released he was advised to await the conclusion of the criminal case against the 2nd and 3rd respondents. In this regard, the 1st respondent's averments were supported by the averments of the 2nd respondent. It is also not disputed that the 2nd and 3rd respondents were thereafter tried and



found not guilty of the charge of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act and were accordingly acquitted on 25th August 2020. Thereafter, attempts by the 1st respondent to have the suit motor vehicle released to him was thwarted when the motor vehicle was furtively removed from Bamburi Police Station to an unknown location.

[24] In the premises, the issues that arise herein for my determination are as hereunder:

- (a) Whether the suit is res judicata.
- (b) Whether conviction is a condition precedent for forfeiture proceedings.
- (c) What constitutes proceeds of crime.
- (d) Who bears the burden of proof?
- (e) Whether the sum of Kshs. 503,400/= sought to be forfeited is proceeds of crime, and whether motor vehicle KCH 429W is an instrument of crime;
- (f) If the answer to (v) above is in the affirmative, whether they should be forfeited.

A. On Res Judicata:

[25] Section 7 of the Civil Procedure Act, provides that:

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

[26] The rationale for the principle has been reiterated over the years but bears repeating herein; namely, that there must be an end to litigation. Thus, in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR a five-judge bench of the Court of Appeal held:

“There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, *William Koross v. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, it was stated;

The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 stated, and we agree;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of



the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.

[27] That the principle is as applicable to main suits as it is to interlocutory applications was made clear in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others*) Civil Appeal No. 36 of 1996), in which the Court of Appeal held:

“There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation...”

[28] The question to pose, therefore, is whether in the circumstances presented herein, it can be said that the instant Originating Motion is *res judicata*. In the *Maina Kiai Case* (*supra*), it was pointed out that:

“...for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

[29] Counsel for the respondents was of the posturing that a similar application had been filed by the Director of Public Prosecutions, being Mombasa High Court Miscellaneous Criminal Application No. 31 of 2020. The applicant, on the other hand, opted not comment on High Court Misc. Criminal Application No. 31 of 2020. Instead it explained that it applied for and obtained preservation orders in Mombasa High Court Misc. Civil Appl. No. 01 of 2021: *Assets Recovery Agency v Musa Athman Kibirige & 2 Others* pursuant to Sections 81 and 82 of POCAMLA and the same was gazetted on the 12th March, 2021; and therefore that it is permissible in law for a forfeiture application to be made during the pendency of a Preservation Order.

[30] In the premises, I have read the Ruling by Hon. Lady Justice Anne Ong’ino in High Court Misc. Criminal Application No. 31 of 2020 reported as *Republic v Yusuf Ahmed & Another* [2021] eKLR and note that the application was filed, not by the Assets Recovery Agency, the applicant herein, but by the Director of Public Prosecutions. The object of the application was to preserve the exhibits pending the hearing and determination of Mombasa High Court Criminal Appeal No. 22 of 2020. To that extent, it cannot be said that the former application was between the same parties or in respect of the



same subject matter. Indeed, in its ruling, the Court noted, at paragraph 13 thus in dismissing the application:

“...the Assets Recovery Agency is the body tasked with bringing forth applications for preservation and/or seizure of assets of proceeds of crime and not the office of the Director of Public Prosecutions.”

- [31] More importantly, the Court noted that a critical party, namely the 1st respondent herein, was not a party to the former application and therefore, that the preservation orders could not be made without notice to him. In addition, whereas the former application invoked the criminal jurisdiction of the Court, the instant application has been brought *in rem* in the exercise of the Court’s civil jurisdiction. It is therefore plain that the bar of *res judicata* is not available to the respondents in the circumstances of this case. Indeed, the Court in the former application recognized, at paragraph 20 of the ruling dated 18th March 2021, that the Assets Recovery Agency was at liberty to commence the process of civil forfeiture “...which is not bogged down by the requirement for convictions...”
- [32] Further to the foregoing, the applicant demonstrated that before filing the instant application, it had applied for and obtained a Preservation Order in Mombasa High Court Misc. Civil Appl. No. 01 of 2021: Assets Recovery Agency v Musa Athman Kibirige & 2 Others. The Order is annexed to the applicant’s Supporting Affidavit as Annexure F.M.16 and was given on 23rd February 2021. It was duly gazetted vide Gazette Notice No. 2348 dated 12th March 2021 pursuant to Section 83(1) of the POCAMLA. Indeed, Sections 81 and 82 of the POCAMLA vis a vis Sections 90 and 92 of the same Act leave no doubt that preservation and forfeiture orders are entirely different tools available to the applicant; and that for an asset to be forfeited it must first be preserved under the procedure set out under Sections 81-89 of the POCAMLA.
- [33] It is manifest therefore that, by the time the ruling in High Court Misc. Criminal Application No. 31 of 2020 was given, the applicant had already obtained a Preservation Order pursuant to which the instant application was filed. In the premises and for the reasons aforesaid, it cannot be said that the instant application is *res judicata* to Misc. Criminal Application No. 31 of 2020; and I so find. Neither can it be argued that this is a case of institutional overreach as the applicant is the proper body with the mandate to enforce the forfeiture provisions of POCAMLA (See Section 54 of the POCAMLA).

B. On Whether conviction is a condition precedent for forfeiture proceedings:

- [34] The 2nd and 3rd respondents having been acquitted in Shanzu Criminal Case No. 988 of 2017: R v Swaleh Yusuf Ahmed & Another on 25th August, 2020, now contend that there is no basis for the forfeiture application. At paragraph 19 of his Replying Affidavit the 1st respondent averred that in the ruling delivered in High Court in Miscellaneous Criminal Application No. 31 of 2021 by Hon. Onginjo, J. an order was made for the release of the exhibits back to the respondents. That is not correct. All the Court did was to dismiss the application dated 3rd September 2020 with no order as to costs. In any event, the Court acknowledged, at paragraph 21 of the ruling, that the subject motor vehicle did not belong to either of the respondents in that application and therefore could not have been released to them order as alleged.
- [35] More importantly, under Section 92(4) of the POCAMLA, the validity of an order for forfeiture is not premised on the outcome of criminal proceedings, the proceedings being *in rem*. Indeed, Section 92 of the POCAMLA provides:
- (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.
- (2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.
 - (3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.
 - (4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.
 - (5) The Registrar of the High Court making a forfeiture order shall publish a notice thereof in the Gazette as soon as practicable but not more than thirty days after the order is made.
 - (6) A forfeiture order shall not take effect—
 - (a) before the period allowed for an application under section 89 or an appeal under section 96 has expired; or
 - (b) before such an application or appeal has been disposed of.

[36] Thus, in *Kenya Anti-Corruption Commission v Stanley Mombo Amuti*** [2017] eKLR the court stated that:

“This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of *Director of Assets Recovery Agency & Ors, Republic versus Green & Ors* [2005] EWHC 3168, the court stated that:

“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.”

I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - *Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another* [2017] eKLR.” (Emphasis added).

[37] It is therefore plain that for the purposes of the instant proceedings, it is immaterial that the 2nd and 3rd respondents were acquitted in *Shanzu Senior Principal Magistrate’s Criminal Case No. 988 of 2017*.

C. On what constitutes proceeds of crime and who bears the burden of proof:**

[38] Section 2 of the POCAMLA defines “proceeds of crime” as follows: -



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

[39] Hence, in the case of *S v Shaik & Others v State* Case CCT 86/06 [2008] ZACC 7, the Constitutional Court in South Africa while sitting on appeal had this to say with regards to the definition of proceeds of crime: -

“...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”.

Similarly, the definition makes clear that proceeds of crime will constitute proceeds even if “indirectly obtained...”.

[40] The definition of proceeds of crime is, therefore, wide as can be seen defined under Section 2 of the Act and precedents it can be obtained directly or indirectly as a result of an offence.

[41] On the burden of proof, since the instant proceedings are civil in nature, they fall under Part VIII of the POCAMLA. In particular, Section 81 is explicit that:

(1) All proceedings under this part shall be Civil proceedings.

(2) The rules of evidence applicable in civil proceedings shall apply to proceedings under this part.”

[42] Thus, the provisions of Sections 107, 108, 109 and 112 of the Evidence Act are applicable herein. Needless to mention that in civil proceedings, the burden of proof is on a balance of probabilities; which means that, once the applicant demonstrates a basis for forfeiture for purposes of Section 92 of the POCAMLA, that the evidential burden shifts to the respondents to prove that the subject assets were lawfully acquired. In *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR for instance, it was held: -

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 matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

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

[43] It is therefore evident that the burden of proof is on the applicant and it only shifts to the respondents when there is a prima facie case that the motor vehicle and money are proceeds of crime.



D. Whether the funds, Kshs. 503,400/=, and motor vehicle KCH 429W are liable to forfeiture:**

[44] The applicant presented an uncontroverted account, namely, that following intelligence report the Anti-Narcotics Police Officers trailed arrested the 2nd & 3rd respondents aboard Motor Vehicle Registration No. KCH 429W Subaru Station Wagon. While three of the occupants fled, the police officers were able to apprehend the 2nd and 3rd respondents from whom they Kshs. 503,400/=. Cpl. Muriuki explained that, upon their arrest the 2nd and 3rd respondents led the officers to their residence within Kikambala Area where a search was conducted in their presence and one package of creamish powdery substance was found which was later ascertained to be heroin with a street value Kshs. 895, 200/=. Other items were found in the house, including a currency counting machine. The relevant documentation was exhibited as Annexures F.M.1 to F.M.7 to the Supporting Affidavit.

[45] The 1st respondent explained that the motor vehicle was bought from the proceeds of his small business as a broker and commission agent and not as a result of a crime. He stated that his small business had no clear records and he therefore did not attach any. It is also noteworthy that the 1st respondent did not attach any document or evidence of any sort to support his assertion that his motor vehicle had been hired by the 2nd and 3rd respondents. That three occupants of the motor vehicle ran away and escaped, the recovery by the police of the items aforementioned all go to show that the subject motor vehicle was being used as an instrument for crime.

[46] As for the amount of Kshs. 503, 400/=: there has been no attempt by any of the respondents to explain to the court whom it belonged to or how it was acquired. In Stanley Mombo Amuti v Kenya Anti-Corruption Commission (supra) the Court of Appeal pointed out, while interpreting the provisions of Section 55(2) of Anti-Corruption and Economic Crimes Act on forfeiture of unexplained assets and that: -

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

[47] Thus, taking into account the totality of the evidence placed before the Court by the parties, it is my finding that the applicant has established on a balance of probabilities that the Motor vehicle KCH 429W Subaru Station Wagon was being used for the commission of crime and that the sum of Kshs. 503,400/= recovered by Anti-Narcotics Police Officers is proceeds of crime, and therefore liable to forfeiture to the State. The Originating Motion dated 20th May, 2021 is therefore allowed and orders granted as hereunder:

(a) That an order be and is hereby granted declaring Motor Vehicle Registration No. KCH 429W, Subaru Station Wagon, registered in the name of the 1st respondent, Musa Athman Kibirige, to be an instrument of crime and that Kshs. 503,400/= deposited in Shanzu Law Courts KCB Account No. 118xxxx473 are proceeds of crime;



- (b) That the said motor vehicle Registration No. KCH 429W, Subaru Station Wagon, registered in the name of the 1st respondent, Musa Athman Kibirige, and Kshs. 503,400/= deposited in Shanzu Law Courts KCB Account No. 118xxxx473 be and are hereby forfeited to the state; to be transferred to the name of the applicant, Assets Recovery Agency for and on behalf of the Government of Kenya.
- (c) That granted the nature of the case, each party to bear own costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF JUNE
2023**

OLGA SEWE

JUDGE

