



**Assets Recovery Agency v Alibhai (Civil Application 93 of 2020)  
[2023] KEHC 22536 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 22536 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPLICATION 93 OF 2020  
DKN MAGARE, J  
JUNE 29, 2023**

**BETWEEN**

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

**AND**

**ALFIN ALLAUDIN ALIBHAI ..... RESPONDENT**

**JUDGMENT**

1. This is a judgment arising from the Originating Summons dated 20/05/2020 filed by Asset Recoveries Agency. The same is supported by the Affidavit of Cpl. Sautet Jeremiah, an investigator with the agency. He states that on 11/1/2020 they arrested the Respondent who was suspected to be trafficking or dealing in illicit trade contrary to the provisions of the Narcotics and Psychotropic Substances Control Act No. 4 of 1994.
2. They recovered 119 grams of cocaine and 355.3 g of cannabis sativa at the first Respondent's house at Waterfront Apartments. They confiscated several items which were weighed and established the aforementioned measures. The Respondent was charged at Shanzu Law Courts vide Criminal Case No. 62 of 2020.
3. The Applicant also received information that the Respondent had assets which he acquired through the sale of narcotics contrary to the Narcotics Act and the *Proceeds of Crime and Anti-Money Laundering Act* and the Prevention of Organized Crime Act. He further testified that the Applicant opened a file and issued requisite notices to the Respondent.
4. According to the Applicant, evidence showed a money laundering scheme. As a result, the witness secured an order for confiscation of vehicle registration Nos. KCX 111F Mercedes Benz, KCW 111B Toyota Marc X. The preservation order was gazetted. It's the applicants view that the Respondent's property was accumulated through criminal activities.



5. The Respondent is said to be a threat to erode national values through dragging youth and making them hard core criminals. The Applicant annexed requisite documents and filed submissions on 8/2/2021.
6. The Respondent stated that he does business of selling cars. According to him, he sold two other cars and got money together with donations from family members. However, he did not produce any agreements including sale agreements, tax payments, bank statements.
7. The Respondent filed a response and subsequently filed submissions on 25/10/2021. In the Replying Affidavit, he annexed the judgment of the lower court. She stated that the current Application is brought at the instigation of ANC and DC. According to the Respondent he had to borrow Kshs. 300,000 to buy Motor Vehicle Registration No. KCW 111B after selling two cars which had earlier been used by him.
8. The Respondent posited that there were no receipts for selling cars since it was Jua Kali. He annexed some documents: the affidavit evidence and parties' submissions. The parties opted for written submissions.
9. Given that the matter proceeded by way of submissions, I shall subsume both submissions and evidence.

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

10. I note that some documents are annexed to the Applicant's submissions. I shall definitely ignore. The documents must be introduced through either viva voce evidence or through affidavits. There is no basis for filing submissions with documents. Submissions are not binding on the court or the parties.
11. Such documents are neither evidence nor pleadings. That is why misleading submissions do not attract penalty for perjury while false affidavits have dire ramifications. Though raised as 3 issues, the issues identified by the Applicant are whether: -
  - a. The subject motor vehicles were proceeds of crime and whether the same should be forfeited.
  - b. Whether conviction or predicate offence is conditional precedent under the *Proceeds of Crime and Anti-Money Laundering Act* and the Prevention of Organized Crime Act.
12. The Applicant submitted in the same line as in the supporting affidavit. They state that deposits were all made in small amounts to avoid reporting over Ksh. 1,000,000/=. These monies were substantively withdrawn in small amounts also. The Applicant asserts that the Motor Vehicles Registration KCX 111R and KCW 111B Toyota Mark X were proceeds of crime. They set out a table on the deposits at paragraph 13.
13. What can be seen from the summary is that from 26/4/2018 to 8/10/2020, a period of 2 years and 6 months, Applicant had withdrawn Ksh. 18,642,467 and banked the same amount. The Applicant posits that the Respondent does not logically explain the sources of funds.
14. The Applicant noted the alleged business of buying and selling of vehicles is a sham. The question that comes into mind is whether, cars can be sold without a trace, documentation and even transfers to the new owners.
15. According to the Applicant, these are not criminal proceedings and as such the presumption of innocence does not apply. Reliance is placed on the case of Assets Recovery Agency v Pamela Aboo;



Ethics & Anti-Corruption Commission (Interested Party) [2018] eKLR, where the court stated as doth:-

“ 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. In the case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 the Court of Appeal stated:

“...that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof,...

65. Forfeiture under POCAMLA is not a violation of an individual’s right to property. Article 40(6) of *the Constitution* is clear that rights acquired under article 40 do not extend to any property that is found to have been unlawfully acquired.”

16. The Respondent relied on the case of Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR, where the court stated as doth: -

“ 56. The question then is whether this court is satisfied that the suit assets are “unexplained assets” or whether the suit assets were acquired otherwise than as a result of corrupt conduct. Section 2 of the *Anti-Corruption and Economic Crimes Act* defines the term “unexplained assets” as-

- a. acquired at or around the time the person was reasonably suspected of corruption or economic crime; and
- b. whose value is disproportionate to his known sources of income at or around that time and or which there is no satisfactory explanation.”

17. It is their view that since the Respondent did not explain then the same should be construed against them in the words of the Court of Appeal in Nguku vs. Republic [1985] eKLR. They also seek refuge in Section 112 of the *Evidence Act*.

18. It is the Applicant’s position that these transactions were within the special knowledge of the Respondent. Under Section 112, of the Evidence the Respondent had the burden of proof in respect to matters within his special knowledge. The said Section provides as doth: -

“ 112. Proof of special knowledge 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.”



## Respondent 's submissions

19. The Respondent set forth the Law regarding proceeds of crime as set out in Sections 90, Section 92 of the Proceeds the [Proceeds of Crime and Anti-Money Laundering Act](#). The two sections state as doth: -

“ 90. Application for forfeiture order

- (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.
- (2) The Agency Director shall give fourteen days notice of an application under subsection (1) to every person who served notice in terms of section 83(3).
- (3) A notice under subsection (2) shall be served in accordance with the provisions of the [Civil Procedure Act](#) (Cap. 21).
- (4) A person who served notice under section 83(3) may appear at the hearing of the application under subsection (1) to—
  - (a) oppose the making of the order; or
  - (b) apply for an order—
    - (i) excluding his interest in that property from the operation of the order; or
    - (ii) varying the operation of the order in respect of that property, and may adduce evidence at the hearing of the application.

20. On the other hand, Section 92 relates to the issuance of the order of forfeiture. The Section provides as doth: -

“ 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.
- (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.

- 21. He states that the Applicant had taken the case to court and it was dismissed, way back in January 2020. They rely on the decisions of Galax Realtors Ltd. =vs= Kenya First Service (2015) eKLR. It is therefore the Respondent's contention that the vehicles were to be preserved in Mombasa and not in Nairobi.
- 22. The Respondent proceeded on the premise that for the order to be issued for forfeiture, there has to be proof from the applicant, that the vehicles were intended for use or used in commission of an offence of are proceeds of crime. They relied on the case of EACC =vs= The Ministry of medical services and another (2012) eKLR. The Respondent prays that given the nature of his business he may not keep his records or file returns meticulously. However, it is a common Practice and he should not be punished without evidence from the Applicant.

### **Analysis**

- 23. The Respondent proceeded on the premises that his failure to meticulously file Tax returns can be used against him. This is not a claim for tax arrears. None payment of taxes cannot be the crime contemplated the *Proceeds of Crime and Anti-Money Laundering Act*.
- 24. Unpaid tax, from a legitimate source cannot be proceeds of crime. The duty of the Respondent was simply to say that I earned X from this and that business, here are the invoices, LPOs, Receipt and cheques from the other side. These are the people who gave me their money. Check their accounts and you will find these are the vehicles I bought from money from source X, sold them to Y and as per agreement Z, they paid in installments.
- 25. That is essentially the use of responding to the statutory Notices. If someone is running a legitimate business and for a period not more than 2 ½ years moves over 18 Million, surely there is a paper trail. There must be an employee whose payee was paid or even defaulted. There must be agents who help you sell the vehicles and the call logs to customs will reveal the nature of the business.



26. The Respondent knew the status of his finances. It is within his special knowledge. He has a duty to set for cogent evidence to show that the properties are legitimate. That is to say that he has the burden of proof. In the case of *In Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The Appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

27. The question as to what amounts to proof on a balance of probabilities was discussed by Justice Luka Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:-

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

28. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

29. Does the legal burden of proof, in this rests with the Applicant. Answer is No. The Burden of proof is the Applicant to raise a prima facie case that: -

- a. There is income to someone, the Respondent in this case; or
- b. There are purchases made; or
- c. The Respondent is in possession of property, which in the normal cause of his business, do not reflect his normal income.

30. At that point only the Respondent knows where the income came from. A case is told in the grapevine of a certain lass who was legitimately married and earning a cool sum of Ksh. 43,000 per month. The



poor husband was earning Kshs. 62,000 and was to maintain about a half a dozen children 2 of whom, were products of his adventure. He maintains that a man ought to do what he ought to do.

31. When faced with allegations on how they could afford Ksh. 50,000 rental where the wife was living in, he wrote a long list showing how he has struggled and has not had a single penny extra. He had been sending his wife Kshs. 20,000/= consistently as rent. In an afternoon, in the sweltering heat of Malindi, the wife walked into the offices of the agency, such as the Applicant, with a 36-page statement from one Giovanni, showing remittances from the Hellenic Republic of Greece.
32. The statement was accompanied with photos of the lady in various places in the world. It became clear that the rent was proceeds of other things other than crime. The poor husband was informed he was properly explained and was off the hook. He did not realize that also a woman can do what a man could do. In the hypothetical case, without the wife to explaining in confidence the source of the huge amounts, it could have been taken as proceeds of crime. It turns out to be proceeds of romance. The agency cannot deal with those. It is the province of the family court. I digress.
33. I have and will continue to say that the *Proceeds of Crime and Anti-Money Laundering Act* is based on a basic Adam Smith economic model of supply and demand. The Respondent dealt with the supply side of the economics. He explained how he sold vehicles and bought others.
34. That leaves me on the supply side. He already has money. He does not explain how come he was able to afford? That is the simplest this court can explain. I recall in a related matter, I dealt with a month or so ago, the Respondent therein gave a meticulous record of the supply side. How he bought, the sale agreement where he was the buyer. He did not answer the question of source of money. He may have legitimately bought the goods, cars in this case and money in the account. However, the question is, where did the money come from?
35. To contextualize the demand size of the economics, it is that while Eneke, the bird says that since men have learned to shoot without missing, he has learned to fly without perching.' so goes an Igbo saying. In a bid to beat declaration required, parties are receiving proceeds in cash and spending them on real estate, cars, women/men, alcohol, among others, without using the banking system.
36. One may have to evade the banking system trap, where the Central Bank Kenya is after hot money, the *Proceeds of Crime and Anti-Money Laundering Act* comes in after a series of events. It is not tied to one crime.
37. It is not a conviction-based liability. It is a purely civil liability whose which has to be proved on a balance of probability. In the case of *Assets Recovery Agency v James Thuita Nderitu & 6 Others* [2020] eKLR, the court stated as doth: -

“In its decision 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 Mwachethe Mulewa & another [2017] eKLR.”

38. Unlike Section 77 of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, 1994 as amended by the Narcotic Drugs And Psychotropic Substances (Control) (Amendment) Act, 2022,
39. There has to be proof on a balance of probabilities. One may even be acquitted or even not charged or charged with a different charge. POCAMLA is a lifestyle accounting tool with motion to explain and retain, fail to explain and forfeit.
40. The raisosn d’etr’e for such an act is to maintain purity of the economic system and deal with the proceeds of crime.
41. I have looked at the originating summons. The supporting affidavit makes the following allegations
  - a. Motor vehicle Registration No. KCX 111F and KCW 111B are proceeds of crime.
  - b. There were 11.9 grams of cocaine and 355.3 grams of cannabis recovered from the 1<sup>st</sup> Respondent at Nyali within Mombasa County -though there is only one Respondent)
  - c. The Applicant has not explained the source of his assets and funds.
42. The Applicant has legitimate interest in tracing, identifying and making an application for forfeiture of proceeds of crime.
43. The Respondent in his submissions stated that the he was acquitted under Section 215 of the Criminal Procedure Code for the offences charged in Shanzu Criminal Case No. 62 of 2020. There is no correction in the between.
44. There was application to have the vehicle that was argued before the then Chief Magistrate’s F.W. Macharia, as then she was, held that such an Application should not be filed in the criminal case. The Court then directed that they can lodge a claim with NTSA. The judgment was for the two specific offences. The same did not find the Respondent guilty.
45. The reason it is not tied to acquittal in any one charge, is because, the capacity to create crime is infinite. There are other crimes that are committed for which the police are yet to investigate. The specific crimes are delinked from proceeds of a crime. That is why the mantra for this kind of crime is explain or lose.
46. They also raise an issue with the period of seizure. It is said that the period is over 2 years. The Application to lift confiscation has not been made. My duty is to find if the said properties are proceeds of crime
47. There is one issue which the Respondent eschewed completely. The silence in dealing with the source of the funds was so loud.
48. In submissions, they raised issue with the state for not attaching the Respondent bank statement. It is true that the bank statements were not attached. There was futile attempt to attach them to the submissions. It is too late in the day.



49. The statements belong to and are accessible to the Respondent. He has cars which are suspected to be proceeds of crime. The Respondent knows his craft. He also knows what he does for a living. He states that he sold his 2 cars and bought others. He has not shown a statement of account showing how he legitimately acquired the assets. Though he was charged, in his Response he only deals with the fact that he was acquitted. Under section 92(4), the criminal case is irrelevant. The section provides as doth: -
- (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.
50. Thinking about this can be seen that you may buy a car, on credit and transfer in anticipation of a drug haul. Once arrested, one may show a log book predating the date of alleged crime and then walk. The agency is recovering civil debts not to pursue competences and investigations under Article 157 of [the Constitution](#). Secondly the tests are different.
51. In criminal law the standard is that of beyond reasonable doubt while in civil, it is a preponderance of evidence or balance of probabilities. These tests when applied to same set of result, yield different results in most of the time.
52. He does not claim in passing during being involved in drug or other illegitimate business. The duty to explain was not taken up. The respondent eschewed the duty. Failure to explain must be construed against the Respondent. In the case of *Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR*, the court, G V Odunga stated as doth: -
41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:
- “Section 112 of the [Evidence Act](#) Chapter 80 of the laws of Kenya provides:
- ‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’
- Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB (2003) 1 EA 108* the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”
53. I am therefore satisfied that the Respondent has not explained the source of funds to purchase Motor Vehicle Registration KCW 11B and KCB 111B.
54. From the statement, the business which the money is coming from is not explained. Motor vehicle business requires a license to operate, payment for water, electricity and other out goings. None were attached. I do not believe that the explanation by the Respondent.
55. Further the particulars ought to have been supplied to the Respondent by the Plaintiff at the time the statutory notice was issued. In the circumstances, the originating summons dated 20/5/2020 is allowed with costs of Kshs. 65,000/=.



## **Determination**

56. I allow the Application dated 20/5/2020 in the following terms: -

- a. Motor Vehicle Registration No. KCW 111B Mercedes Benz registered in the name of ALFIN Allaudin Alibhai and KCW 11113 Toyota Mark X registered in the name of Anas Motors Ltd are proceeds of crime.
- b. An order of forfeiture is hereby issued or the Motor Vehicle Registration KCX 111F Mercedes Benz and KCW 111B Toyota Mark X to be forfeited, to the state.
- c. The National Transport Safety Authority to transfer the said Motor vehicle KCF 111F Mercedes Benz and KCW 111B Toyota Mark X to the Government to be registered in the name of the Assets Recovery Agency.
- d. The requirement of the original log book to be produced be dispensed with and the current log books for the said Motor Vehicle Registration KCX 111F Mercedes Benz and KCW 111B Toyota Mark X, be issued in the name of Assets Recovery Agency.
- e. Costs of Kshs. 65,000 to the Applicant.
- f. File is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 29<sup>TH</sup> DAY OF JUNE, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

No Appearance for parties

Court Assistant Brian

