



Assets Recovery Agency v Kivaa Ventures Limited (Anti-Corruption and Economic Crimes Civil Suit E045 of 2022) [2023] KEHC 21315 (KLR) (Anti-Corruption and Economic Crimes) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E045 OF 2022**

EN MAINA, J

JULY 27, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

KIVAA VENTURES LIMITED RESPONDENT

JUDGMENT

1. By the Originating Motion dated 6th December 2022 which is supported by the affidavit of John Kingori sworn on even date and which is expressed to be made under Sections 81, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) the Applicant seeks the following orders:-
 - a) That this Honourable Court be pleased to issue an order declaring that the following funds are proceeds of crime and therefore liable for forfeiture to the State:
 - i. Kenya Shillings 10, 004, 905 In Account Number xxxx At Kenya Commercial Bank Limited In The Name Of Kivaa Ventures Limited
 - a. That this Honourable Court be pleased to issue orders of forfeiture of the following funds to the Applicant:
 - i. Kenya Shillings 10, 004, 905 In Account Number xxxx At Kenya Commercial Bank Limited In The Name Of Kivaa Ventures Limited
 - b. That this Honourable Court be pleased to issue an order that the above funds be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency.



- c. That this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.
 - d. That costs be provided for”.
2. The Application is made on the following grounds that the Respondent is Limited Liability Company whose account number xxxx held at Kenya Commercial Bank Limited is holding Kshs. 10,004, 905 /= reasonably suspected to be proceeds of crime; that on 27th May 2022, the Agency received information of a suspected case of defrauding members of public, racketeering, obtaining money by false pretense and money laundering committed by the Respondent; that pursuant to that information the Agency opened an inquiry file No.38 of 2022 and subsequently applied for and was issued with warrants to investigate the suspect account in Miscellaneous Criminal Application No. E052 of 2022; that preliminary investigations established that the Respondent, its directors and agents were involved in a suspected scheme of money laundering and received funds from members of the general public and later transferred the funds to the impugned bank account belonging to Respondent; that the impugned account received suspicious funds amounting to Kshs. 30,018,105/= between the period 2020 and 2021 which are reasonably believed to be funds obtained by false pretense from members of the general public; that within the said period there were massive suspicious cash withdrawals and transfers in a suspicious complex money laundering scheme; that part of the suspect funds received from the members of the general public were later used to acquire properties in the names of the respondent and other entities which the Agency is tracing; that there are reasonable grounds to be believe that the account is holding funds reasonably suspected to be Proceeds of crime or acquired from or are the profits or benefits of proceeds of crime and is being used as a conduit of money laundering contrary to Sections 3, 4, 7 and 16 of [Proceeds of Crime and Anti-Money Laundering Act](#) 2009 and that it is in the interest of justice that orders do issue forfeiting the funds specified above to the state.
 3. The Applicant also relied on the supplementary affidavit of Jilloh Ruphus sworn on 7th June 2023 and submissions dated 14th June 2023. On its part the Respondent opposed the forfeiture suit through a replying affidavit sworn by Stephen Muchoka Kimenchu on 23rd May 2023 and written submissions dated 30th June 2023.

The Applicant’s case

4. The gist of the Applicant’s case is that the Respondent was involved in fraud, racketeering, obtaining money from members of the public by false pretenses and money laundering. That upon obtaining warrants the Applicant discovered that between the period 2020 to 2021 the Respondents account received Kshs. 30,018,105/- from various individuals in a manner which is reasonably believed that the funds were obtained by false pretenses from members of the general public and that within the said period there were massive suspicious cash withdrawals and transfers in a complex money laundering scheme. The deposits and withdrawals are evident from a bank statement annexed to the application.
5. The Applicant contends that the Respondent did not tender any evidence to prove legitimacy of the funds and that the replying affidavit sworn by the Director of the Respondent, Stephen Kimenchu was an afterthought as it materially contradicted the statement recorded by the Respondent on 30th August 2022 which is annexed to the further affidavit of Jilloh Rufus an investigator with the Applicant and it ought to be disregarded; that the Respondent did not rebut nor disprove the evidence of the Applicant, and thereby failed to discharge the burden placed upon it by Section 112 of the [Evidence Act](#); that there arose a presumption that the failure to produce evidence indicates that the evidence if produced would have been unfavorable to the Respondent, leading to an irrefutable presumption that the Applicant had proved its case on a balance of probabilities. The Applicant submitted further that it was only



obliged to demonstrate a prima facie case to satisfy the court that the deposits were suspicious. Counsel relied on the case of *Nguku v Republic* [1985] KLR 412 to support the above argument.

6. Counsel for the Applicant also submitted that Sections 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* empower this court to issue forfeiture orders; that the Applicant has proved that the impugned funds were acquired illegitimately and illegally and are therefore proceeds of crime. Further that the offence of money laundering is a standalone offence and the Applicant need not in the first instance to prove a charge of money laundering as Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* makes it clear that the validity of a forfeiture order is not in any way affected by the outcome of criminal proceedings. For this proposition Counsel cited the case of *Assets Recovery Agency v Pamela Aboo*, and the Namibian cases of *Martin Shalli v Attorney General of Namibia & Others High Court of Namibia* case no. POCA 9/2011 and *Teckla Nandjila Lameck v President of Namibia* 2012 (1) NR 255 (HC).

The Respondent's case

7. The Respondent relied on a replying affidavit sworn on 23rd May 2023 by Stephen Muchoka Kimenchu and written submissions of learned Counsel dated 30th June 2023.
8. The Respondent referred to the burden of proof in Section 107 of the *Evidence Act* and the definition of the burden of proof in the *Halsbury's Laws of England* and submitted that the Applicant did not prove that impugned funds were illegitimate; that no witness was called to confirm the allegation that they were defrauded by the Respondent; that in fact, it was the Respondent's shareholder who was a victim of fraud as the events took place when he was in hospital in a coma; that the deponent learnt about the case when he was released from hospital and tried to access the bank account only to be informed that it had been frozen, and that some of the funds had been withdrawn while he was in a coma yet he was the sole signatory to the account.
9. Counsel submitted that the deponent was a well-known business man until he fell sick; that while sick he lost most of his crucial documents, including his academic, business and medical documents before he was rescued by his family; that requesting for the business documents would be unfair considering that he is trying to regain his memory; that he is paralyzed and immobile.
10. Counsel asserted that this suit is intended to deprive the deponent of his hard-earned money; that the Respondents has not been linked to any crime neither has the applicant proved a nexus between the Respondent's business and crime, therefore the funds should be released to the Respondent: Further that the application infringes on the Respondent's right to property under Article 40 of the *Constitution* and lastly that the right to property ought not to be deprived arbitrarily except where it is necessary in the general interest of the people of Kenya.

Issues for determination:

11. The parties framed the following issues:
 - a. Whether Kshs. 10,004,905 in account number 12843XXXXX at Kenya Commercial Bank Limited in the name of the Respondent are proceeds of crime and if so, whether they should be forfeited to the State
 - b. Whether the civil forfeiture proceedings are in violation of the Respondent's right to property



Analysis and determination

Whether Kshs. 10,004,905 in account number 12843XXXXX at Kenya Commercial Bank Limited held by the Respondent are proceeds of crime and if so, whether they should be forfeited to the State

12. The Applicant invokes this court’s jurisdiction under Section 90(1) and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) which state: -

“90. Application for forfeiture order

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”.

.....

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”.

13. The term “Proceeds of crime” is defined under Section 2 of the [Proceeds of Crime and Anti-Money Laundering 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”

14. It is trite that in civil forfeiture proceedings, it is immaterial that the suspect has been charged, tried, or convicted of a criminal offence. (See Section 92 (4) of the POCAMLA). Provided that the Applicant proves on a balance of probabilities that the funds are proceeds of crime then a forfeiture order shall



issue. Money laundering is a predicate offence and likewise the Applicant need not prove a conviction or the pendency of a charge of money laundering in order to succeed. In this respect, this court agrees with and reiterates the holding by Onguto J. in the case of *Republic - v- Director of Public Prosecution & Others* J.R Civil App' No 102 of 2016 that: -

150. It would appear to me therefore, and I so hold, that the prosecution need not prove, prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court of law that there was theft or forgery or fraud that led to the acquisition of the proceeds or property the subject of the money laundering proceedings.
 151. The criminal origins of the proceeds may be proved in the same way as any other elements of an offence can be proved. The offence of money laundering must be deemed as 'stand alone' offence. In proving that the proceeds or property are proceeds of crime even circumstantial evidence will be crucial. There is in my view no need to await any prior convictions of other offences before launching the prosecution of alleged money launderers. It is thus of little wonder that 'proceeds of crime' as defined under POCAMLA 2009 as "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 successfully 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" (emphasis)
 152. I have added the emphasis to illustrate that even the legislators appreciated instances when there may be no one to prosecute hence there may be no conviction for a predicate offence or crime. The need to prove a predicate offence before laying a charge of money laundering was effectively dispensed with."
15. Annexed to the Originating Motion is a bank statement of the impugned account. The same shows various Mpesa deposits of Kshs.10,000,000/= followed by cash withdrawals always of less than Kshs 1 million which would give rise to suspicion as the sources of the deposits is not indicated and the withdrawals were in variously in cash. In a statement recorded on 30th August 2022 at Kirigicha Police Post Stephen Muchoka Kimenchu, who is registered as the sole director and signatory of the Respondent's accounts, denied opening the KCB bank account No. 12843XXXXX or being privy to the account. He also denied having registered the Respondent company and stated that he only came to learn about the company and the bank account when he was asked by one Maxwell Mulonzi a former classmate to add a director and a signatory to the company accounts. He stated that during the period the company is alleged to have been registered and the account opened. He was hospitalized at the Coast General Hospital with serious ailments including meningitis, TB and a stroke and that thereafter he was transferred and admitted to Muranga Level Five Hospital. He denied the signatures in the account opening forms were his and said they were forgeries. He however stated that the passport photo used to open the account was his.
 16. However, in his replying affidavit sworn on 23rd May 2023, the Respondent deposes that the funds subject of forfeiture were acquired from his business of buying and selling minerals and stones; that the allegations of fraud and money laundering were false and that the court ought to set aside the preservation orders of 20th September 2022 to enable him access the funds to buy medicine.
 17. It is trite that once the Applicant has discharged the legal burden of proof the Respondent bears the evidential burden to demonstrate that the property in issue was lawfully acquired. This as was held in



the case of *Assets Recovery Agency – v- Fisher, Rohan and Miller, Delores,* Supreme Court of Jamaica Claim No 2007 HCV003259 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 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 thousands of United States dollars without more.”

There is no indication of any work place or higering 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.”

18. From the circumstances of this case, it is clear that Stephen Muchoki Kimenchi, the director of the Respondent did not register the company and did not open the bank account No xxxx domiciled at the KCB Bank. This he totally denied. In a statement which he himself recorded when called upon by the Applicant, he also disputed having registered the company and stated he could not have done so as he was in hospital at the time. If the alleged director of the company disputes registering the company and opening the bank account then the only logical conclusion is that the account was opened by a person who had a criminal intent. This in itself is enough for this court to make a finding that the funds in the account opened using forged documents are proceeds of crime.
19. In any event, the Respondent did not provide any documents or evidence of the existence of the business, which he alleges to have derived the monies from. One would have expected him to provide this court with documents evidencing registration of the business and also proof of the person he traded with so as to earn the sums deposited in the account. There is no proof at all of transactional records such as receipts, invoices or books of accounts annexed to his affidavit. As was observed by Mumbi Ngugi J, (as she then was) in the case of *Assets Recovery Agency v Lillian Wanja Muthoni Mbogo & others*-ACEC MISC. APPL No. 58 of 2018:

“...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.”
20. The explanation by the deponent of the replying affidavit that he was prevented from availing the documents by reason of illness is not convincing more so given the contradiction between his stamen and the replying affidavit.
21. One of the indicators of money laundering, is large deposits followed by cash withdrawals within a short span of time. In this case, the bank statement shows that the impugned funds were deposited into the account through Mpesa on 5th May 2021 and 11th May 2021 in three tranches of Kshs. 10,000,000. The funds were then withdrawn between 5th and 11th May 2021 in tranches of Kshs 990,000 and Kshs 950,000 which tranches clearly were purposed to escape the Ksh. 1 million scrutiny imposed by the law. (See Section 34 of the POCAMLA).

“The Director-General may by notice in writing and after giving the reporting institution a reasonable opportunity of being heard, require the reporting institution to comply by the



date or within the period as may be specified therein, with such directions as are necessary in connection with any matter arising out of a report made under Section 33.”

22. The Respondent has not explained the source of the funds and the subsequent suspicious withdrawals. It is my finding therefore, that in the absence of an explanation as to the legitimacy of the source of the funds the logical conclusion is that the sum of Kshs 10,004,905 preserved by this court is proceeds of crime liable to be forfeited to the state.

Whether the civil forfeiture proceedings are a violation of the Respondent’s right to property

23. The second issue is whether the making of forfeiture order would amount to a violation of the Respondents’ right to property under Article 40 of the *Constitution*.

24. Suffice it to say that while Article 40 does protect the right to property, this right does not extend to property that has been unlawfully acquired Article 40(6) of *Constitution* clearly states that:-

“40(6). The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

25. The upshot is that the Originating Motion dated 6th December 2022 succeeds and it is hereby ordered that: -

- a. That a declaration be and is hereby issued that the Ksh. 10,004,905 in Account No. 12843XXXXXX domiciled in the KCB Bank, Kilindini is proceeds of crime.
- b. That the said sum of Ksh. 10,004,905 be and is hereby forfeited to the state.
- c. That the said sum of Ksh. 10,004,905 be transferred to the Applicants account.
- d. That the Respondent shall bear the costs of these proceedings.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF JULY 2023.

E.N MAINA

JUDGE

