



**Assets Recovery Agency v Wanjiru; Kimuri Housing Company Limited
(Interested Party) (Civil Application E011 of 2023) [2023] KEHC 25985 (KLR)
(Anti-Corruption and Economic Crimes) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL APPLICATION E011 OF 2023**

EN MAINA, J

NOVEMBER 30, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

JOSEPH KINYANJUI WANJIRU RESPONDENT

AND

KIMURI HOUSING COMPANY LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. This matter concerns the forfeiture application over a house and land alleged to have been acquired by the Respondent using proceeds obtained from the trafficking and trade of narcotic drugs.
2. The Respondent was arrested on 7th December, 2016 and charged with the offense of Trafficking in Narcotic Drugs contrary to Section 4(a)(ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* of 1994 in the Senior Principal Magistrate Court at Jomo Kenyatta International Airport vide Criminal Case Number C.R. 161 OF 2016.
3. On 9th August 2018, the Respondent was convicted and sentenced to a 20-year imprisonment term. The Respondent was still in custody at the time of filing of the current application.
4. The Applicant received information that the Respondent had acquired assets using proceeds from the trafficking of narcotic drugs and opened an inquiry into the activities of the Respondent, File Number 37 of 2019. The applicant established grounds to believe that the subject assets were obtained through the trade in narcotic substances and seeks to have them forfeited to the Government of Kenya.



The Parties

5. The Applicant is the Asset Recovery Agency established under Section 53 of the Proceeds of Crime and Anti Money Laundering Act (herein after referred to as POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. The agency has authority to institute civil proceedings for the recovery of proceeds of crime and seek orders for forfeiture of assets to the government where there are reasonable grounds to believe that such assets are proceeds of crime. The agency also has policing powers under Section 53A of the POCAMLA to enable it investigate, identify, trace, freeze and recover proceeds crime.
6. The Respondent is the Registered owner of the subject assets and was the accused in Criminal Case Number C.R. 161 OF 2016. He is currently serving a prison term at Kamiti Maximum Prison. He alleges that prior to his conviction, he ran a brokerage business in construction material, real estate and second-hand clothing and that before that he was an employee of African Heritage.
7. The interested party was the vendor in respect of the sale of the subject assets.

The applicant's case

8. The application coming for consideration in this Judgement is the Originating Motion dated 19/06/2023 brought under Sections 81, 90, 92 and 131 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and Order 51 Rule 1 of the Civil Procedure Rules, seeking the following orders;
 - 1) That this Honourable Court be pleased to issue an order declaring that Residential House No. 118, Lr No. 7965/89 And Certificate Of Title I.r Number 201022 Mirema Drive (off Thika Road) Roysambu Within Nairobi County is proceeds of crime and therefore liable for forfeiture to the State.
 2. That this Honourable Court be pleased to issue an order declaring that LR No. Limuru East Block 1 (githunguri) Parcel N0. 1436 is proceeds of crime and therefore liable for forfeiture to the State.
 3. That this honourable court be pleased to issue orders of forfeiture of the following assets:-
 - i. Residential House No. 118, Lr No. 7965/89 And Certificate Of Title I.r Number 201022 Mirema Drive (off Thika Road) Roysambu Within Nairobi County.
 - ii. LR No. Limuru East Block 1 (githunguri) Parcel N0. 1436.
 2. That this Honourable court be pleased to issue vesting order and order that the subject assets be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency (the Applicant herein).
 3. That this court do make any other ancillary orders that it considers appropriate to facilitate the transfer of the property forfeited to the Government.
 4. That costs be paid by the Respondent.”
9. The application is based on the following grounds;
 - a. That the Applicant is the Assets Recovery Agency established under Section 53 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAMLA) with the mandate of identifying, tracing, freezing and recovering assets which are acquired from or are the profits of benefits of proceeds of crime or used or intended for the commission of crime.



- b. That pursuant to Part VIII of POCAMLA, Sections 81 – 89 of POCAMLA, the Agency is mandated 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.
 - c. That the Respondent is a male adult of sound mind residing at Mathare drive-in estate within Nairobi County and is the registered and known owner of the assets specified in the application.
 - d. That subject to the arrest and arraignment in court of the Respondent for charges of Trafficking of Narcotic Drugs, the Applicant commenced investigations to trace assets acquired through proceeds of the trade.
 - e. That during the arrest, a search on the Respondent's house recovered 4,857.87 grams of heroin with a market value of Kshs. 14,573,610.
 - f. That the Respondent was convicted for the offense of trafficking narcotic drugs contrary to the *Narcotic Drugs and Psychotropic substances (Control) Act* No. 4 of 1994 and sentenced to 2 years imprisonment.
 - g. That the Applicant received information on 6/8/2019 that the Respondent acquired the subject assets using proceeds from the illegitimate trade of trafficking Narcotic Drugs and opened an inquiry file number 37 of 2019 and preliminary investigations established reasonable grounds to believe that the assets are indeed proceeds of the illegal trade.
 - h. That it is in the interest of Justice that forfeiture orders issue forfeiting the subject assets to the Applicant.
 - i. That if the orders are not granted, the Respondent shall illegitimately enjoy the economic advantage derived from crime.
 - j. Any other ground to be adduced at the hearing.
10. The application is supported by the affidavit of Fredrick Muriuki, a Police Officer- attached to the Applicant as an investigator, sworn on 7/5/2023 which reiterates the grounds upon which the application is brought and further grounds as stipulated below.
 11. He deposed that the applicant had filed an exparte Misc Criminal Application No. 3508 & 3867 of 2019 seeking orders to search, inspect and obtain Bank documents under the listed accounts owned and controlled by the Respondent, which orders were granted, allowing access to Bank Account no. 0701xxxxx (Barclays Lunga Lunga Branch) & xxxxxxxx(Equity Bank Limited) in the name of Joseph Wanjiru Kinyanjui. The orders were served upon the Banks and the applicant obtained statements which established suspicious deposits of huge sums of cash and cheque deposits that indicate activities of money laundering. Both bank accounts were opened and operated by the Respondents. The deposits made were below Kshs. 1,000,000 to evade the reporting threshold as per the Central Bank of Kenya prudential guidelines for account holders to declare the source of money.
 12. He also deposed that the account statements established that the accounts were used as conduits of money laundering and there is reasonable suspicion to believe that the same was acquired from the illegitimate trade in narcotic drugs by the Respondent and are proceeds of crime.
 13. He explained that during the Respondent's arrest on 7th December 2016, the investigating team took an inventory of various items recovered and seized from the Respondent's house number 18



at Mathare Drive-In Estate in Ruaraka within Nairobi County and part of the items seized were packages containing brownish and whitish substances, wrapping paper, weighing scales, heaters, blender, exercise books, masks, mobile phones, wallet, trash bag, knives, scissors and a screw driver. The items were dispatched to the Government chemist for testing and results revealed that the brownish and whitish powder contained diacetylmorphine heroin at 30% purity, which is a narcotic drug under the Narcotic Drugs and Psychotropic Substance Control Act of 1994.

14. Investigations revealed that the Respondent acquired, conveyed, sold and distributed the narcotic drugs and laundered the proceeds by investing them in the subject assets with an intent of concealing, disguising and hiding the source of the funds used to acquire the assets, contrary to the provisions of the POCAMLA.
15. He further deposed that on 28/2/2023, the Applicant had obtained preservation orders against the subject assets from this court in ACEC Number E001 OF 2023, which was gazetted on 17/3/2023 vide Gazette Notice No. 3605 pursuant to Section 83(1) of the POCAMLA.
16. He contended that the Respondent's criminal activities are a threat to National Security, Public good and order, public interest and leads to erosion of societal good values by rendering the youth of the country unproductive and leading them to be susceptible to hard core criminal activities, thus depriving the Respondent of benefits of crime shall act as a deterrence and maintain National Security.
17. He added that there attaches International Obligations in every state to combat illicit trafficking of narcotic drugs and psychotropic substances, transnational organized crime and laundering of proceeds of crime by proper implementation of their National Domestic Laws.

The Respondent's case

18. The Respondent opposed the application in his replying affidavit, dated 28th July 2023 where he deposed that he is a lawful purchaser and owner of Residential House number 118 LR NO. 7965/89 of Title I.R Number 201022 Mirema Drive and L.R. No. Ruiru East Block 1 (Githunguri) parcel number 1435b respectively.
19. He deposed that the Applicant's originating motion has not proffered any firm and cogent evidence in support of its allegations to warrant forfeiture orders. The Applicant has not demonstrated that the subject assets are proceeds of crime, money laundering or intended to commit a crime as alleged. The applicant is acting on mere suspicion and has not met the legal threshold for the grant of the forfeiture orders sought in the application. The onus of proving the allegations lies on a balance of probabilities and the applicant is required to demonstrate, by evidence, that the properties were purchased by proceeds of crime of a money laundering scheme without which, the court cannot issue the orders sought. The applicant being bestowed with the capacity to carry out investigations along with other agencies, it has not presented evidence of its attempt to seek the assistance of other investigative agencies to demystify the "complex money laundering scheme" which is the subject of its application.
20. He deposed that POCAMLA requires this Court to task the Applicant with the onus of establishing, on a balance of probabilities, that the property to be forfeited has been used or is intended to be used in the Commission of an offense and/or is proceeds of crime. The burden can only be discharged by use of evidence to support the preferred allegations.
21. The Respondent explained that he purchased the Land upon which residential house number 118 LR N. 7965/89 of the Title I.R Number 201022 Mirema drive in January 2009, and a certificate of ownership issued by the interested party herein. The certificate of ownership has been attached.



22. He then purchased L.R NO. Ruiru East Block1 (Githunguri Road) Parcel no. 1436 on 27th October 2007. The sale agreement for the transaction has been attached.
23. The Respondent contended that the subject properties were purchased before the dates on which the Applicant claims that there were suspicious transactions in his accounts.
24. He further explained that earlier in his life, he had been employed with African Heritage which is now dissolved, and later owned his own business of brokerage in construction materials, real estate, and second-hand clothes which earned him sufficient income to purchase the subject assets.
25. The Respondent contends that there are no grounds to infer criminal conduct as far as the suit properties are concerned.
26. He asserts that should this Court grant the Applicant's prayers; it will give credence and undeserved legitimacy to the Applicant to continue to maliciously advance false allegations against Kenyans by frustrating their hard-earned money and forfeiting properties without reasonable grounds.
27. He deposed that he believes that the Applicant is acting maliciously and wants to abuse the court process to acquire his property despite Article 27(1) of *the Constitution* of Kenya affirming the significance of the Rule of Law by guaranteeing every individual equal benefits and protection before the law, hence cushioning him from the unfounded excesses of the Applicant.
28. The Respondent also deposed that the subject properties were acquired before the POCAMLA became Law in 2009.
29. He contends that this court should uphold his right to hold property and not to have it unreasonably taken away without justification as enumerated under Article 40 of *the Constitution* of Kenya, by rescinding the existing preservation order in relation to the funds, grant him access to the funds and dismiss the application for forfeiture with costs.

The Interested Party's case

30. The interested party filed a Replying Affidavit, sworn by Margaret Wambui Ngugi, the Director of the interested party, sworn on 11th July 2023.
31. She deposed that the interested party has wrongly been dragged into the proceedings herein as there is no cause of action against it and the applicant does not allege or plead any wrong doing on its part.
32. She further deposed that the interested party is a stranger to the allegations against the Respondent and it has no other relationship with the respondent save for that of a seller and purchaser.
33. She contended that the interested party's name should be struck out of the suit and the applicant should pay costs to the interested party.

The Applicant's response to the Respondent's and Interested Party's affidavits.

34. The Applicant filed a further affidavit sworn by Fredrick Muriuki on 2nd August 2023 where he deposed that the Respondent had failed to present evidence of his legitimate businesses or funds used to acquire the subject assets or explain the deposits in his Bank accounts.
35. He reiterated that investigations against the Respondent commenced in the year 2005, with him being part of a wider web of narcotic drug traffickers, one of whom their assets had already been forfeited.
36. He also reiterated that the Interested party had failed to comply with the preservation orders to hand over the title documents over the house in Mirema Drive.



The Applicant's submissions

37. Learned Counsel for the Applicant, Mr. Mohammed Adow submitted that the principal mandate of the Applicant is to recover assets acquired and/or is a benefit/profit of proceeds of crime or is used or intended for the Commission of crime. Sections 81, 82, 86 & 87 of the POCAMLA authorizes the Applicant to Institute preservation orders against assets where there are reasonable grounds to believe they had been acquired and/or are benefits of proceeds of crime, or used or intended to be used to commit crime.
38. The Applicant obtained preservation orders against the subject properties and filed the present application seeking their forfeiture. It argues that the issues for determination are whether the subject properties are proceeds of crime, whether they should be forfeited to the Government and whether the application for forfeiture violate the Respondent's Right to property as guaranteed by Article 40 of *the Constitution* of Kenya.
39. The applicant established that the Respondent was arrested, charged and convicted with the offense of dealing in Narcotic Drugs contrary to the provisions of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994. Substances seized from the Respondent's home had been tested and proven to contain heroin which is a narcotic drug.
40. The Applicant submits that monitoring of the Respondent started in the year 2005 and since then, he was under active investigations for trafficking, distribution and sale of narcotic drugs, organized crime and money laundering. That the Respondent is part of a wider narcotic drug traffickers who devised complex criminal mechanisms of acquiring, trafficking, distributing and selling narcotic drugs through their family members' associates where the Respondent played both as an acquirer and mule within and outside Kenya. The applicant explains that the assets of some of the wider criminal enterprise network, among them Joseph Wanjohi a relative of the Respondent, were forfeited vide ACES NO. 7 OF 2019 Assets Recovery Agency -v- Joseph Wanjohi and Others.
41. The Applicant submitted that the Respondent subsequently laundered the benefits of the narcotic drugs by investing it in the assets identified with an intent of concealing, disguising and hiding the source of the funds used to acquire the assets. That there are reasonable grounds to believe that the subject assets are proceeds of crime and the respondent has not given a reasonable explanation to prove a legitimate source of the same. It relied on the decision in Assets Recovery Agency -v- Pamela Aboo & Anti-Corruption Commission (Interested Party)(2018) eKLR, where the court noted that:

“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.

Where the person against who allegations have been made does not give a satisfactory explanation to rebut the allegations, it means that what is presented is not challenged . . . The moment the Applicant established through the Bank Statement that there were huge cash deposits, the burden shifted to the Respondent to explain the source. . . The Respondent had a clear duty to explain the source of the huge deposits into her account which she has failed to do.”
42. The Applicant submitted that it has proven that the subject assets were acquired through illegitimate sources and laundered with the intention of concealing the source of income. On the other hand, the Respondent had failed to prove the source of income. Proof of his alleged business was not produced.



43. The Applicant further submits that under paragraph 14 of the Respondent's replying affidavit, he seems to be conceding to having acquired the subject assets illegitimately and from proceeds of narcotic drugs but prior to coming into effect of the POCAMLA. It submits that recovery of assets which are proceeds of crime have no time limitation. It relied on the reasoning in *Stephen Vicker Mangira & Anor -v- Assets Recovery Agency & Others* where the court held that:

“...the position of the law complained about is not novel with the POCAMLA alone. Even prior to the advent of organized crimes, there was always the doctrine of strict liability where the evidentiary burden was upon the accused person. In such a case, one may say that the burden shifted. However, in my opinion, it is not the burden of proof that shifted but the evidentiary burden.”

44. On the issue of forfeiture, the Applicant submitted that under Section 90 of the POCAMLA, the agency is empowered to apply to this court for orders of forfeiture of any assets that are proceeds of crime and that are subject to preservation orders under the Act.

45. The applicant further submitted that this Court has powers under the POCAMLA to issue forfeiture orders if it finds on a balance of probabilities, reasonable grounds to believe that the assets in issue are proceeds of crime. It adds that the forfeiture of the assets in issue will deprive criminals of the ill-gotten gains, deter and prevent crime. Declining the forfeiture orders shall amount to granting permission to a party to benefit from proceeds of crime contrary to the import and purpose of the POCAMLA.

46. As for the interested party, the Applicant submitted that it is in possession of the Title Documents over Residential House No. 118, LR No, 7965/89 Mirema Drive and that it failed to comply with the preservation orders to surrender the title to the Applicant. The Applicant this prays that the interested party be ordered to surrender the title documents in its possession to the Applicant.

47. On the Respondent's Constitutional Right to property, the Applicant submitted that the subject property, being unlawfully acquired, is not constitutionally protected. It relied on Article 40(b) which states that:

“...the rights under this article do not extend to any property that has been unlawfully acquired.”

48. The Applicant urged the Court to allow the Originating Motion dated 17th May 2023 as prayed on its merit.

49. The Applicant cited the following cases in their submissions: *Assets Recovery Agency -v- Joseph Wanjohi & Others*, ACEC Application Number 7 of 2019; *Assets Recovery Agency -v- Pamela Aboo*, EACC (Interested Party)(2018) eKLR; *Nguku -v- Republic (1985)* KLR 412; *Stephen Vicker Mangira & Anor -v- Assets Recovery Agency & Others*; *General -v- New Africa Dimensions & Others*, High Court of Namibia Case No. POCA 10/2012; *Assets Recovery Agency -v- Rohan Antony Fisher & Others*, Supreme Court of Jamaica, Claim No. 2007 HCV003259; *Shabir Shaik & Others -v- State* Case CCT 86/06(2008) ZACC7; *Teckla Nandjila Lameck -v- President of Namibia* 2012(1) NR 255(HC); *Martin Shalli -v- Attorney General of Namibia*

The Interested Party's Submissions**

50. The Learned Counsel for the Interested Party, Mr. Mutua, submitted that the Interested Party was wrongly joined in the suit as there is no cause of action against it and it has no interest in the suit property.



51. He contended that the Interested party was a vendor of the suit property and after sale, ceased being a proprietor.
52. He also submitted that the Applicant had not bothered to interview the interested party, which would have avoided being dragged into the proceedings. Consequently, the interested party has incurred unnecessary legal costs and the Applicant should be condemned to pay the cost of the suit.

The Issues for determination

- i. Whether the interested party is properly enjoined in this application.
- ii. Whether the provisions of the POCAMLA apply for property that was acquired before it came into effect.
- iii. Whether the subject assets are proceeds of crime; and
- iv. Whether the subject assets should be forfeited to the Applicant.
 - v. Whether the application for forfeiture violates the Respondent's Constitutional Right to property.
 - vi. Who should bear the cost of the suit.

Analysis and Determination

Issue (i) Whether the interested party is properly enjoined in this application.

53. In its replying affidavit and submissions, the Interested party contends that it was improperly enjoined in the proceedings as there is no cause of action against it. The Applicant on the other hand submitted that the Interested Party is holding Title documents over the Respondent's house in Mirema drive, that it ignored the preservation orders to hand them over and that the Court should issue orders to the Interested party to hand over those documents.
54. However, a perusal of the Originating Motion does not mention the Interested party either in the prayers or the grounds. The Applicant only addresses the issue of how the Interested Party is a "person of interest" in these proceedings, in the submissions.
55. Order 1 Rule 3 of the Civil Procedure Rules provides that:

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

56. Aside from conceding that the Interested party was the vendor of the subject assets, it has not shed light on whether it is in custody of the title documents and how the process of sale was conducted. It has not controverted the Applicant's submissions that it refused to comply with the preservation order to hand over the title documents to the applicant. Title documents are a fundamental part of the forfeiture process and should the application be allowed, the party holding the documents would be subject to the court's orders. On this basis, I find that the interested party is properly enjoined in these proceedings.

Issue (ii) - Whether the provisions of POCAMLA apply for property that was acquired before it came into effect.



57. In his Replying Affidavit, the Respondent contends that the subject properties were purchased before the POCAMLA came into effect and thus they cannot be forfeited under its provisions. The Applicant submitted that even before coming into effect of the POCAMLA, the Doctrine of Strict liability applied, where the evidentiary burden of proof was upon the accused person.
58. In Francis Bennion's Statutory Interpretation, 2nd Edition, (Butter works, 1984) the question of application of Law retrospectively was explained as follows:
- “The essential idea of legal system is that current law should govern current activities... If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law... The true principle is that *lex prospicit non respicit* (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing law.'”
59. Indeed, laws are not meant to apply retrospectively. However, the question before this Court is whether the acquisition of the subject assets before the enactment of the POCAMLA precludes them for proceedings under the Act. I think not. Since the proceedings are based on the argument that the subject assets are proceeds of crime, the status of such assets would not change even if the crimes had been committed a century before the enactment of the Act. The Respondent's arguments would only hold water if the present application had been brought before the enactment of the Act. I thus find that the provisions under the POCAMLA apply even for properties acquired before the Act came into effect.

Issue (iii) - Whether the subject assets are proceeds of crime

60. The Applicant alleges that the subject assets are proceeds of crime following the Respondent's conviction on charges of trafficking of narcotic drugs. The Respondent has not controverted these claims.
61. In determining whether the subject assets are proceeding of crime, the Applicant has the first burden, on a balance of probabilities to demonstrate to Court that there are reasonable grounds to believe that the assets in issue are indeed proceeds of crime.
62. Section 47A of the *Evidence Act* provides that:
- “A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”
63. The Respondent was indeed convicted of the offense of Trafficking of Narcotic Drugs and convicted for 20 years' imprisonment. The term for appeal has since lapsed. Based on Section 47A of the *Evidence Act*, the Respondent's conviction is taken as conclusive evidence that he was guilty of the offense of Trafficking Narcotic Drugs.



64. Section 2 of the POCAMLA defines proceeds of crimes 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 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.”
65. From the above definition, proceeds of crime include assets acquired through funds derived from crime, as well as income generated from those assets.
66. In the case of *Assets Recovery Agency v Charity Wangui Gethi* [2018] eKLR the High Court held that:
- “It is the duty of the applicant to connect two different transactions so as to show a nexus with a suspicious criminal activity before founding a claim for forfeiture.”
67. Bearing in mind that there is a conviction of the Respondent for the offense of trafficking narcotic drugs which is not controverted, the Applicant has provided a reasonable nexus between the criminal activity that the Respondent was charged with and the evidence collected from his home, to demonstrate reasonable grounds to establish that the subject assets are proceeds of crime. The Applicant has discharged its burden.
68. The burden then shifts to the Respondent to demonstrate that the subject assets were legitimately acquired. The Respondent claims that he acquired the assets through legitimate earnings as an employee of African Heritage and later as a self-employed business man in real estate, construction materials and second-hand clothes. The Respondent also alleges the subject assets were acquired before the dates within which the Applicant claims that there was suspicious deposits made into the Respondent’s Bank account.
69. The Respondent has however not adduced any evidence of his earnings while he was employed, registration certificates of his businesses or their books of accounts to ascertain that the source of funds used to purchase the subject assets was legitimate. He did not also annex evidence detailing the time when the assets were acquired although he made mention of it in paragraphs 8 & 9 of his replying affidavit.
70. Section 112 of the *Evidence Act* which states that:
- “In any Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
71. From the provisions of the above section, the source of the Respondent’s funds could only have been explained by the Respondent as those are facts that are “especially within his knowledge” placing the burden of proving or disproving them solely on him.
72. Without demonstration of the means to acquire an asset, that asset falls within the definition of unexplained assets and where a sufficient nexus connect the asset to crime, it then falls within the definition of “proceeds of crime”.
73. Unlike criminal proceedings that are decided on the standard of proof of “beyond a reasonable doubt”, forfeiture proceedings of assets that are found to be proceeds of crime are decided on the Civil standard of proof of, “a balance of probabilities”.



74. I am persuaded by the reasoning in the case of Assets Recovery Agency -v- Rohan Anthony Fisher & Others, Supreme Court of Jamaica, Claim Number 2007 hcv003259, the Court held that:

“ . . . 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 . . . The only reasonable and inescapable inference based on all the evidence is that the properties seized are obtained through unlawful conduct and are therefore recoverable properties. This Court finds the Applicant’s case proved and will make a recovery order in respect of the properties seized as per the freezing order. . . ”

75. The Applicant has discharged its burden of proof that the that the subject assets have been linked to an actual crime of trafficking narcotic drugs. The Respondent has not adequately explained a legitimate source of income save for claiming he made legitimate income from employment and personal businesses. I thus find that the subject assets are indeed proceeds of crime.

Issue (iv) - Whether the subject assets should be forfeited to the Applicant.

76. I have held that the subject assets, without evidence of legitimate sources of funds to acquire them, are indeed proceeds of crime.

77. The rationale behind forfeiture of proceeds of crime is to deter crime by denying those involved from benefitting from it, for the good of the society. In the case of Abdurahman Mahmoud Sheikh & 6 Others v Republic & Others (2016) eKLR the Court stated that;

“The letter, spirit purpose and gravamen of the [Proceeds of Crime and Anti-Money laundering Act](#) is to ensure that one doesn’t benefit from criminal conduct and that should any proceeds of criminal conduct be traced then it ought to be forfeited, after due process, to the State, on behalf of the public which is deemed to have suffered some injury by the criminal conduct”

78. In the case of Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7(supra) it was held that:

“ the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realization that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order...”

79. In the case of Assets Recovery Agency v Ali Adbi Ibrahim [2022] eKLR the Court held that:

“Once this court makes a finding that the assets or property of the Respondent are proceeds of crime - . . . it is left with no alternative but to make an order for forfeiture. That is my reading of Section 92(1) of the [Proceeds of Crime and Anti-Money Laundering Act](#). . . I am also not persuaded that an order of forfeiture is a violation of the Respondent’s right to property guaranteed in Article 40 of [the Constitution](#).”

80. As stated elsewhere in this decision, it is my finding that the applicant has established, on a balance of probabilities, that the subject assets are proceeds of crime. The Respondent has been unable to



reasonably demonstrate to this Court that the funds from legitimate sources of income purchased the subject assets in his name or dissociate the asset from the criminal activity he was convicted of. I therefore find that the subject assets are liable to forfeiture to the State.

Issue (v) - Whether the forfeiture application violates the Respondent's Constitutional Right to property

81. The Respondent has claimed that the present application violates his Right to property as guaranteed by *the Constitution* of Kenya.

82. Article 40(1) of *the Constitution* of Kenya provides as follows:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.”

83. However, the rights conferred by the above section are not absolute and they may be limited in certain circumstances. Section 40(6) of *the Constitution* provides:

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

84. While Article 40 of *the Constitution* of Kenya guarantees all persons the right to property, it only protects property that is legally acquired. The current application does not violate the Respondent's right to property as guaranteed by *the Constitution* as it concerns illegally acquired property.

85. As for the Interested Party I note that in its written submissions Counsel has stated that it ceased being the proprietors of the properties once it sold them. It does not however dispute that the title documents of the property in question are in its possession. Accordingly an order be and is hereby made that the Interested Party shall surrender those documents to the ARA/Applicant forthwith and in any event not later than 14 days from today.

86. The upshot is that the Originating Motion dated 17th May 2023 is allowed and orders granted as follows: -

1) That an order be and is hereby issued declaring that Residential House No. 118, Lr No. 7965/89 And Certificate Of Title I.r Number 201022 Mirema Drive (off Thika Road) Roysambu Within Nairobi County is proceeds of crime and therefore liable for forfeiture to the State.

2. That an order be and is hereby issued declaring that LR NO. Limuru East Block 1 (githunguri) Parcel N0. 1436 is proceeds of crime and therefore liable for forfeiture to the State.

3. That orders of forfeiture of the following assets be and are hereby issued:-

i. Residential House No. 118, Lr No. 7965/89 And Certificate Of Title I.r Number 201022 Mirema Drive (off Thika Road) Roysambu Within Nairobi County.

ii. LR NO. Limuru East Block 1 (githunguri) Parcel N0. 1436.

4. That vesting order be and is hereby issued and the subject assets be and are hereby forfeited to the Government of Kenya and transferred to the Assets Recovery Agency (the Applicant herein).



5. That the Interested Party shall surrender the title documents for the above forfeited properties to the Assets Recovery Agency forthwith and in any event not later than 14 days from today's date.
4. That the costs of these proceedings shall be borne by the Respondent.

Orders accordingly.

Dated, Signed and Delivered virtually on this 30th day of November, 2023

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E. MAINA

JUDGE

In the presence of:

Mr. Adow for ARA/Applicant

Ms Muluvi for Erick Mutua SC for the Interested Party

Ms Mwilu and Mr. Kang'ahi for the Respondents

Court Assistant - Raymond

