



Assets Recovery Agency v Musau & 3 others; G4S Kenya Limited (Interested Party) (Civil Application E021 of 2021) [2023] KEHC 26184 (KLR) (Anti-Corruption and Economic Crimes) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL APPLICATION E021 OF 2021**

**EN MAINA, J
NOVEMBER 23, 2023**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

JACOB MUTUKU MUSAU 1ST RESPONDENT

AMOS MUTUKU MUSYOKA 2ND RESPONDENT

SYLVESTER MBULI MBUVI 3RD RESPONDENT

PATRICK KARANJA NJAU 4TH RESPONDENT

AND

G4S KENYA LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. The forfeiture application herein concerns money, which was stolen while in Mombasa on 12th February 2010 while on transit in a vehicle belonging to the Interested Party.
2. Together with two other persons who are not the subject of these proceedings, the Respondents were arraigned in the Chief Magistrates Court in Mombasa and charged with various offences related to the theft of the money in MCCR 857 of 2010: *Republic -v- Sylvester Mbisi Mutua & 7 others* (hereinafter referred to as “the Criminal Case”). The basis of the charges against the Respondents was money and other items found in their possession by the police during the investigations into the heist. However, in a judgement delivered on 21st July 2017 the Respondents were all acquitted of the charges. The money



and other items were not returned to them. The trial court made a finding that G4S was the special owner of the money.

3. The Respondents filed an application before the trial court for the release of the items found in their possession at the time of the arrest but which were not produced in evidence at the trial. The court declined to grant the orders stating it was functus officio and that it could not make an order for the release of items that were never produced in court. That prompted the Respondents to move to the High court where they filed a miscellaneous application, Mombasa Misc. Application No. 19 of 2020. It is not clear to me what orders they were seeking but in its ruling delivered on 23rd September 2021 the court ordered that the items found in the possession of the Respondents but which were not part of the case be released to them. I presume those to be a fridge recovered. HiFi system with two speakers, Samsung TV, Samsung DVD, 7 seater brown sofa set, one wall unit, one carpet, a brown leather wallet with an ATM Card, Safaricom sim card, assorted business cards and National ID Card. The court also granted leave to the Interested Party to be enjoined as it laid claim to the cash following the finding of the trial court it was the special owner of the same. It is clear from that ruling that the cash was not to be released. It appears, however that by the time of filing this forfeiture application the High Court in Mombasa had not pronounced itself on the main application.
4. The Applicant herein obtained preservation orders for the funds on 14th February 2022 and gazette the same on 25th February 2022 as required under Section 83 of the [POCAMLA](#). The order prohibited the Respondents and the Interested Party, their agents and representatives from transferring or in any manner dealing with the cash.

The Parties

5. The Applicant is the Asset Recovery Agency which is 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 to seek orders for forfeiture of property to the government where it is proved on a balance of probabilities that the property is proceeds of crime. Section 53A of the [POCAMLA](#) also vests the Agency with police powers to investigate, identify, trace, freeze and recover proceeds crime.
6. The 1st Respondent was the 3rd accused in the CMCRC No 857 of 2010. He has described himself as a businessman dealing with export of mangoes.
7. The 2nd Respondent was the 5th accused in the criminal case and alleges he is a teacher and a trader in cowrie shells.
8. The 3rd Respondent was the 4th accused in the criminal case. He described himself as a business man in Nairobi.
9. The 4th Respondent was the 7th accused in the criminal case. He too describes himself as a business man with a shop in Githurai.

The application

10. In the Originating Motion dated 26th May 2022 brought under Sections 90 & 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#), the ARA/ Applicant seeks orders as follows:-



- i. That this Honourable Court be pleased to issue an order declaring that 150,000 euros in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
 - ii. That this Honourable Court be pleased to issue an order declaring that 50,000 euros in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
 - iii. That this Honourable Court be pleased to issue an order declaring that Kshs. 2,000,000 in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
 - iv. That this Honourable Court be pleased to issue an order declaring that USD 5,700 in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
 - v. That this Honourable Court be pleased to issue an order declaring that 4,000 Great Britain Pounds in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
 - vi. That this Honourable Court be pleased to issue an order declaring that KSHS. 685,000 in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
 - vii. That the costs of this application be provided for.
11. The application is based on grounds, inter alia;-
- a. That the Agency received information from the Directorate of Criminal Investigations on suspected handling of stolen money by the Respondents.
 - b. That pursuant to the information the Agency initiated investigations into inquire the activities of the Respondents with a view of identifying, tracing, freezing and forfeiture of proceeds of crimes under the [Proceeds of Crime and Anti-Money Laundering Act](#).
 - c. That investigations established that on 12th February 2010 at Mombasa Township in Mombasa District, within the Coast Province, the Respondents conspired to steal US Dollars 640,000, 93,000 Great Britain Pounds, 1,775,000 Swiss Francs and Kshs. 7,000,000 which cash was on transit from Mombasa to Nairobi.
 - d. That Investigations established that the Respondents were charged with various offenses before the Chief Magistrate's Courts in Mombasa Criminal Case No. 857 of 2010: Republic -v- Sylvester Mbisi Mutua & 7 Others.
 - e. That Investigations established that the funds which are in local and foreign currency were recovered from the residences and/or possession of Respondents on circa March 2010.
 - f. That Investigations established that the funds held in the custody of the Interested Party are reasonably suspected to be proceeds of crime emanating from the theft orchestrated by the Respondents.
 - g. That there are reasonable grounds to believe that the funds in the custody of the Interested Party are proceeds of crime emanating directly from the theft and are proceeds of crime liable to forfeiture under [POCAMLA](#).



- h. That there are justifiable reasons and grounds to warrant the issuing of the orders sought.
12. The application is supported by the affidavit of Fredrick Muriuki sworn on 26th May 2022 which reiterates the grounds aforesated.
13. The Respondents opposed the application through replying affidavits, all sworn by themselves on 7th November 2022.

The 1st Respondent's case

14. The 1st Respondent deposed that he was in Mombasa on the day of the alleged theft to purchase a Motor Vehicle; that the applicant has not disclosed that the impugned properties were dealt with in Mombasa HC Misc Application 19 of 2020 where substantive orders were made in a ruling dated 23rd September 2021 directing the release of the properties to the Respondents as their rightful owners. He contended that the ruling has neither been appealed nor set aside hence rendering these proceedings Res Judicata.
15. Further, that the Respondents were acquitted of the charges in Mombasa CMCR No. 857 of 2010 and that case cannot be used by the Applicant to prosecute this application; that the search carried out in his house in Kitengela and the consequential confiscation of the money found there was illegal and this court ought not to aid the applicant to rely on the criminal proceedings to deny the Respondents of the right to enjoyment of their right to property guaranteed in Article 40 of the Constitution of Kenya.

The 2nd Respondent's case

16. Like the 1st Respondent, the 2nd Respondent stated that the question of whether the funds in issue are proceeds of crime was dealt with by the High court in Mombasa; that the court ordered which ordered the release of the funds to the Respondents; that this court should not be guided by the investigation in the failed criminal case; that he was acquitted along with the other Respondents and using the same charges in the present application amounts to witch hunting; that there is no proof that he participated in the alleged theft and there was no evidence linking him to the conspiracy or to receiving the alleged funds. He contended that he is a teacher and trader in cowrie shells and his money was made legitimately. Further, that the search conducted in his house was illegal as the officers did not have a valid search warrant and as such, all the property and funds recovered from the search cannot be used to prosecute the instant application.

The 3rd Respondent's case

17. The 3rd Respondent reiterated the 1st and 2nd Respondent's position that a competent court had made a finding that the funds were not proceeds of crime and ordered the same released to the Respondents. He stated that he is a businessman trading in Nairobi in the name and style of Hakika Agencies; that he has made his money through legal means; that the search carried out in his house was illegal and anything seized during the search could not be used as evidence; that there were no motor vehicles involved in the search yet the Applicant had made reference to vehicles in the application and further that the 9th and 10th paragraphs of the supporting affidavit refer to a person different from him as there was nothing connecting him to the alleged theft and he had been acquitted by the court.

The 4th Respondent's case

18. Similarly, the 4th Respondent stated that as determined by the High Court in Mombasa the cash seized from them was not proceeds of crime; that the proceedings in the criminal case should not be relied



upon in these proceedings; that there was no evidence linking him to the theft and destruction of property and as such the applicant's allegations against him are baseless. He contended that he is a businessman with a shop in Githurai from which he made his money legally. Further that the search conducted in his shop was illegal as the officers did not have a valid warrant and all the items confiscated during the search cannot be used as a basis to prosecute the current application.

Applicant's Response to Respondent's affidavits

19. In the further affidavit sworn by Fredrick Muriuki on 19th January 2023, he deposes that the validity of a forfeiture order is not affected by the outcome of criminal proceedings in respect of an offense with which the property concerned is associated; that there has been no other suit between the Applicant and the Respondents and Interested Party concerning the assets in issue herein hence res judicata does not apply; that the Applicant has demonstrated that the funds recovered from the 1st Respondent's house were from the theft perpetrated on 12th February 2010; that investigations carried out by the Applicant established that the 1st Respondent was charged with stealing money in different foreign currencies on or before 12th February 2010 and in the alternative, dishonestly receiving and retaining the money otherwise than in the course of stealing; that the evidence adduced placed the 1st Respondent at the scene of the theft. Further that the searches conducted in the houses of the Respondents were legal and that the police conducting those searches made inventories of the cash and items recovered; that the Respondent's right to property is not without limitation.
20. He further deposed that the Applicant was not a party in Mombasa HC Misc. Application No. 19 of 2020 and is not privy to the orders issued therein; that the 2nd and 3rd Respondents were charged with conspiracy to commit a crime and in the alternative, handling stolen property and that they had admitted, in their recorded statements, to handling the stolen money. He deposed that the mention of motor vehicles was inadvertent and a typographical error and reiterated that the sums sought to be forfeited were exhibits in the criminal case and the Respondents have not offered any cogent documentation to show the source of the funds they claim are theirs.
21. On the 27th February 2023 the 1st Respondent swore a further replying affidavit where he deposed that:-the orders issued in CMCR No. 857 of 2010 to release monies held by the Interested Parties to the Respondents after their acquittal had not been appealed;The Applicant did not carry out separate investigations but relied on the criminal proceedings yet it claims the same do not affect the outcome of these proceedings;The Applicant did not file these proceedings since the year 2010;This matter is not Res Judicata but Sub judice since there is a matter between the Respondents and the Interested Party before the High Court in Mombasa being Misc. Application No. 19 of 2020.

The Interested Party's case

22. The Interested Party's case is contained in a Replying Affidavit sworn on 31st July 2023 by Laurence Okelo where he deposes as follows: The Interested Party was the complainant in Mombasa CMCR Case No. 857 of 2010 as the monies stolen belonged to its clients; that the trial Court found Sylvester Mbisi Mutua and Humphrey Wekesa Wanjala guilty and convicted them on the charges of conspiracy to commit a felony and stealing by servant; that the other accused persons (now Respondents herein) were acquitted; that in its judgement the trial court made a finding that the Interested Party herein was the "special owner" of the cash that was the subject of the criminal proceedings; that the Respondents cannot lay claim to the money as they did not do so in the trial court and that in any event the evidence had shown that the money belonged to it.



The submissions

The Applicant's submissions

23. Learned Counsel for the Applicant submitted that the Applicant's Principal mandate is to recover properties acquired where there are reasonable grounds to believe that the property is used or intended to be used to commit crime or is a proceed of crime; that the Applicant has proved that on or about the 12th of February 2010 the Respondents conspired to steal the money which was in different currencies for which they were charged; that the Applicant obtained orders for preservation, of the money, which were subsequently gazetted on 25th February 2022 and it is now seeking forfeiture of the same; that the Respondents have not demonstrated that the source of the funds found in their possession is legitimate; that their replying affidavits only state the economic activities that they are involved in but no evidence has been tendered to support their assertion that the monies which were in local and foreign currencies were lawfully earned; that the Applicant has proved on a balance of probabilities that the cash currently in the custody of the Interested Party is indeed the proceeds of the crime perpetrated on 12th October 2010 and this court should declare it as such. Further that Section 90 of the [POCAMLA](#) empowers this court to issue the forfeiture orders sought; that such orders are not in any way affected by the outcome of criminal proceedings and that according to Section 82(2) of the [POCAMLA](#), the monies which are in both local and foreign currency are realizable property hence this court may grant the orders sought.

The submissions of the Respondents

24. Learned Counsel for the Respondents submitted that the Applicant has not adduced cogent evidence since it did not conduct its own investigation but instead relies on statements collected by an investigating officer who did not testify at the trial and who the Respondents did not get an opportunity to cross examine; that the said statements were not corroborated, are hearsay and thus inadmissible. On the question of whether this matter is sub-judice, Learned Counsel submitted that by the time these proceedings were instituted HC Misc. Application No. 19 of 2020 was yet to be decided; that the issue of whether the properties seized were the proceeds of crime was raised in that application and the Judge had ruled that no proof had been adduced to substantiate the allegation that they amounted to proceeds of crime. Counsel urged this court to dismiss these proceedings.

The submissions of the Interested Party

25. The Interested Party submitted that the Applicant has demonstrated that the funds in issue were recovered from the Respondents following a heist orchestrated by its employees in collusion with the Respondents while the cash was on transit from Mombasa to Nairobi; that its employees were convicted for the theft; that the funds were recovered from the Respondents; that cash in various denominations in foreign currency were recovered from the 1st Respondent; that the 2nd Respondent led police to the banks of Mita Siana River where money in various denominations was recovered; that US dollars 5700 were recovered from the 3rd Respondent at Muhinde Village in Kitui and that a laptop bag containing cash in a polythene bag was found hidden in the shop of the 4th Respondent and that this occurred at around the time the heist took place.
26. Counsel for the Interested Party stated that unlike the cash in Kenyan currency, that in foreign currency had a paper trail showing the source and none of the Respondents had offered a sufficient explanation as to how it came into their possession; that while the Respondents place much reliance on their acquittal claim the funds, they did not do so during the trial; that the funds in issue were stolen from it; that the trial court acknowledged it as the "special owner" of the cash recovered from the Respondents;



that the finding has not been challenged on appeal and as such the ownership of the impugned funds was resolved by a court of competent jurisdiction and the Respondents cannot lay claim to it.

The Applicant's Supplementary submissions (Reply)

27. Counsel for the Applicant submitted that the Respondent's further replying affidavit dated 27th February 2023 was filed without the leave of this Court and should therefore be struck out; that the 1st Respondent did not file the authority to swear the affidavit on behalf of the Respondents; that gathering of evidence amounts to investigations and further that the evidence adduced by the Applicant is cogent as it is of high quality and it leads to a reasonable and satisfactory conclusion and determination. Counsel argued that the Respondents did not challenge the evidence presented by the Applicant and reiterated that the monies that are the subject of this application are the proceeds of crime and the same should be forfeited.

Issues for determination

28. I have carefully considered all the material placed before this court by the parties including the rival submissions and cases cited and in my view the issues for determination are as follows: -
- i. Whether the current proceedings are Sub-Judice;
 - ii. Whether the Forfeiture Orders sought contradict the release orders made by the Court in Misc. Application Number 19 of 2020;
 - iii. Whether the funds found in the possession of the Respondents are proceeds of crime liable for forfeiture to the State;
 - iv. Whether the judgement in the criminal case which referred to the Interested Party as the "special owner" of the funds in issue is conclusive proof of ownership.
 - v. Whether the preserved funds and assets should be forfeited to the Government.

Issue (i) - Whether the current proceedings are Sub-Judice

29. On the question of whether this application is sub-judice, it is now settled law that the following conditions must be present before a case is ruled to be sub-judice: Firstly, there must exist two or more suits. Secondly, the matter in issue in the suits or proceedings must be directly and substantially the same. Thirdly, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title. Lastly the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed – see the case [*Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)*](#) [2020] eKLR where the Supreme Court stated:

“The term ‘sub-judice’ is defined in [*Black's Law Dictionary*](#) 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over



the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

30. Applying the above principles to this case it is my finding that sub-judice does not apply for reason that firstly, the case in the High Court in Mombasa relates to release of items recovered from the Respondents that were not produced at the trial while the current proceedings relate to the forfeiture of funds which were found in the possession of the Respondents and which it is alleged are proceeds of crime. Secondly the parties in the two cases are different in that the Applicant herein was not a party in the case in Mombasa. The application is therefore properly before this court.

Issue (ii): - Whether the Forfeiture Orders sought contradict the orders made by the High Court in Mombasa in Misc. Application Number 19 of 2020;

31. The orders made by the High Court in Mombasa were in respect to items that had been recovered from the Respondents by the police during the investigations. A perusal of the ruling of that case reveals that the court refrained from making orders in regard to the cash and confined itself to the other items seized from the Respondents but were not part of the case. After commenting on the manner in which the monies were recovered the court stated:

“ 47. Concerning the other items recovered from the Applicants, no representation was made as to their release and in that regard, this court will confirm the order that they should be released to the Applicants forthwith by the 1st Respondent.”

Clearly the release order did not concern the funds which are the subject of these proceedings.

Issue (iii): - Whether the funds found in the possession of the Respondents are proceeds of crime liable for forfeiture to the State;

32. Section 2 of the [POCAML](#) defines proceeds of crimes to mean: -

“ 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.”

33. Any property derived from as a result of or in connection with an offence is therefore proceeds of crime. However, the Applicant need not prove the commission of a specific offence in order to succeed.

34. In the case of *Director of Assets Recovery Agency & others -v- Green & Others* [2005] EWHC 3168, it was stated: -

“In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of 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.”



35. Similarly in the case of *Assets Recovery Agency v Lilian Wanja Muthoni t/a Sabara Consultants & 5 others* [2020] eKLR it was held that: -

“ 132. The principle is that once the applicant establishes on a balance of probabilities that the respondents have in their accounts funds for which they not been able to show a legitimate source, the onus is on them to satisfy the court that the assets and funds held in their accounts are not the proceeds of crime. In *Assets Recovery Agency –vs- Roban Anthony Fisher, and & Others* (supra), the court, in issuing an order for recovery of money found to be proceeds of crime, emphasized the evidential burden placed on a respondent to show the lawful source of the funds in issue and observed as follows:

“...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 higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence, is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.....”

36. It was also the holding in the case of *Assets Recovery Agency v Pamela Aboo: Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR where the court stated: -

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

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

37. Where the Respondent is unable to discharge the evidential burden then the court can safely find the property is proceeds of crime as defined in Section 2 of the *POCAMLA*.

38. In a civil forfeiture application, the burden of proof first lies with the Applicant to prove to the satisfaction of the court that indeed impugned cash or properties are reasonably believed to be proceeds of crime. The standard of proof is on a balance of probabilities. Once the legal burden is discharged



the evidential burden of proof shifts to the Respondents to adequately demonstrate that the assets or cash are legitimate. This is in consonance with Section 112 of the *Evidence Act* which states: -

“ 112. 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.”

39. In this case it is not disputed that the monies in issue were the subject of criminal proceedings in Mombasa CMCR Case No 875 of 2010. The Respondents herein were accused persons in the case and while they were acquitted the court found that the cash did not belong to them. It found that the Interested Party was the special owner of the cash. This court has been urged not to consider the proceedings in the criminal trial in arriving at its finding in this case, for reason that the outcome of these proceedings are not dependent on the outcome of the criminal case. While that proposition is correct in law it is to be noted that civil forfeiture is a completely different regime from criminal proceedings. Unlike a criminal case where it is sought to punish the accused, civil forfeiture targets the property but not the guilt of the accused person. The proceedings have been described as actions in rem- see the case of *NDPP V Prophet* (5926/01) (2003 ZAW CHC 16) where the court stated: -

“ In fact, the Act explicitly separates the criminal process from the civil forfeiture process. Therefore, Chapter 6 is focused not on “wrongdoers, but on the property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owner or possessors of the property is, therefore, not primarily relevant to the proceedings.”

40. It is my finding therefore that as the focus is not on the guilt of the Respondents the argument that the Applicant cannot rely on the criminal proceedings to prove the origins of the monies simply because the Respondents were acquitted is misconceived and cannot hold. That would be an erroneous interpretation of the law on civil forfeiture.

41. Section 47A of the *Evidence Act* provides that where a person is convicted and does not appeal the conviction becomes conclusive evidence that he committed that he committed the offence. In this case two of the Respondent’s co-accused were found guilty of stealing the monies which came into their possession by virtue of them being employees of the Interested Party. It was alleged that in the course of investigations law enforcement officers found part of the stolen money in the possession of the Respondents. The recovered sums were produced in court as exhibits and in the judgment the trial court made a finding that the same constituted part of the monies stolen while they were being transported in a vehicle belonging to the Interested Party. Neither the two persons who were convicted nor the Respondents herein appealed that finding. They have also not, in this case, adduced evidence to the satisfaction of this court, to rebut the Applicant’s assertion. Apart from claiming they were businessmen dealing with this or the other products they did not produce licenses/business permits authorizing them to engage in such business. Neither did they produce documents such as books of accounts, invoices, delivery notes or receipts as would convince this court that they engaged in such business. As for the 1st Respondent he did not produce documents to prove a legitimate source of the funds with which he alleges to have gone to purchase a vehicle with. It is also telling that in the criminal trial none of them laid a claim to the money. That they do so now is an afterthought based merely on the fact that they were acquitted but not because they owned the money. In the premises I find that the Applicant has proved on a balance of probabilities that the funds in issue are indeed linked to an offence, albeit that the Respondents were adjudged not guilty of the crime.



Issue (iv): - Whether the judgement in the criminal case which referred to the Interested Party as the “special owner” of the funds in issue is conclusive proof of ownership.

42. While the Applicant seeks to have the cash found in the possession of the Respondents forfeited for being proceeds of crime, the Interested Party claims that the money should be released to it as the same was stolen from it while in transit and also for reason that, in its judgement, the trial court found that it was “the special owner” of that money.
43. I have considered this issue carefully and in my view the finding of the trial court is not conclusive proof that the Interested Party is the owner of the money. The finding of the trial court stems from Section 272 of the Penal Code which states: -
- “ 272. When a person receives, either alone or jointly with another person, any money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received, unless the money is received on the terms that it shall form an item in a debtor and creditor account, and that the relation of debtor and creditor only shall exist between the parties in respect of it.”
44. The Interested Party was, admittedly, not the general owner of the funds. Special ownership does not confer proprietary rights: the thing still belongs to the owner. In effect therefore, whereas the Interested Party could claim a better interest to the money vis a vis the Respondents, for the purpose of these proceedings it would have to prove a proprietary right to the satisfaction of this court. The standard of proof is on a balance of probabilities. The real or general owner of the funds are the person(s) for who the Interested Party was transporting the money if at all. I say if at all because no other person(s) have expressed an interest in the money which is unusual and also because save for adducing evidence that the money was stolen by its employees while it was on transit, the Interested Party did not disclose the identities of the clients it alleges it was transporting the money for. It did not tender any documentary evidence such as the paper trail it claimed it had kept in respect of the foreign currency. Accordingly, it neither proved on a balance of probabilities that it was the real owner of the money nor did it prove the source of the funds as would warrant this court to release the funds to it and I decline to do so.
45. The upshot therefore is that neither the Respondents nor the Interested Party have proved on a balance of probabilities that the money is their legitimate property. The applicant’s evidence that the cash is proceeds of crime was not therefore rebutted.
46. The issue of the validity or otherwise of the searches which yielded the stolen cash ought to have been raised in the criminal trial but not in these proceedings. Here we are dealing with cash which has already been adjudged to be stolen funds and as this is not an appeal this court cannot go into that issue. Moreover in the statements made by the Respondents to the police which statements were recorded by different Chief Inspectors of Police and hence are admissions under Section 20A of the Evidence Act and which were annexed as evidence in this case the Respondents did not lay claim to those funds. It is clear from those statements that they were simply used to hide the money for the thieves. Although those statements were supplied to them by the Applicant none of them objected to their inclusion as evidence in this case. The admissions contained in the statements leave no doubt in the mind of this court that indeed the money was acquired as a result of a crime.

Issue (v) – whether the preserved funds and assets should be forfeited to the Government

47. Having come to the conclusion that the monies are proceeds of crime this court will not hesitate to find that the same are liable for forfeiture.



48. In the case of *Abdulrahman Mahmood Sheikh & 6 others v Republic & others* [2016] eKLR it was observed, and I fully concur, 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.”

49. Article 40 of the *Constitution* of Kenya guarantees all persons the right to property. However, Article 40(6) makes it clear that the right does not extend to property that is illegally acquired. Thus, property acquired from the proceeds of crime, as in this case, is not protected.

Final disposition

50. Accordingly, I make orders as follows: -

- i. That an order be and is hereby issued declaring that 150,000 euros in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
- ii. That an order be and is hereby issued declaring that 50,000 euros in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
- iii. That an order be and is hereby issued declaring that Kshs. 2,000,000 in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
- iv. That an order be and is hereby issued declaring that USD 5,700 in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
- v. That an order be and is hereby issued declaring that 4,000 Great Britain Pounds in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
- vi. That an order be and is hereby issued declaring that KSHS. 685,000 in cash held in a safe deposit box at G4s Kenya Limited Mombasa are proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
- vii. That the Respondents shall bear the costs of this case.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF NOVEMBER 2023.

E N MAINA

JUDGE

