



**Assets Recovery Agency v Rainbow Techemploy Africa Limited  
(Civil Suit E040 of 2022) [2023] KEHC 25770 (KLR) (Anti-  
Corruption and Economic Crimes) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25770 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
CIVIL SUIT E040 OF 2022  
EN MAINA, J  
NOVEMBER 23, 2023**

**BETWEEN**

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

**AND**

**RAINBOW TECHEMPLOY AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Assets Recovery Agency/ Applicant, is established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing, and recovering proceeds of crime. The Respondent is a registered company - at the Business Registration Service duly registered on 2021-07-01 via registration certificate number PVT KAU7Z68YV - whose director and the beneficial owner is Arike Omolola Oladipo, a foreign national.
2. In March 2022, acting on information that the Respondent was involved in a money laundering scheme and acquisition of proceeds of crime from foreign jurisdictions whose source could not be legitimately established in its bank account held at Guaranty Trust Bank Limited, the Applicant commenced investigations against the Respondent.
3. The Applicant begun by seeking and obtaining warrants to investigate an account through Miscellaneous Criminal Application No. E033 of 2022, Assets Recovery Agency -v- Guaranty Trust Bank Limited dated 4<sup>th</sup> May, 2022. The Application was made pursuant to Sections 118, 118A, 119 and 121(1) of the Criminal Procedure Code; Section 180 of the *Evidence Act*; Section 24(l)(e) of the *National Police Service Act* and Section 53A (5) of the *Proceeds of Crime and Anti-Money Laundering*



Act (POCAMLMA). On the same date, the court issued the orders as sought by the Applicant in respect of the Respondent's Account No.2250xxxxx and served upon Guaranty Trust Bank Limited.

4. According to the Applicant the bank account held approximately USD 1,634,973.62 - which are reasonably believed to be a culmination of suspicious credits and debits from sources that depict a complex scheme of money laundering designed to conceal, disguise and hide the nature, source, movement and disposition of the funds suspected. Investigations also revealed that the bank account received credits in the sum of USD 29,824,304.48 from two (2) entities: Rainbow Techemploy Africa Ltd, and Doxxlive Limited - whose addresses were established to be in Lagos, Nigeria.
5. On 1<sup>st</sup> July, 2022, the Applicant sought and obtained a preservation order in respect of the funds from this court through HCACEC Misc. No. E030 of 2022 Assets Recovery Agency-Vs- Rainbow Techemploy Africa Limited which order was gazetted on 15<sup>th</sup> July 2022 as provided in Section 83(1) of the POCAMLMA. The Gazette Notice is No. 8393 of vol. CXXIVNo.136.
6. This application now seeks the forfeiture of the preserved funds to the State.

### **The Application**

7. The application is brought by way of an Originating Motion dated 14<sup>th</sup> October, 2023. The same is expressed to be brought under Sections 81, 90, and 92 of the POCAMLMA and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seeks for orders: -
  1. That this Honourable Court be pleased to declare USD 1,634,973.62 held in account number 2250xxxxx at Guaranty Trust Bank Limited in the name of Rainbow Techemploy Africa Limited to be proceeds of crime and therefore liable for forfeiture to the Government of Kenya;
  2. That this Honourable Court be pleased to issue an order of forfeiture of the USD 1,634,973.62 held in account number 2250xxxxx at guaranty trust bank limited in the name of rainbow techemploy africa limited.
  3. That the Honourable Court do make any other ancillary orders it may deem fit and necessary for the proper and effective execution of its orders.
  4. That there be no orders as to costs.
8. The Application is supported by the Affidavit of Isaac Nakitare, an investigator sworn on 14<sup>th</sup> October 2023 and on his Further Affidavit dated 8<sup>th</sup> August 2023.
9. The Application is premised on the following grounds: -
  - “ 1) That the Applicant is the Assets Recovery Agency established under Section 53 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLMA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime.
  - 2) That pursuant to Part VIII of POCAMLMA, Sections 81-89 of POCAMLMA, the Agency is authorized 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.
  - 3) That section 53A (5) of the Proceeds of Crime and Anti Money Laundering Act grants the staff of the Agency all the powers, privileges and immunities



of a police officer while executing the mandate of the Applicant in the identification, tracing, seizure and recovery of proceeds of crime,

- 4) That the Respondent is a registered company at the Business Registration Service duly registered on 2021-07-01 via registration certificate number PVTKAUZ68YV.
- 5) That the Respondent's bank account number 2250xxxxx at Guaranty Trust Bank Limited in the name of the Respondent is holding approximately USD 1,634,973.62 reasonably suspected to be proceeds of crimes.
- 6) That the Agency received information on a suspected case of money laundering schemes and acquisition of proceeds of crime involving multiple money transactions through the Respondent's bank accounts held at Guaranty Trust Bank Limited from foreign jurisdiction whose source could not legitimately be established.
- 7) That the Respondent is suspected to be involved in a complex money laundering scheme transnational in nature.
- 8) That investigations have established that the Respondent herein was involved in an intricate money laundering scheme designed to conceal, disguise the nature, source and disposition of the illicit funds, suspected to constitute proceeds of crime and which are the subject matter of this application.
- 9) That there are reasonable grounds and evidence demonstrating that the funds held by the Respondent in the specified bank account are direct or indirect benefits, profits and/or proceeds of crime obtained from a complex money laundering scheme and are liable to be forfeited to the State under the *Proceeds of Crime and Anti-Money Laundering Act* 2009.
- 10) That on 1<sup>st</sup> July 2022, the Applicant filed HCACEC Misc. No. E030 of 2022 Assets Recovery Agency —Vs- Rainbow Techemploy Africa Limited and obtained Court Orders issued on July 2022 preserving funds the subject matter of the instant forfeiture application.
- 11) That on 15<sup>th</sup> July 2022 the Applicant gazetted the Preservation orders pursuant to Section 830) of POCAMLA vide Gazette Notice No. 8393 of vol. cxxrvNo.136
- 12) That there are reasonable grounds to believe that the funds held in the Respondent's bank accounts are proceeds of crime liable for forfeiture to the Applicant under POCAMLA.
- 13) That it is in the interest of justice that the orders of forfeiture do issue forfeiting the above funds to the Applicant on behalf of the Government of Kenya.
- 14) That Section 90 of the POCAMLA provides that where a preservation order is in force, the Agency may apply to the High Court for an order of forfeiture to the Government all or any of the property that is subject to the preservation order.
- 15) That it is in the public interest that the orders sought are granted and the funds therein be forfeited to the Applicant.



- 16) That there are justifiable reasons and grounds to warrant the issuing of the orders sought.
- 17) That unless this Honourable Court grants the orders sought, the Respondent will continue to enjoy the benefits derived from proceeds of crime.”

### **Applicant’s Case**

10. In sum, the Applicant’s case is that the Respondent’s bank account number 2250xxxxx, at Guaranty Trust Bank Limited is holding approximately USD 1,634,973.62 reasonably suspected to be proceeds of crime. According to the Applicant, the Respondent is suspected to be involved in a complex money laundering scheme transnational in nature.
11. The Applicant presented an analysis of the bank statement and SWIFT documents used in the transactions to demonstrate that the account received credits in the sum of USD 29,824,304.48 majorly from: Rainbow Techemploy Africa Ltd, and Doxxlive Limited - whose according to the SWIFT documents are domiciled in Lagos, Nigeria. The transactions are as follows:-



	<b>Date</b>	<b>Source</b>	<b>Amount</b>
1.	07/09/2021	Rainbow Techemploy Africa Ltd	996,805.76
2.	29/10/2021	Rainbow Techemploy Africa Ltd	995,237.16
3.	02/11/2021	Rainbow Techemploy Africa Ltd	997,286.79
4.	03/11/2021	Rainbow Techemploy Africa Ltd	995,844.33
5.	10/11/2021	Rainbow Techemploy Africa Ltd	998,396.79
6.	16/11/2021	Rainbow Techemploy Africa Ltd	997,287.84
7.	18/11/2021	Rainbow Techemploy Africa Ltd	997,396.79
8.	19/11/2021	Rainbow Techemploy Africa Ltd	998,212.66
9.	23/11/2021	Rainbow Techemploy Africa Ltd	994,616.29
10.	26/11/2021	Rainbow Techemploy Africa Ltd	997,287.84
11.	01/12/2021	Rainbow Techemploy Africa Ltd	997,789.32



12.	24/01/2022	Rainbow Techemploy Africa Ltd	995,844.33
13.	25/01/2022	Rainbow Techemploy Africa Ltd	922,082.22
14.	27/01/2022	Rainbow Techemploy Africa Ltd	997,223.41
15.	07/02/2022	Rainbow Techemploy Africa Ltd	997,206.72
16.	18/02/2022	Rainbow Techemploy Africa Ltd	672,779.33
17.	25/02/2022	Rainbow Techemploy Africa Ltd	9,972.43
18.	28/02/2022	Rainbow Techemploy Africa Ltd	996,175.14
	Total (USD)		16,557,445.15



	Date	Source	Amount
1.	11/08/2021	Doxxlive Limited	3,464,950.00
2.	12/08/2021	Doxxlive Limited	2,795,250.00
3.	12/08/2021	Doxxlive Limited	3,275,550.00
4.	07/09/2021	Doxxlive Limited	1,007,450.00
5.	19/09/2021	Doxxlive Limited	1,105,479.45
6.	29/09/2021	Doxxlive Limited	505,092.67
7.	29/09/2021	Doxxlive Limited	554,965.00
8.	01/01/2021	Doxxlive Limited	558,122.21
	Total (USD)		13,266,859.33

12. The Applicant contends that a further analysis established that the debits in the bank account are also suspicious as they are not supported by documents but merely state "GAPS GT-GT Transfer". The Applicant contends that the debits were above USD 100,000 as limit and totalled to USD 26,344,840.
13. The Applicant also states that on 30<sup>th</sup> June 2022, in the course of its investigations it invited Sheila Oluvendi, an Advocate of the High Court to record a statement and while she honoured the summons her statement was to the following effect; "I wish to clearly state that I have never been a signatory to all the bank accounts I filled the opening forms for, neither have I any knowledge on their operations. The signatory was Arike omolola as the sole signatory."
14. The Applicant contends that Ms. Sheila Oluvendi, is a director of the Respondent; that she could neither explain the business the Respondent is engaged in, nor its operations; that as such the funds held in bank account number 2250xxxxx at Guaranty Trust Bank Limited, in the name of the Respondent in the sum of USD 1,634,973.62 are illicit funds as a result acquired through a money laundering scheme designed to conceal and disguise their nature, source, location, and movement.
15. The Applicant maintains that there are reasonable grounds to believe the Respondent's bank account was used as a conduit of money laundering - contrary to Sections 3, 4 and 7 as read together with Section 16 of the *Proceeds of Crime and Anti-Money Laundering Act*
16. Further, in rebuttal to the Respondent's case, the Applicant in stating their case contended that the averment, the Respondent is in the business of creating employment through the outsourcing of labour services for its clients across the world is a mere statement that is unsupported; and is contrary to the purported agreement which stated it's a merchant service agreement for which the Respondent is to purportedly receive payment gateway services, and other services offered by Flutterwave, and/or its subsidiaries and affiliates. That it is evident from the purported merchant service agreement the Respondent was not outsourcing, but was being allowed/granted access to certain payment gateway services offered by Flutterwave.



17. The Applicant states that the purported merchant service agreement is an afterthought, and an attempt to legitimise the funds received by the Respondent which attempt has failed as the document contains the irregularities/anomalies. Also, that the Respondent is a limited liability company and the deponent, who has sworn the Replying Affidavit has not attached the board resolution, nor the authority to represent/act on behalf of the Respondent.
18. The irregularities/anomalies being that the purported agreement is: undated, no company seal, no name of the executors, the Respondent's address does not correspond with its registered address, and that the Rainbow Technology Limited is a different company from the Respondent's Rainbow Techemploy Africa Limited.
19. In the end, that Applicant averred that, considering there are justifiable reasons, and in the public interest the orders sought are granted, to the effect the funds be forfeited to the Applicant. That unless this Honourable Court grants the orders sought, the Respondent will continue to enjoy the benefits derived from proceeds of crime to the disadvantage of the economy and to the public, whilst dealing a big blow to financial investigations.

### **The Respondent's Case**

20. In response to, and opposing the Application, the Respondent filed their Replying Affidavit dated 25<sup>th</sup> July, 2023 deponed by Arike Omolola Oladipo, the director of the Respondent.
21. The Respondent's case is that the Application does not disclose any specific transactions said to be suspicious or money laundering; save for the general pleading that there is reasonable ground to believe that the funds are proceeds of crime.
22. According to the Respondent, they are a company engaged in the business of creating employment, through the outsourcing of labour services for its clients across the world. That in the course of business, the Respondent entered into an agreement with Flutterwave Payment Technology Limited, [for the latter company, on behalf of the former company] to process payment from Respondent's customers.
23. Consequently, as per the Respondent, the preserved funds are not proceeds of crime, but are legitimate earnings from the genuine businesses engaged in. The Respondent maintained that having explained, demonstrated, and disclosed the source of the preserved funds, it is in the interests of justice that the Originating Motion dated 14<sup>th</sup> October, 2022 be dismissed.

### **Submissions**

24. Learned Counsel for the parties canvassed their cases through written submissions. Those of the Applicant's are dated 22<sup>nd</sup> September, 2023 while those of the Respondents are dated 15<sup>th</sup> September 2023.
25. Learned Counsel for the Applicant contends that Article 40(6) of *the Constitution* of Kenya, 2010 provides the framework on asset recovery as it does not extend the right to property under Article 40 to any property that has been found to have been unlawfully acquired. That Section 92(1) of the Proceeds of Crime and Anti -Money Laundering Act (POCAMLA), provides that the High Court shall make an order for forfeiture, if it finds on a balance of probabilities that the property concerned has been used or is intended for use in the commission of an offence or is proceeds of crime.
26. Counsel submitted that forfeiture proceedings are civil in nature and the standard of proof is on a balance of probabilities. Further, that civil forfeiture is not affected by the outcome of criminal



proceedings, or of an investigation thereof. For this proposition Counsel placed reliance on the cases of Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168 as cited in Assets Recovery Agency -v Pamela Aboo; Ethics & Anti-Corruption Commission (interested Party) [2018] eKLR; the Jamaican case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 and Section 92(4) of the Proceeds of Crime and Anti -Money Laundering Act (POCAMLA).

27. Counsel asserted that the objective of forfeiture is not to enrich the state, but to ensure that those who commit crimes do not benefit from proceeds of crime, essentially depriving them of ill-gotten gains. To this end Counsel cited the cases of Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR, Schabir Shaik & Others -vs- State Case CCT 86/06(2008) ZACC 7; Assets Recovery Agency -vs- Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No 2007 HCV003259 as cited in the case of Assets Recovery Agency -v Quorum Limited supra & 2 Others [2018] eKLR; and Assets Recovery Agency-v- James Thuita Nderitu & 6 Others [2020] eKLR.
28. On what amounts to proceed of crime, Counsel for the Applicant referred to Section 2 of the POCAMLA and the case of Schabir Shaik & Others -vs- State Case (supra). In regard to the definition of money laundering Counsel referred this court to Section 3 of the POCAMLA. Counsel stated that the offence of money laundering is prescribed in s Section 3 of the POCAMLA.
29. Counsel contended that the Respondent has not established a legitimate business from which they could have received the impugned funds. Counsel stated that the Respondent has also not given reasons or the purpose for receiving the funds which funds lacked supporting documents. Counsel submitted that the Respondents receipt of the impugned funds is a deliberate act intended to conceal and disguise the nature, source and movement of the funds.
30. Further that transfer of the funds from Rainbow Technology in Nigeria, to Rainbow Techemploy Africa Limited in Kenya was a ploy executed under the guise of incorporating companies with similar first names, in different jurisdictions, in an effort to circumvent the rigorous customer due diligence placed on the banks while transferring the funds; that the intention was to circumvent the rigorous, Know Your Customer (KYC) exercise set out in Sections 44 (1-7) as read together with Section 46(1) to (3) and Section 48 of the POCAMLA. Counsel pointed out that the companies share one address to wit 7 Ibiyinka Olurumbe close, Victoria Island Lagos.
31. Counsel submitted that in the absence of a resolution granting the deponent the authority to defend the suit on behalf of the Respondent the Replying affidavit sworn by Arike Omolola Oladipo on 25<sup>th</sup> July 2023 is defective. For this Counsel relied on the case of Leo Investments Limited v Trident Insurance Company Limited [2014] eKLR.
32. It was contended that the Applicant has established that the Respondent is a shell company which is not engaged nor generating income and both possession and also reasonable suspicion that the funds held in its bank account are proceeds of crime. Reliance was placed on the case of Revision of People v Laito (Appeal No.291/2014) (2015] ZMSC 26 (1<sup>st</sup> June 2015; the Supreme of Court of Zambia).
33. Counsel urged this court to find that the Applicant has demonstrated on a balance of probabilities that the funds herein constitute proceeds of crime. Counsel stated that civil forfeiture proceedings are proceedings in rem (against the property) but are not intended to prove the guilt of the defendant as was observed in Assets Recovery Agency v Quorum Limited & 2 others [2018] eKLR case. Counsel also relied on is the case of Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR. Counsel urged this court to allow the Originating Motion and issue an order forfeiting the impugned funds as they are proceeds of crime and award the costs of this case to the Applicant.



## Submissions of the Respondent

34. Learned Counsel begun by attacking the procedure used in bringing these applications. It was Counsel's submissions that a party can only approach the court by way of Originating Summons in the circumstances outline in Order 37 of the Civil Procedure Rules as proceedings under the POCAMLA which are civil proceedings, are not one of those instances then this application is not properly before the court. Counsel relied on two cases Daniel Kimani Njihia v Francis Mwangi Kimani & Anor [2015] eKLR and Michael Mungai v Housing Finance Co. (K) Ltd & 5 others [2017] eKLR. Counsel urged this court to find that use of the wrong procedure is not one that can be wished away under Article 159 of *the Constitution*.
35. On the merits Counsel submitted that the burden of proof in civil recovery proceedings rests on the Applicant, that the standard of proof is that of a balance of probabilities, which necessitates that the Applicant demonstrates - to a high level of credibility and persuasion and to a more likely than not degree - that the funds in question are indeed proceeds of crime. For this Counsel relied on the book, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, Edward Elgar Publishing [2009].
36. Counsel contended that the Applicant has not demonstrated that the impugned funds have been obtained from illegal activities and accordingly, that its acquisition cannot be said to be based in unlawful activity, on the basis of an assumption. Counsel stated that the Respondent had demonstrated the source and purpose of the funds as declared in the SWIFT transactions.
37. The Respondent wondered why the Applicant who has withdrawn all matters and investigations relating to Messrs. Flutterwave Payment Limited is still seeking forfeiture of these funds.
38. The Respondent maintains that the impugned funds are neither proceeds of crime, nor unexplained assets - within the meaning of the law – so as to be liable for forfeiture. In support of this submission Counsel relied on the case of Director of Assets Recovery and Others, Republic vs Green & Others (Supra) case.
39. Counsel argued that in the absence of a statement made by a person giving oral evidence in the proceedings, the supposed received information can only be concluded to be hearsay, which is inadmissible as evidence of a stated fact. Also, that in the absence of the source of information that led to the investigations conducted against the Respondent, and the present proceedings, this harassment of an international investor demonstrates at the very least the assumption and speculation that a party has committed an offence as was noted by the Court in Feisal Mohamed Ali v Republic [2018] eKLR.
40. To demonstrate that the Applicant's allegations of money laundering have no basis, Counsel for the Respondent placed reliance on the Halsbury's Laws of England definition of money laundering. Counsel submitted that the fact that other than the mere allegation of money laundering, the Applicant herein has not demonstrated or in any way substantiated the alleged offence in which the Respondent is involved.
41. Counsel stated that the Applicant bears the onus of providing concrete and verifiable evidence establishing a direct link between these funds and criminal activities and contended that the evidence presented thus far by the Applicant falls short of establishing this critical connection.
42. As to Ms. Sheila Olubendi, a director of the Respondent, it is the Respondent's contention that the said Director served in her capacity as a silent partner; and thus, her assertion that she had no involvement in the operational aspects of the company is entirely consistent with her status as such.



43. Counsel argued that the above position is supported by the fact that the sole signatory of the Respondent's bank account, held at Guaranty Trust Bank Limited, is Ms. Arike Omolola Oladipo, a foreign national who has had sight of the company's multi-jurisdictional operations and accordingly, the Applicant cannot rely on the statement of a silent partner to cast aspersions on the character of an active partner and the characteristics of the business carried out by the Respondent.
44. According to the Respondent, the Applicant's insistence on implicating the Respondent in money laundering schemes without concrete evidence amounts to undue harassment and unfounded speculation. Counsel asserted that the burden of proof remains with the party bringing the suit; that in the absence of compelling evidence, the burden of proof cannot be shifted to the Respondent. In other words, that the Applicant, being the one that asserts that these funds are illicit, bears the responsibility of presenting convincing evidence to demonstrate its claim failing which its case should be dismissed. Counsel cited the provisions of the *Evidence Act* and the case of *M'Bita Ntiro v Mbae Mwirichia & another* [2018] eKLR.
45. The Respondent submits that to establish that a property is an instrumentality of crime liable to forfeiture, there must be a sufficiently close link between the property and its criminal use and a close enough relationship to the actual commission of the offence. For this proposition reliance was placed on the decision of Constitutional Court of South Africa in the case of *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* (CCT19/06) [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC); 2007 (2) SACR 145 (CC) (26<sup>th</sup> March 2007).
46. Counsel for the Respondent urged this court to find the Originating Motion fatally defective and devoid of merit and to accordingly dismiss the Application with costs to the Respondent.

### **Issues for Determination**

47. After a careful consideration of the Application, responses thereto, party's submissions, and the authorities cited; I find the following issue arises for determination:
1. Whether these proceedings are fatally defective
  2. Whether the USD 1,634,973.62 held in account number 2250xxxxx at Guaranty Trust Bank Limited in the name of Rainbow Techemploy Africa Limited are proceeds of crime, and if so, whether they should be forfeited to the State

### **Analysis and Determination**

#### **Issue No. (1) - Whether these proceedings are fatally defective**

48. On whether the proceedings are fatally defective for being commenced by way of Originating Summons/Motion my take is that these proceedings are very similar to those for forfeiture of unexplained assets under Section 55 of the *Anti-Corruption and Economic Crimes Act*. Section 55(3) of that Act prescribes Originating Summons as the mode of instituting proceedings. The applications are then canvassed through written submissions. Similarly, the words of Section 91 and 92(1) are that proceedings shall be instituted by way of an application. The Act does not state that the proceedings are to be instituted by way of a plaint and it is for that reason that this court has since its inception in 2015 allowed the institution of the applications by way of Originating Motion. See Section 90(1) which states:-

“ 90. Application for forfeiture order



1. If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.” (Emphasis mine)

49. Under Order 3 Rule (1) of the Civil Procedure Rules a suit may be instituted either by way of plaint or other mode prescribed. I am not therefore persuaded that bringing this application by way of Originating Motion renders it fatally defective. The cases cited by Counsel for the Respondent are clearly distinguishable because in those cases the Plaintiff departed from the mode of instituting the suit as prescribed in the rules.

**Issue No. (2) - Whether the USD 1,634,973.62 held in account number 2250xxxxx at Guaranty Trust Bank Limited in the name of Rainbow Techemploy Africa Limited are proceeds of crime, and if so, whether they should be forfeited to the State**

50. On the merits, the Applicant has invoked this court’s jurisdiction under Section 81, 90, and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* which state: -

“81. Nature of proceedings

1. All proceedings under this Part shall be civil proceedings.
2. The rules of evidence applicable in civil proceedings shall apply to proceedings under this Part.”

“90 Application for forfeiture order

1. If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.”

“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.”

51. The term “proceeds of crime” is defined under Section 2 of the Act 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.”



52. In the case of *Schabir Shaik & Others v State* Case CCT 86/06[2008] ZACC 7 the court expressed itself as follows in regard to this wide ambit of the definition:

“... One of the reasons for the wide ambit of the definition of “Proceeds of Crime” is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of “Camouflage”. The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime.”

53. As in all civil cases, the burden of proof in civil forfeiture, lies with the Applicant while the standard of proof is on a balance of probabilities. The Applicant therefore bears the legal burden to prove that the impugned funds are proceeds of crime. It is only once this legal burden is discharged, that the evidential burden shifts to the Respondent to prove that the funds were lawfully acquired and hence they are not proceeds of crime. This position was affirmed in the case of *Assets Recovery Agency v Fischer Rohan & Miller Delores* Supreme Court of Jamaica Claim No. 2007 HCV 003259 where it was stated: -

“... Even though these proceedings are quasi criminal in nature, there is an evidential burden of proof on the Defendant. It is incumbent upon them to demonstrate evidentially how they lawfully came into possession of the assets seized.”

54. The above decision has been cited with approval in several cases in our jurisdiction – such as the case of *Assets Recovery Agency Vs Lilian Wanja t/a Sahara Consultants & 5 Others* [2020] eKLR where the court stated:-

“131. I have also considered the decision cited by the applicant of *Assets Recovery Agency v Rohan Anthony Fisher, and & Others*, Supreme Court of Jamaica, Claim No 2007 HCV003259 in which the court issued an order for the forfeiture of funds found to be proceeds of crime. While the respondents have sought to distinguish this case on the basis that the legal framework in Jamaica is different from the statutory regime obtaining in Kenya, I believe the fundamental principle that emerges from the case is applicable within our jurisdiction.

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.”

55. Section 112 of the *Evidence Act* also requires a defendant who has any fact within his special knowledge to prove or disprove it.

56. It is also instructive that as provided in Section 92(4) of the POCAMLA, the Applicant need not prove the commission of a specific offence in regard to the property the subject of the proceedings. I am in full agreement with the finding of the court in the case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR where citing with approval the case of *Assets Recovery Agency & Others, Republic Vs Green & Others* [2005] EWHC 3168 it stated:-

“63. Forfeiture proceedings are Civil in nature and that is why the standard of proof is on a balance of probabilities. See Section 92(1) of the POCAMLA. In the



case of Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168 the court stated as follows: -

In civil proceedings for recovery under part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

57. Having set out the law as it concerns civil forfeiture let me now turn to the facts of this case. In the Supporting Affidavit dated 14<sup>th</sup> October 2023, Isaac Nakitare, an investigator with the Applicant, deposes that the Respondent is a registered company with its director and sole beneficial owner being Arike Omolola a foreign national; that upon carrying out investigations it was found that the company has an account No. 225010919 at the Guaranty Trust Bank Limited; that the account received a total of USD 29,824,304.48 from two companies, to wit, Rainbow Techemploy Africa Ltd and Doxxlive Limited both domiciled in Lagos, Nigeria; that upon analysis of the entries in the account both the purpose of payment into the account (credits) and the payments (debits) out of the account were not supported by documents; that the source of the funds paid into that account were therefore not clear and when the Agency invited Sheila Olubendi, the director whose documents were used to open the account she recorded a statement to the effect that she was not a signatory to the account and although she filled the account opening forms she had no knowledge of how the account was operated. That lack of a clear explanation led to the investigation and the conclusion that there were reasonable grounds to believe the funds were proceeds of crime.
58. In her replying affidavit sworn on 25<sup>th</sup> July 2023 Arike Omolola Oladipo a Director of the Respondent, disputes that the amounts credited to the account were proceeds of crime and deposes that they are honest earnings from the genuine business of the Respondent as would be demonstrated at the hearing of the forfeiture application. To the affidavit she has annexed documents regarding the registration of the Respondent as a limited liability company here in Kenya and a Flutterwave Merchant Service Agreement. In the written submissions, Learned Counsel for the Respondent reiterated that each and every entry/deposit in the Respondent’s bank account has been proved by a corresponding transaction summary and that the Agency is seeking to forfeit the funds in the account on mere suspicion; that there is no evidence that the funds are proceeds of crime.
59. I have carefully considered the affidavit evidence, the annexures thereto, the submissions of Learned Counsel for the parties and the cases cited. The statement of account which forms the basis of these proceedings covers the period 11<sup>th</sup> August 2021 to 30<sup>th</sup> April 2022. A close scrutiny shows that the monies credited thereto were from Doxxlive Limited and Rainbow Technology Limited, both domiciled in Nigeria. Going through the remittance advises annexed to the supporting affidavit of Isaac Nakitare I notice that the Remittance information given therein is mostly “Restocking of Doxxlive orders”, “supplies payment”, “Restocking orders”, “transfer to Rainbow” and “transfer to Rainbow Kenya” without more. This to me is very vague information as there is absolutely no information of what was being restocked. The reason for the transfers is also omitted.
60. It is also noteworthy that in the account opening forms annexed to the supporting affidavit of Isaac Nakitare it is indicated that in the course of the “know your customer” process it was stated that by the time of opening the account the Respondent “had not started operations in Kenya and was expanding to Kenya after operating in Nigeria for 2 years.” The objective of the Respondent company was indicated as “to offer vast IT software solutions to companies in Africa and it was coming to Kenya as Kenya’s uptake of Tech service had been on the rise.” It is however instructive that there is no evidence of any business it had done in Nigeria. As for the remittances from the two companies in Nigeria there is no indication of what was being restocked or supplied. The purpose of the funds sent



by those companies to the Respondent is therefore not disclosed given that there is no indication of the businesses they themselves carry out. It is therefore my finding that in the absence of a clear explanation for the purpose of the transfer of the funds to the Respondent's account in Kenya and in the absence of an explanation as to the businesses carried out by the two companies transferring the funds and the nature of the business carried out with the Respondent there are reasonable grounds to believe that the Respondent was involved in a money laundering scheme. In other words the Applicant has discharged its legal burden and it behoved the Respondent to explain that the funds were from a lawful source as those are facts within its special knowledge (See Section 112 of the *Evidence Act*).

61. In paragraph 4 of the Replying Affidavit sworn on 25<sup>th</sup> July 2023, Arike Omolola, a Director of the Respondent, together with Sheila Olubendi, deposed that “the Respondent entered into an Agreement with Flutterwave payment Technology Limited to process payment from its customers on its behalf.” In effect she was averring that the agreement is the source of the funds in the bank account. She also averred that the Respondent was in the business of creating employment through outsourcing of labour services.
62. I have perused that agreement and noted several things that rule it out as the source of the impugned funds. Firstly, the agreement is not dated, so it does not corroborate the source of funds deposited in the Respondent's account. Secondly the agreement is between Flutterwave and Rainbow Technology Limited which is a different company from Rainbow Techemploy Africa Limited, the Respondent herein. So again it does not support payment of the funds into the account. Thirdly this agreement has no seal of the companies and the names of the persons who have signed the agreement on behalf of the companies are not indicated as would be expected to be the case in any legally binding contract between companies.
63. More crucial however is that the Respondent is not a party to the agreement. Moreover, even were this court to find that the Respondent is a party there is nothing to demonstrate that the funds in the Respondent's account were paid by Flutterwave or that indeed they were paid pursuant to that agreement. If indeed the funds flowed from services rendered pursuant to that agreement nothing stopped the Respondent from adducing the primary documents such as local purchase orders, invoices, delivery notes and receipts that would inform the fulfilment of an agreement.
64. Further it is curious that, and I have already so stated, that whereas in the account opening forms the Applicant indicates that its objective was to supply IT software Solutions in Africa, in paragraph 3 of the Replying Affidavit, its director alleges that its business is creating employment through the outsourcing of labour services for its clients across the world. This sharply contradicts its objective in the account opening forms and in any event there is no proof that any such business was undertaken. Agreements with its clients would have sufficed.
65. The above contradiction when juxtaposed with the absence of evidence of creation of such employment through outsourcing of labour services and the remittance information in the advises annexed to the Applicant's supporting affidavit only goes to confirm that Arike Omolola was being less than candid.
66. The lack of a clear explanation for the deposit of such huge amounts of cash in the account of the Respondent company by companies domiciled elsewhere is in my view proof that the Respondent was being used by those other companies to conceal or disguise the nature, source, location or movement of the money or its ownership thereof. The Respondent was therefore being used to launder the money. It is not lost to this court that in her statement recorded during the investigations Sheila Olubendi, the Kenyan Director of the Company who also happens to be a lawyer, stated that she had no idea as to the source of the funds; that she merely filled the account opening forms but was not a signatory to the



account. I do not agree with the Respondent's submissions that the Applicant was wrong in casting aspersions on the Respondent's business for this. Indeed, it is curious that the so called silent partner could have involved herself in a company whose business she was not privy to and whose source of money she was not aware of. To me her lack of knowledge simply denotes that the Respondent was not engaged in any business.

67. The fact also that there is no demonstrable evidence that the Respondent has done any business in Kenya since its registration confirms my finding that it was formed merely to be a conduit for money from those other companies. I find that the Respondent has not discharged its evidential burden on a balance of probabilities.
68. In so finding, I am in agreement with the finding in the case of *Assets Recovery Agency v Lilian Wanja Muthoni t/a Sahara Consultants & 5 Others* [2020] eKLR where Mumbi Ngugi J, as she then was, observed: -

“ 134. The respondents have contended that the funds in the ten accounts were from various sources including savings from the 1<sup>st</sup> Respondent's employment salary and allowances part of which were deposited into the accounts; diverse activities in real estate, landholding and construction ventures, as well as mortgages and loans for investment in profit making ventures, the legitimate proceeds from which were directed into the subject bank accounts. As I have found above, there is no evidence that supports these contentions.

135. What I discern from the respondents' submissions is that since the applicant has not shown a direct link between the funds in the said accounts and the funds alleged to have been stolen from the NYS, the said funds are not proceeds of crime, and should therefore not be forfeited to the State. I take the view, however, that POCAMLA and the entire legal regime related to recovery of proceeds of crime and unexplained assets has the underlying premise that crime and corruption are undertaken in a labyrinthine, secretive manner; that funds and assets may not be directly traced to crime; that while investigations may be carried out, some alleged perpetrators charged and subjected to trial, a conviction may not result. Yet, the respondent may have in his or her possession substantial funds and assets, but is not able to show a legitimate source of the funds and assets.

136. The question is what, in such circumstances, should be the option? Is it to say, as the respondents ask the court to do, that there is no trail leading the funds to the suspected source, in this case the NYS funds? That the funds do not belong to the State just because the respondents cannot show a legitimate source? What would such a conclusion mean in relation to the tracing and recovery of, say, funds and assets derived from the narcotics trade, cyber-crime or piracy, or from trafficking in wildlife, or in persons?

137. I believe I would not be remiss if I asserted as an incontrovertible truth that 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.” (Underlining mine).

69. In the upshot I find that in the absence of evidence of a legitimate source, this court is entitled to conclude that these funds were proceeds of crime, hence liable for forfeiture.
70. I am satisfied, therefore, that the Applicant has proved its case on a balance of probabilities and accordingly the Originating Motion dated 14<sup>th</sup> October, 2023 succeeds and it is hereby ordered that:-
1. The USD 1,634,973.62 held in Account Number 2250xxxxx at Guaranty Trust Bank Limited, in the name of Rainbow Techemploy Africa Limited proceeds of crime and the same are hereby forfeited to the State.
  2. The Respondent shall bear the costs of these proceedings.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023**

.....

**E N MAINA**

**JUDGE**

In the presence of:-

Mr. Githinji for the ARA/Applicant

Mr. Nduati for Ndeda for the Respondent

Raymond - Court Assistant

