



**Assets Recovery Agency v Fara; Shanzu Law Courts (Interested Party) (Civil Application 68 of 2020) [2022] KEHC 17044 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 17044 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPLICATION 68 OF 2020**

**MN MWANGI, J  
JUNE 30, 2022**

**IN THE MATTER OF: AN APPLICATION BY THE ASSETS RECOVERY AGENCY UNDER SECTIONS 81, 90 AND 92 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES FOR ORDERS OF FORFEITURE.**

**AND**

**IN THE MATTER OF: FORFEITURE OF KSH. 1,017,600.00 AND USD 3,000.00 HELD IN BANK ACCOUNT NUMBER 118XXXXXXX AT KENYA COMMERCIAL BANK IN MTWAPA, SHANZU.**

**AND**

**MOTOR VEHICLES REGISTRATION NUMBERS KCN 971M TOYOTA ALLION, IN THE NAME OF RUWEIDA BWANAHAMAD FARA.**

**BETWEEN**

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

**AND**

**RUWEIDA BWANAHAMAD FARA ..... RESPONDENT**

**AND**

**SHANZU LAW COURTS ..... INTERESTED PARTY**

**RULING**

1. The application before me is an Originating Motion dated 16<sup>th</sup> October, 2020 brought under the provisions of Sections 81, 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* as read together with Order 51 of the *Civil Procedure Rules*. The applicant seeks the following orders-



- i. That this Honourable Court be pleased to issue an order declaring that a total of Kshs. 1,017,600/= and USD. 3,000.00 produced as exhibits in the Senior Principal Magistrate's Court at Shanzu vide Criminal Case No. C.R. 1126 of 2019 and preserved in the Court's Bank Account No. xxxx held at the Kenya Commercial Bank Mtwapa, Shanzu (sic) are proceeds of crime and therefore liable for forfeiture to the applicant on behalf of the State;
  - ii. That this Honourable Court be pleased to issue orders of forfeiture of the following motor vehicles; KCN xxxx Toyota Allion;
  - iii. That this Honourable Court be pleased to issue an order directing the National Transport and Safety Authority to transfer the above motor vehicle to the applicant (Assets Recovery Agency) on behalf of the Government; and
  - iv. That this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government; and
  - v. That the costs be provided for.
2. The application is brought on the grounds on the face of the Motion and is anchored on supporting and further affidavits sworn on 16<sup>th</sup> October, 2021 and 22<sup>nd</sup> January, 2021, respectively, by No. 75821 CPL Sautet Jeremiah, a Police Officer attached to the applicant herein.
  3. In opposition to the Motion, the respondent on 24<sup>th</sup> November, 2020 filed a replying affidavit sworn on 23<sup>rd</sup> November, 2020 and on 23<sup>rd</sup> February, 2021 she filed a supplementary affidavit.
  4. The application was canvassed by way of written submissions. The applicant's submissions were filed on 22<sup>nd</sup> January, 2021 by the Director, Assets Recovery Agency, whereas the respondent's submissions were filed by the law firm of J.O. Magolo & Company Advocates on 15<sup>th</sup> November, 2021.
  5. Ms. Ngelechei, learned Counsel for the applicant submitted that Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act*, 2009 (POCAMLA) provides for civil forfeiture and that Sections 81, 82, 86 and 87 authorize the Agency to institute preservation proceedings against assets where there are reasonable grounds to believe that the property sought to be preserved has been used or is intended to be used in the commission of an offence or is a proceed of crime. She argued that on 26<sup>th</sup> July, 2019, the respondent was charged with the offence of trafficking in Narcotic Drugs in the Senior Principal Magistrate's Court at Shanzu vide Criminal Case No. C.R. 1126 of 2019. That thereafter, the Assets Recovery Agency commenced investigations to recover proceeds of crime accrued to the respondent through illegitimate trafficking and trading of narcotic drugs.
  6. She submitted that during the arrest of the respondent, a search was conducted at her residence and a total of 533.7 grams of heroin, Kshs. 1,017,600.00 and USD. 3,000.00 were recovered from her house situated at Bamburi, Mtambo area in Mombasa County. She further submitted that on 6<sup>th</sup> August, 2019, the Agency received information to the effect that two bank account numbers xxxx and xxxx in the name of Ruweda Bwanahamad Fara, held at the Gulf African Bank were suspected to have been receiving money which was suspected to be proceeds of crime. The information received also indicated that the respondent had acquired assets using proceeds obtained from illegitimate trade of narcotic drugs and that she had received funds which were suspected to be proceeds of crime, contrary to the provisions of the POCAMLA, which information turned out to be true after investigations by the Agency.
  7. It was submitted by Ms. Ngelechei that the benefits derived from the illegal trade of narcotic drugs were obtained by the respondent by way of physical cash so as to conceal the source of funds and



subsequently the cash was deposited in small tranches which were below Kshs. 1,000,000/= to evade the reporting threshold as per the Central Bank of Kenya guidelines for account holders to declare the source of funds. She further submitted that the said benefits were laundered by withdrawing the money in cash tranches below Kshs. 1,000,000/= and that she used the money to acquire motor vehicle registration No. KCN xxxx Toyota Allion, registered in her name and the assets in issue, contrary to the provisions of POCAMLA.

8. The applicant's Counsel argued that the respondent's replying affidavit did not logically explain the source of the motor vehicle and funds in issue, and that she had not rebutted the applicant's application and the evidence presented therein. The applicant's Counsel contended that the business that the respondent claimed to be engaged in of buying and selling of livestock was a sham and meant to disguise the source of the funds and to conceal the benefits she derived from the illegal trade of narcotic drugs. Ms Ngelechei referred to the case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) [2018]* eKLR, where the Court held that where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means that what has been presented is not challenged.
9. She also cited the case of *Nguku v Republic [1985] KLR 412*, where the Court held that where a party fails to produce certain evidence, a presumption arises that the evidence produced, would be unfavourable to that party. Ms. Ngelechei relied on 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. She submitted that the respondent had failed to rebut the evidence presented by the applicant. She contended that the funds and motor vehicle in issue are proceeds of crime within the meaning of Section 2 of POCAMLA, which defines what constitutes proceeds of crime.
10. She stated that ownership of the funds and assets in issue can be direct or indirect and that there is no requirement that it must be traced to a specific criminal offence but once evidence is adduced to show that the respondent is unable to explain reasonably the source of funds in issue and upon failing to explain, it is clear proof that the same are proceeds of crime. It was submitted by Ms. Ngelechei that the respondent had not demonstrated that she filed tax returns from her alleged livestock business, which was a clear indication that she does not have any source of legitimate income which would form the source of the funds in the specified accounts used to procure the motor vehicle herein.
11. She relied on the case of *Schabir Shaik & others v State case CCTT 86/06 [2008] ZACC 7*, where the Court stated that one of the reasons of 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. Ms Ngelechei submitted that the agency only needs to make a prima facie case where the Court is satisfied that there is evidence which establishes the Agency's belief within the meaning of POCAMLA as is the case herein. While relying on the provisions of Sections 90 and 92(1) of POCAMLA, she submitted that this Court has powers to issue forfeiture orders if it finds on a balance of probabilities or reasonable grounds that the funds and assets in issue are proceeds of crime.
12. She relied on the case of *Assets Recovery Agency v Rohan Anthony Fisher, and others, Supreme Court of Jamaica, Claim No. 2007 HCV003259* where it was held that even though the proceedings are quasi criminal in nature there is an evidential burden of proof on the defendant to demonstrate evidentially how he lawfully came into possession of the assets seized. In citing the case of *Schabir Shaik & others v State (supra)*, she submitted that by allowing the application herein, this Court shall be depriving criminals of ill-gotten gains, and it will deter and prevent crime.



13. In making reference to Article 40 of *the Constitution* of Kenya, she submitted that inasmuch as it provides for the right to property, the said right does not extend to property which has been unlawfully acquired. While relying on the case of *Nandjila Lameck v President of Namibia 2012 (1) NR 255 (HC)* and the case of *Martin Shalli v Attorney General of Namibia & others*, High Court of Namibia case No. POCA 9/2011, she submitted that since the funds and motor vehicle in question were obtained illegally, they were proceeds of crime, hence not protected by Article 40 of *the Constitution* of Kenya.
14. She contended that civil forfeiture proceedings against property which is reasonably believed to be a proceeds of crime are expressly provided for, under Part VIII of the POCAMLA and they are not the same as the criminal prosecution proceedings where the Criminal Court is required to determine the criminal liability of an individual in the offence of money laundering. She maintained that in these proceedings, the Court is only required to determine whether on a balance of probabilities the funds sought to be forfeited are proceeds of crime.
15. She argued that conviction is not a pre-condition to the proceedings herein. Counsel relied on the case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017]* eKLR, where the Court held that a claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct.
16. Ms. Ngelechei also relied on the case of *Serious Organized Crime Agency v Gale* cited in the case of *Assets Recovery Agency and others v Audrene Samantha Rowe & others* Civil Division Claim No. 2012 HCV 02120, where the Court stated that civil recovery proceedings are directed at the seizure of property and not the conviction of any individual hence there is no reason to apply the criminal standard of proof. She submitted that Section 92(4) of the POCAMLA provides that the validity of the forfeiture order is not in any way affected by the outcome of the criminal proceedings.
17. Mr. Magolo Paul, learned Counsel for the respondent relied on Sections 90 and 92 of the POCAMLA and submitted that in order for the orders sought herein to be granted, the applicant has to prove on a balance of probabilities that the properties in question are proceeds of crime. He referred to the case of *Ethics and Anti-Corruption Commission v Ministry of Medical Services & another [2012]* eKLR, where Justice Odunga stated that under Section 56(1) of POCAMLA, a *prima facie* case must be presented before Court to show that the property in question has been the subject of some corrupt dealings, and that it is not enough for the commission to simply walk into Court with a request and expect the said orders to be granted.
18. It was submitted by the respondent's Counsel that in the case herein, the only evidence presented before this Court was that the respondent was an accused in Criminal Case No. C.R. 1126 of 2020 where she is facing charges relating to narcotic drugs. He further submitted that the applicant had made a flimsy attempt by attaching the respondent's bank statement which shows deposits made as early as the year 2015, whereas the allegations that gave rise to the criminal charges came up in the year 2020. He contended that the applicant had failed to connect the respondent's deposits to illegitimate sources and thereby failed to meet the required threshold.
19. He argued that the motor vehicle and the funds in question are exhibits in a matter pending before the Chief Magistrate but neither the said Court at Shanzu nor the prosecution had been joined in these proceedings. He submitted that the said exhibits are the property of the Trial Court which needs to consider them until judgment (sic) and then eventually dispose of them. Mr. Magolo contended that notice ought to have been given in relation to the exhibits herein and that once such a notice was given, the Inspector General of Police had the power to dispose of the seized property in the event that they were not the subject of a trial.



20. Mr. Magolo Paul submitted that the Assets Recovery Agency no longer had the locus standi to make an application of this nature because if an order of forfeiture was necessary, the Trial Court has the jurisdiction to order it. He stated that in addition, the Inspector General also has authority to seek an order of forfeiture from the High Court. He relied on the case of *Africa Spirits Limited v D.P.P & another*, HCC (Nrb) Misc Criminal Application No. 407 of 2019, where the Court stated that Government agencies should stop overreaching themselves in the manner the applicant herein was doing.

### **Analysis and Determination.**

21. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying and supplementary affidavits filed by the respondent and the written submissions by Counsel for parties. The issues that arise for determination are-
- i. Whether the respondent's properties sought to be forfeited are proceeds of crime;
  - ii. Whether the applicant is entitled to file civil assets forfeiture proceedings for recovery of the respondent's properties sought to be forfeited; and
  - iii. Whether the respondent's right to property has been violated.
22. In the affidavit filed by the applicant, it deposed that on 11<sup>th</sup> January, 2020 the respondent was arrested by officers from the Directorate of Criminal Investigations under suspicion of dealing in illicit trade in narcotic drugs contrary to the provisions of *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994. It averred that during the arrest, a search was conducted at the respondent's residence and seven packages of unknown grams containing brownish powdery substance, Kshs. 1,017,600.00, USD. 3,000.00 and Motor Vehicle Registration No. KCN xxxx Toyota Allion among other things were recovered from her house.
23. It was further deposed by the applicant that on 25<sup>th</sup> July, 2019, the seven packages of unknown grams containing a brownish powdery substance were dispatched to the Government Chemist and after being subjected to analysis, it was found to contain heroin at 40%. It weighed 11.9 grams. Subsequently, the respondent was arraigned in Court on 22<sup>nd</sup> July, 2019 and charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 in the Senior Principal Magistrate's Court at Shanzu, vide Criminal Case No. C.R. 1126 of 2019.
24. The applicant stated that on 16<sup>th</sup> September, 2019, the Senior Principal Magistrate's Court at Shanzu issued an order that the money produced in Court in Criminal Case No. C.R. 1126 of 2019 being Kshs. 1,017,600.00 and USD. 3,000.00 be deposited at Shanzu Court deposits account No. xxxx at KCB Mtwapa. It deposed that on 14<sup>th</sup> July, 2020 it obtained orders for preservation of assets from this Court vide Miscellaneous Application Number 103 of 2020, which orders were gazetted on 24<sup>th</sup> July, 2020 pursuant to the provisions of Section 83(1) of the POCAMLA, 2009.
25. The applicant averred that depriving the benefits of crime from the respondent shall act as deterrence and maintain national security. It also averred that investigations in this matter had established that the assets herein are suspected to be proceeds of crime which require to be forfeited to the applicant on behalf of the government. The applicant stated that the greater public interest outweighs private rights of the respondent.



26. The respondent in her replying affidavit deposed that she is the accused person in Criminal Case No. C.R. 1126 of 2019 where the charge she is facing is under the [Narcotic Drugs and Psychotropic Substances Control Act](#). She admitted that at the time of her arrest, Kshs. 1,017,600.00, USD. 3,000.00 and motor vehicle registration No. KCN xxxx all belonging to her were taken as exhibits. She stated that the money had already been produced in Court whereas the motor vehicle awaits production.
27. She deposed that disposal of exhibits is solely within the jurisdiction of the Trial Court, which was yet to pronounce itself with regard to the disposal of the same. She stated that should any order be given, it would be a direct interference with the trial. She also stated that the Act under which she was charged provides for disposal of exhibits. The respondent contended that the money found on her was for her business of buying and selling livestock which requires liquid cash at hand.
28. She averred that the application herein had been made in bad faith since it was filed after she had applied to the Trial Court for release of her motor vehicle and she refused to abandon her intention to seek the release of her vehicle after the Investigating Officer requested her to do so.
29. The applicant in its further affidavit in response to the respondent's replying affidavit averred that in civil forfeiture proceedings for the recovery of proceeds of crime, non-conviction in criminal proceedings is not a defence. It contended that the respondent was summoned to appear before the Bamburi Police Station in Mombasa for purposes of recording a statement in relation to motor vehicle registration No. KCN xxxx Toyota Allion and how she procured it but she declined to do so by stating that her Advocate had advised her not to do so.
30. The applicant deposed that the respondent did not produce any proof of the existence of a livestock trading business such as trade permits, tax compliance certificate, capital gains certificate or the existence of any other legitimate business. It deposed that the respondent also failed to give any reasonable explanation to prove how ownership of the suit motor vehicle was acquired, hence the respondent's allegations were incorrect and meant to conceal and hide the source of the said assets. The applicant stated that the foregoing is a classical scheme of money laundering contrary to the provisions of the [POCAMLA](#).
31. The respondent in her supplementary affidavit averred that the money held at the Shanzu Law Courts account in Kenya Commercial Bank was produced as an exhibit and is still an exhibit. She deposed that the suit motor vehicle is also held as an exhibit awaiting production and this can be confirmed by the seizure notice, thus Shanzu Law Courts and the ODPP are interested parties in the exhibits.
32. It was stated by the respondent that the suit motor vehicle was detained and parked at the County Police Headquarters but it was not there anymore. She further stated that she had received a text message informing her of failure to pay parking fees in Nairobi which suggests that someone was freely using her motor vehicle in abuse of the orders of the Court.

**Whether the respondent's properties sought to be forfeited are proceeds of crime.**

33. Proceeds of crime is defined under Section 2 of the [POCAMLA](#) as-  

“any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.”



34. It is not in dispute that the respondent herein is the accused person in Shanzu Principal Magistrate’s Court Criminal Case No. C.R. 1126 of 2019, where she was charged with the offence of trafficking in narcotic drugs. When she was arrested, Kshs. 1,017,600.00, USD. 3,000.00 were recovered from her house. Motor vehicle registration No. KCN xxxx Toyota Allion registered in her name was also recovered, among other items. The said money has already been produced as exhibits before the Trial Magistrate’s Court whereas the motor vehicle awaits production.
35. The applicant submitted that as a result of the respondent’s arrest, it commenced investigations to recover proceeds of crime accrued to the respondent through the illegitimate trafficking and trading of narcotic drugs. It contended that it received information to the effect that two account numbers xxxx and xxxx in the name of Ruweda Bwanahamad Fara, held at Gulf African Bank were suspected to have been receiving money which was suspected to be proceeds of crime and that the respondent had acquired assets using proceeds obtained from illegitimate trade of narcotic drugs contrary to the provisions POCAMLA, which information turned out to be true after investigations were undertaken by the police.
36. The respondent on the other hand denied the allegations that monies recovered in her house were proceeds of crime and that she had acquired motor vehicle registration No. KCN xxxx Toyota Allion using proceeds of crime. She submitted that the money found on her was for her business of buying and selling livestock. The respondent argued that for the orders herein to be granted, the applicant has to prove on a balance of probabilities that the properties in question are proceeds of crime but the only evidence adduced by the applicant herein is that the respondent has been charged before the Trial Magistrate with charges relating to narcotics. She asserted that the applicant has failed to adduce evidence with regard to the funds and assets in question having been acquired through proceeds of crime. She contended that, the applicant had failed to connect the cash deposits to illegitimate sources.
37. The applicant however maintained that after carrying out investigations, it established that the benefits derived from the illegal trade of narcotic drugs were obtained by the respondent by way of physical cash so as to conceal the source of funds and the said cash was subsequently deposited in small tranches which were below Kshs. 1,000,000/= as set out in the affidavit in support of the application. It was stated that the intention of so doing was to evade the reporting threshold as per the Central Bank of Kenya guidelines for account holders to declare the source of funds. In addition, the applicant averred that the business of buying and selling livestock is a sham and meant to disguise the source of the funds. In the case of *Schabir Shaik & others v State Case (supra)* the Court held as follows on the definition of the term “proceeds of crime” –
- “...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.”
38. Section 112 of the *Evidence Act* provides that 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 the said party. In this case, it is my considered opinion that the respondent herein had the burden of establishing and/or proving before this Court that the money and motor vehicle in issue were proceeds and/or were acquired using funds from a legitimate source of income and not proceeds of crime. Looking at the respondent’s affidavits, she alleges that the money in question was for her business of



buying and selling livestock, that required liquid cash at hand. She however failed to produce and/or annex to her affidavits any form of documentation to support the said allegation.

39. I have perused the statements annexed to the applicant's affidavit in respect of the respondent's bank accounts. It is discernible that the respondent's bank accounts received huge sums of cash and cheque deposits made in tranches of below Kshs. 1,000,000/=. The respondent did not offer any explanation as to the source of the money that was being deposited in the said bank accounts as all that she stated is that she carries out a legitimate business of buying and selling of livestock. In the case of *Asset Recovery Agency v Lillian Wanja Muthoni Mbogo & others ACEC Misc. Appl No. 58 of 2018*, the Court made the following observation-

“...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 purchase orders and delivery notes showing to whom goods are sold, deliveries made and payment receipts showing from whom payment has been received.”

40. The burden to prove how she obtained the funds in her bank accounts falls squarely on the respondent's shoulders since this is a fact that is especially within her knowledge. In this regard, I am guided by the decision in *Assets recovery Agency –vs- Fisher, Rohan and Miller, Delores*, Supreme Court of Jamaica, Claim No 2007 HCV003259, where the Court held 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.”

41. Having duly analyzed the case for each party herein, I am in agreement with Ms. Ngelechei that the business fronted by the respondent of buying and selling of livestock was a sham and was meant to disguise the source of the money recovered from the respondent and to conceal the benefits she derived from the illegal trade of narcotic drugs since she adduced no evidence of the existence of the livestock business. In view of the foregoing and on a balance of probabilities, this Court can safely draw the conclusion that motor vehicle registration No. KCN xxxx Toyota Allion registered in the name of the respondent was acquired using money unlawfully obtained. Further, that Kshs. 1,017,600.00 and USD. 3,000.00 which she was found to be in possession of, are proceeds of crime as defined under Section 2 of [POCAMLA](#).

**Whether the applicant was entitled to file civil assets forfeiture proceedings for recovery of the respondent's properties sought to be forfeited.**

42. On the above issue, I am guided by Section 90(1) of [POCAMLA](#) which provides that:

“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.”



43. Section 92(1) of the Proceeds of the said Act states that:

“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.” (emphasis added).

44. Having found that the money and motor vehicle in issue are proceeds of crime, this Court can only issue an order for forfeiture of the same to the Government through the filing of a civil assets recovery suit as provided under Section 92(1) of [POCAMLA](#).

45. The respondent submitted that the said motor vehicle and money are exhibits in a matter pending before the Chief Magistrate at the Shanzu Law Courts. The Chief Magistrate’s Court at Shanzu was joined in these proceedings but the Director of Public Prosecutions (DPP) was not. This Court would not have expected the Trial Magistrate to take any part in these proceedings but had the DPP been joined as a party, he would have been expected to respond to the application herein.

46. In her written submissions, the respondent contended that the motor vehicle and money in issue are the property of the Trial Court and that the said Court needs to consider them (sic) till judgment, then eventually dispose of them. She asserted that the Assets Recovery Agency lacks the locus standi to make the application herein since in the event that an order of forfeiture is necessary, the Trial Court has the jurisdiction to order it.

47. The respondent’s case therefore is that the criminal case against her is still ongoing and is yet to be determined, thus this Court cannot grant orders for forfeiture at this stage as no offence has been proved against her and she has not been convicted in any Court. She is of the view that condemning her under [POCAMLA](#) would go against the spirit of the law.

48. The applicant maintained the position that the proceedings herein are in respect of recovery of proceeds of crime and were instituted under the [Civil Procedure Rules](#) as provided under [POCAMLA](#) against a property which is reasonably believed to be a proceed of crime. It further submitted that the civil proceedings herein are not the same as criminal prosecution proceedings where the criminal Court is required to determine the criminal liability of an individual in the offence of money laundering. It posited that conviction in criminal proceedings is not a condition precedent to civil forfeiture as provided for under Section 92(4) of the [POCAMLA](#), which states as hereunder-

“The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.”

49. In the case of *Phillips v The United Kingdom* [2001] ECHR 437 cited in the case of *Martin Shalli -vs- Attorney General of Namibia & others* (*supra*), the Court held that civil proceedings are not subject to the presumption of innocence in Art 6(2), and that the proceedings for civil recovery of proceeds under the Proceeds of Crime Act of 2002 (of England and Wales) are civil proceedings and not proceedings where a person is charged with a criminal offence within the meaning of Art. 6(2) of the European Convention.



50. Similarly, in the case of Kenya Anti-Corruption Commission v Stanley Mombo Amuti (*supra*), the Court considered the same issue in relation to the civil proceedings for forfeiture before it and held that-

“I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial.”

51. It is therefore my considered view that the proceedings before this Court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the respondent where presumption of innocence is applicable. To this end, I am guided by the decision in ARA & others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120, where the Court of Appeal stated as follows-

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

52. It is my finding that the order of asset forfeiture being sought herein is a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused and even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. In the UK case of *National Crime Agency -v- Mrs A* [2018] EWHC 2534 it was stated as follows-

“for an unexplained wealth order to issue, there must be reasonable grounds for suspecting that the known sources of an individual’s lawfully obtained income would have been insufficient for the purpose of enabling the individual to obtain the property. The court observed that one of the critical factors to be taken in account is the “income requirement” and an individual required to explain source of wealth should lead sufficient evidence to defeat any “reasonable grounds for suspicion” under the income requirement.”

53. This Court holds that the Asset Recovery Agency had the requisite locus standi to institute the proceedings herein and did not have to await the conclusion of the criminal trial against the respondent before instituting civil proceedings for recovery of funds or assets reasonably believed to be proceeds of crime. In the case of *Abdulrahman Mahmoud Sheikh & 6 others v Republic & others* [2016] eKLR, the Court held 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.”

54. I hold that on a balance of probabilities, the applicant herein has shown that the assets the subject of this application are proceeds of crime. The respondent failed to demonstrate that the funds deposited in her bank account and the funds used to acquire the motor vehicle in question, had a legitimate source. That being the case, it is my finding and that the assets and funds in this case are proceeds of crime, thus liable to be forfeited to the State.



**Whether the respondent's right to property has been violated.**

55. Article 40 of *the Constitution* of Kenya, 2010 provides for the right to property and that every person has the right to acquire and own property of any description and in any part of Kenya. The said right however, does not extend to property which has been unlawfully acquired as provided under Article 40(6) of *the Constitution* of Kenya, 2010 which states as hereunder-

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

56. As explained in the preceding paragraph, this Court having found that the respondent's properties being Kshs. 1,017,600.00, USD. 3,000.00 and motor vehicle registration No. KCN xxxx Toyota Allion are proceeds of crime and/or were acquired using proceeds of crime, they are not protected by Article 40 of *the Constitution* of Kenya, 2010.

57. The upshot is that the application herein has merit and is allowed in the following terms-

- a. That an order is hereby issued declaring that a total of Kshs. 1,017,600.00 and USD. 3,000.00 produced as exhibits in the Senior Principal Magistrate's Court at Shanzu vide Criminal Case No. C.R. 1126 of 2019 and preserved in the said Court's Bank Account No. xxxx held at Kenya Commercial Bank, Mtwapa are proceeds of crime;
- b. An order of forfeiture is hereby issued against the property known as Kshs. 1,017,600.00, USD. 3,000.00 and motor vehicle registration No. KCN xxxx Toyota Allion to the Assets Recovery Agency;
- c. A vesting order is hereby issued transferring motor vehicle registration No. KCN xxxx Toyota Allion to the Assets Recovery Agency on behalf of the Government;
- d. That an order is hereby issued directing the National Transport and Safety Authority to transfer motor vehicle registration No. KCN xxxx Toyota Allion to the Assets Recovery Agency on behalf of the Government; and
- e. There shall be no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JUNE, 2022.RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Ms Ngelechei for the applicant

Mr. Magolo Paul for the respondent

Mr. Oliver Musundi – Court Assistant

