



**Assets Recovery Agency v Gachagua & another; Rafiki Microfinance Bank Ltd
(Interested Party) (Anti-Corruption and Economic Crimes Civil Suit E020 of 2020)
[2022] KEHC 12557 (KLR) (Anti-Corruption and Economic Crimes) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E020 OF 2020**

EN MAINA, J

JULY 28, 2022

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

RIGATHI GACHAGUA 1ST RESPONDENT

ANNE KIMEMIA T/A JENNE ENTERPRISES LTD 2ND RESPONDENT

AND

RAFIKI MICROFINANCE BANK LTD INTERESTED PARTY

JUDGMENT

1. By its Originating Motion dated October 7, 2020, the Assets Recovery Agency seeks the following orders against the Respondents:
 - “i. Spent
 - ii. That this Honourable Court be pleased to issue an order declaring that the following funds are proceeds of crime and therefore liable for forfeiture to the State:
 - a) Kshs. 165,000,000 held in account number XXX at Rafiki Micro Finance Bank in the name of Rigathi Gachagua.
 - b) Kshs. 35,000,000 held in account number XXX at Rafiki Micro Finance Bank in the name of Rigathi Gachagua.



- c) Kshs. 773,228.33 held in account number XXX at Rafiki Micro Finance Bank in the name of Rigathi Gachagua.
 - d) Kshs. 1,138,142.95 held in account number XXXX at Rafiki Micro Finance Bank in the name of Jenne Enterprises.
 - iii. That this Honourable Court be pleased to issue an order that the above funds be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency.
 - iv. That this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.
 - v. That costs be provided for.”
2. The application which is brought under Sections 81, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#) is supported by the affidavit sworn by an Investigating Officer, attached to the Assets Recovery Agency, S/SGT Fredrick Musyoki, on October 7, 2020, and his Further Affidavits sworn on March 8, 2021, September 6, 2021, May 17, 2022 and July 7, 2022. The application is premised on the following grounds:
- “i. That the Applicant is the Assets Recovery Agency established under Section 53 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAML) as a body corporate with the mandate of identifying, tracing, freezing and recovering assets which are acquired from or are the profits or benefits of proceeds of crime.
 - ii. That part VIII of POCAML sets out the procedure for Civil Forfeiture.
 - iii. That pursuant to Part VIII of POCAML, Sections 81-89 of POCAML, 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 or acquired from or is the profits or benefits of proceeds of crime.
 - iv. That under section 90 of [POCAML](#), 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.
 - v. That the 1st Respondent is adult of sound mind and Member of Parliament (MP) for Mathira Constituency within County of Nyeri.
 - vi. That the 2nd Respondent is a female adult of sound mind trading as Jenne Enterprises Limited, a business entity registered under CPR/523395 on August 13, 2008.
 - vii. That on March 30, 2020, the Agency received information into suspected complex money laundering schemes and proceeds of crime involving public funds siphoned from various public entities including the Ministry of Land (Kenya Informal Settlements Programme), State Department for Special Planning, Ministry of Health, Bungoma County Government, Mathira



Constituency Development Fund, Nyeri County Government, the National Irrigation Board among others.

- viii. That pursuant to the information the Agency opened an inquiry file No.14 of 2020 to investigate and subsequently applied for and was issued with warrants to investigate suspect entities and accounts reasonably believed to be owned or associated with the Respondents vide Misc Criminal Applications Numbers 1275, 1340, 1341, 1444, 1447, 1471, 1535, 1703 and 1817 of 2020 dated 20th, 28th May 2020, 12th, 16th, 22nd June 2020, 6th and July 13, 2020.
- ix. That investigations established that the Respondents were involved in a suspected complex scheme of money laundering involving several companies, which initially received funds from National Government Ministries and State Agencies and later transferred the funds to companies/business entities associated with the 1st Respondent and subsequently transferred the funds to the 1st Respondents personal accounts specified in this application.
- x. That investigations established that on diverse dates between 2013 and 2020 the 1st Respondent's personal account numbers XXX, XXXX and XXXX conducted a series of huge suspicious debit transactions amounting to Kenya Shillings 7, 330, 011, 256.8 and total credit of Kenya Shillings 12, 530, 784, 485 reasonably suspected to have been acquired from proceeds of crime or are the profits or benefits of proceeds of crime.
- xi. That within the said period, account No. XXXX at Rafiki Micro Finance Bank in the name of the 1st Respondent, Rigathi Gachagua, operated as a collection account conducted several suspicious transactions and received suspect funds from the companies/business entities which had received huge suspicious payments from National Government Ministries, Agencies and County Governments.
- xii. That within the said period there were massive suspicious cash withdrawals, transfers, inter and intra bank transfers from other accounts to the accounts under investigations and other bank accounts owned by the 1st Respondent in suspicious complex money laundering schemes.
- xiii. That part of the suspect funds received from the National Government Ministries, Agencies and the County Governments were later transferred to account numbers XXX and account number XXXX which are fixed deposit accounts in the name of the 1st Respondent with a total of Kshs. 200,000,000 at Rafiki Micro Finance Bank.
- xiv. That there are reasonable grounds to believe that the accounts are holding funds reasonably suspected to be Proceeds of crime or acquired from or are the profits or benefits of proceeds of crime and are used as conduits of money laundering contrary to Sections 3,4, 7 and 16 of [Proceeds of Crime and Anti-Money Laundering Act](#) 2009.
- xv. That it is in the interest of justice that forfeiture orders do issue forfeiting the funds specified above to the Applicant.



- xvi. That unless this Honourable court grants the orders sought, Respondents shall illegitimately enjoy the economic advantage derived from the commission of crimes and acquisition of proceeds of crime or profits and benefits of crime contrary to the provisions of the *Proceeds of Crime and Anti-Money Laundering Act* and the general public interest.
- xvii. That the greater Public interest outweighs private rights of the Respondents.
- xviii. That it is in the public interest that the orders sought are granted and the suspect funds in the aforementioned accounts be forfeited to the Applicant on behalf of the State.
- xix. And any other ground that may adduced during the hearing of the application.”

Applicant’s Case

3. S/SGT Fredrick Musyoki deposes that he is a police officer attached to the Assets Recovery Agency which is a body corporate established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* and which has the mandate to identify, trace, freeze and recover proceeds of crime. Pursuant to Part VIII of the Act, the Assets Recovery Agency is authorized to institute civil proceedings and seek forfeiture orders where there are reasonable grounds to believe that assets in question are proceeds of crime.
4. S/SGT Fredrick Musyoki continues in regard to this case that on March 30, 2020, the Director of the Assets Recovery Agency received information on a suspected case of money laundering and conversion of proceeds of crime involving public funds, from different National Government ministries and entities including the Ministry of Land (Kenya Informal Settlements Programme), State Department for Special Planning, Ministry of Health, the National Irrigation Board and Mathira Constituency Development Fund and several County Governments including the County Government of Bungoma, the County Government of Nyeri and the County Government of Kwale.
5. Consequently, the deponent was assigned the task of investigating the case and opened an inquiry file No.14 of 2020 to investigate the bank accounts of the Respondents, to identify and trace any assets acquired from proceeds of crime or that are the profits or benefits of proceeds of crime owned by the Respondents. For this purpose, the Agency filed an application for search and seizure warrants under Sections 118, 118A, 119 and 121(1) of the *Criminal Procedure Code* and Section 180 of the *Evidence Act* under the policing powers granted to the Assets Recovery Agency vide Section 53A (5) which orders were granted in the Chief Magistrates in Misc. Criminal Applications Nos. 1275, 1340, 1341, 1444, 1447, 1471, 1535, 1703 and 1817 /2020 dated 20th, May 28, 2020, 12th, 16th, June 22, 2020, 6th and July 13, 2020.
6. The Agency then obtained bank statements of bank accounts listed below belonging to the Respondents, various entities owned or associated with them and their proxies and entities which it deems were used by them as a façade:
 - “ i. Bank account number XXXX, No. XXXX, No. XXXX in the name of Rigathi Gachagua held at Rafiki Micro Finance Bank.
 - ii. Bank account Number XXXX and XXXX in the name of Wamunyoro Investments Limited held at Rafiki Micro Finance Bank.



- iii. Bank account number XXX in the name of Jenne Enterprises held at Rafiki Micro Finance Bank.
- iv. Bank account number XXX in the name of Encarta Diagnostics Ltd held at Rafiki Micro Finance Bank.
- v. Bank account number XXXX in the name of Technical supplies and services limited held at Rafiki Micro finance Bank.
- vi. Bank account number XXXXX in the name of Crystal Kenya Limited held at Rafiki Micro Finance Limited.
- vii. Bank account number XXXXX in the name of Machine Centre Limited held at Sidian Bank Limited.
- viii. Any bank account in the name of William Wahome Mwangi holder of Identity Card number XXXXX held at Sidian Bank limited.
- ix. Any bank account in the name of Beth Wachera Wachuga holder of Identity Card number XXXX held at Sidian Bank Limited.
- x. Bank account number XXXX in the name of Machine Centre Limited held at Rafiki Mirco-finance Bank.
- xi. Bank account number XXXX in the name of Specific supplies limited held at Rafiki Micro-finance bank.
- xii. Bank account number XXXX in the name of Wamunoro Investment Limited and Machine Centre Limited held at Equity Bank Limited.
- xiii. Bank account number XXXXX in the name of Machine Centre Limited held at Equity Bank Limited.
- xiv. Bank account number XXXX in the name of Skytop Agencies held at Equity Bank Limited.
- xv. Bank account number XXX in the name of Mwangi Kiunjuri held at Equity Bank Limited.
- xvi. Bank account number XXXX in the name of Wamunoro Investment limited held at Equity Bank Limited.
- xvii. Bank account number XXX in the name of Petlico Agencies Company Limited held at Equity Bank limited.
- xviii. Bank account number XXX in the name of Karandi Farm Limited held at Equity Bank Limited.
- xix. Bank account number XXX in the name of Riang International Group Limited held at Equity Bank Limited.
- xx. Bank account numbers XXXX and XXXX in the name of Beth Wachera Wachuga held at Equity Bank Limited.
- xxi. Bank account number XXXX and XXX in the name of Specific Supplies limited held at Equity Bank Limited.



- xxii. Bank account number XXXX in the name of Triple Eight Construction Limited held at Equity Bank Limited.
- xxiii. Bank account number XXXX in the name of Crystal Kenya limited held at Equity Bank Limited.
- xxiv. Bank account numbers XXXX and XXXX in the name of Calvary Creed International limited held at Equity Bank Limited.
- xxv. Bank account number XXXX in the name of Technical Supplies and Services limited held at Equity Bank Limited.
- xxvi. Bank account number XXXX in the name of Biovet Kenya Limited held at Equity Bank Limited.
- xxvii. Bank account number XXXX in the name of Pioneer Medical (K) limited held at Equity Bank Limited.
- xxviii. Bank account number XXXX in the name of Ridor Furniture Mart limited held at Equity Bank Limited.
- xxix. Bank account number XXXX in the name of Biocare Supplies held at Equity Bank Limited.
- xxx. Bank account number XXXX in the name of Wamunyor Investment limited held at Paramount Bank Limited.
- xxxi. Bank account number XXXX in the name of Encartar Diagnostic limited held at Co-operative Bank Kenya Limited.
- xxxii. Bank account number XXXX in the name of Mukeni Wahome held at Equity Bank Limited.
- xxxiii. Bank account number XXXX and XXX in the name of William Wahome Mwangi held at Equity Bank limited.
- xxxiv. Bank account number XXX in the name of Skytop Agencies held at Equity bank Limited.
- xxxv. Bank account number XXX in the name of Wamunyor Investment limited at Cooperative bank.
- xxxvi. Bank account number XXXX in the name of Elizabeth Wachera held at Family Bank.
- xxxvii. Bank account number XXXX in the name of Wamunyor Machine Centre held at Kenya Commercial Bank.
- xxxviii. Bank account number XXXX in the name of Institute of Applied Technology held at Family Bank.
- xxxix. Bank account number XXXX and XXX in the name of Rapid Medical Supplies limited held at Rafiki Micro finance bank.”



7. Further to the 39 bank accounts enumerated above, investigations revealed that the Respondents also opened with the Interested Party and operated the following bank accounts of interest which the applicant deems to be proceeds of crime:
- i. Account number XXXXX in the name of Rigathi Gachagua held at Rafiki Micro-Finance Bank holding a total of Kenya Shillings 165,000,000/=
 - ii. Account number XXXXX in the name of Rigathi Gachagua held at Rafiki Micro-Finance Bank holding a total of Kenya Shillings 35,000,000/=
 - iii. Account number XXXX in the name of Rigathi Gachagua held at Rafiki Mirco-Finance Bank holding a total of Kenya Shillings 773, 228.33/=
 - iv. Account Number XXXX in the name of Jenne Enterprises held at Rafiki Micro Finance Bank holding a total of Kenya Shillings 1, 138, 142. 95/= reasonably suspected to be proceeds of crime or to have been acquired from or is the profits or benefits of proceeds of crime.
8. The narrative presented by S/SGT Musyoki is that on diverse dates between 2013 and 2020, being a 7-year period, the following 1st Respondent's personal bank accounts at Rafiki Micro-finance Limited conducted huge suspicious transactions as tabulated below:

- a. Savings Account number XXXX

TOTAL DEBIT	TOTAL CREDIT	TOTAL BALANCE AS AT 2 ND JUNE 2020
5, 831, 898, 125.86	5,832,671,354.19	773, 228.33

- b. Fixed deposit Account number XXXXX

TOTAL DEBIT	TOTAL CREDIT	TOTAL BALANCE AS AT 26 TH MAY 2020
792, 931, 356.94	827,931,356.94	35,000,000/=

- c. Fixed deposit Account number XXXX

TOTAL DEBIT	TOTALCREDIT	TOTAL BALANCE AS AT 16 TH MAY 2020
705,181,774.00	5,870,181,774.00	165,000,000/=

9. It is deposed that as depicted in the foregoing tabulation, the 1st Respondent's personal account numbers XXXX, XXX and XXXX conducted a series of huge suspicious debit transactions amounting to Kenya Shillings 7, 330, 011, 256.8 and total credit of Kenya Shillings 12, 530, 784, 485. As for the 2nd Respondent, her bank account no.XXX in the name of Jenne Enterprises held at Rafiki Micro Finance Bank was also a conduit for illicit funds as demonstrated below:



TOTAL DEBIT	TOTAL CREDIT	TOTAL BALANCE AS AT 28 TH MAY 2020
505, 416, 720. 45	506, 554, 863.40	1, 138, 142.95

10. According to S/SGT Musyoki, investigations further established that the 1st Respondent is a director/ shareholder in various entities including the following companies and business entities; Wamunyoro Investments Limited, Specific Supplies Limited, Wamunyoro Investments and Machine Cent, Crystal Kenya Limited and Technical Supplies and Services Limited. That the 1st Respondent used the said entities to siphon public funds as follows:
- i. Account number XXXX in the name of Wamunyoro Investments Limited held at Rafiki Micro-Finance Bank.
 - ii. Account number XXXX in the name of specific supplies limited held at Rafiki Micro-Finance Bank.
 - iii. Account Number XXXX in the name of Wamunyoro Investments and Machine Centre held at Rafiki Micro-Finance Bank.
 - iv. Account number XXXX in the name of Crystal Kenya Limited held at Rafiki Micro-Finance Bank
 - v. Account number XXXX in the name of Technical Supplies and Services Limited held at Rafiki Micro-Finance Bank.
 - vi. Account number XXXX in the name Skytop Agencies held at Equity Bank Limited.
11. The investigator deposes further that an analysis of the bank statement of account number XXXX owned by the 1st Respondent held at Rafiki Microfinance Bank revealed that on May 24, 2013 the account received a suspicious deposit of Kshs. 64,000,000 from account number XXXX owned by the 1st Respondent. In turn, bank account number XXXX in the name of the 1st Respondent received a total of Kshs. 64,000,000 between 9th and May 24, 2013 as follows:-
- i. On May 9, 2013 the account received an internal transfer of Kshs. 10,000,000
 - ii. On May 13, 2013 the account received an internal transfer of Kshs. 30,000,000
 - iii. On May 24, 2013 the account received Kshs. 24,000,000.
12. The deponent avers that the suspicious funds received in account number XXXX as specified above were subsequently transferred into a fixed deposit account number XXXX owned and operated by the 1st Respondent so as to conceal and hide the trail and possession of the funds in issue. On 7th January 2014, the 1st Respondent transferred Kshs 100,000,000 from his account number XXXX to account number XXXX, a fixed deposit account in his name. That the Kshs. 100,000,000 transferred from account number XXXX was received in the said account in two tranches of Kshs. 66,130,749.95 and Kshs. 33,851,540.92 received from Specific Supplies Limited; a company in which the 1st Respondent is a director.
13. Later on, on July 4, 2014, account number XXXX in the name of Specific Supplies Limited held at Rafiki Microfinance Bank received funds amounting to Kshs. 64, 990,000 in two tranches of Kshs 12,750,000 and Kshs 52,240,000 from the Ministry of Lands and Housing. Further, on 8th



July 2014 account number XXXX in the name of the 1st Respondent held at Rafiki Micro Finance Bank received Kshs. 65,000,000 transferred from account number XXXX in the name of Specific Supplies Limited also held at Rafiki Microfinance Bank. On 1 June 6, 2015, account number XXX held at Rafiki Microfinance Bank in the name of the 1st Respondent received Kshs. 165,000,000 from account number XXXX. Bank account number XXXXX owned by the 1st Respondent received Kshs 35,000,000 on June 13, 2015 from bank account number XXXX in the name of Encarta Diagnostics Ltd.

14. With regard to Anne Kimemia trading as Jenne Enterprises, the 2nd Respondent, holder of account number XXXX held in Rafiki Microfinance Bank was stated to be an associate of the 1st Respondent who acted in concert with him. Analysis of the bank statement number XXXX in the name of Anne Kimemia trading as Jenne Enterprises demonstrated that there were suspicious transactions indicative of a complex money laundering scheme for several years spanning 2015 to 2020. That account number XXXX was operated in collusion with the 1st Respondent and his associated business entities namely Wamunoro Investments Limited, Technical Supplies and Services (K) limited, Crystal Kenya Limited in which the 1st Respondent is a shareholder and director which entities received funds reasonably suspected to be proceeds of crime. In addition, the 2nd Respondent's bank account number 0142020000511 received Kshs. 31,267,500 from Wamunoro Investments Limited, in which the 1st Respondent is a director and shareholder.
15. Investigations focusing on the period of interest being May 2013 to March 2020, established that the 1st Respondent received suspicious funds from different entities/individuals reasonably suspected to be proceeds of crime through his bank accounts and proxies used as decoys of money laundering as stipulated below;
 - i. Hon. Rigathi Gachagua bank account number XXXX



Source of suspicious funds	Beneficiary account	Suspicious amount received (Kshs)
Total transfers from Encarta Diagnostics	Rigathi Gachagua	112, 404, 711.00
Total internal transfers to Rigathi Gachagua from Wamunyoru Investments and Machine Center	Rigathi Gachagua	7, 500,000.00
Total incoming transfers from Wamunyoru Investments Limited	Rigathi Gachagua	51, 511, 780.
Total transfers from Rapid Medical Supplies Limited	Rigathi Gachagua	58, 239, 657.01
Total transfers to Rigathi Gachagua by Specific Supplies Limited	Rigathi Gachagua	103, 551, 540. 92
Total transfers from Jenne Enterprises	Rigathi Gachagua	5, 174, 000.00
Suspicious cash deposits	Rigathi Gachagua	9, 121, 250.00
Total Suspicious Funds Received By Rigathi Gachagua		347, 502, 938.93

16. A pictorial depiction of the manner in which the suspect funds were disbursed and utilized by the 1st Respondent is as follows;



Account name & number	Amount (kshs)
Account number XXXX in the name of Rigathi Gachagua held at Rafiki Micro-Finance Bank.	165,000,000.00
Account number XXX in the name of RigathiGachagua held at Rafiki Micro-Finance Bank.	35,000,000.00
Outgoing RTGS Transfers to Dorcas Rigathi Gachagua, spouse to Hon. Rigathi Gachagua	12, 950, 500.00
Outgoing transfers to Toyota Kenya & Taitan Motolink	9,000,000.00
Cash withdrawals	87, 321, 955.00
TOTAL	309, 272, 455.00

17. In the course of investigations, the Agency came across the case of Encartar Diagnostics Limited of Bank Account Number XXX held at Rafiki Micro-Finance Bank. It was established that between the period of 2015 to 2016, Encartar Diagnostics Limited received funds totaling to Kshs. 113,009,913.80 from County Governments of Kwale and Bungoma. In total Kshs. 112, 404, 711.85 was transferred to the 1st Respondent's bank account number XXXX held at Rafiki Microfinance Limited in several transactions. However almost all of the total suspect funds of Kshs. 113,009, 913.80 was transferred or delivered to the 1st respondent indicative of using the Company owned by one Jimcarter Muriungi as a conduit of scheme of money laundering.
18. According to the Applicant, the 1st Respondent invested the subject funds in fixed deposit account numbers XXXX and XXXX in his name held at Rafiki Microfinance Bank so as to disguise and launder it as legitimate assets and to reintegrate it back into the ordinary market. It is the applicant's case that the cash deposits in question were unlawfully acquired hence they are proceeds of crime. The applicant is apprehensive that the 1st Respondent being a politically exposed person who falls under Regulation 22 of the *Proceeds of Crime and Anti-Money Laundering Regulations, 2013* could have used his political position to influence the siphoning of public funds using the above entities as a decoy and façade to hide his suspicious transactions and activities. The deponent asserted that there are reasonable grounds to believe that the said accounts received and are holding funds believed to be unlawfully acquired and the impugned accounts were used to execute a complex money laundering scheme in an effort designed to conceal, disguise and hide the nature, source, movement and disposition of the funds.

1st Respondent's Case

19. The 1st Respondent's narrative was that during the period of interest between 2013 and 2020, he saved a sum of Kshs. 200,000,000 at Rafiki Microfinance Bank which was invested in a fixed deposit account. That upon maturity which occurred quarterly, the 1st Respondent would roll over the principal sum and access the interest only. He asserted that the money deposited in the fixed deposit accounts were essential in enabling corporate entities in which the 1st Respondent was a shareholder to access bank loans and guarantees on carrying out their business activities.



20. The 1st Respondent explained that each time the money was rolled over, a new entry of the same sum would be entered in the bank statement creating a false impression that the account was holding in excess of Kshs. 12 billion. His explanation was supported by Benjamin Kuria Wangai in an affidavit sworn on behalf of Rafiki Microfinance Bank who observed that the 12 billion was arrived at by the applicant's deponent simply adding three closing balances, credit turnovers and representing the credit to the three accounts to arrive at what he termed a sensational figure.
21. The 1st Respondent cited Article 40 of *the Constitution* to submit that he enjoys the right to own property unless it was unlawfully acquired. He contends that the applicant has failed to prove unlawful acquisition hence the property remains protected under *the Constitution*. According to the 1st Respondent, from the definition of "proceeds of crime" under the *Proceeds of Crime and Anti-Money Laundering Act*, there must be a predicate offence committed before property or economic advantage can be realized as a direct or indirect consequence of it, which the applicants have failed to identify.
22. The 1st Respondent continues that the applicant, through its Investigating Officer, S/SGT Musyoki has established through investigations that the provenance of the subject funds were public entities such as the Ministry of Lands, State Department for Special Planning, Ministry of Health and various County Governments which begs the question whether monies originating from National and County governments are dirty money in need of laundering. He averred that the said monies paid by National Treasury for goods and services rendered cannot be categorized as proceeds of crime. The 1st Respondent placed reliance on the case of *The National Director of Public Prosecutions vs Carolus and Others* cited in the Namibian case of *The Prosecutor General vs New Africa Dimensions & Others* POCA 10/2012 in which it was held that a connection must be established between the alleged unlawful activity and the property concerned by way of evidence; that it was derived, received or retained, directly or indirectly in connection with an unlawful activity carried out by any person. The Respondent also cited the case of *Director of Assets Recovery; Republic vs Green & Others* (2005) EWHC 3168 in which the court observed that in civil proceedings for recovery, the Director must set out matters alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained. That in this case, no known crime has been pointed out.
23. The 1st respondent dismissed the authorities cited by the Agency as being irrelevant and inapplicable in this case as they relate to situations in which the respondents have been unable to explain the source of their funds or assets subject to forfeiture proceedings. Counsel submitted that in this case, the 1st Respondent has explained the source of his funds being from government tenders properly procured and undertaken and that no evidence has been presented to show that a certain tender was not undertaken in accordance with the contract. In support of this assertion, the 1st respondent cited the case of *Asset Recovery Agency vs Ali Abdi Ibrahim* (2020) eKLR in which the Court held as follows:

“ 43.in order for funds to be transferred from one entity's account, to another's account, the entities must have legitimate businesses from which they obtain the money that they transfer between themselves.”

The 2nd Respondent's case

24. In regard to the 2nd Respondent the applicant seeks an order declaring that a sum of Kshs.1,138,142.95 held in account No. XXXX at Rafiki Micro Finance Bank in the name of Jenne Enterprises are proceeds of crime and the same ought to be forfeited to the state and transferred to the Applicant. The Applicant contends that the 2nd Respondent is an associate of the 1st Respondent and is suspected to be involved in a complex web of money laundering in cahoots with the 1st Respondent; that an analysis of the 2nd Respondent's account revealed that there were suspicious transactions and more particularly



- that it received money from Wamunyoro Investments Ltd Technical Supplies and Services (K) Limited and Crystal Kenya Limited in which the 1st Respondent is a shareholder and Director which entities received funds reasonably suspected to be proceeds of crime or were acquired from or are profits or benefits of crime. More particularly that the account received Kshs.31,267,500/= from Wamunyoro Investments Limited.
25. It is the 2nd Respondent's case however, that the funds are not proceeds of crime but rather proceeds of legitimate and verifiable business carried out by herself as Jenne Enterprises. She disputes that the account received KShs.506,554,863.40 and contends that it received only Kshs.140,399,120.35 for work done. She contends that the account statement has the names of the various government entities which paid the monies. The 2nd Respondent avers that Jenne Enterprises gave Wamunyoro Investments Limited a loan of Kshs.28,654,500 to fund a tender for the construction of storm water drainage in Embu Town Tender No. MLHUD/KMP/COMP3/EMBU-SWD Phase 1 2014-2015 which had been awarded to a joint venture between Wamunyoro Investments and Machine Centre Limited; that Wamunyoro repaid Jenne Enterprises Kshs, 31,267,500 as principal and interest; that neither herself nor Jenne Enterprises was involved in any money laundering scheme; that the deponent of the supporting affidavit has not in any case indicated which specific transactions are suspicious and that this court ought to restrict itself to the source of funds in question. The 2nd Respondent contends further that the Applicant has not demonstrated that the sum of Kshs.1,138,142.95 are proceeds of crime hence liable to forfeiture.
26. The depositions of the 2nd Respondent find support in the affidavit of Benjamin Kuria Wangai sworn on 26th January, 2021 where he deposes that the 2nd Respondent's account in the Bank received credits amounting to Kshs.506,580,581.45 (this figure is disputed by the 2nd Respondent); that the transactions carried out by the Respondents were not suspicious and none was reported to the Financial Reporting Centre; that the 2nd Respondent borrowed a sum of Kshs.30,000,000/- from the bank on 10th July, 2015 which was approved and granted and that on 29th March, 2017 the bank advanced her a sum of Kshs.20,400,000/-
27. In a further affidavit sworn on June 30, 2022 the 2nd Respondent annexed tender documents in respect to the award to Wamunyoro Investments being the notification of Award dated February 5, 2015, a loan application form and bank statements for Account number XXXX. She also alleged to have annexed invoices and LPO as AK 2 but the same is not annexed. She contends that the value of the tender documents, invoices and bank statement are tallying which goes to prove the source of funds and the work they were meant for. It is her further contention, that she runs a legitimate business as is evidenced by the search certificate (not annexed); that she earns money legitimately and is a law abiding citizen who pays her taxes and the funds are not proceeds of crime.
28. In her submissions dated January 12, 2022, the 2nd Respondent reiterates the aforestated narrative and avers that the loan advanced to Wamunyoro Investments was a bank loan from Rafiki Microfinance Limited hence it cannot be said to be dirty money. She admitted that she would not know the source of the Kshs. 31,267,500 from Wamunyoro Limited but was categorical that it was a repayment of monies owed. To support her case, the 2nd Respondent cited the case of *Assets Recovery Agency vs Lillian Wanja Muthoni t/a Sabara Consultants & 5 Others* (2020)eKLR in which it was held that money and assets can be traced to specific sources; hers being monies lent to fund legitimate business and duly repaid.
29. The 2nd Respondent also placed reliance on the cases of The National Director of Public Prosecutions vs Carolus & Others cited in the Namibian case of The Prosecutor General vs New Africa Dimensions & Others (supra); Director of Assets Recovery and Others, Republic vs Green and Others (supra) and *Assets Recovery Agency vs Ali Abdi Ibrahim* (supra) also cited by the 1st Respondent on establishment



of a connection or link between the subject funds and the alleged unlawful activity; and in her assertion that a predicate offence must be identified.

30. In response to the applicant's claim that the 2nd respondent did not file minutes and board of director's resolutions for the period of 2013 to 2020, it is submitted that the 2nd Respondent is a business name registered under the Business Names Act hence this requirement is not applicable to it. On the question whether the bank transfers were suspicious transactions, the 2nd Respondent associated herself with Mr. Benjamin Kuria Wangai's deposition in his affidavit that the same were regular and above board which she claimed could not be locked out simply because neither himself nor the bank was a party to the proceedings at the time. That the court in *Assets Recovery Agency vs Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* (supra) confirmed that a Respondent can call third parties to support his/her case through affidavit evidence. She concludes that the Applicant makes baseless allegations of suspicious transactions without an iota of evidence which ought to be disregarded.
31. As reflected in the Court record, on June 14, 2022 this court granted the 2nd Respondent leave to file and serve additional documents as prayed in her Notice of Motion dated 3rd June, 2022. Her Advocate also made an application for highlighting of their submissions. However, no additional documents were filed and neither did Counsel attend Court for highlighting of submissions despite being allocated a date to do so.
32. Further, Rafiki Microfinance Bank Limited sought and obtained leave to be enjoined to these proceedings as an interested party. That leave is contained in a ruling of this court dated March 31, 2022. Pursuant to that leave the interested party filed a Notice of Objection dated 12th April, 2022. The same was filed under Sections 83(3), 90(4) and 91(5) of the *Proceeds of Crime and Anti-Money Laundering Act* No. 9 of 2009. It objects to the making of a forfeiture order with respect to the funds held by it on behalf of the 1st and 2nd Respondents on grounds that the objector holds enforceable legal and equitable rights over the said funds by way of a security over various credit facilities advanced to 3rd parties hence the funds cannot be forfeited to the state on account that they are allegedly proceeds of crime without sufficient protection of the objector. The above ground forms the gist of the Interested Party's case and is reiterated in the replying affidavit sworn on 12th April 2022 by Richard Murage the Head of Special Assets and Debt Recovery Unit at the Bank and further affidavit sworn by the same person on June 2, 2022. The deponent has annexed various documents in support of the Interested Party's case. This court also received the written submissions of the interested party's submissions dated June 8, 2022.
33. The issues for determination are: -
- i. Whether the funds in the 1st and 2nd Respondent's accounts the subject of these proceedings are liable to forfeiture to the State.
 - ii. Whether the interested party has demonstrated that the said funds are not proceeds of crime and that it has a legal lien over the funds on account of credit facilities advanced to 3rd parties."
34. I have carefully considered the Originating Motion, the grounds thereof, the affidavit evidence adduced by the parties, the rival submissions and the law. Section 92(1) of the *Proceeds of Crime and Anti-Money Laundering Act* enjoins this court to make a forfeiture order where it finds on a balance of probabilities that the property concerned is proceeds of crime or has been used or is intended for use in the commission of an offence. The Section states:-

" 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.”

35. The forfeiture order is made subject to Section 94 which states:-

“94. Exclusion of interests in property

- (1) The High Court may, on application—
 - (a) under section 90(3); or
 - (b) by a person referred to in section 91(1), and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.
- (2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of crime if it finds, on a balance of probabilities, that the applicant for the order—
 - a. has acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
 - b) where the applicant had acquired the interest concerned after the commencement of this Act, that such person neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of crime.
- (3) The High Court may make an order under subsection (1), in relation to the forfeiture of property which has been used or is intended for use in the commission of an offence, if it finds, on a balance of probabilities, that the applicant for the order had acquired the interest concerned legally and—
 - a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held has been used or is intended for use in the commission of an offence; or
 - b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property



concerned in connection with the commission of an offence.

- (4) If an applicant for an order under subsection (1) adduces evidence to show that he did not know or did not have reasonable grounds to suspect that the property in which the interest is held is tainted property, the Agency Director may submit a return of the service on the applicant of a notice issued under section 90(3) in rebuttal of that evidence in respect of the period since the date of such service.
- (5) Where the Agency Director submits a return of the service on the applicant under subsection (4), the applicant shall, in addition to the facts referred to in subsections (2)(a) and (b), also prove on a balance of probabilities that, since such service, he has taken all reasonable steps to prevent the further use of the property concerned in the commission of an offence.
- (6) The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the High Court deems appropriate, including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the High Court may determine, to prevent the future use of the property in connection with the commission of an offence.”

36. A person such as the interested party in this case under Section 90(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#) may also oppose the making of the forfeiture order; or apply for an order:

- (i) Excluding his interest in that property from the operation of the order; or
- (ii) Varying the operation of the order in respect of that property and may adduce evidence at the hearing of the application.

37. Whereas the burden of proof lies upon the Applicant to prove its case against the Respondents on a balance of probabilities it is trite that the Applicant needs only to discharge that legal burden whereupon the evidential burden shifts to the Respondent to prove how they lawfully came into possession of the impugned assets. See the case of *Assets Recovery Agency v Fisher Rohan and Miller Delores*, Supreme Court of Jamaica, Claim No. 2007 HCV 003259 in which the court observed that:

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

38. The above case was cited with approval in [Assets Recovery Agency v Pamela Aboo: EACC Interested Party](#) [2018] eKLR where the court faced with a similar set of facts pronounced itself thus:-

“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."

39. In this case I am satisfied that Assets Recovery Agency/Applicant has discharged the legal burden on a balance of probabilities. It has proved and it is indeed admitted that the funds in the 1st and 2nd Respondent's impugned accounts were derived from government ministries and entities. It has demonstrated through affidavit evidence that the funds were moved to the bank accounts belonging to the 1st Respondent by entities which claim to have done business with the government. It was therefore incumbent upon the 1st and 2nd Respondent to prove that the funds were transferred into their accounts lawfully. I have very carefully considered the evidence placed before this court by the 1st Respondent and my finding is that he has not discharged that evidential burden. There is no evidence at all that he supplied any goods or rendered any services to support such payment. Indeed one of the entities Encarta has disputed that the 1st Respondent paid it any amount of money even though it is the one that rendered the services to Bungoma County Government. The 1st Respondent did not tender any evidence to prove that it was awarded any tenders by the ministries and State agencies from which he received the funds save for one which was exhibited by the 2nd Respondent in her further affidavit dated February 5, 2015. Even then there is no evidence that that contract was performed. All we have is a letter from a permanent secretary indicating that the tender had been won by Wamunyoro Investment Limited and Machine Centre limited. There is no evidence that the contract documents referred to in that Notification of Award was ever executed and whether indeed there was performance of the contract. It is also instructive that the funds in issue are funds held in three different account in the names of the 1st Respondent and not the Kshs. 200,000,000 which he alleges he deposited in fixed account. Accordingly, I find that in the absence of evidence that these funds were acquired lawfully the same are proceeds of crime – a complex scheme of money laundering – which are liable to forfeiture to the State.
40. My finding also applied to the sum of Kshs.1,138,142.95 held in the 2nd Respondent's account NO.XXXX held in the name of Jenne enterprises. Whereas the 2nd Respondent alleges to have received money which she had loaned to the 1st Respondent's company Wamunyoro that sum was Kshs.28,000,000 and indeed she had first obtained a loan of Kshs.30,000,000/-. However, she has not given any explanation in regard to this sum of Kshs.1,138,142.95 which she received from the 1st Respondent's company after it received the same from a government entity for which he did not render any services or supply goods. Again the letter dated February 9, 2015 which the 2nd Respondent relies upon as prove of a tender awarded to the 1st Respondent's company does not demonstrate that there was indeed a contract between the two companies and the ministry. Nothing was adduced to prove that a contract was executed and that the same was performed. I am satisfied that the 2nd Respondent's account was merely being used to launder money unlawfully acquired from the government entities. That money is liable for forfeiture to the State.



Issue No. (ii) Whether the Interested Party has demonstrated that the said funds are not proceeds of crime and that it has a legal lien over the funds on account of credit facilities advanced to 3rd parties.

41. On this issue it is my finding that the interested party has not proved that it has any interest in the funds sought to be forfeited. Clearly its interest would be in the fixed deposit of Kshs. 200,000,000 which was used by the 1st Respondent to guarantee the various entities evidenced by its documents but not the funds in these three accounts. Accordingly, its claim fails.
42. In the upshot the Originating Motion is granted in terms of prayers 2, 3 and 4 as follows:
- i. That a declaration is hereby issued that the following funds are proceeds of crime and therefore liable for forfeiture to the State:
 - a) Kshs. 165,000,000 held in account number XXXX at Rafiki Micro Finance Bank in the name of Rigathi Gachagua.
 - b) Kshs. 35,000,000 held in account number XXXX at Rafiki Micro Finance Bank in the name of Rigathi Gachagua.
 - c) Kshs. 773,228.33 held in account number XXX at Rafiki Micro Finance Bank in the name of Rigathi Gachagua.
 - d) Kshs. 1,138,142.95 held in account number XXXX at Rafiki Micro Finance Bank in the name of Jenne Enterprises
 - ii. That an order is hereby issued that the above funds be forfeited to the Government of Kenya and be transferred to the Assets Recovery Agency.
43. Costs follow the event and accordingly the costs of the

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY, 2022.

E N MAINA

JUDGE

