



Assets Recovery Agency v Mubadala Merchants Limited & 3 others; Bernhard Ten Brinke Holding BV & another (Interested Parties) (Anti-Corruption and Economic Crimes Civil Suit E023 of 2021) [2022] KEHC 14486 (KLR) (Anti-Corruption and Economic Crimes) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E023 OF 2021
EN MAINA, J
OCTOBER 27, 2022**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

MUBADALA MERCHANTS LIMITED 1ST RESPONDENT

FIRST CARGO LOGISTICS LIMITED 2ND RESPONDENT

FIRST LINE CAPITAL LIMITED 3RD RESPONDENT

DOUMBE MA 4TH RESPONDENT

AND

BERNHARD TEN BRINKE HOLDING BV INTERESTED PARTY

THREE GOLD BV INTERESTED PARTY

JUDGMENT

1. The Assets Recovery Agency, the Applicant, has filed an Originating Motion dated July 14, 2021 supported by an affidavit sworn by CPL Sautet Jeremiah sworn on the same date. The Application is brought under the provisions of Sections 81, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and seeks the following orders: -

- ' 1) That this Honourable Court be pleased to declare funds held in the following bank accounts as proceeds of crime and therefore liable for forfeiture to the Government of Kenya;



- i. Kshs 26,782,298.00 held in account number 01192xxxxx1200 at Cooperative Bank in the name of Mubadala Merchants Limited.
 - ii. Kshs 1,101,944.10 held in account number 0102xxxxx1100 at Standard Chartered Bank in the name of First Cargo Logistics Limited.
 - iii. USD 32,330.73 held in account number 8702xxxxx1100 at Standard Chartered in the name of First Cargo Logistics Limited.
 - iv. Kshs 823,392.85 held in account number 0102xxxxx5500 at Standard Chartered Bank in the name of First Line Capital Limited.
 - v. Kshs 5,306,260.95 held in account number 0100xxxxx3700 at Standard Chartered Bank in the name of Doumbe Malonga Eddy Michel
 - vi. USD 60,854.68 held in account number 8700xxxxx3700 at Standard Chartered Bank in the name of Doumbe Malonga Eddy Michel.
1. That this Honourable Court be pleased to issue an order of forfeiture of the following funds to the Government of Kenya;
 - i. Kshs 26,782,298.00 held in account number 01192xxxxx1200 at Cooperative Bank in the name of Mubadala Merchants Limited.
 - ii. Kshs 1,101,944.10 held in account number 0102xxxxx1100 at Standard Chartered Bank in the name of First Cargo Logistics Limited.
 - iii. USD 32,330.73 held in account number 8702xxxxx1100 at Standard Chartered in the name of First Cargo Logistic Limited.
 - iv. Kshs 823,392.85 held in account number 0102xxxxx5500 at Standard Chartered Bank in the name of First Line Capital Limited.
 - v. Kshs 5,306,260.95 held in account number 0100xxxxx3700 at Standard Chartered Bank in the name of Doumbe Malonga Eddy Michel
 - vi. USD 60,854.68 held in account number 8700xxxxx3700 at Standard Chartered Bank in the name of Doumbe Malonga Eddy Michel.
 3. That the funds forfeited in prayer 2 above be deposited in A/c No 1xxxxx1339 held at the Kenya Commercial Bank, KICC branch, in the name of the Assets Recovery Agency.
 4. 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.
 5. That there be no orders as to costs.'



2. The Application is based on the grounds stated on the face of it, the supporting affidavit and supplementary affidavit sworn on December 10, 2021 by CPL Sautet Jeremiah, as follows:

- 1) That the Applicant is the Assets Recovery Agency 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.
2. That Sections 81, 82, 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* authorizes the Agency to institute Civil Forfeiture proceedings for the recovery of proceeds 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 investigation, identification, tracing, seizure and recovery of proceeds of crime.
4. That the 1st Respondent is a registered company at the Business Registration Service duly registered on April 23, 2019 via certificate number PVT-xxxxx32.
5. That Mr Elvis Ouma Muga of National identity card Number 258xxxxx is a director of the 1st Respondent and the account sole signatory and ultimate beneficiary of funds held in Co-operative Bank account number 01192xxxxx1200 (a Kenya Shillings account) held in the name of the 1st Respondent.
6. That the 2nd Respondent is a registered company at the Business Registration Service duly registered on August 8, 2018 vide certificate number PVT-xxxxx6V.
7. That the 3rd Respondent is a registered company at the Business Registration Service duly registered on September 29, 2017 via a certificate number PVT-xxxxxXO.
8. That Mr. Bupe Chipando is a holder of a Zambian passport number Zxxxxx09; an alien certificate No 1xxxxx31; and a director of the 2nd and 3rd Respondents.
9. That Mr Bupe Chipando is the account signatory and beneficial owner of the bank accounts operated by the 2nd and 3rd Respondents held at Standard Chartered Bank identifiably account numbers 0102xxxxx1100 (a Kenya Shillings account) at Standard Chartered Bank in the name of First Cargo Logistics Limited; 8702xxxxx1100 (a US dollar account) at Standard Chartered in the name of First Cargo Logistics Limited; 0102xxxxx5500 (a Kenya Shillings account) at Standard Chartered Bank in the name of First Line Capital Limited.
10. That the 4th Respondent is an adult, a Cameroon National holder of a Kenyan Alien Certificate number 2xxx24.



11. That the 4th Respondent is the account signatory and beneficial owner of funds held in account number 8700xxxxx3700 (a US dollar account) held at Standard Chartered Bank.
12. That on November 23, 2020, the Agency received information into a suspected case of complex money laundering schemes, and proceeds of crime transnational in nature involving multiple money transactions of approximately USD 1,567,150 from foreign jurisdiction whose source could not legitimately be established involving the Respondents herein.
13. That the Respondents are suspected to be involved in a complex money laundering scheme, transnational in nature involving USD 1,567,150 from an entity in Amsterdam on the pretense that they are able to export timber to the Netherlands from Kenya.
14. That investigations have established that the Respondents who include a natural person and the legal entities executed a complex scheme of money laundering designed to conceal, disguise the nature, source, disposition and movement of illicit funds, suspected to constitute proceeds of crime and which are the subject matter of this application.
15. That to facilitate payment and movement of the funds to the Respondents accounts, the Respondents used agreements supported with falsified custom declaration forms purportedly from Kenya Revenue Authority to support the transfer of funds into their accounts.
16. That there are reasonable grounds and evidence demonstrating that the funds held by the Respondents in the specified bank accounts 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.
17. That on March 29, 2021, the Applicant filed HCACEC Misc No E009/2021 Assets Recovery Agency -Vs- Mubadala Merchants Limited & 3 Others and obtained Court Orders preserving funds in the said accounts and orders prohibiting the Respondent and/or his agents, representative from transacting, transferring and/or dealing in any manner with the funds held in the bank accounts.
18. That on April 16, 2021 the Applicant gazetted the Preservation orders pursuant to Section 83(1) of POCAMLA vide Gazette Notice No 10849 of Vol CXXII-No 226.
19. 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.
20. 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.
21. 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.

22. That it is in the public interest that the orders sought are granted and the suspect assets be forfeited to the Applicant.
 23. That there are justifiable reasons and grounds to warrant the issuing of the orders sought.'
3. Additional grounds stated on the Applicant's further affidavit are that the Respondents concealed the source of funds by preparing multiple vague agreements which were vague and part of the money laundering scheme, hence the funds are illicit.
 4. The Application is opposed by the Respondents who have filed their respective responses; 1st Respondent's replying and supplementary affidavits sworn by Elvis Ouma Omuga on November 17, 2021 and December 15, 2021, 2nd and 3rd Respondent's replying affidavit sworn on November 22, 2021 and 4th Respondent's replying affidavit sworn on November 17, 2021.
 5. By consent of the parties on October 14, 2021, the 1st and 2nd Interested Parties were joined into the proceedings, to which they filed a replying affidavit sworn by Bernhard Ten Brinke on December 11, 2021 and written submissions dated May 25, 2022.

The Responses

6. The 1st Respondent opposed the Application vide an affidavit sworn by Elvis Ouma Muga. They contend that they are the legal and beneficial owners of account no xxxx held at Cooperative Bank. They contend that Ochieng Opiyo Advocate was the central and integral person to the transaction that is the subject of these proceedings, yet he was not joined by the Applicant. That it was important for him to be made a party to clarify the nature of the transactions. Further, the Applicant admits that USD 7,283,101 was deposited in Alfred Opiyo Advocate's accounts from a foreign jurisdiction and it is suspicious that he was not made a party.
7. They aver that Alfred Opiyo Advocate approached the 1st Respondent and asked to supply timber to a foreign national. That he did groundwork for the supply and subsequently entered into a contract with Benhard T H Brinke for the Interested Parties, upon which he raised an invoice and was paid Kshs 37,630,177.00.
8. He denied ever transacting with Eva Wanjiku Mwangi of Peva Cargo Limited and Odhiambo Tallam Advocates and Granfield Investment Limited. He also denied transacting in Gold, and that George Fundu was unknown to him. That the transactions were above board and the Respondent's dealings are above board and the Applicant has not discharged its burden under the Act.
9. In their replying affidavit, the 2nd and 3rd Respondents contend that they are the legal and beneficial owners of account numbers 0102xxxxx1100, 8702xxxxx1100 and 0102xxxxx5500 held at Standard Chartered Bank. They aver that these bank accounts were temporarily frozen by an order of the court dated March 31, 2021.
10. That the Director of both Companies, Bupe Chipando was summoned and he recorded a statement with the Applicant on April 8, 2021 in which he explained the source of funds, which were payments for the supply of timber of mahogany and mvule species. That the transaction was to be managed by Alfred Ochieng Opiyo Advocate of Ochieng Opiyo & Company Advocates.



11. That they secured contracts with the 4th Respondent to supply timber, and thereafter raised an invoice addressed to the 1st Interested Party on January 12, 2021. It is on the basis of this invoice that they received the funds subject of these proceedings. They contend that they never had a contract for supply of Gold to the Interested Party. That the Contract for supply of gold dated August 27, 2021 is between the Interested Parties and George Fundu who is unknown to the Respondents. That the said George Fundu, Opiyo Advocate and Alinina Precious Metals were deliberately not made parties to these proceedings.
12. They aver that the Application contravenes the *Proceeds of Crime and Anti-Money Laundering Act* as the Interested Parties have confirmed the source of funds; that the dispute between the Respondents and the Interested Parties is of commercial nature and does not fall within the court's jurisdiction; that the Interested Parties have not disputed the signatures on the contracts signed between them and the 3rd Respondent. That the Respondent's dealings are above board and the Applicant has not discharged its burden under the Act.
13. On his part, the 4th Respondent in his affidavit avers that he is the legal and beneficial owner of accounts 0100xxxxx3700 and 8700xxxxx3700 at Standard Chartered Bank, which accounts were frozen on March 31, 2021 pursuant to an order of the court. That he was summoned and recorded a statement with the Applicant on April 8, 2021 where he explained the source of the funds as supply of timber.
14. That the Applicant has not given an iota of evidence to prove that the funds were proceeds of crime and the freezing order had denied him access to funds and subsequently basic needs. He contends that the Applicant has not discharged his burden under the *Proceeds of Crime and Anti-Money Laundering Act* as the Interested Parties have surfaced and confirmed the source of funds. That the conflict between the Interested Parties and the Respondent on the source of funds is not subject to interpretation by this court as it is a commercial dispute.

The Interested Parties' Response

15. The Interested Parties opposed the Application vide the affidavit of Bernhard Ten Brinke sworn on December 11, 2021.
16. They aver that they have an identifiable stake in the money frozen by the Applicants under Section 93 of the *Proceeds of Crime and Anti-Money Laundering Act* and ask the court to release the funds back to the 1st Interested Party's Bank account no NL85ING000xxxxx45, ING Bank N.V Netherlands. The state that the funds subject of these proceedings belong to them for the following reasons:
 1. A sum of USD 1,567,160.00 was sent from the 2nd Interested Party's Bank account no NL85ING000xxxxx45, ING Bank NV Netherlands to Ochieng Opiyo & Company Advocate's account no 105102xxxxx21 at Sidian Bank Limited.
 2. That the money was sent to the firm of advocates for purposes of conducting genuine gold business with the company known as Global Freight Management Limited vide a contract executed on the December 21, 2020.
 3. That the money was acquired through genuine business conducted in the Netherlands vide his various investment companies and does not form part of proceeds of crime, drug trafficking or terrorism.
 4. That the amount sent by the firm of Ochieng' Opiyo & Company Advocates to the accounts of the Respondents was done in complete breach of the Escrow Agreement dated 9th of January



2021 and was sent in furtherance of a criminal enterprise and conduct meant to defraud my companies of their hard earned cash.

5. That the Interested Parties' director has instituted criminal civil proceedings and disciplinary proceedings against the advocate and the conspirators of the fraud in an endeavor to recover the said amounts that were fraudulently obtained from his companies.
17. The Interested Parties aver that the Director Benhard Ten Brinke is a businessman in the Netherlands with vast and considerable interest in a conglomerate known as BTB-GROUP that is a big business player in kitchen appliances, housing, investments, leisure, car racing and real estate. He is also a respected rally driver in the Netherlands having participated in numerous rally competitions like, Hellendoorn Rally, the prestigious Dakar Rally Dutch racing activities. That the source of the funds was from the sale of his business Bribus Holding BV dealing with high end kitchens to NOBIA AB company listed on Nasdaq Stockholm stock exchange for Fifty-Five Million Euros (€ 55,000,000) the equivalent of about Seven Billion Four Hundred and Ten Million (KSH 7,000, 000,000/=)
18. That he incorporated the 1st and 2nd Interested party with the aim of undertaking the purchase and sale of high value precious metals among them gold nuggets, gold ore and nuggets; that on December 21, 2020 the 2nd Interested party entered into a contract for the purchase of 500 kilograms of Gold with an individual named George Fundu transacting through Global Freight Management Limited. To facilitate the performance of the said agreement, on January 9, 2021 an Escrow Agreement was executed between the 1st Interested Party and Mr Alfred Ochieng' Opiyo of Ochieng' Opiyo & Company Advocates. Vide the Escrow Agreement aforesaid, Alfred Ochieng' Opiyo was instructed by the 1st Interested Party to be responsible for handling monies on behalf of the 1st Interested Party and applying the said monies strictly as instructed by the 1st Interested Party.
19. That Alfred Ochieng Opiyo Advocate breached the escrow agreement and without the knowledge of the Interested Parties and Benhard Ten Brinke transferred the fund into numerous bank accounts with the intention of keeping the funds out of reach of the Interested Parties.
20. That the conduct of Alfred Ochieng Opiyo Advocate was that of a conspiracy with Bupe Chipando, Elvis Ouma Muga and others including the respondents to breach the escrow agreement furtherance of a criminal enterprise. He made false declarations to conceal the purpose of the funds as 'timber export' business yet they have never engaged in such business.
21. That Opiyo Advocate conspired with the directors of the 1st, 2nd and 3rd Respondents Bupe Chipando and Elvis Ouma Muga (Elias Nick H Muganda) in a criminal enterprise to deprive the Interested Parties of their legitimate funds. That the funds were irregularly transferred to Alfred Opiyo's co-conspirators as follows:
 1. Alfred Ochieng Opiyo transferred Kshs 26,782,298.00 from 1051xxxx0321 held at Sidian Bank to account number 01192xxxx1200 held by Mubadalla Merchants Limited (the 1st Respondent herein) at Cooperative Bank of Kenya Limited;
 2. Alfred Ochieng Opiyo transferred Kshs 77,957,616.00 from 1051xxxx0321 held at Sidian Bank to account number 8702xxxx5500 held by First Line Capital Limited (the 3rd Respondent herein). First Line Capital then moved Kshs 49, 050, 800 from its aforesaid account number 8702xxxx5500 to USD Dollar Account Number 8702xxxx1100 held by First Cargo Logistics (the 2nd Respondent herein); and



3. Out of the Kshs 49,050, 800.00 transferred into USD Dollar Account Number 870xxxxx1100, a sum of Kshs 15,000,000.00 was transferred to the account number 8700xxxxx3700 held by Eddy Doumbe Michel (the 4th Respondent herein) at Standard Chartered Bank.
4. On January 18, 2021, Opiyo Advocate transferred Kshs 47,000,000 to Peva Cargo Limited which company transferred Kshs 25,800,000 to Granfield Investments Limited, a company associated with Opiyo Advocate. A further Kshs 19,000,000 was transferred to Conrad Maloba Associates who transferred this amount back into Opiyo Advocates account.
22. They aver that a representative of the Interested Parties Ewout Haantra together with George Fundu visited Alinina Gold smelting and witnessed the smelting of 50 kgs of gold, which he paid for and took to Smart Ultra Vault for safe custody. The contract was 500kgs of gold hence the payment of the remaining funds into the escrow account. At no time did they discuss sale of timber. That despite payment of the funds into the escrow account, the Respondents failed to deliver the gold; it is on this basis that the Interested Parties representatives reported to the DCI on May 26, 2021.
23. Lastly, they aver that on July 8, 2021, the ODPF wrote a letter in respect of the criminal inquiry on Elvis Ouma Muga alias Nick H Muganda. He was subsequently charged with the offense of conspiracy to defraud contrary to Section 317 of the *Penal Code* and Obtaining money by false pretenses contrary to Section 313 of the *Penal Code*. The Interested Parties have also filed a complaint against Alfred Ochieng Opiyo Advocate before the Advocates Disciplinary Tribunal and have sued the Respondents in the Milimani High Court Case No E632 of 2021 which proceedings are currently pending before court.

Submissions by the Applicant

24. The Applicant, Respondents and Interested Parties filed written submissions which they highlighted in court on July 14, 2022.
25. The Applicant raised two issues for determination: whether the funds identified in prayer 2 of the Originating Motion are proceeds of crime liable for forfeiture to the Government and whether the Interested Parties have met the threshold for third party protection in Section 93(1) of the *Proceeds of Crime and Anti-Money Laundering Act*.
26. The Applicant submits that the funds held in the Respondents' bank accounts in prayer 2 are proceeds of crime arising from money laundering. Section 3 of the *Proceeds of Crime and Anti-Money Laundering Act* provides for money laundering as a stand-alone offence. That the Interested Party executed a money-laundering scheme in which they purportedly executed legally enforceable contracts to disguise, and conceal the nature, disposition and movement of the funds through the escrow agreement with Ochieng Opiyo Advocate and the various contracts executed by the Respondents and the 1st Interested Party for sale and purchase of timber.
27. They submit that there was no timber for sale as established by the Kenya Revenue Authority as per the alleged customs declaration forms submitted to the Bank. That the declaration had only been filled but not registered. That the 2nd and 3rd Respondents have produced an agreement for sale of timber executed by the respondents and the interested party which is proof of money laundering. That the 4th Respondent surprisingly stated that he gave the money to people he did not remember to buy timber from Congo on his behalf. Accordingly, there was a common intention between the interested parties and the respondents in the money laundering.



28. They submit that the forfeiture proceedings are civil in nature and the stand of proof is on a balance of probabilities. They referred to Director of Assets Recovery and Others, Republic v Green & others [2005] EWHC 3168 cited with approval in *Assets Recovery v Pamela Aboo*.
29. They cited further *Assets Recovery Agency v Fisher Roban and Miller, Delore, Supreme Court of Jamaica Claim No 2007 HCV003259* and submitted that the respondents have failed to rebut the evidence by the Applicant and accordingly, the funds are proceeds of crime and should be forfeited.
30. On the second issue, the Applicant submits that the Interested Parties have failed to meet the threshold of Section 93 of the *Proceeds of Crime and Anti-Money Laundering Act*. That the escrow agreement signed between Ochieng Opiyo & Company Advocates and the 1st Interested party is vague as it does not specify the purpose of funds with clarity hence it cannot be established that the funds were for the purchase of precious metals.
31. They submit that the Interested Parties willingly participated in the laundering; that of the *Proceeds of Crime and Anti-Money Laundering Act* of the *Proceeds of Crime and Anti-Money Laundering Act* is similar to Section 52 (2A) of the South Africa Prevention of Organized Crime Act 121 of 1998 and therefore referred to a decision of the Court of Appeal of South Africa in *National Director of Public Prosecutions v R O Cook Properties Cases 260/03, 666/02 and 111/03* where the court held as follows in this respect:
- (28) We agree that property owners cannot be supine. In particular, we endorse the notion that the State is constitutionally permitted to use forfeiture, in addition to the criminal law, to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime. In a constitutional state law-abiding property owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and to refrain from implicating themselves or their possessions in its ambit. And the State is entitled to use criminal sanctions and civil forfeitures to encourage this. Here constitutional principle recognizes individual moral agency and encourages citizens to embrace the responsibilities that flow from it.
- (29) We therefore agree that the Act requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilization. But the pursuit of those statutory objectives cannot exceed what is constitutionally permissible. Forfeitures that do not rationally advance the inter-related purposes of chapter 6 are unconstitutional. Deprivations going beyond those that remove incentives, deter the use of property in crime, eliminate or incapacitate the means by which crime may be committed and at the same time advance the ends of justice are in our view not contemplated by or permitted under the Act.'
32. Lastly, they submitted that the Interested Parties Application ought to be dismissed as it offends Section 6 of the *Civil Procedure Act* as the matter is substantially in issue in Commercial Suit No E 632 of 2021 whether the interested parties seek to recover a sum of USD 1,589,760 and have secured an order of attachment issued on June 16, 2021 by Majanja J, freezing the funds in account number 0100xxxxx2916 held in the name of Ochieng Opiyo & Company Advocates at Stanbic Bank. That they have an alternative remedy before a court of competent jurisdiction and the court should allow the application.



Submissions by the Respondents

33. In opposing the Application, the 1st and 4th Respondents submit on 3 three issues: procedural impropriety on the party of the Applicant; are the monies in question proceeds of crime and remedies.
34. Counsel for the 1st and 4th Respondents took issue with the procedural propriety of the Applicant; that prior to the filing of the forfeiture application, the Applicant had sought preservation orders in Misc Application E009 of 2021 to enable them to conduct investigations into the accounts of the Respondents. That the court granted the orders as a supervisory court and as such the Applicant was to report their findings. However, the Applicant's case is still based on suspicions, no evidence filed and they make reference to statements made by persons who are not party to the proceedings and therefore prejudicial to the Respondents.
35. They submit that suspicion alone that the funds are illicit cannot be the basis of forfeiture; that the Interested Party has demonstrated that they have the capability and resources to raise the funds and the only issue is what the purpose of the funds was, either gold or timber trading which are not crimes. They submit that the Applicant has entered the fray in a private transaction; that the Interested Party confirms to have filed a suit in the commercial division of the High Court over the same subject matter; that the court should consider the effect of an order of forfeiture on the pending proceedings in the commercial court. That there was a valid agreement between the Respondent and the Interested Party for the purchase of timber. That they also produced agreements for supply of timber between the 3rd and 4th Respondents.
36. That the Applicant has failed to discharge the burden of proof as the Application is based on mere suspicions; no evidence was produced to demonstrate that the funds were proceeds of crime hence the court should dismiss the Application.
37. On their part, the 2nd and 3rd Respondents submitted that the circumstances of this case do not fit the ingredients of an offence of money laundering under Section 3 of the [Proceeds of Crime and Anti-Money Laundering Act](#). That the Interested Parties have the capacity and means to transact over and above the funds in issue. That there existed a legitimate commercial transaction between the Respondents and the Interested Parties and the Applicant has not put forth any criminal intent on the part of the Respondents and Interested Parties.
38. They submit that the Application is based on mere suspicions and no evidence of criminal conduct has been adduced. That there is an ongoing suit in Milimani HC Suit E632 of 2021 Three Gold BV and another v Global Freight Management Limited and 6 others and as such, admission that there was a subsisting contract between the parties
39. They close by submitting that the Applicant has not discharged the burden of proof and as such the Application should be dismissed with costs.

Submissions by the Interested Party

40. The Interested Parties oppose the Application and seek protection of the funds under Section 93 of the [Proceeds of Crime and Anti-Money Laundering Act](#).
41. They submit that the Interested Parties are victims of transnational organized crime; that they have a stake in the funds subject of the proceedings; that the funds were acquired by the Respondents through criminal conduct, and the Directors of the Respondents have been charged with conspiracy to defraud and obtaining money by false pretenses, which cases are currently pending before the Magistrates court.



42. They submit that the allegation that the Interested Party was part of the money laundering is not supported in evidence; that the Applicant has in the Application and supporting affidavit stated that the funds were credited to the Respondents through a scheme to defraud foreign nationals. They referred to a letter by the ODPP dated December 11, 2021 and urge the court to arrive at similar findings, that the transfer of funds is enough proof that the suspects obtained money from the complainant and that there was sufficient evidence against Elvis Muga and George Fundu to sustain a criminal charge. Subsequently, Elvis Muga and Bupe Chipando, Directors of the 1st, 2nd and 3rd Respondents respectively were charged.
43. That the Interested Parties seek protection under Section 93 of the [Proceeds of Crime and Anti-Money Laundering Act](#); that the money was legitimate and the purpose was for the purchase of gold. That it was upon the receipt of the money that the Respondents conspired to defraud the Interested Parties.
44. That no charge or investigations have been tendered in court to show that the Interested Parties took part in money laundering; that the Applicant's supporting affidavit contains averments that suspicions on money laundering was only against the Respondents; that they have demonstrated the trail on how the funds ended up in the Respondents accounts and the Directors of the Respondents have been charged with the aforementioned charges. That the pending civil proceedings in respect of the funds subject of this suit do not affect these proceedings.

Analysis and determination

45. From a review of the pleadings, responses and submissions filed by the parties, the following issues arise for determination:
 1. 'Whether the funds in prayer number 2 of the Originating Motion are proceeds of crime and are liable for forfeiture to the Government;
 2. Whether the Interested Parties have met the threshold for protection under Section 93 of POCAMLA'

Whether the funds in prayer number 2 of the Originating Motion are proceeds of crime and are liable for forfeiture to the Government

46. The Applicant seeks orders that the funds particularized in prayer number 2 of the originating motion be declared as proceeds of crime and forfeited to the Government. The funds were preserved by an order of this court made in HCACEC Misc No E009/2021 Assets Recovery Agency -Vs- Mubadala Merchants Limited & 3 Others on April 9, 2022 and the preservation order published in the Kenya gazette vide Gazette Notice No 10849 of vol CXXII-No 226 in compliance with Section 83 (1) of the [Proceeds of Crime and Anti-Money Laundering Act](#)
47. It is trite that for any forfeiture order to be issued, the court must be satisfied that the property or asset is a proceed of crime or is to be used to perpetuate a crime. Section 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) provides thus:

' 92.

- (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.
- (2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.'

48. Forfeiture proceedings are civil in nature and the standard of proof is on a balance of probabilities. The Applicant need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct. The court in *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission [Interested Party]* [2018] eKLR held as follows in this respect:

' 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 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 matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.'

49. The gist of this case is that the Respondents are alleged to have defrauded the Interested Parties a sum of USD 1,567,120 under the pretext that the Respondents would sell to them 500kgs of gold, which they did not deliver.

50. Ultimately, the ODPP in its letter dated December 11, 2021 directed that the Directors of the 1st, 2nd and 3rd Respondents be charged with the offences of obtaining money by false pretense contrary to Section 313 of the *Penal Code* and conspiracy to defraud under Section 317 of the *Penal Code*. Based on this directive, Elvis Muga and Bupe Chipando, the Directors of the 1st, 2nd and 3rd Respondents were charged with the said offences and the proceedings are currently pending before the Magistrates court.

51. This court, while alive to the fact that there are pending criminal proceedings against the Respondents cautions that the criminal charges or the outcome of the criminal process do not affect the validity of civil forfeiture proceedings such as those in this case. Civil forfeiture is not dependent on the outcome of any criminal trial in relation to the parties and the subject matter. This principle is codified in Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* which provides as follows:

' 92(4) 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'

52. Further, this court in *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR in determining a similar issue cited with an affirmation the holding of the court in *Republic vs Department of Public Prosecution & Others JR Civil Application No 102 of 2016* where the court held as below:

' It would appear to me therefore, and I so hold, that the prosecution need not prove, prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court



of law that there was theft or forgery or fraud that led to the acquisition of the proceeds or property the subject of the money laundering proceedings.

The criminal origins of the proceeds may be proved in the same way as any other elements of an offence can be proved. The offence of money laundering must be deemed as 'stand-alone' offence. In proving that the proceeds or property are proceeds of crime even circumstantial evidence will be crucial. There is in my view no need to await any prior convictions of other offences or before launching the prosecution of alleged money launderers.'

53. It is not disputed that a total USD 1,567,160 was remitted from the 1st Interested Party's bank account no NL85ING000xxxxx45, ING Bank NV Netherlands to the account of Ochieng Opiyo & Company Advocates 1051xxxxx0321 to hold as an escrow agent on behalf of the Interested Parties. Part of these funds were thereafter transferred to the Respondents in the sums detailed by the Applicant, receipt of which is admitted by the Respondents.
54. The Respondents have expressly admitted receiving the funds; the purpose of the funds is however disputed, with the Respondent contending that it was for the sale of timber to the Interested Parties while the Interested Parties assert that it was for the purchase of gold.
55. The explanation by the Respondents on the source of funds is that the Respondents and Interested Parties had entered into a timber business, a fact that has been denied by the Interested Parties in the affidavit of their Director Bernhard Ten Brinke who avers that they were defrauded by the Respondents in the pretext that they would sell them gold.
56. The Interested Parties' explanation is given pre-eminence by the investigations carried out by the Directorate of Criminal Investigations and by a letter by the Office of the Director of Public Prosecutions to the Directorate of Criminal Investigations notifying it that the offence of money laundering had not been disclosed. It also become more probable, given that the Respondents have not produced evidence to show that they were in the business of selling timber. The evidence shows that the Respondents in fact delivered 50 kgs out of the agreed 500kgs of alleged 'gold' to the Interested Parties. This court is therefore satisfied that the Applicant has proved on a balance of probabilities that the money was proceeds of crime.
57. Once the Applicant proved on a balance of probabilities that the funds in the respondents' accounts were illegally obtained, the burden of proof shifted to the Respondents to demonstrate how they lawfully came into possession of the seized funds, which they have failed to discharge. The Respondents' allegation that they were in the business of selling timber is not convincing as the 4th Respondent's statement was that once received, he gave out the money to people he did not remember to buy timber from Congo on his behalf. No timber was delivered at all. One would have expected that for such a huge amount of money the 4th Respondent would have done due diligence before releasing the money. Moreover, what they delivered to the Interested Party was 50 kgs of 'gold' but not timber hence rendering it more probable that the relationship was about 'gold' not timber.
58. In the case of *Assets Recovery Agency v Quorum Limited & 2 others [2018] eKLR* the court cited with approval the holding in *Assets Recovery Agency –vs- Fisher, Rohan and Miller, Delores*, Supreme Court of Jamaica, Claim No 2007 HCV003259 where it was held:-

' 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 thousand 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.

This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the August 14, 2007.

This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The money was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets.'

59. In the upshot, this court is satisfied that the Applicant has proved on a balance of probabilities that the funds in the Respondents' accounts were not legitimately acquired. It should be noted that this court has exercised a lot of caution so as not to use language which can lead to the conclusion that has already pre-determined the criminal proceedings in the lower court. Accordingly, this court finds that the same would be liable for forfeiture to the Government. However, before, I can make an order to that effect, I must determine whether the Interested Parties have met the threshold for protection under Section 93 of the *Proceeds of Crime and Anti-Money Laundering Act*.

Whether the Interested Parties have met the threshold for protection under Section 93 of POCAMLA

60. The Interested Party through their joint replying affidavit dated December 11, 2021 claim that they have a legitimate, identifiable claim to the monies frozen by the Applicant. They fervently claim to have been defrauded USD 1,567,120 consisting of the funds subject of these proceedings.
61. According to the Interested Parties, the fraud was perpetrated by the Respondents and one Alfred Opiyo Advocate who is not a party to these proceedings. The Directors of the 1st, 2nd and 3rd Respondents have been charged with the offence of obtaining money by false pretenses before the Magistrates court. There are also parallel proceedings before the court in Commercial Suit No. E 632 of 2021 and disciplinary proceedings against the said Alfred Opiyo Advocate at the Advocates Disciplinary Commission regarding the same issues.
62. Section 93 of the *Proceeds of Crime and Anti-Money Laundering Act* provides as follows in respect to protection of third- party interests:

- ' 93. Protection of third parties
- (1) Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities —
- (a) that the person was not in any way involved in the commission of the offence; and
- (b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—
- (i) for sufficient consideration; and without knowing, and in circumstances such as not to arouse a reasonable suspicion, that



the property was, at the time he acquired it, tainted property, the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.'

63. The case of the Interested Parties clearly falls under Section 93(1) (a) of the *Proceeds of Crime and Anti-Money Laundering Act*. This law is intended to protect third parties from loss provided that they were not in any way involved in the commission of the crime. The Applicant has not produced any evidence before the court on the basis of which this court can conclude that the Interested Parties were involved in any offence.
64. In the case of *Assets Recovery Agency v Phylis Njeri Ngirita & 2 others; Platinum Credit Limited (Interested Party) & another [2020] eKLR* the High Court in allowing a similar application for third party protection held as follows:

' 275. Section 93 of POCAMLA is intended to protect third parties in the circumstances set out under its provisions. The Agency did not place any material before the court on the basis of which the court could conclude that the Interested Parties were involved in the offences out of which the property the subject of forfeiture was acquired, or that they knew that the motor vehicles were tainted properties at the time they acquired such interests. There is a danger that a party who acquires property in circumstances similar to what is presently before me may obtain financing on the security of such properties with a view to concealing the source of the properties or defeating forfeiture proceedings, and those who acquire such interests may be complicit. However, no such evidence in this case has been placed before me by the Agency. That being the case, the interests of the Interested Parties merit the protection of the court under section 93 of POCAMLA.'

65. In the written submissions the applicant argued that the Interested Parties participated in money laundering. This assertion was however not made in the Originating Motion and the affidavits filed. It is trite that parties are bound by their pleadings; Pleadings are the bedrock upon which all the proceedings derive from. The Applicant's submissions should accordingly be aligned with the pleadings and the averments in the supporting and further affidavits. See the case of *Independent Electoral and Boundaries Commission & Ano vs Stephen Mutinda Mule & 3 others (2014) eKLR* where the court held:

' In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'

Accordingly, the Applicant must confine itself to its pleadings; it cannot be allowed to make allegations outside of its pleadings.

66. In the supporting affidavit the Applicant stated that the Respondents 'defrauded' the Interested Parties; that the subject funds were transferred to the Respondents by the 1st Interested Party and that the Interested Parties were victims of fraud. No evidence has been adduced to prove that the Interested Parties obtained the funds from an illegitimate source or that the funds were tainted. Indeed, there is nothing to show that the source of the Interested Parties' funds was the subject of investigations. It is instructive that upon the file being placed before the Director of Public Prosecutions by the Directorate



of Criminal Investigations for action, the Director of Public Prosecutions (ODPP) considered the evidence and by a letter dated July 8, 2021 made the following findings:

' As regards the counts on money laundering, we find that the evidence on record cannot sustain the said charges. Kindly refer to Section 3 of POCAMLA on the definition of money laundering. Further investigations need to be done to establish the source of funds.'

67. The Applicant has not demonstrated through evidence that it carried out investigations to establish the source of funds as directed by the ODPP. This Court therefore finds that there is no basis for its assertion that the interested parties were involved in money laundering.
68. The Interested Parties have demonstrated on a balance of probabilities that they were victims rather than accomplices of the Respondents. I note however that there is a commercial dispute, touching on the funds, between the Interested Parties and the Respondents in the Commercial Division of the High Court being Commercial Suit No E632 of 2021 and therefore this court would in deference to those proceedings (Commercial Suit No E632 of 2021), decline to make any orders under Section 93(1) of the [Proceeds of Crime and Anti-Money Laundering Act](#). It shall however direct that the funds shall continue to be preserved pending the hearing and determination of those proceedings or orders of the Judge hearing the matter.
69. The costs of this case shall be borne by the Respondents. Orders accordingly.

Signed, dated and delivered virtually this 27th day of October 2022

E N MAINA

JUDGE

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