REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC APPLICATION NO 7 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

JOSEPH WANJOHI.....1ST RESPONDENT

JANE WAMBUI WANJIR.....2ND RESPONDENT

SIDJOE MANUFACTURERS & SUPPLIERS.....3RD RESPONDENT

MARUDIANO ZONE LTD.....4TH RESPONDENT

JUDGMENT

1. The applicant, the Asset Recovery Agency, is a body corporate established under section 53 of the **Proceeds of Crime and Anti-money Laundering Act (POCAMLA)**. It has the mandate to recover assets which are acquired from or are the profits or benefits or proceeds of crime. It filed the present application against the respondents by way of Originating Summons dated 11th February 2019 premised under sections 81, 90 and 92 of the POCAMLA as read with Order 51 of the Civil Procedure Rules seeking the following orders:

> ***1. THAT this Honourable Court be pleased to issue an order declaring that a Total of Kshs 10,589,069.9 held in Accounts number 2039278483 and 0754417005 in the name of Joseph Wanjohi at Barclays Bank Moi Avenue Branch, Nairobi and in the name of Sidjoe Manufacturers and Suppliers at Barclays Bank Muthaiga North Branch Nairobi are proceeds of crime and therefore liable for forfeiture to the State.***
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> ***2. THAT this Honourable Court be pleased to issue an order declaring that motor vehicles registration numbers KBU 940W Ranger Rover sport, S. Wagon and KCD 299H Mercedes Benz, DBA-207347, Saloon are proceeds of crime and therefore liable for forfeiture to the State.***
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> ***3. THAT this Honourable Court be pleased to issue an order declaring that L.R. NO. 27981/7 & I.R. 122131/65, L.R. NO. 16217/87/17 & I.R. 90025 and L.R. NO. 27981/8 & I.R. 122131/66 all registered under the name of Marudiano Zone Limited are proceeds of crime and therefore liable for forfeiture to the State.***
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> ***4. THAT this Honourable Court be pleased to issue orders of forfeiture of the following funds;***
>
> > ***i. Kshs 10, 013, 187.60 held in Account number 2039278483 in the name of Sidjoe Manufacturers and Suppliers held at Barclays Bank Muthaiga North Branch Nairobi.***
> >
> > ***ii. Kshs 575,882.30 held in Account number 0754417005 in the name of Joseph Wanjohi held at Barclays Bank Moi Avenue Branch, Nairobi.***
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> ***5. THAT this Honourable Court be pleased to issue orders of forfeiture of the following motor vehicles;***
>
> > ***i. KBU 940W Ranger Rover sport, S. Wagon***

ii. KCD 299H Mercedes Benz, DBA-207347, Saloon

6. THAT this Honourable Court be pleased to issue orders of forfeiture of the following properties;

i. L.R. NO. 27981/7 and I.R. 122131/65 registered in the name of Marudiano Zone Limited

ii. L.R. NO. 16217/87/17 and I.R. 90025 registered in the name of Marudiano Zone Limited

iii. L.R. NO. 27981/8 and I.R. 122131/66 registered in the name of Marudiano Zone Limited

7. THAT this Honourable Court be pleased to issue an order that the above funds, motor vehicles and properties be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency (the Applicant herein).

8. THAT this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.

9. THAT costs be provided for.

2. The application is supported by affidavits sworn by Cpl. Fredrick Muriuki, anInvestigating Officer attached to the applicant, and is based on the grounds set out on the face of the application.

3. The 1st -4th grounds in the application constitute descriptions of the applicant. It states that it is a corporate body established under section 53 of POCAMLA with the mandate to identify, trace, freeze and recover proceeds of crime. It further states that Part VIII of POCAMLA sets out the procedure for civil forfeiture of proceeds of crime, and that under sections 81-89 thereof, it is authorized to institutecivil 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. Under section 90 of POCAMLA, where a preservation order is in force, the Act authorises the applicant to apply to the High Court for an order of forfeiture to the government of all or any of the property that is subject to the preservation order.

4. The applicant states that the 1st and 2nd respondents are husband and wife, residing at Muthaiga North Parkside Drive House No. 65 within Nairobi. The 1st respondent is also the holder of bank account number 0754417005 holding funds amounting to Kshs 575,882.30. He is also the registered owner of motor vehicles registration numbers KBU 940W Ranger Rover Sport, S. Wagon and KCD 299H Mercedes Benz, DBA-207347, Saloon.

5. According to the applicant, the 3rdand 4th respondents are business entities whose proprietors and directors are the 1stand 2nd respondents. It is its case that the following properties are registered in the name of the 4th respondent, Marudiano Zone Limited:

i. L.R. No. 27981/7 and I.R. 122131/65;

ii. L.R. No. 16217/87/17 and I.R. 90025;

iii. L.R. No. 27981/8 and I.R. 122131/66.

6. The applicants further state that the 3rd respondent, Sidjoe Manufacturers and Suppliers, is the holder of bank accounts numbers 2039278483 and 2039278459 held at Barclays Bank, Nairobi holding funds amounting to Kshs 10, 024,441.60.

7. The applicant states that the 1st and 2ndrespondent were arrested on 12thJuly 2018 at Muthaiga North and subsequentlycharged in court on 13thJuly 2018 in the Senior Principal Magistrates Court at Jomo Kenyatta International Airport Criminal Case Number 90 of 2018 with various offences including possession of wildlife trophies contrary to the provisions of the Wildlife Conservation and Management Act, 2013. Thereafter, the applicant, in exercise of its mandate, commenced investigations to recover proceeds of crime accrued to the respondents through the illegitimate trade in wildlife trophies and narcotic drugs.

8. According to the applicant, a search conducted at the residence of the 1st and 2nd respondents'home in Muthaiga North Parkside Drive House No. 65 during their arrest resulted in the recovery of four (4) pieces of elephant tusks, assorted alcoholic drinks, cash totaling to Kshs 469,000/=, motor vehicle registration number KCD 299H and mobile phones among other items.

9. The applicant further states that on 6thAugust 2018, it had received information that the respondents had acquired massive assets using proceeds obtained from the illegitimate trade in wildlife trophies and narcotic drugs, which proceeds had been received in the bank accounts set out above, and which were suspected to be proceeds of crime contrary to the provisions of the Wildlife Conservation and Management Act, 2013, the Narcotic Drugs and Psychotropic Control Act No. 4 of 1994 and the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA).

10. It had accordingly opened an inquiry file No. 19 of 2018 to investigate and inquire into the activities in the above accounts for the purpose of ascertaining whether they held any funds that are proceeds of crime. Its investigations established that the assetsand funds set out above are proceeds of crime obtained from the illegitimate trade in wildlife and narcotic drugscontrary to the provisions of the legislation referred to above. It had further established that the 1st and 2nd respondents had jointly acquired massive assets using proceeds from the

illegitimate trade in wildlife trophies and narcotic drugs and had registered them in their names and in the name of the 4th respondent in order to conceal and disguise the source of the funds used to procure the said assets.

11. It is its case therefore that from its investigations, there are reasonable grounds to believe that the assetsand the funds in the accounts set out in the application above were obtained through the illegitimate trade in wildlife trophies, drugs and illegal substances. The respondents, according to the applicant, have not given any reasonable explanation to prove any legitimate source of the funds. The applicant asserts that the assets and funds in the respondents' accounts were unlawfully acquired and are therefore proceeds of crime contrary to the provisions of POCAMLA. Further, that there are reasonable grounds to believe that the accounts are holding proceeds of crime contrary to POCAMLA and are used as conduits for money laundering contrary to sections 3, 4 and 7 as read together with section 16 of the said Act.

12. Theapplicant argues that it is in the interests of justice and in the public interest that orders do issue forfeiting to the applicant, on behalf of the government of Kenya, the assets and funds specified above; that if the orders sought are not granted, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of national security, interest, economy and general interests; and that there is an international obligation on the State to combat illegitimate poaching, transnational organized crime and laundering of proceeds of crime by proper implementation of their national domestic laws.

The Case of the Applicant

13. The application is supported by an affidavit sworn by No. 62047 Cpl. Fredrick Muriuki, a police officer attached to the applicant. He avers that he is part of a team of police investigators undertaking investigations relating to offences under the Narcotic Drugs and Psychotropic Substances (Control) Act No 4 of 1994, the Wildlife Conservation and Management Act, 2013, the POCAMLA and the Prevention of Organised Crimes Act 2010 against the respondents and their associates and mules.

14. Cpl. Muriuki avers further that their investigations against the 1st and 2nd respondents had started way back in 2005. Further, that the respondents have been under active investigations for narcotics trafficking, distribution and sale of narcotic drugs, illegitimate trading of wildlife trophies, organized crimes and money laundering.

15. Cpl. Muriuki deposes that on 16thOctober 2009, the 1st and 2nd respondents were arrested at their Muthaiga home while in possession of 1274 grams of heroin and were subsequently charged with the offence of trafficking in narcotic drugs contrary to the provisions of the Narcotic Drugs and Psychotropic Control Act vide Criminal Case Number 4704 of 2009 at Kibera Law Courts. A copy of the charge sheet in the case is annexed to his affidavit as FM-1.

16. The investigations against the 1st and 2nd respondents established that the two respondents had devised a complex scheme and criminal network mechanism of acquiring, trafficking, distributing and selling narcotic drugs through their family members, associates and hired mules within and outside Kenya. This network included Elizabeth Njoki Wanjiru, a Kenyan citizen who is a sister of the 2nd respondent and a sister-in- law of the 1st respondent. It also included oneNassoro Salim Said, a Tanzanian national. The applicant's investigations established that both Elizabeth Njoki Wanjiru and Nassoro Salim Saidworked for the 1st and 2nd respondent as mule distributors and conveyorsof narcotic drugs.

17. According to Cpl. Muriuki, Elizabeth Njoki Wanjiru and Nassoro Salim Said were arrested on 2ndSeptember 2016 at Mlolongo while conveying and in possession of a narcotic drug namely heroin of 3921.6 grams of market value Kshs 11, 764,800/= and were charged in court as evidenced in a charge sheet annexed to his affidavit as FM-2.

18. The applicant further averred that its investigations had also established that one Kinyanjui Joseph, a brother of the 2ndrespondent, and Elizabeth Njoki Wanjiru, worked for the 1stand 2nd respondents as a mule distributor and conveyor of narcotic drugs. That Kinyanjui was arrested on 4thSeptember 2017 while conveying and in possession of heroin of 238.2 grams with a market value of Kshs 714, 600/= and was charged with trafficking in a narcotic drug contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act before the Senior Principal Magistrates' Court at Jomo Kenyatta International Airport in Criminal Case Number 164 of 2017 as evidenced in a charge sheet marked FM-3 annexed to Cpl. Muriuki's affidavit. He was convicted on 9thAugust 2018 and sentenced to 20 years imprisonment and a fine of Kshs 1 million.

19. Cpl. Muriuki further averred that Joseph Kinyanjui Wanjiru andElizabeth Wairimu Nyoike, both Kenyans, were arrested on 7th December 2016 at Mathare Drive-in Estate in Ruaraka while in possession of heroin of 4, 857.87 grams with market value of Kshs 14, 573,6100/=. Investigations established that both worked for the 1stand 2nd respondents as mule distributors and conveyors of narcotic drugs. They were both charged with trafficking in narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994 as evidenced in annexure FM-4, which is a copy of the charge sheet. On 9thAugust 2018, Joseph Kinyanjui Wanjiru was convicted and sentenced to 20 years imprisonment and a fine of Kshs 1 million.

20. The applicant avers that the benefits derived from this illegal trade in narcotic drugs and wildlife trophies were subsequently delivered to the 1st and 2nd respondents by way of physical cash and deposits into their identified bank accounts by their agents, associates and conduit entities in order to concealand disguise the source of the funds. It is its case that its investigations established that the 1stand 2nd respondents subsequently laundered the benefits of the narcotic drugs and wildlife trophies by investing the same in the properties and assets identified with an intent of concealing, disguising and hiding the source of the funds used to acquire the assets in issue contrary to the provisions of the POCAMLA. Further, that the 1stand 2nd respondents, in a scheme to disrupt the chain of investigations, source of funds and the connections between the assets they acquired through the benefits derived from the illegal trade in narcotic drugs and wildlife trophies, created and registered the 3rdand 4th respondents and other entities as conduits for money laundering. They also registered some of the assets in issue under the names of these conduit entities.

21. Cpl. Muriuki avers that on 12thJuly 2018, a team of police officers from Directorate of Criminal investigation, headquarters arrested the 1stand 2nd respondents on suspicion of dealing in illicit trade in wildlife trophies and narcotic drugs. During the arrests, a search was conducted at their residence at Muthaiga North Parkside Drive House No. 65 and four (4) pieces of elephant tusks weighing seven (7) kilograms with a street value of approximately Kshs 700,000, assorted alcoholic drinks, cash totaling to Kshs 469,000/=, motor vehicle registration number KCD 299H and mobile phones, among other items, were recovered.. He avers that the four (4) pieces of elephant tusks were found with the help of a police sniffer dog inside the master bedroom of the 1stand 2nd respondents, sealed in sellotape.

22. It is his further averment that assorted alcoholic drinks are valued at approximately Kshs Seventeen Million (17,000,000/) and the 1st and 2nd respondents are suspected to be trading in them illegally without permits and certification clearances from the relevant government agencies. On13thJuly 2018, the 1st and 2nd respondents were charged before the Senior Principal Magistrates' Court at Jomo Kenyatta International Airport in Criminal Case Number 90 of 2018 as indicated in the charge sheet annexed to his affidavit as FM-5.

23. Cpl. Muriuki avers that on 6thAugust 2018, the applicant received information that the respondents had acquired massive assetsusing proceeds obtained from the illegitimate trade in wildlife trophies and narcotic drugs contrary to the law aforesaid. The respondents had also received funds which are suspected to be proceeds of crime contrary to the provisions of the POCAMLA. The applicant had accordingly opened an inquiry file No. 19 /2018 to investigate and inquire into the activities in the above accounts for the purpose of ascertaining whether they hold any funds that are proceeds of crime.

24. It was Cpl. Muriuki's averment that on 9thAugust 2018, he had filed *exparte*applications in the Chief Magistrates' Court in Misc. Criminal Application Nos. 2877 and 2878 of 2018 seeking orders to search, inspect, seize, freeze and preserve funds in several accounts owned and/or controlled by the respondents, which orders were granted for 14 days. Copies of the orders were annexed to his affidavit as FM 6 (a & b). The accounts in respect of which he sought and was granted orders were:

i. Account number 2039278483 in the name of Sidjoe Manufacturers and Suppliers held at Barclays Bank Muthaiga North Branch Nairobi.

ii. Account number 0754417005 in the name of Joseph Wanjohi held at Barclays Bank Moi Avenue Branch, Nairobi

iii. Account number 0758526593 in the name of Jane Wambui Wanjiru held at Barclays Bank Moi Avenue Branch Nairobi.

iv. Account number 2036784280 in the name of Joseph Wanjohi held at Barclays Bank Moi Avenue Branch, Nairobi.

v. Account number 0150192835623 in the name of Jane Wambui Wanjiru held at Equity Bank Limited, Nairobi.

vi. Account number 2039278459 in the name of Sidjoe Manufacturers and suppliers held at Barclays, Muthaiga North Branch Nairobi.

25. On 5th November 2018, he had further applied through*ex parte* Misc. Criminal Applications Numbers 4153 and 4154 of 2018 seeking orders to further search, inspect, seize, freeze and preserve funds in the above accounts owned and/or controlled by the respondents which orders were granted for a period of 7 days. Copies of the orders from the Chief Magistrate's Court were annexed as FM 7 (a & b). He had also, through the same application, obtained copies of the account opening forms and accounts statementsexhibited in his affidavit as 'FM 8 (a, b, c and d).'

26. Cpl. Muriuki averred that from his analysis of the accounts opening forms and statements of accounts,he established that all the six (6) accounts were opened and operated by the 1st and 2nd respondents, and all the six (6) accounts received suspicious huge cash deposits that indicate activities of money laundering.He further established that the deposits were made in tranches of below Kshs 1,000,000/= to evade the reporting threshold required by the Central Bank of Kenya Prudential Guidelines for Account Holders to declare the source of the money.

27. According to the applicant, the funds in the following bank accounts are funds which there is reasonable cause to believe were acquired using the proceeds of crime from the illegitimate trade in wildlife and narcotic drugs by the respondents:

i. Kshs 10, 013, 187.60 held in account number 2039278483 in the name of Sidjoe Manufacturers and Suppliers at Barclays Bank Muthaiga North Branch Nairobi;

ii. Kshs 575,882.30 held in account number 0754417005 in the name of Joseph Wanjohi at Barclays Bank Moi Avenue Branch, Nairobi.

28. Cpl. Muriuki further avers that the applicant establishedthat the 1stand 2nd respondents jointly acquired massive assets or properties using proceeds from the illegitimate trade in narcotic drugs and wildlife trophies. These properties were registered in their names and in the name of the 4th respondent in order to conceal and disguise the source of the funds used to procure the said assets.

29. It was his averment further that he established in the course of his investigations that the respondents had acquired several motor vehicles which there was reasonable cause to believe were acquired using the proceeds of crime from the illegitimate trade in wildlife trophies and narcotic drugs. These were motor vehicles registration number KBU 940W Range Rover Sport, S. Wagon and KCD 299H Mercedes Benz, DBA-207347 Saloon, both registered in the name of the 1st respondent. Copies of documents from the National Transport Safety Authority (NTSA) in support of this averment were annexed as 'FM 9 (a & b).'

30. The applicant had also established that the 1st and 2nd respondents had acquired several real properties which there was reasonable cause to believe were acquired using the proceeds of crime from the illegitimate trade in wildlife trophies and narcotic drugs. These properties, which were registered in the name of the 4th respondent, Marudiano Zone Limited, were:

i. L.R. No. 27981/7 and I.R. 122131/65;

ii. L.R. No. 16217/87/17 and I.R. 90025;

iii. L.R. No. 27981/8 and I.R. 122131/66;

31. A copy of form CR 12 from the Registrar of Companies was annexed to Mr. Muriuki's affidavit as annexure 'FM 10.'

32. Cpl. Muriuki avers that on 14th November 2018, the 1st and 2nd respondents were served with the Kenya Police requisition form P 52 to compel attendance for the purpose of recording their statements in relation to the sources of the funds and assets in issue. They appeared before the investigating team on 15th November 2018 at the DCI headquarters Mazingira House along Kiambu Road and their statements were recorded. Copies of Form P. 52 and the 1st and 2nd respondents' statements are exhibited as annexures FM-11 (a & b) and FM-12 (a & b) respectively.

33. Cpl. Muriuki deposes that an analysis of the statements recorded from the 1stand 2nd respondents does not satisfactorily explain the source of the funds used to procure the assets in issue and the funds in the identified bank accounts. He further avers that the 1st and 2nd respondents contradict each other in the said statements although they claim to own and run their businesses jointly. It was his contention that the 1st and 2nd respondents' statementsmirror the applicant's findings that their explanation depicts activities of typical money laundering activities.

34. He further averred that their allegation that they were constantly changing their businesses and creating entities is an indication of their effort and intentions to conceal, hide and disguise the benefits they derived from the illegal trade in narcotic drugs and wildlife trophies, which they have expanded while using mules and proxies. In his view, depriving the respondents of the benefits of crime accumulated through criminal activities of trading in prohibited wildlife trophies and sale of narcotic drugs shall act as a deterrence and maintain national security. He asserts that the applicant's investigations have established that the respondents' assets and funds are suspected to be proceeds of crime and should be forfeited to the applicant.

35. Cpl. Muriuki swore a further affidavit on 22nd July 2019 in reply to the affidavit of the 1st respondent sworn on 23rd April 2019. He deposes in this affidavit that the applicant is required to share and receive information with and from other law enforcement agencies, including the Kenya Revenue Authority, on suspects' tax affairs.He had, on 7thJune 2019, received the income tax returns statement of the 4th respondent and an entity known as Arvina Enterprises, entities allegedly running the businesses of the 1stand 2nd respondents, for the years 2014 to 2018 in which they filed nil returns. Annexures FM-1 (a) and (b) in his affidavit are copies of income tax returns statements of Marudiano Zone Limited and Arvina Enterprises for the period2014 to 2018.

36. According to Cpl. Muriuki, the nil tax returns are clear indication that the respondents do not have any source of legitimate income which generated income that is the source of the funds in the specified accounts, and which was used to procure the assets the subject of these proceedings. In his view, this renders these assets clear proceeds of crime.

37. Cpl. Muriuki further avers that investigations by the applicant established that the 3rd respondent has not filed any tax returns for the period under investigations.Additionally, that the respondents were not filing tax returns or were under declaring their income for the years 2013 to 2018 despite the fact that they were receiving huge sums of funds through their accounts. He terms this an indication that they were and are trading in prohibited wildlife trophies and sale of narcotic drugs contrary to the law. He exhibits in support as annexure FM-2copies of the respondents' tax assessments for the years 2013 to 2018 dated 14thNovember 2018.

38. With regard to the averment by the 1st respondent that Kibera Chief Magistrates Criminal Case Number 4704 of 2009 resulted in an acquittal, Cpl. Muriuki avers that the attached copy of the alleged acquittal judgment cannot be verified and may not be genuine as the court file on the said case went missing as is indicated in the court records and register. He annexes in support a copy of a letter from the Chief Magistrate, Kibera Law Courts, and a copy of the court register (annexure 'FM-3'). The letter, which is dated 31st July 2018, indicates that the original criminal file cannot be traced, and the criminal register indicates no results for the matter. Cpl. Muriuki avers, however that in any event, acquittal in criminal proceedings is not a defence in civil forfeiture proceedings for recovery of proceeds of crime.

39. Cpl. Muriuki contends that the authenticity of receipts annexed to the affidavit of the 1st respondent cannot be ascertained. In his view, there is no shred of evidence to show linkages between the funds and the assets in issue and the alleged businesses. Indeed, it is his averment that on 10th January 2019, the applicant's investigation team arrested one Joseph Gathua Wahito who was suspected to be doing inventive accounting for the respondents while in possession of purported receipt books owned by the respondents and Arvina Enterprises. The applicant had recorded the said Joseph Gathua Wahito's statement in which he admitted doing accounting activities for the respondents. This statement, which is dated 10thJanuary 2019, is annexed to Cpl. Muriuki's affidavit as exhibit FM-4.

40. Cpl. Muriuki terms the respondents' allegation that they are doing legitimate business and the assets and funds in issue are obtained from the legitimate businesses as incorrect, deceitful and a ploy to disguise, conceal and hide the source of the said assets and funds in a classical scheme of money laundering contrary to the provisions of POCAMLA.

The Case of the Respondents

41. The respondents oppose the forfeiture application and have filed an affidavit in reply sworn on behalf of all the respondents by the 1st respondent, Joseph Wanjohi, on 23rd April 2019. Mr. Wanjohi avers that the applicant has not demonstrated any reasonable grounds to believe that the properties and money in question have either been used or are intended for use in the commission of an offence or are the proceeds of crime. The application does not therefore, in his view, meet the threshold set out under section 81, 90, and 92 of the POCAMLA for the issuance of forfeiture orders. He contends that the applicant has also not demonstrated any link between his property and the illegal money or suspicious persons. He terms the contents of the application as mere allegations which cannot form a basis for depriving the respondents of their hard-earned properties, and he denies that the respondents have been under investigation since 2005.

42. The 1st respondent contends that he acquired the properties in contention following years of hard work in business and savings on or before the year 2007. This was before the year 2009 when the applicant alleges he received money from illegal activities. He exhibits in his affidavit copies of sale agreements and certificates of title to the properties as annexure JW1. The documents annexed are a sale agreement dated 26th November 2007 between Morgan Kangethe Mbugua and the 1st respondent for a property known as L.R. No. 16217/87/17 for the price of Kshs 5,500,000; a copy of a cheque drawn in favour of Vimor Enterprises dated 26th November 2007 for Kshs 5,500,000; a sale agreement dated 5th July 2007 between the 1st respondent and Wandemi Developers Limited for plot numbers 36 and 37 being sub-divisions from the original L.R. No. 12803 at a price of Kshs 4,500,000; a receipt from Wandemi Developers Limited dated 5th July 2007 in respect of this amount for *'Two plots at Roysambu No. 36 and 37*'; two share certificates issued by Wandemi Enterprises Limited in respect of Plot No. 36 and 37 Roysambu Vwithin L.R. No. 12803; and a cheque for Kshs 4,500,000 in favour of Wandemi Developers Limited dated 5th July 2007.

43. The 1st respondent avers that the facts relied upon by the applicant are half-truths, selective, punctuated by deliberate omissions and consist of non-material disclosure and thereby untrue and misleading. This is because the 1st and 2nd respondent were acquitted of the offences they were charged with in 2009 and were pronounced innocent by a duly competent court. He relies in support on annexure JW3, what is referred to in the affidavit as*'an extract of a judgment of the criminal case of 2009'* dated 29th November 2010 in which he and the 2nd respondent were acquitted on a charge of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. It is his averment that he has no criminal case pending in court relating to narcotics. What he and the 2nd respondent are facing is a trumped-up charge of possessing wildlife trophies which they are currently fighting in court.

44. According to the 1st respondent, he has a reasonable explanation on how he obtained the funds flowing into the respondents' accounts. He states that this is evidenced by the regular income resulting from trading activities from lawful businesses, which is confirmed by a comprehensive paper trail of the flow of funds that he has provided as annexure JW3, which are copies of receipts of cash deposits and cheque deposits and invoices from his businesses.

45. He asserts that the bank accounts in issue in this application have been the subject of other freezing and preservation orders since 28thAugust 2018. It was his averment that this is evidence that the various agencies have been acting in cahoots to frustrate him without any good reason, which has subjected him to untold hardships. He relies in support on annexure'JW4' which he states is a copy of the preservation order obtained by KRA, which has been in place since August 2018.

46. Mr. Wanjohi denies that the respondents have, as averred by the applicant,devised a complex scheme and criminal network mechanism of acquiring and dealing in narcotic drugs through their family members, associates and hired mules. He also denies that the respondents were making cheque deposits of amounts below Kenya shillings one million in a bid to evade scrutiny by the Financial Reporting Centre and the Central Bank under the Prudential Guidelines. It is his contention that this is a misrepresentation of facts as he made the said cheque deposits in favour of the Kenya Revenue Authority as payment of lawful taxes due. He relies in this regard on annexure JW5, which are bankers' cheques from various banks, including the National Bank and Co-operative Bank, in favour of *'Commissioner of Customs.'*

47. Mr. Wanjohi further denies that there were suspicious huge cash and cheque deposits into the respondents' bank accounts. He asserts that the only deposits made were honest payments by clients from legitimate and lawful trading activities. He cites in this regard annexure JW6 which he states are copies of receipts of deposits made to the bank accounts by customers and clients. He further avers that the assorted drinks seized from his residence were supplies for his businesses and he has all the required permits in respect thereof. Further, the said drinks have since been returned to him by the applicant.

48. Mr. Wanjohi contends that he and the 2nd respondent have been involved in legitimate business for many years. Such businesses include Arvina Enterprises, hardware business and import and retail of clothes. He asserts that they have various business permits from the relevant government agencies, citing in this regard annexure JW8 (the annexure is JW7) which he states are copies of certificates of registration, lease agreements and business permits for the various businesses that he owns.

49. It is Mr. Wanjohi's further averment that some of the deposits in his bank account which have been flagged by the applicant are transfers of monies paid to him from the sale of his various properties and cars which have appreciated in value having been acquired in years past. He reiterates that the monies contained in the bank accounts the subject of the present application were obtained from legitimate business and trading. He deposes that the various deposits were made by his customers and clients He refers in this regard to annexure JW10which he states are copies of bank slips made by customers and clients to Sidjoe Manufacturers', the 3rd respondent's, account.

50. According to the 1st respondent, one of the properties named by the applicant in paragraph 23 of the affidavit of Cpl. Muriuki, a Range Rover Sport registration number KBU 940W, is non-existent having been written off following an accident. It is his averment that this clearly illustrates that the applicant did not conduct any proper investigations against the respondents, and that it further demonstrates the desperation with which the applicant is pursuing the respondent and his businesses. He refers in support on annexure JW11, a copy of a police abstract and communication from the insurance company settling his claim and writing off the vehicle.

51. Mr. Wanjohi avers that the acts of the applicant in seeking preservation orders in this and the lower court are actuated by malice and spite and are based on misapprehensions and conjectures. This averment is based on the assertion that there is no evidence that the applicant had

conducted any preliminary investigations prior to seeking preservation orders on more than two occasions.

52. It is also his averment that the dubious charge of dealing in wildlife trophies was only made in July 2018 by which time he had already acquired all the properties in question. He avers, on the basis of advice from his advocates that an application for a forfeiture order premised solely on this charge cannot stand.

53. Mr. Wanjohi contends that the business of importing and dealing in liquor in the name of the 3rd respondent, Sidjoe Manufacturers, which partly explains his source of money, was licensed and approved by various regulatory authorities, including the Kenya Revenue Authority. He cites in support annexure JW14 which he states are copies of import certificates issued by KRA and other documentation in support. The said annexure is an import certificate dated 5th June 2017 authorizing importation with effect from 5th June 2017.

54. Mr. Wanjohi denies that the statements he and the 2nd respondent made to the applicant are contradictory at all, asserting that they explain the sources of their property and cash. It is his deposition that he and his wife have been operating business under the name of Sidjoe Manufacturers and Suppliers which deals with importation, wholesale and retail of high-end beverages including alcohol for which they have cash sale receipts from various customers as evidence of payments and source of money. Reliance is placed on annexure JW15, said to be copies of cash sale receipts paid to the 3rd respondent. The court notes that the documents are delivery notes, some of which are blank, many of which do not indicate the names of the person to whom the items are consigned.

55. Mr. Wanjohi asserts that there is no evidence linking any of the respondents with illegal activities as alleged by the applicant, reiterating that the applicant is relying on suspicions and conjecture. There is also no reasonable suspicion that the properties in issue or the funds in the bank accounts were acquired from illicit activities. It is the 1st respondent's position that he has a constitutional right to own and enjoy property so long as it is lawfully acquired. Further, that he has a right to fair hearing and fair administrative action which has been infringed by the applicant. In his view, the present application for forfeiture does not accord with section 90 of POCAMLA and is thus without merit.

56. The respondents filed a further replying affidavit sworn by the 1st respondent on 2nd August 2019. It is a reply to the affidavit sworn by Cpl. Muriuki on behalf of the applicant on 22nd July 2019. In this affidavit, Mr. Wanjohi denies that the respondents were filing nil returns, asserting that they were filing tax returns on their income. He relies in support on exhibit JW1 which comprises a KRA payment slip in his name; a tax compliance certificate dated 12th April 2017; and e-return acknowledgment receipts in his name for 2015, 2016, and 2017.

57. With regard to the tax returns in respect of the 4th respondent, he avers that it is a company in which the 1st and 2nd respondents' home is registered, and it is therefore not liable for tax as it is not an income-generating investment. As for the 3rd respondent, Mr. Wanjohi deposes that it is registered as a business name rather than a limited liability company and is therefore not liable or assessable for income tax as a stand-alone entity. His position is that the profit earned from the business operated under the 3rd respondent was paid by the 1st and 2nd respondent as evidenced by the tax returns exhibited as JW1. He accuses the applicant of lying under oath in averring that the respondents did not file tax returns, and asserts that in any event, the 1st and 2nd respondent have objected to the tax assessment by KRA and a case is pending before the Tax Appeals Tribunal in Case No. 138 of 2019(Annexure JW2).

58. The 1st respondent terms the averment that the judgment from the Kibera Chief Magistrate's Court is not genuine an absurdity. It is his averment that the letter from the court stating that the file cannot be traced says nothing about the culpability of the 1st and 2nd respondents, and that in any event, it is a common occurrence for files to be misplaced.

59. The 1strespondent asserts that the applicant has no basis for alleging that the receipts relied on to show the respondents' income are not genuine. He concedes that his accountant was arrested by the Directorate of Criminal Investigations and a statement taken from him, but that he was not charged with any offence and his statement does not show any wrongdoing either on his part or on the part of the respondents. It is his position that the averments of the applicant and the available evidence do not show any nexus between the properties he has acquired over the years and any criminal activities.

The Submissions

The applicant's submissions

60. The applicant relied on submissions dated 22nd July 2019 and a list of authorities dated 30th May 2019. The submissions were highlighted by its Learned Counsel, Mr. Mohamed Adow. In the said submissions, the applicant identifies four issues as arising for determination in the matter. These are:

> ***i. Whether the funds and other properties the subject of the application for forfeiture are proceeds of crime;***
>
> ***ii. If the answer to i) above is in the affirmative, whether the said properties should be forfeited to the government;***
>
> ***iii. Whether the application for civil forfeiture is in violation of the respondents' right to property under Article 40 of the Constitution;***
>
> ***iv. Whether conviction is a precondition for civil proceedings under part VIII of the Proceeds of Crime and Anti-Money Laundering Act.***

61. Regarding the first issue, the applicant reiterates the factual basis on which it commenced investigations against the respondents. It had received information on 6th August 2018 that two account numbers 2039278483 and 0754417005 in the name of Joseph Wanjohi at Barclays

Bank Moi Avenue Branch, Nairobi and in the name of Sidjoe Manufacturers and Suppliers at Barclays Bank Muthaiga North Branch Nairobi were holding money which is suspected to be proceeds of crime. Further, that the respondents had acquired massive properties using proceeds obtained from illegitimate trade in wildlife trophies and narcotic drugs. The respondents had thus received funds which are suspected to be proceeds of crime contrary to the provisions of the POCAMLA.

62. The applicant further sets out the steps it took in its investigations which are already set out earlier in this judgment. It found that the two accounts were holding a total of Kshs 10,589,069.9 suspected to be proceeds of crime and believed to have been obtained from the said illegitimate business. It further notes that an analysis of the accounts opening forms and statements of accounts established that there were massive suspicious transactions, and that the deposits were made in tranches of below Kshs 1,000,000/= to evade the reporting threshold set by the Central Bank of Kenya Prudential Guidelines for Account Holders to declare the source of the money.

63. The applicant submits that there is reasonable cause to believe that the funds and assets were acquired using proceeds of crime from illegitimate trade in wildlife trophies and narcotic drugs by the 1st and 2nd respondents. These assets are then registered under their names and in the name of the 4th respondent. The applicant submits that the respondents engaged the services of mules to acquire, convey, sell and distribute the narcotic drugs and wildlife trophies on their behalf within and outside Kenya. It is the benefit derived from these illegal tradesthat is then delivered to the 1stand 2nd respondents by way of physical cash and deposits into the bank accounts the subject of the present application in order to concealthe source of the funds deposited. The 1stand 2nd respondents then laundered the benefits by investing them in the properties, which is contrary to the provisions of the POCAMLA.

64. The applicant submits that in order to disrupt the chain of investigations and conceal the source of funds and the connections between the assets they acquired through the benefits derived from the illegal trade, the 1st and 2nd respondents registered the 3rdand 4th respondents and other entities as conduits formoney laundering. They also registered some of the assets in issue under the names of these conduit entities.

65. According to the applicant, an analysis of the statements made to its investigators by the 1stand 2nd respondents does not logically explain the source of their funds and assets. It notes that the statements contradict each other though the 1st and 2nd respondent claim to own and jointly run their businesses. In the applicant's view, these contradictions support its contention that the 1st and 2nd respondents' explanations depicts typical money- laundering activities. By way of illustration, the applicant cites the statement of the 1strespondentto the effect that he bought one plot in Muthaiga on L.R. 16217/87/17 for Kenya Shillings 3 million while the 2nd respondent states that they bought two plots in Muthaiga from a pastor for Kenya Shillings 1.5 million each.

66. The applicant further cites the practice of the 1st and 2nd respondents of constantly changing their businesses and creating entities as an illustration of their effort and intentions to conceal the benefits they derived from the illegal trade in narcotic drugs and wildlife trophies. It submits that the criminal activities of the 1stand 2nd respondents are a threat to national security, public good and order, public interest and leads to erosion of societal good values by rendering the youth of this country unproductive and making them susceptible to hard core criminal activities. Its submission is that depriving the respondents of the benefits of crime would act as a deterrence and maintain national security.

67. The applicant submits that while it has demonstrated that it has reasonable grounds to believe that the funds and assets in issue are proceeds of crime as set out in its pleadings, the respondents have not given a reasonable explanation that they have a legitimate source of the funds and assets. The applicant relies on the decision in **Assets Recovery Agency v Pamela Aboo; Ethics &Anti-Corruption Commission (Interested Party)[2018] eKLR** for the proposition that the respondent in a case such as this has a duty to explain the sources of its funds or assets. It further submits, still on the authority of the **Pamela Aboo** case, that where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, what has been presented is not challenged.

68. The applicant submits that it has proved that the funds and assets in issue are from illegitimate sources as they were acquired from unlawful trade in wildlifetrophies and narcotic drugs contrary to the law. In its view, the respondents have not tendered any reasonable evidence showing a reasonable source of legitimate income that would explain how they acquired the assets in issue. They have also not given an account of why they could not produce such an explanation. Reliance for this submission is placed on the case of **Nguku v Republic [1985] KLR 412** in which it was held that where a party fails to produce certain evidence, a presumption arises that the evidence produced, would be unfavourable to it. The applicant also cites section 112 of the Evidence Act which places the burden of proof, in civil proceedings, on the party in whom any fact is especially within the knowledge of.

69. The applicant submits that the failure by the respondents to provide evidence to prove the existence of legitimate businesses leads to an irrefutable presumption that the allegation that such businesses exist is false, and that such alleged businesses were used as decoys to launder the benefits derived from the illegitimate trade in wildlife trophies and narcotic drugs. It further relies on the case of Col**. Dr. Besigye Kiiza v Museveni Yoweri Kaguta, Election Petition No. 1 of 2001**which was relied on in **Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR** with regard to the burden of proof placed on a party in a matter such as this.

70. According to the applicant, once it has proved that the assets and funds in issue are proceeds of crime, it is immaterial in whose possession they are. In its view, the act of depositing cash by the respondents and third parties in tranches that are designed to evade the requirements of disclosure and the provisions of POCAMLA and regulations thereto and CBK Prudential Guidelines was meant to conceal and disguise ownership of the said funds and make it difficult to detect the movement/trail of funds obtained through illegitimate means. Further, that the act of creating other entities such as the 3rd and 4th Respondents and registering the assets in issue under their names is classical activity of money laundering meant to disguise the funds and assets which are proceeds of crime, and to conceal the source of the funds and in order to make it difficult to detect the offence of money laundering.

71. The applicant submits that the 1stand 2ndrespondent have been unable to explain the source of funds in issue. Once they are unable to reasonably explain the source of funds, it is clear proof that such funds are proceeds of crime. Its submission is that there is no requirement

that the funds be traced to specific criminal offences. The applicant terms as inconceivable the respondents' contention that they own businesses from which they have derived the funds and assets in issue. Its submission is that the alleged businesses were acquired using the proceeds of the illegitimate trade in wildlife trophies and narcotic drugs and were used as decoys for money laundering.

72. The applicant further argues that thefailure by the respondents to file tax returnsor the filing of nil returns are clear indication that the respondents do not have any source of legitimate income. It observes that while the respondents were not filing tax returns or were under declaring their income for the years 2013 to 2018, they were receiving large sums of money through their accounts, which in its view is an indication that they were or are trading in prohibited wildlife trophies and sale of narcotic drugs. As for the receipts annexed to the respondents' replying affidavit, they are, in the view of the applicant, a mere collections of unverified photocopied documents with no evidentiary value. Its submission is that the authenticity and sources of the said receipts cannot be ascertained, nor is there any evidence to link the said receipts to the funds and assets in issue.

73. It is the applicant's submission further that in money laundering schemes, criminals createsophisticated complex schemes to camouflage and conceal the assets and benefits they derive from their criminal activities, which the applicant argues is the situation in this case. It reiterates that the respondents have created a complex web for concealing the funds and assets in issue by creating decoy entities, conducted their illegitimate activities through them and then registering the assets acquired from the illegitimate in wildlife trophies and narcotic drugs in the names of these entities in order to depict the assets as legitimate. The applicant relies for this submission on the case of **Schabir Shaik & Others –vs - State Case CCT 86/06(2008) ZACC 7**.

74. The applicant submits that the burden placed upon it in a matter such as this is to make a *prima facie*to satisfy the court that that there is evidence to establish the applicant's belief that, within the meaning of POCAMLA, the funds sought to be forfeited are proceeds of crime or proceeds of unlawful activities. It submits that it has done this, and invites the court, once it is satisfied that the funds and assets in issue are proceeds of crime, to make an order that they should be forfeited to the State.

75. In reiterating that it has established its case as required, the applicant asks the court to take into consideration that in money laundering schemes, ownership of the proceeds of crime may be direct or indirect. Its contention is that the thread of transaction showing the deposits of funds, the change of business activities several times, the creation of the 3rd and 4th respondents and the registration of the assets in these entities, the use of mules to acquire, convey and sell illegal wildlife trophies and narcotics drugs and the involvements of the 1st and 2nd respondents forms a pattern of transaction that depicts a classical scheme of complex money laundering.

76. It is its case that the 1st and 2nd respondents had complete control of the acquisition of the assets and funds in issue, and the creation of the 3rdand 4th respondents and registering the assets in their names, with the 1stand 2nd respondents in control, completed the money laundering scheme. The applicant asked the court to be guided by the decision in **Prosecutor General vs New Africa Dimensions & Others, High Court of Namibia Case No.POCA 10/2012**in which the court issued forfeiture orders in respect of assets found, on a balance of probabilities,to be proceeds of unlawful activities. It also cited the case of**Assets Recovery Agency –vs- Rohan Anthony Fisher, and & Others, Supreme Court of Jamaica, Claim No 2007 HCV003259**in which the court considered the evidential burden on a party in the position of the respondents.

77. ***The*** applicant urges the court to issue the forfeiture orders in exercise of its powers under section 92 of POCAMLA. Its submission is that in so doing, the court will be depriving criminals of their ill-gotten gains and deter and prevent crime.

78. In addressing the question whether the making of a forfeiture order violates the right to property under Article 40 of the Constitution, the applicant notes that while the Constitution does protect this right, Article 40(6) excludes property found to have been unlawfully acquired. It relies in support on the case of **Teckla Nandjila Lameck-Vs- President of Namibia 2012(1) NR 255(HC)**and **Martin Shalli –vs - Attorney General of Namibia & Others High** (supra) to conclude that the funds and assets in issue in this matter are not protected under Article 40 of the Constitution as they are the proceeds of crime, and the court can issue forfeiture orders in respect thereto.

79. The last issue addressed by the applicant relates to the question whether conviction is a precondition for civil proceedings under Part VIII of POCAMLA. Its submission is that civil forfeiture proceedings are expressly provided for under Part VIII of POCAMLA and are instituted under the Civil Procedures Rules as provided in the Act. They are proceedings in *rem*(against property) which is reasonably believed to be proceeds of crime. They are not the same as criminal proceedings in which the trial court is required to determine the criminal liability of an individual charged with the offence of money laundering. Its submission is that in a matter such as this, the court is only required to determine, on a balance of probabilities, whether the funds sought to be forfeited are proceeds of crime.

80. It is the applicant's submission therefore that its application is for the forfeiture of the funds in issue pursuant to Part VIII of POCAMLA, and conviction of the respondents is not a precondition. What is required for such forfeiture is the identification of lack of reasonable explanation disclosing legitimate source of the funds in issue.

81. The applicant submits that the offence of money laundering is a *"stand alone"* offence, and one need not prove any charges prior to the charges of money laundering. It cites in support of this submission the case of **Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others [2016] eKLR** and **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR**. Reliance is also placed on the case of **Teckla Nandjila Lameck-vs- President of Namibia;Martin Shalli –vs -Attorney General of Namibia & Others**; and **Serious Organized Crime Agency vs Gale** quoted in the case of **Assets Recovery Agency & Others –Vs-Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120**.

82. It is also the applicant's position, in reliance on section 92(4) of POCAMLA thatthe validity of the forfeiture order is not in any way affected by the outcome of the criminal proceedings. Reliance is placed for this submission on the decision of the High Court in **Assets Recovery Agency vs Pamela Aboo** (supra).

83. The applicant urges the court to find that the respondents' allegations that they are carrying on legitimate businesses from which they

have obtained the funds and assets in issue are incorrect, deceitful and a ploy to disguise, conceal and hide the source of the said assets; that it is a classical money laundering scheme contrary to the provisions of POCAMLA, and to allow the application with costs.

Submissions in Response

84. In written submissions dated 28th August 2019, the respondents submit that the application before the court raises three issues for determination:

> ***i. Whether the Respondents' assets are proceeds of crime within the meaning of section 2 of POCAMLA as to be liable for forfeiture;***
>
> ***ii. Whether the Respondents' Properties and Cash are unexplained assets within the meaning of the law as to be liable for civil forfeiture.***
>
> ***iii. Whether the proportionality test applies in cases of civil forfeiture in terms of the nature and scope of properties liable for forfeiture.***

85. With respect to the first issue, the respondents submit that their assets the subject of this application are neither the proceeds of crime nor unexplained assets within the meaning of the law as to be liable for civil forfeiture. It is their submission that they have ably demonstrated how they acquired the said properties and cash. That this was through the conduct of various trades for which invoices, receipts, business licences and other documents have been presented to the court, and which evidence has not been controverted by the applicant.

86. The respondents contend that for a forfeiture order to be made, the court must be satisfied that the assets at issue are the proceeds of crime or are to be used to perpetrate a crime. They cite the provisions of section 92 of POCAMLA to submit that the applicant has predicated its application on the ground that the assets and cash in issue are proceeds of crime. Their argument is that under section 2 of POCAMLAwhether particular property or economic advantage is proceeds of crime is dependent on whether such property has any direct or indirect connection with an offence, including other property that such tainted property has been intermingled with including any benefits arising from the use or application of such tainted property. It is their submission that the definitive test therefore is a connection with an offence, whether direct or indirect. In the present case, no such connection, direct or indirect linking the respondents' property and cash sought to be forfeited on the one hand and any offence on the other hand have been made by the applicant.

87. The respondents submit that the law allows the applicant to bring a forfeiture application founded on reasonable suspicion and puts a relatively low barn of balance of probabilities as in ordinary civil cases for cases of civil forfeiture. Their submission, however, is that the law does not allow for unreasonable suspicions or trivialities given the stakes involved in forfeiting the fruits of an individual's sweat. In their view, the law jealously protects regularly acquired wealth and property no less than it zealously scorns at irregularly acquired wealth and property. They submit that the applicant has not met the evidential threshold as it has not provided either oral or documentary evidence to show any connection. What the applicant has done, according to the respondents, is to make generalized allegations such as that the 1st Respondent was arrested in July 2018.

88. It is the respondents' submission further that the applicant merely alleges in its application and affidavits in support that the respondents' bank accounts had huge suspicious amounts of deposits and withdrawals. It does not, however, mention where the monies were deposited from to demonstrate any kind of suspicion. It has also conveniently omitted to mention to the court that the deposits made were supported by documentation showing payments mainly made to the KRA in form of taxes. In the respondents' view, this is not only misleading but was also meant to create a particular narrative. It is their submission that an analysis of the bank statements in the bundle of documents bears out their submission and shows no suspicious deposits. Rather, it shows only bank transactions that are usually done in the ordinary course of such business as the respondents were engaged in.

89. The respondents argue that the applicant has also misled the court that they were found with assorted illicit drinks. Their submission is that the said drinks were part of their business stock which was duly licensed and authorized by all the requisite state agencies.They submit that the investigators who carried off the said drinks have already returned them to the respondents. The respondents argue that the carrying off of the drinks revealed nothing other than unknown motives for subjecting them to oppression and to create an appearance of malfeasance and malevolent behavior on their part with a view to colouring the mind of the court that the respondents are engaged in money laundering.

90. The respondents further submit that the applicant has deliberately chosen not to disclose to the court when the properties owned by the respondents were purchased. In their view, this should be a basic and elementary fact for investigators keen on establishing acquisition of any property using proceeds of crime. It is their submission that even the most casual examination of the documents relating to the acquisition of the properties sought to be forfeited would have revealed to the applicant that they were acquired long before July 2018 when it is alleged that the respondents were arrested and charged.

91. The respondents submit that the properties in contention were all regularly and lawfully acquired years before the alleged event (s) giving rise to this application for forfeiture orders. They observe that in the affidavits in support of the application for forfeiture, the applicant avers that the respondents were arrested on 12thJuly 2018 and charged the following day as evidenced in the charge sheet (annexure JW14). They submit that properties L. R No. 122131/65; L. R No. 16217/87/17 and L.R No. 279881/8 all registered in the name of Marudiano Zone Limited were acquired in 2007 while motor vehicle registration number KCD 299H Mercedes Benz was acquired in June 2015. They refer in support to the sale agreements and transfer instruments marked as annexure JW2 and JW10 in the respondent'sbundle of documents. It is therefore, in their view, not only logically impossible but also ludicrous to argue that the properties were proceeds of crime yet the arrests of the respondents was made in July 2018. This would be so even were it assumed that the allegations that the properties were the proceeds of crime, which the respondents deny.

92. The respondents submit that in the case of **Ethics & Anti-Corruption Commission v Jimmy Mutuku Kiamba& others [2019] eKLR**,

the High Court considered such an issue and excluded various properties which had been acquired well in advance. It stated in its decision that the defendant in the matter had the means to acquire the said properties, and it excluded a variety of properties from the forfeiture orders upon finding that the defendant had the means and acquired the said properties regularly and lawfully. The respondents note that the properties were excluded despite the fact that the period of investigation in the said case was between 2009 and 2015.

93. The respondents submit that the applicant may argue that the 1st and 2nd respondent were charged with the offence of dealing in narcotics in 2009 and that this is support for the claim that the properties acquired after the year 2009 may be proceeds of crime. It is their submission, however, that the respondents were acquitted of the trumped-up charges. They rely on what they refer to as the judgment of the Kibera Magistrates' Court (annexure JW3 in their bundle of documents). It is their argument that this fact illustrates that the applicant did not have any reasonable ground or belief for the orders that it seeks against them. In their view, its actions are actuated by malice or ill will. It is the respondents' submission that the effect of an acquittal in a criminal case, especially after a substantive trial, is that the accused person is pronounced innocent by a court of law.

94. The respondents cite the decision in **Ethics & Anti-Corruption Commission v Ministry of Medical Services & Another [2012] eKLR** in which the court held that: for an order under section 56 (1 of the Anti-corruption and Economic Crimes Act to be issued, a prima facie case must be presented before the court that the property in question has been the subject of some corrupt dealings.

95. The respondents conceded that it does not matter whether there has been aconviction in criminal proceedings, or if even any criminal proceedings have been commenced, for an action in civil forfeiture to succeed. It was their submission, however, that it was entirely feasible for one to be charged with a criminal offence in the face of completely fabricated charges and even in exceptional cases to be convicted. In their view therefore, being charged with an offence without more, and especially after acquittal, cannot automatically give rise to reasonable grounds and meet the balance of probabilities standard of proof required under the law for forfeiture. It was their submission that to allow this would subject persons to the very forceful hand of the law and make the law amenable to manipulation by persons connected with law enforcement officials keen on settling business or other scores.

96. The respondents contend that it is ridiculous for the applicant to contend that because there is a tax dispute between them and KRA, this is an indication that they were dealing in narcotics and trading in wildlife trophies. They assert that as shown in their replying affidavit, there is a live tax dispute at the Tax Appeals Tribunal over the taxes claimed. It is their submission that the existence of a tax dispute is not an indication of dealings in suspicious or criminal activities, especially given that the respondents have not been charged with any tax evasion charges.

97. With regard to the assertion by the applicant that the receipts that the respondents rely on cannot be ascertained and there is no evidence connecting the assets in issue and the businesses, the respondents argue that this assertion is strange as the onus is on the applicant to lead evidence to prove what it alleges. They submit that it is not enough to speculate that the receipts are not authentic without laying a basis for the assertion. They rely on section 107 of the Evidence Act to assert that he who alleges must prove, and it is only upon the applicant discharging such burden that the evidentiary burden may shift to the other party to disprove it if they so wish.

98. The respondents further submit that the basis on which the present application is brought, that the properties of the respondents are proceeds of crime, is flawed as no evidence has been presented to show a nexus between the properties and cash with any suspicious illicit activity. Other than presenting the properties that the respondents own and money in their bank accounts, the applicant has presented nothing to the court to show that such properties are the proceeds of crime. In their view, without the applicant linking the properties acquired or the money in the banks to any crime or suspicious activity, there is no basis upon which the court should grant the orders of forfeiture.

99. The respondents rely on the case of **Assets Recovery Agency v Charity Wangui Gethi [2018] eKLR** to submit that the High Court was emphatic that it is the duty of the applicant to connect two different transactions so as to show a nexus with a suspicious criminal activity before founding a claim for forfeiture.

100. The respondents also addressed themselves to the question whether their properties the subject of this application unexplained assets within the meaning of the law are. They argue that in the alternative, even if this position is not expressly set out in POCAMLA, even if it were to be assumed that an action for civil forfeiture may be founded on grounds that the properties subject to forfeiture are 'unexplained assets', the applicant has not met the test in law for a finding that one has unexplained assets.

101. They rely on the decision of the Court of Appeal in **Civil Appeal No. 184 of 2018; Stanley Mombo Amuti –vs Kenya Anti-Corruption Commission (supra) which**, while interpreting section 2 and 55(2) of the Anti-corruption and Economic Crimes Act 2003,established thecriteria for what 'unexplained assets.' The Court in that case had noted that first, there must be a set time period for the investigation of a person; secondly, that the person must be reasonably suspected of corruption or economic crime; thirdly, that the person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation and finally, that there is no satisfactory explanation for the disproportionate assets.

102. Their submission is that the test in the **Amuti** case is conjunctive rather disjunctive. Accordingly, that all the four criteria identified in the case must be present and met if a case for *'unexplained assets'* is to be made. Their submission is that the applicant has not met the test as there does not appear to be any time period for the investigation of the respondents given that properties acquired well over a decade ago is still the subject of the forfeiture application. In their view, the criteria was set for good reason as a party should not be forcedto defend or prove his or her innocence their whole life. They contend that there is no reasonable suspicion that they have been engaged in any economic crime, and they have made a satisfactory explanation for all the cash and assets that they own.

103. The respondents reiterate that the properties at issue were acquired in a regular manner through proceeds of legal and legitimate businesses. it is their case that they have been businesspeople for a long time as their documents show, which has enabled them to lawfully acquire the properties. It is also their submission that it is normal and ordinary course of trading that deposits are made to bank accounts and withdrawals made for payment of various expenses including suppliers. They contend that an analysis of the bank accounts statements and particularly the one in the name of Sidjoe Manufacturers and Suppliers which is the trading account reveals that there were both deposits by clients and withdrawals.

104. The respondents cite the case of **Ethics & Anti-Corruption Commission v Jimmy Mutuku Kiamba & others (supra)** to submit that where a party demonstrates the acquisition of their property through the production of lease agreements, sale agreements, loan agreements and other documentary evidence, courts readily accept such evidence and take it that such property are regularly acquired unless the authenticity of such agreements or evidence is impugned.

105. The respondents submit that they have been engaged in genuine businesses as illustrated by a trail of invoices, payments, receipts and comprehensive paper trail and documents evidencing existence of business and trading activities. These documents, in their view, displace the contention by the applicant that their bank deposits were suspicious and were proceeds of crime. The respondents cite in support the decision in **Assets Recovery Agency v Pamela Aboo(supra).**

106. In the respondents' view, the above decision lays down the test to be applied in determining whether a party has been engaged in legitimate business, thereby discounting an allegation of acquisition of properties through proceeds of crime. It is their contention that the decision in the **Pamela Aboo** case is distinguishable from their case in that there are clear accounts of deposits and withdrawals from their bank accounts statements; and that there are also invoices and payments from customers that prove trading, thereby displacing the allegation that the properties or the money in their bank accounts are proceeds of crime.

107. The third issue identified by the respondents relates to the question whether the proportionality test applies in cases of civil forfeiture in terms of the nature and scope of properties liable for forfeiture. It is their submission that the question to be addressed is whether, even where the applicant is able to prove that particular properties are proceeds of crime, what the extent and scope of the amount of property to be forfeited should be. They submit that this is an important consideration for the court to address given the ramifications of civil forfeiture whose effect is to deprive a property holder of their property including those which may have been acquired lawfully and legitimately but commingled with other property. As I understand this submission, the question is how the property acquired lawfully is to be separated, for purposes of an order of forfeiture, from the property acquired from the proceeds of crime, should the court find this to be the case.

108. In addressing this issue, the respondents submit that the applicant should not just conduct searches at the Companies Registry, the Lands Registry,bank accounts and at the National Transport Safety Authority and other relevant registries with a view to getting information about an individual's possession, then list all such assets and cash as properties liable for forfeiture without showing that the said properties and cash were acquired as a result of corrupt acts. They submit that in this case, this is what the applicant did, with the help of the multi-agency team, without even attempting to prove how all such assets and cash are proceeds of crime. In the respondents' view, such a move is both unconstitutional and unknown in law in this and other jurisdictions.

109. In support of their submission on this point, the respondents relied on the decision in the United States Supreme Court case of **Timbs v Indiana 586 U.S. (2019)**. They summarise the facts of the case as being that Mr. Tyson Timbs, a small-time drug offender in Indiana pleaded guilty to the criminal offence of selling heroin valued at $ 225 to undercover police officers. He was sentenced to one year of house arrest and five years of probation, as well as a fine of $1, 200 in accordance with criminal law. In addition, under the law of civil forfeiture, state officials also seized a Land Rover he owned valued at $42, 000 which he had bought using his father's life insurance policy on grounds that he had used it to commit crimes. Upon legal challenge, the Supreme Court held that seizing of the Land Rover amounted to excessive fines which was barred by the Eighth Amendment of the United States Constitution. The respondents submit that in a 9-0 majority decision, Justice Ruth Bader Ginsburg stated at page 6 of the judgment that:

> ***"For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties… Even absent a political motive, fines may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money."***

110. The respondents urge the court to be guided by the decision, noting that while it is not binding on this court, it is persuasive and is in consonance with fairness and common sense, does not offend the rules of justice and is within the contours of our Constitution and ought to be given effect to prevent abuse of civil forfeiture powers by the applicant.

111. It is their submission further that the issue of proportionality is particularly important to ensure justice but also to prevent law enforcement agencies and state officials from ripping off property owners of their hard-earned wealth through generalised and unsubstantiated claims. The respondents argue that this is especially important as there islikely a perverse incentive by the applicant in applying for civil forfeiture since it gets to retain some of the forfeited properties and funds, citing in support the decision of the Court in **Assets Recovery Agency v Pamela Aboo [2018] eKLR** (supra).

112. It is their submission therefore that even in the unlikely event that the court finds that the applicant has proven that there is reasonable suspicion that the respondents have in their possession property that are proceeds of crime, an account must be made of what in particular has been so proven to be proceeds of crime and only such property would be liable for forfeiture. This, however, would, in their view, require thorough explanation and demonstration that it was acquired illegally or in unexplained ways. They submit that the applicant has not demonstrated that the forfeiture orders sought under section 90 and 92 of POCAMLA are merited, and that they have fully explained how they acquired the properties and the cash in their possession.

Analysis and Determination

113. I have considered the pleadings and submissions of the parties hereto. While the parties have, in their respective submissions, identified separate issues to which they have addressed themselves, I believe the said issues can be reduced to the following five issues:

a. Whetherconviction is a precondition for civil proceedings under Part VIII of Proceeds of Crime and Anti-Money Laundering Act;

b. Whether the respondents' assets are proceeds of crime within the meaning of section 2 of POCAMLA and are therefore liable to forfeiture to the State;

c. Whether the respondents' properties and cash are unexplained assets within the meaning of the law as to be liable for civil forfeiture;

d. Whether the application for civil forfeiture is in violation of the respondents' rights to property under Article 40 of the Constitution;

e. Whether the proportionality test applies in cases of civil forfeiture in terms of the nature and scope of properties liable for forfeiture.

114. In order to arrive at a determination of the above issues, I start by considering the law with regard to civil forfeiture prescribed under POCAMLA. The long title of POCAMLA is ***'An Act of Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes.'***Section 2 of the Act defines *'proceeds of crime'* as follows:

> ***"proceeds of crime"*** *means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed;"*(Emphasis added)

115. Part VIII of POCAMLA sets out the procedure to be used in cases of civil forfeiture. At section 82, the Asset Recovery Agency, the applicant in this case, is empowered to apply for preservation orders in situations where there are reasonable grounds to believe that the property concerned has been used or is intended to be used for commission of an offence, or that it is proceeds of crime. Section 90 contains provisions with respect to forfeiture of property preserved under orders issued pursuant to section 82 of POCAMLA. Titled *'Forfeiture of Property'*, it provides as follows:

> ***90. Application for forfeiture order***
>
> ***(1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.***

116. At section 92 titled *'Making of forfeiture order'*, POCAMLA provides that:

> ***(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 timethereafter, 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.***
>
> ***(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.***
>
> ***(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.***
>
> ***(5) …***
>
> ***(6) A forfeiture order shall not take effect—***
>
> ***(a) before the period allowed for an application under section 89 or an appeal under section 96 has expired; or***
>
> ***(b) before such an application or appeal has been disposed of.***(Emphasis added)

117. Thus, section 92(4) of POCAMLA addresses the first issue that arises in this matter- whether conviction is a precondition for civil proceedings under Part VIII of POCAMLA. It may be useful, however, in the interests of certainty and clarity, to set out the arguments of the parties and judicial precedents on the issue.

118. The respondents have argued that while they were charged with the offence of trafficking in narcotic drugs contrary to the provisions of the Narcotic Drugs and Psychotropic Control Act in Kibera Criminal Case Number 4704 of 2009, the proceedings resulted in an acquittal. They have annexed to their affidavit what the 1st respondent avers is a copy of the judgment of the trial court in the matter. The judgment shows that the 2nd respondent was discharged at the completion of the prosecution case, while the 1st respondent was acquitted at the completion of the trial. The applicant responds that a conviction is not a condition precedent to an application for forfeiture under POCAMLA. It relies on several decisions for this position. The first is the case of **Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others (supra)** in which the court held that:

> ***"150. 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.***
>
> ***151. 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 before launching the prosecution of alleged money launderers….***
>
> ***152. I have added the emphasis to illustrate that even the legislators appreciated instances when there may be no one to prosecute hence there may be no conviction for a predicate offence or crime. The need to prove a predicate offence before laying a charge of money laundering was effectively dispensed with.***
>
> ***153. The principal offender who committed the predicate offence may never be there to be prosecuted, yet access to the proceeds of crime would have been achieved. He may have left jurisdiction with assistance of others. He may be a fugitive. He may have passed on. Behind him though, he would have left money launderers. If the principal offender may not be indicted, would it then mean that the money launderers would never be prosecuted" In my view, that certainly cannot be what the legislators intended."***(Emphasis added)

119. The applicant has also sought reliance on the case of **Kenya Anti-Corruption Commission v Stanley Mombo Amuti (supra)** in which it was held that:

> ***"This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168, the court stated that: "In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained." I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR."***(Emphasis added).

120. I have also noted the holdings in the two cases from Namibia, which are of persuasive authority, relied on by the applicant. In **Teckla Nandjila Lameck-vs- President of Namibia 2012(1) NR 255(HC)** the court stated as follows:

> ***"…Asset forfeiture is, as is stated in 50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution.***
>
> ***…even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above."***See also**Martin Shalli –vs -Attorney General of Namibia &Others High Court of Namibia Case No: POCA 9/2011.**

121. In**SeriousOrganized Crime Agency vs Gale** quoted in the case of **Assets Recovery Agency & Others –vs- Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120**also cited by the applicant, the court held that:

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

122. Finally, I note the holding in **Assets Recovery Agency vs Pamela Aboo** (supra)in which the court considered the issue in relation to the

civil proceedings for forfeiture before it and observed as follows:

> **"***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."***
>
> *64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of* ***ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120*** *the Court of Appeal stated:*
>
> > **"*....that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof.,..."***

123. I agree with the holdings in the above cases, which are all in consonance with section 92(4) of POCAMLA and help to better explain its prescription that the validity of an order for forfeiture under section 92(1) is not affected by the outcome of criminal proceedings.

124. What emerges from the decisions is that in order for the court to make orders of forfeiture under the civil forfeiture process set out in Part VIII of POCAMLA, the applicant need not establish that there were criminal proceedings related to the property at issue. Once the applicant establishes, on a balance of probability, that the assets in questions are suspected to be the proceeds of crime, a duty is cast on the respondent to establish the contrary. Which leads me to a consideration of the question whether the assets at issue in this matter are proceeds of crime as alleged by the applicant.

Whether the respondents assets are proceeds of crime

125. This issue is intricately linked with the third issue that arises from the submissions and pleadings of the parties-whether the respondents' properties and cash are unexplained assets within the meaning of the law and therefore liable for civil forfeiture. I will therefore consider the two under the one head.

126. The applicant alleges that the 1st and 2ndrespondents have been involved in the sale of narcotics drugs and wildlife trophies and has placed affidavit evidence before the court to support its case. It contends that the 1st and 2nd respondent were arrested on 12th July 2018 at Muthaiga North andwere arraigned in court on 13th July 2018 in the Senior Principal Magistrates Court at Jomo Kenyatta International Airport Criminal Case Number 90 of 2018. The charges against them were possession of wildlife trophies contrary to the provisions of the Wildlife Conservation and Management Act, 2013. A search of their residence resulted in the recovery of four (4) pieces of elephant tusks, assorted alcoholic drinks and Kshs 469,000/= in cash, among other items.

127. The evidence further indicates that investigations against the 1st and 2nd respondents had started as far back as 2005 that they had been arrested on 16th October 2009 at their Muthaiga home while in possession of 1274 grams of heroin. They were charged with the offence of trafficking in narcotic drugs contrary to the provisions of the Narcotic Drugs and Psychotropic Control Act vide Criminal Case Number 4704 of 2009 at Kibera Law Courts. While the respondents argue that they were acquitted and have produced an uncertified copy of a document which they say is the judgment in the criminal case against them, the applicant argues that its authenticity cannot be relied on as the file on the matter is not available and the Registry indicates no result for the matter in its records. As I have held above however, a conviction in a criminal trial is not a condition precedent in a claim for civil forfeiture.

128. The applicant's case is that the assets acquired by the 1st and 2nd respondents and registered in the name of the 4th respondent or held in the bank accounts in their names and that of the 3rd respondent are from their dealings in narcotic drugs and illegal trade in wildlife trophies.

129. The applicant supports this claim with averments relating to the use of the 1st and 2nd respondents' relatives as mules for the illicit trade. It is averred by Cpl. Muriuki that the 1st and 2nd respondents' network for this unlawful trades includes Elizabeth Njoki Wanjiru and Kinyanjui Joseph, a brother and sister of the 2nd respondent. It also includes a Tanzanian national, one Nassoro Salim Said.

130. The applicant's averments are that Elizabeth Njoki Wanjiru and Nassoro Salim Said were arrested on 2nd September 2016 at Mlolongo. They were in possession of 3921.6 grams of heroin with a market value of Kshs 11, 764,800/=. Both were charged in court with the offence.

131. The 2nd respondent's brother, Kinyanjui Joseph, was arrested on 4th September 2017 while conveying and in possession of 238.2 grams of heroin with a market value of Kshs 714, 600/=. He was charged with trafficking in a narcotic drug contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act before the Senior Principal Magistrates' Courts at Jomo Kenyatta International Airport in Criminal Case Number 164 of 2017 and was convicted on 9thAugust 2018 and sentenced to 20 years imprisonment and a fine of Kshs 1 million.

132. The applicant also alleges that the said Joseph Kinyanjui Wanjiru and one Elizabeth Wairimu Nyoike, were arrested on 7thDecember 2016 at Mathare Drive-in Estate in Ruaraka while in possession of 4, 857.87 grams of heroin with a market value of Kshs 14, 573,6100/=.

The applicant avers that their investigations indicated that the two worked for the 1st and 2nd respondents as mule distributors and conveyors of narcotic drugs. Both were charged with the offence of trafficking in narcotic drugs. A charge sheet in respect of the charges against the two is exhibited as FM-4.

133. I have carefully perused the affidavit in reply sworn by the 1st respondent, whose contents I have set out at some length earlier in this judgment. I note that aside from a general denial that they do not use their families as mules in the illegal trade in narcotics and game trophies, the 1st and 2nd respondents do not respond at all to the specific averments by the applicant with regard to their alleged use of their relatives as drug mules and the arrest and, in one case, the conviction of one of them for drug trafficking. Their response in this regard is confined to the averment that they were not convicted in the case against them for drug trafficking in 2009.

134. The applicant alleges that the properties acquired by the 1st and 2nd respondent were acquired from the proceeds of the illicit narcotics and wildlife trade. They submit that the funds in the accounts are from this trade. They note that the accounts received large deposits, and they have placed before the court the account statements in this regard.

135. I have considered the properties the subject of this matter and the bank statements relied on by the applicant. I note that the statements of the respondents do show large deposits, with minimal debits, over the years, running back to the period of investigation including 2009-2018. The statements in respect to the Barclays Bank account attached to the applicant's affidavit in support of the application shows deposits of sums in the range of Kshs 500,000, 300,000, and 800,000. The account held by the 2nd respondent in Equity Bank shows daily deposits and minimal debits over a similar period. The account in the name of Sidjoe Manufacturers and Suppliers also has large deposits in the period from April 2018, though the account appears to have been opened in 2010. Curiously, the certificate of registration of Sidjoe Manufacturers and Suppliers indicates that it was registered on 24th April 2014.

136. I further note that the real property purchased by the 1st and 2nd respondent L. R. No. 16217/87/17 and Plot Nos. 36 and 37 on from L.R. No. 12803 were acquired in November and July 2007 at a price of Kshs 5,500,000 and 4,500,000 respectively. Thus, the 1st and 2nd respondents were able to purchase, within five (5) months, property worthKshs ten million (Kshs 10,000,000). This information emerges from annexure JW1 annexed to the affidavit of the 1st respondent dated 23rd April 2019.

137. The respondents assert that their assets and funds were obtained lawfully. They have been running legitimate businesses, and the1strespondent annexes to his affidavit, in two volumes, documents which he avers show the sources of their funds. I have considered these documents annexed as annexure JW3, what the 1st respondent terms as receipts of cash sales, invoices, and deliveries from their businesses. The documents relate to a business known variously as Arvina Enterprises and Arvina Investment. One is a local purchase order (LPO) for floor tiles from Bidii Supermarket to Arvina Enterprises. Another is an LPO from Homepark Flowers to Ian Muriuki for supply of towel racks and tissue dispensers. Others are receipts indicating payments for items like shoes, t-shirts, and stockings, without indications of whom the sales are made. Volume 2 of the respondents' annexures shows cheques in various amounts made to Sidjoe Manufacturers and Suppliers. There are also delivery notes in the name of Sidjoe Manufacturers and Suppliers. However, a good number are blank while others do not show the person or entity to which the items indicated are consigned.

138. Several matters are of concern with respect to the respondents' assertion of their sources of funds. First, what is the connection between Arvina Enterprises or Arvina Investment and Sidjoe Manufacturers and Suppliers? Why would payments be made to Sidjoe Manufacturers when the sales are purportedly made by Arvina Enterprises? Can the sales of t-shirts, shoes, stockings and such items at a retail outlet result in the level of funds deposited in the respondents\ accounts? Do entities running legitimate businesses establish their income in legal proceedings with receipts that are barely legible, with no books of accounts and tax returns? One would expect that parties running multi-million shilling businesses would have cash books, stock registers, audited accounts and income tax returns. In this case, the respondents have only produced the receipts referred to above, as well as documents showing that they opened various businesses and that they filed minimal or no returns with the Kenya Revenue Authority.

139. It may be argued for the respondents that they have a thriving business selling high-end alcoholic drinks. Indeed, from the averments of both the applicant and the respondents, the 1st and 2nd respondents had a large stock of these assorted alcoholic drinks in their house at the time of their arrest in July 2018. However, the permit for the business annexed to the 1st respondent's affidavit shows that it relates to the period from 5th June 2018. Such funds as may be obtained from the sale of alcoholic drinks cannot account for assets and funds accumulated and deposited prior to that date. Indeed, a question may arise regarding the source of the funds for the purchase of the alcoholic drinks, said to be worth Kenya shillings seventeen million (Kshs 17,000,000), given the doubtful source of the respondents' funds.

140. The onus was on the respondents to satisfy the court that the assets and funds held in their accounts are not the proceeds of crime. In the case of **Assets Recovery Agency –vs- Rohan Anthony Fisher, and & Others (supra)**,the court, in issuing an order for recovery of money obtained through crime, emphasized the evidential burden placed on a respondent to show the lawful source of the funds in issue and observed as follows:

> ***"…Even though these proceedings are quasi criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousands of United States dollars without more.***
>
> ***There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence, is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.***
>
> ***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 14th August 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…"

141. In its decision in **Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) (supra)** the court held that:

"I have done an analysis of the deposits above and shown how much was being deposited in a day or so for the Respondent. Even with all this, the Respondent has not attempted to explain the source of this money either through the replying or supplementary affidavit. It could be true that she does business with Samson Waweru, Jonathan Kimindu and her own business but where is the evidence.

There is nothing that stopped Samson Waweru and other business partners from swearing affidavits to support her claims. If indeed Samson Waweru and Jonathan Kimindu were among the cash depositors based in Mombasa, could they not have come out to specifically state on oath when and how much they deposited" The Respondent did not support the claim that she gave Kshs 1 million to Samson Waweru. That sum of money must have come from somewhere if the allegation is anything to go by.

Mr. Odoyo in his submissions has asked what law prohibits one from depositing money and if there is any offence in not withdrawing the same. My quick answer to that is that there is no law that prohibits one from depositing money and there is also no offence committed if one fails to withdraw their money. How was she running her business without making any withdrawals" Even as one fails to withdraw it must be shown how they are surviving. One is at liberty to deposit even a billion shillings but the person must be ready to share the source of such huge deposits with the relevant authorities. When no satisfactory explanation is forthcoming the court will take it that the same was not lawfully acquired".

142. The court further observed in the **Pamela Aboo** case that:

"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. 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".

143. Having considered all the evidence and submissions on this issue, I am satisfied that the applicant established, on a balance of probabilities, that the assets and funds were the proceeds of crime. The respondents have not been able to rebut this. Taken together, all the evidence before me leads to the conclusion that the respondents' assets are proceeds of crime as defined in POCAMLA.At any rate, the respondents have not been able to rebut the evidence placed before the court by the applicant; they have not been able to explain the source of the funds in their accounts or the assets registered in the name of the 4th respondent. All the evidence before the court leads to the conclusion that the funds and assets are proceeds of crime.

144. The question then is whether, in light of the above findings, the court should grant the forfeiture orders sought. In answering this question, I will address myself also to the last two issue identified earlier in this analysis.

Violation of Right to Property and the Principle of Proportionality

145. The applicant submits, on the authority of **NDPP vs Rebuzzi (94/2000) ZASCA 127** which was quoted in the case of **Schabir Shaik & Others –vs- State (supra)**that the court should grant the said orders. In that case, the court had emphasised the objective of forfeiture orders as follow:

"….the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realization that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order…"

146. We are all no doubt fully aware of the damage that crime, particularly crime that involves dealing in narcotic drugs, does to our young people, our families, and society in general. We have also seen the devastation wrought on our wildlife and, by extension, on our economy which is dependent on wildlife by those who engage in trade in wildlife trophies. We cannot over-emphasise how critical it is to stop and deter those who engage in these illegal trades. Should it not be possible to deter them, as far as possible, we must ensure that they do not enjoy the proceeds of their crimes.

147. The question is whether issuing an order of forfeiture amounts to unconstitutional deprivation of the right to property. In the case of **Teckla Nandjila Lameck-vs- President of Namibia (supra)** the court held that:

"….The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity which is defined to "constitute an offence or which contravenes any law…"

148. In **Martin Shalli vs-Attorney General of Namibia** (supra)it was held that:

> ***"…the proceeds of unlawful activity would not constitute property in respect of which constitutional protection is available. This court in that matter further held that the protection of property under art 16 is in any event not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate purpose…***
>
> ***…I accordingly conclude that chapter 6 does not violate the right to property under article 16 of the Constitution because art 16 does not protect the ownership or possession of the proceeds of crime. I further reiterate the approach of the court in Lameck that even if chapter 6 were to infringe upon art 16, then it would in my view be a proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrongdoing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose…"***

149. Our Constitution at Article 40 does protect the right to property. However, Article 40(6) is clear that such protection does not extend to illegally acquired property. Thus, property acquired, as the court has found in this case, from the proceeds of crime, is not protected. Making an order for its forfeiture does not therefore violate the right to property.

150. The respondents submitted that the court, should it find that the applicant had made a case that the funds and assets are proceeds of crime, should apply the principle of proportionality and separate such property as was acquired legally from the property that is the proceeds of crime. Unfortunately for the respondents in this case, it is difficult to discern what property was lawfully acquired from the material placed before the court. Unlike in the **Timbs v Indiana** case that they relied on, in which the court found that seizure of the vehicle amounted to an excessive fine, and noting that the plaintiff in that case was able to prove the source of the funds for the vehicle, his father's life insurance, the respondents in this case have not been able to demonstrate a legitimate source of funds from which it would be possible to separate what was acquired from legitimate sources of funds and what was acquired from proceeds of crime.

151. Accordingly, the application dated 11th February 2019 succeeds, and I grant orders as prayed therein with costs to the applicant.

Dated Delivered and Signed at Nairobi this 21st day of February 2020

MUMBI NGUGI

JUDGE