REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC CIVIL SUIT NO 2 OF 2019

ASSETS RECOVERY AGENCY...APPLICANT

VERSUS

JAMES THUITA NDERITU..1ST RESPONDENT

FLAGSTONE MERCHANTS..2ND RESPONDENT

FIRSTLING SUPPLIES LTD...3RD RESPONDENT

EXCELLA SUPPLIES LTD...4TH RESPONDENT

BETTY MARTHA WAJEWA OMONDO...........................5TH RESPONDENT

FLAGSTONE CO. LTD..6TH RESPONDENT

INTERSCOPE TECH & SERVICES..................................7TH RESPONDENT

JUDGMENT

1. The applicant, the Assets Recovery Agency, is established under section 53 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). It is a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. Sections 81-89 of Part VIII of POCAMLA sets out the procedure for civil forfeiture and authorizes the applicant to institute civil forfeiture proceedings and seek orders prohibiting any person, subject to such conditions as the court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime. Section 90 authorizes the applicant, where a preservation order is in force, 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.

2. In the application dated 12th March 2019, the applicant seeks the following orders against the respondents:

1. **THAT this Honourable Court issue orders declaring funds held in the following accounts as proceeds of crime and therefore liable for forfeiture to the Government;**

a. Kshs 2,981,067 in Account No 0151247643100 held at Standard Chartered Bank Ruaraka Branch; and Kshs 217,598.25 in Account no 0180198054920 held at Equity Bank, Ruaraka Branch in the name of James Thuita Nderitu;

b. Kshs 1,088,065.20 in Account No. 0102031937400 held at Standard Chartered Bank Ruaraka Branch; and Kshs 182,463.85 in Account No 0671003217 held at Barclays Bank Ruaraka Branch in the name of Flagstone Merchants Ltd

c. Kshs 3,124,964 in Account No 01022010315700 and Kshs 3,160,584.30 in Account No 0102010315701 held at

Standard Chartered Bank Ruaraka Branch in the name of Firstling Supplies Ltd

d. Kshs 22,700,580.70 in Account No 0102447666600 held at Standard Chartered Bank Ruaraka Branch in the name of Excella Supplies Ltd

e. Kshs 1,708,290.35 in Account No 0100314850400 held at Standard Chartered Bank Nakuru Branch in the name of Betty Martha Wajewa Omondi

f. Kshs 27,890.70 in Account No 1340266304885 held at Equity Bank Ridgeways Branch in the name of Flagstone Co. Ltd

g. Kshs 434,619.63 in Account No 0180290286272 held at Equity Bank, Ruaraka Branch in the name of Interscope Tech & Services

2. THAT the Honourable Court be pleased to issue orders of forfeiture of the following funds:

a. Kshs 2,981,067 in Account No 0151247643100 held at Standard Chartered Bank Ruaraka Branch; and Kshs 217,598.25 in Account no 0180198054920 held at Equity Bank, Ruaraka Branch in the name of James Thuita Nderitu;

b. Kshs 1,088,065.20 in Account No. 0102031937400 held at Standard Chartered Bank Ruaraka Branch; and Kshs 182,463.85 in Account No 0671003217 held at Barclays Bank Ruaraka Branch in the name of Flagstone Merchants Ltd

c. Kshs 3,124,964 in Account No 01022010315700 and Kshs 3,160,584.30 in Account No 0102010315701 held at Standard Chartered Bank Ruaraka Branch in the name of Firstling Supplies Ltd

d. Kshs 22,700,580.70 in Account No 0102447666600 held at Standard Chartered Bank Ruaraka Branch in the name of Excella Supplies Ltd

e. Kshs 1,708,290.35 in Account No 0100314850400 held at Standard Chartered Bank Nakuru Branch in the name of Betty Martha Wajewa Omondi

f. Kshs 27,890.70 in Account No 1340266304885 held at Equity Bank Ridgeways Branch in the name of Flagstone Co. Ltd

g. Kshs 434,619.63 in Account No 0180290286272 held at Equity Bank, Ruaraka Branch in the name of Interscope Tech & Services

3. THAT this Honourable Court be pleased to issue an order that the above funds be forfeited to the Government and transferred to the Applicant

4. THAT the Honourable Court makes any other ancillary orders that it may deem fit for the proper, fair effective execution of its orders.

5. THAT costs be provided for.

3. The application is brought under the provisions of sections 81, 82, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Order 51 rule 1 of the Civil Procedure Rules.

4. The application is based on eight grounds set out on the face of the application. The applicant states in these grounds that on or about 26th April, 2018, it received information on ongoing criminal investigations involving fraud and economic crimes at the National Youth Service (NYS), which were being conducted by the Directorate of Criminal Investigations (DCI).

5. On 29th May, 2018, several suspects and entities including the 1st and 3rd respondents were charged with criminal offences in Criminal Case No. ACC 12 of 2018 with offences including conspiracy to commit an offence of economic crime contrary to sections 47(a)(3) and 48(1) of the Anti-Corruption and Economic Crimes Act and fraudulent acquisition of public property contrary to sections 45(1)(a) and 48(1) of the Anti-Corruption and Economic Crimes Act (ACECA).

6. The applicant had thereafter, on 30th May, 6th June and 25th June 2018 through Chief Magistrate's Court Miscellaneous Application Nos. 1833, 1839, 1997 and 2253 of 2018 obtained court orders freezing the accounts of the respondents under section 118 and 121 of the Criminal Procedure Code and section 180 of the Evidence Act for purposes of investigation. Following its analysis of the respondents' bank statements and other documents relating to their accounts, the applicant established that the respondents had received funds fraudulently from the NYS through their business entities and personal accounts and associates split in several transactions. Such funds were further intra-transferred into accounts owned by their family members and associates.

7. It is the applicant's case that it has established that the accounts are holding funds suspected to be proceeds of crime and hence liable for

forfeiture to the government. The applicant had, on 7th September 2018, obtained court orders freezing the respondents' accounts under section 53A (5) and 54(2) of POCAMLA and section 180 of the Evidence Act vide Nairobi High Court Anti-Corruption & Economic Crimes Division, Misc Application Nos. 33 and 36 of 2018 for a period of 90 days.

8. It had further obtained preservation orders against the respondents' funds and assets on 7th December, 2018 through Nairobi High Court Civil Application No. 56 of 2018- Assets Recovery Agency –vs- James Thuita Nderitu & 6 others. These orders were, as required under section 83(1) of POCAMLA, gazetted on 21st December 2018 vide Kenya Gazette Notice No. 13118 Vol CXX – No. 155.

9. The applicant states that there are reasonable grounds to believe that the respondents' accounts were used as conduits for money laundering contrary to sections 3, 4 and 7 as read with section 16 of POCAMLA. It argues that it is in the interests of justice that this court issues an order that the funds held in the respondents' accounts set out above be forfeited to the government. Should the court not grant these orders, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of the general public interest.

10. The application is supported by an affidavit sworn by No. 60040 S/SGT Fredrick Musyoki, a police officer attached to the applicant as an investigator. He avers that he was part of a team of police officers undertaking investigations relating to offences under POCAMLA. S/SGT Musyoki had, on or about 26th April, 2018, received information on ongoing criminal investigations involving frauds and economic crimes at the National Youth Service (NYS), which were being conducted by the DCI.

11. The investigations had culminated in charges on 29th May 2018 against several individuals and entities including the 1st, 2nd and 3rd respondent in Criminal Case No. ACC 12 of 2018. The charges were conspiracy to commit an offence of economic crime contrary to sections 47(a)(3) and 48(1) of ACECA, fraudulent acquisition of public property contrary to sections 45(1)(a) and 48(1) of ACECA as evidenced by the charge sheet annexed to his affidavit as 'FM1'. He had thereafter, on 30th May, 6th June and 25th June 2018 obtained court orders ('FM 2''FM3' 'FM4' and 'FM5') freezing the accounts of the respondents under section 118 and 121 of the Criminal Procedure Code and section 180 of the Evidence Act for purposes of investigation vide Chief Magistrate Miscellaneous Application Nos. 1833, 1839, 1997 and 2253 of 2018.

12. In the course of the investigations, he had traced bank accounts belonging to the respondents and their business entities and/or associates. These accounts were suspected to have been used for money laundering purposes. Annexed to the application were statements in respect of the accounts and the balances in each as follows:

a. Kshs 2,981,067 in Account No 0151247643100 held at Standard Chartered Bank Ruaraka Branch; and Kshs 217,598.25 in Account no 0180198054920 held at Equity Bank, Ruaraka Branch in the name of James Thuita Nderitu; (annexure 'FM6')

b. Kshs 1,088,065.20 in Account No. 0102031937400 held at Standard Chartered Bank Ruaraka Branch; and Kshs 182,463.85 in Account No 0671003217 held at Barclays Bank Ruaraka Branch in the name of Flagstone Merchants Ltd (annexure 'FM7')

c. Kshs 3,124,964 in Account No 01022010315700 and Kshs 3,160,584.30 in Account No 0102010315701 held at Standard Chartered Bank Ruaraka Branch in the name of Firstling Supplies Ltd (Annexure 'FM8')

d. Kshs 22,700,580.70 in Account No 0102447666600 held at Standard Chartered Bank Ruaraka Branch in the name of Excella Supplies Ltd (Annexure 'FM9')

e. Kshs 1,708,290.35 in Account No 0100314850400 held at Standard Chartered Bank Nakuru Branch in the name of Betty Martha Wajewa Omondi (Annexure 'FM10')

f. Kshs 27,890.70 in Account No 1340266304885 held at Equity Bank Ridgeways Branch in the name of Flagstone Co. Ltd (Annexure 'FM11')

g. Kshs 434,619.63 in Account No 0180290286272 held at Equity Bank, Ruaraka Branch in the name of Interscope Tech & Services (Annexure 'FM12')

13. Documents in respect of the registration of the business entities holding the above accounts namely Flagstone Merchants Ltd, Firstling Supplies Ltd, Excella Supplies Ltd, Flagstone Co. Ltd, and Interscope Tech & Services were exhibited as annexure 'FM14'.

14. S/SGT Musyoki avers that upon analyzing the bank statements and documents relating to the accounts of the respondents, he had established that the respondents had fraudulently received funds from the NYS and associates split in several transactions. The funds received from NYS by the respondents and their associates were then further intra-transferred into accounts owned by their family members and associates. These funds are suspected by the applicant to be proceeds of crime and are liable to forfeiture to the state. S/SGT Musyoki averred in detail with respect to the funds received by the respondents from NYS.

15. According to S/SGT Musyoki, the 1st respondent, James Thuita Nderitu, had received money from NYS and associates in Account No 0151247643100 held at Standard Chartered Bank Ruaraka Branch and Account No 0180198054920 held at Equity Bank, Ruaraka Branch as follows:

JAMES THUITA NDERITU			

A/C No. 0151247643100 STANDARD CHARTERED	DATE	MONEY RECIEVED FROM	AMOUNT (KSHS)
	28/4/2017	Funds Transfer	10,000,000.00
	14/7/2017	Funds Transfer	100,000,000.00

16. The 2nd respondent**,** Flagstone Merchants Ltd**,** had received funds from the NYS and associates in Account Nos. 0102031937900 &. 0102031937400 held at Standard Chartered Bank Ruaraka Branch; and Account No 0671003217 held at Barclays Bank Ruaraka Branch as illustrated below:

FLAGSTONE MERCHANTS LTD A/C No. 0102031937400 STANDARD CHARTERED	DATE	FROM	AMOUNT (KSHS)
	21/3/2017	NYS	51,093,103.45
	21/3/2017	NYS	51,093,103.45
	21/3/2017	NYS	44,280,689.65
	21/3/2017	NYS	44,280,689.65
	21/3/2017	NYS	44,280,689.65
	10/5/2017	NYS	43,699,396.55

17. The 2nd respondent had therefore, according to Musyoki, received on 21st March 2017 a total of Kshs 195,176,275.85 from the NYS. The court notes, however, that from the amount in the table set out above the actual amount received on 21st March 2017 was Kshs 235,028,275.85.

18. It is the applicant's averment further that the 3rd respondent, Firstling Supplies Ltd, received a total of Ksh 795,199,245.65 from NYS in Account No 01022010315700 held at Standard Chartered Bank Ruaraka Branch between 4th and 13th July 2017 as follows:

FIRSTLING SUPPLIES LTD A/C No. 01022010315700 STANDARD CHARTERED	DATE	FROM	AMOUNT (KSHS)
	21/6/2017	NYS	41,321,120.70
	4/7/ 2017	NYS	25,793,103.45
	4/7/ 2017	NYS	139,396,551.70

	5/7/2017	NYS	11,606,896.55
	11/7/2017	NYS	10,063,577.60
	13/7/2017	NYS	65,250,862.05
	13/7/2017	NYS	57,849,568.95
	13/7/2017	NYS	21,336,206.90
	13/7/2017	NYS	94,803,879.30
	13/7/2017	NYS	104,357,758.60
	13/7/2017	NYS	94,803,879.30
	13/7/2017	NYS	141,767,241.40
	13/7/2017	NYS	28,169,719.85
	13/9/2017	NYS	10,063,577.60
	9/10/2017	NYS	26,077,586.20

19. The 4th respondent, Excella Supplies Ltd, received money from NYS and associates in Account No 0102447666600 held at Standard Chartered Bank Ruaraka Branch as follows:

EXCELLA SUPPLIES A/C No 0102447666600 STANDARD CHARTERED	**DATE**	**FROM**	**AMOUNT (KSHS)**
	22/5/2017	Flagstone Merchants Ltd	3,000,000.00
	18/9/2017	NYS	94,946,120.70
	27/11/2017	NYS	91,034, 482.75

20. The 5th respondent, Betty Martha Wajewa Omondi had, according to the applicant, received money from associates in Account No 0100314850400 held at Standard Chartered Bank Nakuru Branch as follows:

BETTY OMONDI	**DATE**	**FROM**	**AMOUNT (KSHS)**
	1/4/2017	Funds Transfer	3,500,000.00

	25/4/2017	Funds Transfer	1,600,000.00
	3/2/2017	Funds Transfer	1,500,000.00
	18/7/2017	Firstling Supplies Ltd	2,000,000.00

21. Musyoki further avers on behalf of the applicant that Flagstone Co. Ltd, the 6th respondent, received Kshs 400,000.00 from associates, Ellwyn Supplies, on 10th January 2017 in Account No 1340266304885 held at Equity Bank Ridgeways Branch.

22. The 7th Respondent, Interscope Tech and Services, received money from NYS and associates in Account No 0180290286272 held at Equity Bank, Ruaraka Branch as illustrated in the table below:

INTERSCOPE TECH A/C No 0180290286272 EQUITY BANK	**DATE**	**FROM**	**AMOUNT (KSHS)**
	19/12/2016	NYS	10,623,297.40
	17/1/2017	NYS	9,915,077.60
	25/1/2017	NYS	18,369,051.70
	25/1/2017	NYS	19,913,793.10
	1/2/2017	NYS	40,225,862.05
	16/2/2017	NYS	15,191,379.30
	8/3/2017	NYS	9,492,620.70
	21/3/2017	NYS	19,913,793.10
	21/3/2017	NYS	19,913,793.10

23. The applicant had thereafter obtained court orders freezing the respondents' accounts pursuant to section 53A (5) and 54(2) of the POCAMLA and section 180 of the Evidence Act vide Nairobi High Court Anti-Corruption & Economic Crimes Division, Misc Application Nos. 33 and 36 of 2018 (annexure 'FM15' and 'FM16'). It had further, on 7th December, 2018, in Nairobi High Court Civil Application No. 56 of 2018, Assets Recovery Agency –vs- James Thuita Nderitu & 6 others obtained preservation orders ('FM 17') against the respondents' funds and assets. The preservation orders were gazetted on 21st December 2018 vide Kenya Gazette Notice No. 13118 Vol CXX – No. 155 (exhibit 'FM 18') pursuant to section 83(1) of POCAMLA.

24. S/SGT Musyoki asserts that there are reasonable grounds to believe that the respondents' accounts were used as conduits for money laundering contrary to sections 3, 4 and 7 as read together with section 16 of POCAMLA. It is therefore in the interest of justice that the court issues the forfeiture orders that the applicant seeks that the funds held in the respondents' accounts be forfeited to the government and transferred to the applicant.

25. In his affidavit in response to the affidavit sworn by the 1st respondent on behalf of all the respondents, S/SGT Musyoki avers that the present forfeiture proceedings and the criminal trial against the respondents are separate and distinct. He asserts that the applicant is pursuing assets which are reasonably believed to be proceeds of crime in accordance with its mandate under POCAMLA. He also avers that the validity of a forfeiture order is not dependent on the outcome of criminal proceedings as provided under section 92(4) of POCAMLA, and that under POCAMLA, proceeds of crime means any property derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender. It is his averment that the respondents have not discharged the burden of proving that

the funds sought to be forfeited were acquired legitimately. Musyoki further contends that under Article 40(6) of the Constitution, the right to property does not apply to or protect property that is unlawfully and or illegally acquired and/or proceeds of crime.

26. In written submissions which were highlighted by its Counsel, Mr. Ngumi, the applicant submits that the 1st and 3rd respondents were charged with others in Criminal Case No 12 of 2018, referring in this regard to the charge sheet (annexures FMI). The applicant had then obtained orders in Misc Appn Nos 1833, 1839, 1997 and 2253 of 2018 (annexures FM 2,3,4 and 5) to investigate the respondents' accounts. It had obtained the statements of the respondents' accounts (annexures FM 6, 7, 8, 9, 10). Mr. Ngumi reiterated the dates on which and the amounts which had been transmitted to the respondents' accounts, which I have set out above. His submission was that these funds are proceeds of crime, and should be forfeited to the State.

27. Mr Ngumi submitted that the affidavit sworn on behalf of the respondents by James Thuita Nderitu on 4th April 2019 is defective as it does not have the requisite authority from the other respondents, some of whom are individuals, to swear on their behalf. Further, that in the response sworn on 3rd June 2019, the applicant had indicated that the forfeiture proceedings are separate and distinct form the criminal proceedings against the 1st and 3rd respondents. In any event, according to the applicant, the validity of a forfeiture order is not dependent on the outcome of criminal proceedings.

28. The applicant notes that while the 1st respondent averred that he was a businessman engaged by the NYS and other institutions and organizations, he had not furnished any evidence to support his averment and he had therefore failed to discharge the burden of proof that the funds the applicant seeks forfeiture of were acquired legitimately.

29. The applicant denies that the application for forfeiture is a violation of the respondents' right to property. It submits that under Article 40(6), the protection of the right to property does not extend to property that is illegally acquired. It is its submission that the making of a forfeiture order is on a balance of probabilities as civil proceedings are directed at the seizure of property and not the conviction of any individual. There is therefore no reason to apply the criminal standard of proof.

30. With regard to a contention by the respondents that it is only the 1st and 3rd respondents who are charged in the criminal case, the applicant responds that section 2 of POCAMLA defines proceeds of crime to include funds or assets obtained directly or indirectly from crime. It contends that the analysis of the funds done by S/SGT Musyoki shows an intermingling of funds between the accounts held by the respondents. It further shows that the 1st respondent is an accused person; the 2nd respondent is a business name whose proprietor is the 1st respondent; the 3rd respondent is a company whose directors are the 1st respondent and his wife; the 4th respondent is also a company whose director is a known wife of the 1st respondent; while the 5th respondent is also a known wife of the 1st respondent and a director of the 4th respondent.

31. The applicant further submitted that the 6th respondent is a company that is owned by the 1st respondent and one Wanjiku Ngugi. Further, the 1st respondent is a director of all the respondent firms except the 4th and 5th respondents. It was also its submission that from its analysis, Excella Supplies, Ltd, the 4th respondent, received Kshs 3 million on 22nd May 2017 which funds were transmitted from Flagstone Merchants, the 2nd respondent a business name whose proprietor is the 1st respondent.

32. The applicant further notes that the 5th respondent, Betty Martha Wajewa Omondi, received Kshs 2m on 18th July 2017 from Firstlings Supplies Ltd, the 3rd respondent, which is also owned by the 1st respondent. The applicant therefore submits that all the funds in the accounts the subject of this application are proceeds of crime as defined in POCAMLA. It relies on several authorities set out in its written submissions dated 1st July 2019 which I shall consider later in this judgment, and urges the court to grant the orders sought in its application.

The Response

33. The respondents filed an affidavit sworn on their behalf by James Thuita Nderitu, the 1st respondent, on 4th April 2019 and submissions dated 1st August 2019 as well as authorities annexed thereto. The submissions were highlighted by their Learned Counsel, Mr. Gachie.

34. In his affidavit, the 1st respondent does not address the facts relating to the funds deposited in the respondents' accounts as set out in the statements annexed to the applicant's affidavit. He avers that the present application is misplaced, an abuse of the court process, and is intended to vex the respondents. While conceding that he has been charged with the offence of fraudulent acquisition of public property, he avers that it is only he and the 3rd respondent who have been charged with any offences.

35. Accordingly, it is his contention that the application is premature since, first, the applicant asks the court to declare the funds proceeds of crime when no crime has been proved; it seeks forfeiture of funds which would be the evidence in the criminal case to prove that the funds were acquired fraudulently; and thirdly, that the application presupposes that he is guilty as charged and he needs to prove himself innocent, which is contrary to the presumption of innocence, a basic tenet of criminal law.

36. The 1st respondent avers that the application is based on the suspicion that the funds in the respondents' accounts are proceeds of crime. He avers that suspicion alone has never been a basis for condemning a person and the applicant has no proof that the funds are proceeds of crime. He denies that the funds in contention are from the NYS as alleged by the applicant. He asserts that he is and has always been a major supplier to many government institutions, including the NYS, the Ministry of Lands and Education, as well as other institutions such as the AIG Insurance.

37. According to the 1st respondent, the movement of funds from one account to another in the ordinary course of business would not render those entities to be accused of having proceeds of crime. He observes that some of the money has been used to pay tax, his averment then being that the accounts of the Kenya Revenue Authority (KRA) cannot be frozen. He asserts that the transactions in the subject accounts

show vibrant companies that have dealt with a variety of businesses, importing goods from far and wide and receiving funds from different sources. In his view, for the applicant to claim that all the funds held in the respondents' accounts are unlawful is to be disrespectful of the respondents. The respondents ask the court to dismiss the application and allow the trial before the lower court to take its course and prove the 1st respondent guilty or otherwise.

38. In highlighting the respondents' submissions, Mr. Gachie contended that it is a principle of law that he who alleges must prove, placing reliance for this proposition on the Evidence Act. In the respondents' view, while the applicant had shown figures set out in the affidavit of S/SGT Musyoki and seeks to persuade the court that the respondents received monies from NYS, it had not shown in the bank statements credits of monies from the NYS. Their submission was that the averments in the applicant's affidavit were not borne out by the documents annexed thereto.

39. The respondents referred to an entry in the 1st respondent's statement running from 15th November 2013- 31st May 2015 which had an entry of 19th December 2014 of an RTGS payment from the Ministry of Lands and Housing of Kshs 24m deposited in the 1st respondent's account. Their submission was that this demonstrated that the 1st respondent and his companies have been trading with the government, and monies received from the government or any government entity are not necessarily proceeds of crime. They further cited by way of illustration other payments shown in the statements for the period 31st December 2015-31st January 2016 which had an RTGS payment from the Ministry of Lands and Housing of Kshs 36m to the 1st respondent's account.

40. Their submission was that it was the duty of the applicant to prove to the court that a credit of Kshs 41m set out in the applicant's affidavit were proceeds of crime, and not the other deposits. In their view, what the accounts demonstrate is that the 1st respondent is a businessman who has had dealing with different government entities, and that his accounts hold monies outside the alleged credits from NYS.

41. As regards the applicant's reference to the definition of proceeds of crime under POCAMLA, the respondents argue that there is a difference between a crime and an offence; that a crime is an offence that has been proved in a court of law as having been committed; that a person becomes a criminal after a conviction, and that before a conviction, he or she is a suspect. It was submitted on their behalf therefore that the right forum in which a conviction can be made and a declaration that property is ill- gotten is the criminal court. While conceding that the 1st and 3rd respondent are accused persons before the criminal court, their submission was that the allegation by the applicant that the money in contention was unlawfully obtained from NYS are matters the subject of a trial court. In their view, it is at the trial court that a finding will be made that a crime was committed.

42. The respondents further submitted that section 92 of POCAMLA provides the circumstances under which an order for forfeiture is made. In their view, it had not been shown that if there was money paid to the respondents by NYS, there was no corresponding LPO raised by NYS, delivery done by the respondents and an invoice raised by the recipient. Their submission was that this burden lay on the applicant and should not have been shifted to the respondents, and in any event, these were the issues before the trial court.

43. The respondents noted that section 92(4) of POCAMLA states that the validity of a forfeiture order under section 92(1) is not affected by the outcome of a criminal trial. In their view, this means that it matters not even if the court were to make a forfeiture order even if the respondents are acquitted by the trial court. According to the respondents, an order of forfeiture could be placed before the trial court, which brings into play Article 50 which protects the right to a fair trial. Their submission was that to the extent that it contradicts Article 50 of the Constitution, sections 92 of POCAMLA should be declared unconstitutional.

44. With regard to the applicant's contention that the payment of funds from one company to another was evidence of money laundering, the respondents submitted that it was the duty of the applicant to prove that an entry of 19th September 2017, which was a payment from the account of the 4th respondent of Kshs 1m to KRA, was not money laundering, as opposed to other payments, to other companies. In their view, payment or movement of money is not evidence of money laundering. If it was, then all entities paid should have been brought to court.

45. The respondents emphasised that while the burden of proof in forfeiture applications is lower than in criminal law, it lies on the applicant to persuade the court that the amount they intend to freeze are proceeds of crime. They urged the court to find that proceedings such as these should be entertained after a conviction, and that while section 90 of POCAMLA says that the applicant may file such proceedings, it is not compelled to file the proceedings before a conviction. They urged the court to dismiss the application until the criminal proceedings against the 1st and 3rd respondents are complete.

46. In his submissions in reply, Mr. Ngumi argued that the burden of proof in cases of civil forfeiture is on a balance of probabilities. He relied in support on the case of **Assets recovery Agency –vs- Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No 2007 HCV003259** and **Asset Recovery Agency vs Quorandum Limited & 2 others (2018) eKLR.**

47. With regard to the reference by the respondents to LPOs delivery notes and invoices which would have supported payments from NYS, his submission was that the respondents had not provided such documents.

48. While conceding that the respondents' accounts had monies transmitted from other government agencies, Mr. Ngumi submitted that the applicant was only interested in what the respondents obtained from NYS. It was also the applicant's case that there was no denial of the respondents' right to hearing under Article 50. It had not taken the respondents' property arbitrarily but had filed the present application in which the respondents had an opportunity to be heard.

49. According to the applicant, POCAMLA provides for both criminal and civil forfeiture. While criminal forfeiture is dependent on the outcome of a criminal trial, civil forfeiture, like the present application, is not affected by the outcome of a criminal trial. The applicant urged the court to find that the applicant has, on a balance of probabilities and in the absence of evidence to support payment to the respondents by

the NYS, established that the funds in their accounts are proceeds of crime and issue orders of forfeiture as prayed in the application.

Analysis and Determination

50. I have considered the application and affidavits in support, as well as the respondents' replying affidavit in opposition. I have also read and considered the submissions and authorities placed before me by the parties.

51. The applicant has identified four issues for determination in this matter, while the respondents have identified a sole issue for determination. This is whether the applicant is entitled to the orders that it seeks at this stage, an issue that corresponds to the fourth issue identified for determination by the applicant. Accordingly, the four issues that I am called upon to determine in this matter are as follows:

> **i. Whether the application for forfeiture is premature and ought to await the outcome of the criminal proceedings against the respondents;**
>
> **ii. Whether the respondents' properties sought to be forfeited are proceeds of crime;**
>
> **iii. Whether the respondents' properties are liable to forfeiture to the government;**
>
> **iv. Whether the application for forfeiture violates the respondents' right to property and fair hearing.**

Whether the application for forfeiture is premature and ought to await the outcome of the criminal proceedings against the respondents

52. This issue is at the core of the respondents' case. Accordingly, I believe it is useful to address it first, for a finding in favour of the respondents on the issue would dispose of the application in its entirety.

53. The respondents argue that the applicant has the burden of proving that the funds held in their accounts are proceeds of crime. They cite in support sections 90 and 92 of POCAMLA, as well as sections 107-109 of the Evidence Act. They also rely on the decision of the **Court of Appeal in Stanley Mombo Amuti v Kenya Anti-corruption Commission (2019) eKLR** in which the court relied on the case of **Director of Assets Recovery and others vs Green & others [2005] EWHC 3168** with respect to what the state, in civil proceedings for recovery, is required to establish. The respondents reiterate the averment by the 1st respondent that he is a supplier of repute to many government institutions including but not limited to the NYS. It is their submission that the documents relied on by the applicant show that the funds are from a source different from what is alleged as the accounts have received funds from different ministries.

54. The respondents further submit that under section 65 of POCAMLA, the applicant must first show that an offence was committed. Secondly, that the property the subject of the application was acquired through that offence. They rely on the case of **Assets Recovery Agency vs Charity Wangui Gethi [2018]eKLR**.

55. The respondents' case, as I understand it, is that as the criminal case against the 1st and 3rd respondents is still ongoing and is yet to be determined, the court cannot grant the orders for forfeiture at this stage. They have also relied on Article 50(2) (a) which sets out the constitutional presumption of innocence. It is their submission that no court of law has determined that the funds in the accounts are proceeds of crime, and it is only the criminal court that can make a finding in that regard. Since no offence has been proved against the respondents and they have not been convicted in any court, condemning them under POCAMLA would go against the spirit of the law.

56. In its submissions in response on this issue, the applicant argues that a conviction in criminal proceedings is not a condition precedent to civil forfeiture. It submits that the respondents have been charged in Criminal Case No. ACC 12 of 2018 with various offences, including conspiracy to commit an offence of economic crime contrary to sections 47(a)(3) and 48(1) of ACECA and fraudulent acquisition of public property contrary to sections 45(1)(a) and 48(1) ACECA. The applicant relies on the case of **Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR** in which the court stated that civil forfeiture proceedings are proceedings in *rem* (against property) in which a civil suit is brought for recovery of property reasonably believed to be a proceed of crime. It asserts that the present proceedings seek to determine the criminal origins of the property in issue and are not a criminal prosecution against the respondents, Accordingly, the presumption of innocence is not applicable.

57. The applicant further relies on section 92 (4) of POCAMLA to support its submission that a conviction is not required as a condition prior to a suit for recovery of funds reasonably believed to be proceeds of crime. It further cites the case of **Phillips v The United Kingdom [2001] ECHR 437** quoted in the case of **Martin Shalli -vs-Attorney General of Namibia & Others High Court of Namibia Case No:POCA9/2011** in which it was held that civil proceedings are not subject to the presumption of innocence in Art 6(2), and that the proceedings for civil recovery of proceeds under the Proceeds of Crime Act of 2002 (of England and Wales) are civil proceedings and not proceedings where a person is charged with a criminal offence within the meaning of Art. 6(2) of the European Convention.

58. The applicant further relies on the case of **Teckla Nandjila Lameck-vs- President of Namibia 2012(1) NR 255(HC**) in which the court held that proceedings for forfeiture of proceeds of crime are directed at confiscation of the proceeds of crime and not at punishing an accused person.

59. Under section 92(4) of POCAMLA, it is provided that:

> **(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.**

60. In its decision in **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR** the court stated that:

> **"This is a claim for civil recovery. <u>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.</u> 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. <u>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.</u> See - Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR."** (Emphasis added).

61. Similarly, in **Assets Recovery Agency vs Pamela Aboo [2018] eKLR**, 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 **<u>Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168</u>** 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 **<u>ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120</u>** 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..."**

62. Finally, in the Namibian case of **Teckla Nandjila Lameck-vs- President of Namibia (supra)**, the court stated that:

> **"…Asset forfeiture is, as is stated in section 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.**
>
> **<u>…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.</u> 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.**

63. I agree with the sentiments expressed by the courts in the above decisions. A conviction in a criminal trial is not necessary before a suit for recovery of funds or other assets reasonably believed to be proceeds of crime is instituted. As is provided in section 92(4) of POCAMLA, even where an investigation or prosecution is launched, its outcome does not have an impact on a suit for recovery of proceeds of crime. I accordingly find that the response to the first issue in this matter is in the negative. The present application is not premature. As the outcome of criminal proceedings does not, under the law, have a bearing on forfeiture proceedings, the applicant does not have to await the conclusion of a criminal trial before instituting civil proceedings for recovery of funds or assets reasonably believed to be proceeds of crime.

Whether the funds in the respondents' accounts are proceeds of crime and therefore liable to forfeiture to the State

64. The second issue for consideration is whether the funds sought to be forfeited are proceeds of crime. I will consider this issue alongside the third issue, which is a natural corollary of the second issue: if the funds at issue are proceeds of crime, whether they should be forfeited to the State.

65. The applicant submits that the present application is brought under POCAMLA, which provides for the offence of money laundering and introduces measures for combating the offence. It also provides measures for the identification tracing, freezing, seizure and confiscation of the proceeds of crime. The applicant cites in support the case of **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR** in which it was held that:

> **"The letter, spirit purpose, and gravamen of the Proceeds of Crime and Anti-Money Laundering Act is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after due process, to the state, on behalf of the public which is deemed to have suffered some injury by the criminal conduct."**

66. Reliance is also placed on the case of **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** where it was held that:

> **"…. 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 realisation 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…"**

67. The applicant further cites the definition of proceeds of crime in POCAMLA to submit that from its investigations and investigations by the DCI as set out in the affidavit in support of the application, bank accounts belonging to the respondents and their business entities had been traced and are suspected to have been used for money laundering purposes. The accounts had received large sums of money as detailed in the said affidavit**,** with the 2nd respondent, Flagstone Merchants Ltd, having received a total of Kshs 195,176,275.85 on 21st March 2017 from the NYS, while the 3rd respondent, Firstling Supplies Ltd, had received, between 4th and 13th July 2017, a total of Kshs 795,199,245.65 from the NYS. The applicant further submits that the funds had then been intra-transferred within the same bank and various banks into accounts owned by the applicants and their family members and/or associates in an intricate web in the money laundering scheme.

68. The applicant further cites the words of the court in **Schabir Shaik & Others –vs- State (supra)** in which the court had observed as follows:

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

69. The applicant relies on section 112 of the Evidence Act to submit that the respondents have failed to demonstrate with particularity how they obtained the funds in their accounts, a burden that falls upon them since this is a fact that is especially within their knowledge. The applicant notes that the respondents only aver that the funds are from vibrant companies that have dealt with a variety of business importing goods from far and wide across the world. It also relies on the decision in **Assets Recovery Agency –vs- Fisher, Rohan and Miller (supra)** in which the court observed that:

> **"………Even though these proceedings are quasi Criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousand of United States dollars without more."**
>
> **There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence. is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.**
>
> **This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 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…"**

70. The applicant further submits that the contention by the respondents that they dealt with a variety of businesses importing goods from far and wide across the world is not supported in the affidavit. It maintains that the funds held in the respondents' bank accounts are proceeds of crime. It relies on the decision in **Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence Forces & another [2017]eKLR**; **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others SCK Presidential Petition No. 1 of 2017 [2017]eKLR** and **Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others Nairobi EP No. 15 of 2008 [2010]eKLR** for the proposition that in the absence of pleadings, any evidence produced by a party cannot be considered.

71. According to the applicant, the actions of the respondents of intra transferring the amounts they received from NYS was a money laundering scheme to camouflage the proceeds of crime and disguise the economic benefit derived as legitimate. In its view, there are reasonable grounds to believe that the respondents' accounts were used as conduits of money laundering contrary to sections 3, 4 and 7 as read with section 16 of POCAMLA. Since the respondents have failed to provide even an iota of evidence to show how the suspect funds from NYS were received in their accounts and for what particular purpose, the respondents are beneficiaries of proceeds of crime and the funds in the said accounts are proceeds of crime as they were obtained directly as a result of money laundering and other predicate offences.

72. With regard to the final issue, the applicant submit that it has demonstrated that the funds in the respondents' accounts are proceeds of crime as defined in POCAMLA and should be forfeited to the State. It cites section 92(1) of POCAMLA which empowers the High Court to make a forfeiture order if it finds on a balance of probabilities that the property concerned has been used or is intended for use in the commission of an offence or is proceeds of crime. It submits that the *r*espondents benefitted as a result of the crimes committed at the NYS and that it has demonstrated that on a balance of probabilities, the funds sought to be forfeited are proceeds of crime as they were acquired directly as a result of the offences committed at the NYS.

73. As indicated at the beginning of this analysis, the respondents have identified one sole issue for determination, that is whether the applicant is entitled to the orders sought at this stage. I have already addressed myself to this issue and found that the application is not premature as a conviction is not a pre-condition to an application for forfeiture under section 92 of POCAMLA. In their averments in reply to the application and in the written submissions, the respondents have not addressed themselves at all to the source of the funds in their accounts. They submit that the applicant is out to condemn and convict the 1st and 3rd respondents prematurely as there is a criminal case ongoing relating to the investigation involving funds at the NYS. They argue that the application presupposes that the funds held in the accounts are proceeds of crime while the crime has not been proved and the criminal case is still ongoing. It is their case that the accused persons in the case are presumed innocent until proven guilty.

74. It is also their submission, whose meaning is not quite clear, that *'the onus of proof is on the Criminal Court'* in which the criminal case is being tried. In their view, it is not for the applicant or the DCI to determine and establish authoritatively that a crime has been committed and if so by whom. According to the respondents, under section 90 and 92 of the POCAMLA, the court, in determining an application such as is presently before me, must address itself to the question whether an unlawful activity was done on a balance of probabilities. It must satisfy itself that the property sought to be forfeited is proceeds of crime or is to be used to perpetuate a crime.

75. The respondents rely on the decision in **Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR and section** 107 (1) of the Evidence Act with respect to the burden of proof. It is their submission that in this case, the applicant has the burden to prove that the funds held in their accounts were fraudulently acquired from the NYS, which they submit the applicant has failed to do.

76. The respondents submit that the 1st respondent has deposed in his replying affidavit that he is a supplier of repute to many government institutions, including but not limited to NYS. Their submission is that from the annexures filed by the applicant, the respondents' accounts have received funds from different Ministries such as the Ministry of Lands, among others.

77. The respondents further submit that under section 65 of POCAMLA, the applicant must first establish that an offence was committed and secondly, that the property the subject of the forfeiture proceedings was acquired through that offence. They rely in support on the case of **Assets Recovery Agency v Charity Wangui Gethi [2018] eKLR**. The respondents further argue that the annexures relied on by the applicant ***"simply shows what the business entities perform their objectives in the ordinary course of their business which partly is to enter into transactions with other entities that mainly involves transfer of funds from one entity to another"***, and in their view, there is nothing suspicious about this.

78. With respect to the 2nd, 4th, 5th, 6th and 7th respondents, the submission is that they are neither accused persons in the criminal matter nor are they facing any criminal charges. These respondents, they argue, have simply been joined to this application because they are part of the entities that have received funds from NYS.

79. The respondents further contend that the applicant has failed to produce evidence to link the respondents to the funds allegedly stolen from NYS. They contend that part of the money has been used to pay tax to KRA, and in their view, this would not give the applicant freedom to freeze accounts belonging to KRA or such other entity. They rely **on the case of Macfoy v United Africa Co Ltd [1961] 3 ALL EL.R. 1172 and Nguku v Republic [1985] KLR 412** for the proposition that where a party fails to produce **certain evidence, a presumption arises that the evidence produced would be unfavourable to that party.**

80. The respondents further assert that granting the orders sought will deny them a chance to be heard, reliance for this submission being placed on the case of Asset Recovery Agency v Charity Wangui Gethi (supra). The gravamen of their case is that the allegations against them are criminal in nature and are the subject of ongoing criminal proceedings. They contend that under Article 50 (2) (a), they are presumed innocent until proved guilty. As no court has determined that the funds in their accounts are proceeds of crime or that the 1st and 3rd respondents are guilty of any offence, it would be to violate this right for the court to issue the orders sought. Further, that it is only the court hearing the criminal case that can make a finding that the funds are proceeds of crime.

81. I have perused the account statements in respect of the respondent's bank accounts placed as exhibits before me by the applicant. As contended by the applicant, the respondents did receive substantial funds from the State Department for Public Service and Youth. From the statements annexed to the applicant's affidavit and the analysis done therein by S/SGT Musyoki, between March and October 2017, the 1 st, 2nd and 3rd respondents received approximately Kenya shillings one billion, one hundred million, three hundred and seventy five thousand, five hundred and twenty one and fifty cents (Kshs 1,100,375,521.50). The respondents do not deny receipt of these funds-indeed they tacitly admit receipt. Their argument, however, is that they receive funds from many other government ministries and organisations, not just the NYS, and they name the Ministry of Lands and Housing by way of illustration.

82. In my view, the applicant has placed material before the court that indicate that funds were transferred to the respondents in circumstances that show, on a balance of probabilities, that these funds are the proceeds of crime. It is correct that, as the respondents argue, the 1st and 3rd respondent have been charged with a criminal offence, but they have not been convicted. However, whether they are convicted or not, under the provisions of POCAMLA, once it is established on a balance of probabilities that the funds in their accounts are proceeds of crime, they have an obligation to show that such funds are legitimate, and that they are not proceeds of crime. This the respondents have not even attempted to do, confining themselves to stating only that they are involved in business far and wide, throughout the world.

83. There is a very specific allegation by the applicant in this case. This is that the funds received in the respondents account were obtained unlawfully from the NYS. The bank statements placed before the court show that indeed there were funds deposited in the respondents' accounts from the Ministry of Public Service and Youth. These funds were first deposited in the respondents' accounts, but were thereafter transferred to other accounts. In my view, the respondents needed to go beyond the allegation that they have wide ranging businesses and show how these businesses translated to the credits of millions from the State Department of Public Service and Youth, under which the NYS falls, into their accounts.

84. At paragraph 17 of their written submissions, the respondents make an intriguing argument in response to the applicant's contention that the intra-account transfers between their various accounts was a sign of money laundering contrary to sections 3, 4, and 7 of POCAMLA. They submit that such intra account transfers ***"simply shows what* (sic) *the business entities perform their objectives in the ordinary course of their business which partly is to enter into transactions with other entities that mainly involves transfer of funds from one entity to another".***

85. If I understand the respondents correctly, their business involves the transfer of funds from one entity to another. Fair enough. But two questions come to mind. First, apart from banking institutions, I do not know of any entities whose business involves ***"the transfer of funds from one entity to another."*** Secondly, in order for funds to be transferred from one entity's account to another's account, the entities must have legitimate businesses from which they obtain the money that they transfer between themselves. As I observed in **Asset Recovery Agency v Lillian Wanja Muthoni Mbogo & others-ACEC MISC. APPL No. 58 of 2018**:

> **"…money and assets are not plucked from the air or, like fruits, from trees. They can be traced to specific sources- salaries, businesses in which one sells specific items or goods, or provides professional services. There must be books of accounts, stock registers, local purchases orders and delivery notes showing to whom goods are sold, deliveries made and payment receipts showing from whom payment has been received."**

86. To explain the large deposits from NYS into their accounts, the respondents had the evidential burden of placing before the court the nature of the business they transacted with the NYS. They did not do so, confining their pleadings to assertions that the 1st respondent has had business with other government ministries, and their submissions to an assertion that they have businesses far and wide. In my view, the applicant has established that the funds in the respondents' accounts are proceeds of crime, and that they should be forfeited to the state.

87. The applicants have cited section 65 of POCAMLA and the decision in **Assets Recovery Agency vs Charity Wangui Gethi** (supra) to submit that the applicant needed to prove the commission of a crime, and that no nexus has been shown between the crime and the funds in contention. I make two observations on these submissions. First, section 65 is found in Part VII of POCAMLA, which provides for criminal forfeiture. The present application is for civil forfeiture which, as I have observed above, is not dependent on the outcome of investigations or criminal prosecutions.

88. With regard to the case of **Assets Recovery Agency vs Charity Wangui Gethi (supra)**, I note from the facts thereof that the decision turned on the court being satisfied that the funds used for the purchase of the vehicle that the applicant sought to be forfeited had been deposited in the respondent's account prior to the deposit of funds linked to the NYS into the respondent's accounts. This is a vastly different situation from the present case in which the funds sought to be forfeited, though only a small fraction of the funds that the respondents received in their accounts, has a clear and direct link to the funds transferred from the NYS to the respondents' accounts.

89. I observe, finally, that the 1st and 3rd respondents, in reality the 1st respondent who is, primarily, the human face behind all the other respondents, have been charged with offences related to the NYS funds. Whether or not they were to be convicted, the other respondents, the corporate entities that received the funds from the Ministry of Public Service and Youth, still have an obligation, in an application for forfeiture such as this, to explain the legitimate basis on which they received the considerable funds deposited into their accounts. I note in this regard that the Central Bank of Kenya, the regulator under the Banking Act and Regulation 22 of the POCAMLA Regulations, has already imposed penalties on the banks into which these funds were deposited-see the Press Release issued on 12th September 2018 titled **"NVESTIGATIONS OF BANKSRELATED TO NATIONAL YOUTH SERVICE TRANSACTIONS (https://www.centralbank.go.ke/uploads/press_releases/104465402_Press%20Release%20-%20Investigations%20of%20Banks%20Related%20to%20National%20Youth%20Service%20Transactions.pdf).** In the absence of an explanation regarding the legitimate basis for the transfer of the funds, the conclusion that the funds are proceeds of crime and liable to forfeiture is inevitable.

Violation of the Respondents' Rights

90. The final issue to consider is whether the making of forfeiture orders would amount to a violation of the respondents' right to a fair hearing or the right to property. The applicant has submitted that the making of a forfeiture order does not violate the right to property as Article 40(6) provides that the Constitution does not protect property that is unlawfully acquired. The respondents have not addressed themselves to this point. Suffice to say that while Article 40 does protect the right to property, under Article 40(6), property that is found to be unlawfully acquired is not protected. It provides that:

> **(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

91. With regard to the right to a fair hearing, the respondents' contention is that it is only the court seized of the criminal trial against the 1st and 3rd respondents which can determine the question whether the funds in the respondents' accounts are proceeds of crime. However, as I have observed above, the present application has been brought under Part VIII of POCAMLA, which relates to civil forfeiture. The making of such an application is not dependent on the outcome of a criminal prosecution or investigation, and the court vested wit the jurisdiction to determine the matter is the High Court. The respondents have an opportunity to present their case before the court seized of the civil application, which they have done in this case. That their case was confined to an argument that the present application is premature is entirely their choice. No violation of the right to be heard has, in any event, been demonstrated.

Disposition

92. Accordingly, it is my finding and I so hold that the applicant has established, on a balance of probabilities, that the amounts held in the respondents' accounts are proceeds of crime, and they should be forfeited to the State. I therefore grant orders as prayed in the application dated 12th March 2019.

93. The respondents shall bear the costs of the application.

Dated Signed and Delivered at Nairobi this 22nd day of April 2020

MUMBI NGUGI

JUDGE

<u>ORDER</u>

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent and pursuant to a notice issued on 15th April 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE