



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

CIVIL APPLICATION NO 2 OF 2020

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

ROSE MONYANI MUSANDA.....1ST RESPONDENT

THOMAS ODHIAMBO KONDUTI.....2ND RESPONDENT

MARGARET WAMBUI MUGO.....3RD RESPONDENT

JUDGMENT

Introduction

1. The applicant, the Assets Recovery Agency, has filed the present matter seeking forfeiture of funds and assets from the respondents which it alleges are proceeds of crime/ In the application dated 10th January 2020, the applicant seeks the following orders:

1. THAT this Honourable Court be pleased to issue an order declaring that a Total of Kshs1,788,675.92/= held in Bank Account Number 010010100088 at Sidian Bank and Account Number 0325610001 held at Diamond Trust Bank in the Name of Monyani Rose Musanda are proceeds of crime and therefore liable for forfeiture to the State.

2. THAT this Honourable Court be pleased to issue an order declaring that motor vehicles registration numbers KCM 465X TOYOTA AXIO, KCR 279A, KBT 692T, KCC 646D KBY 184H AND KCH 179N ISUZU BUS COACHES are proceeds of crime and therefore liable for forfeiture to the State.

3. THAT this Honourable Court be pleased to issue orders of forfeiture of the following funds;

(i) Ksh 1,462,963.47 held in bank account number 010010100088 in the name of Monyani Rose Musanda held at Sidian Bank Kangemi Branch.

(ii) Kshs 325,712.45 held in bank account no. 0325610001 in the name of Monyani Rose Musanda held at Diamond Trust Bank, Madina Mall Branch.

4. THAT this Honourable Court be pleased to issue orders of forfeiture of the following motor vehicles;

i. KCM 465X TOYOTA AXIO,

ii. KCR 297A Isuzu Bus Coach

iii. KBT 692 W Isuzu Bus Coach

iv. KCC 646D Isuzu Bus Coach

v. KBY 184H Isuzu Bus Coach

vi. KCH 179N Isuzu Bus Coach

5. 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).

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

7. THAT costs be provided for.

2. The application is brought under sections 81, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) as read with Order 51 of the Civil Procedure Rules. It is supported by an affidavit sworn by Cpl. Fredrick Muriuki on 10th January 2020 and is based on the grounds set out on the face of the application.

3. The application was duly served on the respondents and directions given with respect to the filing of responses thereto on 5th February 2020. However, the respondents did not file their responses within the timelines directed. Instead, by an application dated 17th April 2020, the 2nd and 3rd respondents sought orders that pending the hearing and determination of the application, this court does rescind, revoke and/or vary its orders issued on 8th October 2019 to make provision for reasonable living expenses for them. They also sought an order for the immediate reinstatement and unhindered access and control of KBY 184H and KCH 179N, both Isuzu bus coaches registered in the name of the 2nd and 3rd respondent respectively, to enable them continue carrying on their trade of *matatu* transportation.

4. The court, however, noted that it had given directions with respect to the hearing of the main application. It further noted that instead of complying with directions on the hearing of the substantive application, the respondents had filed the said application, despite the directions issued on 2nd February 2020 and reiterated on 4th March 2020, and the substantive application fixed for hearing on 26th March 2020. The court therefore ruled that proper use of judicial time required that it deals with the substantive application which would in effect deal with the issues raised in the application dated 17th April 2020. This judgment therefore relates to the main application for forfeiture. However, it will also address the question raised by the 2nd and 3rd respondents regarding their entitlement to the vehicles registered in their names as prayed in the application dated 17th April 2020.

The Applicant's Case

5. The applicant's claim against the respondents is contained in the grounds set out on the face of the application, the affidavit in support, the further affidavit sworn by Cpl. Muriuki on 2nd March 2020 in reply to the affidavits by the 2nd and 3rd respondents, a further affidavit in response to a supplementary affidavit sworn by the 1st respondent on 26th April 2020, and the written submissions dated 17th March 2020.

6. The applicant is established under section 53 of POCAMLA as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. It is authorized under sections 81-89 in Part VIII of POCAMLA, which contains the procedure for civil forfeiture, 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. Where a preservation order is in force, section 90 of POCAMLA authorizes 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.

7. On 8th October, 2019, the applicant had obtained orders for preservation of funds and assets against the properties the subject of the application from this court in Miscellaneous Application Number 43 of 2019. The preservation order was gazetted on 18th October 2019 vide Gazette Notice No. 9949 pursuant to section 83(1) of POCAMLA

8. The applicant has brought the forfeiture application against the 1st respondent who is the beneficial owner of the assets the subject of this application. The 2nd respondent is a proxy of the 1st respondent in whose name motor vehicle registration number KBY 184H is registered. The 3rd respondent, in whose name motor vehicle registration number KCH 179N is registered, is also a proxy of the 1st respondent.

9. According to the applicant, the 1st respondent had been arrested at her residence on 14th June, 2019 at Kinoo, Kiambu County. During her arrest, 796.66 grams of heroin were recovered. She was charged in court on 17th June, 2019 and 25th June 2019 with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act No.4 of 1994 in the Senior Principal Magistrates Court at Jomo Kenyatta International Airport in Criminal Case No C.R.88 of 2019 and CR 102 of 2019. Thereafter, the applicant commenced investigations to recover proceeds of crime accrued to the respondent through the illegitimate trafficking and trading in narcotic drugs in accordance with its mandate.

10. On or about 16th June, 2019, the applicant received information that the 1st respondent had acquired massive assets using the proceeds obtained from the illegitimate trade in narcotic drugs which had been received in the 1st respondent's accounts contrary to the provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act, POCAMLA and Preventions of Organized Crimes Act 2010. The applicant opened an inquiry file No.36 of 2019 to investigate the activities in the 1st respondent's accounts for purposes of ascertaining whether they hold any funds that are proceeds of crime. The investigations established that the funds in the accounts are proceeds of crime obtained from the illegitimate trade in narcotic drugs contrary to the legislation aforesaid.

11. It had also established that the 1st respondent had acquired massive properties from this illegitimate trade which she had registered under her name and in the name of her proxies in order to conceal and disguise the source of funds used to procure the said assets. It argues that

there is reasonable ground to believe that the assets and funds the subject of this application were obtained through the illegitimate trade in narcotic drugs. They 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 1st respondent's accounts are holding proceeds of crime and are used as conduits for money laundering contrary to sections 3, 4, 7 and 16 of POCAMLA.

12. In his affidavit in support of the application, Cpl. Muriuki, a Police Officer attached to the applicant, deposes that he was part of the team of police officers undertaking investigations relating to offences under the legislation aforesaid. On 14th June, 2019 a team of officers from the Directorate of Criminal Investigations (DCI) headquarters arrested the 1st respondent who was suspected to be dealing in illicit trade in narcotic drugs contrary to the provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act. During the arrest, a search was conducted at her house at Kinoo within Kiambu County and a total of 796.66 grams of heroin were recovered. The investigating team also took an inventory of items found in the 1st respondent's house as follows:

- i. One package of unknown grams containing brownish powdery substance;
- ii. Passport number B128415 of Musanda Rose Monyani;
- iii. Nokia 3310, serial number 355826096229603/355826096229603;
- iv. Nokia 1690C serial number 356782024090154;
- v. Weighing scale Tanita Model 1479v;
- vi. Total cash in coins of Kshs 45,842;
- vii. Ten (10) text books squire 200 pages.

13. A second search of the 1st respondent's house carried out pursuant to a court order issued on 21st June 2019 resulted in an inventory of the following items found at and seized from the said house:

- i. Kshs 25,000/= in denominations of 1,000/=;
- ii. Three (3) brooms of green plant material.
- iii. Two clear polythene bags with creamish granular substance inside a white bag labeled 'chicken inn';
- iv. A clear polythene bag with creamish granular substance, 26 boosters and 4 sachets;
- v. 10 plastic containers with laboratory substance;
- vi. A wooden lockable drawer.

14. On 15th July 2019, the creamish powder was weighed and found to be weighing 412.54 grams. On 24th July 2019, the creamish granular substances were weighed and established to be weighing 384.12 grams. The substances were sent to the Government Chemist on 28th July 2019 for analysis. The report of the Government Analyst dated 11th July 2019 states that the analysis established that the substances contained heroin at 40% purity which is a narcotic drug. The 1st respondent was subsequently charged in court on 17th June, 2019 and 25th June 2019 in Criminal Case No C.R.88 of 2019 and CR 102/2019.

15. On or about 8th August, 2019, the applicant received information, that the 1st respondent had also received in her bank accounts the subject of this application funds suspected to be proceeds of crime contrary to the provisions of the legislation aforesaid. The applicant had commenced investigations into the activities in the above accounts for purposes of ascertaining whether they held any funds that are proceeds of crime.

16. It had, on 9th August, 2019, filed an *ex parte* Misc. Criminal Application No. 3403 2019 in which it sought and was granted, for a period of 30 days, orders to search, inspect seize freeze and preserve funds held in accounts number 010010100088 in the name of the 1st respondent held at Sidian Bank Kangemi Branch and bank account number 0325610001 held at Diamond Trust Bank (DTB), Madina Mall Branch. An analysis of the account opening documents and bank statements obtained pursuant to the court orders established that both bank accounts were opened and operated by the 1st respondent. Both accounts had also received suspicious huge sums of cash and cheque deposits that indicate activities of money laundering.

17. Its investigations established that the deposits were made in tranches below Ksh 1,000,000/= to evade the reporting threshold set in the Central Bank of Kenya Prudential Guidelines which require that an account holder declares the source of the money. The applicant contends that the bank accounts hold funds which there is reasonable cause to believe were acquired though proceeds of crime from the illegitimate trade in narcotic drugs by the 1st respondent. Bank account number 010010100088 held at Sidian Bank Kangemi had a total of Kshs 1,462,963.47 while bank account number 0325610001 at DTB, Madina Mall Branch, held Kshs 325,712.45.

18. According to the applicant, the deposits in these accounts were made by the 1st respondent, her daughter, one Anne Akeyo Musanda, her

son in law, one Joseph Macharia Mugo, as well as **proxies** and associates acting as mules for the 1st respondent.

19. The applicant further contends that the 1st respondent acquired massive assets using the proceeds from the illegitimate trade in narcotic drugs. She registered these properties in her name and the names of her proxies in order to conceal and disguise the source of the funds used to procure the said properties. The applicant had established, that the 1st respondent had acquired six motor vehicles which there is reasonable cause to believe were acquired using the proceeds of crime from the illegitimate trade in narcotic drugs. These vehicles were:

- i. KCM 465X TOYOTA AXIO
- ii. KCR 297A ISUZU Bus Coach
- iii. KBT 692 W ISUZU Bus Coach
- iv. KCC 646D ISUZU Bus Coach
- v. KBY 184H ISUZU Bus Coach
- vi. KCH 179N ISUZU Bus Coach.

20. The 1st respondent had deployed the vehicles in various activities, including as *matatus*. The applicant placed produced in evidence official search documents from the National Transport and Safety Authority in respect of these vehicles.

21. It is the applicant's case further that the 1st respondent had devised a complex criminal mechanism of acquiring, trafficking, distributing and selling narcotic drugs and registering the assets she acquired from the illicit trade through her close relatives, associates and hired mules. In this regard, the applicant contends that in a bid to evade and disrupt the ongoing investigations against her, the 1st respondent registered motor vehicle registration number KBY 184H in the name of the 2nd respondent, Thomas Odhiambo Konduti, her close confidant and ally, in order to conceal its ownership.

22. The applicant had also established that while investigations were ongoing, the 1st respondent had registered motor vehicle registration number KCH 179N in the name of the 3rd respondent in order to conceal its ownership. Its investigations had established that the 3rd respondent is a close associate and relative of the 1st respondent. Her daughter, Anne Akeyo Musanda, is married to the son of the 3rd respondent, one Joseph Macharia Mugo.

23. It is the applicant's contention that it had established that both the 1st respondent's daughter and son in law are her mules, who acquire, distribute, sell and convey narcotic drugs on her behalf. On 14th July 2019, Joseph Macharia Mugo and Anne Akeyo Musanda were arrested at their house number 5 in Kinoo within Kiambu County. An inventory of items found and seized from their house and in their presence comprised, among other things, a creamish powdery substance wrapped in a khaki material with black oil like paint; a green sack containing 56 brooms of dry green plant material; and Kshs 43, 660/= in a cream shopping bag.

24. Upon being weighed, the creamish powdery substance was found to weigh 255.76 grams. The creamish powdery substance and the 56 brooms of dry green plant material were sent to the Government Chemist on 28th June 2019 as evidenced in an Exhibit Memo Form of that date. The report of the Government Analyst dated 10th July 2019 indicates that upon analysis, the creamish powdery substance was found to contain heroin at 40% purity, a narcotic drug listed in the first schedule of the Narcotic Drugs and Psychotropic Substances Act, 1994. The 56 brooms of plant material were found to be *cannabis*, a narcotic drug.

25. Both Joseph Macharia Mugo and Anne Akeyo Musanda were subsequently charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act in the Senior Principal Magistrates Court at Jomo Kenyatta International Airport in Criminal Case No C.R.88 of 2019 and CR 102 of 2019.

26. The applicant asserts that the 1st respondent is actively engaged in the illicit narcotics trade using the motor vehicles the subject of this application as the means of marketing, trade, sale and laundering of the narcotics, and that she uses the crew of the vehicles as mules. The proceeds from the illegitimate narcotics trade were mixed with the legitimate daily sales from the *matatus* and deposited into the 1st respondent's accounts so as to disguise the source and launder the funds. The benefits derived from the illegal narcotics trade were subsequently delivered to the 1st respondent by way of physical cash and deposits into her identified bank accounts by her agents, associates and conduits. The 1st respondent would then launder these funds by investing the funds in the assets the subject of this application, contrary to the provisions of POCAMLA. In her statement dated 12th November 2019 recorded pursuant to summons issued to her on 11th November 2019, the 1st respondent does not logically explain the source of the assets and funds in issue.

27. The applicant notes that the explanation given by the 1st respondent was that she had inherited Kshs 500,000/= from her late husband, and that her first business was in sale of second hand clothing. She had used the savings from her second hand clothing business to carry out commercial farming at her home in Vihiga. She had stated further that she used to save up to Kshs 300,000/= per month from her businesses. She had bought a parcel of land, plot number 2866 at Kshs 120,000/= and had thereafter sold it to a Mr. Ebose for Kshs 495,000/=. She had entered into the business of buying motor vehicles, including the ones at issue in this matter, and had entered into the *matatu* businesses, having registered with Latema Sacco.

28. The 1st respondent did not, however, produce any proof of the businesses that earned her the capital to purchase the motor vehicles in

issue and that was the source of the savings in her bank accounts. She had not produced any trade permits, tax returns, tax compliance certificate or electronic tax register (ETR) evidence, vendor/purchaser invoices or anything to support her claims with respect to the source of funds.

29. In the applicant's view, her statement confirms its findings that her explanation depicts typical money laundering activities. In particular, her allegation that she is constantly changing her businesses is an indication of her effort and intentions to conceal, hide and disguise the benefits she derived from the illegal trade in narcotic drugs. She had also expanded her illegitimate trade of prohibited sale of narcotic drugs through mules and proxies. The applicant asserts that the 1st respondent has accumulated her wealth through criminal activities of trading and sale of narcotic drugs contrary to the provisions of the legislation aforesaid. Her criminal activities 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, thereby rendering them susceptible to hard core criminal activities. It contends that depriving the respondents of the benefits of crime shall act as a deterrence and maintain national security.

30. In response to the affidavits sworn in opposition to the application by the 2nd and 3rd respondents, the applicant relies on an affidavit sworn by Cpl. Muriuki on 2nd March 2020. Cpl. Muriuki avers that on 31st January 2020, he had served the 2nd and 3rd respondents with a police requisition form to appear before him on 10th February 2020 at DCI headquarters for the purpose of recording their statements in relation to motor vehicles registration numbers KBY 184H and how they had procured them from the 1st respondent.

31. In his statement recorded on 10th February 2020, the 2nd respondent stated that he is a salesman dealing with sale of motor vehicles as an agent of various companies, including Ryce Motors. That on a date that he could not recall, he and the 1st respondent had entered into an agreement under which he agreed to buy her motor vehicle registration number KBY 184H for Kshs 1, 800,000/=. The 1st respondent is his longtime friend and he has been paying her for the vehicle in small amounts, all in cash. He could not remember how much he had paid as a deposit for the vehicle but he has been paying for it in small instalments. He still had a balance to pay, though he could not tell how much. He was responsible for the vehicle's day to day operations and he employs its driver and conductor. He services the motor vehicle loan from the commissions he gets from his place of work and from income derived from Latema Travellers Limited.

32. On her part, the 3rd respondent, in her statement also recorded on 10th February 2020, stated that she is a farmer within Mbirithi village. She also operates a small kiosk in Engineer Township in which she sells chips and other food stuffs. She also has a farm of three (3) acres where she keeps three dairy cows and farms subsistence crops such as peas, potatoes and cabbages for commercial purposes. She sells up to 20 kilogrammes of milk per day.

33. In 2018, her son, Joseph Macharia Mugo, had informed her that his mother in law, the 1st respondent, was selling her bus *matatu* registration number KCH 179N. She had agreed to purchase the said vehicle from the 1st respondent for Kshs 2,700,000/=. She had sold her one (1) acre parcel of land at Magumu area for Kshs 1,000,000/= which she used as part payment for the said motor vehicle. She had used the proceeds from the farm and the kiosk to raise and pay Kshs 1,300,000/= for the vehicle, Later, she paid Kshs 1,300,000. She still has a balance of Kshs 400,000/=.

34. As for the manner in which she had paid for the vehicle, her Advocate had advised her not to disclose whether she had paid in cash, cheques or deposits in the seller's bank account. She had been assisted by her children to pay for the motor vehicle. The vehicle was run and operated by her son Joseph Macharia and his wife Anne Akeyo who reside in Nairobi. She had used the profit from the vehicle to settle the balance due to the 1st respondent. She had not produced any proof of the existence of a farm business such as trade permits, tax compliance certificates or anything to support the said farming business or show the existence of any other legitimate business.

35. The applicant avers that the 2nd and 3rd respondents' allegations that they bought the said motor vehicles from the 1st respondent contradict their respective sworn affidavits, and they have not given reasonable explanations to prove ownership of the said motor vehicles. The applicant had, on 18th December 2019 and 20th February 2020, received the income tax returns of the 1st, 2nd and 3rd respondents for the years 2013 to 2019 in which the 2nd respondent had filed nil returns in some years and no return in some. The 1st and 3rd respondents had filed no returns at all. Such returns, in its view, are clear indication that the respondents do not have any source of legitimate income which generated the funds used to procure the motor vehicles the subject of this proceeding. In its view, this is a clear indication that the said motor vehicles are proceeds of crime and are registered under the names of 2nd and 3rd respondents by the 1st respondent as her conduits to hide and conceal ownership.

36. Regarding the sale agreements produced by the 2nd and 3rd respondents, the applicant avers that they are an afterthought as they contradict their recorded statements. The allegation that the respondents are doing legitimate business and the motor vehicles in issue are obtained from the legitimate businesses are incorrect, deceitful and a ploy to hide the source of the said assets. The allegations demonstrate, in its view, a classical scheme of money laundering contrary to the provisions of POCAMLA.

37. In his affidavit sworn on 10th January 2020 and 2nd March 2020, Cpl. Muriuki observes that the 1st respondent has not produced any evidence of the existence of her alleged second hand clothing business. She had also not disclosed any form of payments through Sidian Bank. He also notes that that the initial source of the funds for the purchase of the motor vehicles which the 1st respondent sold to the 2nd and 3rd respondents is suspect. Further, that the loans she allegedly received through the bank are a decoy to launder the suspect proceeds of crime. Cpl. Muriuki notes that the annexures that the 1st respondent has placed before the court are unknown as they do not show the account numbers and the name of the account holders. Further, the documents that the 1st respondent has placed before the court in her supplementary affidavit as evidence of the *matatu* business have no linkages with the assets in issue and have been collected as an afterthought.

The 1st Respondent's Case

38. The respondents oppose the application and have filed several affidavits in response. The 1st respondent filed an affidavit sworn on 10th March 2020 and a supplementary affidavit filed on 26th April 2020. The 1st respondent contends that she is a business woman engaged in the transport industry under the umbrella of Latema Travellers Sacco, relying in support on a letter from the Sacco. She avers that she also trades in second hand clothes or 'mitumba', relying in support on copies of City Council licences for 2013 and 2016. With regard to the source of funds for the purchase of the vehicles at issue, she avers that she had lawfully acquired them after selling her plot, ref. no. 2866 Nzoia Sisal Farm in Kakamega. She relies in support on a copy of a plot card and land registration payment receipts. From the proceeds of the land sale and money generated from sale of second hand clothes, she sought financing from Nyeri Motors Services Ltd. She was offered motor vehicle registration number KBQ 281U at Kshs. 3,080,016/-. The logbook of the vehicle had later been released to her after she repaid the loan. She relies in support on a copy of a duty payment receipt to Kenya Revenue Authority. She had put the vehicle under the management of Star Services but had later moved to Latema Travellers.

39. The 1st respondent had acquired another vehicle, registration number KBT 692W NQR Isuzu, a 33 seater worth Kshs. 4,300,000/-, through another asset financing option by Equity Bank. The vehicle had, however, been stolen from the parking after 9 months. She had been paid by the insurer a sum of Kshs. 3,200,000/- in compensation. Equity Bank had recovered its loan balance of Kshs.1,600,000/- and she was left with the balance of Kshs. 1,600,000/-. She relies in support on a copy of a discharge voucher from Direct Line Insurance dated 25th July 2014.

40. She had used the Kshs. 1,600,000/- compensation to purchase, with support from Central Farmers Garage and Sidian Bank, motor vehicle registration number KBY 184H NQR Isuzu, a 33 seater *matatu*. She had sold this vehicle on 5th April 2019 to the 2nd respondent. She relies in support on a between her and the 2nd respondents dated 5th April 2019. She had also sold motor vehicle KBQ 281U and deposited the proceeds in her account in Sidian Bank to obtain a loan which she used to acquire motor vehicle registration number KCC 646D.

41. She had later sold this vehicle, KCC 646D after full payment of the loan. She had then purchased motor vehicle registration number KCH 179N. The vehicle was registered in her name as the bank had built trust in her as a customer. She had later sold the motor vehicle KCH 179N to Margaret Wambui Mugo pursuant to an agreement dated 8th May 2018 for the sum of Kshs 3,100,000. After repaying the loan for KCC 646D, she again obtained a loan from Sidian Bank to purchase motor vehicle KCR 297A.

42. The 1st respondent concedes that sometime in July 2019, she was arrested and charged jointly with her children, Mercy Musanda and Anne Musanda, on allegations of trafficking of narcotics and psychotropic substances. Her bank accounts have also been frozen and her properties detained by the applicant as proceeds of crime. She contends, however, that her assets have been acquired through hard work and legitimate business. She terms the present application a manifestation of witch hunt, harassment, intimidation and molestation of an innocent hard working citizen of this country. She further asserts that her fundamental rights to own property and peaceful enjoyment of her rights have been infringed and continue to be trampled upon by State agencies.

43. The 1st respondent denies trading in narcotic drugs and avers that the police officers who arrested her in July 2019 unsuccessfully searched her house for the alleged narcotics and psychotropic substances in vain. They had, however, found the alleged substances on the third search in her locked premises. It is her averment that she believes that the alleged narcotics and psychotropic substances were placed by the police officers in her premises with the sole intention of framing her.

44. The 1st respondent filed a supplementary affidavit sworn on 26th April 2020. She reiterates her averments in her replying affidavit with regard to her occupation and businesses as well as the facts relating to the purchase of her motor vehicles. She had paid for purchase of motor vehicle KMC 465X in instalments through Sidian Bank from money generated from sales of clothes and shares from Latema SACCO. She relies in support on annexure 'RMM2,' which she describes as a copy of sales receipts for second hand clothes. The vehicle had yet to be transferred to her as the copy of the logbook marked 'RMM3' showed. She had also acquired motor vehicle KCR 297A Isuzu through a loan from Sidian Bank as a swift transfer of Kshs.2.8 million to her account held at Sidian Bank done by the said Sidian Bank showed. The vehicle is registered in her name and the name of the Bank as illustrated by annexure 'RMM4', being copies of the logbook and bank statement. The loan was still due to Sidian Bank.

45. The 1st respondent avers that she had sold vehicle KBY 184H to the 2nd respondent as shown by the sale agreement exhibited as annexure 'RMM7' in the replying affidavit. He had paid her by instalment of Kshs 100,000 each deposited in DTB bank respectively on 2nd December 2015; 8th December 2015; 10th March 2016; 5th October 2016; 16th January 2017 and 20th December 2017. She exhibits in support bank statements from DTB bank.

46. It is also her averment that she sold motor vehicle KCH 179N to Margaret Wambui Mugo, the 3rd respondent, pursuant to the agreement exhibited as annexure 'RMM8' in her replying affidavit. The 3rd respondent had also paid her by three instalments deposited in her DTB account. The instalments were of Kshs 200,000 and one instalment of Kshs 300,000 deposited respectively on 4th January 2017; 11th January 2017; 6th February 2018 and 19th February 2019. She exhibits as annexure 'RMM6' bank statements from DTB which she states demonstrate these payments.

47. The 1st respondent states that she had obtained loans from Latema Travellers Sacco on diverse dates, and that the loans had been deposited in her account at DTB. She had received in this regard a loan of Kshs 600,000 on 2nd November 2015; Kshs.500,000 on 21st October 2016; and Kshs.500,000 on 27th February 2018. She exhibits in support annexures 'RMM7' which she states are loan agreement forms from the Sacco; 'RMM8' being a copy of the cheque and bank statement showing deposit of the cheque at DTB; and 'RMM9' being a Latema Sacco schedule on loan disbursement.

48. It is her averment that her daily *matatu* business income was banked in Sidian Bank as received. Sometimes the vehicles were hired for long distance journeys and the monies received were deposited in her account as illustrated by annexure 'RMM10', described as samples of

daily records from the *matatu* business. It is her deposition therefore that she had not received proceeds of crime as alleged by the applicant.

The 2nd and 3rd Respondents' Case

49. The 2nd and 3rd respondents filed affidavits sworn in opposition to the application. The two affidavits are worded in essentially the same terms.

50. The 2nd respondent avers that he is currently a business man involved in buying and selling of motor vehicles. He denies all the allegations made by the applicant in the application. It is his averment that he willingly bought motor vehicle registration number KBY 184H from a willing seller, the 1st respondent, and he has no reason to disguise or hide the ownership of the said motor vehicle as it legally belongs to him. He relies in support of this averment on the sale agreement dated 5th April 2019 entered into between him and the 1st respondent. He was only a customer of the 1st respondent and not a confidant, nor does he operate under her instructions. They are strictly associates and only got to know each other through the *matatu* business.

51. The 2nd respondent deposes that his motor vehicle registration number KBY 184H is actively engaged in public transport and has never been used as a means of marketing, trade, sale and laundering of money using the *matatu* crew as mules. It is engaged in legitimate public service transport under Latema Travellers Sacco. His business is not a threat to national security and as a Kenyan, he has a right to conduct legitimate business in Kenya. The benefits of his business are derived from hard work and not criminal activities as alleged by the applicant and his vehicle is not a proceed of crime and should not be forfeited to the applicant.

52. The 3rd respondent avers that she is currently a business woman involved in public service transport. She willingly bought motor vehicle registration number KCH 179N from a willing seller, the 1st respondent, and has no reason to disguise or hide its ownership. She relies in support on a copy of the sale agreement dated 8th May 2018 entered into between her and the 1st respondent in respect of the motor vehicle.

53. Like the 2nd respondent, she asserts that her motor vehicle registration number KCH 179N is actively engaged in public transport and has never been used as a means of marketing, trade, sale or money laundering by the crew, nor have they ever been used as mules. Her vehicle is engaged in legitimate public service transport under Latema Travellers Sacco. She has a right to conduct legitimate business in Kenya, and the applicant has not established that her vehicle is proceeds of crime and should therefore not be forfeited to the applicant.

The Applicant's Submissions

54. The applicant identifies and submits on four issues in support of its case. The first is whether the funds and assets in issue are proceeds of crime. Its submission is that from the facts that it has presented to this court, the amount of Kshs 1, 788, 675.92 held in accounts number 010010100088 and 0325610001 in the name of the 1st respondent at Sidian Bank and DTB, Kangemi and Madina Mall branches as well as the motor vehicles the subject of the application are proceeds of crime. Its analysis of the accounts opening forms and statements of accounts had established that there were suspicious transactions, and that the deposits in the accounts were made in small tranches which were below Kshs 1,000,000/= to evade the reporting threshold set under the Central Bank of Kenya Prudential Guidelines for Account Holders to declare the source of the money.

55. The applicant's investigations had further established that the 1st respondent's daughter and son-in-law are mules for the 1st respondent. They acquire, distribute, sell and convey narcotic drugs on her behalf. They were both arrested on 14th July 2019 at their house in Kinoo and charged with offences as averred in its affidavits.

56. The applicant contends that the 1st respondent is actively engaged in the illicit trade of narcotic drugs using the above motor vehicles as means of marketing, trade, sale and laundering, and that she uses the vehicles crew of the vehicles as mules. The proceeds from the illicit trade are mixed with the legitimate sales from the motor vehicles and deposited in the 1st respondent's account so as to disguise the source of the funds and thereby launder them. The benefits derived from the illegal trade in narcotic drugs were subsequently delivered to the 1st respondent by way of physical cash and deposits into her bank accounts by her agents, associates and conduits. She had thereafter laundered the benefits of the narcotic drugs by investing them in the motor vehicles with the intent of concealing the source of the funds used to acquire the assets.

57. In illustrating the deposits made into the 1st respondents account by her alleged agents, mules and associates, the applicant notes that Anne Akeyo Musanda had deposited large sums of money in the 1st respondent's account number 010010100088 at Sidian Bank. In January 2019, she deposited a total of Kshs 266,000/= . The amount was deposited in sums ranging between Kshs 25,000 and 63,500 in the period 3rd January to 24th January 2016. In February 2016, she deposited in the 1st respondent's account a total of Kshs 400,600. The amounts were deposited between 1st and 29th February 2016 on an almost daily basis in sums ranging between 13,000 and 43,000.

58. Joseph Macharia Mugo had deposited large amounts into account number 010010100088 held at Sidian Bank in the name of the 1st respondent. A sampling of the deposits that he made showed that he had deposited a total of Kshs 95,000 in February 2019. The deposits ranged between Kshs 9,000 and 20,000.

59. The applicant further submits that there were suspicious deposits in the 1st respondent's account number 0325610001 held at DTB. The amounts, a total of Kshs 3, 370, 000, was deposited between 2nd December 2015 and 27th February 2018. In 2015, the deposits were as follows:

2.12.2015 -Kshs 100,000/=

7.12.2015 -Kshs 600,000/=

8.12.2015 -Kshs 100,000/=

60. In 2016, deposits were as follows:

10.3.2016 -Kshs 100,000/=

23.3.2016 -Kshs 20,000/=

29.7.2016 -Kshs 450,000/=

5.10.2016 -Kshs 100,000/=

61. In 2017, deposits were as follows

4.1.2017 -Kshs 200,000/=

16.1.2017 -Kshs 100,000/=

4.9.2017 -Kshs 100,000/=

19.9.2017 -Kshs 50,000/=

29.9.2017 -Kshs 50,000/=

16.11.2017 -Kshs 100,000/=

20.12.2017 -Kshs 100,000/=

61. In 2018, deposits were made into the account as follows:

11.1.2018 -Kshs 200,000/=

6.2.2018 -Kshs 200,000/=

19.2.2018 -Kshs 300,000/=

27.2.2018 -Kshs 500,000/=

62. It is the applicant's submission that the 1st respondent subsequently laundered the benefits of the narcotic drugs delivered to her by investing the funds in the vehicles the subject of this application with the intention of disguising and hiding the source of the funds. Further, in a scheme to disrupt the chain of investigations, source of funds and the connections between the assets she acquired through the benefits derived from the illegal trade of narcotic drugs, the 1st respondent registered some of the motor vehicles in the names of her conduits, the 2nd and 3rd respondents.

63. The applicant submits that the 1st respondent has not logically explained the source of the motor vehicles and funds in issue. In its view, the 1st respondent's averments are a depiction of classical money laundering activities. Further, the averments by the 2nd and 3rd respondents support its findings that the purported sale and transfer of the two motor vehicles registration numbers KBY 184H and KCH 179N are sham and meant to hide and conceal ownership of the vehicles. The actions of the 1st respondent of constantly changing her businesses and purportedly getting loans and transferring assets to 3rd parties such as the 2nd and 3rd respondents is an indication of her effort to conceal the benefits she derived from the illegal trade in narcotic drugs.

64. The applicant relies on the decision in **ACEC Application Number 7 of 2019- Assets Recovery Agency v Joseph Wanjohi & Others** to support its contentions that the 1st respondent has been using her relatives as mules, a fact which she has not denied, in the illicit trade in narcotic drugs. It is its case that the criminal activities of the respondents are a threat to national security, public good and the public interest. Depriving them of the benefits of crime will act as a deterrence to others.

65. The applicant argues that there are reasonable grounds to believe that the motor vehicles and funds in issue are proceeds of crime obtained from the illegitimate trade in narcotic drugs contrary to the provisions of the Narcotics Drugs and Psychotropic Substance (Control) Act and POCAMLA. The respondents have not given reasonable explanation to prove any legitimate source of the funds. The applicant relies on **Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)[2018] eKLR** in which the court held that where a person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, what has been presented has not been challenged. It also relied on the case of **KACC vs James Mwathethe Mulewa & Anor [2017] eKLR** in which the court accepted the evidence presented by the applicant which had not been rebutted by the respondent.

66. It is its submission that it has proved that the funds and motor vehicles in issue are from illegitimate sources, having been acquired by the 1st respondent through the unlawful trade in narcotic drugs contrary to the law. She has laundered some of the assets through the 2nd and 3rd respondents with the sole intention of concealing the sources of the funds contrary to sections 3, 4 and 7 of POCAMLA. The respondents have not tendered any evidence showing reasonable sources of legitimate income that explains how they have acquired the assets in issue. They have also not given any reasonable explanation why they did not produce such evidence.

67. The applicant places reliance on **Nguku v Republic [1985] KLR 412** in which the court held that where a party does not produce certain evidence, it is presumed that such evidence, if produced, would be unfavourable to it. It also cites section 112 of the Evidence Act to submit that the respondents had a duty to produce evidence of the existence of legitimate businesses, and since they had not, their allegation to that effect is false. The funds and assets in issue are therefore proceeds of crime as defined under section 2 of POCAMLA.

68. According to the applicant, the contention by the respondents that they own businesses is inconceivable. The said businesses were acquired using the proceeds of the illegitimate trade of narcotic drugs and were used as a decoy for money laundering as demonstrated in its affidavits in support of the application. It is its submission that ownership of the funds and assets in issue can be direct or indirect, and there is no requirement that it must be traced to specific criminal offence. Once it produced evidence that the respondents are unable to explain reasonably the source of funds in issue, it is clear proof that the funds are proceeds of crime.

69. The applicant further submits that the nil tax returns or non-filing of tax returns by the respondents are a clear indication that the respondents do not have any source of legitimate income which generated the funds that were in the specified accounts and used to procure the motor vehicles the subject of these proceedings. While the 1st respondent received large sums of money through her accounts, she did not file tax returns for the years 2013 to 2019. In the applicant's view, this was an indication that she was trading in prohibited narcotic drugs contrary to the provisions of POCAMLA, Prevention of Organized Crimes Act and Narcotic Drugs and Psychotropic Substances (Control) Act.

70. The applicant relies on the decision in **Assets Recovery Agency Vs Joseph Wanjohi & Others** (supra) in which the court questioned the manner in which the respondents had sought to present their proof of income, noting that they had sought to do so with illegible documents, no books of accounts and tax returns, cash books, stock registers, audited accounts or income tax returns.

71. The applicant submits that in money laundering schemes, criminals always create sophisticated complex schemes to camouflage and conceal the assets and benefits they derive from their criminal activities. It submits that the 1st respondent colluded with the 2nd and 3rd respondents and her mules to create a complex web of concealing the funds and assets in issue by using them as decoy entities; conducted her illegitimate activities through them; and that she eventually registered some of the assets acquired from the illegitimate trade in their names so as to depict them as legitimate assets. The applicant relies on the case of **Schabir Shaik & others v State Case CCT 86/06(2008) ZACC 7** in which the court, in defining proceeds of crime stated:

“...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.”

72. It is the applicant's case that it needs only to make a *prima facie* case to satisfy the court that there is evidence which establishes its belief within the meaning of POCAMLA that the funds and assets sought to be forfeited are proceeds of crime or proceeds of unlawful activities. The evidence that it has placed before the court establishes that its belief is true and that the funds and motor vehicles are proceeds of crime under POCAMLA. Its belief is not groundless or frivolous and the court should grant the orders that it seeks.

73. The second issue addressed by the applicant is whether the assets should be forfeited to the State. It submits that if the funds and assets are found to be proceeds of crime, they should be forfeited to the state. It contends that it is empowered under section 90 of POCAMLA to apply to the court for orders of forfeiture of any property that is proceeds of crime and is subject to a preservation order under the Act. The court has the power under section 92(1) of POCAMLA to issue forfeiture orders if it finds, on a balance of probabilities or reasonable grounds, that it has established that the funds and assets in issue are proceeds of crime.

74. The applicant submits that in money laundering schemes, ownership of the proceeds of crime may be direct or indirect. The thread of transaction showing the deposits of funds, changing alleged business activities several times, colluding and registering some of the assets acquired through the illegitimate trade in narcotic drugs under the names of the 2nd and 3rd respondents and using mules to acquire, convey and sell illegal narcotics drugs and the involvements of the 1st respondent forms a pattern of transaction that depicts a classical scheme of complex money laundering. The 1st respondent had complete control of the acquisition of the assets and funds in issue. The involvement and usage of the 2nd and 3rd respondents and registering the assets in issue under their names over which the 1st respondent had control completed the money laundering scheme.

75. The applicant submits that by issuing the orders under section 92 of POCAMLA, this court will be depriving criminals of ill-gotten gains and deter and prevent crime. Further, that the issuance of such orders and the effect thereof is an effective and justifiable way of depriving them of the proceeds of crime obtained from the illegitimate trade in narcotic drugs. The applicant relies on the case of **Prosecutor General –vs- New Africa Dimensions & Others, High Court of Namibia Case No. POCA 10/2012** and **Assets Recovery Agency –v- Rohan Anthony Fisher & Others, Supreme Court of Jamaica, Claim No 2007 HCV003259** in which the court issued orders for recovery of money obtained through crime. The applicant also relies on the case of **NDPP -v- Rebuzzi** quoted in the case of **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** with regard to the objectives of forfeiture.

76. The applicant addresses, thirdly, the respondents' argument that they have a right to property which will be violated by an order of

forfeiture. It submits that Article 40 of the Constitution does protect the right to property and guarantee to every person the right to acquire and own property of any description and in any part of Kenya. It submits, however, that at Article 40(6), the protection does not extend to property which has been unlawfully acquired. The applicant relies on the case of **Teckla Nandjila Lameck-vs- President of Namibia 2012(1) NR 255(HC) and Martin Shalli -vs-Attorney General of Namibia** (supra) and **Assets Recovery Agency vs Joseph Wanjohi & Others** (supra) in support of this submission.

77. The last issue identified by the applicant is whether a criminal conviction is a necessary precondition for the making of a forfeiture order. Its submission is that conviction is not a condition precedent for civil forfeiture proceedings under Part VIII of POCAMLA. Such proceedings are *in rem* or against property which is reasonably believed to be proceeds of crime. They are not the same as criminal proceedings in which the criminal court is to determine the criminal liability of an individual in the offence of money laundering. In these proceedings, the court is only required to determine whether, on a balance of probabilities, the funds sought to be forfeited are proceeds of crime. Reliance for this submission is placed on **Assets Recovery Agency vs Joseph Wanjohi & Others** (Supra).

78. It is the applicant's submission that under Part VIII of POCAMLA, the recovery proceedings are directed at forfeiture of the funds and assets and conviction is not a precondition. What is required is the identification of lack of reasonable explanation disclosing legitimate source of the funds in issue. It 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 relies for this submission on **Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others [2016] eKLR**.

79. Reference is also made to the case of **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR; Teckla Nandjila Lameck -vs- President of Namibia** (supra); **Martin Shalli -vs -Attorney General of Namibia & Others High Court of Namibia Case No POCA 9/2011** and Serious **Organized Crime Agency -Vs- Gale** quoted in **Assets Recovery Agency & Others -Vs- Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120**.

80. According to the applicant, section 92(4) of POCAMLA provides that the validity of the forfeiture order is not in any way affected by the outcome of the criminal proceedings. It also relies on **Assets Recovery Agency vs Pamela Aboo** (supra) where the court held that the burden of proof in civil cases is on a balance of probabilities, and forfeiture proceedings under section 92(1) of POCAMLA are civil in nature.

81. The applicant terms the allegations by the respondents that they are doing legitimate businesses and that the motor vehicles and funds in issue are obtained from the legitimate businesses as incorrect, deceitful and a ploy to disguise and hide the source of the said assets and funds. In its view, this is a classical scheme of money laundering contrary to the provisions of the POCAMLA. It urges the court to issue the orders that it seeks and to be guided by its decision in **Assets Recovery Agency vs Joseph Wanjohi & Others** (supra) in which the Court held:

"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".

The 1st Respondent's Submissions

82. The 1st respondent submits that the case against her must fail as it is a manifestation of a witch hunt, harassment and intimidation of an innocent hard working citizen. This is because the investigations against her have not established any criminal activity in the acquisition of her property.

83. While conceding that she is facing charges of drug trafficking, it is her submission that these are mere allegations that are yet to be proved, and they cannot therefore be a basis for an application for forfeiture of her assets. It is also her submission that the applicant is relying on assumptions in alleging that she uses her *matatu* crew as conduits in the sale of drugs. It has not provided evidence to support the allegation, and none of the *matatu* crew has been charged in a court of law. Further, that one cannot be charged on the basis of assumptions, reliance for this submission being placed on **Criminal Appeal No.87 of 2016: Feisal Mohamed Ali Alias Feisal Shabhal -v- Republic and Criminal Appeal No. 141 of 2015: Joshua Karianjahi Waiganjo - v- Republic**.

84. The 1st respondent submits that she lawfully acquired her property after selling her plot ref. no. 2866 (Nzoia Sisal farm- Kakamega) and through the business of selling second hand clothes. She had used the money generated from the sale of land and second hand clothes to seek financing from Nyeri Motors Services Ltd where she got her first vehicle registration number KBQ 281U at Kshs. 3,080,016/- which she paid in instalments. She has been working hard since and getting loans from banks to get other motor vehicles.

85. The 1st respondent explains the acquisition of each of the motor vehicles the subject of this application. The first, motor vehicle registration number KCM 465 X, was bought from Memon Auto Ltd, Mombasa, and it is still in the name of the seller. It was paid for by instalments through DTB. The funds to pay for the vehicle were generated from Latema Sacco where she was one of the officials, as well as from sale of clothes.

86. The second vehicle, registration number KCR 297A Isuzu, was acquired through a loan from Sidian Bank. The vehicle is still in the joint names of the 1st respondent and the bank as the loan is still due and owing. The 1st respondent submits that this is demonstrated by a swift transfer of Kshs. 2.8 million in the bank statement of her account held at Sidian bank. The said motor vehicle is therefore not the proceeds of crime.

87. The 1st respondent submits that she had a third motor vehicle, KBT 692W Isuzu bus coach acquired through a loan from Equity Bank of Kshs. 4.3 million. The vehicle was stolen in 2013, but she was compensated by her insurer with a sum of Kshs. 3,200,000.

88. Motor vehicle registration number KBY 184H Isuzu bus coach was purchased after the compensation of Kshs.3,200,000 on the loss of KBT 692W was used to clear the loan from Equity bank of Kshs. 1,600,000/- leaving a balance of Kshs. 1,600,000/- She used this balance, with a loan from Central Farmers Garage and Sidian Bank, to finance the purchase. The logbook of the vehicle was in the joint names of the 1st respondent and Sidian Bank. The 1st respondent later transferred it to the 2nd respondent as demonstrated by the sale agreement between them.

89. With regard to motor vehicle KCH 179N Isuzu bus coach which the 1st respondent sold to the 3rd respondent, she submits that she bought it from a loan facility from Sidian Bank of Kshs. 4.5 million. She submits that this loan was obtained after sale of motor vehicle KBQ 281 U for Kshs. 1.2 million and sale of motor vehicle KCC 646D for 2.2 million.

90. The last vehicle, motor vehicle registration number KCC 646D Isuzu was also purchased from the proceeds of the sale of motor vehicle KBQ 281 U. The proceeds of the sale were deposited with Sidian Bank who financed the purchase. The log book of the vehicle indicates joint ownership of the motor vehicle with Sidian Bank. The vehicle was later transferred to Wallmas and Sons Co. Ltd, who are the current owners. I observe this latter part of the 1st respondent's submission is not contained in any of her affidavits.

91. Regarding the cash deposits in her account numbers 010010100088 in Sidian Bank Kangemi Branch and 0325610001 in DTB, the 1st respondent submits that they are all from lawful sources on income arising from the management of *matatu* business, refund of shares in Latema Travellers Sacco and deposits from sale of motor vehicles. The deposits in Sidian Bank indicate only the normal daily *matatu* business income, and there are no 'abnormal huge' credits save for the loan disbursements by the various banks at different periods as evidenced by the bank statements. Her submission is that the cash obtained from Sidian Bank and other financial institutions to acquire property cannot be said to be proceeds of crime.

92. The 1st respondent submits that the applicant has failed to make full disclosure regarding the relationship between the source of the money used to purchase the motor vehicles and the illicit trade and dealings in drugs. Without such disclosure, the court will not be able to arrive at a fair and just decision. In her view, a general condemnation of the assets as having been obtained from illicit trade does not sanitize the false allegation. She relies in support of this submission on the case of **Bahadurali Ebrahim Shamji v Al Noor Jamal and 2 others [1998]eKLR** and **Ethics & Anti-corruption Commission v Joseph Chege Gikonyo and another [2016] eKLR** to submit that courts have always set aside freezing orders for non-disclosure of material evidence, which is the case in the present matter. She asks the court to protect her right to own property and dismiss the application with costs.

Submissions by the 2nd and 3rd Respondents

93. These respondents submit that motor vehicle registration number KBY 184H and KCH 179N which belong to them have been included in the application for forfeiture as suspected proceeds of crime. The inclusion has been due to their connection with the 1st respondent who is suspected to be a drug trafficker and uses the monies obtained from drug trafficking to acquire assets.

94. The 2nd and 3rd respondents submit, however, that the two vehicles belong to them legitimately. They had purchased the vehicles from the 1st respondent from the proceeds received from their business dealings. The proof of ownership of the two vehicles is to be found in the sale agreements between them and the 1st respondent. The two vehicles, are registered in their respective names under Latema Sacco for *matatu* business.

95. The respondents deny that the two vehicles are proceeds of crime, asserting that they are involved in various businesses and have never been involved in any criminal activity. The 2nd respondent is an agent of various companies, including Ryce Motors, where he works for gain and is not in any way a criminal or involved in criminal activities since he is paid a commission. The 3rd respondent is a dairy and subsistence crops farmer and operates a small kiosk which generates income for her. She bought the motor vehicle through the proceeds of a parcel of land that she sold to pay for the deposit for the motor vehicle. Under the terms of the sale agreement, she could pay the balance in instalments. She has been paying the balance through the proceeds of the farm and with the help of her children.

96. The 2nd and 3rd respondent submit that since their motor vehicles are not proceeds of crime, they should not be forfeited to the State. The applicant's investigation of the 1st respondent have not proved that the motor vehicles are proceeds of crime obtained from illegitimate trade in narcotic drugs. They have never been charged with any criminal offence and the applicant has not demonstrated that the motor vehicles are proceeds of crime or that they have committed an offence under section 2 of POCAMLA.

97. The 2nd and 3rd respondent further submit that they are entitled, under Article 40 (1), to acquire and own property of any description. That Article 27 supports this right by providing that every person is equal before the law and has the right to equal protection and equal benefit of the law. They rely in support on **Assets Recovery Agency v Jared Kiasa Otieno Anti-corruption and Economic Crimes Division –Milimani Civil Application No. 36 of 2019** in which the court rescinded and set aside preservation orders in respect of the motor vehicle in the matter. They further seek support in **EACC v Jimmy Mutuku Kiamba Misc/Civil Application No 804 of 2014** in which it was held:

“I appreciate that investigations are an ongoing process, but that should not be used to block a desiring party from accessing his property just because investigations have not revealed the source. At most, the Applicant can only say the source is suspect. However, suspicion alone, however strong, is not evidence.”

98. It is their submission that the two vehicles belong to them and have no connection with the alleged criminal activities committed by the

1st respondent. There is no *prima facie* evidence to justify continued preservation of the said motor vehicles and the preservation is exerting unnecessary and undue hardship on them and denying them their rights under Article 40.

Analysis and Determination

99. I have read and considered the pleadings and submissions of the parties, as well as the authorities relied on. This is an application for civil forfeiture of assets believed to be proceeds of crime, lodged under section 92(4) in Part VIII of POCAMLA. From the pleadings and submissions of the parties, I believe that four issues arise for determination as follows:

- i. Whether conviction is a condition precedent for the issuance of an order for forfeiture;*
- 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 a conviction is a condition precedent to an order for forfeiture

100. The respondents have submitted that though the 1st respondent has been charged with a criminal offence, the offence of drug trafficking, she has not yet been convicted. The 2nd and 3rd respondents have not been charged with any offence. In their view, therefore, the applicant has not established that the funds and motor vehicle sought to be forfeited are proceeds of crime. The applicant argues that a conviction in criminal proceedings is not a condition precedent to civil forfeiture, though the 1st respondent and her daughter and son in law, who is the son of the 3rd respondent, have been charged in the Senior Principal Magistrates Court at Jomo Kenyatta International Airport in Criminal Case No C.R.88 of 2019 and CR 102/2019 with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act No.4 of 1994.

101. The applicant relies on the case of **Assets Recovery Agency v Quorum Limited & 2 others [2018] eKLR** in which it was held 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 submits that these proceedings seek to determine the criminal origins of the property in issue and are not a criminal prosecution of the respondents. Conviction is not therefore a condition precedent to an application for civil forfeiture of assets reasonably believed to be proceeds of crime.

102. It is also the applicant's submission that under section 92 (4) of POCAMLA, a conviction is not required as a condition prior to a suit for recovery of funds reasonably believed to be proceeds of crime. The applicant relies on the case of **Martin Shalli -vs-Attorney General of Namibia & Others High Court of Namibia** (supra) and **Teckla Nandjila Lameck-vs- President of Namibia** (supra) for its submission that proceedings for forfeiture of proceeds of crime are directed at confiscation of the proceeds of crime and not at punishing an accused person. In **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.

...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.”

103. Section 92(4) of POCAMLA provides that:

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.

104. 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. 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).*

105. The court in **Assets Recovery Agency vs Pamela Aboo [2018] eKLR** took a similar view when it 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...”

106. I fully agree that a reading of Kenya’s legislation relating to recovery of assets reasonably believed to be proceeds of crime does not require that a conviction in a criminal trial is obtained before a suit for recovery of such funds or assets is instituted. As section 92(4) of POCAMLA expressly stipulates, even where an investigation or prosecution is launched, its outcome does not have an impact on a suit for recovery of proceeds of crime. Accordingly, it is my finding that a conviction is not a condition precedent to a suit for recovery of assets reasonably believed to be proceeds of crime.

107. Whether or not the 1st respondent and her co-accused are ultimately convicted or acquitted does not have a bearing on the suit for recovery of assets believed to be proceeds of crime. In this regard, the decision in **KACC vs James Mwathethe Mulewa & Anor [2017] eKLR** is instructive. Even though the defendant in the suit had been acquitted in his criminal trial, the court still held that his failure to explain the source of his assets justified their forfeiture to the State.

108. The reasoning for this legislative intent encapsulated in section 92(4) of POCAMLA or the unexplained assets provisions of the Anti-corruption and Economic Crimes Act is, in my view, sound. State agencies dealing with criminal offences are, more often than not, faced with great difficulties in investigation and prosecution of offences, particularly corruption and economic crimes as well as crimes related to drug trafficking and organized crime which have, so to speak, been turned into ‘businesses’. The history of criminal convictions in such matters worldwide, but more so in Kenya, demonstrates the difficulty of obtaining convictions. The obstacles placed by the accused in the successful prosecution of such cases are legendary, and the standard of proof in criminal cases often leads to acquittals on technical grounds. This, in my view, is the rationale for provisions such as are found in section 92(4) of POCAMLA. To peg suits for civil forfeiture on criminal convictions would defeat the legislative purpose and intent of POCAMLA.

Whether the funds and assets sought to be recovered are proceeds of crime and therefore liable to forfeiture to the State

109. The second and third issues that arise in this matter are closely interlinked. The first is whether the motor vehicles and funds the subject of this application are proceeds of crime. If they are, then the response to the third issue would follow naturally: they should be forfeited to the state. I will accordingly deal with them together.

110. According to the applicant, this matter 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 relies on the case of **Schabir Shaik & Others –vs- State** (supra) 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...”

111. The applicant further cites the words of the court in the **Schabir Shaik** case in which the court observed that:

“...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.”

112. Reliance is also placed on section 112 of the Evidence Act to submit that the respondents have failed to demonstrate with particularity how they obtained the assets and funds in their accounts, a burden that falls upon them since this is a fact that is especially within their knowledge. 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 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....”

113. The applicant submits that it has demonstrated that the motor vehicles at issue and the funds in the 1st respondent’s accounts are proceeds of crime as defined in POCAMLA and should therefore 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.

114. The respondents contend that the motor vehicles at issue are not proceeds of crime. The 1st respondent argues that she obtained funds from the sale of her plot in Kakamega, some Kshs 500,000 which she inherited from her deceased husband, and from the sale of second hand clothes and from the *matatu* business. She has also explained the source of funds for the purchase of the motor vehicles.

115. What emerges from the depositions before me is that the 1st respondent, her daughters and the son of the 3rd respondent, who is the 1st respondent’s son –in- law, have been charged with offences under the Narcotic Drugs and Psychotropic Substances (Control) Act. A search of their residences resulted in the seizure of various items which, upon analysis, turned out to be heroin and cannabis. Such charges, in themselves, are not proof that the funds and assets are proceeds of crime as defined in POCAMLA.

116. However, the charges against the 1st respondent and members of her family led the applicant, which seems to play a rear-guard or reactive role in the State effort to combat corruption and economic crimes, as well as in cases of organised crime and drug trafficking, to undertake investigations in accordance with its powers under POCAMLA against the respondents.

117. The evidence that emerged from the investigations that it has placed before the court shows that the 1st respondent’s accounts received sizeable deposits, sometimes on an almost daily basis, which were made by the 1st respondent’s daughter and son- in law. Anne Akeyo Musanda had deposited in the 1st respondent’s account number 010010100088 at Sidian Bank a total of Kshs 266,000/= in January 2019. The amount was deposited in sums ranging between Kshs 25,000 and 63, 500 between 3rd January and 24th January 2019. Between 1st and 29th February 2016, she deposited in the same account a total of Kshs 400,600. The amounts were deposited on an almost daily basis in sums ranging between 13,000 and 43,000.

118. The 1st respondent’s son-in-law, Joseph Macharia Mugo, had deposited in the 1st respondent’s account number 010010100088 held at Sidian Bank a total of Kshs 95,000 in February 2019. The deposits ranged between Kshs 9,000 and 20,000.

119. The evidence further shows that between 2015 and 2018, several large deposits were made in the 1st respondent’s account at DTB. These deposits were as follows:

2015

2.12.2015-Kshs 100,000/=

7.12.2015-Kshs 600,000/=

8.12.2015-Kshs 100,000/=

2016

10.3.2016-Kshs 100,000/=

23.3.2016-Kshs 20,000/=

29.7.2016-Kshs 450,000/=

5.10.2016-Kshs 100,000/=

2017

4.1.2017 -Kshs 200,000/=

16.1.2017-Kshs 100,000/=

4.9.2017 -Kshs 100,000/=

19.9.2017-Kshs 50,000/=

29.9.2017-Kshs 50,000/=

16.11.2017-Kshs 100,000/=

20.12.2017-Kshs 100,000/=

2018

11.1.2018 -Kshs 200,000/=

6.2.2018 -Kshs 200,000/=

19.2.2018 -Kshs 300,000/=

27.2.2018-Kshs 500,000/=

120. According to the applicant, these deposits are from the illegal narcotics trade that the 1st respondent engages in. Any assets derived from the funds are therefore proceeds of crime.

121. The 1st respondent gives several explanations for these deposits. The first is that these are normal daily income from her *matatu* and second hand clothes businesses. However, despite the 1st respondent being an owner of at least 6 bus coaches and a vendor of second hand clothes, she has not placed before the court any documents that can establish the earnings from her businesses. Though she has placed handwritten documents which she avers show that her *matatus* were often hired for long distance journeys, there is no way of authenticating these documents.

122. The 1st respondent has also averred that she had been obtaining loans from banks with which she purchased the motor vehicles. She has placed before the court, particularly in her affidavit sworn on 26th April 2020, documents which she deposes show that she obtained loans from Latema Sacco and Sidian Bank. I observe, however, that the document intended to show the loan from Latema Sacco is a loan application form. It is not evidence of a loan. The statements alleged to be from Sidian Bank and DTB do not bear the account number or the name of the account holder. She has mentioned loans from Equity Bank of Kshs 4.5m and Nyeri Motors Services Ltd from which she states that she was '*offered motor vehicle registration No. KBQ 281U at Kshs. 3,080,016.*' No documents have been placed before the court from which these averments can be verified. It is therefore not possible to tell whether or not the alleged loans were made or any deposits made to her account.

123. The explanation with respect to the purchase of the motor vehicles at issue is particularly confusing. KCM 465X was bought from Memon Auto Ltd, Mombasa. It was paid for by instalments through DTB from funds generated from the *matatu* business and sale of second hand clothes. KCR 297A in the name of the 1st respondent and Sidian Bank was acquired through a loan from the said bank, the evidence of which is a swift transfer of Kshs. 2.8 million into her account as demonstrated by a statement which the court notes does not bear her name. KBT 692W was acquired through a loan of Kshs. 4.3 million from Equity Bank. The vehicle was stolen in 2013.

124. She used the balance of Kshs 1,600,000/- and a loan from Sidian Bank to buy KBY 184H. Though the vehicle was in her name and Sidian Bank, she had later transferred it to the 2nd respondent. Motor vehicle KCH 179N was bought from a loan advanced by Sidian Bank of Kshs. 4.5 million. The loan was obtained after sale of KBQ 281U for Kshs. 1.2 million and sale of KCC 646D for 2.2 million. KCC 646D was also purchased from the proceeds of sale of KBQ 281 U. KCC 646D was in the joint names of the 1st respondent and Sidian Bank, but was transferred to 'Wallmas and Sons Co. Ltd'. At the end of this narrative, particularly in view of the paucity of supporting documents, one is none the wiser about the source of funds for the purchase of the vehicles.

125. With respect to the deposits in her account in 2015-2017, the 1st respondent has deposed in her affidavit sworn on 26th April 2020 that they were made by the 2nd respondent as the purchase price for motor vehicle registration number KBY 184H. He had made the payments in her DTB account on 2nd December 2015; 8th December 2015; 10th March 2016; 5th October 2016; 16th January 2017 and 20th December 2017 respectively.

126. The 1st respondent further explains the deposits in her DTB account between 2017-2019 as having been made by the 3rd respondent as payment for motor vehicle registration number KCH 179N. She deposes that the 3rd respondent paid for the vehicle in three instalments, two of Kshs 200,000 and one of Kshs 300,000 deposited respectively on 4th January 2017; 11th January 2017; 6th February 2018 and 19th February 2019.

127. There are several problems with the 1st respondent's explanation of these deposits. The first one is glaring. The agreement for the sale

of the motor vehicle between the 1st and 2nd respondents is dated 5th April 2019. The 2nd respondent has averred that he bought the vehicle in 2019, and has annexed the said agreement. The agreement between the 1st and 3rd respondent is dated 8th May 2018. The purchase price for the vehicle, KCH 179N, is Kshs 2.7m, though the 1st respondent avers that it was 3.1m.

128. As submitted by the applicant, the sale agreement between the respondents are afterthoughts. Perhaps the 1st respondent was attempting to use the 2nd and 3rd respondents to conceal her assets, but given the obvious contradictions and disparities in their averments, it is clearly not a well thought out subterfuge. The deposits in 2015 could not have been in respect of the purchase price for a motor vehicle sold in 2019 pursuant to a sale agreement entered into on 5th April of 2019. Nor could the 3rd respondent have paid, in 2017 and early February 2018, for a vehicle she heard about in 2018 and purportedly purchased pursuant to a sale agreement dated 8th May 2018. It is my finding and I so hold that all the vehicles the subject of this application belong to the 1st respondent, and the sale agreements and purported transfers were an attempt to conceal their ownership.

129. Taking all the facts placed before me in this matter, I am satisfied that the applicant has established, on a balance of probabilities, that the assets and funds the subject of the application do not have a lawful basis. The respondents generally, but the 1st respondent in particular, has not shown a legitimate source of the funds.

130. In the case of **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR** 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.”

131. The applicant in this matter has shown that the assets the subject of this application, which are held by the 1st respondent, are proceeds of crime. The respondents have given explanations that do not show that the funds deposited in the 1st respondent’s account, which were the source of funds for the motor vehicles, had a legitimate source. That being the case, it is my finding and I so hold that the assets and funds in this case are, for the most part, proceeds of crime, and that they are liable to forfeiture to the State. I will return to this observation shortly.

Violation of the Respondents’ Rights

132. The last issue for determination is whether making an order of forfeiture of these assets amounts to violation of the respondents’ right to property. The respondents have submitted that they have a right to property guaranteed under Article 40 of the Constitution, as well as the right to equal benefit of the law guaranteed under Article 27. To make an order of forfeiture of the assets, they submit, would violate these two rights.

133. The applicant responds that while the right to property is guaranteed, it does not extend to property that is found to have been unlawfully acquired as Article 40(6) of the Constitution provides.

134. I believe that I need not belabour this point. Article 40 does protect the right to property. However, as submitted by the applicant, 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.

135. It is also correct that Article 27(1) guarantees to everyone equality before the law. It provides that

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

136. The respondents have not placed before me anything that demonstrates a violation of this equal protection provision. The assets and funds at issue in this matter have not been taken arbitrarily. The respondents have been given an opportunity in these proceedings to present their side of the story to the court. The provisions of POCAMLA apply to everyone. There is no basis, in my view, for the respondents to complain about denial of the right to equal protection of the law.

137. However, there is an element of this case that has somewhat exercised the mind of the court. I observed that the funds and assets in this matter have been shown, ‘for the most part’, to be proceeds of crime. I made this observation bearing in mind the definition of ‘proceeds of crime’ in POCAMLA, which is 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)

138. The applicant submitted that the proceeds from the illegitimate narcotics trade were mixed with the legitimate daily sales from the *matatus* and deposited into the 1st respondent’s accounts in order to disguise the source and launder the funds. The concern that the court had was whether, having obtained the assets primarily from proceeds of crime but intermingled them with legitimate funds from the *matatu* business, a distinction could be drawn and a separation made between what was accrued from a legitimate source and what was a proceed of crime and liable to forfeiture. This, I believe, may have been in contemplation in the use of the words ‘**on a proportional basis**’ in the definition of proceeds of crime. None of the parties hereto addressed the court on this point. Having considered the definition of proceeds of

crime set out above, however, and in the absence of pleadings or submissions from the parties on that point, I am constrained to find that all the funds and assets the subject of this application are proceeds of crime and liable to forfeiture to the State.

Disposition

139. In the result, it is my finding that the applicant has established, on a balance of probabilities, that the motor vehicles and funds the subject of this application are proceeds of crime, and that they should be forfeited to the State. I therefore grant orders as prayed in the application dated 10th January 2020.

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

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

MUMBI NGUGI

JUDGE