



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION & ECONOMIC CRIMES**

**MISCELLANEOUS APPLICATION NO. 4 OF 2017**

**IN THE MATTER OF : AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR ORDERS UNDER SECTIONS 90 AND 92 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES FOR ORDERS OF FORFEITING PROPERTY KNOWN AS DUPLEX APARTMENT NUMBER C16 SITUATED ON LR NO. 209/59990/13 GRANT NO. 18295/9 AND KSHS.8,800,000**

**BETWEEN**

**THE ASSETS RECOVERY AGENCY.....APPLICANT**

**VERSUS**

**QUORANDUM LIMITED.....1<sup>ST</sup> RESPONDENT**

**EZEKIEL OTIENO OWOUR.....2<sup>ND</sup> RESPONDENT**

**AND**

**DUCHESS PARK DEVELOPMENT**

**COMPANY LIMITED.....INTERESTED PARTY**

**JUDGMENT**

1. The Applicant the Assets Recovery Agency established as a semi autonomous body under the office of the Attorney General under Sections 53 of the Proceeds of Crime and Anti-Money Laundering Act (hereinafter also known as POCAMLA), filed an originating summons dated 3<sup>rd</sup> January 2017 under sections 81, 90,92 &100 of the POCAMLA as read together with order 51 of the Civil Procedure Rules seeking the following orders:-

*i. Spent*

*ii. THAT this Honourable Court be pleased to issue orders of forfeiture against property known as Duplex apartment number C16 situate on L.R No. 209/5990/13 grant number 18295/9 (hereinafter also known as the apartment) and Kshs. 8,800,000 to the Applicant.*

*iii. THAT this Honourable Court be pleased to issue a vesting order transferring the apartment to the Applicant.*

*iv. THAT this Honourable Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the forfeited assets to the Government of Kenya.*

*v. THAT costs of this application be provided for.*

2. The above application was supported by the affidavits of the Director of the Assets Recovery Agency (Muthoni Kimani) and the investigating officer (James Manyuru) averring that under section 90 the POCAMLA provides that where a preservation order is in force, the Agency Director may apply to the High Court for an order of forfeiture to the Government all or any of the property that is subject to the preservation order. Hence, the Applicant obtained preservation orders of the apartment and an order directing the 2<sup>nd</sup> respondent to deposit Kshs. 8,800,000 into an escrow account in Misc. Application No. 32 of 2016(MK1) dated 26<sup>th</sup> October 2016. Furthermore, the preservation order was gazetted on 8<sup>th</sup> November 2016 vide Gazette notice No. 9240(MK2) pursuant to section 83(1) of POCAMLA.

3. She further explained that the preservation orders were premised on the findings of the investigations conducted by the Directorate of Criminal Investigations Department which established that funds amounting to Kshs. 180,894,946 were unlawfully transferred from the Youth Enterprise Development Fund (hereinafter also known as YEDF) Bank Account No. 0017054604027 in the same bank without provision of any services. She further averred that according to information garnered from Chief Inspector James Manyuru, part of the Kshs. 180,894,946 was used to procure the apartment from the interested party at a cost of Kshs 48,500,000 but the same has however, not been transferred to the 1<sup>st</sup> respondent. In addition to this, that Kshs. 8,800,000 being part of the said Kshs. 180,894,946 was subsequently transferred by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent as a purported loan. Hence, it is the Applicant's case that the apartment and Kshs. 8,800,000 are proceeds of crime liable for recovery under the Proceeds of Crime and Anti-Money Laundering Act and it is in the interests of justice that the above mentioned properties be forfeited to the Government of Kenya and applied for public good on behalf of the citizens of Kenya who are victims of crime.

4. The supporting affidavit by the investigating officer (James Manyuru) confirmed that he was one of the investigators from the Director of Criminal Investigations undertaking the investigations of the fraudulent transfer of funds from the YEDF to the 1<sup>st</sup> respondent amounting to Kshs. 180,894,946 from the YEDF bank account no. 0017054604027 at Chase Bank, Delta House Westlands to 1<sup>st</sup> Respondent's Bank Account no. 0052075584001 in the same bank without provision of any services.

5. Their investigations revealed that the YEDF 2014/2015 budget was presented by the then acting Chief Executive Officer (Catherine Namuye) to the YEDF Board for consideration and approval. According to the budget, one of the items on the budget was the acquisition of information systems and upgrades which included the Enterprise Resource Program (ERP), an ICT program to integrate the management of the YEDF i.e the management of loans, tracing of interest and use of phones to get information from the fund e.t.c. Their investigations established that the YEDF Board on the 6<sup>th</sup> August 2014 approved a budget allocation of Kshs. 192 million (JM1) for the acquisition of the information systems, upgrades and recommended that any purchase had to comply with the existing procurement laws and procedures which included floating of tenders.

6. Subsequently, on 20<sup>th</sup> January 2015, the YEDF Board's Audit Committee recommended to the YEDF Board that the acquisition of information systems and upgrades which included the Enterprise Resource Planning system be temporarily suspended for the following reasons:-

a) YEDF had a cash flow problem;

b) YEDF did not have the capacity to execute the Enterprise Resource Program system as it did not have the qualified staff to manage the same and;

c) The YEDF Board did not have the mandate to recruit qualified staff prior to acquiring the requisite approval from the Head of Public Service and Chief of Staff for any recruitment. To prove this, he attached copies of statements by Samuel Mbuu and Timothy Gitari (JM2 A & B).

7. Pursuant to section 12(2) of legal notice No. 63 of 2007 of the State Corporations Act, the YEDF Board on 3<sup>rd</sup> October 2012 (JM3) resolved to place call deposits with 20 banks accredited by the Central bank of Kenya that offer the highest rates any moneys not immediately required for the purposes of the Youth Fund. As a consequence of the resolution, on 23<sup>rd</sup> February 2015, the management placed a call deposit of Kshs. 402,095,890 at Chase Bank account number 0017054604027. The signatories to the above account were as follows:

**Category A -mandatory signatories**

**a. Catherine Namuye -the suspended acting CEO**

**b. Judy C. Kimeto – Lending and Investment Manager.**

**Category B**

**a. Benedict Atavachi- Finance Manager**

**b. Robert Mrima-Senior Accountant**

**c. Benson Mutwii-Accountant**

The board also resolved that any of the above signatories were authorized to operate the accounts but no single category could operate the accounts in the absence of the other category without a mandatory signature (JM5A-C).

8. In the course of their investigations, he further established that the then acting CEO Catherine Namuye despite being aware that the YEDF Board had temporarily suspended the acquisition of the information systems, upgrades and ERP unlawfully contracted the 1<sup>st</sup> Respondent, (Quorandum Limited) for provision of two consultancy services i.e one on design of specifications for an Enterprise Resource Planning at a cost of Kshs. 114,909,946 and the other on ICT strategy design at a cost of Kshs. 65,985,000 all totaling to Kshs. 180,894,946 (JM6 A and B).

9. He further established from the YEDF Board members that they had not approved any consultancy services with the 1<sup>st</sup> Respondent (JM7A-H). Furthermore, the investigations also revealed that during the YEDF board meeting held on 21<sup>st</sup> October 2015 the audit committee reported to the YEDF Board members that over Kshs. 180 million could not be accounted for and even presented two letters (JM8) showing transfer of payments of KShs. 65,184,046 and KShs. 115,710,000 from YEDF Investment bank account held at Chase Bank to the 1<sup>st</sup> Respondent's bank account. In addition to this, he also established from the YEDF Legal assistant whose duties included advising and preparing contractual documents for the YEDF, that he was not consulted or involved in the transaction between YEDF and 1<sup>st</sup> respondent(JM9 A & B).

10. Apparently, by a letter dated 11<sup>th</sup> February 2015(JM10) Catherine Namuye issued instructions to Ken Ouko (the Director in charge of Business Development at Chase Bank, Central Office) to transfer Kshs.115,710,000 from YEDF matured fixed deposit bank account number 0017054604027 (JM4) at Chase Bank to the 1<sup>st</sup> respondent bank account number 0052075584001 in the same bank. The said instructions were however not acted upon and on 13<sup>th</sup> February 2015, Ms. Iman Hussein ( the General Manager of Chase Bank) and Ken Ouko wrote to Catherine Namuye( JM11 A-E) informing her that the bank had declined to act on her instructions for the following reasons:-

**a. The letter issuing instructions had not been signed by the two signatories.**

**b. The recipient account with the bank had a paltry sum of Kshs. 3,000 as its credit balance and the account had been largely dormant and there was no proof of any transaction to justify the large payment.**

11. Thereafter, on 17<sup>th</sup> February 2015 Catherine Namuye and the former Chairman of YEDF(Bruce Odhiambo) wrote another letter (JM12) to the general Manager of Chase Bank informing her on the change of signatories of the YEDF Chase bank accounts and further indicated that Catherine Namuye could sign off any instructions or in her absence two signatories must sign with one being a mandatory signatory. As a result, on 23<sup>rd</sup> February 2015, pursuant to the above instructions, the bank rolled over Kshs. 402,095, 890 to a new call deposit account number 0017054604027 in the name of YEDF and concurrently transferred Kshs. 115,710,000 to the 1<sup>st</sup> Respondent bank account number 005207558001 in the same bank.

12. Furthermore, in a letter (JM13) dated 27<sup>th</sup> April 2015, Catherine Namuye again instructed the General Manager of Chase bank to transfer KShs. 64,654,789 from the YEDF fixed bank account number 0017054604027 to the 1<sup>st</sup> Respondent bank account 0052075584001. Hence, from their investigations, they established that only a total of KShs. 180,364,789 was unlawfully transferred to account number 0052075584001 of the 1<sup>st</sup> respondent from YEDF account number 0017054604027 which are both held at Chase bank.

They also established that the 1<sup>st</sup> respondent used part of the funds obtained fraudulently from the YEDF to procure the apartment at a cost of KShs. 48,500,000 from the 1<sup>st</sup> interested party. He attached copies of the sale agreement and statement by Daniel Ojijo Agili and I & M bank account statements (JM14 A-C). They again established that the apartment was one of the properties under construction to be completed in 2017( JM15).

13. It was revealed that on diverse dates, the 1<sup>st</sup> Respondent transferred KShs. 8,800,000 from its bank account number 0102497392600 held at Standard Chartered, Yaya Centre branch to the 2<sup>nd</sup> Respondent's bank account( JM16) number 03-1022378 held at Barclays Bank, Westlands. The 2<sup>nd</sup> Respondent confirmed receiving (JM17A & B) KShs. 8,800,000 which he claimed was a loan to be paid back to the 1<sup>st</sup> Respondent from November 2016.

14. Their investigations established that the 1<sup>st</sup> respondent's bank account was opened in September 2014 and by the time Kshs. 115,710,000 was transferred from YEDF on 23<sup>rd</sup> February 2015 it had only a balance of KShs. 571.24( JM18). Again, on 4<sup>th</sup> May 2015, the 1<sup>st</sup> Respondent's bank account received KShs. 64,654,78 from YEDF bank account and as at 10<sup>th</sup> November 2015, the 1<sup>st</sup> Respondent's bank account had only a balance of KShs. 1,184,326.75 which was preserved through a court order(JM19).

15. It was further established that on 4<sup>th</sup> March 2015, Chase bank made a report to the Financial Reporting centre (JM20) concerning the 1<sup>st</sup> Respondent's suspicious transaction. As a consequence thereof, the 1<sup>st</sup> Respondent was charged (JM21) in the Chief Magistrate Court in court file no. ACC 13 of 2016 with the offence of unlawful acquisition of public property among other offences. It was thus the Applicant's case that there was sufficient evidence that the above properties are proceeds of crime liable for confiscation under the Proceeds of Crime and Anti-money Laundering Act.

16. The above originating summons was opposed by **Mukuria Ngamau** the Managing Director of the 1<sup>st</sup> Respondent's through a replying affidavit dated 21<sup>st</sup> February 2017. In his affidavit, he confirmed that pursuant to the investigations conducted by the DCI, criminal proceedings were commenced (MN 1) in Anti – Corruption case No. 13 of 2016. He contended that though the said criminal proceedings are yet to be determined, it was wrong for the Applicant to conclude that the investigations established that the funds were transferred unlawfully from the YEDF as the onus of proof is on the criminal court where the criminal case is being tried and not for the Applicant or the DCI to determine and establish authoritatively that a crime has been committed and if so by whom.

17. He further stated that he was entitled to a presumption of innocence until proven guilty as the presumption of innocence is protected by the Constitution and cannot be displaced by mere allegations regardless of the strength of the DCI. Furthermore, the 1<sup>st</sup> Respondent together with all other accused persons in the aforementioned criminal proceedings entered a plea of not guilty and have been released on bail as it is their right.

18. He averred that there has not been any unlawful conduct in the dealings of the 1<sup>st</sup> Respondent and the YEDF as the contract (MN 2) between the 1<sup>st</sup> Respondent and the YEDF was a valid contract, fully performed to the satisfaction of the 1<sup>st</sup> Respondent.

19. Lastly, the 1<sup>st</sup> Respondent termed allegations by the Applicant as incorrect that the purchase of the apartment was from the proceeds of crime and contended that no crime had been committed as none has been proved to the satisfaction of the law. He therefore termed the above application by the Applicant to be a gross abuse of court process.

20. The above originating summons was also opposed by **Ezekiel Otieno Owour** the 2<sup>nd</sup> Respondent through a replying affidavit dated 6<sup>th</sup> April 2018. He averred that "proceeds of crime" meant 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. Furthermore, that civil forfeiture is premised on the fundamental principle that a person shall not benefit from his or her wrong doing.. Hence, forfeiture was therefore based on commission of an unlawful activity.

21. He averred that he has neither been implicated nor called to respond to any charges or informed of any wrong doing on his part in relation to the issues herein. He further stated that the aim of a preservative order and a forfeiture Application under POCAMLA is to preserve property or monies which are available and have been identified or are suspected to be proceeds of crime. Hence, the property or money in question has to be in the possession of the Respondent or/and at a known place. He thus termed the application by the Applicant as misplaced since the monies which are to be preserved and forfeited were obtained as a loan by him and were **expended** as at the time the order of preservation was made. Therefore, according to him, the said order was made in vain as there was nothing to preserve. **(He attached a copy of his bank statement EOO-2)**

22. He explained that sometime in March 2015, he approached a friend of his i.e the 1<sup>st</sup> respondent (Mr. Ngamau Mukuria) requesting him for a loan of KSHS 10,000,000. That on diverse dates between 6<sup>th</sup> March 2015 and 25<sup>th</sup> May 2015, the 1<sup>st</sup> respondent advanced him a loan amounting to KSHS 8,800,000 which was disbursed to him by way of direct transfers from the 1<sup>st</sup> Respondent's Standard Chartered Account number 0102497392600 domiciled at Yaya Centre to his account number 036-1022378 held at Barclays Bank of Kenya, Westlands. **(He attached copies of letters ( EOO-3) acknowledging receipt of the loan)**

23. He confirmed that Mr. Ngamau Mukuria is a Director and owner of the 1<sup>st</sup> Respondent Company together with his wife and that other than the loan, he obtained from Mr Ngamau Mukuria, he had never had any dealings with the 1<sup>st</sup> Respondent and it was entirely upon Mr. Ngamau Mukuria to decide how to disburse the loan to him. He explained that it was a term in their agreement with Mr. Ngamau Mukuria that he would pay the loan in 36 equal monthly installments after a grace period of 18 months. Therefore, after the grace period which was to lapse in November 2016, he was to repay Kshs 244,445 monthly.

24. However, in April 2015, just before the grace period for the repayment of the loan lapsed and before he paid the first installment, he learnt through print and electronic media that the trail of transactions from the banking records of 'YEDF' and the 1<sup>st</sup> Respondent, his name featured as one of the persons that could have had financial interaction with the 1<sup>st</sup> Respondent. Moreover, he explained that the dealing between Mr. Ngamau Mukuria and himself was in relation to the loan he received from him and no other finding had been made contrary to that assertion. He said this was confirmed by the averment of Chief Inspector James Manyuru at paragraph 26 of his supporting affidavit to the application.

25. He denied that he ever derived or realized, directly or indirectly, an economic advantage from the money, and contended that he was not aware of any finding of guilt on the part of Mr. Ngamau Mukuria and the 1<sup>st</sup> Respondent. He thus averred that he was still indebted to Mr. Ngamau Mukuria in accordance with the acknowledgment letters (EOO-3)

26. He referred to the supporting affidavit of Chief Inspector James Manyuru at paragraph 21 in which he avers that the transaction under investigation was the transfer of Kshs 180,364,789 from the YEDF and contended that both supporting affidavits of Muthoni Kimani and Chief Inspector James Manyuru, did not show the link and connection between the 1<sup>st</sup> Respondent's Standard Chartered Bank Account 0102497392600 at Yaya Centre and its Chase Bank Account Bank Account 0052075584001.

27. He denied being privy to the dealings and transactions of the 1<sup>st</sup> Respondent and its bank account at Chase Bank but referred to the Affidavit of Chief Inspector James Manyuru at paragraph 25 attaching the 1<sup>st</sup> Respondent's Standard Chartered Bank Account 0102497392600 at Yaya Centre (the account which money was transferred from to his account). Furthermore, according to him, it was not possible to establish whether the funds in the 1<sup>st</sup> Respondent's Standard Chartered Bank Account 0102497392600 at Yaya Centre are part of Kshs 180,364,789 transferred to the 1<sup>st</sup> Respondent's Chase Bank Account 0052075584001 by the YEDF. Hence, according to him, there is no nexus between his bank account 036-1022378 held at Barclays Bank of Kenya, Westlands and the 1<sup>st</sup> Respondent's Chase Bank Account 0052075584001.

28. He averred that the 1<sup>st</sup> Respondent's account statement annexed to the supporting affidavit of Chief Inspector James Manyuru **(JM16)** indicated other transactions that have not been investigated and queried such as the debit transaction from the 1<sup>st</sup> Respondent to **INDUSTRIE B AMICO SRL** of KSHS 4,232,000 and KSHS 6,032,500 on 6<sup>th</sup> May 2015 and 13<sup>th</sup> May 2015. **(He attached a copy of the statement EOO-4).**

29. He explained that he engaged the Applicant with a view of settling the matter amicably by repaying the loan to the Applicant but despite concerted efforts by his Advocates, the said discussions have protracted owing to a hard stance taken by the Applicant on repayment terms. **(He attached copies of letters EOO-5 from his Advocates to the Applicant and the responses from the Applicant)**

30. He contended that despite his efforts to resolve the matter amicably the Applicant had not offered any form of immunity and indemnity to him from his debtor Mr Ngamau Mukuria and being an innocent borrower, it would be unjust and unfair for the Applicant to ask for the repayment of the loan according to their terms and not offer him any form of immunity or protection from his debtor.

31. Lastly, he contended that according to the *Turquand rule*, each outsider such as himself, contracting with a company in good faith is entitled to assume that the internal requirements and procedures of the 1<sup>st</sup> Respondent have been complied with and, he had no capacity to know whether or not the 1<sup>st</sup> Respondent had illegally obtained money which it advanced to him.

32. He therefore, he prayed that the Application be dismissed with costs as the amount received by the 2<sup>nd</sup> Respondent was obtained as a loan to be repaid as the same does not constitute 'proceeds of crime'. He also prayed that he be allowed to repay the loan in accordance with the loan agreement to his debtor and if the court directs otherwise; that he be granted immunity from his debtor.

33. In response to the replying affidavit, the investigating officer (James Manyuru) in his supplementary affidavit dated 2<sup>nd</sup> May 2018 reiterated that their investigations established that the 1<sup>st</sup> respondent transferred Kshs. 48,500,000 (being part of the funds fraudulently obtained from (YEDF) to the 1<sup>st</sup> interested party bank account number 0030081198210 held at I & M Bank limited for the purchase of the apartment and the said amount was transferred as follows:-

- On 30<sup>th</sup> March 2015, the 1<sup>st</sup> Respondent transferred through RTGS (JM1) Kshs. 8,000,000 from its bank account number 0052075584001 held at Chase Bank to the Interested Party's account number 0030081198210 held at I&M bank Limited.
- On 2<sup>nd</sup> April 2015 the 1<sup>st</sup> Respondent transferred through RGS (JM2) Kshs. 8,100,000 from its bank account number 0052075584001 held at Chase bank to the Interested Party's bank account number 0030081198210.
- On 10<sup>th</sup> April 2015 the 1<sup>st</sup> Respondent transferred RTGS (JM3) Kshs. 10,000,000 from its bank account number 0052075584001 held at Chase Bank to the Interested Party's bank account number 0030081198210 held at I & M Bank Limited.
- On 16<sup>th</sup> April 2015, the 1<sup>st</sup> Respondent transferred through RTGS (JM4) Kshs. 11,200,000 from its bank account number 0052075584001 held at Chase Bank to the Interested Party bank account number 0030081198210 held at I & M Bank Ltd.
- On 24<sup>th</sup> April 2015, the 1<sup>st</sup> respondent transferred through RTGS (JM5) Kshs. 11,200,000 from its bank account number 0052075584001 held at Chase Bank to the interested Party bank account number 0030081198210.

34. That investigations further established that the 1<sup>st</sup> Respondent further transferred Kshs. 8,800,000 (being part of the funds fraudulently obtained from the YEDF) to the 2<sup>nd</sup> respondent bank account number 0361022378 held at Barclays Bank Westlands as a purported loan as follows:-

- On 26<sup>th</sup> February 2015 the 1<sup>st</sup> Respondent transferred through RTGS (JM6) Kshs. 4,800,000 from its bank account number 0052075584001 held at Chase Bank to its other bank account 0102497392600 held at Standard Chartered Bank Yaya Centre Branch.
- On 6<sup>th</sup> March 2015, the 1<sup>st</sup> Respondent transferred Kshs. 1,500,000 from its bank account 0102497392600 held at Standard Chartered bank Yaya Centre Branch to the 2<sup>nd</sup> Respondent bank account number 036-1022378 held at Barclays Bank Westlands as evidenced by (JM7 A&B) which are copies of the 1<sup>st</sup> respondents Standard Chartered bank statement and the 2<sup>nd</sup> respondent Barclays bank statement.
- On 12<sup>th</sup> March 2015, the 1<sup>st</sup> respondent transferred through RTGS (JM8) Kshs. 4,700,000 from its bank account number 0052075584001 held at Chase Bank to its other bank account 01032497392600 held at Standard Chartered bank Yaya Centre Branch.
- On 16<sup>th</sup> March 2015, the 1<sup>st</sup> Respondent transferred Kshs. 1,999,450 from its bank account 0102497392600 held at Standard Chartered Bank Yaya Centre Branch to the 2<sup>nd</sup> Respondent bank account number 036-1022378 held at Barclays Bank West lands. (JM7 A&B)
- On 24<sup>th</sup> March 2015, the 1<sup>st</sup> respondent again transferred through RTGS (JM9) Kshs. 4,500,000 from its bank account number 0052075584001 held at Chase bank to its other bank account 0102497392600 held at Standard Chartered bank Yaya Centre Branch.
- On **26<sup>th</sup> March 2015** the 1<sup>st</sup> Respondent transferred Kshs **2,000,000** from its bank account 0102497392600 held at Standard Chartered bank Yaya Centre Branch to the 2<sup>nd</sup> Respondent bank account number 036-1022378 held at Barclays Bank Westlands **(JM7 A & B)**
- On **10<sup>th</sup> April 2015** the 1<sup>st</sup> Respondent transferred through RTGS (JM10) Kshs **3,500,000** from its bank account number 0052075584001 held at Chase Bank to its other bank account 0102497392600 held at Standard Chartered bank, Yaya Centre Branch.
- On **15<sup>th</sup> April 2015** the 1<sup>st</sup> Respondent transferred **Kshs 1,300,000** from its bank account 0102497392600 held at Standard Chartered bank Yaya Centre Branch to the 2<sup>nd</sup> Respondent bank account number 036-1022378 held at Barclays Bank Westlands.

**( JM7 A & B)**

· On **5<sup>th</sup> May 2015** the 1<sup>st</sup> respondent transferred through RTGS(JM11) **Kshs 7,480,000** from its bank account number 0052075584001 held at Chase Bank to its other bank account 0102497392600 held at Standard Chartered bank, Yaya Centre Branch.

· On **12<sup>th</sup> May 2015** the 1<sup>st</sup> respondent transferred through RTGS(JM12) **Kshs 6,800,000** from its bank account number 0052075584001 held at Chase Bank to its other bank account 0102497392600 held at Standard Chartered bank, Yaya Centre Branch.

· On **19<sup>th</sup> May 2015** the 1<sup>st</sup> Respondent again transferred through RTGS(JM13) **Kshs 8,000,000** from its bank account number 0052075584001 held at Chase Bank to its other bank account 0102497392600 held at Standard Chartered bank, Yaya Centre Branch.

· On **25<sup>th</sup> May 2015** the 1<sup>st</sup> Respondent transferred **Kshs 2,000,000** from its bank account 0102497392600 held at Standard Chartered bank Yaya Centre Branch to the 2<sup>nd</sup> Respondent bank account number 036-1022378 held at Barclays Bank Westlands. **(JM7 A & B above)**

· On **6<sup>th</sup> August 2015** the 1<sup>st</sup> Respondent further transferred through RTGS(JM14) **Kshs 3,000,000** from its bank account number 0052075584001 held at Chase Bank to its other bank account 0102497392600 held at Standard Chartered bank, Yaya Centre Branch.

· On **14<sup>th</sup> October 2015** the 1<sup>st</sup> Respondent transferred through RTGS(JM15) **Kshs 2,000,000** from its bank account number 0052075584001 held at Chase Bank to its other bank account 0102497392600 held at Standard Chartered bank, Yaya Centre Branch.

35. According to the Applicant, there is sufficient evidence that the property and **Kshs 8,800,000** were obtained from the funds fraudulently transferred from YEDF bank account to the 1<sup>st</sup> respondent bank account and are therefore liable for recovery by the Applicant under the Proceeds of Crime and Anti-money Laundering Act.

36. In addition to this, and in response to the above replying affidavit, the investigating officer (James Manyuru) in his further affidavit dated 2<sup>nd</sup> May 2018 termed the allegation by the 1<sup>st</sup> respondent that there was no nexus between the 1<sup>st</sup> Respondent bank account held at Chase Bank and the one held at Standard Chartered Bank as false, since there was sufficient evidence showing the direct link between funds transferred from (YEDF) bank account to the 1<sup>st</sup> respondent Chase bank account and subsequent transfers to the 2<sup>nd</sup> Respondent's bank account (as demonstrated herein at para 35 of this judgment).

37. Furthermore, according to the Applicant, the investigations established that the 1<sup>st</sup> Respondent Standard Chartered bank account number 0102497392600 was opened on 13<sup>th</sup> November 2002 and as at 31<sup>st</sup> January 2015 the said bank account had a negative balance of Kshs -10,370, therefore the **8,800,000** transferred by the 1<sup>st</sup> respondent from its Standard Chartered bank account to 2<sup>nd</sup> Respondent Barclays bank account was part of the funds fraudulently obtained from YEDF by the 1<sup>st</sup> Respondent. **(He attached JM11 a copy of the account opening form & referred to JM2 A & B)**

38. Moreover, the Applicant termed the 2<sup>nd</sup> Respondent's contention that certain parties such as Industries B Amico SRL have not been investigated was misleading and baseless, as the investigations into the fraudulent transfer of Kshs 180,894,946 from the YEDF bank account to the 1<sup>st</sup> respondent account had not been closed and the same was still ongoing.

39. Therefore, it was the Applicant's case that there was sufficient evidence that Kshs 8,800,000 was directly obtained from the funds fraudulently transferred from YEDF bank account to the 1<sup>st</sup> respondent's bank account and is therefore liable for recovery by the Applicant under the Proceed of Crime and Anti-money Laundering Act.

#### **SUBMISSIONS BY THE APPLICANT**

40. Ms Muchiri for the Applicant outlined four(4) issues for determination and these are well set out in the written submissions.

41 She submitted that the properties known as Duplex apartment number C16 situate on **LR No.209/5990/13** grant number **18295/9** and **Kshs 8,800,000** are proceeds of crime as investigations conducted by Directorate of Criminal Investigations established that the funds unlawfully transferred from YEDF were used to procure the property and also used to advance the loan to the 2<sup>nd</sup> Respondent.

42 Referring to the investigations she submitted that the procurement of information systems and upgrades was in total breach of the procurement Laws as every State Organ or public entity is required to comply with procurement laws when procuring any good or service and should do so in a fair, transparent and competitive manner. Counsel relied on article 227 (1) of the Constitution of Kenya which states;

***“When a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”***

43 In addition to this, counsel also relied on **Section 60** of the Public Procurement & Asset Disposal Act No. 33 of 2015 which provides as follows;

***“An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.”***

Further counsel relied on **Section 69** of Public Procurement & Asset Disposal Act No. 33 of 2015 provides for procurement approvals which states that;

***“All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.”***

44 It was her submission that there was no compliance with Public Procurement & Asset Disposal Act No. 33 of 2015 when the 1<sup>st</sup> respondent was contracted to provide services at the YEDF. Further that the YEDF board members and the former procurement manager at YEDF in their statements annexed to the supporting affidavit of James Manyuru marked as annexures **JM7 and JM9** stated that there was no approval by the YEDF board to award the 1<sup>st</sup> respondent the contract for consultancy services or any other service. Additionally, the 1<sup>st</sup> respondent has not proved that they performed the contract they were unlawfully awarded by the then acting Chief Executive Officer, Catherine Namuye.

45 On whether unlawful Payments were made to the 1<sup>st</sup> Respondent Counsel submitted that the 1<sup>st</sup> respondent unlawfully received funds from YEDF without provisions of any services. That their investigations revealed that on **23<sup>rd</sup> February 2015** the YEDF management placed a call deposit of **Kshs 402,095,890** at Chase Bank account number **0017054604027**. She submitted on how signatories were changed enabling money to change hands through fictitious transactions.

46 Counsel thus submitted that property known as Duplex Apartment Number C16 situate on L.R No.209/5990/13 Grant Number 18295/9 is a proceed of crime as defined under section 2 of POCAMLA and is liable for recovery by the Applicant. Section 2 of the POCAMLA states:-

***“ .....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”***

47 Counsel relied on the case of **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** where 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.”***

48 Counsel submitted that the 1<sup>st</sup> Respondent transferred **Kshs 8,800,000** being part of **Kshs 180,364,789** to the 2<sup>nd</sup> Respondent a fact which has not been denied by the 1<sup>st</sup> Respondent. That the 2<sup>nd</sup> Respondent further admitted in his statement marked as annexure **JM16B** that he received the said amount from the 1<sup>st</sup> Respondent which he claims was a loan payable with effect from 1<sup>st</sup> November 2016. Further that the 2<sup>nd</sup> Respondent is ready and willing to repay the said sum to the Applicant.

49 Counsel further submitted that the said amount was a proceed of crime and was liable for recovery under civil forfeiture. She relied on the case of **Prosecutor General –vs- New Africa Dimensions & Others, High Court of Namibia Case No. POCA 10/2012** where the court stated:-

***“..... It may be true that there is no legal rule in Namibia that forbids legitimate transfer of funds to accounts of other entities, but there certainly is an obligation in terms of 4 to 6 of POCA, 2004 placed on parties to explain the origin and the basis of transferring the money.***

***If a party fails to explain the origin and the basis of the transfer of the “Money they commit the offence of money laundering.....”***

50 On Whether the Applicant is entitled to file civil assets forfeiture proceeding for recovery of property known as Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 and **Kshs 8,800,000** counsel submitted that the honourable court has powers to issue forfeiture orders if it finds reasonable grounds that the property concerned is a proceed of crime. She quoted Section 92(1) of POCAMLA which states that:

***The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned***

***(a) has been used or is intended for use in the commission of an offence or;***

***(b) Is proceeds of crime.***

51 It was thus counsel's submission that the Applicant has on a balance of probabilities demonstrated that the property known as Duplex apartment number **C16** situate on **LR No.209/5990/13** grant number **18295/9** and **Ksh. 8,800,000** were obtained from the funds fraudulently stolen from YEDF and are proceeds of crime which should be forfeited to the Government.

52 She invited the court to apply the findings in the case of **Prosecutor General –vs- New Africa Dimensions & Others, (supra)** where the court in issuing forfeiture orders of assets which it found on a balance of probability were proceeds of unlawful activities observed:-

**“.....Mr. Breitenbach who appeared for the applicant submitted that the evidence adduced by the applicant proved on a balance of probabilities that the fraud, corruption, the contravention of the Tender Board Act, 1996 and the contravention of the State Finance Act, 1996 induced the conclusion of the agreements between the first respondent and the Ministry and as consequence the preserved property is the proceeds of unlawful activities and should therefore be forfeited to the state. I agree with Mr.Breitenbach**

**.....I accordingly make the following order;**

**The positive bank balance in an account held at Bank Windhoek, account number 8003042804, held in the name of the first respondent, (New Africa Dimensions CC, in the amount of N\$ 1453083, 73;**

**In an account held at Bank Windhoek, account number 8002979907 in the name of Kage Trading CC (“Kage”) in the amount of N\$ 498527,86;**

**In an account held at Bank Windhoek, account number 8002359254**

**In the name of (“C Three Trading CC”);**

**In an account held at First National Bank of Namibia, account number 62234053560 in the name of Taleni Multi Media Consulting CC; are forfeited to the State.**

**The 2010 model, Volkswagen Golf GTI motor vehicle with registration number N 130698 W and engine number CCZ049937,purchased by the first respondent for Shilongo in April 2012 for N\$ 320000 is forfeited to the State.....”**

53 Furthermore, counsel relied on the case of **Assets recovery Agency –vs- Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No 2007 HCV003259** where the court issued an order of recovery of money obtained through crime and stated that the evidential burden of proof lay on the defendant to demonstrate how they lawfully came into possession of the seized assets. The court held:-

**“.....Even though these proceedings are quasi Criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousand of United States dollars without more.**

**There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence. is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.**

**This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 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.....”**

54 Counsel further submitted that the effect of grant of forfeiture orders was not meant to enrich the State but to deprive criminals of the ill-gotten wealth and act as a deterrence and prevention to crime. That recovered proceeds were intended to be used for sustainable development of the country. Counsel relied on the case of **NDPP -Vs- Rebuzzi** quoted in the case of **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** where the court stated 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...”**

55 On whether the respondents' right to property is violated counsel submitted that article 40 of the Constitution of Kenya provides for the right to property and every person has the right to acquire and own property of any description and in any part of Kenya. However, that the said right to property does not extend to property which has been unlawfully acquired as provided under article 40(6) which states as follows;

**"...the rights under this article do not extend to any property that has been unlawfully acquired..."**

It was thus the Counsel's submissions that the 1<sup>st</sup> Respondent's property known as Duplex Apartment Number C16 situated on L.R No.209/5990/13 Grant Number 18295/9 having been procured from the funds stolen from YEDF is a proceed of crime and is not protected by Article 40 of the Constitution.

56 She relied on Teckla Nandjila Lameck-Vs- President of Namibia 2012(1) NR 255(HC) where the court stated;

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

57 She also relied on the case of Martin Shalli -Vs-Attorney general of Namibia (supra) where the court stated;

*"..... that the proceeds of unlawful activity would not constitute property in respect of which constitutional protection is available. 28 This court in that matter further held 29 that the protection of property under art 16 is in any event not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate purpose....."*

*..... I accordingly conclude that chapter 6 does not violate the right to property under article 16 of the Constitution because art 16 does not protect the ownership or possession of the proceeds of crime. I further reiterate the approach of the court in Lameck that even if chapter 6 were to infringe upon art 16, then it would in my view be a proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrongdoing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose....."*

58 Counsel further submitted that the right to property sought by the 1<sup>st</sup> Respondent is not absolute. That it is not absolute that the Respondents are entitled to the rights and fundamental freedoms they are alleged to contravene; and the same must be checked if the enjoyment of the rights prejudices or interferes with others rights .

She referred to Article 24 of the Constitution which limits certain rights. It provides:

*"A right or fundamental freedom in the Bill of rights shall not be limited except by law, and the only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

*(a) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others*

**a) Whether the Forfeiture Application violates the Respondent's right to presumption of innocence?**

59 On the 1<sup>st</sup> respondent's contention that they are entitled to the right of presumption of innocence which is provided under article 50(2) (a) of the Constitution of Kenya since the criminal proceedings against them are ongoing, counsel submitted that **civil forfeiture proceedings are proceedings in rem** (against the property) and it **would involve a civil suit being brought** in court against the property which is reasonably believed to be a proceed of crime. Hence, according to the Applicant, the proceedings before this Honourable Court are to determine the criminal origins of the property in issue and are not criminal prosecution against the respondents where presumption of innocence is applicable.

60 Furthermore, it was counsel's submission that the application for forfeiture is not made on behalf of the prosecution, but on behalf of the Asset Recovery Agency (ARA). She relied on the case of Serious Organized Crime Agency vs Gale quoted Assets recovery Agency & Others -vs- Audrene Samantha Rowe & Others Civil division claim No 2012 HCV 02120 where 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 conviction of any individual and thus there was no reason to apply the criminal standard of proof..."*

61 She further submitted that civil forfeiture proceedings are not subject to presumption of innocence. That in the present case, the proceedings are civil forfeiture pursuant to part VIII of POCAMLA and are in respect of recovery of Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 procured by the 1<sup>st</sup> respondent using funds stolen from YEDF and Kshs 8,800,000 transferred to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent as a purported loan. In this regard, the 1<sup>st</sup> Respondent is not facing a criminal offence in these proceeding which would require observation of the right of presumption of innocence.

62 Counsel relied on the case of Phillips v The United Kingdom [2001] ECHR 437 quoted in the case of Martin Shalli -Vs-Attorney General of Namibia where the European Court held:-

*"that civil proceedings are not subject to the presumption of innocence in art 6(2). That court held 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."*

Counsel also relied on the Namibian case of Martin Shalli vs Attorney General of Namibia & Others (supra) where the court held:

*..... I have already referred to the finding of the full court in Lameck that asset forfeiture proceedings are civil in nature. I can find no reason why that finding (that civil forfeiture under chapter 6 is a civil remedy unrelated to a criminal prosecution and punishment of offenders) should not be followed. As civil proceedings and given their nature, they do not engage art 12(1) (d) of the Constitution. The presumption of innocence would not in my view arise. This approach is also consonant with the applicable foreign authority referred to above raised within a similar context.*

*.....I accordingly conclude that asset forfeiture proceedings in chapter 6 of POCA do not violate the presumption of innocence applicable to criminal proceedings embodied in art 12(1) (d) as that subtitle is not applicable to such proceedings.....*

63 Counsel further relied on the case of Teckla Nandjila Lameck-Vs- President of Namibia (supra) where the court stated;

*“..... Asset forfeiture is, as is stated in 50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution.*

*....., even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above.*

*..... But the forfeiture proceedings under chapter 6 do not in my view constitute a penalty imposed upon an accused as punishment for a crime. Those proceedings are directed at the proceeds of crime and not at the person who committed the crime....”*

64 It was thus counsel’s submission that the grant of the forfeiture orders against property known as Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 and Ksh 8,800,000 is not affected by the outcome of the criminal proceedings where the 1<sup>st</sup> respondent is being tried. She relied on Section 92(4) of POCAMLA which states;

*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*

65 **1<sup>ST</sup> RESPONDENT’S SUBMISSIONS** Mr Mogere narrowed down the issues for determination to three and the same are clearly set out in the written submissions:

66 On whether failure to include the Youth Enterprise Development Fund as party in this suit is fatal to this Application he relied on the cases of Zephir Holdings Limited v Mimosa Plantations Limited, Jeremaih Matagaro & Ezekiel Misango Mutisya[2014] eKLR quoted in the case of Apex International Limited & Anglo-Leasing and Finance International Limited v Kenya Corruption Commission[2012] eKLR which quoted the decision of the Supreme Court of Nigeria in the case of Goodwill and Trust Investment Ltd & Another v Will & Bush Ltd that:-

**“It is trite law that to be competent and have jurisdiction over the matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine . When proper parties are not before the court lacks jurisdiction to hear the suit, and, where he court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned.”**

67 Counsel stated that the 1<sup>st</sup> Respondent entered into an agreement with the YEDF on the 17<sup>th</sup> November 2014 for the provision of consultancy services on Design of Specifications of an Enterprise Resource Planning and consultancy on ICT Strategy Design. The contract prices of these services were Kshs. 114,909,946.00 and Kshs. 65,985,000.00 respectively. He thus submitted that for an agreement to be possible, there has to be two or more parties. That if an issue were to arise as to the legality of the same then the parties involved have to be included in the adjudication of the matter and if any party is crucial in the presentation of information that would be vital to the resolution of a matter then they too should be included to allow the court to reach a just outcome.

68 It was thus, counsel’s submission that YEDF should be brought in as a party to these proceedings because any decision made in regard to this matter shall directly affect it and failure to include YEDF as a party is a glaring discrepancy that ought not to be allowed.

69 On whether the application if allowed the court would have decided the matter on a balance of probabilities which is of a lower standard than the one set by the law being that of beyond reasonable doubt, Counsel quoted section 92 of the POCAMLA which has been cited elsewhere.

He further relied on the case of Philip Muiruri Ndaruga v Republic [2016]Eklr quoted by Brennan J in the United States Supreme Court decision in Re Winship [20] where the court stated:-

**“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the possibility that he would be stigmatized by conviction.....Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in**

**doubt whether innocent men are being condemned.”**

70 It was thus counsel’s submission that the Applicant had not come with clean hands to court as being a beneficiary of an order that placed an injunction on the property of the 1<sup>st</sup> Respondent, it had spat on the face of this court by wrongfully stating in its Application that it was already established through investigations that the property is a proceed of crime and yet the criminal proceedings, Anti-Corruption Case Number 13 of 2016 is yet to be determined. According to counsel, the evidence that has been presented by the Applicant is not enough to decide that the property in question in deed is a consequence of crime.

71 Whether the 1<sup>st</sup> Respondent’s right under section 40 has been breached or is at risk of breach by the Applicant counsel contended that the allegation by the Applicant that investigations established that the property in question was indeed acquired unlawfully from money given by the YEDF was yet to be determined. He relied on the case of **Evelyn College of Design Ltd v Director of Children’s Department & another [2013] eKLR** Majanja J opined:-

**First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such ‘finding’ cannot be by any other means other than due process**

72 It was counsel’s submission that the Applicant seeks to forcefully occupy the property belonging to the 1<sup>st</sup> Respondent and thus breaching its right to property under Article 40 of the Constitution. **2<sup>ND</sup> RESPONDENTS SUBMISSIONS**

Mr Malenya for the 2<sup>nd</sup> Respondent **Counsel stated that the order of preservation was issued in vain as there was nothing to preserve and submitted as follows:-**

- The Applicant made an Ex-parte Application for preservation orders on 26<sup>th</sup> October 2016, and the said orders were granted by this court.
- The aim of a preservatory order and a forfeiture Application under POCAMLA is to preserve property or monies which are available, have been identified or are suspected to be proceeds of crime. The property or money in question has to be in the possession of the Respondent or/and at a known place.
- The Honourable court issued orders in vain as the amounts sought had been obtained as a loan and had been expended as at the time the Application for preservation was filed. (**Reference is made to annexure E.OO2**) Orders made to preserve money held in bank accounts are usually made to freeze the withdrawal, transfer or use of such amounts. Such an order is effective if there is money in the subject account. Counsel relied on the case of ***Ogola Mujera Advocates Llp v Banking Fraud Investigation Unit & 2 others [2016] e KLR*** where the court observed:

**“A bank account being a special kind of place, not capable of seizure in the sense of the word, would, in practical terms be ‘frozen’ so as to preserve the contents of the account until further direction of the court. This requirement is important as it is in accord with the constitutional requirement under Article 50, that all persons should be granted an opportunity to be heard on matters affecting them”.**

**73 Counsel further stated that monies advanced to the 2<sup>nd</sup> Respondent were obtained in good faith as a loan and submitted as follows:-**

- At paragraph 11 of the Replying Affidavit, the 2<sup>nd</sup> Respondent depones that sometime in March 2015, he approached his friend - Mr Ngamau Mukuria- for a loan of KSHS 10,000,000 to deal with some personal issues.
- On various dates between 6<sup>th</sup> March 2015 and 25<sup>th</sup> May 2015, Mr. Ngamau Mukuria advanced the 2<sup>nd</sup> Respondent a loan of KSHS 8,800,000 which was disbursed by way of direct transfers from the account of the 1<sup>st</sup> Respondent (a company owned by Mr Ngamau Mukuria and his wife) at Standard Chartered Account number 0102497392600 domiciled at Yaya Centre to the 2<sup>nd</sup> Respondent’s account number 036-1022378 held at Barclays Bank of Kenya, Westlands. This is evidenced by acknowledgement letters marked as **EOO-1** to the Affidavit of the 2<sup>nd</sup> Respondent.

74 Referring to the definition of proceeds of crime under section 2 of POCAMLA counsel submitted that the said provision expressly alludes to the commission of a crime or an unlawful activity as an antecedent to classify property obtained thereafter as proceeds of crime. However, that under section 90 and 92 of POCAMLA which provides for civil forfeiture, a finding of guilt in a criminal process is not required for an order of civil forfeiture to be made.

75 To support this argument he referred to section 92(1) and (4) of POCAMLA, which has already been cited above.

76 Counsel thus submitted that in as much as civil forfeiture is not predicated upon a finding of guilt and/or reliant on an outcome of a criminal case, 3<sup>rd</sup> parties with an interest in the property upon which a forfeiture application has been made are protected under section 93 of POCAMLA which protects their interests provided they were not involved in the commission of the offence in question or had no knowledge of the commission of the offence or unlawful activity. The court considers whether reasonably and on a balance of probabilities such 3<sup>rd</sup> parties interests may be excluded in the forfeiture proceedings.

77 According to Counsel, section 93 of POCALMA presupposes that innocent parties who have no knowledge and were not involved in the unlawful activity which resulted into the proceeds of crime are protected from forfeiture Applications. Counsel quoted Professor Joshua Alan Krane in his article 'Civil Forfeiture and the Canadian Constitution (2010) which opines that civil forfeiture is premised on a fundamental principle of morality that no person should benefit from his or her wrong doing.

78 Civil forfeiture therefore aims to provide restitution of profits, proceeds and interests in property which arises from an unlawful act. Specifically he notes:

***“Governments generally cast civil forfeiture as a crime-control or crime-prevention measure by contending that the confiscation of illegal profits and the instruments of unlawful activity, both by the participants of crime and by those that acquiesce to its commission, will deter crime.”***

79 He contended that there was no nexus between the 2<sup>nd</sup> Respondent's Account that received the loan and the 1<sup>st</sup> Respondent's Account that received money from YEDF and submitted that the affidavit of the chief inspector did not indicate when the money from the 1<sup>st</sup> Respondent's account at Chase bank got to its account at Standard chartered bank and whether the amount in question is part of the Kshs 180,364,789. He queried the failure by the Applicant to query other debit transactions from the 1<sup>st</sup> Respondent's account to other accounts. He pointed out Kshs 4,232,000/- to Industrie B Amico SRL (EOO-4) and kshs 6,032,500/- on 6<sup>th</sup> May 2015 and 13<sup>th</sup> May 2015 as examples.

80 On the Turquand Rule counsel submitted that the 2<sup>nd</sup> Respondent had no business dealings or other dealings with YEDF and the 1<sup>st</sup> Respondent as his only connection was the loan advanced to him by Mr. Ngamau Mukuria who happens to be a Director and owner with his wife of the 1<sup>st</sup> Respondent. He contended that the 2<sup>nd</sup> Respondent is protected by the Turquand rule because the 1<sup>st</sup> Respondent being a limited liability company and the 2<sup>nd</sup> Respondent being an outsider, he could not have known the internal business arrangements and transactions of the company.

81 He further submitted that the Turquand rule also known as the doctrine of indoor management argues that outsiders dealing with the company are entitled to assume that everything had been regularly done so far as its internal proceedings are concerned. The rule was established in the case of **Royal British Bank v Turquand (1856) 6 E&B 327** where Jervis CJ noted as follows.

***“We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.”***

82 It was therefore counsel's submission that despite the accusation facing the 1<sup>st</sup> Respondent and its directors and whether they are found guilty or not, the 2<sup>nd</sup> Respondent is absolved of any wrong doing as his only interaction with the 1<sup>st</sup> Respondent was the loan he received from Mr Ngamau Mukuria. That the 2<sup>nd</sup> Respondent had no knowledge of any business decisions and or activities transacted by the 1<sup>st</sup> Respondent and YEDF.

83 In its further submissions M/s Muchiri reiterated her earlier submissions saying the Applicant had shown the movement of the money complained of from the 1<sup>st</sup> Respondent's account to that of the 2<sup>nd</sup> respondents. Further that a nexus had been shown to exist between the money movement. She submitted that the Turquand was inapplicable since the issue was not about the 2<sup>nd</sup> Respondent being privy to the on goings in the 1<sup>st</sup> Respondent's company but rather the money transferred by the 1<sup>st</sup> Respondent was a proceed of crime.

84 Counsel explained that the Applicant had all along been willing to accommodate and have the 2<sup>nd</sup> Respondent pay the money. However the 2<sup>nd</sup> Respondent was never serious about anything. This led to the flopping of the negotiations.

85 I have considered the Originating summons by the Applicant dated 3<sup>rd</sup> January, 2017, the affidavits, annexures, submissions and authorities herein, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents replying affidavits, annexures, submissions and authorities herein. I find the following issues to fall for determination:-

**1. Whether property known as Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 and Kshs 8,800,000 are proceeds of crime liable for recovery by the Applicant under POCAMLA.**

**2. Whether the Applicant is entitled to file civil assets forfeiture proceeding for recovery of property known as Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 and Kshs 8,800,000.**

**3. Whether the Respondent's right to property has been violated.**

**4. Whether the Forfeiture Application violates the Respondent's right to presumption of innocence.**

86 Before I delve into the identified issues I wish to deal with an issue that was passionately submitted on by Mr. Malenya for the 2<sup>nd</sup> Respondent. This was on exparte orders issued by this court on 26<sup>th</sup> October 2016. He censored the court for having issued preservation orders against the 2<sup>nd</sup> Respondent's account in vain as there was no money in the said account. For clarity the orders issued by the court were as follows:

(i) That preservation order be and is hereby issued prohibiting the transfer, mortgage, attachment, disposal or any other dealings with property known as Duplex apartment number 16 situated on L.R. NO 209/5990/13 Grant number 18295/9 for a period of 6 months.

(ii) That an order be and is hereby issued directing the 2<sup>nd</sup> Respondent to deposit Kshs. 8,800,000 into an escrow account in the joint names of the Asset recovery Agency and the 2<sup>nd</sup> respondent within the next 30 days pending the hearing and determination of this matter. It is clear from the above orders that the only property preserved was the Apartment No. C 16. There is no mention of a bank account let alone the 2<sup>nd</sup> Respondent's account anywhere. The 2<sup>nd</sup> Respondent has not to date complied with the order directing him to deposit what he received into the escrow account. The orders of 26<sup>th</sup> October 2016 were therefore lawfully issued based on the material placed before the court.

**Issue no (i) Whether the property known as Duplex apartment number C16 situate on L.R.No.209/5990/13 grant number 18295/9 and Kshs. 8,800,000 are proceeds of crime liable for recovery by the applicant under POCAMLA**

87 From the investigation conducted by Chief Inspector James Manyuru, it was established that the acquisition of the information systems and upgrades which included the ERP in the 2014/2015 budget was suspended by the YEDF Board due to cash flow problems and lack of capacity to execute the same. The suspension of the implementation of the ERP Program was known by the then acting CEO Catherine Namuye who chose to proceed by unlawfully contracting the 1<sup>st</sup> Respondent, (Quorandum Limited) for provision of two consultancy services, one on design of specifications for an Enterprise Resource Planning at a cost of **Kshs 114,909,946** and the other on ICT strategy design at a cost of **Kshs 65,985,000** totaling to **Kshs 180,894,946** without the approval of the YEDF Board nor following procurement laws and procedures.

88 This fact has not been contravened by the 1<sup>st</sup> Respondent. Hence, the said procurement was in breach of the procurement Laws as every State organ or public entity is required to comply with procurement laws when procuring any goods or services and should do so in a fair, transparent and competitive manner. This is provided under Article 227 (1) of the Constitution of Kenya.

89 Furthermore, **Section 60** of the PPADA No. 33 of 2015 sets out what an accounting officer of a procuring entity is expected to do. Section 69 of the PPADA also speaks to this. These provisions have been set out at paragraphs 43 and 44 of this Judgment.

90 Therefore, on a balance of probability, the Applicant has proved that there was no compliance with the PPADA No. 33 of 2015 when the 1<sup>st</sup> Respondent was contracted to provide services at the YEDF. Furthermore, the YEDF board members and the former procurement manager at YEDF in their statements (**JM7 and JM9**) stated that there was no approval by the YEDF board to award the 1<sup>st</sup> Respondent a contract for consultancy services or any other service. Moreover, the 1<sup>st</sup> Respondent has not proved that they performed the contract they were unlawfully awarded by the then acting Chief Executive Officer, Catherine Namuye. I find that there was no need of enjoining YEDF as a party as the Applicant has no claim against it. The statements **JM7** and **JM9** explained the position of YEDF.

**91 Unlawful payments made to the 1<sup>st</sup> Respondent:** From the affidavits of Chief Inspector James Manyuru, the investigations revealed that the then acting CEO Catherine Namuye and the former chairman of YEDF board Bruce Odhiambo colluded and changed the signatories of the above YEDF bank account allowing the acting CEO to sign off any instructions or in her absence two signatories signing with one being mandatory. Following the unlawful change of signatories, on **23rd February 2015** the acting CEO unlawfully issued instructions to the Bank to transfer of **Kshs 115,710,000** to the 1<sup>st</sup> Respondent's bank account number **0052075584001** from YEDF account number **0017054604027**.

92 Subsequently, on **27<sup>th</sup> April 2015**, the acting CEO again unlawfully instructed the General Manager of Chase bank, Iman Hussein to transfer a further **Kshs 64,654,789** from the YEDF fixed bank account number **0017054604027** to the 1<sup>st</sup> Respondent bank account number **0052075584001**. All this was without the approval of the YEDF board.

93 The investigations further revealed fraudulent transfer of funds amounting to **Kshs 180,364,789** from YEDF Bank Account Number **0017054604027** at Chase Bank, Delta House Westlands to the 1<sup>st</sup> Respondent's Bank Account Number **0052075584001** Chase Bank as shown in the copies of bank statements annexed in the supporting affidavit of James Manyuru and marked as annexure (**JM4**). The 1<sup>st</sup> Respondent has not denied that he received funds from the YEDF neither has he explained why he received the said money.

94 The investigations established that the 1<sup>st</sup> Respondent used part of the Kshs. **180,364,789** unlawfully received from YEDF to purchase property known as Duplex Apartment Number **C16** situated on **L.R.No.209/5990/13 Grant Number 18295/9**(the property) at a cost of **Kshs 48,500,000** from the interested party a fact which is not denied.

95 In line with the above evidence and on a balance of probability, this Court can safely draw a conclusion that the property known as Duplex Apartment Number C16 situate on L.R.No.209/5990/13 Grant Number 18295/9(the property) was purchased by use of money unlawfully obtained. It is therefore a proceed of crime as defined under section 2 of POCAMLA and is liable for recovery by the Applicant. This transaction also squarely falls within the definition of proceeds of crime in the case of **Schabir Shaik & Others** (supra)

**96 What about the Kshs.8,800,000 transferred to the 2<sup>nd</sup> respondent account by the 1<sup>st</sup> respondent?** Counsel for the 2<sup>nd</sup> Respondent submitted that the 2<sup>nd</sup> Respondent had no business dealings or other dealings with YEDF and the 1<sup>st</sup> Respondent. That the only connection was the loan advanced to him by Mr. Ngamau Mukuria who happens to be a director and owner with his wife of the 1<sup>st</sup> Respondent. Hence, it was the 2<sup>nd</sup> Respondent's contention that he was not privy to any dealings by the 1<sup>st</sup> Respondent and the YEDF. That the 2<sup>nd</sup> Respondent is protected by the Turquand rule because the 1<sup>st</sup> Respondent being a limited liability company and the 2<sup>nd</sup> Respondent being an outsider, could not have known the internal business arrangements and transactions of the company.

97 It is an undisputed fact that the 1<sup>st</sup> Respondent transferred a total of **Kshs 8,800,000** from the account that had benefitted from the Kshs. **180,364,789** received by the 1<sup>st</sup> Respondent in its chase bank account. This is a fact that has not been denied by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent further admitted in his statement marked as annexure (**JM16B**) that he received the said amount from the 1<sup>st</sup> Respondent money he claims was a loan payable with effect from 1<sup>st</sup> November 2016.

98 The 2<sup>nd</sup> Respondent had a duty to prove that the Kshs 8,800,000 he received from the 1<sup>st</sup> Respondent was obtained in good faith as a loan. If the 1<sup>st</sup> Respondent was acting in good faith why could he not transfer the money from the chase Bank account directly to the 2<sup>nd</sup> Respondent? The Applicant demonstrated in this matter that Ksh 8,800,000 was directly obtained from the Ksh **180,364,789** fraudulently transferred from YEDF bank account to the 1<sup>st</sup> Respondent's bank account, before being moved to the 2<sup>nd</sup> Respondent's account. It is clearly a proceed of crime and liable for recovery under the POCAMLA.

99 On the the Turquand Rule the 2<sup>nd</sup> Respondent submitted that he is protected by the same because the 1<sup>st</sup> Respondent being a limited liability company and him being an outsider, he could not have known the internal business arrangements and transactions of the company. I find the Turquand rule not applicable in this matter because the Applicant's case is whether the Ksh 8,800,000 which was allegedly loaned to the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> respondent is a proceed of crime and not whether the 2<sup>nd</sup> Respondent was privy to the dealings of the 1<sup>st</sup> Respondent. I am persuaded by the Namibian case of **Prosecutor General –vs- New Africa Dimensions & Others**, to support my finding.

**Issue No ii Whether the Applicant is entitled to file civil assets forfeiture proceedings for recovery of property known as Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 and Kshs 8,800,000/-.**

100 Section 92(1) of POCAMLA states that.

*The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned*

*(a) has been used or is intended for use in the commission of an offence or;*

*(b) Is proceeds of crime.*

I have already found that the property known as Duplex apartment number **C16** situate on **LR No.209/5990/13** grant number **18295/9** and **Ksh. 8,800,000** were obtained from the funds fraudulently obtained from YEDF and are proceeds of crime which should be forfeited to the Government. This can only be achieved through the filing of a civil assets recovery suit.

101 I am fortified in this finding by what was held in the case of **Prosecutor General vs New Africa Dimensions and other** (supra) at paras 70 and 76. AND **Assets Recovery agency vs Fisher, Rohan and Miller Delores** (supra).

102 The Applicant has also correctly submitted that the effect of grant of forfeiture order is not meant to enrich the State but to deprive criminals of the ill-gotten wealth and to act as a deterrence and prevention to crime. Therefore recovered proceeds are intended to be used for sustainable development of the country. See United Nations SDGs, and the case of **NDPP -Vs- Rebuzzi** quoted in the case of **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** where the court stated 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 realization that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order...”*

**Issue No (iii) Whether the Respondent's right to property is violated**

103 The 1<sup>st</sup> Respondent contended that his right to property will be violated by the Applicant if the orders sought are granted. Article 40 provides for the right to property and every person has the right to acquire and own property of any description and in any part of Kenya. The said right to property does not extend to property which has been unlawfully acquired and this is provided under article 40(6) which states as follows;

*“...the rights under this article do not extend to any property that has been unlawfully acquired...”*

The above principal was emphasized in the case of **Teckla Nandjila Lameck-Vs- President of Namibia (supra)** and **Martin Shalli vs A.G. of Namibia** (supra)

104 Furthermore, as correctly submitted by the Applicant, the right to property sought by the 1<sup>st</sup> respondent is not absolute. The limitation of constitutional rights is provided under Article 24 of the Constitution. From the evidence adduced by the Applicant, the 1<sup>st</sup> Respondent's property known as Duplex Apartment Number C16 situated on L.R No.209/5990/13 Grant Number 18295/9 having been procured through funds fraudulently and unlawfully obtained from YEDF it is a proceed of crime and is not protected by Article 40 of the Constitution.

**Issue no. (iv) Whether the Forfeiture Application violates the Respondent's right to presumption of innocence**

105 In his affidavit and submissions, the 1<sup>st</sup> Respondent avers that they are entitled to the right of presumption of innocence which is provided under article 50(2) (a) of the Constitution of Kenya since the criminal proceedings against them are ongoing. My take on this is that **civil forfeiture proceedings are proceedings in rem** (against the property) and it **involves a civil suit being brought** in court against the property which is reasonably believed to be a proceed of crime. The proceedings before this Court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondents where presumption of innocence is applicable. Further the application for forfeiture is not made on behalf of the prosecution, but on behalf of ARA as held in *Serious Organized Crime Agency vs Gale* quoted in the case of *Assets recovery Agency & Others –vs- Audrene Samantha Rowe & Others Civil division claim No 2012 HCV 02120* where 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 conviction of any individual and thus there was no reason to apply the criminal standard of proof...”***

See also Phillips v The United Kingdom [2001] ECHR437 quoted in Martin shalir A.G. of Namibia (supra); Techla Nadjila Lameck vs Presidnet of Namibia (supra)

106 Simply put civil forfeiture proceedings are not subject to presumption of innocence which is a criminal law phenomenon. In the present case, the proceedings are civil forfeiture pursuant to part VIII of POCAMLA and are in respect of recovery of Duplex apartment number C16 situated on LR No.209/5990/13 grant number 18295/9 procured by the 1<sup>st</sup> respondent using unlawfully obtained funds plus the Kshs 8,800,000/- transferred to the 2<sup>nd</sup> Respondent as a purported loan. The 2<sup>nd</sup> Respondent will pay this money to the Applicant and will be released from any liability in respect of the money he received from the 1<sup>st</sup> Respondent.

107 Lastly, the grant of the forfeiture orders against property known as Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 and Ksh 8,800,000 is not affected by the outcome of the criminal proceedings where the 1<sup>st</sup> Respondent has been charged. Section 92(4) of POCAMLA states;

***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***

108 My conclusion is that the Applicant’s originating summons has merit and I allow it and enter Judgment with costs in the following terms:

a) An order of forfeiture is hereby issued against property known as Duplex apartment number C16 situate on L.R No. 209/5990/13 grant number 18295/9 and Kshs. 8,800,000 to the Asset Recovery Agency.

b) A vesting order is hereby issued transferring Duplex apartment number C16 situate on L.R No. 209/5990/13 grant number 18295/9 to the Asset Recovery Agency.

c) The Kshs 8,800,000 to be recovered from the 2<sup>nd</sup> Respondent

**Dated, signed and delivered this 21<sup>st</sup> day of September 2018 in open court at Nairobi.**

**HEDWIG I. ONG’UDI**

**JUDGE**