Assets Recovery Agency v Quorandum Limited (Anti-Corruption and Economic Crimes Civil Suit E021 of 2023) [2025] KEHC 4870 (KLR) (Anti-Corruption and Economic Crimes) (23 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E021 OF 2023

LM NJUGUNA, J

APRIL 23, 2025

BETWEEN

ASSETS RECOVERY AGENCY ..... APPLICANT

AND

QUORANDUM LIMITED ..... RESPONDENT

JUDGMENT

1. The Applicant, the Assets Recovery Agency is established under section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (herein after referred as (POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime.

2. The Applicant filed the Originating Summons dated the August 31, 2023 under sections 81, 90 and 92 of the *Proceeds of Crime and Anti- Money Laundering Act* and order 51 of the Civil Procedure Rules, seeking the following Orders:-

> "1. That this Honourable court be pleased to issue an Order declaring that Ksh. 1,075, 083.15 held in the respondent's bank account No. XXXXXXXXXXXXat SBM bank are proceeds of Crime and are liable for forfeiture to the Government.
>
> 2. That the Honourable court be pleased to issue an order that Ksh. 1,075,083.15 held in the respondent's account number XXXXXXXXXXXX at SBM bank be forfeited to the Government of Kenya.
>
> 3. That the Honourable court do issue an order that the funds forfeited in Prayer 2 above be deposited in account number XXXXXXXXXat Kenya

Commercial Bank, KICC branch in the name of Assets Recovery Agency on behalf of the Government of Kenya. Kenya.

4. That the Honourable court makes any other ancillary orders that it may deem fit and just for proper and effective execution of its orders.

5. That costs be provided for.

3. The application is premised on the grounds set out on it's body and on the supporting affidavit, sworn by CPL Isaac Nakitare, on August 31, 2023, in which he has averred that he is an investigator with the Applicant and that he was part of the investigators who undertook investigations of the fraudulent transfer of Ksh 180,894,946 from Youth Enterprise Development Fund (YEDF) bank account number XXXXXXXXXXXX to the Respondent Bank Account Number XXXXXXXXXXXX, both accounts at the time of the fraud were held at the former Chase Bank which was acquired by SBM Bank.

4. That the preliminary investigations revealed that the Respondent is a limited Liability company registered in 2010 registration Number CPR /2010/239743 following which, the investigating officers obtained court order in Misc Appl No E061/ 2023 and 2304/ 2015 authorizing them to restrict and investigate accounts suspected to have received funds from YEDP.

5. That the investigations established that the fraudulent transfer of the funds were facilitated by the former acting CEO of YEDF who is now deceased, the late Catherine Namuye, who unlawfully entered into two contracts with the respondent to provide two consultancies; one for provision of consultancy on design for an Enterprise Resource Planning at a cost of Ksh 114,909,946 and the other one for provision for consultancy on ICT strategy design at a cost of Ksh 65,985,000 whose cumulative cost was Ksh 180,894.946 but no services were rendered to the YEDF.

6. That on the 11th February, 2023, the late Catherine Namuye, instructed Ken Ouko, who was the Director in charge of Business Development at the former Chase Bank, Central Office to transfer Ksh 115,710,000 from YEDF fixed deposit bank account number XXXXXXXXXXXX to the Respondent's bank account number XXXXXXXXXXXX held in the same bank.

7. That the said instructions could not be acted upon as the bank had old account mandates for the YEDF account and required up to date mandates for the said account. Further, there was no Board resolution to proceed on any instructions on the YEDF Account.

8. That vide a letter dated the February 17, 2015, the late Catherine Namuye and the former Chairman of YEDF Board, one Mr. Bruce Odhiambo informed the General Manager of Chase bank, Ms Iman Hussein to change the signatories of the YEDF Chase bank account with new mandate indicating that the late Catherine Namuye could sign off any instructions and/or in her absence two signatories must sign with one being a mandatory signatory.

9. That on the February 23, 2015, pursuant to the above instructions and changes to the signatories, the bank transferred Ksh 115,710,000 into the Respondent bank account number XXXXXXXXXXXX. That on the April 27, 2015, the late Catherine Namuye further instructed the General Manager of Chase bank, Iman Hussein to transfer Ksh. 64,654,789 from the YEDF fixed bank account number XXXXXXXXXXXX to the respondent bank account number XXXXXXXXXXXX, making a total of Ksh 180, 364,789.

10. That during the YEDF Board meeting held on the October 21, 2015, the audit Committee reported to the YEDF Board members that over Ksh 180 million Shillings could not be accounted for, and

presented two letters showing transfer of payments of Ksh 65,184,046 and Ksh 115,710,000 from YEDF investment bank account held at Chase Bank to the Respondent's bank account.

11. The Applicant has contended that the purported change of signatories to YEDF bank accounts and payments made to the Respondent were unlawful since they were not approved by YEDF Board and no service was rendered by the Respondent. That the investigations established a clear case of fraud and theft of public funds which resulted in the prosecution of the Respondent alongside other suspects for the offence of acquisition of public property, conspiracy to commit economic crime among other offences before the Chief Magistrates in court file number ACC 13 of 2016 and were convicted.

12. That the respondent and one of its director, Mukuria Ngamau were convicted in the Anti-Corruption Case No. 13/2016 for conspiracy to commit economic Crime contrary to Section 47A as read with Section 48(1) of the Anti- Corruption and Economic Crimes Act, unlawful acquisition of public property contrary to Section 45(1) as read with Section 48(1) of the Anti- Corruption and Economic Crimes Act, and making a false document contrary to Section 347 as read with Section 349 of the *Penal Code*.

13. The Applicant further states that it filed Misc. Application No. 4 of 2017 against the Respondent herein on the 5th January,2017, for recovery of Duplex Apartment Number C16 erected on L.R No. 209/5990/13 purchased by the Respondent using the fraudulent funds from YEDF and Ksh. 8,800,000 loaned to Ezekiel Otieno Owuor, which assets were proceeds of crime, and vide a judgment delivered on the 21st September,2018, the Honourable court found on a balance of probabilities that the Duplex Apartment number C16 and Ksh. 8,800,000 were proceeds of crime and issued forfeiture orders of the said assets.

14. The Applicant avers that there are reasonable grounds to believe that the Ksh. 1,075,083.15 are part of the Ksh. 180,894,946 fraudulently transferred from YEDF to the Respondent's account and constitutes proceeds of crime liable for forfeiture pursuant to the Provisions of Proceeds of Crime and Anti- Money Laundering Act. The Applicant has urged the court to grant the orders it has sought to prevent the proceeds and economic advantage derived from the commission of the crimes, benefitting the suspect to the disadvantage of the general public interest.

15. The Respondent did not file any response to the application despite the court granting him several adjournments to enable him to do so.

16. The matter proceeded by way of written submissions and only the Applicant filed the same.

17. In its submissions, the Applicant identified two issues for determination as follows: -

    a. Whether the preserved Ks. 1,075,083.15 held in the Respondent's account are proceeds of crime liable for forfeiture to the Government.

    b. Whether the issuance of the forfeiture order will violate the Respondent's right to property.

Applicant's Submissions

18. The Applicant submitted that it has demonstrated that the Respondent was unlawfully contracted by the former CEO of YEDF, the late Catherine Namuye to provide two consultancies; one for provision of consultancy on design for an Enterprise Resource Planning at a cost of Ksh. 114,909,946 and the other one for provision of consultancy on ICT strategy design at a cost of Ksh 65,985,000 whose cumulative cost was Ksh 180,894,946 but no services were rendered to the YEDF.

19. The Applicant further submitted that it has also demonstrated that the late Catherine Namuye and the late Bruce Odhiambo unlawfully authorized the change of signatories of the YEDF account, and that

the late Catherine Namuye unlawfully authorized payment of a total of Ksh 180,894,946 from YEDF account Number XXXXXXXXXXXX to the Respondent's account number XXXXXXXXXXXX.

20. It was further submitted that the Applicant demonstrated that the Respondent and one of its directors, Mukuria Ngamau were convicted in Anti-Corruption case number 13 of 2016 and that, it also obtained judgment against the Respondent herein, in Anti-Corruption and Economic Crimes Misc. Application No 4 of 2017 for recovery of duplex Apartment Number C 16 which the Respondent had purchased using the fraudulent funds from the YEDF and Ksh 8,800,000 loaned to Ezekiel Otieno Owuor after the court found that they were proceeds of crime and issued forfeiture orders of the said assets. That the Respondent has not denied receiving the fraudulent payments from YEDF nor has it tendered any evidence to controvert the same.

21. In support of this issue, the Applicant has referred to various decisions to wit;

    a. Schabir Shaik & Others v State CCT/06 (2008) ZACC7

    b. Assets Recovery Agency v James Thuita Nderitu & Others (2020) eKLR

    c. Assets Recovery Agency v Felista Nyamathira Njoroge & another (Misc. application No. E006 of 2022)

    d. Assets Recovery Agency v Lilian Wanja Muthoni Mbogo & Others (2020) eKLR

    e. Assets Recovery Agency v Joseph Wanjohi & 3 0thers (2020) eKLR

    f. Assets Recovery Agency v Rose Monyani Musanda & Others Civil Application No 2 of 2020

    g. Schabir Shaik & Others v State Case CCT 86/06 (2008) ZACC7

    h. Assets Recovery Agency v Quarandum Limited & 2 others (2018) eKLR

22. On whether the issuance of forfeiture order will violate the Respondent's right to property, the Applicant relied on article 40(6) of *the Constitution* which does not protect any property that has been unlawfully acquired. Reliance was placed on the following cases:-

    a. Tecla Nandjila Lameck v President of Namibia 2012 (1) NR 255 (HC)

    b. Martin Shalli Vs. Attorney General of Namibia High court of Namibia case no POCA 9 of 2011

    c. Assets Recovery Agency v James Thuita Nderitu & Others, ACEC Civil Suit No 2 of 2019.

23. The court has considered the Originating Summons, the Applicant's submissions and the authorities relied on.

24. As submitted by the Applicant, the two issues for determination are as follows;

    a. Whether the preserved Ksh 1,075,083.15 held in the Respondent's account is proceeds of crime liable for forfeiture to the Government.

    b. Whether issuance of forfeiture order will violate the Respondent's right to property.

Analysis And Determination

25. The Applicant herein is established under Section 53 of the Proceeds of Crime and Anti- Money Laundering Act as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of Crime. Under Part VIII of the POCAMLA, the Applicant has authority to institute Civil

proceedings for the recovery of proceeds of Crime and seek orders for forfeiture of such assets to the Government where there are reasonable grounds to believe that such assets are proceeds of crime.

26. Section 2 of the POCAMLA define proceeds of crime as follows:-

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

27. The matter herein is premised on an investigation that was conducted by the Applicant's team of investigators following allegations of a fraudulent transfer of funds amounting to a total of Ksh 180,364,789 from YEDF bank account number XXXXXXXXXXXX to the Respondent's bank account Number XXXXXXXXXXXX which accounts were both held at the former Chase bank.

28. The investigations established that the fraudulent transfer of the funds were facilitated by the former acting CEO of the YEDF, the late Catherine Namuye who unlawfully entered into two contracts with the Respondent for provision of consultancy on design for an Enterprise Resource planning and the other was for provision of consultancy on ICT strategy design, at a cost of Ksh 114,909,946 and Ksh 65,985,000 respectively, but no services were rendered to the YEDF.

29. The Applicant produced before the court two service agreements between the Respondent herein and the YEDF both dated the 17th November, 2014 for the provision of services that the Applicant has alluded to, in its pleadings, for a total sum of Ksh 180, 894,946 for both contracts.

30. The evidence before the court shows that the money was paid by the YEDF from funds that were held in its account number XXXXXXXXXXXX, to the Respondent's account number XXXXXXXXXXXX and both accounts were held at the former Chase Bank. The payments were authorized by the then acting CEO, the late Catherine Namuye and the former Chairman to the YEDF, Bruce Odhiambo after they unlawfully authorized the change of signatories of YEDF account. This was done vide the letter dated the 17th February, 2015 which was written by Bruce Odhiambo to the Manager, Chase Bank Kenya Limited.

31. The change of signatories was done after Chase bank wrote the letter dated the 13th February, 2015 in which, the bank indicated it was unable to act on the YEDF's CEO's letter of instructions dated the 11th, February,2015, to debit YEDF's account with Ksh 115,710,000.00 and make payment to the Respondent herein. In its letter dated 13th February, 2015, the bank stated that it was unable to act on the instructions because it had in its possession old account mandates and it required up to date mandates for YEDF, and a Board resolution for it to proceed on any instructions on the said account.

32. The court notes that no Board resolution was availed to the Bank and in it's meeting that was held on the 21st October, 2015 the Committee presented two letters to the YEDF Board showing the transfer of payments to the respondent's account, and in the said meeting the PS advised the members to immediately call in the CID and the Anti-Banking Fraud Unit to undertake forensic Investigations on the reported payments. This therefore means that there was no Board resolution authorizing the two payments.

33. The investigations by the Applicant established a case of theft of public funds which resulted in the prosecution of the Respondent and other suspects for the offence of unlawful acquisition of public property, conspiracy to commit Economic crimes among other offences, in ACC Number 13 of 2016

and the Respondent and one of its directors, one Mukuria Ngamau were found guilty and convicted of conspiracy to commit Economic crimes and unlawful acquisition of public property.

34. Further, the Applicant has produced evidence before the court proving that, it filed Misc Application number 4 of 2017 for recovery of Duplex Apartment Number C16 which the Respondent had purchased using the fraudulent funds from YEDF and Ksh 8,800,000 loaned to Ezekiel Otieno Owuor which assets the High court found were proceeds of crime. There is no evidence before the court to show that the Respondents has appealed against any of the two judgments.

35. The Respondent has not denied that it entered into the two service contracts and that the two payments were made into its account.

36. In the case of Assets Recovery Agency v James Thuita Nderitu & 6 others (2020), the court while dealing with a similar case stated;

> " .....in its view , there are reasonable grounds to believe that the Respondent accounts were used as conduits of money laundering contrary to sections 3, 4 and 7 as read with section 16 of POCAMLA since the Respondent has failed to provide even an iota of evidence to show how the suspect funds from NYS were received in their accounts and for what particular purpose , the Respondents are beneficiaries of proceeds of crime and the funds in the said account are proceeds of crime as they were obtained directly as a result of money laundering predicate offence....."

37. Similarly, in the case of Asset Recovery Agency vs. Felista Nyamathira (supra), the court stated: -

> " It is my finding that the cash deposits were suspicious in the circumstances and the evidential burden therefore properly shifted to the respondent to prove not only the Source of the funds but that the source of the fund was a legitimate one."

38. Also in the case of Lilian Wanja Muthoni Mbogo (supra), in which the court stated:-

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

39. In the case herein, the Respondent chose not to defend the case. There is no explanation on whether it offered the services that it was contracted to do, so as to legitimize the purpose for which the payment was made. In any event, the Applicant has already provided sufficient evidence to prove that the payment to the Respondent was not legitimate.

40. On whether the issuance of forfeiture Order will violate the respondent's right to property, article 40 of *the Constitution* provides that protection of right to property under that article does not extend to any property that has been found to have been unlawfully acquired. See the case of Assets Recovery Agency v James Thuita (supra)

41. In the end, and based on the foregoing, the court finds that the Applicant has proved its case on a balance of probabilities that the funds in issue held in the Respondent's account was fraudulently obtained and thus, it is proceeds of crime and liable for forfeiture. I hereby enter judgment in favor of the Applicant against the Respondent in the following terms: -

a. An order is hereby issued declaring that Ksh 1,075,083.15 held in the Respondents' Bank account Number XXXXXXXXXXXX at SBM bank is proceeds of crime

b. An order is hereby issued that the Ksh 1,075,083.15 held in the Respondent's bank account XXXXXXXXXXXX at SBN bank be forfeited to the Government of Kenya.

c. An order is hereby issued that the funds forfeited in prayer (2) above, be deposited in account number XXXXXXXXX at Kenya Commercial ssBank, KICC Branch in the name Assets Recovery Agency on behalf of the Government of Kenya.

d. The Applicant is awarded the costs of the suit.

42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF APRIL 2025.

.....

L.M. NJUGUNA

JUDGE

In the presence of:-

Mr. Kandie holding brief for Miss Muchiri for the Applicant

Court Assistant – Adan