Assets Recovery Agency v Jonam (Anti-Corruption and Economic Crimes Civil Suit E032 of 2024) [2025] KEHC 5551 (KLR) (Anti-Corruption and Economic Crimes) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E032 OF 2024

BM MUSYOKI, J

MAY 2, 2025

BETWEEN

ASSETS RECOVERY AGENCY ..... APPLICANT

AND

DAVID NJOROGE JONAM ..... RESPONDENT

JUDGMENT

1. The applicant is a statutory body established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (hereinafter referred to as 'POCAMLA') with mandate of identifying, tracing, freezing and recovering proceeds of crime. Pursuant to this mandate, the applicant has brought this matter vide originating motion dated 18th September 2024 praying for the following orders;

    a. This Honourable Court do issue orders declaring the motor vehicle registration number KDA 678W, Toyota succeed in the name of David Njoroge Jonam as a proceed of crime liable for forfeiture to the applicant.

    b. This Honourable Court be pleased to issue orders of forfeiture of the motor vehicle in prayer 1 above to the Assets Recovery Agency on behalf of the government.

    c. This Honourbale Court be pleased to issue an order directing the Director General of the National Transport Authority to register the motor vehicle specified in order 2 above in the name of the applicant, Asset Recovery Agency.

    d. The Honourable Court do make any other ancillary orders it may deem fit for the proper and effective execution of its orders.

    e. Costs be provided for.

2. The ground upon which the application is brought are on the face of it and are mainly that the motor vehicle in question has been used for furtherance or commission of a criminal offence of trafficking in persons contrary to section 3(1)(d) as read together with Section 3(5) of the *Counter-Trafficking in Persons Act* Chapter 61 of the Laws of Kenya. The grounds are expounded in the supporting affidavit of the applicant's investigator one Duncan Odhiambo sworn on 18th September 2024.

3. The deponent of the supporting affidavit avers that on 22-11-2022, the applicant received information from the International Organized Crime Unit of the Directorate of Criminal Investigations about a suspected case of trafficking in persons. Upon receipt of the information, the applicant conducted investigations which revealed that on 14th July 2022, a multi-agencies team while acting on intelligence intercepted motor vehicle registration number KDA 678W (hereinafter referred to as 'the vehicle') along Sakaita-Maktau road in Tsavo West National Park while being driven by one Yasin Khalifa Mboa. The driver was unable to give proper account about himself and was as a result arrested and detained at Taita Taveta police station where his mobile phone was confiscated and analysed revealing that he had been in contact with an unknown person who had instructed him to ferry four people suspected to be aliens to Taveta from Voi direction.

4. At 9.00 am the same day, Kenya Wildlife Services officers intercepted two suspicious motorcycles with 7 people among them the respondent. Of these, three were Kenyans while the other four could not communicate due to language barriers and were believed to be foreign nationals. Upon interrogation at the police station, the four who could not communicate were found to be Ethiopian nationals who were believed to be in the country illegally. It was also established that the Ethiopian nationals were earlier ferried in the motor vehicle in question in this matter but were handed over to the motor cycles riders to avoid arrest as they had noticed that the police were pursuing them. This motor vehicle was found to belong to the respondent.

5. Following the above, the respondent and others were charged in Taveta law courts with the offence of trafficking in persons vide criminal case number E449 of 2022. Through warrants issued in this court's miscellaneous civil application number E025 of 2024, the motor vehicle was preserved. Analysis of the respondent's mpesa statement showed that he was receiving money on daily basis and it was not clear for what purpose as the respondent failed to give clear information on his nature of business and sources of the funds.

6. It is averred that the respondent has also failed to honour summons by the applicant calling upon him to visit its offices for purposes of recording statement or giving information. The applicant believes that the funds used to buy the motor vehicle were proceeds of crime accrued from trafficking in persons and for those reasons it prays that the application be allowed.

7. The respondent was served with the application and appointed the firm of John Bwire & Associates Advocates to represent him in this matter. The respondent has been represented in all the occasions the matter has appeared in court. In these appearances, seven to be precise, the respondent has been asking the court for time to file replying affidavit but none has been filed. What the respondent has filed are grounds of opposition dated 21-11-2024 and submissions dated 24-02-2025. When the matter came for mention before me on 11-03-2025 the advocate for the respondent told me that he had complied and asked the court to give a date for judgment. Based on this, the court believes that the respondent has chosen to rely on the grounds of opposition and not to file any replying affidavit. The grounds of opposition are;

    1. The application is premature and misconceived because it is based on allegations that are yet to be proven in an ongoing a criminal case thus contrary to the principle of presumption of innocence under Article 50(2)(a) of *the Constitution*.

2. The application violates due process and constitutional rights.

3. It fails to meet the threshold for forfeiture under POCAMLA.

4. The application is based on unsubstantiated allegations.

5. It fails to consider legitimate ownership and third party risks.

6. There is premature invocation of forfeiture provisions.

7. It is a violation of fair trial rights.

8. There is misrepresentation of facts.

9. It is an abuse of court process.

10. There is no evidence of illegal use of the property.

11. It is incompetent

12. Granting the application will be against the interest of justice and equity.

8. I have read and considered the supporting affidavit, the grounds of opposition, the submissions of the applicant dated 21st November 2024 and those of the respondent dated 24th February 2025. Although the applicant avers that the funds used to purchase the motor vehicle were proceeds of crime, there is no direct evidence to prove the same. However, the facts and evidence produced by the applicant point to the vehicle having been used in commission of an offence. If the facts pleaded by the applicant are correct, the vehicle would be liable to forfeiture under Section 92(1)(a) of POCAMLA which provides 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 has been used or is intended for use in the commission of an offence'

9. The applicant has given chronology of the events leading to the arrest and charging of the respondents and others. The respondent has chosen not to reply to the issues of facts and this court has no alternative but to take them as the true position. Issues of facts cannot be presented to court by way of grounds of opposition or submissions. This court holds that the applicant has established on a balance of probabilities that the motor vehicle was used to commit an offence of trafficking in persons which is a known offence. In that regard, the respondent was obligated to rebut the evidence of the applicant which he has failed to do.

10. The respondent has argued that the application is premature because it is based on the same allegation as in Taita Taveta court criminal case number E449 of 2022 and in that case, it violates the principle of innocence until proven guilty and in breach of Article 50(2)(a) of *the Constitution*. This is a civil forfeiture under Section 90(1) of POCAMLA. In civil forfeitures, the court is not bound to consider the merits of the predicate offence. In **Assets Recovery Agency v Kivaa Ventures Limited (2023) KEHC 21315 (KLR)** Honourable Justice E.N. Maina restated this position in law thus;

> 'It is trite that in civil forfeiture proceedings, it is immaterial that the suspect has been charged, tried, or convicted of a criminal offence. (See Section 92 (4) of the POCAMLA). Provided that the Applicant proves on a balance of probabilities that the funds are proceeds of crime then a forfeiture order shall issue.'

11. The standard of proof in civil forfeiture is on a balance of probabilities while in criminal cases, the standard is that of beyond reasonable doubt. This difference is justified by the principle that the criminals should not be allowed to reap benefits or enjoy tainted fruits of their criminal activities because of lack of sufficient evidence to convict in criminal proceedings whose standard of proof is high. Many offenders escape criminal culpability because of the intricacies of collection of evidence and the complex nature of their operations where proceeds from their acts are laundered in a manner that the trail of the movement of the proceeds is lost. That is why the law on forfeitures focuses on the property rather than the offenders. In **Muazu Bala v Asset Recovery Agency; Chief Executive Officer, Kenya Airways (Interested Party) (2020) KEHC 852 (KLR)** it was held that;

> 'The proceeds of this nature are independent of any criminal proceeding which may be instituted or ongoing against the person and is not dependent upon conviction. The agency need not prove any predicate offense so as to succeed at the civil forfeiture stage. The applicant is only supposed to satisfy the court that there are reasonable grounds to believe that the property in question is a proceeds of crime and or is to be used in a criminal activity.'

12. It is therefore not a requirement or necessary for the applicant to wait for the conclusion of the criminal case before it files for forfeiture. Actually, even an acquittal in the criminal case would not be relevant to the civil forfeiture and will not assure the respondent of escape liability in this matter. I agree with the holding in **Assets Recovery Agency v Stephen Vicker Mangira & 2 others; Ali Cars Limited (Interested Party) (2021) KEHC 4201 (KLR)** that;

> 'Therefore, it would appear to me, and I so hold, that the validity of preservation orders which lay the basis of the forfeiture proceedings is not predicated on the existence of a conviction or an affirmation of a predicate offence. In the former, the Asset Recovery Agency has to lead evidence in the forfeiture proceedings to prove that the subject property are proceeds of crime, independent of what happens in the criminal case. It is until then, and only then, that the court can pronounce itself on whether the subject property has to be forfeited to the state as proceeds of crime or to be released back to the Defendant.'

13. A party who finds himself confronted with an application for forfeiture must defend the same by producing evidence enough to rebut the claim by the applicant. The argument that the application violates Article 50(2)(a) of *the Constitution* is therefore unmerited as the said Article deals with hearings in criminal matters whereas what is before this court is an application for civil forfeiture.

14. The respondent has also claimed that the application violates due process and constitutional rights without elaborating the argument. To my understanding, due process requires that the respondent be granted his rights of fair hearing and that the application be heard in compliance with the law and rules of procedure. The respondent has not pointed out what law or process has been breached by the filing and prosecution of this matter and I see none. The respondent does not deny having been properly served with the application and he has actually replied to the same. The matter appeared before the Deputy Registrar for pre-trial six times where the respondent had always asked for time to file response which was always granted. He exercised the right to respond by fling grounds of opposition and submissions. His right to be heard has been respected and granted. Right to be heard does not mean that the party must be given indefinite time to present their case and in any event the respondent has never asked for time or an adjournment and denied. I find that ground lacking in merits.

15. The respondent has also sought reliance on section 65 of POCAMLA and submits that the applicant must prove that an offence was committed and that the property which is the subject of the application was acquired through commission of the offence in issue. The respondent does not specific which of

the 5 subsections of the said Section he relies on in this argument. I have looked at the whole Section and I see nothing close to the line of argument presented by the respondent. in any case, the said Section is applicable in matters involving criminal forfeiture and in the circumstances, it is not applicable in this matter. For clarity, the said Section provides as follows;

1. For the purpose of determining whether a defendant has derived a benefit in an inquiry under section 61(1), if it is found that the defendant did not, at the fixed date, have legitimate sources of income sufficient to justify the interests in any property that he holds, the court shall accept this fact as prima facie evidence that the interests form part of the benefit.

2. For the purpose of an inquiry under section 61(1), if it is found that a court had ordered the defendant to disclose any facts under section 64(5) and that the defendant had without sufficient cause failed to disclose the facts or had, after being so ordered, furnished false information, knowing that information to be false or not believing it to be true, the court shall accept these facts as prima facie evidence that any property to which the information relates-

    a. forms part of the defendant's benefit, in determining whether he has derived a benefit from an offence; or

    b. is held by the defendant as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 61(1).

3. For the purposes of determining the value of a defendant's proceeds of crime, in an inquiry under section 61(1) if the court finds that defendant has benefited from an offence and that the defendant held property at any time, or since, his conviction, the court shall accept these facts as prima facie evidence that the property was received by him at the earliest time at which he held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 61(1).

4. If the court finds that the defendant has benefited from an offence and that expenditure had been incurred by him since the beginning of the period contemplated in subsection (3), the court shall accept these facts as prima facie evidence that the expenditure was met out of the advantages, payments, services or rewards, including any property received by him in connection with the offences or related criminal activities referred to in section 61(1) committed by him.

5. For the purpose of determining the value of any property in an inquiry under section 57(1), if the court finds that the defendant received property at any time as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in that subsection committed by the person or by any other person, the court shall accept this fact as prima facie evidence that that person received that property free of any other interest therein.'

16. The position in law is that the applicant only needs to establish a prima fascie case upon which the respondent is supposed to show that he has legitimate source of income which could be sufficient to acquire the property in question. The respondent has chosen not to show his source of income except for stating in his submissions that he is a well known farmer in Taita Taveta. He does not provide evidence or details of the kind of farming he doses neither has he given account of how much he makes from the alleged farming.

17. Analysis of the respondent's mpesa statement which he has not denied shows that he has been receiving money on regular basis, sources of which have not been explained. He has not denied that he was arrested in the company of aliens who could not explain themselves or their missions in the country. The vehicle was used to carry the Ethiopians and the respondent is silent on the same. On this basis, I

find that the respondent has not only failed to explain his sources of income but has also failed to rebut evidence that the vehicle was used for commission of a criminal offence.

18. It is argued that the vehicle was bought in 2020 while the alleged offence was committed in 2022 and as such the same could not have been purchased using proceeds of crime committed in 2022. The fact that the respondent was caught in 2022 does not mean that he was not involved in the same activities previously. It was upon the respondent to rebut the allegations by telling the court what he used to do in 2020 and where he sourced the funds to purchase the motor vehicle otherwise the court is called upon by the law to impute that the respondent has been involved in the criminal activities for the period going back to the acquisition of the motor vehicle. Again, even if the vehicle was not bought using proceeds of crime, it was caught being used to commit an offence. This perfectly places the vehicle under section 92(1)(a) of the POCAMLA.

19. The respondent has also submitted that whereas he is aware of the position in law that forfeiture proceedings are civil and are not affected by the outcome of criminal proceedings, he invites the court to consider that the court in the criminal case would be swayed or influenced by an order of forfeiture in this matter. It must be understood that the judgement herein should not have a bearing on the criminal case as the standard of proof in the two matters are different. Again, this court is not expected to make an order giving directions on how the criminal proceedings should be conducted or prosecuted. This court believes that the trial court in the criminal case is competent and knowledgeable enough to exercise its independence on the issues and evidence produced before it. This court and the trial court in the criminal case are exercising totally different jurisdictions. That argument in my view is misplaced and has no legal basis.

20. The conclusion of the above analysis is that the court finds that the applicant has met the threshold for granting the prayers sought. I therefore make the following orders.

    a. A declaration is hereby issued that motor vehicle registration number KDA 678W, Toyota Succeed registered in the name of David Njoroge Jonam is a proceed of crime and is liable to be forfeited to the applicant.

    b. Motor vehicle registration number KDA 678W, a Toyota succeed is hereby forfeited to the Assets Recovery Agency on behalf of the government.

    c. The Director General of the National Transport Authority is hereby directed to transfer and register the motor vehicle registration number KDA 678W a Toyota succeed to the Asset Recovery Agency.

    d. There shall be no orders as to costs.

Dated signed and delivered at Nairobi this **2nd day of May** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of Mr. Kandie for the applicant and Mr. Kilumo holding brief for Mr. John Bwire for the respondent