



Assets Recovery Agency v Auma; Mwananchi Credit Limited (Interested Party) (Anti-Corruption and Economic Crimes Civil Suit E028 of 2024) [2025] KEHC 7814 (KLR) (Anti-Corruption and Economic Crimes) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7814 (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 E028 OF 2024**

BM MUSYOKI, J

JUNE 5, 2025

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

RUTH ATIENO AUMA RESPONDENT

AND

MWANANCHI CREDIT LIMITED INTERESTED PARTY

JUDGMENT

1. The applicant is statutory body established under Section 53 of the Proceeds of Crimes and Anti-Money Laundering Act Chapter 59A of the Laws of Kenya (hereinafter referred to as 'POCAML') with mandate of identifying, tracing, freezing, investigating and recovering assets which were acquired through or by use of proceeds of crime. The law allows the applicant to make application to forfeit any property suspected to be proceeds of crimes.
2. In its efforts of discharging the statutory mandate, the applicant has approached this court for the following orders;
 1. That this Honourable Court be pleased to issue an order declaring that Mavoko Municipality Block 40 parcel number 63 approximately 0.0465 Ha. Registry Map Sheet No. 1 (148/4/5) is proceeds of crime and therefore liable for forfeiture to the Applicant.
 2. That this Honourable Court be pleased to issue orders of forfeiture of the following asset;



- a. Mavoko Municipality Block 40 parcel number 63 approximately 0.0465 Ha. Registry Map Sheet No. 1 (148/4/5).
 - b. That this Honourable Court be pleased to issue vesting order and order that the Mavoko Municipality Block 40 parcel number 63 approximately 0.0465 Ha. Registry Map Sheet No. 1 (148/4/5) be forfeited to the Applicant and transferred to the Assets Recovery Agency.
3. That this Honourable Court be pleased to issue an order declaring that motor vehicle registration numbers XXX XXXX Toyota and motor vehicle registration number XXX XXXX Toyota and owned by the Respondent are proceeds of crime and therefore liable for forfeiture to the Applicant.
4. That this Honourable Court be pleased to issue an order of forfeiture of the following motor vehicle to the Applicant:
 - a. Motor vehicle registration numbers XXX XXXX Toyota.
 - b. Motor vehicle registration number XXX XXXX Toyota.
5. That this Honourable Court be pleased to order the National Transport and Safety Authority (NTSA) to register the following motor vehicles in the name of the Assets Recovery Agency.
 - a. Motor vehicle registration numbers XXX XXXX Toyota.
 - b. Motor vehicle registration number XXX XXXX Toyota.
 - c. THAT this Honourable Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Applicant.
 - d. THAT costs be paid by the Respondent.
3. The grounds upon which the originating summons motion dated 6-09-2024 has been brought are that the respondent acquired the said properties using funds generated from dealing or trading in narcotics substances contrary to Section 4A of the Narcotics and Psychotropic Substances (Control) Act. It is alleged that on 14-08-2022, the respondent was arrested at Gilgil weighbridge along Nakuru - Nairobi highway during which 368.5 kilograms of green substance was recovered from her. During the arrest, motor vehicle XXX XXXX, 9 sacks of green plant material stored in the motor vehicle and a police abstract for one Paul Otieno Ochieng were recovered. The green substance was later tested at the Government Chemist and confirmed to be cannabis with a street value of Kshs 11,055,000/=. The 1st respondent was subsequently charged with the offence of trafficking narcotic drugs in JKIA law courts vide criminal case number 37 of 2020.
4. It is deponed in the supporting affidavit of one Nicholas Sune an investigator with the applicant that, upon receiving information of the respondent's arrest and arraignment, it commenced investigations on her assets and the source of the same which investigations discovered the properties which they seek to forfeited were registered to the respondent. Through miscellaneous application number E086 of 2023, the applicant obtained warrants to search and inspect bank accounts and mobile lines which were in the name and controlled by the respondent.
5. The supporting affidavit has enumerated five bank accounts held with Absa Bank. The investigator's analysis of the accounts established that they received suspicious deposits most of which were in tranches below Kshs 1,000,000.00 to evade reporting threshold as per the Central Bank of Kenya prudential guidelines for an account holder to declare the source of the money.



6. The applicant made a conclusion that the properties it seeks to forfeit was obtained from the proceeds of dealing with narcotics drugs and therefore proceeds of crimes. Based on this conclusion, the applicant obtained a preservation order vide this court's miscellaneous civil application number E021 of 2024 on 7-06-2024 and thereafter filed this origination motion.
7. The respondent opposes the application through her replying affidavit sworn on 3rd December 2024. She has admitted that she is the owner of Mavoko Municipality Block 40 parcel number 63 and motor vehicles registration numbers XXX XXXX and XXX XXXX. She does not in the relying affidavit indicate where and how she acquired the said properties. She has also admitted that she was arrested in August 2020 and charged of trafficking of narcotics and psychotropic substances but urges that, that alone should not negate the fact that her assets have been acquired through hard work and legitimate business.
8. The respondent depones further that she has a constitutional right to acquire and own property under Article 40 of *the Constitution* and the onus of proving that the properties were acquired through illegitimate means is on the applicant which it has failed to do as the application is based on mere suspicions. She adds that during the pendency of the criminal case, she was able to demonstrate that motor vehicle registration number XXX XXXX legitimately belonged to her leading to its release to her vide a court order dated 6th June 2024 which order she has not attached to the affidavit despite making reference to it as an exhibit. The respondent has not given any explanation on how she acquired the properties or the kind of business she is involved in and how she generates her income.
9. The interested party filed a chamber summons application dated 24th October 2024 seeking to be struck out from the proceedings as it had no interest in motor vehicle registration number XXX XXXX because the same was used as security for a loan advanced to one Brian Omondi Ouma which was guaranteed by the respondent. The interested party adds that the loan was cleared on 18-06-2024 and it discharged the motor vehicle and as such it no longer had interested in it. On 20-01-2025, I ordered that the chamber summons shall be considered as the interested party's response to the originating motion.
10. The application was disposed of by way of written submissions. The applicant and the respondent filed their respective submissions but the interested party has not. I have read the submissions of the applicant dated 31st January 2025, the respondent's submissions dated 11th March 2025, the affidavits of the parties and the annexures produced as exhibits in the matter.
11. The ownership of the assets mentioned in the originating motion is not disputed. It is also common ground that the respondent was arrested and charged with offence of trafficking narcotic drugs. The replying affidavit does not deny that the cannabis referred to was recovered from her. There is also no dispute that the statements attached to the applicant's supporting affidavit belong to the respondent and their contents is not contested. There is also no dispute that the interested party no longer has interest in motor vehicle registration number XXX XXXX.
12. The respondent's defence in this matter as far as I understand is that the applicant had a duty to prove the nexus between the alleged narcotic drugs or illegitimate business with the acquisition of the properties. In matters of forfeiture, the law is that the legal burden of proof lies with the applicant while the evidentiary burden lies with the respondent. What this means is that the applicant has a duty to lay basis that it is probable that the assets it targets are proceeds of crime. The proof may be direct and tangible evidence or circumstantial. Where the applicant relies on circumstantial evidence, the court must be convinced that owing to the circumstances of the case as laid, the targeted assets are more probable than not proceeds of crimes.



13. Once the applicant establishes a prima facie case that the properties it seeks to forfeit are proceeds of crime, the respondent is called upon by the law to produce evidence that the assets were obtained through legitimate business or earnings. In my view, the respondent would not have to prove with strictness the way of acquisition of the assets but must at least show the court that she does legitimate business which is capable of acquiring such assets or at least show the source of the funds for which she used to acquire the property in question.

14. But before then, the applicant has a duty to connect the assets to a probable crime which crime does not have to be proved. Where the applicant fails to establish a prima facie case, the respondent has no duty to disclose their financial statements or affairs. The law does not give the applicant a blank cheque to make allegations against the respondent which are not supported by evidence and expect the court to demand disclosure of financial affairs of the respondent. The applicant must execute its mandate of identifying, tracing, investigating and recovering proceeds of crime. This mandate includes proper investigations and not mere suspicions. In *Assets Recovery Agency v Namunyu & 2 Others* (2024) KEHC 7954 (KLR), the court held that;

‘ The thread running through statutes on civil forfeiture require such testimony and other evidence as the court deems sufficient, to satisfy the court that the property is not proceeds of crime or unexplained assets.

Except, however, failure to offer rebuttal evidence does not necessarily mean forfeiture order will be issued as a matter of course. Forfeiture order is made because the applicant has proved its case to the required standard; after consideration of the evidence tendered by the applicant and any rebuttal evidence offered. Forfeiture order will be declined where the applicant has not proved the case on a balance of probabilities.

See *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR, where the Court found that where both parties' explanations are equally (un)convincing, the party bearing the burden of proof (the applicant) will lose, because the requisite standard will not have been attained.’

15. In this case, the applicant has brought evidence that the respondent was arrested with narcotic drugs with a street value of Kshs 11,055,000.00. The respondent admits having been arrested but does not expressly admit the possession except that she has been charged in JKIA law courts in connection to the said drugs. It is the position of the law that the applicant does not have to wait for determination of the criminal case because the outcome of the criminal case will not affect the validity of the orders in these forfeiture proceedings. The standards of proof in the said criminal case is different from and higher than the that required in this case. This is in line with Section 92(4) of POCAMLA which states that;

‘ The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.’

16. I have gone through the statements and documents produced by the applicant which show that;

- a. Account number XXXXXXXXXXXX had an opening balance of Kshs 2,911.45 on 1-01-2020 and ends with Kshs 2,928.85 on 5-10-2020. That is a period of nine months and I do not see any significant deposit or withdrawals in the said account.
- b. Account number XXXXXXXXXXXX opens with a credit balance of Kshs 68,561.75 on 1-01-2020 and closes with Kshs 73,809.20 on 31-12-2020. The deposits in this account average Kshs 5,000.00 per month with only three withdrawals of Kshs 10,000.00 twice and Kshs 30,000.00



once. I also see no significant deposits which can lead someone to suspect probable illegitimate business.

- c. Account number XXXXXXXXXX opens with a zero balance on 1-01-2020 and the first deposit of Kshs 20,000.00 was on 4-12-2020. There are flagged three deposits totaling to Kshs 790,000.00 within a span of five days in that month.
 - d. The much transacted account is XXXXXXXXXX which opened with a credit balance of Kshs 1,062,125.00 on 3-01-2020 and closes with 59,245.00 on 2-11-2020 with substantial deposits and drawings of large amounts of money at some point over Kshs 30,000,000.00.
 - e. Account number XXXXXXXXXX started the year 2020 with a zero balance and has only two debits totaling to Kshs 8,431,693.80 in December 2020 and a credit of Kshs 101,411.00 but it appears to me to be a loan account.
 - f. The mpesa statement for line number 0717XXXXXX46 runs from 28-09-2020 to 31-12-2020 with fifty seven pages with significant and substantial deposits.
 - g. The mpesa statement for line number 0710XXXXXX86 runs from 1-01-2020 to 31-12-2020 with 21 pages with significant deposits and withdrawals.
17. The above transactions were made the same year the respondent was arrested. It is notable that the applicant has not sought to forfeit money in the said accounts. This court therefore assumes that the purposes of exhibiting the accounts statement was to show that the respondents was making transactions through the same. Since it has not made a prayer for forfeiture of the money in the said accounts, it follows that the applicant had no interests in the money therein but the property allegedly acquired using the said money. In that case, the applicant had a duty to draw nexus between the assets it seeks to forfeit and the transactions in the said accounts.
18. The applicant has not told the court why it concentrated on the year 2020 only in respect of the transactions whereas the motor vehicles it seeks to forfeit were acquired outside this period. Motor vehicle registration number XXX XXXX was registered on 6-12-2019 but one would not tell whether it was bought with proceeds of crime. The copy of records exhibited shows that the respondent was the first and the only owner. I do not see any difficulties the applicant would have faced in tracing where the motor vehicle was purchased from as such information is easily obtainable from the National Transport and Safety Authority. Getting the information of the seller would have given a trail of how the purchase price was moved. Was it moved from the accounts the applicant investigated? This court wouldn't know because the applicant did not provide statements for 2019.
19. Motor vehicle XXX XXXX was registered on 13-05-2021 when the respondent had already been arrested but before the preservation orders were issued. Again, it is not explained why the applicant did not provide the court with its investigations surrounding the acquisition of this motor vehicle. There are no bank statements or mpesa statements beyond December 2020 neither is there trail of funds leading to the acquisition of the motor vehicle. Further the several persons showed to have transacted in both bank and mpesa accounts have not been identified although their mobile contacts are in the statement. The applicant has not flagged a single transaction which it investigated and traced to a suspicious act. The only suspicions in this matter are deposits in 2020.
20. The title deed for Mavoko Municipality Block 40/63 shows that it was issued on 27th October 2020. The title is charged to Absa Bank Kenya Limited for Kshs 8,400,000.00. Where a property is charged, the same cannot be forfeited without giving the chargee an opportunity to be heard. I stated earlier that account number XXXXXXXXXX is a loan account and judging by the dates of the entries in the account and the charge registered on the property, it will be safe to take it that the property was bought



using the facility advanced to the respondent by the bank as per the said statement. The applicant should have demonstrated to this court that the repayments of the loan were from proceeds of crimes which would have justified forfeiture. It is my finding that the applicant has not sufficiently connected this property to any proceeds of crime.

21. In my view, the applicant's mandate of tracing and investigating do not end with physically tracing or seizing the assets and their ownership or title documents. The applicant has a duty to investigate the root of the title and connect it on a balance of probabilities to the funds alleged to be proceeds of crime. It is not enough for the applicant to give a general statement that their investigations show that the assets are proceeds of crimes. If the applicant gets the information through its investigations, it should disclose it to court and not keep it to itself.
22. This is a trend I have seen in other applications of this nature made to this court and in my view, it is time the applicants upped their game. Allowing the trend to continue would encourage the applicant and other investigative state agencies to make general statements and allegations in respect of anyone arrested or suspected of committing an offence and leaving the matter to court to call upon the respondent to explain their sources of income even without the applicant establishing a prima facie case. In *Asset Recovery Agency v Maina; Mesel (Interested Party) 2023* KEHC 24704 (KLR), Honourable Lady Justice E. Mian held that;

‘ Under section 92(4) of the POCAMLA the applicant needed not to prove the commission of a specific offence in regard to the funds. Forfeiture proceedings were civil in nature and that was why the standard of proof was on a balance of probabilities. In civil proceedings for recovery under part 5 of POCAMLA the Director needed not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.’
23. A distinction has to be made between proceeds of crimes under POCAMLA and unexplained assets under Section 55 of the *Anti-Corruption and Economic Crimes Act* in that under POCAMLA, the proceedings are targeted at the property which has trail, trace or association with known criminal offences whereas recovery proceedings under Section 55 of *Anti-Corruption and Economic Crimes Act* the target is the property of a person or their associates suspected to have engaged in corrupt conduct and are unable to explain how they acquired their wealth which is found to be incommensurate with their known earnings.
24. The basis of the investigations under ACECA starts with Section 26 of the Act while under POCAMLA the proceedings are founded on Section 82 as read together with Section 92 which gives the basis of forfeiture as the property having been used or is intended for use in commission of an offence or is proceeds of crime. This application having been grounded on the limb of proceeds of crime, the money used in acquiring the assets must on a balance of probabilities be traced to the proceeds of crime.
25. The regime of recovery under unexplained assets which is concerned with corrupt conduct of the targeted person is under the mandate of the EACC whereas recovery of proceeds of crime which targets assets acquired through criminal enterprise is under the applicant herein.
26. In *Ethics and Antic-Corruption Commission v Moses Kasaine Lenolkulal (2021) KEHC 1977 (KLR)*, Honourable Justice J. Nyakiaga held as follows;

‘ Unexplained assets or wealth is defined as the difference between a person's total wealth and their lawfully acquired wealth, whereas civil forfeiture targets the proceeds and



instrumentalities of unlawful activity. Unexplained assets is against the assets and puts the burden upon respondent to show that the assets were lawfully acquired. Section 55(2) of ACECA empowers the commission to commence proceedings against a person if after investigation it is satisfied that the person has unexplained assets, after the person has been afforded reasonable opportunity to explain the disproportion between the assets and his known legitimate sources of income.’

27. The above position is echoed in *Assets Recovery Agency v Charity Wangui Gethi* (2018) KEHC 1421 (KLR) thus;

‘ Before any forfeiture order is made, the court must be satisfied that the property sought to be forfeited is a proceed of crime or is to be used to perpetuate a crime.’

28. One may say that both regimes of the law are aimed at recovering unexplained assets without necessarily proving the offence but it should be noted that the procedures and mandates therein are different and in either case, proper investigations must be carried out to establish a prima facie case before calling upon the respondent to explain their wealth.

29. In my opinion the applicant did not conduct sufficient investigations to warrant the respondent to be called upon to provide explanations of acquisition of her assets. I say so because there were no investigations for 2019 and 2021 when the motor vehicles were acquired. It appears to me that the only investigations that the applicant carried out after receiving the information about the respondent being charged in JKIA law courts was procurement of the respondent’s bank and mpesa statements and ownership of the landed property. This to me is not enough to establish a prima facie case as not all persons arrested and charged in court are necessarily guilty or connected to the offence they are charged with. The applicant must make further steps to investigate the suspected assets and make a correlation between the assets and a crime or illegitimate source of funds.

30. The upshot of the above analysis is that I find that the applicant has failed to prove its case and the originating motion is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT .

Ruling delivered in presence of Mr. Adow for the applicant and in absence of the respondent.

