



**Assets Recovery Agency v Mucheru (Civil Application E016 of 2021) [2024] KEHC 878 (KLR)
(Anti-Corruption and Economic Crimes) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL APPLICATION E016 OF 2021**

EN MAINA, J

FEBRUARY 1, 2024

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

DAVID MUIGAI MUCHERU RESPONDENT

JUDGMENT

1. Before this court is a civil forfeiture application brought by way of Originating Motion under Part VIII, Sections 81-89 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA).
2. The Applicant is the Assets Recovery Agency established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) as a Body corporate with the mandate of identifying, tracing, freezing, and recovering proceeds of crime.
3. The Respondent is described as the registered owner of motor-vehicle registration number KCD 012T, a Toyota Hilux, VAN/PICKUP, Chassis Number MROFZ29GT02510380, Engine Number 1KD6010397.
4. By the Originating Motion which is dated 21st June, 2021 the Applicant seeks for the following orders: -
 - “ a) That this Court be pleased to issue an order declaring that motor vehicle registration number KCD 012T, Toyota Hilux, Van/Pickup, Chassis Number MROFZ29GT02510380, Engine Number 1KD6010397 is a proceed of crime liable for forfeiture to the Applicant.
 - b. That this Court be pleased to issue orders of forfeiture and transfer of the motor vehicle KCD 012T, Toyota Hilux, Van/Pickup, Chassis



Number MROFZ29GT02510380, Engine Number 1KD6010397 to the Assets Recovery Agency on behalf of the Government

- c. That this Court do issue an Order directing the Director NTSA to transfer ownership in the Logbook of the motor vehicle in prayers 1 and 2 above to the Assets Recovery Agency.
 - d. That this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Applicant
 - e. That costs be provided for.”
5. The application is supported on the grounds on its face, the Supporting Affidavit of Cpl. Jeremiah Sautet (Investigator with the Applicant) sworn on 21st June 2021 and the Further Affidavit dated 18th September, 2023 which is sworn by Collins Ipapo, also an Investigator employed by the Applicant.

The Applicant’s Case

6. Briefly, the Applicant’s case is that it instituted investigations into the affairs of the Respondent following information that he was involved in the illicit trade of sandalwood which is a protected plant in Kenya.
7. That on 4th February 2021 the Respondent was charged with the offence of being in possession of wildlife trophy contrary to Section 92(4) of the *Wildlife Conservation and Management Act*, 2013 and the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code in the Chief Magistrate’s Criminal Case No. E.233 of 2021. That prior to that he had been charged in
 - i. Kajiado MCCR/1373/2009- Republic vs David Mucheru for being in possession of Ossyris Lanseorata (East African Sandalwood) contrary to Section 34(1) (2) as read with Section 54(8) (d) and 55(1) (c) of the Forest Act, 2005 and Gazette Notice No. 3176 of 2007;
 - ii. Makadara MCCR/45/2010- Republic vs David Mucheru for being in possession of Ossyris Lanseorata (East African Sandalwood) contrary to S. 34(1) (2) as read with Section 54(8) (d) and 55(1) (c) of the Forest Act; and;
 - iii. Kibera MCCR/841/2009- John Edwin & 3 others where his driver, two loaders and a clearing agent were charged with and acquitted of being in possession of Ossyris Lanseorata (East African Sandalwood) contrary to Section 34(1)(2) as read with Section 54(8) (d) and 55(1) (c) of the Forest Act.
8. That investigations further established that the court cases referred to in paragraph 7(i) and (ii) above were terminated or withdrawn under Section 87 (a) of the Criminal Procedure Code but however copies of the charge sheets and proceedings of the Kibera MCCR/841/2009 and Makadara MCCR/45/2010 could not be procured as the court files had been destroyed.
9. That investigations revealed that the Respondent acquired the motor vehicle KCD 012T the subject of those proceedings, during the period when he was believed to have been engaged in the illegal trade.
10. That further investigations established that between 2015 and 2017 when the Respondent acquired the Motor Vehicle, he had made numerous visits to the Kenya/Uganda and Kenya/Tanzania borders where pieces of the East African Sandalwood are known to be smuggled after being illegally harvested in Samburu, Pokot, Baringo, and other parts of the North Rift; that in particular, he visited Busia, Malaba, Oloitoktok, Isebania and Namanga (copies of a letter dated 10th February, 2021 evidencing



the Respondent's travelling history as maintained by the Director of Immigration and Citizen Services were annexed as exhibit "C12").

11. That investigations also established that the Respondent acquired the motor vehicle by way of a hire purchase in the sum of Kshs. 3,200,000/= from Rift-Cars Motor Bazaar Mombasa whereat payments were made in instalments as follows:

Item No:	Date of Payment	Mode of Payment	Sum Paid (KShs)
1.	30/11/2015	Cash	1,200,000/=
2.	4/01/2016	Cheque	150,000/=
3.	3/02/2016	Cheque	150,000/=
4.	2/03/2016	Cheque	150,000/=
5.	22/04/2016	M-Pesa	50,000/=
6.	27/05/2016	Cheque	150,000/=
7.	8/06/2016	Cheque	150,000/=
8.	5/07/2016	Cheque	150,000/=
9.	17/05/2017	Cheque	250,000/=
10.	6/06/2017	Trade in with KAX Toyota Prado	800,000/=
****	Total	****	3,200,000/=

(copies of the Motor Vehicle Sale Agreement dated 30/11/2015, copies of cheques and payment receipts and a statement by Mr. Enock Kibowen Limo of Rift Cars Motor Bazaar were annexed as exhibit "C13").

12. That further investigations established that between 2009 and 2017, the Respondent maintained 3 bank accounts namely:-
- i. A/c No. 0130190385492, Equity Bank Kenya Limited - David Muigai Mucheru; and
 - ii. A/c No. 0102054207200- Standard Chartered Bank Kenya Limited David Muigai Mucheru; and
 - iii. A/c No. 0016993001, Diamond Trust Bank - Zama Investments Limited.
13. That however upon carrying out investigations into those accounts pursuant to warrants obtained from the Chief Magistrates Court it was established that during the period when the Respondent acquired the impugned motor vehicle, he received numerous sums of money whose source was not explained or accounted for.



14. That an analysis of A/C No. 0130190385492- Equity Bank Kenya Limited showed that between January 2015 and June 2017, the Respondent received numerous suspicious cash deposits and cash withdrawals whose summary is as follows:

Place of transaction	Total deposit/Received from (Kshs.)	Total cash withdrawals/ Transfers to (Kshs.)
Nakuru	15,664,500/=	9,124,000/=
Malaba	-	922,000/=
Isiolo	-	1,150,000/=
Namanga	-	100,000/=
Transfer/ Receipts from Taqebwa Arthur	1,400,000/=	29,468,400/=
Transfer/ Receipts from Jane	5,200,000/=	-
Transfer/ Receipts from Darius	1,187,000/=	-
Transfer/ Receipts from Osman Olinga	-	2,245,000/=
Transfer/ Receipts from Faith Wangui Wamaitha	1,764,000/=	-
Transfer/ Receipts from David Muigai Gicheru	1,000,000/=	-
Transfer/ Receipts from Henry Kagiti Ngere	1,793,800/=	-

(Attached copies of an extract of the Respondent's bank statement with Equity Bank Kenya Limited and a summary of the payments and receipts made between 1/01/2015 and 1/08/2017 in the account No. 0130190385492- Equity Bank Kenya Limited were annexed as exhibit "C15".)

15. It was further alleged that an analysis of the said Equity Bank account established that between 1st January 2015 and 1st August 2017 numerous cash deposits were made in Nakuru, Namanga, Malaba and Isiolo which places are used as conduits for the illegal transportation of the East African Sandalwood; that most of the cash withdrawals were intentionally made to be for less than Kshs. 1,000,000/= which was the minimum statutory limit for a declaration to be made under Section 12 of the POCAMLA; that between 1st January 2015 to 1st August 2017 the Respondent received payments of between Kshs. 1,864/= to 184,043/= per month from Brookside Dairy Limited; between 1st January 2017 and 1st August 2017 a payment of Kshs. 94,537.00 to Kshs. 275,164/= per month from Rongai



- Dairy Limited and that the sum total of the amounts received from both Brookside Dairy Limited and Rongai Dairy Limited during the period 1st January 2015 to 1st August 2017 was Kshs. 2,496,822.20/= only which was less than the purchase price of the Motor Vehicle.
16. Further, that an analysis of the Respondent's Standard Chartered bank account No. 010254207200 for the period between 1st January 2015 to 1st August 2017 established that since 2009, the bank account was subject to a loan or overdraft facility and at most times it maintained a negative bank balance but the Respondent was nevertheless repaying for the said loan; that there were numerous cash deposits and withdrawals from the said account; that according to the Respondent most transfers of monies to or from the entity known as Damumu Investments Limited were proceeds of sale or were intended to purchase maize but the Respondent did not furnish any documents to establish any business dealings between himself and Damumu Investments Limited relating to sale and purchase of maize; that most of the cash withdrawals from that account were also intentionally made to be of less than Kshs.1,000,000/= which is the minimum reporting threshold; that some cash withdrawals of Kshs.1,000,000/= or more were not declared contrary to Section 12 of the POCAMLA and that the said withdrawals include, inter alia, those made on 13th July 2015, 31st August 2015, 12th October 2015, 9th November 2015, 3rd December 2015, 29th December 2015 and 14th January 2016.
 17. Further that once a deposit was made, there followed a number of cash withdrawals some of which would be made on the same day of receipt or a few days thereafter; that the cheques used to pay for motor vehicle would be drawn on the Standard Chartered Bank account but not any other account; that on some occasions, the Respondent would make cash deposits into the said bank account of less than Kshs. 1,000,000/= so as to avoid declaration of the source of the funds. (copies of the bank statement and a summary of the deposits and withdrawals made between January, 2015 to 1/08/201. were annexed as exhibit "C16").
 18. The Applicant further claims that sometimes in the year 2021 when the Applicant summoned the Respondent to make a statement on the source of funds which were used to purchase the motor vehicle he purported to have acquired it through a loan from the Standard Chartered Bank Limited coupled with a trade-in of his salvaged Toyota Prado Reg. No. KAN for Kshs. 800,000/=; that however, he did not furnish the loan agreement or charge entered into between himself and the Standard Chartered Bank Kenya Limited (A copy of the Respondent's Statement made on 16/10/2021 was annexed as exhibit "C17").
 19. That in the statement, the Respondent further stated that the Standard Chartered Bank account referred to had a loan of Kshs. 6,000,000/= which he had been servicing for the previous ten (10) years using his milk business. However, an analysis of the said bank account did not indicate that he received any monies from Brookside Dairy, Rongai Dairy Limited, KCC-Nakuru or any other company for milk to which he delivered milk. That to the contrary the proceeds of the milk sales were paid into his Equity Bank account. (A copy of a statement made by Moses Njoroge Migwi of KCC-Nakuru for milk delivery made between 2018 and 2021 was annexed as exhibit "C18").
 20. That further investigations revealed that the Respondent supplied maize worth Kshs.4,120,462/08 only to the National Cereals and Produce Board and that was between 21st January 2018 to 2nd February 2018. (A copy of a statement made by one Mr. Anthony Kipkemoi Tanui of the National Cereal and Produce Board and a statement of account for the period between 1/01/2015 to 15/02/2022 was annexed as Exhibit "C19")
 21. That an analysis of the Diamond Trust bank account No. 0016993001 in the name of Zamah Investments Limited for the period 14th February 2017 and 31st May 2015, indicated that the bank account had deposits of between Kshs.1,000/- and Kshs. 2,000/= with a paltry available balance of



Kshs.1,608.75 as at 21st June 2021 (Attached and marked "C/10" is a copy of the bank statement for account No. 0016993001).

22. That in view of the above revelations, it is clear that the Respondent used the proceeds of the illicit trade in the East African Sandalwood to purchase the impugned motor vehicle; that the motor vehicle ought therefore to be declared a proceed of crime liable for forfeiture to the State.

The Respondent's case

23. In response to, and in opposition to the Application, the Respondent through the firm of Z.N Gathaara & Company Advocates filed a Notice under Section 83 of the [Proceeds of Crime and Anti-Money Laundering Act](#) dated 14th December 2021. The notice declares that the Respondent will be opposing the prayers for forfeiture of his motor-vehicle.
24. Further taking note that in his submissions the Respondent alluded to filing a Replying Affidavit dated 14th December 2021 and that the same was missing from the court record including both the e-filing system and court email this court wrote to Counsel for the Respondent and requested to be furnished with a copy of the same. The request was complied with and on 29th January 2024 this court received a replying affidavit which, though it is without proof of having been filed in court, has a stamp indicating that it was served upon the Assets Recovery Agency/Applicant on 15th December 2021. In the affidavit the Respondent disputes that the motor vehicle is a proceeds of crime and contends that he acquired it with income from sale of milk from his farm, a car loan which he laboriously paid over a long period of time and trading-in his vehicle, a Prado. He stated that he sells him milk to Brookside Dairies, the Kenya Co-operative Creameries, Rongai Dairy and maize to the National Cereals Board and income from such sales also went into purchasing the vehicle. He therefore urged this court not to forfeit the vehicle.

Submissions

25. The parties summed up their case through written submissions. The Applicant's submissions are dated 18th October, 2023 with its supplementary submissions in reply to those of the Respondent dated 17th November, 2023. The Respondent's submissions are dated 3rd November, 2023.

Submissions of the Applicant

26. Placing reliance on the case of Assets Recovery Agency vs Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) Nairobi HC Misc Application No. 73 of 2017 (2018) eKLR, Learned Counsel for the Applicant submitted that its onus was to prove on a balance of probabilities that the motor vehicle is a proceeds of crime. Counsel also cited the case of Director of Assets Recovery Agency & others, R (on the application of) vs Green & others (2005) EWHC 3168 Admin (16 December, 2005) where it was held that an applicant seeking a recovery order (forfeiture order) would be expected to identify the property and the conduct that was said to be unlawful. The court went further to hold that in civil proceedings for recovery, the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kinds of unlawful conduct by or in return for which the property was obtained and further that a claim for civil recovery cannot be sustained solely on the basis that a respondent has no identifiable lawful income. Counsel stated that the Applicant had adduced evidence to prove on a balance of probabilities that the vehicle is a proceed of crime as defined in Section 2 of the POCAMLA that the motor vehicle was acquired from unlawful conduct, to wit, the business of illegally dealing, handling, and transportation of sandalwood since the year 2009.



27. Counsel stated that the Respondent was charged with being in possession of Osyris Lanceorata (East African Sandalwood) contrary to Section 34(1)(2) as read with Section 54(8) (d) and Section 55(1) (c) of the Forest Act, 2005 and Gazette Notice No. 3176 of 2007 in Makadara MCCR/45/2010, and Kajiado MCCR/1373/2009 and that his driver, two loaders and clearing agent were also charged but acquitted of the same offence in Kibera MCCR/841 /2009. Counsel argued that however, Applicant need not prove that the Respondent was convicted of the offenses in order to demonstrate that he was dealing in the illegal business. Counsel asserted that the Respondent did not on his part adduce any evidence to negate his dealings with Osyris Lanceorata (Sandalwood).
28. Counsel stated that between 2013 and 2021, the Applicant established that the Respondent had made numerous visits to Busia, Malaba, Oloitoktok, Isebania and Namanga which are border points where smuggling of the East African Sandalwood is rampant. Counsel stated that whereas in his statement, the Respondent claimed to have visited relatives at the said border points and to have gone there to buy maize he did not provide any documents to show that he bought or imported any maize between 2015-2017.
29. Counsel further averred that from an analysis of the Respondent's bank accounts [at Equity bank, and at Standard Chartered bank], he received large sums of monies whose source could not be explained; that most transactions were made in towns known for the illegal trade in sandalwood and the Applicant reasonably believes that the source of funds in the accounts is the illegal trade in East African Sandalwood. Counsel stated that most funds transfers in the account were made to or received from Damumu Investments Limited and were declared to be proceeds of the sale or were intended to purchase maize and that the cheques used to pay for the motor vehicle were drawn on the Standard Chartered account but not from the Equity Bank account to which the milk and maize monies were paid.
30. Counsel argued that once the Applicant had discharged its onus the evidential burden shifted to the Respondent to prove that the monies used to purchase the motor-vehicle were from a legitimate source. Counsel placed reliance on Section 112 of the *Evidence Act*, and on the cases of Assets Recovery Agency vs Lilian Wanja Muthoni t/a Sahara Consultants & 5 others HC Misc Application No. 58 of 2018 (2020) eKLR, and Assets Recovery Agency vs Rohan Anthony Fisher, and others, Supreme Court of Jamaica, Claim No. 2007 HCV003259.
31. Counsel stated that the Respondent's explanation that he purchased the vehicle through a loan cannot hold water, given that he did not avail any documents to support the allegation. Also, that the analysis of his bank account did not show any loan disbursement to him by the bank. In support of this submission Counsel relied on the case of Assets Recovery Agency vs Rose Monyani Musanda & 2 others HC Civil Application No. 2 of 2020 (2020) eKLR.
32. Counsel asserted that the terms of payment between the Respondent and the seller of the vehicle do not support the existence of a loan since payments were made in installments with a period of default between August and December 2016 and January and April 2017. Counsel contended that if there was a loan, it was intended to conceal the illegal source of income hence money laundering.
33. Counsel further stated that the Respondent's contention that he used monies from his milk business to service the loan from Standard Chartered bank was not supported by the bank statements as the proceeds from maize were being deposited into the Equity Bank Account.
34. Counsel stated that the Respondent did not explain the source of the monies in his Standard Chartered, and Equity Bank accounts; He also failed to challenge the Applicant's evidence despite having been accorded the opportunity to do so; that the Respondent did not have the relevant permits



to deal with *Osyris Lanceolata* (East African Sandalwood) and hence the motor vehicle is a proceeds of crime and ought to be forfeited. Counsel contended that the Motor Vehicle is not subject to the protection afforded by Article 40 of *the Constitution* as sub-article (6) provides that the rights under Article 40 do not extend to any property found to have been unlawfully acquired. Reliance was placed on the cases of Lilian Wanja Muthoni t/a Sahara Consultants case (supra), the case of Assets Recovery Agency vs Joseph Wanjohi & others HCACEC Appln. No. 7 of 2019, and the case of Schabir Shaik & others vs State CCT 86/06 (2008) ZACC 7.

35. On who should bear the costs of the suit, Counsel stated that as the Applicant has proved its case against the Respondent, the Respondent should bear the costs.
36. In the further submissions, in reply to those of the Respondent, the Applicant stated that the Originating Motion dated 21st June, 2021 remains unopposed as the Respondent did not file any pleadings or adduce any evidence to oppose it; that under Section 90 (2), (3) and (4) of the POCAMLA the Respondent is required to respond to a forfeiture Application either through oral evidence, or by affidavit; further that by dint of Order 51 Rule 14(1) of the Civil Procedure Rules, 2010 and the practice of this Court, the Respondent ought to have filed a replying affidavit, a notice of preliminary objection and/or a statement of grounds of opposition. Further that whereas in his submissions the Respondent alleged to have filed a replying affidavit dated 14th December, 2021 the court record does not bear that out; that moreover the affidavit of David Muigai Mucheru was not served upon the Applicant and that the documents filed did not amount to a response to the application. In support of that submission Counsel cited the case of Kenya Engineering Workers Union vs Nano/Aluminium Rolling Mills Limited Mombasa CACA No. 72 of 2015 (2016) eKLR. Counsel urged this court to allow the application.

Respondent's Submissions

37. On his part Learned Counsel for the Respondent submitted that the Respondent filed a Replying Affidavit dated 14th December, 2021; that the Respondent has a Constitutional right to property under Article 40 which would be violated by a forfeiture order; that the offence of money laundering is a stand-alone offence and the previous charges against the Respondent do not have any bearing on the money laundering allegations before this court. Counsel relied on the case of Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others [2016] eKLR.
38. Counsel submitted that civil forfeiture are proceedings in rem (against property) reasonably believed to be proceeds of crime; that the Respondent acquired the motor-vehicle lawfully as demonstrated by the sale agreement attached to the Replying Affidavit dated 14th December, 2021. That it was purchased from Rift-Cars Motor Bazaar through instalments and a trade-in of his old vehicle a Toyota Prado KAX 825N and that the loan was repaid over a period of 3 years from 2015 to 2017 from the earnings of his dairy farming.
39. Counsel averred that the Respondent uses the motor-vehicle to transport his farm produce and has since it was impounded been forced to seek alternative means of transport, which is costly and unsustainable.
40. Counsel maintained that the Respondent had demonstrated how he acquired the vehicle; that the Applicant had not established any link between the source of the money used to purchase the motor-vehicle and the alleged illicit trade in wildlife trophy; that the Respondent produced invoices, receipts, business licenses and other documents which evidence had not been controverted by the Applicant and hence the application has no merit and should be dismissed.



Issues for Determination

41. After a careful consideration of the materials placed before me and the rival submissions of Learned Counsels, I find that the following issues arise for determination:
- i. Whether there is a competent response to the Originating Motion Application.
 - ii. Whether the motor-vehicle KCD 012T, a Toyota Hilux, VAN/PICKUP, Chassis Number MROFZ29GT02510380, Engine Number 1KD6010397 is a proceed of crime liable for forfeiture to the State and whether it should be so forfeited.

Analysis and Determination

Issue (i) Whether there is a competent response to the Originating Motion Application

42. Section 90(4) of the POCAMLA provides that a person who has given a notice under Section 83 (3) of the POCAMLA has a right to be heard in the forfeiture application. The Respondent herein gave a notice under Section 83 and was hence entitled to be heard in this application. The said notice is however not a response for the reasons underlined below.

43. The procedure applicable to forfeiture applications is set out in Section 81 of the POCAMLA which states that: -

“ 81. Nature of proceedings

- (1) All proceedings under this Part shall be civil proceedings.
- (2) The rules of evidence applicable in civil proceedings shall apply to proceedings under this Part.”

44. Order 51 Rule 14 of the Civil Procedure Rules, 2010 which sets out the procedure for applications envisages a response to an application as being either a notice of preliminary objection, a replying affidavit and/or grounds of opposition. The section states: -

“ Order 51

- (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
 - (a) a notice preliminary objection: and/or;
 - (b) replying affidavit; and/or
 - (c) a statement of grounds of opposition;
- (2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.....”

45. A party wishing to oppose a forfeiture application must in addition to the notice envisaged in either Section 83(3) or Section 91 of the POCAMLA also file a response as provided in Order 51(1) of the Civil Procedure Rules.

46. It is the Applicant’s contention that the Respondent did not file a response and hence this application is not opposed. However, in his written submissions Counsel for the Respondent alluded to a Replying



Affidavit filed on 14th December 2021. I could not however find the said replying affidavit on the court record. I also searched for it on the e-filing portal but it was not there either and believing therefore that it may have been filed manually and misplaced in the registry I directed the Deputy Registrar to do an email to Counsel for the Respondent requiring a copy of the replying affidavit. The Replying Affidavit filed in response to the email has a stamp showing it was served upon the Applicant on 15th December 2021 but it has nothing to show that it was filed in court. Be that as it may this court admitted it in the interest of justice reason being that the court has no way of knowing whether it was ever filed or not and to give the Respondent the benefit of doubt in that matter is the better option. The first issue is therefore answered in the affirmative.

Issue No. (ii) Whether the motor-vehicle KCD 012T, a Toyota Hilux, Van/Pickup, Chassis Number MROFZ29GT02510380, Engine Number 1KD6010397 is a proceed of crime liable for forfeiture to the State and whether it should be so forfeited.

47. The power of this court to issue a forfeiture order stems from Sections 90 (1) and 92 (1) of the POCAMLA. Section 90(1) provides that where there is a preservation order in force the Assets Recovery Agency Director may apply to this court for an order forfeiting to the Government all or any of the property that is subject to the preservation order. Section 92(1) then stipulates the instances when the court may make a forfeiture order and states: -

“92. Making of forfeiture order

(1) 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.”

48. What constitutes proceeds of crime is defined in Section 2 of the POCAMLA as follows: -

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

49. My reading of the foregoing definition is that proceeds of crime goes beyond those assets that are acquired through an offence to include those acquired through income generated from those assets acquired through an offence.

50. It is instructive however that Section 92 (4) of the POCAMLA provides that an order for forfeiture is not affected by the outcome of criminal proceedings or of an investigation with a view to institute such proceedings. In other words, there need not be a conviction for an offence for the Agency Director to bring an application for forfeiture. Indeed, there need not be any criminal proceedings either and the Agency need not allege the commission of a specific offence. This was the holding in the often cited



case of Director of Assets Recovery Agency & Others v Green & Others [2005 EWHC 3169 where it was stated: -

“In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of 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.”

51. It has also been explained that civil forfeiture targets the property but not the person and are therefore proceedings in rem as opposed to in personam. As such they are not predicated on the guilt or otherwise of the person. In the South African case of NDPP v Prophet (5926/01) (2003) ZAW CHC 16 the Court stated: -

“(4) The present application involves Chapter 6 of the Act, which bears the heading “Civil recovery of property” and thus provides for civil forfeiture, as opposed to criminal forfeiture, which is regulated by Chapter 5. As the proceedings under Chapter 6 are deemed to be civil proceedings they are governed by the rules of evidence and procedure applicable to proceedings of that kind. Clearly the purpose of chapter 6 is to target the assets bases of criminal enterprises, independent of criminal proceedings. In the words of Ackerman J, “Chapter 6 (comprising Sections 37 to 62) provides for forfeiture of the proceeds of and instrumentalities used in crime, but it is not conviction based; it may be invoked even where there is no prosecution.” In fact, the Act explicitly separates the criminal process from the civil forfeiture process. Therefore, Chapter 6 is focused not on “wrongdoers, but on the property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owner or possessors of the property is, therefore, not primarily relevant to the proceedings.”

(5) Section 37 of the Act entrenches the distinction between civil proceedings and criminal proceedings. Section 50(4) of the Act expressly states that the validity of an order made in terms of Section 50(1), forfeiting to the state property that is subject to a preservation of property order made in terms of Section 39(2) is not affected by the outcome of any related criminal proceedings. This section sanctions the granting of an order for the forfeiture to the state of property that is an ‘instrumentality of an offence referred to in Schedule 1 to the Act’ before any criminal proceedings in respect of that offence are instituted or, if instituted, determined.”

52. Similarly in the Jamaican case of ARA v Rohan Antony Fisher, Delores Elizabeth Miller & Others [2012] JMSC Civil No. 16 [2007] H cr 003259 the Court stated:-

“24. In the case of The Queen on the Application of the Director of the Assets Recovery Agency and Others v Jeffrey David Green and Others [2005] EWHC 3168. Mr. Justice Sullivan looked at Parliaments intention in determining unlawful conduct and stated that “civil rules of evidence will apply and it is not to matter for example that the person who carried out the conduct might be untraceable, or has died, or has been acquitted on a criminal trial relating to the ‘unlawful conduct’. The Court in a civil recovery action, in other words is not concerned to establish criminal guilt. It is concerned with ‘unlawful conduct’



solely for the purpose of identifying property with a sufficient relationship to that conduct to render it recoverable.”

53. As for the onus of proof this is well captured in the recent decision of the Court of Appeal in Civil Appeal No.452 of 2018 between Pamela Aboo and Assets Recovery Agency and Ethics and Anti-Corruption Commission (unreported) where in a majority decision the court overturned the decision of the High Court which relying on Section 112 of the *Evidence Act* concluded that the property was liable for forfeiture as the Respondent had not discharged the evidential burden. Warsame JA observed:

“... What then is the legal and evidential burden in proceedings for civil forfeiture?

37. It is elementary that he who alleges a fact must prove the existence of that fact. To that end, Part 1 of Chapter IV (Sections 107 to 119) of the *Evidence Act* is dedicated to burden of proof. According to Section 107 (2);

“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

38. The legal burden lies only on one of the parties and does not shift to the other party throughout the length and breadth of the trial. Section 108 explains that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

39. On the other hand, evidential burden refers to the obligation on a party to adduce sufficient evidence of a particular contested fact in order to justify a decision on that fact in his favour. It is also elementary that in civil cases, the standard of proof required is on a balance of probabilities or on preponderance of evidence. A litigant who fails to discharge the evidential burden in a case carries the risk, he may lose the whole or some part of the case. Furthermore, unlike the legal burden, the evidential burden is not static: it keeps shifting between the parties throughout the course of the trial.

40. In this regard, Section 92 of POCAMLA is clear 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.”

...

45. ...Indeed, an integral part of the institution of forfeiture is that a link must establish that certain benefits flowed either directly or indirectly originating from the offence.

...

47. In discharging its legal burden, it was therefore incumbent upon the respondent to establish the source of benefits, the type of benefit and the



beneficiary. The primary issue for determination by the trial court was whether the respondent had discharged its burden by proving that the property to be forfeited is indeed the product of criminal activity. In my considered view, it must be shown that the proceeds were a product of a criminal act and there must be a causal connection between the proceeds and the offence.”

54. In our case the Applicant contends that the impugned motor vehicle was acquired through income from illegal trade in sandalwood (a protected tree) which is an offence under the [Forest Conservation and Management Act](#). The Respondent disputes that allegation and contends that he acquired the vehicle with proceeds from farming (sale of maize and milk), trade-in of his old vehicle, (a Prado) and a bank loan. Both the Applicant and the Respondent have exhibited documents to support their cases. Those documents include bank statements.
55. After a careful consideration of all the material placed before this court by both sides, the rival submissions and upon applying the principles laid in the cases cited earlier I am persuaded that there is evidence on a balance of probabilities that motor vehicle Registration No. KCD 012T was acquired through proceeds of the illicit trade in Sandalwood.
56. It is my finding that the Applicant has not only discharged the legal burden placed upon it by Section 107 (2) of the [Evidence Act](#) but also the evidentiary burden which as was held by the Court of Appeal in Pamela Aboo and Assets Recovery Agency & Another Civil Appeal No. 452 of 2018 keeps shifting from the Respondent to the Applicant. The Applicant has in this case proved a causal link between the illicit trade and acquisition of the motor vehicle. This the Applicant did by placing evidence before this court to rebut the Respondent’s assertion that he purchased the vehicle with income from farming. The Applicant has demonstrated that the monies used to pay for the vehicle - after trading-in the Prado, were from a Standard Chartered account. It has also adduced evidence that the said account never received income accruing from the sale of milk or grains (maize). To the contrary the Applicant has proved on a balance of probabilities that whereas the Respondent was engaged in dairy farming and delivered milk to the Kenya co-operative Creameries (KCC), Brookside Dairy and Rongai Dairy, payments for the milk deliveries were made to the Respondent’s account at Equity Bank but not to the Standard Chartered account from which payments for the vehicle were remitted. As for maize evidence was adduced that the Respondent supplied maize to the National Cereals & Produce Board between 21st January 2018 and 2nd February 2018 only long after purchase of the impugned motor vehicle, a fact which is confirmed by the Respondent’s own documents/exhibits annexed to the replying affidavit which indicate he completed paying for the vehicle in June 2017.
57. The sale agreement shows that the vehicle was purchased from Rift Cars Motor Bazaar through a hire purchase agreement. There is also evidence that the installments were paid over a period of time. It is not so much about the sale agreement of the motor vehicle but the source of the money by which it was purchased.
58. It is my finding that there is evidence which proves on a balance of probabilities that around the time the vehicle was acquired the Respondent was involved in the illegal trade of sandalwood. The applicant adduced evidence, which is confirmed in an affidavit of the respondent sworn on 18th June 2010, in respect to a Misc Application No. 301 of 2020 made by himself to the High court, that he was charged with offences related to that trade in Makadara, Kibera and in Kajiado courts (see exhibit “C1-1” on page 21 of the Applicant’s bundle). As a matter of fact, that affidavit was sworn in support of an application by which the Respondent return of the exhibits after he was discharged in one of the cases



following a Nolle prosequi by the Attorney General. In paragraphs 6 and 7 of that affidavit he deposed:

“That following the said discharge I sought to have the suit property released to me by the Kenya Forest Services the 2nd Respondents herein in vain.

7. That consequently, I filed a miscellaneous criminal application dated 9th April 2010 before the chief Magistrate’s court Makadara seeking inter alia the release of my property the subject matter of the aforementioned criminal cases....”

59. Among the documents annexed to the affidavit in support of the Originating Motion is a report from the Kenya Forestry Research Institute (KEFRI) which puts to rest any doubt that the exhibit he sought to be returned to him was sandalwood (see annexures marked “SJ3” to the affidavit of Jeremiah Sautet sworn on 9th March 2022 in reply to the Respondent’s application dated 10th February 2022 seeking release of the motor vehicle KCD 012T). The Respondent’s application for return of the exhibits and the report from KEFRI confirm to this court that the Respondent was in fact involved in the illegal trade of sandalwood. I say illegal because the Respondent has not adduced proof that he was licensed to carry out the trade.

60. It was also alleged that during the period in issue the Respondent made several visits to certain border towns which are notorious for sandalwood trade and that he in fact made some deposits into his bank accounts from those border towns. On his part the Respondent contended that he went to those border towns to visit his kin a fact which was not rebutted by the Applicant and there being no cogent evidence that those border towns are hot spots for the illicit trade this court finds that to be just an allegation but not evidence.

61. The upshot is that this court finds that the monies used to acquire the impugned motor vehicle were tainted; that as a matter of fact the vehicle was a means of laundering the tainted money. Accordingly, the vehicle is a proceeds of crime.

62. Having found that the vehicle is a proceeds of crime this court is left with no choice but to make an order for its forfeiture to the State as provided in Section 91(1) of the POCAMLA. In the premises, I enter judgment for the Applicant against the Respondent as prayed in the Originating Motion dated 21st June 2021 and grant orders as follows:-

1. That a declaration be and is hereby made that Motor Vehicle Registration No. KCD 012T, Toyota Hilux, Van/Pick-up, Chassis Number MROFZ 29GT 02510380, Engine Number 1KD6010397 is a proceed of crime liable for forfeiture to the Applicant.
2. That the Motor Vehicle Registration KCD 012T be and is hereby forfeited to the Applicant on behalf of the Government of Kenya.
3. That the Director NTSA be and is hereby ordered to transfer ownership of the motor vehicles Registration No. KCD 012T to Assets Recovery Agency as per prayer 4 of the Originating Motion.
4. That the costs of these proceedings shall be borne by the Respondent.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 1ST DAY OF FEBRUARY 2024.

E N MAINA

JUDGE



In the presence of:-

Mr. Wambua for ARA/Applicant

Mr. Maina for the Respondent

Karanja - Court Assistant

