



**Assets Recovery Agency v Amufa; Gathu (Interested Party) (Civil Suit E020 of 2023)
[2024] KEHC 3250 (KLR) (Anti-Corruption and Economic Crimes) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL SUIT E020 OF 2023
EN MAINA, J
MARCH 14, 2024**

BETWEEN

THE ASSETS RECOVERY AGENCY APPLICANT

AND

VINCENT AYESA AMUFA RESPONDENT

AND

GRACE WAMUYU GATHU INTERESTED PARTY

JUDGMENT

1. By the Originating Motion dated 14th August 2023 which is expressed to be brought under Sections 81, 82, 90 & 92 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) and Order 51 Rule 1 of the Civil Procedure Rules, the Applicant seeks the following orders;

- “1) That this Honourable Court be pleased to declare the following funds proceeds of crime and therefore liable for forfeiture to the Government of Kenya;
- a. Cash of 120,000 seized from the Respondent on 5th April 2023.
 - b. Kshs. 438,453.80 held in account number 1252254326 at Kenya Commercial Bank in the name of Vincent Ayesa Amufa.
2. That this Honourable Court be pleased to issue an order of forfeiture of the following funds to the Government of Kenya:-
- a. cash of 120,000 seized from the Respondent on 5th April 2023 by the Police.



- the registered owner of motor vehicle registration number KDJ 072Z; that on 5th April 2023 the Respondent was arrested and subsequently arraigned and charged at the JKIA Law Courts Vide Court File No. MCCHR E004 of 2023 with trafficking in narcotic drugs, namely 596 grams of cocaine with a market value of Kshs2,384,000/- contrary to Section 4(a) (ii) of the [Narcotic Drugs and Psychotropic substances \(Control\) Act](#) No. 4 of 1994.
7. That at the time of his arrest, a search was conducted in his residence which yielded a bluish bag which contained a package of whitish powdery substance wrapped in a clear polythene bag enclosed in a khaki bag, two packages of white powdery substances wrapped in a clear polythene bag enclosed in a blue carry- on bag; twelve sachets of white powdery substance wrapped in clear polythene all suspected to be narcotic drugs, Also from the bag a silver digital weighing scale, a blue non-woven bag containing a tusk suspected to be a Government trophy; cash in the sum of Kshs.120,000/- and two motor vehicles registration number KDD 806L, and KDJ 072Z.
 8. That the substances suspected to be narcotic drugs seized at the Respondent's residence were presented to the Government Chemist who weighed, sampled and analyzed the substance and concluded that the suspect substance contained Cocaine, a narcotic drug with a purity of 65%w/w.
 9. It is the Applicant's case that investigations have established that the Respondent acquired the funds and assets/properties, the subject matter of this application, from the illegitimate trade in narcotic drugs and therefore the same constitute proceeds of crime and are liable for forfeiture pursuant to the provisions of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994; the [Proceeds of Crime and Anti-Money Laundering Act](#) 2009; the [Wildlife Conservation and Management Act](#) and the Prevention of Organized Crimes Act.
 10. Further that through Miscellaneous Criminal Application No. E029 of 2023 Assets Recovery Agency —v- Family Bank and 6 Others the Applicant investigated the bank accounts of the Respondent to ascertain whether they hold funds that are proceeds of crime; that investigations have established that bank account number 1252254326 at Kenya Commercial Bank in the name of Respondent hold funds that are reasonably suspected to be proceeds from the illicit trade in narcotic drugs and dealing in wildlife trophy without a permit contrary to the provisions of the Narcotic Drugs and Psychotropic Substances Control Act, the POCAMLA, the [Wildlife Conservation and Management Act](#) and the Prevention of Organized Crimes Act.
 11. Further that investigations have established that the Respondent executed a complex scheme of money laundering designed to conceal, disguise the nature, source, disposition and movement of the illicit funds, which constitute proceeds of crime and which are the subject matter of this application; that there are reasonable grounds and evidence demonstrating that the funds held by the Respondent in the specified bank accounts are direct or indirect benefits, profits and/or proceeds of crime obtained from a complex money laundering scheme and are liable to be forfeited to the Government of Kenya under the POCAMLA.
 12. That on 1st May 2023, the Applicant filed HCACEC Misc. No. E009 of 2023 Assets Recovery Agency —Vs- Vincent Ayesa Amufa and obtained a preservation order of cash and vehicles the subject of this application. That the preservation order was gazetted on 2nd June 2023 in Gazette Notice No. 7185 of vol. CXXV No.126 as required under Section 83(1) of the POCAMLA.
 13. Through an affidavit sworn by SGT PETER MUTISYA on 14th August 2023 in support of the application, the Applicant further contends that the Respondent purchased motor vehicle Regn. No. KDJ 072Z in an agreement dated 16th November 2022 but had it registered in the name of the Interested Party so as to conceal and disguise its ownership; that in the course of investigations



the Applicant obtained a warrant through a Miscellaneous Criminal Application No. E041 of 2023 to investigate the Respondent and Interested Party's mobile money wallets held at Safaricom Kenya Limited; that investigations revealed that between 1st January 2020 and 31st December 2021 the Respondent's mobile number 0727332747 had received Kshs. 28,287,335.75 and paid out Kshs. 28,287,733; that an analysis of the Respondent's M-pesa statement revealed that between 11th June 2013 and 9th April 2023 he credited his Co-operative Bank Account number 01109402838600 with Kshs. 16,400,465.20 from his said mobile number 0727332747; that between 1st February 2019 and 8th March 2023, the Respondent had credited his KCB Account Number 1252254326 with Kshs. 2,897,413. Further that investigations revealed that the Respondent has never filed tax returns since his registration as a tax payer and does not have a legitimate source of income and hence the impugned properties are proceeds of crime and they should be forfeited to the government.

The Respondent and Interested Party's case

14. The Respondent opposed the application through a replying affidavit, sworn on 14th November 2023 where he deposed that he is indeed the registered owner of motor vehicle KDD 806L and beneficial owner of motor vehicle KDJ 072Z which is registered in the name of his spouse, the Interested Party. He confirmed that he is the subscriber of the Safaricom mobile money wallet Number 0727332747, the Co-operative Bank Account Number 01109402838600 and KCB Back Account Number 1252254326.
15. He further deposed that he makes his living from a barber shop which he has operated from the year 2019. He contended that he ploughs the profits from the barbershop back into the business; that he has also operated a pharmacy business from the year 2021 and it is the profits therefrom that assisted him in the purchase of the impugned motor vehicles. He attached copies of sales made from the two businesses. He deposed that the funds deposited via mobile money into the Co-operative Bank Account were from the above two businesses and that the earnings were used in a revolving manner so that he could gain visibility with the bank for purposes of getting loans.
16. The Respondent deposed that the aforementioned mobile money wallet is linked to till number 849045 for the barbershop and till number 7675455 for the pharmacy which tills received Kshs. 3,333,290 and Kshs. 327,611 respectively. He explains that he bought the motor vehicle KDD 806L through hire purchase after paying a deposit of Kshs. 450,000 paid from the Co-operative Bank and KCB Bank accounts and thereafter paid the balance in instalments from use of the vehicle as a taxi.
17. He also explained that motor vehicle KDJ 072Z was bought through hire purchase upon payment of a deposit of Kshs. 520,000 paid from the KCB account and he was paying the balance until March 2023 when he was unable to complete payment due to his arrest. However, thereafter he took a loan of Kshs. 371,492 and cleared the balance. The Respondent also deposed that the Applicant's investigating officers impounded several documents from him and refused to return them. In paragraph 4 of the affidavit he disputes that police found narcotics in his house and contended that the said narcotics and the sum of Kshs.120,000/- were planted in the house by officers of the Applicant. He prayed that this application be dismissed.

The Applicant's submissions

18. Mr. Githinji, Learned Counsel for the Applicant, submitted that the impugned cash and vehicles are proceeds of crime as they constitute property and economic advantage, derived or realized in connection to an offense of money laundering as defined in Sections 3 & 16 of the POCAMLA and trafficking of narcotic drugs contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*.



19. Counsel stated that, in his replying affidavit, the Respondent admitted that he is the owner of the impugned assets and had not refuted that he had been charged with the offense of trafficking in narcotic substances. Counsel stated that the documents presented by the Respondent to demonstrate legitimate business were not legible and could thus not be authenticated and the copies of sales invoices had not been independently verified. Counsel asserted that although the Respondent registered as a tax payer on 23rd March 2008 he has never filed any tax returns as has been confirmed in the letter by the Kenya Revenue Authority dated 9th June 2023. Counsel submitted that as the Respondent had not filed any tax returns then he had no legitimate source of income and the funds transacted through his mobile wallet had not been explained.
20. Counsel submitted further, that as forfeiture proceedings are civil in nature and the burden of proof in civil cases is on a balance of probabilities, the Applicant has discharged its burden of proving that the impugned cash and motor vehicles constitute proceeds of crime and they ought to be forfeited to the State.
21. To support his submissions Counsel placed reliance on the following cases:-Director of Assets Recovery & Others, Republic v Green [2005] EWHC 3168.ARA v Pamela Aboo, EACC (Interested Party) [2018] eKLR.ARA & Others v Audrene Samantha Rowe & Others Civil Division Claim No. 2012 HCV 02120: The Court of Appeal of Jamaica.Abdulrahman Mahmod Sheikh & 6 others v Republic & Others (2016) eKLR.Shabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7ARA v Quorum Limited & 2 others [2018] eKLR.ARA v Lilian Wanja Muthoni Mbogo & Others (2020) eKLR.Miller v Minister of Pensions [1947] 2 ALL ER 372ARA v Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No. 2007 HCV003259KAC v Stanley Mombo Amuti [2017] eKLR.

The Respondent and 1st Interested Party's submissions

22. The Respondent and the Interested Party filed their submissions through the firm of Change Busiku & Company Advocates.
23. Learned Counsel for the Respondent and the Interested Party submitted that the Applicant had not tendered any evidence before this court to demonstrate that the substance suspected to be narcotic drugs alleged to have been recovered by the Applicant's investigators in the Respondent's residence actually belonged to the Respondent; Counsel submitted that whereas the Applicant had submitted extensively on the law regarding forfeiture it failed to analyze the documents provided by the Respondent to explain the source of the deposits in his mobile wallet; that the Respondent produced books of accounts for the services rendered at the barbershop and the pharmacy; that the Respondent therefore demonstrated that he had a legitimate source of income and the Applicant had not controverted those facts; that the Applicant did not interrogate the Respondent's businesses and it did not produce the M-pesa statements from the businesses. Counsel stated that the Respondent produced copies of sales he made from the barbershop in 2019, 2020, 2021, 2022 and 2023 and the pharmacy in September 2021 to October 2022.
24. Counsel further submitted that the Applicant deliberately failed to inform the Court that the funds deposited in the Respondent's Co-operative Bank Account was deposited from the Safaricom mobile wallet which is a business number attached to the Respondent's barbershop and pharmacy and that the funds had been used in a revolving manner hence it is not true that the deposits amounted to Kshs. 28,287,335. Counsel prayed that the Originating Motion dated 9th August 2023 be dismissed with costs.



Issues for Determination

- i. Whether the sum of Kshs. 438,453/80 in the Respondent's KCB Acc. No. 1252254326, the Kshs. 120,000/- allegedly recovered from the Respondent's house during a search conducted on 5th April 2023 and motor vehicles KDJ 072Z and KDD 806L are proceeds of crime.
- ii. If so, whether the subject assets should be forfeited to the Government of Kenya.
- iii. Who should bear the Costs of the suit.

Analysis and Determination

Issue (i):- Whether the sum of Kshs.438,453/80 in the Respondent's KCB Acc. No. 1252254326, the Kshs.120,000/- allegedly recovered from the Respondent's house during a search conducted on 5th April 2023 and motor vehicles KDJ 072Z and KDD 806L are proceeds of crime.

25. On this issue it is the Applicant's contention that it has discharged its burden of proof by demonstrating, on a balance of probabilities, that the Respondent was arrested and charged with the offence of trafficking narcotic drugs, that he has never filed tax returns and hence he obtained the subject assets through proceeds of crime. On the other hand, the Respondent has contended that the Applicant planted the items and the sum of Kshs. 120,000/- on him so as to implicate him to the offence of trafficking illegal substances; that the criminal case is yet to be heard and determined. He also contends that he has adduced evidence and produced documents which prove that the funds in his accounts as well as the two vehicles were acquired through legitimate businesses namely a barber shop and a pharmacy.
26. I have carefully considered the evidence adduced by the parties through their affidavits, the annexures thereto, the submissions, the cases cited and the law. Before I make a finding on this issue it is important to reiterate that in proceedings for civil forfeiture under the POCAMLA the Applicant need not prove the commission of an offence, or await the conviction of the Respondent for an offence. (See Section 92(4) of the POCAMLA). Indeed, it is now settled that civil forfeiture targets the property in issue but not the guilt of the Respondent. They are therefore actions in rem as opposed to in personam. This is as was stated in the case of *ARA & Others v Audrene Samantha Rowe & Others Civil Division Claim No. 2012 HCV 02120* the Court observed that:

“ . . . Civil recovery proceedings are directed at the seizure of property found, on a balance of probabilities, to be proceeds of crime, and not the conviction of any individual.”
27. Similarly in the case of *Director of Assets Recovery Agency & others, Republic -v- Green & Others [2005] EWHC 3168* it was held that:-

“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.”
28. Closer home in the Court of Appeal case of *Pamela Aboo v ARA & Another, Civil Appeal No. 452 of 2018 (unreported)* Warsame JA expressed it as follows:-

“ 41. I must underscore that civil forfeiture proceedings may be brought against any person who holds tainted property connected to an offence irrespective of



whether or not that person has committed the unlawful conduct or not. The subject of the proceedings is the property or proceeds and how it was derived or realized from illegal conduct.

42. Civil forfeiture is not tied to the identification, charging, prosecution, conviction or punishment of any offender. Civil forfeiture therefore denotes an action in rem, that is as against the property in contrast with in personam actions which are actions against individuals. ...”

29. It is also instructive that as provided in Section 92 (1) of the POCAMLA the burden of proof lies with the Applicant and the standard of proof is as in all civil cases on a balance of probabilities. However, once the court is satisfied that the Applicant has discharged its burden of proof, the evidential burden shifts to the Respondent to adequately demonstrate that the source of the assets is legitimate. (See the case of *ARA V Fisher, Rohan and Miller, Delores*, Supreme Court of Jamaica Claim No. 2007 HCV003259 where the court stated: -

“Even though these proceedings are Quasi- Criminal in nature, there is an evidential burden of proof on the Defendant. It is incumbent to them to demonstrate evidentially how they lawfully came into possession of the assets seized. . . There is no indication of any work place or higglering or any enterprise on her part, The only reasonable and inescapable inference is that the property seized are obtained through unlawful conduct and are therefore recoverable properties.”

30. Similarly, in the case of *Pamela Aboo v ARA & Another*, Civil Appeal No. 452 of 2018 (unreported), Warsame JA stated: -

“(54) . . . At this point, the Respondent had discharged both its legal and evidentiary burden. The evidentiary burden then shifted to the Appellant to explain the source of funds in her account.”

31. In this case the Applicant alleges that on 5th April 2023 police officers arrested the Respondent and upon searching his house they recovered a substance and items which they reasonably believed were narcotic drugs and items used in the sale of such narcotics. They had obtained warrants to search the house and hence the search and arrest were lawful and indeed no issue has been raised in that regard. The Applicant alleges that a sum of Kshs.120,000/- (in cash) was also recovered in the Respondent’s house and that therefore even the funds in the Respondent’s bank accounts and the two vehicles can be traced to that illegal trade. The Respondent has vehemently disputed that the substance, items and cash were found in his house and contended that they were planted in his house by the officers.

32. I have considered the evidence by both sides carefully and I am persuaded on a balance of probabilities that the cash, substances and other items were indeed found in the Respondent’s house. I have combed the affidavits by both sides for a hint of any reasons that would cause the officers of the Applicant to lie against the Respondent and I have not come across any. The Respondent has himself not alluded to any even in the submissions of his Advocate and for that reason I find it more probable than not that the items were found in his house as clearly the officers had no reason to lie against him or to plant the items in his house. It is also not lost to this court that upon conducting a search the officers made an inventory of all the items they found and that the Respondent and his spouse signed. Appending their signatures to that inventory is in my view also testimony that the things were in fact recovered in their house. The Respondent does not claim to have been coerced into signing the inventory meaning he did so because those items were in his house. That, in addition to my earlier finding that there is



- no iota of evidence that the officers could have had any reason to plant the substances and other items in the house.
33. Evidence is annexed that proves that the substance recovered in the residence of the Respondent was cocaine which is a prohibited substance in our jurisdiction. Trade in narcotics is an offence under our law hence the reason the Respondent and the Interested Party were arraigned in a Magistrate's court for the offence. Any income generated from such trade would therefore be proceeds of crime as defined in Section 2 of the POCAMLA and hence realizable property under the Act.
 34. As at the time the illicit drugs were found in his house, the Respondent had a balance of Kshs.438,453/80 in his account No. 1252254326 at Kenya Commercial Bank. This was in addition to the Kshs.120,000/- in cash recovered in his house. There is also evidence that he had a safaricom mobile money wallet through which he had transacted a sum of Kshs.28,287,355.75 during the period 1st January 2020 and 31st December 2021 and that Kshs.16,400,465/20 had been credited into his Co-operative Bank account No. 01109402838600 from the said Safaricom mobile wallet between 11th June 2013 to 9th April 2023. The manner in which this was done is demonstrated in a table in paragraph 15 and the graph in paragraph 16 of the supporting affidavit. In his replying affidavit the Respondent admitted that indeed his mobile wallet and bank accounts transacted the said amounts of money. It has also been demonstrated that the motor vehicles in issue were acquired during the period it is believed that the Respondent was carrying on the illicit trade in narcotics. I am therefore satisfied that the Applicant has proved on a balance of probabilities that there are reasonable grounds to believe that the funds found in the Respondent's house and bank accounts and those that had previously been transacted through his mobile money wallets (M-pesa) and bank accounts and the two vehicles are proceeds of crime. The Applicant having discharged its legal burden of proof the evidential burden shifts to the Respondent.
 35. I have considered his evidence that the monies and properties are proceeds of his legitimate business – barbershop and pharmacy but I am not persuaded by that explanation. While the business of a barbershop can be carried out by any person upon obtaining a business permit, to engage in the business of a pharmacy one must be registered and licenced under the *Pharmacy and Poisons Act* and whereas that issue was not raised by the Applicant, the Respondent has not adduced any evidence that he was registered and licenced to engage in the business of a pharmacy. I have also perused the documents exhibited by the Respondent as proof of his sales but I find that the same do not support the large deposits in his accounts or the sum of Kshs.28,287,733 transacted by the Respondent during the period in issue which is 1st January 2020 – 31st December 2021. Moreover, the documents/sales are not audited accounts. There is no indication therefore of what were the sales, expenses and profits as would be expected of such businesses.
 36. It is also instructive that despite carrying on such alleged “profitable businesses” the Respondent did not file any tax returns and hence did not pay any tax. In my view that omission is also proof that the income was not from the businesses he alleges. It can only be interpreted to mean that he could not possibly have been engaged in any legitimate business for which he could have filed returns and paid tax.
 37. I am also not persuaded by his explanation that the monies were revolved so that he could qualify for a loan. The M-pesa statements and bank statements placed before this court prove that these were monies paid to the Respondent's accounts through his M-pesa and then moved to his bank account and vice versa at various times and from different persons. Accordingly, the explanation advanced by the Respondent that they were the same funds but revolved is not convincing. Moreover, even if they were revolved I have already found that there is no evidence that the source of the funds was legitimate. It is also my finding that the same funds were used to acquire the vehicles in question and to generate



the sum of Kshs. 120,000/- found in his house. In the case of ARA V James Thuita Nderitu & 6 Others (2020) eKLR, the Court held that:

“... in order for funds to be transferred from one entity’s account to another, the entities must have legitimate businesses from which they obtain the money that they transfer between themselves.

38. Similarly, in the case of ARA V Lilian Wanja Muthoni Mbogo & Others ACEC Misc Appl No. 58 of 2018 the court observed: -

“Money and assets are not plucked from the air or, like fruits, from trees. They can be traced to specific sources – salaries, businesses, in which one sells specific items or goods, or provides professional services.”

39. I find therefore that the Applicant has proved on a balance of probabilities that the subject assets are proceeds of crime and further that the Respondent did not discharge his evidential burden to demonstrate that the assets are from legitimate sources. In the premises my finding is that the impugned monies and vehicles are proceeds of crime.

Issue (ii):- Whether the subject assets should be forfeited to the Government of Kenya.

40. Having found that the subject assets are proceeds of crime, it is my finding that the same shall be forfeited to the Government of Kenya.

Issue (iii): - Who should bear the cost of the suit

41. Having found that the Originating Motion dated 14th August 2023 is merited and costs follow the event, the Respondent shall bear the costs of the suit.

Disposal

42. Accordingly, I enter judgment for the Plaintiff against the Respondent and Interested Party as follows: -

- 1) That a declaration be and is hereby issued that the following funds are proceeds of crime and therefore liable for forfeiture to the Government of Kenya;
 - a. Cash of 120,000 seized from the Respondent on 5th April 2023.
 - b. Kshs. 438,453.80 held in account number 1252254326 at Kenya Commercial Bank in the name of Vincent Ayesa Amufa.
2. That an order for forfeiture be and is hereby issued for the following funds to the Government of Kenya;
 - a. cash of 120,000 seized from the Respondent on 5th April 2023 by the Police.
 - b. Kshs. 438,453.80 held in account number 1252254326 at Kenya Commercial Bank in the name of Vincent Ayesa Amufa.
3. That a declaration be and is hereby issued that the following motor vehicles are proceeds of crime and therefore liable for forfeiture to the Government of Kenya: -
 - i. KDJ 072Z Nissan Note
 - ii. KDD 806L Nissan Note



4. That an order for forfeiture be and is hereby issued for the following motor vehicles:-
 - i. KDJ 072Z Nissan Note
 - ii. KDD 806L Nissan Note
5. That an order be and is hereby issued directing the Director General National Transport and safety Authority to transfer title/ownership in favour of the Applicant in respect to the following motor vehicles:-
 - i. KDJ 072Z Nissan Note
 - ii. KDD 806L Nissan Note
6. That the Respondent shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF MARCH, 2024.

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E. N. MAINA

JUDGE

