



**Assets Recovery Agency v Ndungi (Civil Application E012 of 2021 & Anti-Corruption and Economic Crimes Civil Suit E030 of 2021 (Consolidated))
[2024] KEHC 2773 (KLR) (Anti-Corruption and Economic Crimes) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL APPLICATION E012 OF 2021 & ANTI-CORRUPTION AND
ECONOMIC CRIMES CIVIL SUIT E030 OF 2021 (CONSOLIDATED)**

**EN MAINA, J
MARCH 14, 2024**

BETWEEN

THE ASSETS RECOVERY AGENCY APPLICANT

AND

SILA JEFFREY NDUNGI RESPONDENT

JUDGMENT

Introduction

1. The Applicant filed two applications, one in HCACEC Suit No. E012 of 2021 and the other in HCACEC Suit No. E030 of 2021 seeking a declaration that funds owned by the Respondent held in various Bank Accounts at Absa Bank Kenya are proceeds of crime and forfeiture of the funds to the Government of Kenya. The two applications were subsequently consolidated.
2. The applications are premises on the ground that the Respondent was convicted of criminal offenses involving the Tax Refund Scheme in the United States of America.
3. The Applicant had previously obtained preservation orders from this court through Misc. Application No. E004 of 2021, Assets Recovery Agency vs Sila Jeffery Ndungi, and Misc. Application No. E024 of 2021, Assets Recovery Agency vs Sila Jeffery Ndungi. The preservation orders prohibited the Respondent and or their agents or representative from transacting, transferring or dealing in any manner with the funds in the accounts in the name of the Respondent that are subject of these applications. The Preservation orders were gazetted on 26th December 2021 vide Gazette Notice No. 1828 and on 6th August 2021 vide Gazette Notice No. 8002 respectively.



The Parties

4. The Applicant is the Assets Recovery Agency established under Section 53 of the Proceeds of Crime and Anti Money Laundering Act (herein after referred to as the POCAMLA] as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. The agency has authority to institute civil proceedings for the recovery of proceeds of crime and seek orders for forfeiture of assets to the government where there are reasonable grounds to believe that such assets are proceeds of crime. The agency also has policing powers to investigate, identify, trace, freeze and recover proceeds crime under Section 53A of the POCAMLA.
5. The Respondent is a Business man in the aviation industry, and a Kenyan National residing in the United States of America.
6. The Originating Motion was canvased through affidavit evidence and written submissions.

The applicant's case

7. The applications are brought under Sections 81, 90 & 92 of the POCAMLA and Order 51 Rule 1 of the Civil Procedure Rules and seek similar orders as follows: -
 - a. That this Honourable Court be pleased to issue an order declaring that the funds in the Applicant's account number 2034744559 in the name of Sila Jeffrey Ndungi at Absa Bank Kenya.
 - b. That this Honourable Court be pleased to issue orders that funds held in the said account be forfeited to the Government of Kenya.
 - c. That this Honourable Court do make an order that the funds in prayer 1 and 2 be deposited in account number 124022339 at Kenya Commercial Bank, in the name of the Applicant on behalf of the Government of Kenya.
 - d. That the honourable court makes any other ancillary orders that it may deem fit and for proper and effective execution of its orders.
 - e. That costs be provided for.
8. The applications are based inter alia: -
 - a. That the agency received information that the subject accounts in the names of the Respondent received suspicious funds believed to be proceeds of crime and subject of money laundering prompting it to begin investigations.
 - b. That investigations established that the Respondent engaged in an identity tax refund fraud scheme to defraud the Government of the United States of America (USA) in which electronic filing of thousands of fraudulent income tax returns had been orchestrated from an IP address in Kenya.
 - c. That the Respondent was charged and convicted in the USA for knowingly stealing and converting to his own use, property of the USA.
 - d. That the investigations revealed that the monies in the Respondent's accounts were unlawfully acquired, hence they are proceeds of crime and liable for forfeiture pursuant to the provisions of the POCAMLA.
 - e. That there are justifiable reasons and grounds to warrant the issuing of the orders sought.



9. Both applications are supported by the affidavit of CPL Sautet Jeremiah, a Police officer attached to the Agency, sworn on 20th May 2021 and 23rd October 2021. The affidavits reiterate the grounds upon which the application is brought and state further that the Agency obtained orders in Misc. Criminal Application E1955 OF 2020 to investigate and inspect the subject accounts which investigation established that between 2015 and 2020, the Respondent's accounts had received suspicious sums of over Kshs. 50 million and some of which was invested in a fixed deposit account had earned interest.
10. That investigations also revealed that upon the Respondent's arrest in the USA, he was charged with the Offense of theft of Public funds in violation of 18 United State Code 641 and 2; Aggravated identity theft and aiding and abetting in violation of 18 United State Code 1028A and Theft of Public Funds in violation of United State Code 641 and 2.
11. That the Respondent was found guilty on all three counts and sentenced to 97 months in the court of first instance but upon appeal the convictions for the first two offences were upheld but that in the charge of theft of public funds was quashed.
12. That given the above there are reasonable grounds to believe that the funds held in the Respondent's accounts are proceeds of crime obtained from the crimes committed by the Respondent in the USA.
13. In a supplementary affidavit sworn by Isaac Nakitare on 7th November 2023 he deposed that Kshs. 14,000,000 deposited in the Respondent's fixed account on 23rd January 2017 had accumulated an interest of Kshs.692,845.25 by 21st July 2020; that the funds in the fixed account had been transferred from the Respondent's account number 0455428017 which had received suspicious funds whose legitimate source had not been explained. He also deposed that the Respondent had not provided any evidence to demonstrate the legitimate source of the funds.

The Respondent's case

14. The Respondent opposed the application in three replying affidavits, all sworn by himself on 9th October 23 where he deposes that of the Kshs. 14 million in the fixed deposit account, Kshs. 4,346,850.50 came from an accumulation of deposits from his businesses; Kshs. 2,573,295 was a withdrawal of his investment at Genghis Capital Ltd; Kshs. 2,580,000 was from AIG Insurance as compensation for an accident by one of his tracks; Kshs. 5,243,000 was paid by of East Africa Assurance Company in an aviation claim while the rest were from minor deposits. He stated that there was nothing suspicious about the funds in the fixed account as it was an aggregate from different sources as explained.
15. The Respondent further stated that the account number 2034405523 belongs to Digital Holdings (K) Limited which is not a party to this suit and which has not been served with the relevant pleadings and forfeiting its funds to the Government will amount to it being condemned unheard.
16. The Respondent also deposes that this suit is barred by the application of Section 45 of the Limitations of Actions Act which in his view limits "an action for recovery for any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law" to two years. He contends that as the suit is premises on acts done in 2019 it is time barred. He further contends that the suit having been brought more than eight years from the time of the alleged actions, is not able to trace documents to aid his defense or to obtain such supporting documents from banks and institutions. He would thus suffer great prejudice by the State's inertia.
17. The Respondent also deposes that he was unaware of the current proceedings as he was not served and only became aware of them after his bank accounts were frozen.



18. The Respondent further contends that the Applicant's allegations are vague as they refer to all the transactions in his accounts without pinpointing which ones are proceeds of crime. He states that the Applicant should have laid a basis for each and every transaction that it alleges is unlawful noting that it had access to bank records and supporting documents through a court order; that had the applicant done that it would have aided this court to establish the source of the funds; that as such, this court should not be made to speculate and make assumptions regarding the source of the monies. He further states that the lack of specificity as to which transactions were suspected to be unlawful, made it difficult for him to give an explanation.
19. Further, that the impugned accounts were not new and had been receiving large deposits since the year 2010 and hence it cannot be said that the transactions between 2015 and 2020 were strange or suspicious. He contended that Absa had raised no issue with his account until the charges in the USA were published in a local paper. He contended that given that the alleged crimes were committed in the USA, then it would only make sense if the alleged suspicious funds were deposited in USA Dollars.
20. The Respondent explained that this application is premised on misunderstanding and misinterpretation of the charges preferred against him in the USA; that one of the penalties sought from the USA Court was forfeiture of all the proceeds obtained directly or indirectly as a result of the offense he was charged with plus a money judgement of USD 48,000; that, the prayer for forfeiture was dismissed by the USA Court and that the court instead found that the USA Government should compensate him.
21. He contended that forfeiture proceedings against him ought to have been closed as provided in Section 60 of the POCAMLA, yet he's being subjected to double jeopardy, having to defend himself twice against the same facts, for the same penalty, in different jurisdictions and the prayer for forfeiture, having been determined by a court of competent jurisdiction, is Res Judicata.
22. In regard to the documents relating to the USA case and relied upon by the Applicant in this case, the Respondent stated that they are not admissible in evidence either under the *Evidence Act* or Sections 116 and 117 of the POCAMLA. He contended that the documents ought only to have been obtained pursuant to a request by the Attorney General to the USA Government and that the applicant has failed to explain the source of the documents which have also not been certified by the relevant authorities in the USA.
23. The Respondent also deposed that the Applicant had not demonstrated that any request was made by the USA Government to Kenya to institute these current proceedings on its behalf.
24. The Respondent confirmed that he was arrested in the USA in 2016 with a cheque for USD 76,592.86 and that he was also accused of identity theft. He however asserted that in two of the counts he had been convicted in relation to a cheque that was never encashed and from which he did not draw any financial benefits from, which would amount to an attempt under Kenyan Law and as such, the charges could not have generated any proceeds that could be referred to as proceeds of crime. He stated that there is no allegation of him successfully stealing any funds from the USA Government or any other person; that the link to a previously suspected theft was for a charge for which he was acquitted on appeal; that as such, the USA charges have no connection with the funds sought to be forfeited.
25. Regarding the source of the subject funds, he deposed that he was an enterprising Kenyan with several lucrative businesses in his name, and the funds consisted of regular deposits from his businesses; that he was the owner of two registered aircrafts used for commercial purposes, and training as evidenced by the annexed Kenya Aviation Authority invoices for landings, take offs, and parking during the period under consideration; that the business was lucrative, bringing in USD 50 to 80 per hour and



his customers deposit the funds into his accounts before they are availed the aircrafts and further that he is also in the transport business, owning trucks that operated a lucrative business under the name of Digital Cargo Forwarders Limited.

26. He deposed that he also had investments which yielded good results in the money markets through Genghis Capital as could be seen in the annexed statements.
27. The Respondent explained that as a businessman, he has invested in various enterprises resulting in debits and credits in his accounts; that he also lent money to family and friends who would repay by depositing into his account and that there were also internal transfers of money from his various accounts. He contended that at all material times, he paid due taxes to the Government and urged this court to lift the preservation orders placed on his accounts, find the current suit to be without merit and dismiss it with costs.

The Applicant's submissions

28. Miss Muchiri, Learned Counsel for the Applicant, submitted that the cash deposits in the Respondent's impugned accounts were not adequately explained and that the Respondent did not demonstrate the trail between his alleged businesses and the monies in his accounts. Counsel submitted that the Respondent had not denied that he was charged and convicted for the offense of stealing and converting to his own use, property of a value exceeding USD 1,000 belonging to the USA government and that the conviction on count 1 and 2 was upheld by the Court of Appeal. Counsel submitted that the decision of the Appellate Court had not been overturned; that the Respondent's accounts received suspicious funds at the same time as the USA government was investigating him for theft of public funds, aggravated identity theft, aiding and abetting. That there are therefore reasonable grounds to believe that the funds held in the subject accounts are proceeds of crime and the accounts are conduits of money laundering meant to conceal the illicit funds. To support this submission Counsel relied on the finding in the case of Assets Recovery Agency -v- Lilian Wanja Muthoni Mbogo & Others [2020] eKLR where the court stated: -

“ . . . 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. . . For one to deposit, in different accounts, on the same days, hundreds of thousands of shillings . . . there must be a very clear source of such funds.”

29. Counsel further submitted that, as provided in Section 92(1) of the POCAMLA, this court has power to grant the forfeiture orders sought if it finds on a balance of probabilities that there are reasonable grounds to believe that the funds in issue are proceeds of crime. Counsel stated that the Applicant had demonstrated that the funds in issue are tainted; that the right to acquire and own property as guaranteed under *the Constitution* does not extend to property that is unlawfully acquired and as to the effect of the outcome of the criminal proceedings on the current application, that the current proceedings are in rem, against the property but not against the Respondent as in criminal proceedings and hence the claim by the Respondent that the decision of the criminal Court makes the current proceedings Res Judicata is farfetched and misleading. For this Counsel relied on Section 92(4) of the POCAMLA which provides: -

“The validity of a forfeiture order under sub-section (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 offense with which the property concerned is in some way associated.”



30. She further relied on the case of Director of Assets Recovery and Others, Republic -v- Green & Others (2005) EWHC 3168 where it was held that:-

“In Civil proceedings for recovery under Part 5 of the Act, the Director need not allege the Commission of any particular offense 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.”

31. Counsel urged that the applications under consideration are merited and should be allowed.

32. Counsel also relied on the following cases:-ARA V James Thuita Nderitu & 6 Others [2020] eKLRARA V Lilian Wanja Muthoni Mbogo [2020] eKLRARA V Joseph Wanjohi & 3 Others [2020] eKLRARA V Rose Momanyi Musanda & Others, Civil Application Number 2 of 2020Schabir Shaik & Others v State Case CCT 86/06 (2008) ZAC 7ARA V Quorum Limited & 2 Others (2018) eKLRTecla Nandjila Lameck V President of Namibia 2012(1) NR 255 HCMartin Shalli v Attorney General of Namibia High Court of Namibia Case Number POCA 9/2011.

The Respondent's submissions

33. Learned Counsel for the Respondent submitted that these proceedings concern funds accrued as far back as the year 2014 and are therefore time barred under Section 4(5) of the Limitations of Actions Act which states: -

“An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.”

34. Counsel also relied on Section 52(2) of the POCAMLA which provides: -

“For the purposes of Parts VI to XII, a person will have benefited from an offence if that person has at any time, whether before or after the commencement of this Act, received or retained any proceeds of crime.”

35. Counsel stated that Section 52(2) of the POCAMLA only provided for the retrospective application of the POCAMLA but does not in any way vitiate the application of the Limitations of Actions Act. Counsel submitted that there is no conflict between Section 4(5) of the Limitations of Actions Act and the provisions of the POCAMLA and hence this court should find that the two applications are stale and dismiss them with costs.

36. Counsel further submitted that based on Section 92 of the Evidence Act the documents in respect to the proceedings in the USA were not admissible in evidence. Section 92 of the Evidence Act states: -

“The court may presume that any document purporting to be a copy of a judgment or judicial record of any country not forming part of the Commonwealth is genuine and accurate, and that such judgment or record was pronounced or recorded by a court of competent jurisdiction, if the document purports to be certified in any manner which is certified by a Kenya consular officer or diplomatic representative in or for such country to be the manner commonly in use in that country for the certification of copies of judgments or judicial records.”



37. Consequently, the Respondent submits that the exhibits having arisen from judicial proceedings in the USA, which is not a member of the Commonwealth; they can only be admitted in evidence if certified by a Kenyan Consular or Diplomatic Representative or a manner commonly in use in the USA.
38. The Respondent also relied on Sections 116 and 117 of the POCAMLA and submitted that the Applicant has not controverted evidence by the Respondent that the documents from the Court in the USA were obtained contrary to law. Counsel contended that the affidavit by Tanisha Manning is irregular as it contravenes Section 9 of Oaths and Statutory Declaration Rules which requires annexures to be sealed and stamped and also as it should have been filed on its own and not as an annexure.
39. On the question of whether the present proceedings are res judicata, the Respondent submitted that the issue of forfeiture of all properties derived from the proceeds of the offense including a money judgement of USD 48,000 was considered and determined in the USA Court which is a court of competent jurisdiction and as such is considered as concluded. Counsel contended that civil penalties are also punishment for the purpose of double jeopardy and therefore the current suit is an attempt to levy further penalty on the Respondent and violates the double jeopardy principle enshrined in Article 50(2)(o) of *the Constitution* of Kenya.
40. Counsel stated that the Applicant's assertion that the current proceedings are not affected by the outcome of USA criminal proceedings does not vitiate the doctrine of res judicata.
41. On the burden of proof, Counsel relied on Sections 107 and 109 of the *Evidence Act* which impose the burden on the Applicant to prove its case on a balance of probabilities. Counsel contended that the burden remained static throughout the trial and that it is the evidential burden that shifts once the Applicant has discharged its burden. Counsel stated that the Applicant had not discharged its burden of proof for the evidential burden to shift to the Respondent given that the cheques upon which his conviction was based were never encashed, and hence no benefit had accrued from him being in possession of the cheques. Counsel stated that the Applicant had failed to draw a link between the alleged crime and the funds sought to be forfeited; that the Applicant has not alleged any other offenses or convictions that could be the source of the subject funds and thus it has laid no basis that the subject funds were proceeds of crime. Counsel asserted that the bank statements had been consistently receiving funds since 2010 and there had not been any radical change between 2015 to 2020; that there was no evidence that the impugned credit had roots in the USA and the currency was not in USD. He relied on the decision in the case of *Republic v Michael Aliwa Simba (2019) eKLR* where the Court stated: -
- “Suspicion however strong without any other evidence to buttress it is worthless. . . it cannot provide the basis for inferring guilt which must be proved by evidence . . .”
42. Counsel further submitted that there had not been a request from the USA government for the Applicant to recover funds on its behalf; that Absa Bank had never flagged any transactions on the Respondent's account; that the Applicant, having a court order, had the capacity to obtain supporting documents from the bank to trace the source of funds, which it had failed to do; that the Respondent had offered a satisfactory explanation as to the source of funds which was not controverted by the Applicant and hence this court should find that the funds in the impugned accounts were regularly obtained and are not subject to forfeiture.
43. On the issue of fair trial, the Respondent takes issue with the generalized nature of claims against him and stated that the lack of specificity in the Applicant's pleadings inhibited him from responding with



the necessary precision thereby causing him prejudice. He urged the Court to find the applications to be incurably defective, as they offend the Respondent's Constitutional right to fair trial.

44. Learned Counsel for the Respondent also relied on the following cases: Francis A. Mbalanya v Cecilia N. Waema (2017) eKLRARA V Charity Wangui Ngethi & Anor (2021) eKLRUnited States v Halper, 490 US 435 (1989)ARA v Muazu Bala [2021]ARA v Ali Abdi Ibrahim [2022] eKLRMiller v Minister of Pensions (1947) 2 ALL ER 372Raila Odinga & Anor v IEBC [2013] eKLRARA v Felister Nyamathira Njoroge [2022] eKLR

The Issues for determination

45. From the Originating Motion, affidavits and rival submissions the following issues arise for determination:-
- i. Whether these proceedings are res judicata
 - ii. Whether these proceedings are time barred under the *Limitation of Actions Act*.
 - iii. Whether the proceedings and judgment of the USA Court can be admitted as evidence in these proceedings and if the answer to the above are in the positive.
 - iv. Whether the Applicant has proved that the funds in the impugned accounts are proceeds of crime liable to forfeiture to the Government of Kenya.
 - v. Who should bear the Cost of the suit.

Analysis and Determination

Issue (i) - Whether these proceedings are res judicata

46. On the issue of whether the matter is res judicata, the argument by the Respondent is that the issue of forfeiture was determined by the court in the USA; that the USA court is a court of competent jurisdiction. To succeed in this argument, the Respondent has to satisfy the three pong test as laid out in the case of John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR where the court stated:-

“From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & Another v the Attorney General and Others [2005] 1 EA 83.”

47. It is my finding that these proceedings do not meet the above test as the case before the USA court though related to this one did not concern the same parties. The USA case was one where the USA government charged the Respondent with fraud related offences committed in its jurisdiction while these are proceedings for civil forfeiture in Kenya, a completely separate jurisdiction. The parties are also different not to mention that civil forfeiture is not dependent on a criminal conviction – See Section 92 of the POCAMLA so that even had the cases ticked all the boxes above res judicata would not apply. The answer to issue (i) is therefore in the negative.

Issue (ii): - Whether these proceedings are time barred under the *Limitation of Actions Act*.



48. On this issue the Respondent's argument is that these proceedings are time barred by dint of Section 4(5) of the Limitations of Actions Act. The section states:-

“4(5) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.”

49. The Applicant did not offer any response to these submissions but my finding on the issue is that as the Limitation of Actions Act does not apply to criminal acts this case is not time barred. It is my finding that civil forfeiture of assets acquired through proceeds of crime does not amount to a penalty or the kind of forfeiture within the meaning of Section 4(5) of the Limitations of Actions Act. This is because in my view civil forfeiture are special proceedings and secondly because these are proceedings in rem against the property and what therefore is deemed to be guilty is the property which is considered to be the offender. Criminal or unlawful conduct must be established albeit on a balance of probabilities before the property can be forfeited. Civil forfeiture is intended to stop those who acquire property by committing criminal acts from enjoying the illicit wealth and because such wealth would be tantamount to that which is unlawfully acquired even Article 40 of the Constitution would not protect it. It is therefore my finding that the Statute of limitation does not apply to these proceedings. Indeed, these proceedings are no different from those undertaken under the Anti-Corruption and Economic Crimes Act (the ACECA) yet Section 74 of that Act and Section 42(1) (j) of the Limitation of Actions Act have removed the application of the Limitation of Actions Act to those proceedings.

50. Moreover, even were we to hold that the statute of limitation applies the Applicant states that it only got information concerning the charges in the USA in September 2020 so two years were yet to lapse when the Applicant instituted these proceedings for forfeiture. This is in light of the preservation orders having been obtained in the year 2021.

Issue (iii) & (iv) - Whether the proceedings and judgment of the USA Court ought to be admitted as evidence in these proceedings and if the answer to the above is in the positive; whether the Applicant has proved that the funds in the Respondent's accounts are proceeds of crime liable for forfeiture to the Government of Kenya.

51. To prove its case, the Applicant seeks to rely on the proceedings and judgments of a USA Court. The proceedings indeed demonstrate that the Respondent was tried, found guilty, convicted and imprisoned in the USA for a fraud related offence. The proceedings also demonstrate that much of the preparation for the commission of that offence took place in Kenya and that the Respondent only travelled to the USA to complete the commission of the offence, which he as a matter of fact and law did commit, save that he sold the cheque to an undercover law enforcement officer. It is also not lost to this court that the offences he was charged and convicted for are also offences in Kenya and therefore fall within the definition of what constitutes an offence as defined in Section 2 which states:-

“2. "offence" in this Act, means an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya.”



52. The doctrine of dual criminality is also imported into the POCAMLA by dint of Section 127 thereof so that whatever offence was committed by the Respondent in the USA then became an offence in Kenya. Section 127 of the POCAMLA states: -

“ 127. Conduct of person outside Kenya

The conduct of a person that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence against a provision of any law in Kenya if it occurred in Kenya.”

53. However, the crux of the matter in this case is that other than the information received from the USA in regard to what took place there, there is no other evidence as would provide a causal link of the Respondent having committed an offence. Indeed, it is the said information which triggered/initiated the investigation and subsequently these proceedings and which forms the basis of the suspicion that the monies held in the Respondent’s account, which are sought to be forfeited, are proceeds of crime. The question that then begs an answer is whether the information from the USA, the proceedings and the judgment of the USA court are admissible in evidence in this case.

54. The Respondent contends that the proceedings in the court in the USA are not admissible in evidence as they were not properly requested for by Kenya and are not properly certified. I am persuaded by that position. Section 115(1) of the POCAMLA prescribes the instances and manner in which Kenya may obtain evidence from another country for purposes of an investigation or proceedings under the POCAMLA. The section states:-

“ 115. Request made by Kenya to other countries

1. For the purpose of an investigation or proceedings under this Act, the Attorney-General may request an appropriate authority of another country to arrange for—
 - a. evidence to be taken, or information, documents or articles to be produced or obtained in that country;
 - b. a warrant or other instrument authorizing search and seizure to be obtained and executed in that country;
 - c. a person from that country to come to Kenya to assist in the investigation or proceedings;
 - d. a restraint order or forfeiture order made under this Act to be enforced in that country, or a similar order to be obtained and executed in that country to preserve property that had it been located in Kenya would be subject to forfeiture or confiscation under this Act;
 - e. an order or notice under this Act to be served on a person in that country; or
 - f. other assistance to be provided, whether pursuant to a treaty or other written arrangement between Kenya and that country or otherwise.



2. Requests by other countries to Kenya for assistance of a kind specified in subsection (1) may be made to the Attorney-General.”

55. Section 116 (a) & (b) of the POCAMLA then seems to me to suggest that only once obtained as provided in Section 115(1) can such information or evidence be received in Kenya. The Section states:-

- “ 116. Evidence, etc., obtained from another country
Evidence, documents or articles obtained pursuant to a request made under section 115 shall—
- a. be received in evidence in Kenya;
 - b. not be used for a purpose other than that specified in that request, except with the consent of the appropriate authority of the foreign country; and
 - c. be returned when its use is no longer required, unless that authority indicates to the contrary.”

56. The Assets Recovery Agency/Applicant has not disclosed how exactly they came by the information upon which the case against the Respondent is premised. In the supporting affidavit in HCACEC Suit E030 of 2021 it is merely stated that in the course of investigations the Applicant obtained further information which revealed that since 2010, the United States Department of the Treasury, Internal Revenue Service Criminal Investigations has been investigating large stolen identity tax refund fraud scheme orchestrated by persons in Kenya. The scheme involves electronic filing of thousands of fraudulent income tax returns from IP addresses from Kenya. Further that the information further revealed that on 4th April 2017 the Respondent was charged in the United States district court, Northern District of Texas, Dallas Division in case number 3:16-CR-00448-B United States of America Vs Jeffrey Ndungi Sila with three counts stated hereunder:- Count 1: theft of the offence of theft of public funds in violation of 18 United States Code 641 and 2, Count 2: aggravated identity theft and aiding and abetting in violation of 18 United State Code 1028A and 2, Count 3: theft of public funds in violation of United State Code 641 and 2.

57. Certainly if the information was not obtained through a request made by our Attorney General under Section 115(1) of the POCAMLA then the information cannot be received as evidence by this court. Rather it is what would remain to be mere information which was not converted into evidence and hence not of any probative value.

58. Having come to the conclusion that the information regarding the proceedings in the USA is inadmissible and there being no evidence that in bringing these proceedings the Applicant was acting upon a request of the USA government, it is my finding that the Applicant has not discharged its legal burden of proof as to warrant this court to make a finding that the monies in the Respondent’s accounts are proceeds of crime and hence shift the evidential burden to the Respondent to prove their legitimacy. (See the case of Pamela Aboo v Assets Recovery Agency & Another Civil Appeal No.452 of 2018 (unreported)).

59. In the upshot the Applicant’s claim that the funds are proceeds of crime has not been proved on a balance of probabilities and it is must therefore fail and I need not go into the other issues. The funds should be released to the Respondent forthwith.



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

60. Having found that the Applicant failed to discharge its burden of proof on a balance of probabilities, it follows that the applications herein must fail and accordingly they are dismissed and it is hereby ordered that the funds in the two impugned accounts must be returned to the Respondent. However, as these are proceedings filed in the public interest, I shall make no order as to costs.

It is so ordered.

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

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E. MAINA

JUDGE

