



REPUBLIC OF KENYA



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**Asset Recovery Agency v Mokaya (Civil Suit E029 of 2023) [2024] KEHC 9024 (KLR)
(Anti-Corruption and Economic Crimes) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9024 (KLR)

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

CIVIL SUIT E029 OF 2023

F GIKONYO, J

JULY 19, 2024

BETWEEN

ASSET RECOVERY AGENCY APPLICANT

AND

ALPHANUS OSORO MOKAYA RESPONDENT

JUDGMENT

Forfeiture of Proceeds of Crime

1. These are non-conviction-based forfeiture proceedings which are in the nature of civil proceedings in accordance with our law. The proceedings have been commenced by way of an Originating Summons dated the 26th October, 2023 seeking for:
 - i. A declaration that Kshs. 17,873,560 held at Stima Sacco A/C No. 80201XXXX Kisumu Branch in the name of the respondent is proceeds of crime and liable to forfeiture;
 - ii. An order of forfeiture of the said funds to the Applicant on behalf of the Government;
 - iii. An order that the said funds be transferred to the applicant's Deposit Account for recovered assets A/C No. 1240XXXX at Kenya Commercial Bank;
 - iv. Any ancillary orders the court may deem fit and necessary for the proper and effective execution of its orders; and
 - v. Costs of the application.
2. The application is supported by the affidavit of ALFRED MUSALIA, an Investigating officer attached to the applicant, and the grounds set out in the application which have been exemplified in the applicant's submission.



3. The broad grounds upon which the application is premised are:
- i) That the proceedings have been filed under Part VIII of the *Proceeds of Crime and Anti-money Laundering Act* (hereafter 'POCAML A'), and pursuant to the applicant's mandate of identifying, tracing, freezing and recovering proceeds of crime under section 53 of POCAML A.
 - ii) That, section 53A (5) of POCAML A grants the staff of the applicant all powers, privileges, and immunities of a police officer in the execution of the applicant's mandate stated above.
 - iii) That, the applicant vide inquiry file number 44 of 2023 investigated the respondent on allegations of embezzlement of public funds and engaging in money-laundering activities.
 - iv) That, the respondent was the immediate former Chief Officer in the County Government of Kisii and holder of A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch.
 - v) That the respondent received large unsupported payments from the County Government of Kisii into his KCB Account No. 1125XXXX without reasonable explanation and supporting documents.
 - vi) That the respondent would make cash withdrawals or mobile money transfers to other accounts associated with him including A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch from the KCB account. Upon withdrawals, he would make structured deposits into Stima Sacco account.
 - vii) That the respondent did not provide explanations as to the legitimate source of the funds in his A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch.
 - viii) That there are reasonable grounds to believe that the funds in the respondent's bank account are a conduit of money laundering contrary to sections 3, 4, and 7 as read with section 16 of the POCAML A.
4. According to the applicant, the analysis it carried out of the respondent's KCB account revealed that, between 2014 and 2021, the respondent had received into the account, funds amounting to Kshs. 65,142,325.00 from the County Government of Kisii out of which Kshs. 595,196.90 were salary payments for the duration he was an employee of the County Government of Kisii. The analysis is contained in a table in paragraph 8 of the affidavit in support of the application.
5. The deposits into the Stima Sacco account were similar to the withdrawals from the KCB account.
6. Upon investigations, the County Government of Kisii confirmed through a letter dated 25th September, 2023 that, it could trace documents in support of only 8 payments to the respondent totalling up to Kshs. 7,125,100. Neither the County Government of Kisii nor the respondent provided documents to support the other payments made to the respondent. According to the investigator, all the other payments to the respondent totalling up to Kshs. 58,017,225 were unsupported by any document, making this a clear case of embezzlement of public funds.
7. The investigator found that close scrutiny of the documents provided revealed discrepancies and gave an example of a payment voucher of Kshs. 2,230,000 made to the respondent on 7.10.2016 for the provision of training materials and equipment for artificial insemination training showed that trainees were paid an allowance of Kshs. 7,500 for the 5-day training at a rate of Kshs. 1,500 per day and the trainers were paid Kshs. 45,000 for the entire 5-day training, yet, the rate indicated in the payment schedule was Kshs. 45,000 per day.



8. He stated that further analysis of the payment schedule above shows that the number of trainees paid exceed the number of those who in attendance.
9. He averred further that investigations revealed that the respondent received Kshs. 1,742,000 on 29/06/2016 being payment for alleged training on artificial insemination. A scrutiny of the documents in support of the said payment shows that the trainees were paid while there is no evidence that the trainers were ever paid, thereby raising doubts as to whether the said training actually took place.
10. On the payment of Kshs. 357,000 from the county government of Kisii, the document in support of the payment is an alleged letter dated 15/09/2021 which was addressed to the County Secretary County Government of Kisii, which document was not signed by the author and it did not bear the receiver stamp of the County Secretary, therefore, raising serious doubt as to the very existence of the said letter clearing the Respondent herein.
11. The Respondent recorded his statement and stated that the payments made to him were for various activities as per the work plan and that not all the amount paid to him was solely administered by him alone as the payments were only made through his account as an imprest holder.
12. The respondent termed it as an error; of the trainees being paid Ksh. 7,500 for the five days of training while the trainers were paid Ksh. 45,000 for the same period at the rate of Ksh. 45,000 per day. And, the Respondent blamed the accountants at Kisii County for the error.
13. The Respondent further stated that, the missing documents to support the specific transactions herein, were in possession of the Kisii County Government who are the official custodians of the same.
14. Thus, according to the respondent, the funds held in his Stima Sacco account are genuine savings from private veterinary sale and training of dogs. He did not, however, provide any document in support of this allegation. No evidence was adduced to support any business.
15. The statement of one John Nyalaji Nyandanyi who is the acting head of accounts at Kisii County Government stated that, he was tasked by the County Secretary Kisii County to provide supporting documents in support of thirty-seven (37) payments made to the Respondent, but confirmed that they could only trace documents in support of 8 payments made to the Respondents.
16. On the unsigned letter which was used as supporting document for the payment of Ksh. 375,500 to the Respondent, the said John Nyalaji Nyandanyi stated that it's true that the document that he was showed did not bear any signature or stamp.
17. In the statement of one Christopher Momanyi Kiragori who is an accountant treasury pool, he stated that he was instructed to retrieve documents in support of thirty-seven (37) transactions but he could only trace 8 of the payment vouchers while the others were missing.
18. On the issue of payment of Ksh. 1,742,000 to the Respondent where the trainees were paid Ksh. 200 while the trainers were never paid, the witness stated that he could not explain why the trainers were never paid.
19. The explanation rendered together with the documents supplied by the Respondent herein in support of the alleged payments present glaring discrepancies such that the large payments have not been sufficiently explained by the Respondent herein.
20. There is every reason to believe that the said funds deposited into the Stima Sacco account held in the name of the Respondent is tainted property and the Respondent might be engaging in money laundering and theft of public funds.



The response

21. The respondent opposed the application vide replying affidavit sworn on 16/01/2023.
22. He deposed and stated that pursuant to orders of the Court in Kisii High Court Misc. Civil Application No. 2 of 2023 consolidated with Kisii High Court Misc. Civil Application No. E044 of 2023 between Ethics and Anti-Corruption Commission vs Dr. Alphanus Osoro Mokaya dated 20th January 2023 and 13th February 2023 determined that the savings held at Stima Sacco account number 802011091900-0 Kisumu Branch are not proceeds of crime.
23. That based on the orders of the court in the above stated matters in Kisii High Court, the Respondent averred that he was able to explain and satisfy the court on a balance of probability that the funds in his Stima Sacco account were legitimately acquired and not from commission of any crime.
24. That the Applicant being motivated by ulterior motives and abusing the provisions of the *Proceeds of Crime and Anti-Money Laundering Act* and the process of the court to maliciously circumvent and defeat the effect of the orders of the court issued in Kisii High Court and that the Applicant is guilty of material non-disclosure for failing to disclose this Honourable court existence of the court orders issued by the High Court at Kisii.
25. The deponent further stated that the issue raised herein having been heard and determined in Kisii High Court Misc. Civil Application No. 2 of 2023 consolidated with Kisii High Court Misc. Civil Application No. E044 of 2023 between Ethics and Anti-Corruption Commission vs Dr. Alphanus Osoro the same is materially and substantially in issue with the present matter pending before this court.
26. The Respondent in his reply stated that the County Government of Kisii is the custodian of all supporting documents in relation to any payments made to the Respondent and denied the Applicants allegation that once he had received funds from Kisii County Government he would withdraw and deposit them into his Stima Sacco account and that the mere withdrawing and depositing funds in and out of an account cannot be reasonable suspicion that the funds are proceeds of crime.
27. The deponent further stated that there has been no single complaint from the Kisii County Government concerning loss of funds and that the said County Government has not raised any concern or complained that he has never surrendered documents to support expenditure and that there is no single internal or external audit query investigations or adverse recommendation made against him by the county auditor or the auditor general.
28. The Respondent asked this Honourable court to consider the fact that apart from having been a chief officer at the County Government of Ksii, he is a veterinary consultant and sugarcane and livestock farmer and that attributed the funds in his Stima Sacco to the alleged businesses and dividends earned from his deposits ploughed back to the Sacco.

Further affidavit

29. In a Further Affidavit, Alfred Musalia, the investigator herein, responded to claims on res judicata. He averred that the subject matter in Kisii HC Mis Civil Application No. E044 & E002 of 2023 (consolidated) is substantially and materially different from the subject matter of these forfeiture proceedings. The former related to kickback the respondent was receiving from companies offering services to Kisii County Government. Whilst the latter relate to forfeiture of embezzled funds from Kisii County Government into his accounts. And, in any case, the applicant is not a party in the proceedings in Kisii.



30. He stated that the Kisii county confirmed that it could not trace the documents for the 29 transactions through which the respondent received money from the County. Investigations revealed that he irregularly received the public funds and he did not produce supporting documents.
31. He stated that the respondent did not provide evidence to support his claims that he was engaged in sugar cane farming, livestock keeping and dog breeding. According to him, the look at the statement of the Sacco, it shows that he never received any salary in the account which raises more doubts on the legitimacy of the funds.
32. He also responded to the allegation by the respondent that these proceedings violate his right to property under article 40 of *the Constitution*. He took the view that, these proceedings are for forfeiture of illegally acquired property which is not protected by property rights in the said article.
33. On fair trial requirements, he deposed that the respondent was invited to record a statement on 9.10.2023 which has been annexed as exhibit AM8.
34. He concluded that the respondent has not sufficiently explained the source of the funds in question, and so he urged the court to find that the funds in the respondent's Stima Sacco Account are proceeds of crime liable to be forfeited to the state.

Directions of the court

35. The application was canvassed by way of written submissions

The Applicant's submissions

36. The applicant submitted that the suit is not res judicata. The applicant contends that the above case was between the Ethics and Anti-Corruption Commission and the Respondent and the Applicant was neither a party to the said proceedings emanating from Kisii High Court Misc. Civil Application No. 2 of 2023 consolidated with Kisii High Court Misc. Civil Application No. E044 of 2023 as such any orders emanating from the said proceedings were only binding as between the Respondent and the Ethics and Anti-Corruption Commission the ruling in Kisii High Court Misc. Civil Application No. 2 of 2023 consolidated with Kisii High Court Misc. Civil Application No. E044 of 2023 was between the Respondent and the Ethics and Anti-Corruption Commission and the Applicant was never joined as a party to it.
37. A perusal of the proceedings from Kisii High court shows that the Ethics and Anti-Corruption Commission was pursuing the funds held in the Respondents account based on allegations of kickbacks he received from contractors who were supplying goods to the County Government of Kisii; whilst, the proceedings before this court are on forfeiture of funds embezzlement which he received from the County Government without any supporting documents and banked into his accounts.
38. The applicant relied on Section 7 of the *Civil Procedure Act*, John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR. The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR.
39. The applicant submitted that the funds held in Stima Sacco account number 802011091900-0 are proceeds of crime having been deposited by the Respondent into his account funds which were paid to him from the County Government of Kisii into his account number 1125305843 domiciled at KCB without supporting documents. Section 2 of the *Proceeds of crime and Anti-Money Laundering Act*, Section 107 of the *Evidence Act* William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526,



Schabir Shaik & Others-Vs-State Case CCT 86/06(2008) ZACC 7 Assets Recovery Agency vs James Thuita Nderitu & others, Pamela Aboo vs Assets Recovery Agency Civil Appeal No. 452 of 2018

40. The applicant submitted that the Applicant has already established that the funds held in Stima Sacco in the name of the Respondent are proceeds of crime, the same ought to be forfeited to the state. NDPP vs Rebuzzi (94/2000) ZASCA 127 Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR, National Director of Public Prosecutions v Samuel and Others (9863/2016) [2023] ZAKZDHC 38

The respondent's submissions

41. The respondent submitted that this court is estopped by record from making contrary conclusions as to those which were made by this court in earlier proceedings. The respondent submitted that having been vindicated from being proceeds of crime in the former proceedings the applicant did not show this court that between 19/07/2023 when the court in the former proceedings lifted the prohibition orders and on 27/07/2023 when the preservation orders herein were given and new transaction were made into the respondent's stima sacco account. The respondent relied on section 56(1)(2)(4)(5) ACECA, Section 90(1)(b) of Pocamla, Virgin Atlantic Airways Ltd v Zodiac Seats Uk Ltd [2013] UKSC 46, Zurich Insurance Company PLC vs Collin Richard Haywad [2011] EWCA Civ 641 cited with Approval By The Court Appeal In Dyer and Blair Investment Bank Limited v John Kungu Kisarier & CFC another [2017] EKL, Nur Muslim School Society through Mohamed Duhmy (former Chairman) & 2 others [2019] EKL, cited with approval the Case of Elroy Garraway v Ronald William [2011] UJ 12, Assets Recovery Agency v Josphat Kamau [2020] EKL.
42. The respondent submitted that the respondent's Stima Sacco Savings are not proceeds of crime and the applicant has not presented any evidence to found any reasonable grounds to believe that the respondent's Stima Sacco savings have been used or are intended for use in the commission of an offence or are proceeds of crime.
43. They relied on the following cases: Assets Recovery Agency v Rose Monyani Musanda, Sidian Bank Limited (Interested Party) [2020] eKLR, Assets Recovery Agency v Abdi Mohamed Ali & another [2020] eKLR, Ethics and Anti-corruption Commission vs Ministry Of Medical Services and another [2012] eKLR, Emmanuel Sulpanu Siyangav vs Republic CR. Appeal 124 of 2009 [2013] eKLR, and Ethics and Anti-corruption Commission vs Moses Kasaine Lenokulal & another (supra).

Analysis and Determination

Issues

44. From the pleadings, evidence and arguments presented by the parties in their written submissions, the issues for determination are: -
- i. Whether these proceedings are res judicata
 - ii. Whether the funds in the Stima Sacco are proceeds of crime, and therefore forfeitable to the state? Here, will be discussed concepts of proceeds of crime, burden and standard of proof.
 - iii. Who bears the cost of the proceedings?



Res judicata

45. Res judicata is one of the general jurisdiction-regulating principles; it is a preclusion doctrine aimed at protecting the finality of the decision, and to shield from the undesired consequences or vexation of sequential proceedings. Res judicata is provided for in section 7 of the *Civil Procedure Act*.
46. The triple identity test for res judicata relate to: existence of a previous suit between same parties or their privies; in which the same cause of action or subject matter or issues were directly in issue; and a final decision by a competent court was made in the previous suit completely settling or determining the issues between, and rights of the parties.
47. See the Supreme Court in Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another.
48. From the record, the proceedings in Kisii cases were between the respondent and EACC. The applicant herein was not a party in those proceedings.
49. Whereas the respondent stated that the two are government agencies, each has a defined mandate under the different implementing statutes setting up the institutions.
50. In the words of the respondent, the proceedings in Kisii were for prohibition orders under ACECA, yet, the current proceedings are forfeiture proceedings under POCAMLA.
51. In addition, EACC applied for orders on the basis of suspicion of kickbacks received from certain companies that were offering services to the County of Kisii. The current proceedings relate to suspected embezzlement of funds received directly from Kisii county government into the account of the respondent.
52. There is no final decision on forfeiture of the funds in question.
53. Accordingly, these proceedings are not res judicata.

Nature of forfeiture proceedings

54. Forfeiture proceedings is civil proceedings, and the rules of evidence applicable in civil proceedings shall apply; and the judgment therefrom is executable as a civil judgment within the meaning in the CPA (s. 11 of EACC Act, s. 55 & 56 of ACECA, s. 81 of POCAMLA)
55. And, civil forfeiture proceedings are in rem as explained below;

‘Civil recovery proceedings are directed at the seizure of property and not the conviction of any individual and thus there was no reason to apply the criminal standard of proof’ (ARA vs Quorum Limited & 2 others [2018] eKLR)
56. Action in rem, helps to navigate great legal hurdles, especially where the defendant cannot be found, or has fled the jurisdiction of the court or enjoys immunity (POCAMLA, International instruments). The court may however, issue a personal or money judgment to be executed against other property of the defendant who is accused of a criminal conduct (Part VIII-X of POCAMLA, ACECA, EACC Act).
57. Notably also, NCB forfeiture may be directed at a third party in the custody of the property on the basis of tracing of property.
58. The constitutional imperative in article 40(6) of *the Constitution* discussed below is also and absolutely necessary in anchoring forfeiture of proceeds of crime.



Constitutional underpinning

59. Article 40(6) of *the Constitution* provides that: -
60. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
61. Article 40 is on ‘protection of right to property’.
62. The article embodies the principle that proceeds of crime are not protected by property rights under article 40. The article emphasizes on the property, and manner of acquisition of property as the basis for conferment of property rights. The word found in the article connotes a determination with legal force made in a lawful adjudication process. The proceeding could be criminal or civil or sui generis.
63. Courts have used this subsection as a limitation to the right to acquire property (COA Petition No. 187 of 2018[2024] eKLR).
64. However, the Supreme Court provided the power and punch of the claw-back provision in the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR), when it held that: -

Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser. We therefore agree with the appellate court that the appellant’s title is not protected under article 40 of *the Constitution*’

65. The real purport of this provision in relation to forfeiture of proceeds of crime is yet to be fully exploited.
66. Faced with constitutional challenges by defendants, asking the correct question would be quite profitable. What event or cause of action to which a claim of right can properly draw in proceeds of crime? Which, will help in the application of the principle of relation back to ‘the root of the title’, and restitution of illicit asset. Thus, situating forfeiture within the constitutional framework in article 40(6) of *the Constitution*.

What should be proved?

67. See *Pamela Aboo v ARA & Another*, Civil Appeal Number 452 of 2018 where the Court held that:

“. . . the Respondent had the legal burden to prove a prima facie case on a balance of probability either of the two elements under Section 92 of POCAMLA, that the appellant either had assets that have been used or are intended for use in the Commission of an offense or the assets are proceeds of crime . . . a link must establish that certain benefits flowed directly or indirectly originating from the offense.”

68. Proceeds of crime has been broadly cast in section 2 of POCAMLA: -

‘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;

69. Thus, making recoverable or realizable assets, to include, the actual illicit property or related property or comingled property. Related property refers to property into which or for which the illicit property was converted or exchanged, respectively. Comingled property refers to the mixing of illicit property and other property of the defendant (associated property). Restitution of these traceable products arises on the basis of the obligation created by law to surrender property that is unlawfully acquired.
70. Similarly, on the basis of this very same obligation, a defendant who deliberately comingles illicit property with other property to conceal the identity of the forfeitable property, has the onus of disentangling the recoverable properties, lest the whole property becomes recoverable. Again, this draws upon the rule of evidence that: -

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

Criminal Conduct or in connection with crime

71. For purposes of civil forfeiture under POCAMLA, the law talks of property ‘derived or realized, directly or indirectly, as a result of or in connection with an offence’
72. Therefore, in civil forfeiture you need not prove or allege commission of a specific offence. The pleading must, however, set out matters that constitute the criminal conduct complained of. The test in the case of Director of Assets Recovery Agency & others -v- Green & Others [2005] EWHC 3168 has been adopted with approval, which is:

“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.”

Standard of proof for NCB forfeiture

73. It bears repeating that relevant legislation provides that forfeiture proceeding is a civil proceeding and the standard of proof applicable is that of balance of probabilities. Pamela Aboo v ARA & Another, Civil Appeal Number 452 of 2018.
74. Section 92 of POCAMLA provides:
- 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.
75. But, some arguments hold the view that, the standard should be towards the upper limits of the balance of probabilities as the cause of action is founded on criminal conduct or offence. This standard is known in Kenya as intermediate standard of proof applicable in civil proceedings whose cause of action is founded on criminal conduct or a criminal offence; and is cast as; ‘above the balance of probabilities but not as high as beyond reasonable doubt’.
76. Burden of proof for NCB forfeiture



77. Arguments are made that NCB forfeiture provisions in Kenya shift the burden of proof-others call it reverse burden of proof- a tag that may misrepresent the problem statement.
78. There is sustained litigation on this issue. But, courts have pronounced themselves on, and found the provisions on civil forfeiture to only shift the evidential burden, making it necessary to discuss legal burden of proof and evidential burden.
79. Focusing our mind on the generic term 'burden of proof'; it entails the legal burden of proof and evidential burden. Legal burden lies with the applicant or the person who alleges. Legal burden does not shift. Evidential burden initially rests with the applicant. But as preponderant evidence is adduced, evidential burden shifts to the party who would fail without further evidence. It is at this point that the defendant should rebut the case. Therefore, evidential burden, is the basis for explanations by the respondent on the source of the assets in forfeiture proceedings which is not shifting of burden of proof as parties often generally claim. The opportunity to explain the source of the property is also a due-process requirement. A party may choose to or not to offer rebuttal evidence, except, at the risk that he may fail without further evidence.
80. But, failure to offer rebuttal evidence does not necessarily mean forfeiture order will be issued as a matter of course. Forfeiture order is made because the applicant has proved its case to the required standard; after consideration of the evidence tendered by the applicant and any rebuttal evidence offered. Forfeiture order will be declined where the applicant has not proved the case on a balance of probabilities.
81. See *Kanyungu Njogu Vs Daniel Kimani Maingi* [2000] eKLR, where the Court found that where both parties' explanations are equally (un)convincing, the party bearing the burden of proof (the applicant) will lose, because the requisite standard will not have been attained.
82. Understanding this distinction helps in resolving arguments around shifting of burden of proof.

Applying the test.

83. This court will apply the above principles and standard in this case and analyze the evidence to establish whether the funds in the subject account are proceeds of crime or used to commit or in connection with crime.
84. According to the applicant, the funds in the stima sacco account are funds received from the county government of Kisii into his KCB account. This statement carries two issues. Proof that the funds received from the county government of Kisii were embezzlement of public funds. And, drawing a connection between the funds in KCB account with those deposited in the stima sacco account. This case will be resolved around this axis.

Of KCB account and embezzlement claim

85. The applicant stated that, the respondent was the immediate former Chief Officer in the County Government of Kisii and holder of A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch, and KCB Account No. 1125XXXX. These facts were not denied.
86. According to the applicant, the respondent received large unsupported payments from the County Government of Kisii into his KCB Account No. 1125XXXX without reasonable explanation and supporting documents.
87. The analysis it carried out of the respondent's KCB account by the applicant revealed that, between 2014 and 2021, the respondent had received into the account, funds amounting to Kshs.



- 65,142,325.00 from the County Government of Kisii out of which Kshs. 595,196.90 were salary payments for the duration he was an employee of the County Government of Kisii. The analysis is contained in a table in paragraph 8 of the affidavit in support of the application.
88. Upon investigations, the County Government of Kisii confirmed through a letter dated 25th September, 2023 that, it could trace documents in support of only 8 payments to the respondent totalling up to Kshs. 7,125,100. Neither the County Government of Kisii nor the respondent provided documents to support the other payments made to the respondent. According to the investigator, all the other payments to the respondent totalling up to Kshs. 58,017,225 were unsupported by any document, making this a clear case of embezzlement of public funds.
89. The investigator found that close scrutiny of the documents provided revealed discrepancies and gave an example of a payment voucher of Kshs. 2,230,000 made to the respondent on 7.10.2016 for the provision of training materials and equipment for artificial insemination training.
90. The applicant gave the respondent an opportunity to provide explanations and supporting documents for these huge payments.
91. This court is of the view that, being the Chief Officer in the County Government of Kisii and the recipient of public funds into his account, the respondent was under a legal obligation and responsibility to account for the funds which he claims he received as imprest holder. He did not provide supporting or accountable documents for the colossal amounts of public funds received into his account. His claim that the documents were with the county government of Kisii was merely avoidance. The witnesses from the county government stated that there were no documents to support the 29 payments received by the respondent from the county government of Kisii. The respondent did not discharge this responsibility.
92. Based on the evidence by the applicant, the funds received by the respondent from Kisii county government totalling up to Kshs. 58,017,225 into his account, was not supported by official documentation from the county of Kisii. Only 8 out of the 37 payments made to his account were supported by documents. The respondent did not provide supporting documents of these payments. Accordingly, these are funds arising from embezzlement of public funds. Therefore, proceeds of crime.

Connection between the two accounts

93. The applicant is required to establish a connection between the funds in the KCB account and those in the stima sacco account.
94. The applicant has shown through evidence and analysis of the two accounts that, the respondent would make cash withdrawals or mobile money transfers to other accounts associated with him including A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch from the KCB account. Upon withdrawals, he would make structured deposits into Stima Sacco account.
95. Investigations revealed that, the deposits into the Stima Sacco account were similar to the withdrawals from the KCB account.
96. The respondent was given an opportunity but, according to the applicant, he did not provide explanations as to the legitimate source of the funds in his A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch.
97. The applicant, therefore, on the basis of investigations formed the opinion that, there are reasonable grounds to believe that the funds in the respondent's bank account are a conduit of money laundering contrary to sections 3, 4, and 7 as read with section 16 of the POCAMLA.



98. The court notes that, the respondent gave explanations of the source of the funds in the stima sacco account to be; proceeds of sugar cane farming, livestock keeping and dog breeding.
99. It is important that, sugarcane is strictly controlled by legislation. Sugarcane farmers also have agreements with the millers on their sugar.
100. That notwithstanding, there is no payment into the Stima Sacco account which show that it was made in respect of or by any sugarcane company for sugarcane harvest supply. In essence, there is nothing whatsoever that was produced by the respondent to show the money in the Stima Sacco account was proceeds of sugarcane sales.
101. Claims for livestock keeping and dog breeding should also have some record to support a deposit or an entry in a bank account. Needless to state that, also dog breeding is a professional business with documentation for the breeds. Nothing shows the money in the Stima Sacco Account were proceeds of livestock or dog breed sales.
102. Therefore, the respondent did not provide evidence to support his claims that he was engaged in sugar cane farming, livestock keeping and dog breeding and that proceeds of sale of sugarcane, livestock or dog breeds were deposited into the Stima Sacco account.
103. It bears restating that, the applicant has shown through evidence and analysis of the two accounts that, the respondent would make cash withdrawals or mobile money transfers to other accounts associated with him including A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch from the KCB account. Upon withdrawals, he would make structured deposits into Stima Sacco account.
104. The applicant has also shown that, the deposits into the Stima Sacco account were similar to the withdrawals from the KCB account.
105. The amounts he received in his KCB account are traced in his stima sacco account. Analysis done by the applicant and evidence adduced, draw a relationship between the money received from Kisii County Government into his KCB account with the deposits into his stima sacco account.
106. There is nothing to show that the funds in his A/C No. 802011091900-0 held at Stima Sacco, Kisumu Branch were from legitimate source.
107. Accordingly, the applicant has proved on a balance of probabilities that, the funds in the respondent's bank account A/C No. 80201XXXX held at Stima Sacco, Kisumu Branch are in connection with, and the account thereof is a conduit for money laundering contrary to sections 3, 4, and 7 as read with section 16 of the POCAMLA. The funds, are therefore, proceeds of crime.

Conclusion and orders

108. In the upshot, this court is satisfied that the applicant has proved on a balance of probabilities that Kshs. 17,873,560 held at Stima Sacco A/C No. 80201XXXX Kisumu Branch are proceeds of crime as defined in Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act*.
109. A submission was made by the respondent that the applicant is infringing on their right to property in respect of the funds at Stima Sacco account. The court holds the view that, a finding that assets or property of the Respondents are proceeds of crime, invokes application of the claw-back provision in article 40(6) of *the Constitution*, thus removing such property from the property protection offered under article 40 of *the Constitution*.
110. And following a finding that property is proceeds of crime, a forfeiture order is issued (subject to Section 94 of the *Proceeds of Crime and Anti-Money Laundering Act*).



111. Forfeiture order so made, is also within the framework of article 40(6) of *the Constitution*.
112. This court is therefore, not persuaded that an order of forfeiture violates the Respondent's right to property guaranteed in Article 40 of *the Constitution*.
113. Accordingly, the application dated 26th October, 2023 succeeds, and this court enters judgment for the applicant against the Respondents as follows: -
- i. That the sum of Kshs. 17,873,560 held at Stima Sacco A/C No. 80201XXXXX Kisumu Branch is proceeds of crime and is hereby forfeited to the State.
 - ii. That it is hereby ordered that the funds in the said account shall be transferred to the applicant.
 - iii. That the Respondents shall bear the costs of this Originating Motion.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19TH JULY, 2024

.....

F. GIKONYO M

JUDGE

In the presence of: -

Kandie for applicant

Akhaabi/Ms. Oweri for respondent

Raymond C/A

