



**Assets Recovery Agency v Escobar Kenya Limited & another; Kenyatta National Hospital (Interested Party) (Civil Suit E002 of 2024) [2024] KEHC 8821 (KLR) (Anti-Corruption and Economic Crimes) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8821 (KLR)

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

**CIVIL SUIT E002 OF 2024**

**EN MAINA, J**

**JULY 18, 2024**

**BETWEEN**

**THE ASSETS RECOVERY AGENCY ..... APPLICANT**

**AND**

**ESCOBAR KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ERIC NGUKU MBIU ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYATTA NATIONAL HOSPITAL ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. By the Originating Motion dated 16<sup>th</sup> January 2024, filed herein on even date, the ARA/Applicant seeks orders for forfeiture to the government of Kenya of the following monies: -
  - i. Kshs.14,280,345/80 in Account No. 01037134639000 domiciled at the National Bank in the name of Escobar Kenya Limited, the 1<sup>st</sup> Respondent.
  - ii. Kshs.358,556/33 in account No.01045085144600 at the National Bank in the name of Erick Nguku Mbiu, the 2<sup>nd</sup> Respondent.
2. The Originating Motion is brought under Sections 81, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (The POCAMLA).



3. The Applicant is the Asset Recovery Agency established under Section 53 of the POCAMLA as a body corporate with power to identify, trace, freeze and recover proceeds of crime and with authority to institute civil proceedings for that purpose.
4. The 1<sup>st</sup> Respondent is a limited liability company registered on 1<sup>st</sup> July 2014 via certificate No. CPR/2014/149478. It is the owner of account No. 013037134639000 domiciled at the National Bank of Kenya.
5. The 2<sup>nd</sup> Respondent is a Kenyan Citizen who at all material times was a director of the 1<sup>st</sup> Respondent company and owner of Account No. 01037134639000 domiciled at the National Bank of Kenya.
6. The Interested Party is a National Referral Hospital situated and operating in Nairobi and the public body from whom the suit funds originated.
7. The gravamen of the Originating Motion, as can be discerned from the grounds on the face thereof, and in the two affidavits sworn by Collins Ipapo on 16<sup>th</sup> January 2024 and 20<sup>th</sup> May 2024, is that the ARA/Applicant received information that a sum of Kshs.35,441,587 had been siphoned from the Kenyatta National Hospital's (the KNH) staff loan bank account No. 01L50000162390 domiciled at the National Bank of Kenya by the 2<sup>nd</sup> Respondent; that it instituted investigations by first obtaining a warrant and orders to investigate the bank accounts associated with the 2<sup>nd</sup> Respondent. That investigations revealed that on 7<sup>th</sup> June 2023 a sum of Kshs.35,441,587/35 had been diverted into the 1<sup>st</sup> Respondent's bank account No. 01037134639000 by changing the details of the account number to which that amount was to be transferred from the KNH payrolls Administration Account No.1003058005000. That the funds were intended to go into Acc. No. 01L50000162390 Kenyatta National Hospital Staff Unsecured Personal Loans (UPL) Suspense Account in the same branch. Further, that once the funds were credited into the 1<sup>st</sup> Respondent's account No.01037134639000 the 2<sup>nd</sup> Respondent personally withdrew a sum totaling to Kshs.21,161,241.55 over the counter through cheques and in cash and also transferred a sum of Kshs.358,556.33 into his personal account No.01045085144600 in the same bank. That when he was called upon by the ARA/Applicant to give an explanation as to the source of the Kshs. 35,441,587/35 in the 1<sup>st</sup> Respondent's account, the 2<sup>nd</sup> Respondent who is the sole signatory of that account recorded a statement (Annexure CI6) on 3<sup>rd</sup> October 2023 and alleged that the funds were proceeds of a tender No. KNH/7/82/2022 – 2023 awarded to the 1<sup>st</sup> Respondent by the KNH for the supply of various equipment to the tune of Kshs.35,523,269/-; that the 2<sup>nd</sup> Respondent supplied the ARA/Applicant with documents to wit, Local Purchase Orders, invoices and delivery notes purportedly evidencing the tender but when the purported KNH rubber stamps on the said document were put to a forensic examination by Eli John Mwangi, a document examiner attached to the Directorate of Criminal Investigations (the DCI), it turned out that they were all forgeries.
8. According to the ARA/Applicant, whereas the KNH had in fact advertised a tender No. KNH/T/82/2022 – 2023 it was for the Supply and Delivery of Proposed Construction of and Equipping of Interventional Radiology suite and the 1<sup>st</sup> Respondent was not one of the bidders and further that as a matter of fact the tender had been subsequently cancelled for reason of insufficient budget and was not awarded.
9. Following the above revelations, the Applicant sought and obtained a preservation order of the funds in the two impugned accounts vide HCACEC MISC Application No. E038 of 2023. The order was subsequently gazetted on 3<sup>rd</sup> November 2023 vide Gazette Notice No. 14883 dated 19<sup>th</sup> October 2023. Thereafter the Applicant filed this Originating Motion seeking to recover the sums in the impugned bank accounts for being proceeds of crime.



10. According to Collins Ipapo, the Investigating officer in this case, the Respondents are part of a syndicate involved in a money laundering scheme which fraudulently diverted the funds belonging to the KNH. He contended that the KNH had by a letter dated 14<sup>th</sup> September 2023 confirmed that the funds had been diverted from its staff personal loan account to that of the 1<sup>st</sup> Respondent and that it is therefore in the interest of justice that the funds be forfeited or else the economic advantage obtaining from the commission of crime will continue to benefit a few to the detriment of the economy and the public.

### **The Respondents' case**

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the Agency's application through a replying affidavit dated 27<sup>th</sup> March 2023 where the 2<sup>nd</sup> Respondent deposed that there is currently a criminal case MCCR/E1052/2023 Republic v Erick Nguku Mbiu and Anna Wangui Mburu which is at pre-trial stage, in relation to the subject matter herein. He deposed that he has a right to fair hearing that includes the presumption of innocence until the contrary is proved and further that should this application be heard before the conclusion of the criminal case, his right to fair hearing will be infringed as were he to be acquitted these proceedings would be rendered nugatory and hence these proceedings ought to be stayed until the criminal case is heard and determined.

### **The Interested Party's case**

12. The Interested Party presented its case through a Notice of Motion application dated 8<sup>th</sup> May 2024 which is expressed to be brought under Articles 43(3) and 159(2) of *the Constitution* of Kenya, Section 1A, 1B & 3A of the *Civil Procedure Act* and Order 51 of the Civil Procedure Rules 2010 and which seeks orders as follows: -
  - a. That this Honourable Court be pleased to grant an order declaring that the suit funds rightfully belong to the Interested Party;
  - b. That this Honourable Court be pleased to issue an order directing that the suit funds be transferred to the Interested Party.
13. The Notice of Motion is based on the grounds that the Interested Party is a victim of fraud and theft of Kshs. 42,275,517.40, which amount includes the suit funds, which was illegally transferred to the 1<sup>st</sup> Respondents' account instead of the account for its Staff Unsecured Personal Loans Suspense Account; that the purpose of the stolen funds was to remit its staff's statutory deductions and financial obligations such as loan repayments and insurance premiums; that after discovering the fraud, the Interested Party reported the incident to the Kenyatta Hospital Police Post which referred the case to the Director of Criminal Investigations (the DCI) and subsequently to the Assets Recovery Agency/ the Applicant herein and hence the Interested Party is thus intimately connected to the instant proceedings and their outcome.
14. The Interested Party asserts that it is in the interest of justice that the suit funds be returned to it as the rightful owner, instead of being forfeited to the Government, as it has suffered substantial loss as a result of the theft and returning the funds would mitigate that loss.
15. The Notice of Motion is supported by an affidavit sworn on 8<sup>th</sup> May 2024 by Calvin Nyachoti, the KNH Company Secretary where he deposes that the Interested Party is the complainant in the Criminal case where the 2<sup>nd</sup> Respondent is the accused in relation to those funds; he explained the process by which the KNH makes its payments by stating that it prepares an excel spreadsheet with details of the payments to be made that month which is then uploaded into the National Bank of



Kenya's e-pay system, then printed and presented to its signatories for approval. Upon verification, the signatories authorize the payments through the bank's e-pay platform which then generates an advice number and slip as confirmation of the transaction. Before effecting the transaction, the bank calls any of the three signatories for confirmation, then effects the transfer through the RTGS System. Calvin Nyachoti deposes that on 7<sup>th</sup> June 2023, payments for the month of May were processed as usual and a sum of Kshs. 35,441,587.35 was to be transferred into the hospital's payroll deductions; that the fraud was only detected on 14<sup>th</sup> June 2023, when the bank inquired about the payment in regard to the staff loan repayment for the month of May; that it was also discovered that a further Kshs. 6,833,930.10 had also been illegally diverted into another account; that upon discovery of the fraudulent transactions, the Interested Party issued "recall and resend" instructions to the respective banks with a view of reversing the transactions but it was informed that of the Kshs.35,441,587.35, Kshs. 358,556.33 had already been transferred to the 2<sup>nd</sup> Respondent's account and Kshs. 21,161,241.55 had already been withdrawn from the account by the 2<sup>nd</sup> Respondent and only a balance of Kshs. 15,280,345.80 remained in the 1<sup>st</sup> Respondent's account. Upon further inquiry, it was revealed to the Interested Party that the 2<sup>nd</sup> Respondent had tendered forged procurement documents to explain the source of the funds in the 1<sup>st</sup> Respondent's account. Calvin Nyachoti further stated that the Interested Party had cancelled the purported tender and that in any event the Respondents had neither bid nor participated in the same.

16. Calvin Nyachoti also deposed that the fraud was reported to the Kenyatta Hospital Police Post and had been referred to the Director of Criminal Investigations and the Asset Recovery Agency which subsequently obtained search warrants over the Respondent's accounts.
17. He deposed that in its Originating Motion application, the Agency confirmed that the suit funds originated from the Interested Party. he deposed that it would therefore be in the interest of justice that the suit funds are returned to their rightful owner.
18. On 5<sup>th</sup> June 2024 the Interested Party filed a Supplementary Replying Affidavit in response to the Agency's Further Affidavit where Calvin Nyachoti reiterated that the suit funds were part of the Interested Party's monthly check-off remittances for the month of May 2023; that the documents received by the bank from the Interested Party were original and only the account number was wrongly indicated. He deposed further that the DCI charged its staff involved in the fraud and the Respondents but it did not implicate its accounting officers and account signatories. He contended that no forged documents were used to effect the fraudulent transaction; that what occurred was an alteration of the payroll system and that its staff were investigated internally and by the DCI. He also deposed that the Interested Party took action by dismissing the staff charged with the criminal offense. He asserted that thereafter the Interested Party put in place measures as would prevent such occurrences in the future, including discontinuation of the NBK e-pay system, reconfirmation of suppliers' bank details, introducing maker-checker confirmation of bank details, attachment of payee bank details to vouchers before approval and issuance of instructions to its banks to reconfirm details before making payment. He contended that the Agency has not presented any evidence that if the suit funds are remitted back to the Interested Party, they might be subjected to a similar fraudulent scheme. He asserted that the Interested Party transacts more than Kshs. 1.5 billion per month and it had never experienced a similar incident. He explained that the Interested Party's payment system has been efficient and as it had never encountered any glitch or theft before the Agency's Affidavit is baseless, lacks merit and is an attempt to frustrate the Interested Party's proprietary rights to the suit funds. He further contended that the Interested Party's Application has met the threshold set out in Sections 93 and 94 of the POCAMLA.
19. In response to the Relying Affidavit of the Respondent and the Interested Party's application dated 8<sup>th</sup> August 2024, the Agency filed a further affidavit sworn by COLLINS IPAPO on 20<sup>th</sup> May 2024, where he deposed that the proceedings in the criminal cases against the Respondents herein are separate and



distinct from the instant forfeiture proceedings and hence these proceedings are not affected by those outcome of the criminal proceedings. He contended that the instant proceedings are civil in nature and the evidentiary burden is on a balance of probabilities and are in compliance with Article 50 of *the Constitution* of Kenya.

20. In regard to the Interested Party's application, Collins Ipapo deposed that it had not met the threshold set out in Sections 93 and 94 of the POCAMLA as the fraudulent transfer of the suit funds was by means of forged documents and alteration of the payroll payment schedule through the collusion of the Interested Party's accounting officers and account signatories.
21. He deposed that the Interested Party's application does not address what measures it had taken to deal with the errant staff involved so as to obviate such occurrences from happening in the future. He was thus apprehensive that if the funds are remitted back to the Interested Party, they may be subject to a similar fraudulent scheme.

## **SUBMISSIONS**

22. Learned Counsel for the parties canvassed the applications through written submissions.

### **The ARA/Applicant's submissions**

23. Mr. Githinji, Learned Counsel for the Agency/Applicant, submitted that the funds in the impugned bank accounts are proceeds of crime, as they constitute economic advantage derived as a result of or in connection with an offense. He contended that the Respondents have not controverted the facts as presented by the Applicant, which facts are corroborated by the Interested Party in its application dated 8<sup>th</sup> May 2024.
24. He submitted that forfeiture proceedings are civil in nature and the standard of proof is "on a balance of probabilities". He asserted that the averments by the Respondents of violation of their right to fair trial are unfounded as the instant proceedings are under Section 92(4) of the POCAMLA independent of the outcome of the criminal proceedings. He asserted that the Applicant has proved a clear case of money laundering and the Respondents have failed to rebut the evidence presented by the Applicant.
25. On the Interested Party's application to have the suit funds returned to it, Counsel for the Applicant submitted that the Interested Party's staff colluded and participated in the money laundering scheme and the Interested Party is thus estopped from invoking Section 93 or 94 of the POCAMLA. He cited the case of National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd (260/03) [2004] ZASCA 36 (13 May 2004) where the Supreme Court of Appeal of South Africa discussed the Principle of the Exclusion of Interest and opined:

“ . . . we agree that property owners cannot be supine. .c.c we endorse the notion that the State is Constitutionally permitted to use forfeiture, in addition to criminal law, to induce members of the Public to Act vigilantly in relation to goods they own or possess so as to inhibit crime. . . owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and refrain from implicating themselves or their possessions in its ambit. . . We therefore agree that the act requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilization.”

26. Counsel relied on the following cases to support his submissions: -Director of Assets Recovery and Others, Republic -v- Green & Others (2005) EWHC 3168.ARA & Others -v- Audrene Samantha Rowe & Others Civil Division Claim No. 2012 HCV 02120 the Court of Appeal of



Jamaica. Abdulrahman Mahmoud Sheikh & 6 others -v- Republic & Others (2016) eKLR. Kenya Anti-Corruption Commission -v- Stanley Mombo Amuti (2017) eKLR. Schabir Shaik & Others -v- State Case CCT 86/06(2008) ZAC 7. Miller -v- Minister of Penions (1947) 2ALL ER 372. Assets Recovery Agency -v- Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No. 2007 HCV003259. Assets Recovery Agency -v- Quorum Limited & 2 Others (2018) eKLR. National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd (260/03) [2004] ZASCA 36 (13 May 2004)

27. Counsel for the Respondents did not file any submissions despite seeking and obtaining an extension of time to do so.

### **The Interested Party's submissions**

28. Miss Mwachoni Learned Counsel for the Respondents, submitted that Sections 93 and 94 of the POCAMLA places a burden on the Applicant to prove that the Interested Party was involved in the commission of the offenses through which the property was acquired and that the Interested Party knew that the funds were a result of crime, failure to which, the suit funds should be returned to the Interested Party. She contended that the Applicant did not prove that the Interested Party participated in the fraudulent acts that transferred the suit funds into the Respondent's accounts. Counsel asserted that being a State Corporation, the Interested Party is a separate legal entity from its members and staff and should be treated as such. Counsel referred to Section 3 of the State Corporation Act, 2012 which provides that a State Corporation shall have perpetual succession, is capable of suing and being sued and is capable of alienating moveable and immovable property. Counsel contended that the fact that its staff may have colluded with the Respondents to illegally and unprocedurally transfer the suit funds does not legally implicate the Interested Party, which had proven that it was not involved in the fraudulent transfer of the suit funds but had in fact suffered huge losses.
29. Counsel for the Interested Party took issue with the Agency's reliance of the case of National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd (*supra*) and contended that the issue in that case was whether the property was an instrumentality of an offense and therefore liable to be forfeited. She contended that the case ought not to persuade this court to deprive the Interested Party of its funds. She asserted that Article 40 of *the Constitution* guarantees that the courts shall not arbitrarily deprive any person of the legal right to own property if they are not satisfied that the same was gotten through ill-gains. Counsel emphasized that the main purpose of forfeiture proceedings is to prevent the person involved in crime from benefitting from ill-gotten gains; that the Interested Party has never been accused of fraud or any other related offences; that as soon as the Interested Party discovered the illegal transfer, it reported the incident to the Banking Fraud Unit and the Director of Criminal Investigations and the matter was investigated and the staff involved charged. That the Interested Party then took measures to further protect its funds through discontinuance of the use of the National Bank e-pay system due to control inadequacies, requesting suppliers to re-submit their banking details, introducing marker-checker confirmation for processing of payment vouchers, and issued instructions to their banks to confirm payment details before effecting bank transfers.
30. In response to the Agency's submission that the suit funds should be remitted directly to account number 01L50000162390 to offset the KNH Staff Loan, the Interested Party explained that it already offset the loan by repurposing funds from elsewhere to avoid high interest and transferring the funds to the account would amount to double repayment of the loans. Counsel concluded by stating that the Interested Party has met the threshold for the third party protection set out under Section 93(1) of the POCAMLA.



31. Counsel placed reliance on the following: -Asset Recovery Agency V Phylis Njeri Ngirita & 2 Others; Platinum Credit Limited (Interested Party) & Anor (2020) eKLR.Salomon -v- Salomom & Company Ltd (1897) A. C. 22Lee -v- Lee Air Farming Ltd (1961) A. C. 12 (P.C.)Victor Mabacho & Anor -v- Nurtturn Bates Ltd, Civil Appeal No. 247 of 2005 (2013) eKLR.National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd (260/03) [2004] ZASCA 36 (13 May 2004)Timbs -v- Indiana 586 US (2019)Schabir Shaik & Others -v- State Case CCT 86/06(2008)ZAC 7Abdulrahman Mahmoud Sheikh & 6 Others -v- Republic & Others (2016) eKLR.Jasbir Singh Rai & 3 Others -v- Tarlochang Singh Rai & 4 Others, SC Petition No. 4 of 2012 (2014) eKLR.
32. I have carefully considered the pleadings and the submissions by Counsel for the Agency, the Respondents and the Interested Party and have Identified the following as the issues for determination.

### **The Issues for determination**

- i. Whether the funds in the two impugned bank accounts are proceeds of crime liable for forfeiture to the government.
- ii. Whether the Interested Party has met the threshold set out under Section 93(1) of the POCAMLA: Whether its application to have the funds returned to it should be allowed.

### **Analysis and Determination**

#### **Issue (i):- Whether the funds in the two impugned bank accounts are proceeds of crime liable for forfeiture to the government.**

33. I have carefully considered the applications herein; the grounds thereof, the evidence adduced by the parties through thier various affidavits, the documentary evidence annexed thereto, the rival submissions, the cases cited therein and the law.
34. This court can only order forfeiture of property if it is satisfied on a balance of probabilities that the said property is an instrumentality of crime or is proceeds of crime. (See Section 92(1) of the POCAMLA)
35. Proceeds of Crime is defined in Section 2 of the POCAMLA to be:-
 

“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.”
36. The impugned funds are held in two bank accounts owned by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent respectively. Both are separate and distinct legal persons, despite the 2<sup>nd</sup> Respondent being a director and the sole signatory of the 1<sup>st</sup> Respondent’s bank account No. 01037134639000 as per the attached Account Opening Application Form dated 28<sup>th</sup> June 2017 (Annexure CI3 to the Supporting Affidavit of Collins Ipapo). There is cogent evidence that on 7<sup>th</sup> June 2023, the above account received Kshs. 35,441, 587.35. Prior to that payment the balance in that account was Kshs.775.45. The 1<sup>st</sup> Respondent’s bank statement which is produced as annexure CI3 shows that subsequent to the deposit of Kshs.35,441,587.35 several withdrawals were made by the 2<sup>nd</sup> Respondent way of mobile transfers, cheques and cash and by 14<sup>th</sup> June 2023 when another deposit of Kshs.160,000/- was made only Kshs.14,120,945 remained in the account. The amount that was deposited into the account on 7<sup>th</sup> June



2023 can directly be traced to the Interested Party through its payment schedule of 05<sup>th</sup> June 2023 for Payroll Administration Account No. 0100305800500 which is also attached to the supporting affidavit of Collins Ipapo. The RTGS payment appears as No. 62 in the schedule leaving no doubt in the mind of this court that the money belonged to the KNH. According to the schedule the money was to be credited to Acc. No. 001003058005000 at the National Bank Harambee Branch. There is however evidence that instead it was deposited into the 1<sup>st</sup> Respondent's account number cited above, in the same branch. There is also evidence that on 7<sup>th</sup> June 2023 Account Number 010445085144600 in the name of Eric Mbiu, the 2<sup>nd</sup> Respondent, received an amount of Kshs.1.8 Million from the 1<sup>st</sup> Respondent's account through a cheque and by way of a cash deposit from that account by himself of Kshs. 500,000 on 9<sup>th</sup> June 2023. There is evidence that diversion of the funds to the 1<sup>st</sup> Respondent's account some of which ended up in the 2<sup>nd</sup> Respondent's personal account was done by altering the account number stated in the schedule of payments. It was therefore a fraudulent and unlawful diversion of the funds. There is evidence by way of a letter dated 14<sup>th</sup> June 2023 (Annexure "CI5" to the supporting affidavit) that as soon as the KNH (Interested Party) got wind of the fraudulent diversion/ theft of the funds it wrote to the bank and instructed it to recall and resend the money to the right account but by then it was too late as some of it had either been withdrawn or transferred no doubt by the 2<sup>nd</sup> Respondent.

37. In a forfeiture application, the burden of proof lies with the Applicant to prove on a balance of probabilities that the impugned property is proceeds of crime. Only once the court is so satisfied does the evidentiary burden shift to the Respondent to prove that the source of the property is a legitimate one. In this case the ARA/Applicant has proved on a balance of probabilities that the sum of Kshs. 35,441,587.35 belonging to the KNH (Interested Party) was diverted from its account to the account of the 1<sup>st</sup> Respondent. The Applicant has also proved that part of that money was subsequently withdrawn by the 2<sup>nd</sup> Respondent and part of it transferred to the 2<sup>nd</sup> Respondent's personal account. The Respondents did not make any effort, in these proceedings, to explain the reason of those transfer or even the source of the funds. However, in a statement recorded with the ARA/Applicant on 3<sup>rd</sup> October 2023 which is exhibited as "Annexure CI6" the 2<sup>nd</sup> Respondent's explanation was that the money was paid to the 1<sup>st</sup> Respondent by the Interested Party after it emerged as the winning bidder in a Tender No. KNH/T/82/2022-2023 and awarded the tender to supply various equipment's. There is evidence that thereafter the 2<sup>nd</sup> Respondent supplied procurement documents as proof of the tender which however turned out to be forgeries. The Document Examiner's report Ref: CID/ORG/8/3/1/773 - 2023 to that effect and the letters by the KNH dated 8<sup>th</sup> March 2023 to the various bidders notifying them of the cancellation of the tender were not controverted. It is therefore my finding that the Respondents have not discharged the evidentiary burden placed upon them to prove the legitimacy of the funds. The Applicant's evidence that the funds were stolen from the Interested Party was not therefore rebutted.
38. In the case of ARA V Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica Claim No. 2007 HCV003259 it was held that:

"Even though these proceedings are Quasi- Criminal in nature, there is an evidential burden of proof on the Defendant. It is incumbent to then 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."



39. Similarly, in this case it is my finding that the funds in the impugned accounts are proceeds of crime. The 2<sup>nd</sup> Respondent neither worked for the KNH (Interested Party) and neither did he or the 1<sup>st</sup> Respondent of which he was a director supply any goods or render any services to the KNH, as would have justified such a payment. The movement of the money has all the imprints of theft and money laundering and I say so despite that the 2<sup>nd</sup> Respondent is yet to be adjudged guilty in the criminal case. This because it is now settled that civil forfeiture proceedings are “in rem” (against property) and civil in nature as opposed to criminal proceedings that are against the accused person. While in criminal proceedings the prosecution has to prove the guilt of the accused person beyond reasonable doubt, in these proceedings all that the Applicant needs to do is to prove on a balance of probabilities that the property in issue is proceeds of crime. It is instructive that the Applicant is not required to prove the commission of a specific offence and proof of a conviction is not mandatory. This is made clear in Section 92 (4) of the POCAMLA which provides that the validity of forfeiture order is not affected by the outcome of criminal proceedings or investigations instituted for that purpose. It means therefore that even where an accused person is acquitted in a criminal prosecution concerning the property in issue the property can still be forfeited.

40. In the case of Pamela Aboo v Assets Recovery Agency and Kenya Anti-Corruption Commission, Civil Appeal No. 452 of 2018, Warsame JA, explained the above principle as follows: -

“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. . . 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...” (Emphasis mine)

41. In the case of Assets Recovery Agency -v- Quorum Limited & 2 Others (2018) eKLR the Court held that: -

“Civil proceedings are proceedings in rem (against the property . . . The proceedings are to determine the criminal origins of the property in issue and are not a criminal prosecution against the respondents where presumption of innocence is applicable.”

42. In the case of Assets Recovery Agency V Lilian Wanja Muthoni T/A Sahara Consultants & 5 Others the court held that: -

“It is my finding and so I hold, that a criminal conviction is not a condition precedent to the making of an order for Civil Forfeiture under Part VIII of POCAMLA.”

43. I find therefore that the instant proceedings do not violate the Respondents’ right to fair trial, and in particular, the right to be presumed innocent until proven guilty. Accordingly, it is my finding that the funds in the two impugned accounts being proceeds of crime they are liable for forfeiture to the government.

**Issue (ii):- Whether the Interested Party has met the threshold set out under Section 93(1) of the POCAMLA: Whether its application to have the funds returned to it should be allowed.**

44. The Interested Party’s Notice of Motion application dated 8<sup>th</sup> May 2023 poses the question of whether the funds should be forfeited to the Government or returned to the Interested Party.



45. The Interested Party argues that since there is no question that the funds originated from its accounts, the funds should be returned to it as it is “the true owner”. The Interested Party further asserts that its payment systems have been sound and no occurrence of theft had ever happened before. When put to task to explain the measures it had taken upon discovery of the fraudulent transfer of the suit funds, it contended that it had reported the matter to the police who in turn referred the issue to the DCI and subsequently to the ARA/Applicant for further investigations. It also conducted internal investigations and dismissed the staff that had been implicated in the fraudulent scheme. The Interested Party claims that after this incident it sealed the loop-holes through verification of vouchers, confirmation of accounts and effecting of payment in such a way as would ensure that such a scheme would not recur in the future. It contended that its accounts officers and account signatories were not involved in the fraudulent transfer of the suit funds to the Respondents’ accounts and that there is no possibility that if returned to it, the funds would be subjected to the same fraudulent scheme.
46. The ARA/Applicant opposed the Interested Party’s application on grounds that it did not meet the threshold provided under Sections 93 and 94 of the POCAMLA since its own staff were involved in the fraudulent scheme. It argued that if the funds were returned to the Interested Party, they might be subjected to a similar fraudulent scheme.
47. Ideally the Interested Party should have approached this court through Sections 83(3), 90(4) and 91 of the POCAMLA instead of by way of Notice of Motion as it did. However, this court shall take that as a procedural technicality which it can overlook under Article 159(2)(d) of *the Constitution* and proceed to determine the application on its merits. In any event the application by the Interested Party to be enjoined to these proceedings did not meet any resistance by the principal parties then or even now. Let me therefore turn on the issue of whether the funds ought to be forfeited to the government or whether they should be returned to the Interested Party.
48. Section 93(1) of the POCAMLA under which the ARA/Applicant seeks to resist the claim to the funds by the Interested Party states:-
- “Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities -
- (a) that the person was not in any way involved in the commission of the offence; and
- (b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest -
- (i) for sufficient consideration; and
- (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property.”
49. The Agency relies especially on Section 93(1)(a) above and contends that the Interested Party was involved in the Commission of the offense as it was executed by its staff and it is therefore not entitled to have the monies preserved in the two accounts.
50. In its submissions, the Interested Party asserted that being a corporation, it has a separate and distinct legal personality from its staff thus it should not be held liable for their actions. It further contended that there was no forgery of documents on its end as the fraud was executed by original



and legitimate documents with the detail of the receiving bank account being fraudulently altered. It further contended that none of its accounts officers or signatories was involved in the fraudulent transfer.

51. Section 93 of the POCAMLA enjoins this court to protect third party interests in these kind of proceedings. However, for such protection to ensue the third party must demonstrate that it did not take part in the commission of the offence. This in my view is a simple and straight forward doctrine which is not fettered by whether or not the third party is a separate legal entity. The Interested Party herein has demonstrated that the monies in the two accounts were diverted from its account through the acts of a third party. It has demonstrated that this theft only came to its attention because the bank called to inquire why it had not remitted the funds due to the staff personal loan account. It has also demonstrated that upon discovery of the diversion, the Interested Party immediately wrote a letter to the bank requesting it to reverse the transaction but it was too late. It also demonstrated that it thereafter brought the matter to the attention of the law enforcement authorities and by extension to the ARA/Applicant. It has also sworn that it has now put in place measures as would deter such criminal acts from recurring again and that those of its officers who did so were brought to book. I am therefore persuaded that as a corporate body the Interested Party was not involved in the commission of the offence but that that was the act of the bad elements within its ranks. Accordingly, I find in its favour in coming to the conclusion that the forfeited funds shall be returned to the Interested Party so that as between the Applicant and the Interested Party, the Interested Party's application is successful and the sum of Kshs.14,638,902.13 the subject of the preservation order granted by this court on 25<sup>th</sup> October 2023 shall be returned to the Interested Party forthwith and in any event not later than 21 days of this judgment.
52. As for the costs of this suit and the Notice of Motion the order that commends itself to me is that the same shall be borne by the Respondents.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 18<sup>TH</sup> DAY OF JULY 2024.**

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**E.N. MAINA**

**JUDGE**

In the presence of:-

Ms Mwachoni holding brief for Dr. Mutubua for the Interested Party

Ms Tank for the Respondent

Mr. Githinji for the ARA/Applicant

Court Assistant – Wilson

