



**Assets Recovery Agency v Oduory & another; Family Bank Limited
(Interested Party) (Civil Suit E025 of 2023) [2024] KEHC 12648 (KLR)
(Anti-Corruption and Economic Crimes) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL SUIT E025 OF 2023**

F GIKONYO, J

OCTOBER 16, 2024

**IN THE MATTER OF: AN APPLICATION FOR
ORDERS UNDER SECTIONS 81, 84, 90, AND 92
OF THE PROCEEDS OF CRIME AND ANTI-
MONEY LAUNDERING ACT (POCAMLA) AS READ
TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES AND
IN THE MATTER OF: FORFEITURE OF MOTOR
VEHICLES REGISTRATION NO: KDH 211F ISUZU
NQR AND KBR 343V MITSUBISHI FUSO AND
IN THE MATTER OF: FORFEITURE OF LR NO. NANDI KAPKANGANI/3624**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

PEPRITER KADENYI ODUORY 1ST RESPONDENT

ALEX GATHEGU MURIMA 2ND RESPONDENT

AND

FAMILY BANK LIMITED INTERESTED PARTY



JUDGMENT

Forfeiture and contempt of court

1. There are two applications before this court for determination; a) an application for forfeiture; and b) an application for contempt of court.

Forfeiture application

2. The forfeiture application was commenced by way of an originating motion dated 29/09/2023 seeking the following orders THAT;
 - i. This honourable court be pleased to declare the following motor vehicles proceeds of crime and therefore liable for forfeiture to the government of Kenya;
 - a. KDH 211F ISUZU NQR
 - b. KBR 343V MITSUBISHI FUSO
 - ii. This honourable court be pleased to issue an order of forfeiture of the following motor vehicles;
 - a) KDH 211F ISUZU NQR
 - b) KBR 343V MITSUBISHI FUSO
 - iii. This court be pleased to issue an order directing the Director General National Transport and Safety Authority to transfer title/ownership in favour of the applicant in respect to the following motor vehicles;
 - a) KDH 211F ISUZU NQR
 - b) KBR 343V MITSUBISHI FUSO
 - iv. This honourable court be pleased to declare land parcel registration number Nandi/Kapkangani/3624 as proceeds of crime and therefore liable for forfeiture to the government of Kenya.
 - v. This honourable court be pleased to issue an order of forfeiture in respect of land parcel registration number Nandi/Kapkangani/3624 as proceeds of crime and therefore liable for forfeiture to the government of Kenya.
 - vi. This honourable court be pleased to issue a vesting order in respect of land parcel registration number Nandi/Kapkangani/3624 in favour of the applicant on behalf of the government of Kenya.
 - vii. The honourable court be pleased to issue an order to the chief land registrar to register the forfeiture/vesting order issued in prayer (v) and (vi) in respect of land parcel No. Nandi/Kapkangani/3624 in favour of the applicant.
 - viii. The honourable court makes any other ancillary order it may deem fit for the proper, fair, effective execution of its orders.
3. The application is supported by the supporting affidavit of No. 64485 S/SGT. PETER MUTISYA an investigating officer attached to the asset recovery agency.



4. The Applicant herein is the Assets Recovery Agency established under section 53(1) of the Proceeds of Crime and Anti-Money Laundering (hereinafter referred to as POCAMLA). The principal mandate of the Agency is to identify, trace, freeze, and recover proceeds of crime.

Investigations for asset-tracing and recovery

5. Section 53A (5) of POCAMLA grants the staff of the agency all the powers, privileges, and immunities of a police officer while executing the mandate of the applicant in the identification, tracing, seizure, and recovery of proceeds of crime.
6. Part VIII of POCAMLA provides for civil forfeiture. Sections 81, 82, 86, and 87 authorize the Agency to institute preservation proceedings against assets where there are reasonable grounds to believe that the property has been used or is intended to be used in the commission of an offence or is a proceed of crime.
7. Being satisfied that there are reasonable grounds to believe that the motor vehicles registered in the names of the respondents and land parcel No. Nandi /Kapkangani/3624 registered in the name of the 1st respondent, are proceeds of crime and liable for forfeiture to the applicant under POCAMLA, embarked on investigations thereto.
8. Investigations established the following: -
 1. The 1st respondent is the registered owner of land parcel No. Nandi /Kapkangani/3624.
 2. The 1st respondent and the interested party are the registered owners of motor vehicle registration No. KDH 211F ISUZU NQR.
 3. The 2nd respondent is a proxy of and partner of the 1st respondent in the illicit trade in narcotic drugs and the registered owner of motor vehicle registration No. KBR 343V MITSUBISHI FUSO.
 4. The 1st respondent was arrested and charged at JKIA law courts vide JKIA MCCR NO. E013 OF 2023 with trafficking in narcotic drugs namely heroin to wit 435.29 grams with a market value of Kshs. 1,305,870/= contrary to section 4(a) (ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 on 13/04/2023.
9. At the time of arrest on 06/04/2023, a search was conducted at the residence of the 1st respondent and the following were recovered; I) five packages of brownish granular/powdery substances in clear polythene bags suspected to be narcotic drugs; ii) two packages containing brownish granular; iii) one package containing brownish granular substances; iv) one package containing whitish powdery substances; v) greenish dry plant materials concealed in a gunny manila sack wrapped with a clear celotape in a carton box labeled uken pressure cooker 7.5 litres.
10. The substances suspected to be narcotic drugs seized at the 1st respondent's residence were presented to the government chemist who weighed, sampled and analyzed the substance and concluded the suspect brownish granular and powdery substance seized contained heroin, a narcotic drug with a purity of 35% w/w; while the greenish plant material was found to be cannabis.
11. Investigations established that the respondents acquired the properties of the subject matter of this application from the illegitimate trade in narcotic drugs and therefore constitute proceeds of crime and are liable for forfeiture pursuant to the provisions of the Narcotic Drugs and Psychotropic Control Act. no. 4 of 1994; the Proceeds of Crime and the Anti-money Laundering Act 2009 and the Prevention of Organized Crimes Act.



12. The motor vehicle registration no. KDH 211F ISUZU NQR was purchased by the 1st respondent from Thika dealers sometime in 02/03/2022 which is within the period under investigation.
13. The 1st respondent was issued with a land title for land parcel No. Nandi/Kapkangani/3634 by Nandi district land registrar on 06/09/2022 which is within the period under investigation.
14. Vide Miscellaneous Criminal Application No. E041 of 2023 Assets Recovery Agency v Safaricom Kenya Limited and 6 others filed in the chief magistrate's court pursuant to sections 118, 118A, 119, and 121(1) of the Criminal Procedure Code, section 180 of the *Evidence Act*, section 24(1) (e) of the *National Police Service Act* and section 53 A(5) of the *proceeds of crime and Anti-Money Laundering Act* for search warrants to investigate inter alia the respondents' mobile money wallets.
15. An analysis of the 1st respondent's money wallet no. 0729 806 151 established for the period 1st January 2020 – 31st December 2021 the money wallet transacted the sum of KShs. 37,097,819.92. further analysis established that the 1st respondent received funds from the 2nd respondent to the tune of KShs. 12,099,950 for the period 1st January 2020 – 31st December 2021.
16. An analysis of the 2nd respondent's mobile money wallet in respect of mobile no. 0795 435 612 established the line had transacted KShs. 28,806,304 for the period 1st January 2020 to 31st December 2021.
17. The investigations established a nexus between the 1st respondent's mobile wallet no. 0729 806 151 and the 2nd respondent's mobile wallet No. 0795 543 612.
18. The 1st respondent registered for income tax resident obligation on 22/05/2009 and the 2nd respondent registered on 29/09/2021. both have not filed their returns since registration.
19. Investigations further established that the respondents executed a complex scheme of money laundering designed to conceal and disguise the nature, source, disposition, and movement of the illicit funds, which constitute proceeds of crime and from which the respondents acquired the assets therefrom and are the subject matter of this application.
20. The investigation established that the respondents have no legitimate sources of income and as such the property's subject matter of the instant forfeiture application reasonably constitutes proceeds of crime from the illicit trade in trafficking in narcotic drugs.
21. The applicant contends that there are reasonable grounds and evidence demonstrating that the motor vehicles held in the name of the respondent and land reference No. Nandi/Kapkangani/3624 are direct or indirect benefits, profits, and/or proceeds of crime obtained from a complex money laundering scheme and are liable to be forfeited to the government of Kenya under the *Proceeds of Crime and Anti-Money Laundering Act*, 2009.

Preservation and forfeiture proceedings

22. On 16/06/2023, the applicant filed HCACEC Misc. No. E013 of 2023 Assets Recovery Agency Vs Pepriter Kadeny Oduory & 2 Others and obtained court orders issued on 19/06/2023 preserving the subject matter of the instant forfeiture application.
23. On 07/07/2023 the applicant gazetted the preservation orders pursuant to section 83(1) of POCAMLA vide gazette notice no. 9126 of vol. CXXV-No. 158.



24. The applicant contends that there are reasonable grounds to believe that the motor vehicles registered in the names of the respondents and land parcel No. Nandi /Kapkangani/3624 registered in the name of the 1st respondent, are proceeds of crime and liable for forfeiture to the applicant under POCAMLA.
25. In the end, the applicant prayed that it is in the interest of justice that the orders of forfeiture do issue forfeiting the above properties to the applicant on behalf of the government of Kenya.

The responses

26. The interested party filed a replying Affidavit sworn on 21/11/2023 by Joan Gachomba.
27. The interested party averred that the purchase of the motor vehicle registration no. KDH 211F ISUZU NQR by the 1st respondent was financed by the interested party to the tune of Kshs. 3,576,800. the financing of the motor vehicle was subject to the terms of the letter of offer dated 01/03/2022 concluded between the 1st respondent and the interested party.
28. Following the purchase of the motor vehicle on loan, the logbook was registered in the joint names of the 1st respondent and the interested party.
29. To secure its interest in the motor vehicle in the event the 1st respondent defaults on the loan repayment, the interested party registered the initial notice under the Movable Property Security Act, 2017.
30. The interested party contends that the 1st respondent is yet to repay the loan facility in full. As it stands the amount owing to the interested party from the loan facility is Kshs. 2,556,456.59.
31. The interested party contends that it was not in any way involved in the commissioning of any of the offences but only provided the loan facility to the 1st respondent in the lawful and ordinary course of its business as a bank. Therefore, should this court grant the orders sought the interested party stands to lose its lawfully acquired interest in the motor vehicle.
32. The interested party prayed that the subject motor vehicle be exempted from the forfeiture proceedings pursuant to section 94 of the *Proceeds Of Crime And Anti-Money Laundering Act*.

Further affidavit

33. The applicant filed a further affidavit sworn by SSGT Peter Mutisya on 12/03/2024.
34. The deponent averred that an advertisement was published in the Daily Nation on 29/01/2024 in which motor vehicle registration number KDH 211F, stored at Leakey Storage Limited was advertised for sale by public auction by the interested party.
35. In a letter dated 31/01/2024 addressed to the interested party and copied to Leakey Storage Limited, the agency informed the sale by public auction of motor vehicle registration No. KDH 211F was ill-advised.
36. In response vide a letter dated 16/02/2024, the interested party through Mohammed Muigai LLP confirmed the disposal of motor vehicle registration No. KDH 211F by public auction.
37. The applicant contends that the conduct of the interested party in disposing of motor vehicle registration No. KDH 211F by public auction while a preservation order was in force is contemptuous of the high court order issued on 19/06/2023 and the instant proceedings in ACECE Civil application No. E025 of 2023.



38. The applicant contends that the conduct of the interested party in disposing of motor vehicle registration no. KDH 211F by public auction constitutes an offence pursuant to section 14 as read together with section 16(4) of the Proceeds of Crime and Anti Money Laundering Act and ought to be reprimanded as it frustrates the fight against organized crime, undermines national interest, and public interest and the rule of law.

Contempt of court application

39. The applicant filed an application dated 12/03/2024 seeking the following orders;

- i. Spent.
- ii. That the honourable court be pleased to order Ms. Nancy Njau, the ag. chief executive officer of Family Bank Limited be personally and physically present on all dates appointed for the hearing and delivery of the ruling on the instant application.
- iii. That this honourable court be pleased to cite for contempt;
 - a. Ms. Nancy Njau, the ag. chief executive officer of Family Bank Limited, the interested party,
 - b. Family Bank Limited, the interested party
- iv. That further to prayer ii) this honourable court be pleased to convict or fine the contemptors pursuant to sections 14 as read with section 16(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#).
 - a. Ms. Nancy Njau, the ag. chief executive officer of Family Bank Limited, the interested party, to a conviction of 2 years or a fine of one million shillings;
 - b. Family Bank Limited, the interested party to a fine of five million shillings
- v. That the honourable court makes any other ancillary order it may deem fit for the proper, fair, effective execution of its orders.

40. The application is supported by the supporting affidavit of SSGT Peter Mutisya sworn on 12/03/2024.

41. The deponent reiterated the averments contained in the supporting affidavit dated 29/09/2023 and further affidavit sworn on 12/03/2024.

The response

42. The interested party filed a replying affidavit sworn by Nancy Njau sworn on 22/03/2024.

43. The deponent averred that she instructed the firm of Mohammed Muigai llp to peruse the case tracking system and she became aware that there was no record of any preservation orders having been issued by the court in these proceedings.

44. The deponent averred that the interested party was not served with the proceedings in ACEC Misc. E013 of 2023 in which the interested party was cited as an interested party. therefore, the interested party was not aware of the preservation orders.

45. The deponent averred that she was never physically or otherwise served with the preservation orders neither was the interested party served with those orders by the applicant or at all.



46. The deponent averred that the preservation orders were issued for a period of 90 days from 19/06/2023. Those preservation orders unless they were extended and such extension served upon the interested party, lapsed on or around 19/09/2023. The alleged contemptuous actions of the interested party took place sometime in January 2024 more than three months after the lapse of the preservation orders. The applicant only filed these instant proceedings once the preservation orders were issued in ACEC Misc. No. E013 of 2023 had lapsed. The preservation orders were directly targeted to the respondent in ACEC Misc. No. E013 OF 2023 who is also a respondent in this matter. Nothing in the preservation order prohibited the interested party from recovering its interest in the motor vehicles subject matter of the preservation orders and it did so lawfully the respondent having defaulted on its loan. When the applicant wrote directly to the interested party on 31/01/2024 it did not alert the interested party of the existence of the preservation orders issued in ACEC Misc. No. E013 of 2023.
47. Once the interested party received the letter it instructed its advocates on record to respond with the information that they had already sold the motor vehicle to recover their interest in the motor vehicle which had been purchased through a loan given by the interested party. The interested party informed the applicant that there was an excess of Kshs. 311,000/= which it offered to deposit with the court pending the determination of this matter given that the respondent has not participated in these proceedings.
48. The applicant failed to demonstrate that the interested party intentionally refused or failed to comply with an order of this court. Therefore, the interested party has not acted contemptuously of this court as alleged
49. The interested party averred that the applicant has made an application for contempt in these proceedings yet the order they allege was disobeyed was issued in separate proceedings therefore this court has no jurisdiction to entertain the application or make any orders in its respect.

Directions of the court

50. The application was canvassed by way of written submissions.

The applicant's submissions

51. The applicant submitted that motor vehicle registration no. KDH 211F ISUZU NQR, land title No. Nandi/Kap Kangani/3614 and motor vehicle registration No. KBR 343V MITSUBISHI FUSO are proceeds of crime as the properties constitute an economic advantage derived and realized as a result of or in connection with an offence. the applicant relied on Article 40(6) of the constitution of Kenya, section 2,3,4,16,92(1)(4) of the POCAMLA, Director Of Assets Recovery And Others, Republic Vs Green & Others [2005] EWHC 3168, Assets Recovery Agency V Pamela Aboo; Ethics & Anti-Corruption, Commission(Interested Party)[2018] eKLR, ARA &Others Vs Audrene Samantha Rowe& Others Civil Division Claim No. 2012 HCV 02120 the court of appeal of Jamaica, Assets Recovery Agency V Pamela Aboo, Abdulrahman Mahmoud Sheikh & 6 Others V Republic & Others [2016] eKLR, Schabir Shaik & Others Vs State Case CCT 86/06(2008) ZACC 7, Assets Recovery Agency V Quorum Limited Supra & 2 Others [2018] eKLR, Assets Recovery Agency V Lillian Wanja Muthoni Mbogo & Others [2020] eKLR, Miller Vs Minister Of Pensions (1947) 2 ALL ER 372, Kenya Anti-Corruption Commission V Stanley Mombo Amui [2017] eKLR.
52. The applicant submitted that the balance of the funds realized from the sale of motor vehicle registration no. KDH 211F in the sum of Kshs. 311, 000 plus accrued interest thereon be remitted to the applicant's bank account.



The respondents' submissions

53. The respondents did not file written submissions.

The interested party's submissions.

54. The interested party submitted that no preservation orders were issued in this suit but in Misc. E013 of 2023 which was specifically issued against the respondent and not the interested party, the said preservation order was not served upon the interested party or its CEO, and the preservation order lapsed on 19/09/2023. Therefore, there was no valid preservation order hence the interested party did not violate any court order. Furthermore, the preservation order did not prevent the interested party from disposing of motor vehicle registration number KDH 211F ISUZU NQR after the 1st respondent defaulted on his loan obligation. The interested party relied on section 5(1) of the *Judicature Act*, the Civil Procedure (Amendment No. 3) Rules 2020 of the Senior Courts of England and Wales County courts, England and Wales, *Christine Wangaru Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR, part 81.4 (2)(a), 81.5(1) of the English civil procedure rules
55. The interested party submitted that the applicant has not satisfied the required threshold for a finding of contempt of court to be made. The interested party relied on *Samuel M.N, Mweru & Others V National Land Commission & 2 Others* [2020] eKLR.
56. The interested party submitted that the motor vehicle registration number KDH 211F ISUZU NQR is not a proceed of crime on account of an existing loan agreement between the interested party and the 1st respondent. The interested party contends that its interest in the motor vehicle would be jeopardized should this court consider the same as proceeds of crime. Furthermore, this court has the power to exclude interest in a property from forfeiture proceedings in the administration of justice. The interested party relied on Article 40(6) of *the Constitution*, sections 2 and 94 of POCAMLA, *Assets Recovery Agency V Rose Monyani Musanda; Sidian Bank Limited (Interested Party) [2020] eKLR, Miscellaneous Application No. 43 of 2019.*

Analysis And Determination

57. Upon consideration of the forfeiture application as well as the contempt of court application together with the applicant's affidavits in support thereof, replying affidavits, and the respective parties' submissions, distinct issues arise in respect of each application.

Issues for determination

58. In respect of contempt of court application, the major issues are:
- i. Whether the interested party had notice of the preservation order;
 - ii. And, acted in disobedience of the said orders, thus, committing contempt of court.
59. In respect of forfeiture, the major issues are:
- iii. Whether the respondents were served.
 - iv. Whether motor vehicle registration numbers KDH 211F ISUZU NQR and KBR 343V MITSUBISHI FUSO and land parcel registration number Nandi/Kapkangani/3624 are proceeds of crime?



- v. Whether the said motor vehicles and parcel of land are liable for forfeiture to the state and subsequent transfer to the Applicant?
- vi. Who is entitled to the costs of the suit?

Of the interested party being in contempt of court.

60. The applicant contends that the conduct of the interested party in disposing of motor vehicle registration No. KDH 211F by public auction while a preservation order was in force is contemptuous of the high court order issued on 19/06/2023 and the instant proceedings in ACECE Civil application No. E025 of 2023.
61. A preservation order is issued upon an ex parte application and is in the nature of an ‘order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property’ (s.82(1) of POCAMLA).
62. A preservation order is made against any person and any property as long as ‘there are reasonable grounds to believe 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 (s. 82(2) POCAMLA). Which partly explains the requirement for the ARA to ‘give notice of the order to all persons known to the Agency Director to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette’ (s.83(1) of POCAMLA). The notice shall be served in accordance with the provisions of the Civil Procedure Act (Cap. 21).
63. The court also thinks that, in order to shape any relevant conditions and exceptions to a preservation order, disclosure to the fullest extent of material elements known to or discovered by the investigator is necessary.
64. These are due process provisions which protects third parties with interest in the concerned property.
65. The interested party contends that the preservation orders were issued for a period of 90 days from 19/06/2023. Those preservation orders unless they were extended and such extension served upon the interested party, lapsed on or around 19/09/2023. The alleged contemptuous actions of the interested party took place sometime in January 2024 more than three months after the lapse of the preservation orders. The interested party argued that, the applicant only filed these instant proceedings once the preservation orders issued in ACEC Misc. No. E013 of 2023 had lapsed.
66. The interested party urged that the preservation orders were not directed at them, but, at the respondent in ACEC Misc. No. E013 OF 2023 who is also a respondent in this matter. The court wishes to reiterate that, a preservation order need not necessarily be directed at third parties. The law only requires ARA to ‘give notice of the order to all persons known to the Agency Director to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette’. Therefore, any person with notice- specific or general- of the preservation order is bound and precluded from dissipating the property subject of the preservation order.
67. It bears repeating that, a preservation order binds any person-actual party or person with notice of the order- and prohibits all acts by any person which dissipates the property concerned. Nevertheless, a preservation order does not foreclose the right of the interested party to protect or seek to recovery its interest in the motor vehicles subject of the preservation orders in the proceedings for preservation order and or forfeiture. Except, realizing such interest in a manner that dissipates the property or infringes POCAMLA is unlawful and may attract legal sanctions including restitution, committal for contempt of court, imprisonment, fines, only to mention but a few. Banks should be careful not to fall



into this trap as they seek to realize their interest in the property under preservation order or forfeiture proceedings, lest they should be failing to play their statutory role in combating money-laundering.

68. The interested party has a legitimate interest in the vehicles subject of the preservation order- which attached upon the respondent default on the loan advanced to purchase the vehicles. The interested party argued that, when the applicant wrote directly to the interested party on 31/01/2024 it did not alert the interested party of the existence of the preservation orders issued in ACEC Misc. No. E013 of 2023. At least, the interested party was entitled to notice of the preservation order under section 83(1) of POCAMLA because their interest is easily known from the search in the motor vehicle registration registry. The applicant did not establish this fact which weakens the quest for contempt of court.
69. The alleged contemptuous actions of the interested party took place sometime in January 2024 more than three months after the lapse of the preservation orders. It appears the applicant did not hammer this point to show the interested party's actions were done during the subsistence of the preservation orders. Asset recovery practitioners should ensure property under forfeiture or preservation pending forfeiture is always protected by a court order.
70. The interested party has explained that the motor vehicle was purchased through a loan facility and they were not served with a preservation order by the applicant herein at the time they realized their loan by way of sale of the lorry. In these circumstances, it is difficult to hold the interested party to contempt of court which is quite a serious offence which may attract sanctions including imprisonment.
71. This court finds that a reasonable doubt exists as to whether the interested party had notice of the preservation order when it sold the lorries which is resolved in favor of the interested party. And, strictly for this reason, the application for contempt of court fails.

Of forfeiture application

Service on the respondents

72. The applicant submitted that default judgment can be entered against the respondents in respect to the application dated 29/09/2023 pursuant to section 95(1) of the [Proceeds of Crime and Anti-Money Laundering Act](#).
73. The respondents, despite being served with the forfeiture application dated 29/09/2023 and the respective mention notices, had not entered appearance in the matter when it came up for directions. This is evidenced by the affidavit of service filed thereto.
74. According to the affidavit of service sworn by Nelson Muthoka Isiiye on 06/11/2023, attempts to locate the respondents were futile. The applicant served the respondents vide known email addresses as evidence by affidavit of service sworn on 21/11/2023.
75. The 1st and 2nd respondents did not participate in these proceedings by virtue of being untraceable.
76. This court finds that the respondents were properly served.

Whether motor vehicle registration numbers KDH 211F ISUZU NQR and KBR 343V MITSUBISHI FUSO and land parcel registration numbers Nandi/Kapkangani/3624 as proceeds of crime?

77. Section 2 of the POCAMLA defines further proceeds of crime as:

“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.”

78. Proceeds of crime has been cast broadly. And: -

“One of the reasons for the wide ambit of the definition of “proceeds of crime” is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of camouflage.

The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime.” (Schabir Shaik & others v State case CCT 86/06 (2008) ZACC 7)

79. Forfeiture proceedings are civil proceedings to which rules of evidence and procedure applicable in civil proceedings apply (Assets Recovery Agency vs Pamela Aboo: EACC Interested party [2018] eKLR). The standard of proof is on a balance of probabilities; although some posit that, given that the cause of action is founded on a conduct of a criminal nature, proof is towards the upper limits of the balance of probabilities which other jurisdictions call preponderant weight of or cogent evidence.

80. The degree of proof on a balance of probabilities was discussed in the case of Kanyungu Njogu vs Daniel Kimani Maingi [200] eKLR. In the case of Miller vs Minister of Pensions [1947] 2 ALL ER 372 Denning MR stated: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; “We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lost because the requisite standard will not have been attained.”

81. In civil forfeiture, the applicant need not prove any specific criminal offence, except should state the grounds constituting the particular unlawful act or conduct. See the case of Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168 the court stated as follows:

82. “In civil proceedings for recovery under part 5 of the Act, the Director need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

83. Civil forfeiture proceedings are not criminal prosecution, and so the court does not determine the guilt of the defendant but rather ‘the criminal origins of the property in issue’. Therefore, questions such as presumption of innocence is applicable.

84. One other thing worth of mention is that, the burden of proof rests with the applicant except, evidential burden may shift to the respondent upon adduction of prima facie evidence by the applicant. This shift of evidential burden is the basis for explanations or evidence required of the respondent as rebut the criminal origins of the property in issue lest he should risk judgment being entered against him.



85. See the case of Assets Recovery Agency v Fisher Rohan and Miller Delores, Supreme Court of Jamaica, Claim No. 2007 HCV 003259 it was held:-
- “.....Even though these proceedings are quasi-criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized.”
86. In this case, the burden of proof lies upon the Applicant to prove that the motor vehicles and the parcel of land are proceeds of crime as alleged but should that burden be discharged the evidential burden shifts to the Respondent to explain the source of the funds.
87. It is also trite that in order for the court to make orders of forfeiture under Sections 90 & 91 of the *Proceeds of Crime and Anti-Money Laundering Act*, the applicant need not establish the specific crime committed in relation to the property in issue. All it is required to prove is that there was unlawful conduct. Once the Applicant establishes, on a balance of probabilities as provided in Section 92(1)(b) of the *Proceeds of Crime and Anti-Money Laundering Act* that the assets in question are proceeds of crime, a duty is cast on the respondent to prove that he obtained the funds lawfully. The respondent is required to give a satisfactory explanation that he legitimately acquired the assets in question failing which the said assets shall be declared to have been illegally acquired.
88. The 1st respondent is the registered owner of land parcel No. Nandi /Kapkangani/3624.
89. The 1st respondent and the interested party are the registered owners of motor vehicle registration No. KDH 211F ISUZU NQR.
90. The 2nd respondent is a proxy of and partner of the 1st respondent in the illicit trade in narcotic drugs and the registered owner of motor vehicle registration No. KBR 343V MITSUBISHI FUSO
91. The 1st respondent was arrested and charged at JKIA law courts vide JKIA MCCR NO. E013 OF 2023 with trafficking in narcotic drugs namely heroin to wit 435.29 grams with a market value of Kshs. 1,305,870/= contrary to section 4(a) (ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 on 13/04/2023.
92. At the time of arrest on 06/04/2023, a search was conducted at the residence of the 1st respondent and the following were recovered; I) five packages of brownish granular/powdery substances in clear polythene bags suspected to be narcotic drugs; ii) two packages containing brownish granular; iii) one package containing brownish granular substances; iv) one package containing whitish powdery substances; v) greenish dry plant materials concealed in a gunny manila sack wrapped with a clear celotape in a carton box labeled uken pressure cooker 7.5 litres.
93. The substances suspected to be narcotic drugs seized at the 1st respondent’s residence were presented to the government chemist who weighed, sampled and analyzed the substance and concluded the suspect brownish granular and powdery substance seized contained heroin, a narcotic drug with a purity of 35% w/w; while the greenish plant material was found to be cannabis.
94. Investigations established that the respondents acquired the properties of the subject matter of this application from the illegitimate trade in narcotic drugs and therefore constitute proceeds of crime and are liable for forfeiture pursuant to the provisions of the Narcotic Drugs and Psychotropic Control Act. No. 4 of 1994; the Proceeds of Crime and the Anti-money Laundering Act 2009 and the Prevention of Organized Crimes Act.



95. The motor vehicle registration no. KDH 211F ISUZU NQR was purchased by the 1st respondent from Thika dealers sometime in 02/03/2022 which is within the period under investigation.
96. The 1st respondent was issued with a land title for land parcel No. Nandi/Kap Kangani/3634 by Nandi district land registrar on 06/09/2022 which is within the period under investigation.
97. Vide Miscellaneous Criminal Application No. E041 of 2023 Assets Recovery Agency v Safaricom Kenya Limited and 6 others filed in the chief magistrate's court pursuant to sections 118, 118A, 119, and 121(1) of the criminal procedure code, section 180 of the *evidence act*, section 24(1)(e) of the *National Police Service Act* and section 53 A(5) of the *proceeds of crime and Anti-Money Laundering Act* for search warrants to investigate inter alia the respondents' mobile money wallets.
98. An analysis of the 1st respondent's money wallet no. 0729 806 151 established for the period 1st January 2020 – 31st December 2021 the money wallet transacted the sum of Kshs. 37,097,819.92. further analysis established that the 1st respondent received funds from the 2nd respondent to the tune of Kshs. 12,099,950 for the period 1st January 2020 – 31st December 2021.
99. An analysis of the 2nd respondent's mobile money wallet in respect of mobile no. 0795 435 612 established the line had transacted Kshs. 28,806,304 for the period its January 2020 to 31st December 2021.
100. The investigations established a nexus between the 1st respondent's mobile wallet no. 0729 806 151 and the 2nd respondent's mobile wallet No. 0795 543 612.
101. The 1st respondent registered for income tax resident obligation on 22/05/2009 and the 2nd respondent registered on 29/09/2021. both have not filed their returns since registration.
102. Investigations further established that the respondents executed a complex scheme of money laundering designed to conceal and disguise the nature, source, disposition, and movement of the illicit funds, which constitute proceeds of crime and from which the respondents acquired the assets therefrom and are the subject matter of this application.
103. The investigation established that the respondents have no legitimate sources of income and as such the property's subject matter of the instant forfeiture application reasonably constitutes proceeds of crime from the illicit trade in trafficking in narcotic drugs.
104. The applicant contends that there are reasonable grounds and evidence demonstrating that the motor vehicles held in the name of the respondent and land reference No. Nandi/Kap Kangani/3624 are direct or indirect benefits, profits, and/or proceeds of crime obtained from a complex money laundering scheme and are liable to be forfeited to the government of Kenya under the *Proceeds of Crime and Anti-Money Laundering Act*, 2009.
105. The applicant contends that there are reasonable grounds to believe that the motor vehicles registered in the names of the respondents are proceeds of crime and liable for forfeiture to the applicant under POCAMLA.
106. The interested party submitted that the motor vehicle registration number KDH 211F ISUZU NQR is not a proceed of crime on account of an existing loan agreement between the interested party and the 1st respondent. Nevertheless, the interested party did not indicate any repayments of the loan made by the respondents or the use of the lorry which brings the balance in its hands within the meaning of proceeds of crime.



107. Whereas the interested party has explained its interest in KDH 211F ISUZU NQR, the balance of the funds arising out of the sale of the lorry have been proved to be proceeds of crime.
108. The respondents have not responded to the application herein. Therefore, the allegations by the applicant remain unchallenged.
109. In the upshot having considered all the evidence and submissions before this court, this court is satisfied that the applicant has proved on a balance of probabilities that motor vehicle registration No. KBR 343V MITSUBISHI FUSO and land parcel No. Nandi/Kapkangani/3624 are proceeds of crime as defined in Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act*.
110. Once this court makes a finding that the assets or property of the Respondents are proceeds of crime (subject to Section 94 of the *Proceeds of Crime and Anti-Money Laundering Act*), an order for forfeiture should ensue. This court is also not persuaded that an order of forfeiture is a violation of the Respondent's right to property guaranteed in Article 40 of *the Constitution*.
111. Accordingly, the application dated 29/09/2023 succeeds in part, and this court enters judgment for the applicant against the Respondent as follows: -
- i. That the motor vehicle registration no. KBR 343V MITSUBISHI FUSO ad land parcel No. Nandi/ Kapkangani/3624 are proceeds of crime and are hereby forfeited to the State.
 - ii. That the balance of the funds realized from the sale of motor vehicle registration no. KDH 211F in the sum of Kshs. 311, 000 plus accrued interest thereon be remitted to the applicant's bank account.
 - iii. That the Respondents shall bear the costs of this Originating Motion.
112. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 16TH DAY OF OCTOBER, 2024.

HON. F. GIKONYO M

JUDGE

In the Presence of: -

C/A: Raymond

Githinji for Applicants – Present

Khaseke for interested party – Present

N/A for Respondents

