



**Asset Recovery Agency v Muthamia (Anti-Corruption and Economic Crimes Civil Suit 012 of 2022) [2024] KEHC 12250 (KLR) (Anti-Corruption and Economic Crimes) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 012 OF 2022**

**PJO OTIENO, J  
OCTOBER 9, 2024**

**BETWEEN**

**ASSET RECOVERY AGENCY ..... APPLICANT**

**AND**

**FRANCIS MWENDA MUTHAMIA ..... RESPONDENT**

**JUDGMENT**

1. By way of an originating motion dated 06.05.2022 brought pursuant to sections 90 & 92 of the Proceeds of Crime and Anti Money Laundering Act (henceforth, POCAMLA) as well as Order 51 rule 1 of the Civil Procedure Rules, the applicant has moved this court for the following orders against the respondent;
  - a. That this Honourable Court do issue orders declaring that Kshs. 35,000,000.00 held in NCBA bank, Changamwe Branch Account Number 6655708815 in the name of Francis Mwenda Muthamia are proceeds of crime and liable for forfeiture to the government;
  - b. That this Honourable Court do issue forfeiture orders forfeiting the said funds to the government and transferred to the applicant.
  - c. That this court do make any other ancillary orders it may deem appropriate for the proper, fair and effective execution of the forfeiture order.
  - d. That costs be provided for.
2. The application is supported by the affidavit of No. 62652 CPL Isaac Nakitare, an investigator of the applicant agency, sworn on 6/5/2022. In the affidavit. It is deponed that the applicant received information that there were fraudulent activities at a small holder tea subsector managed by Kenya



- Tea Development Authority (KTDA) which had resulted to loss of earnings by farmers and that there were funds in the sum of Kshs. 35,000,000.00 held at NCBA, Changamwe Branch Account Number 6655708815, which funds were suspected to be proceeds of crime.
3. As a consequence of such report, the agency opened an inquiry file no. 31 of 2021 to investigate and inquire into the activities of the said account to establish whether the funds held therein were proceeds of crime. On 30/11/2022, an ex parte Misc Criminal Application No. E4150 of 2021 was filed seeking orders to search, inspect, seize, freeze and preserve funds in the said account. The application was granted and the deponent then began his investigations. The investigations and analysis of the statement of accounts established that NCBA bank accounts numbers 6655780031 and 6655780018, belonging to the respondent had received suspicious cash deposits that pointed to activities of money laundering. Of note was the fact that the deposits were made in tranches below Kshs. 1,000,000/ to evade the reporting threshold as per section 44 and 4<sup>th</sup> schedule of the POCAMLA, Regulation 34 of POCAMLA [Regulations of 2013](#) and the Central Bank of Kenya Prudential Guidelines requiring an account holder to declare the source of money.
  4. He added that all the funds were placed in a fixed deposit under NCBA account no. 6655708815 with a closing balance of Kshs. 35,000,000.00. Being satisfied that there were reasonable grounds to believe that the funds in the said accounts were proceeds of crime, the applicant filed an application for preservation pursuant to section 8(2) of POCAMLA and that on 25/3/2022, the preservation orders were gazetted vide Gazette Notice No. 3340.
  5. He proceeded to give a narration of his findings by stating that on diverse dates between 6/11/2012 and 19/3/2020, the respondent's NCBA Bank account no. 6655780031 received suspicious cash deposits amounting to Kshs. 20, 524, 850.00/ and that on diverse dates between 2/2/2009 and 30/11/2021, the respondent's NCBA Bank account no. 665578018 also received suspicious cash deposits amounting to Kshs. 13, 027, 600.00/.
  6. He added that he summoned the respondent as the operator of the bank accounts. The respondent offered to record a statement stating that the cash deposits were income from per diem earned from KTDA for international and local travel. The applicant then wrote to KTDA to ascertain the explanation offered by the respondent and KTDA responded by stating that the respondent had only received a total of Kshs. 6,654,444.74/ as per diem for the period between 1/9/2016 and 2/1/2020. That this information helped him established and firm his position that there were reasonable grounds to believe that the funds in issue were indeed proceeds of crime.

### **Response to the application**

7. The application is resisted by Francis Mwenda Muthamia, the respondent, by a Replying Affidavit sworn on the 1/7/2022. In that affidavit he depones that he was employed by KTDA in the year 1998 earning a salary of Kshs. 98,000/ and had since risen to the rank of a General Manager (sales & marketing) a position he holds to date earning a salary of Kshs. 605,000/.
8. To further explain his deposits, he stated that he runs a transport business by the name of Frarosa Transporters, registered in the year 2011 and engages in the matatu business and the transport of goods.
9. He added that as an employee of KTDA, he travelled both locally and internationally and earned per diem allowances and imprest which was paid in cash.
10. In addition, he stated that he has over the years managed to purchase and sell several motor vehicles as listed below;
  - a. KAB 163B ISUZU TX Kshs. 970,000/



- b. KAT 122G TOYOTA Kshs. 350,000/
  - c. KBK 030F Subaru Kshs. 800,000/
  - d. KBM 489U Toyota Kshs. 750,000/
  - e. KBS 523G Prado Kshs. 2, 500,000/
  - f. KAK 208U Bedford Kshs. 500,000/
  - g. KBB 171 Nissan Matatu Kshs. 800,000/
  - h. KBB 363D Mitsubishi Iu Kshs. 750,000/
11. He further stated that he is a member of Chai sacco member no. 14913 where he had saved and had been issued with various loans, interests and dividends and that he has take out various insurance policies with insurance companies which had matured and paid out.
12. Additionally, he stated that over the years, the bank had advanced him loans in the form of equity releases and that in the year 2017, together with his spouse, they decided to put some money in a fixed account which could enable them earn interest. To bring that to fruition, they opened a fixed account with an amount of Kshs. 8,000,000/ for a term of one year and six months and when the amount matured, they deposited a sum of Kshs. 20,000,000/ on 14<sup>th</sup> May, 2019 for a period of six months. When the term matured on 12<sup>th</sup> May, 2019, they placed an amount of Kshs. 30,379,264/ for a term of another one year and on 12<sup>th</sup> May, 2021 he placed a sum of Kshs. 35,000,000/ for a term another one year.
13. He asserted that the sources of his funds are per diems and imprest payments, frarosa business, family, sale of motor vehicles and other unstructured income.
- Supplementary Affidavit of No. 62652 CPL Isaac Nakitare Sworn on 16<sup>th</sup> August 2022
14. With the leave of the court the deponent of the applicant's affidavit swore the affidavit and dismisses the explanation offered by the respondent by arguing that;
- a. the respondent failed to adduce evidence of the purported transport business, the amount of money made, the taxes paid and the expenses incurred.;
  - b. there is no correlation between the cash deposits and the alleged per diems and that in any case the cash deposits far exceed the per diems received for the period;
  - c. the respondent has not provided evidence of any motor vehicle sale agreement, the amount of money received, mode of payment and how the purchase and sale was done;
  - d. that there is no correlation between the various loans, interests and dividends from chai sacco and the cash deposits in his bank accounts and;
  - e. that there is no evidence of the insurance companies that issued the policies alleged by the respondent, the value thereof and when the same matured and was paid.
15. At the request of the respondent, No. 62652 CPL Isaac Nakitare, the deponent of the applicant's affidavit, attended court was cross examined by Mr. Okello for the respondent. During the cross examination, the deponent told the court that KTDA did not inform them that any money had been lost or stolen. He further stated that after establishing that those deposits were proceeds of crime, they did not inform KTDA of this fact.



16. The application has been canvassed by way of written submissions filed by both sides which the court has read and gives the brief summary as below.

### **Applicant's Submissions**

17. The applicant has two sets of submissions on record which appear to have been prepared by different state counsels. They both however identify similar issues.
18. The first issue the applicant identifies for determination by this court is whether the funds subject of the forfeiture application are proceeds of crime. To that issue the applicant relies on the application and the affidavit in support in submitting that even though the respondent contends the funds in question are legitimate funds acquired through salary, allowances, business income, sale of cars, payment of per diems and imprest, sacco payment, family sources, credit interest, fixed deposit and other unstructured income, he has not outlined how these alleged sources of income culminated into large sums now frozen in the bank accounts.
19. The applicant then cites the case of *Assets Recovery Agency v Lilian Wanja Muthoni t/a Sahara Consultants & 5 others* [2020] eKLR on the need by a respondent to explain business income. The court held as follows;

“I believe I would not be remiss if I asserted as an incontrovertible truth that money and assets are not plucked from the air or, like fruits, from trees. They can be traced to specific sources- salaries, businesses in which one sells specific items or goods, or provides professional services. There must be books of accounts, stock registers, local purchases orders and delivery notes showing to whom goods are sold, deliveries made and payment receipts showing from whom payment has been received.”

20. The second issue identified is whether the funds should be forfeited to the state to which they submit in the affirmative and assert that they have demonstrated on a balance of probabilities that the monies in account number 6655708815 are proceeds of crime having been derived from unlawful activity. To support forfeiture, they place reliance on the case of *Abdulrahman Mahmoud Sheikh & 6 others v Republic & others* [2016] eKLR where the court held as follows;

“44. The letter, spirit purpose, and gravamen of the *Proceeds of Crime and Anti-Money Laundering Act* is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after due process, to the state, on behalf of the public which is deemed to have suffered some injury by the criminal conduct.

.....

47 .....The law as I understand it is that the *Proceeds of Crime and Anti-Money Laundering Act* seeks to disable criminal networks and there may be no better way to achieve that goal otherwise than by financial starvation.”

### **Respondent's Submissions**

21. The respondent submits that the proceedings at hand are civil in nature as per section 81 of the POCAMLA and therefore the burden of proof rests with the applicant to prove that the monies held by the respondent at NCBA Bank are proceeds of crime and which burden he contends the applicant has failed to discharge.



## Issue For Determination

22. I have looked at the plaint, the response thereto and the submissions by the plaintiff and determine that only two issues arise for determination by the court. The issues are: -
  - a. whether the funds held by the respondent in NCBA Bank Account Number 6655708815 and which funds the applicant seeks to be forfeited are proceeds of crime as defined in law?
  - b. Whether the said funds are subject to forfeiture?
23. It is designed that the two issues be handled sequentially because, the determination of the first in the affirmative makes it axiomatic that the second is equally so answered.
24. Section 2 of POCAMLA widely defines what constitutes proceeds of crime to mean 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.
25. Section 81 of POCAMLA recognizes forfeiture proceedings to be civil in nature and section 92 goes further to provide that the standard of proof is on a balance of probabilities. A wholesome reading of part VIII of the POCAMLA is that in order to discharge its burden of proof under section 107 of the *Evidence Act*, what is required of an applicant is to demonstrate that there are reasonable grounds to believe that funds or property held by a respondent are proceeds of crime.
26. To discharge this burden, the applicant stated that it received information that there were fraudulent activities at a small holder tea subsector managed by Kenya Tea Development Authority (KTDA) which had resulted to loss of earnings by farmers and that there were funds in the sum of Kshs. 35,000,000.00 held at NCBA, Changamwe Branch Account Number 6655708815, which funds were suspected to be proceeds of crime. They began their investigations and established that the account was held by the respondent who also held two other accounts with NCBA that is account numbers 6655780031 and 6655780018 and which accounts were transferring funds to Account Number 6655708815. They established that deposits were made in tranches below Kshs. 1,000,000/ into account numbers 6655780031 and 6655780018 to evade the reporting to the Central Bank of Kenya after which the monies were transferred to 6655708815 and in their opinion, these suspicious cash deposits indicate activities of money laundering.
27. The respondent was summoned and he offered an initial explanation that the funds were per diems from KTDA for international and local travel. The explanation let the applicant to write to KTDA, the respondent's employer for verification and the employer responded by stating that the respondent had only received a total of Kshs. 6,654,444.74/ as per diem for the period between 1/9/2016 and 2/1/2020. That information strengthened the suspicion and position that there were reasonable grounds to believe that the funds in issue were proceeds of crime.
28. all the applicant is required to establish is reasonable suspicion and with that having been demonstrated, the evidential burden shifted to the respondent to substantiate the source of the suspicious funds and cash deposits into his accounts.
29. The respondent has by his replying affidavit explained the source of the sum of Kshs. 35,000,000.00 held in NCBA bank, Changamwe Branch Account Number 6655708815 to be per diems and imprest



- payments, frarosa business, family income including that of the wife, sale of motor vehicles, loans from banks and sacco, insurance yields and other unstructured income.
30. On income from Frarosa transporters business, the respondent has only exhibited a certificate of registration but no further evidence was adduced to show that the business was ever in operation and if it ever made any income. Not even bank statement of the enterprise, were exhibited. No trail was given on how that income went into the targeted sum. It is difficult to show that the subject money or any part was it was derived from the business of passenger and cargo transport.
  31. On dividends and interests from Chai Sacco, I have analyzed the statement of account provided by the respondent and it shows that the respondent exited the Sacco on 6/8/2020 getting a refund of his deposits totaling to a sum of Kshs. 787, 576.37/. once again, no trail of that money into the subject account is available. The only deposit made in the respondent's NCBA account no. 6655780018 in the year 2020 was the sum of Kshs. 40,000/00 on 14<sup>th</sup> of January. For account no. 6655780031, two deposits were made in 2020 that is on 14<sup>th</sup> January where a sum of Kshs. 800,000.00 was deposited and on 19<sup>th</sup> March when a sum of Kshs. 900,000. Notably, at the time these deposits were made, the respondent had not withdrawn from the Sacco. The court thus find no correlation between the withdrawals from the Sacco and the funds now targeted for forfeiture.
  32. As for the sale of motor vehicle, no sale agreements were tendered to show when the vehicle were sold and for what consideration just like no correlation was demonstrated with the subject money. Even for the insurance policies, there is no indication of the underwriter, no policy documents. There is no evidence that any money was received and commingled with the targeted money.
  33. On the funds earned as per diems and other allowances the tabulation given by the employer show that it aggregated to Kshs 6,654,444.74/ for the period between 1/9/2016 and 2/1/2020.
  34. The court has perused the bank statements provided observed that no deposits were made in the applicant's NCBA accounts on the dates proximate to the dates the payments for per diem and were made. The court therefore holds that there is no correlation between these payments and the funds targeted for forfeiture.
  35. On interest earned from fixed accounts, the evidence adduced shows that the respondent first deposited an amount of Kshs. 8, 500, 632.74 on 27<sup>th</sup> June, 2017 and the same matured on 27<sup>th</sup> December, 2018 receiving a total sum of Kshs. 8,784,053.14. within six months of the maturity date of that deposit, on 14<sup>th</sup> May, 2019, the respondent was ready and did deposit the sum of Kshs. 20,000,000/. It is not explained where the over Kshs 11,000,000 was earned from. Moreover, when that later deposit matured and was retired in the sum of Kshs 20,685,589 on 14<sup>th</sup> November, 2019, it remained uninvested till the 12<sup>th</sup> May, 2020, when the respondent created fixed term deposit of Kshs. 30,379,264.65 which when matured for retirement yielded kshs. 32,445,054.65. Again, no explanation was given on the source of about 9,700,000 within a period of 6 months.
  36. The investment into fixed deposits was made inside a period of two tear during which period there is no disclosure of the source of a sum in excess of 20,000,000. When not explained, it passes as a proceed of crime and it matters not that it has commingled with other money. The court thus answers the first issue in the affirmative.
  37. As said earlier in this decision, a resolution of the first issue determines that of the second. Accordingly, having established that the sum of Kshs. 35,000,000.00 held in the respondents account at NCBA Bank, Account Number 6655708815, Changamwe Branch, is proceeds of crime, section 92(1) POCAMLA demands that an order of forfeiture does follow. To follows to answer to the foundational



object of the Act that none should benefit from criminal conduct and that all proceeds flowing from such conduct is forfeited.

38. The end result is that the application dated 06.05.2022 is allowed on terms that the sum of Kshs. 35,000,000.00 held in the respondent's account at NCBA Bank, Account Number 6655708815, NCBA Changanwe Branch, is declared as proceeds of crime and ordered forfeited to the applicant on behalf of the state.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024**

**PATRICK J O OTIENO**

**JUDGE**

