



Assets Recovery Agency v Kabunge & 2 others; Arham Motors Limited & 2 others (Interested Parties) (Anti-Corruption and Economic Crimes Case E007 of 2024) [2024] KEHC 13400 (KLR) (Anti-Corruption and Economic Crimes) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13400 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE E007 OF 2024
PJO OTIENO, J
OCTOBER 11, 2024

BETWEEN

ASSETS RECOVERY AGENCY APPELLANT

AND

AMINA OSMAN KABUNGE 1ST RESPONDENT

IBRAHIM GINA LIGA 2ND RESPONDENT

MOHAMMED MIYO DUBA 3RD RESPONDENT

AND

ARHAM MOTORS LIMITED INTERESTED PARTY

KHUSHI MOTORS LIMITED INTERESTED PARTY

COOPERATIVE BANK INTERESTED PARTY

JUDGMENT

1. The Asset Recovery Agency has approached the court, pursuant to section 90 and 92 of the proceeds of crime and Anti Money Laundering Act, (Henceforth “the Act”), seeking orders for the forfeiture of three Motor Vehicles after being declared proceeds of crime, and for an order that the Director General National Transport & Safety Authority be directed to effect transfer of the motor vehicles in favour of the Government. The originating summons has its prayers crafted thus:
 - i. This Honourable Court be pleased to issue orders declaring motor vehicle registration numbers KDC 352K Toyota Harrier registered in the name of Amina Osman Kabunge KDB 494U, Toyota Vitz registered in the name of Khushi Motors Limited, and KBV 827J Toyota



Alex registered in the name of Arham Motors Limited as proceeds of crime and liable for forfeiture to the Government of Kenya

- ii. That the Honourable Court be pleased to issue orders of forfeiture of the motor vehicle Registration in the names of the Respondents and interested parties in prayer 1 above to the Assets Recovery Agency on behalf of the Government of Kenya.
 - iii. That this Honourable Court be pleased to issue an order directing the Director General National Transport and Safety Authority to transfer title/ownership of said motor vehicles to the Applicant on behalf of the Government of Kenya.
 - iv. That the Honourable Court makes any other ancillary orders it may deem fit and necessary for the proper and effective execution of its orders.
 - v. That costs be provided for.
2. The grounds upon which the application is premised are that using its mandate under section 53A of the Act and after carrying out investigations, it sought and obtained preservative orders against the Respondents and interested parties concerning motor vehicles Reg. Nos. KDC 352K, KDB 494U and KBV 827J.
 3. The gist of its case is that Respondents and one Hibiba Guyo were charged in the chief Magistrate's Court, JKIA CM CR Case No E028 of 2021 with the offence of trafficking in narcotics contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*.
 4. At the time of their arrest, the police searched the Respondents residence and recovered cannabis sativa valued at Kshs.4,330,650. The Agency then commenced investigatory to establish if any of the Respondents had acquired and laundered any money out of crime through Mpesa and bank accounts.
 5. The investigations revealed the respondents' bank and Mpesa Accounts had questionable transactions with third parties involving trade in narcotic in a complex web of money laundering contrary to the statutes. The investigations further revealed that the respondents used the proceeds of crime to acquire assets and registered in their names while other assets were left to remain in the names of the seller of such property so as to disguise the sources of funds. Accordingly the Applicant contends that there are reasonable grounds to believe that the assets identified, traced and preserved were acquired with the use of proceeds of crime hence the prayer for orders of forfeiture.
 6. The said grounds were reiterated in the Affidavit of support sworn by Isaac Nakitare running into some 48 paragraphs. Over and above reiterating the grounds the Affidavit details the happening and exhibits documents to support the assertions. The documents included; the inventory of the narcotics recovered from raid of the Respondents house, witnesses of seizure, Tenancy agreement between Habiba Guyo and Adam Jillo, the charge sheet in the criminal case, the warrants of search, Bank Statement of the Respondents, statement by the 3rd Respondent, documents of ownership of the three motor vehicles a preservative order and the gazette notice on the same.
 7. Even though duly served, the three Respondents did not enter an appearance nor file any responses to the originating summons. The claim against the three thus remain uncontested. Even though uncontested, the duty of the applicant to prove its case on a balance of probabilities remains.
 8. The originating summons was however opposed by the 2nd and 3rd parties who all filed notices to oppose the making of the forfeiture orders.
 9. In its opposition to the making of the forfeiture orders, the 2nd interested party filed not only the notice but also an affidavit sworn by one Sahale Faris, a representative of the said party. N the Affidavit



it is contended that the 2nd interested party is the owner of motor vehicle Reg No. KDB 494U and that it sold the said motor vehicle to the 2nd Respondent by a sale agreement dated 12/2/2024 at a consideration of Kshs.1,06,000 to be paid by instalments.

10. A deposit of Kshs.460,000 was made at the commencement of the transaction and the balance of Kshs.600,000 was agreed to be paid by 15 monthly instalments over a period of fifteen months. At the time of sale, the 2nd interested party contents; it was not aware of the suspicion nor the charges against the 2nd Respondent and the ongoing prosecution. It additionally contended that there was no conviction between the deposit paid to it by the 2nd Respondent and the offences for which the 2nd Respondent was charged because the sale took place long before the Agency commenced its investigations. If however pleads that if the court was to find the motor vehicle liable for forfeiture nor it be compensated to the extent of its interests in the motor vehicle at Kshs.600,000/=.
11. For the 3rd interested party, a similar notice was filed pursuant to section 83 (3) of Pocamula and also an Affidavit by one Jackson Oire. The contention is that the motor vehicle Reg. No. KDC 352K was acquired through asset Finance Hire Purchase which was wholly financed by the 3rd interested party in the sum of Kshs.2,912,000. The Hire Purchase agreement obligated the 1st Respondent; to pay back the facility periodically in accordance with the schedule of repayments give full details of any event or circumstances that may risk the 3rd interested party's ownership over the chattel and that in default to comply with any of the terms the agreement would be deemed terminated with the agreed consequences of repossession.
12. The instalments were agreed at Kshs. 78, 121, 67 over 48 months and the vehicle was registered in the joint names of the 1st Respondent and 3rd interested party and the 3rd interested party disbursed the agreed sum.
13. The 1st Respondent defaulted in her obligation to pay the agreed instalments on agreed dates, only paying one instalment for August, 2021, and persisted in such default that constraining the 3rd interested party to issue a repossession order over the motor vehicle. The efforts to repossess came to naught because the vehicle had been, by that time, confiscated by the police in relation to the criminal case.
14. Because of the default the account continues to attract interest and the bank fears that I would soon outstrip the value of security yet the vehicle is the only collateral held by the bank yet the bank was never involved in the crime in any way.
15. The 3rd interested party thus implores the court to protect its rights under article 40 of [the Constitution](#) as read with section 93 of Pocamla by not ordering the motor vehicle to be forfeited.
16. The parties were directed to file and exchange submissions pursuant to which the applicant as well as the Applicant, 2nd and 3rd interested parties have all filed written submissions. The court has had the advantage of reading those submissions and derived valuable benefit on the law applicable.

Submissions by the Applicant

17. By brief summary, the applicant takes the position that its duty under section 92 of the Pocamla to prove on a balance of probabilities that the asset subject of the case was a proceed of crime or had been intended for the commission of a crime as well as a casual trite between the asset and the offence. The Agency contends that it has proved the link between crime and the property targeted for forfeiture in that there is proof that the Respondent were engaged in the crime of trafficking in narcotics and had in fact been charged in a criminal court. It added that the analysis of the Mpesa and bank statements disclose receipts of large sums of money from which no plausible explanation was offered. The some



of Kshs.47,623,113.92 transacted between 01/01/2020 and 17/2/2021 and 34, 131, 227 between 01/01/2020 and 15/06/2021 were not explained. It is their stressed that some of the reports into the bank account were constantly made just below the threshold of Kshs.1,000,000/= to pass against reporting regulations. Some of the transactions were exchange of money between the Respondents and the Mr. Habiba Guye Chide in whose house the drugs were recovered.

18. Despite such connection, the Respondents failed to offer a plausible explanation on the dealings they had with Mr. Habiba Guyo and the sources of the money received and deposited in their respective bank and Mpesa Accounts.
19. On whether the 2nd and 3rd interested parties have established any interest on the two motor vehicles, it is submitted that, while there is evidence that the 2nd interested party sold motor vehicle KDB 494U to the 1st Respondent, there was no evidence that any instalment was ever paid over the 2nd interested party made any efforts to enforce payment of the instalments. The same was said of the 3rd interested party. For the applicant, the third parties are helping the respondents disguise proceeds of crime.
20. Section 93 Pocamla was cited for the proposition that the interested parties were duty bound to prove that they were not in any way involved in the crime, they acquired the interest for sufficient consideration without knowledge that property was indeed tainted. The two are faulted for failure to prove that they acted in circumstances which did not raise reasonable suspicion.
21. The South African decision in National Director of Public prosecution – vs – R.O Cook Properties (Pty) Ltd; National Director of Public Prosecutions – vs – Gilles Pie Street Durban (Pty) Ltd and National Director of Public Prosecution – vs – Seer Narayan(111/03) [2004]ZASKA 83 for the Proposition of the law that the burden fall on a party opposing the making forfeiture order to prove beyond innocence and prove lack of knowledge and lack of reasonable grounds of suspicion. It is urged that the court interprets section 92 Pocamula in the never adopted by Supreme Court of South Africa.
22. The decision in Asset Recovery Agency – vs – Waithira & Cooperative Bank [2023] HEHC 22509 EKLR was cited for the proposition of the law that the interests of the party challenging forfeiture cannot outweigh the public interest even where such party was not involved in the crime.
23. The applicant thus prays that the originating summons be allowed as prayed.

Submissions by the interested parties

24. For the 2nd interested party, it is submitted that it entered into a sale agreement with the 2nd Respondent for the sale of the subject motor vehicle and received a deposit of Kshs.460,000 leaving a balance of Kshs.600,000 to be paid over fifteen months at the rate of Kshs.40,000 per month and that it was when the 2nd Respondent defaulted in payment of his instalment that the 2nd interested party came to learn about the 2nd Respondents involvement in crime. It was added that in seeking to obtain the preservatory orders, the 2nd interested party was not notified by the Applicant.
25. On connection between the motor vehicle and crime, it is submitted that on that the 2nd interested party was itself involved in any crime hence the interests of the interested party merit protection. It cited Asset Recovery Urgency – vs – Philis Njeri Ngiriti & 2 others [2020] eKLR for the proposition that the Agency must place material before the court to show that the interested party was involved or was aware the payments made were proceeds of crime within a balance of probabilities as defined in Kanyungu Njogu – vs – Daniel Kamau [2002]eKLR. It also stressed the need and incense of presumption of innocence.



26. On its duty to demonstrate interests in the motor vehicle, it is submitted that the certificate of records and agreement exhibited show their interest in the motor vehicle. In addition, it had filed NBI SCC Comm/E743 of 2023 to recover the balance of the purchase price, but were unable to proceed after the court insisted that it effects physical/personal service and tracing the 2nd Respondent became futile.

Analysis and Determination

27. From the beginning, the court takes the view that by failing to present any material to the court to rebut the assertion that the subject property are proceeds of crime, the prima facie demonstration by the applicant remains unchallenged.
28. In civil proceedings a claim which is not resisted presents no dispute and passes as claimed. If it were an ordinary claim for a liquidated sum it would have only required a request for judgment in default to get a final judgment. In the circumstances of this matter the court entertain no doubt that the applicant have been demonstrated on a balance of probabilities to have received proceeds of crime and used the same to acquire the three motor vehicles.
29. Accordingly the three assets are declared to be proceeds of crime and liable to forfeiture unless a third party demonstrates interests in the same pursuant to section 92(3) and 93 POCAMLA. To that extent motor vehicle Registration No.KBV 827J, to which no third party has raised a claim is declared a proceed of crime forfeited to the state.
30. That leaves the claim by the 2nd and 3rd Respondents over KBD 494U and KDC 352K. Upon reviewing the evidence led and the law applicable, the court finds that the 2nd interested party indeed received money from the 1st Respondent in a sum of Kshs.460,000. That is part of the money the court has held to be a proceed of crime. Thereafter, the 2nd interested party did nothing to pursue the balance of purchase price. The length of time taken to pursue its balance, evidently against the agreement, suggest complicity if not just indolence. The court note that while its balance of purchase price was due for payment with effect from 31/3/2021 it took no steps till 2023 when it filed the recovery suit at the small claims court.
31. The court finds that the conduct by the 2nd interested party is inconsistent with an innocent party doing legitimate hire purchase business but may point towards complicity and pursuance of reasonable suspicion if not knowledge that the 1st Respondent was using it to launder proceeds of crime. The motor vehicle Registration No. KDB 494U is thus deemed a proceed of crime and order forfeited to the state.
32. In coming to this conclusion the court notes that the 2nd interested party is not rendered remediless. It has a civil claim against the 2nd Respondent. It cannot be a reason to refuse forfeiture when it is common knowledge that the same 2nd Respondent faces a criminal charge in a disclosed court and can be served on any date he attends court for his case.
33. For the 3rd interested party, the court notes that its contract with the Respondent was executed in June, disbursement effected in July and by August when the Respondent had defaulted, it did not hesitate to instruct an auctioneer to retake the security.
34. The conduct of the 3rd interested party strikes the court as that of a diligent lender keen to recover its money as stipulated in the agreement. It gives the court no justification or indeed room to infer that it was complicit in the Respondents criminal acts of seeking to launder its proceeds of crime.
35. For this reason, motor vehicle Reg. No. KDC 352K Toyota Harrier, even though could have been acquired to conceal proceeds of crime, the 3rd interested party has sufficiently demonstrated its interest



in the motor vehicle by advance of valuable and sufficient consideration in its ordinary banking business. It paid the full purchase price and nothing has been shown to prove that the Respondent contributed to the purchase price. The court finds vehicle not to have been tainted with proceeds of crime so as to be subject to forfeiture for the interests of the 3rd interested party.

36. Consequently the originating summons succeeds in terms of prayers (a) (b) and (c) in respect of motor vehicle KDB 494U and KBU 827J with costs against both Respondents and 2nd interested party.
37. The application by the 2nd interested party against the application fails with costs being awarded to the applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 11TH DAY OF OCTOBER, 2024.

PATRICK J O OTIENO

JUDGE

