



**Assets Recovery Agency v Firstline Capital Limited & 2 others; Bernhard Ten Brinke Holding BV & another (Interested Parties) (Anti-Corruption and Economic Crimes Civil Suit E024 of 2021) [2023] KEHC 782 (KLR) (Anti-Corruption and Economic Crimes) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 782 (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 E024 OF 2021**  
**EN MAINA, J**  
**FEBRUARY 9, 2023**

**BETWEEN**

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

**AND**

**FIRSTLINE CAPITAL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BUPE CHIPANDO ..... 2<sup>ND</sup> RESPONDENT**

**CAROLLE SIMUTENGU ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**BERNHARD TEN BRINKE HOLDING BV ..... INTERESTED PARTY**

**THREE GOLD BV ..... INTERESTED PARTY**

**JUDGMENT**

1. The Assets Recovery Agency’s originating motion dated 26<sup>th</sup> July, 2021 brought under the sections 81, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and seeks the following orders:

“

- “ a) That this Honourable Court be pleased to declare funds held in the following bank accounts as proceeds of crime and therefore liable for forfeiture to the Government of Kenya;  
USD 253,821.44 held in account number 8702452185500 at Standard Chartered Bank in the name of First Line Capital Limited.



- b) That this Honourable Court be pleased to issue an order of forfeiture of the following funds to the Government of Kenya;

USD 253,821.44 held in account number 8702452185500 at Standard Chartered Bank in the name of First Line Capital Limited.

- b) That the funds forfeited in prayer 2 above be deposited in A/c No 1240221339 held at the Kenya Commercial Bank, KICC branch, in the name of the Assets Recovery Agency.
- c) That the Honourable Court do make any other ancillary orders it may deem fit and necessary for the proper and effective execution of its orders.
- d) That there be no orders as to costs.”

### **Applicant’s Case**

2. The Applicants case as stated in the grounds on the face of the application, the supporting and supplementary affidavits sworn by CPL Sautet Jeremiah is:- that the Applicant is the Assets Recovery Agency established under section 53 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAML) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime; that sections 81, 82, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) authorizes the Agency to institute Civil Forfeiture proceedings for the recovery of proceeds of crime; that section 53A (5) of the [Proceeds of Crime and Anti Money Laundering Act](#) 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 investigation, identification, tracing, seizure and recovery of proceeds of crime; that the 1<sup>st</sup> Respondent is a registered company at the Business Registration Service duly registered on 29<sup>th</sup> September 2017 via certificate number PVT-7LUSJXQ; that the 2<sup>nd</sup> Respondent is an adult, a Zambian National holder of passport number ZN412237; a director and a mandatory/sole signatory of the 1<sup>st</sup> Respondent and also a director of First Cargo Logistics Limited a private company registered on 8th August 2018 under registration number PVT-8LUR66V; that the 3<sup>rd</sup> Respondent is an adult, a Zambian National holder of passport number ZN449212; a director/shareholder of the 1<sup>st</sup> Respondent; that Mr. Bupe Chipando is the account signatory and beneficial owner of the bank accounts operated by the 1<sup>st</sup> Respondent held at Standard Chartered Bank identifiably account number 8702452185500 (a US dollar account); that on 23<sup>rd</sup> November 2020, the Agency received information into a suspected case of complex money laundering schemes, and proceeds of crime transnational in nature involving multiple money transactions of approximately USD 1,567,150 from foreign jurisdiction whose source could not legitimately be established involving the Respondents herein; that the Respondents are suspected to be involved in a complex money laundering scheme, transnational in nature involving USD 1,567,150 from an entity in Amsterdam on the pretense that they are able to export timber to the Netherlands from Kenya; that investigations have established that the Respondents herein were involved in an intricate money laundering scheme executed with the intent of defrauding Foreign Nationals of their funds on pretenses that they had Gold for sale and in an effort to conceal, disguise the nature source and disposition of the funds they hid behind escrow agreements and falsified documents to support bank transactions that they were "exporting timber; that investigations have established that the Respondents who include a natural person and the legal entities executed a complex scheme of money laundering designed to conceal, disguise the nature, source, disposition and movement of illicit funds, suspected to constitute proceeds of crime and which are the subject matter of this application; that to facilitate payment and movement of the funds to the Respondents accounts, the Respondents used agreements supported with falsified custom declaration



forms purportedly from Kenya Revenue Authority to support the transfer of funds into their accounts; that there are reasonable grounds and evidence demonstrating that the funds held by the Respondents in the specified bank accounts 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 State under the Proceeds of Crime and Anti-Money Laundering Act 2009; that on April 14, 2021, the Applicant filed HCACEC Misc. No. E012/2021 Assets Recovery Agency -Vs- First Line Capital Limited & 2 others and obtained court orders issued on April 15, 2021 preserving funds in the said account and orders prohibiting the Respondent and/or his agents, representative from transacting, transferring and /or dealing in any manner with the funds held in the bank accounts; that on April 30, 2021 the Applicant gazetted the Preservation orders pursuant to Section 83(1) of the POCAMLA vide Gazette Notice No. 4168 of vol. CXXIII-No.89; that there are reasonable grounds to believe that the funds held in the 1<sup>st</sup> Respondent's bank accounts are proceeds of crime liable for forfeiture to the Applicant under POCAMLA; that it is in the interest of justice that the orders of forfeiture do issue forfeiting the above funds to the Applicant on behalf of the Government of Kenya; that section 90 of the POCAMLA provides that where a preservation order is in force, the Agency may apply to the High Court for an order of forfeiture to the Government all or any of the property that is subject to the preservation order; that it is in the public interest that the orders sought are granted and the suspect assets be forfeited to the Applicant; that there are justifiable reasons and grounds to warrant the issuing of the orders sought.

3. From the outset, it is imperative to note that this suit is related to ACEC Suit No. E023 of 2021 Assets Recovery Agency v Mubadala Merchants Limited, which was heard and determined and a Judgment delivered by this court on October 27, 2022.

#### **The case of the Respondents**

4. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the Application by filing a preliminary objection dated 11<sup>th</sup> May 2022. They raised 4 grounds as follows:- That there is a pending suit over the same subject matter being HCACEC No. E023 of 2021 Nairobi, Asset Recovery Agency vs Mubadalla merchants' ltd and others; That further there is a pending suit by the Interested Parties over the same subject matter at the Commercial and Admiralty Division being HC Civil Suit No. E632 of 2021, Three Gold BV & another vs Global Freight Management Ltd & 6 others; That this Honourable court has no jurisdiction to award or grant the orders sought by the Interested Parties herein; and That the present suit is mischievous and frivolous and an abuse of the court process as such the same be dismissed with costs.
5. In their written submissions dated June 30, 2022, they contended that section 7 of the Civil Procedure Act deprives this court the jurisdiction to award the reliefs sought by the Interested Parties. That the Interested Parties cannot seek protection under Section 89 of the POCAMLA as that window lapsed upon the expiry of the preservation orders in HCACEC No. E009 of 2021 which was in respect of the same subject matter.
6. They contend further that the Interested Parties have an ongoing case in the Commercial and Admiralty Division of the High Court HC Civil Suit No. E632 of 2021 Three gold BV and another v Global Freight Management Ltd and 6 Others over the same subject matter. For that reason, they contend that this court lacks jurisdiction to grant the orders sought; that the suit is frivolous, vexatious and an abuse of the court process.

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

7. The interested parties opposed the application vide the replying affidavit sworn by the 1<sup>st</sup> Interested Party on February 4, 2022. They relied further on their written submissions dated August 3, 2022.



8. The Interested Parties raised 5 issues for determination: Whether the Interested Parties are victims of Transnational Organized Crime and if in the answer is in the affirmative what is their remedy; Whether the interested party have provided a legitimate source of funds and whether the applicant has controverted the evidence provided; Whether the Interested parties have satisfied the statutory requirement as provided for Under section 93 of the [Proceeds of Crime and Anti-Money Laundering Act](#); Whether the application by the interested parties is Sub-judice and Whether the funds preserved under the freezing order dated 29<sup>th</sup> March 2021 are proceeds of crime therefore recoverable.
9. They contended that the Interested Parties were victims of organized crime in which they were defrauded in a transaction of buying gold. That the transaction met the description of a transnational crime under the UN Convention Against Transnational Organized Crime and the [Proceeds of Crime and Anti-Money Laundering Act](#); that the ODPP and DCI have vide a letter dated 8<sup>th</sup> July 2021 and the charge sheet in the ongoing criminal case in the Magistrates court, confirmed that Bupe Chipando, the 2<sup>nd</sup> Respondent and Director of the 1<sup>st</sup> Respondent defrauded the Interested Parties a sum of USD 1,567,120 under the false pretext of selling 500kgs of gold, through a Sale Purchase Agreement dated 21<sup>st</sup> December 2021, which gold they had no capacity to supply. That the funds were laundered through an intricate scheme involving the bank accounts of an Advocate one Alfred Ochieng Opiyo and subsequently transferred to the bank accounts of Mubadalla Merchants Limited, Peva Cargo Limited and the 1<sup>st</sup> Respondent herein in breach of an escrow agreement with the Interested Parties. The 2<sup>nd</sup> Respondent has been charged alongside one Elvis Ouma with the offences of obtaining money by false pretenses contrary to section 313 of the [Penal Code](#) and conspiracy to defraud contrary to section 317 of the [Penal Code](#). The case is pending in the Magistrates Court Criminal Case No E763 of 2021.
10. They submit that the Interested Parties have demonstrated their stake in the subject funds; That the applicant has not tendered evidence that the interested parties are facing any investigation or are suspects involved in any crime of money laundering either in Kenya or in their home country of Netherlands.
11. They submit that the actions of the Interested Parties have demonstrated they were victims because of the following:-
  - a. The admission by the applicant that the money came into the hands of the respondents vide a scheme meant to defraud as per the deposition of CPL Sautet Jeremiah in his affidavit, that the respondents herein were involved in an intricate money laundering scheme executed with the intent of defrauding foreign nationals of their Funds on pretenses that they had gold for sale
  - b. Instituting criminal charges against the 2<sup>nd</sup>, Respondent and Mr. Elvis Muga Ouma alias Nick H. Muhenda the director of Mubadala Merchants Ltd
  - c. The letter from the ODPP dated 8<sup>th</sup> July 2021 and the finding therein
  - d. The statements of the Interested party witnesses who filed a complaint of being defrauded.
  - e. Documentary evidence showing payments for storage of physical 50 Kilogrammes of gold for storage at Smart Ultra Vault and even a payment slip for the sum of USD 6,000.00 dated the 1<sup>st</sup> April 2021.
  - f. The email request and response dated 4<sup>th</sup> November 2020 by the interested party to the Netherlands Embassy for the verification of the company known as Global Freight Management



- g. The agreement/contract for purchase of 500 Kilogrammes of gold.
  - h. A minerals dealer trading license No: DTL/2015/1 bearing the government stamps from the Ministry of Petroleum and Mining.
    - i. The email communication dated 1<sup>st</sup> March 2021 between the Admin of Global Freight Limited and the 1<sup>st</sup> Interested party representative known as Frank Wijen on the payment of the funds and payment of taxes and correspondence with Alfred Opiyo Advocate asking for the refund of USD 1,900,000.00 for damages that the failure to deliver the gold has caused.
11. Lastly, they contend that as victims of the Respondents' fraud, they deserve protection under Section 93 of the POCAMLA and article 40 of *the Constitution* of Kenya which proscribe the state from depriving a person of property or interest in property of any description. They cited amongst other authorities Assets Recovery Agency v Lillian Wanja Muthoni Mbogo ACEC Misc No. 58 of 2018

### **Analysis and determination**

12. The following issues arise for determination:
- a. Whether the funds USD 253,821.44 held in account number 8702452185500 at Standard Chartered Bank in the name of First Line Capital Limited are proceeds of crime and, if so, liable for forfeiture to the Government;
  - b. Whether the Interested Parties have met the threshold for protection under Section 93 of POCAMLA.

### **Whether the funds USD 253,821.44 held in account number 8702452185500 at Standard Chartered Bank in the name of First Line Capital Limited are proceeds of crime and, if so, liable for forfeiture to the Government;**

13. This suit is related to ACEC Suit No. E023 of 2021 Assets Recovery Agency v Mubadala Merchants Limited by virtue of having arisen from the same set of facts and circumstances, that is the alleged defrauding of the Interested Parties by the Respondents in a purported sale and purchase of 500Kgs of gold resulting in the charging of the 2<sup>nd</sup> Respondent in Chief Magistrates Court Criminal Case No E763 of 2021. However, the subject funds USD 253,821.44 held in the 1<sup>st</sup> Respondent's bank account at Standard Chartered Bank were not the subject of the said ACEC Suit No. E023 of 2021.
14. I have carefully considered the Applicant's and Interested Parties' case summarized in the preceding paragraphs of this judgment. The pleadings and submissions are a replica of the case in ACEC Suit No. E023 OF 2021 as the funds herein are alleged to be part of the USD 1,567,120.00 paid by the Interested Parties to the Respondents through the firm of Alfred Ochieng Opiyo & Co. Advocates based on the contract for sale of 500Kgs of gold between the Interested Parties and Global Freight Management Limited dated December 21, 2021.
15. From the evidence on record, the 2<sup>nd</sup> Respondent is the Director and shareholder of the 1<sup>st</sup> Respondent and First Cargo Logistics Limited, companies that received the funds from the firm of Alfred Ochieng Opiyo & Co. Advocates as payment for the sale and purchase of gold, with the narrative to the bank described as sale of timber.
16. Ochieng Opiyo & Co. Advocates transferred the funds to the 1<sup>st</sup> Respondents and others as follows:



- a. On 21<sup>st</sup> January 2021, First Line Capital, the 1<sup>st</sup> respondent received USD 715,024 in the bank account no 8702452185500 held at Standard Chartered Bank from Ochieng Opiyo & Co. Advocates account number 01051020000321 held at Sidian Bank, the subject of these proceedings;
  - b. On 22<sup>nd</sup> January 2021, Mubadala Merchants Limited received Ksh.37,630,177 in bank account no. 01192697771200 held in Cooperative bank from Ochieng Opiyo & Co. Advocates account number 01051020000321 held at Sidian Bank;
  - c. On 25<sup>th</sup> January 2021 Peva Cargo Limited received Ksh 47, 731,000 from Ochieng Opiyo & Co. Advocates account number 01051020000321 held at Sidian Bank.
17. The USD 715,024 transferred to the 1<sup>st</sup> Respondent's account no 8702452185500 held at Standard Chartered Bank was subsequently transferred to various persons through their bank accounts including Doumbe Malonga Eddy Michel, Odhiambo & Tallam Advocates and Granfield Investments Limited, leaving a balance of USD 253,821.44, the subject of these proceedings.
  18. This court is satisfied on a balance of probabilities upon the affidavit evidence of the Assets Recovery Agency that the frozen funds subject of these proceedings are not the property of the Respondents. Indeed, the Assets Recovery Agency through the affidavit of CPL Sautet sworn on 26<sup>th</sup> July 2021 averred that the Respondents were involved in a complex money laundering scheme where they had acquired more than USD 7,283,101.00 by defrauding foreigners. The 2<sup>nd</sup> Respondent and one Elvis Muga are in fact currently facing charges for offences of obtaining money from the Interested Party by false pretenses in Chief Magistrates Court Criminal Case No E763 of 2021. Whereas the charges are yet to be proven it is the law that civil forfeiture is not dependent on the outcome of criminal proceedings. (See section 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#)).
  19. The Respondent's argument that what they were selling to the Interested Party was timber but not gold is not convincing as the same was discounted by the documents adduced by the Interested Party. In any event, the Respondents admitted that the alleged transaction was not completed and as such the frozen funds cannot by any imagination belong to them.
  20. However, this court finds that the Assets Recovery Agency has not rebutted the Interested Parties' explanation on the source of funds. The Interested Parties have in the replying affidavit and submissions explained that the funds were acquired from the sale of the 1<sup>st</sup> Interested Party's company listed at the NASDAQ stock exchange for EUR 55,500,000.00 (an equivalent of KSH. 7 Billion) in 2018 and have produced a contract for the sale. The ARA/Applicant did not adduce any evidence to discredit or rebut the contents of the documents annexed by the Interested parties and which taken on face value prove the claim of the Interested Parties on a balance of probabilities. Further, the Interested Party adduced evidence and produced documents explaining the failed transaction of purchase of gold from the Respondents, which evidence was also not rebutted by the Applicant. Accordingly, there is no evidence to prove the allegations by the Assets Recovery Agency/Applicant that the Interested Parties were together with the Respondents part of a scheme of money laundering or that the funds were tainted. In the face of this court and in the absence of evidence to rebut that of the Interested Parties as aforegoing stated it could also be that the Interested Parties were merely victims of a fraudulent scheme perpetuated by the Respondents.
  21. The upshot is that the Interested Parties have proved, on a balance of probabilities, that the funds belong to them and as such this court is satisfied that the Interested Parties' claim duly satisfies the statutory requirement of third party protection under section 93 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and hereby orders that the frozen funds be released to them.



**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

**E N MAINA**

**JUDGE**

