



**Assets Recovery Agency v Gethi & 3 others (Miscellaneous Application 17 of 2016)
[2023] KEHC 2260 (KLR) (Anti-Corruption and Economic Crimes) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
MISCELLANEOUS APPLICATION 17 OF 2016**

EN MAINA, J

MARCH 23, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

CHARITY WANGUI GETHI 1ST RESPONDENT

JEDIDAH WANGARI WANGUI 2ND RESPONDENT

JOHN KAGO NDUNG’U 3RD RESPONDENT

PATRICK ONYANGO OGOLA T/A OGOLA & MUJERA

ADVOCATES 4TH RESPONDENT

JUDGMENT

1. The Assets Recovery Agency’s application dated 14th March 2016 is made under Sections 81, 90, 92 and 100 of the *Proceeds of Crime and Anti-Money Laundering Act* and seek the following orders: An order of forfeiture of the following properties to the Government of Kenya;
 - i. L.R. No. 14902/38 Muthaiga North, Nairobi;
 - ii. L.R. No. 8361/12, Thika;
 - iii. L.R. No. 21/1/97 in Roslyn Estate, Nairobi;
 - iv. The business known as Eden Times Restaurant situate on the Ground Floor of Mercury Building along Moi Avenue, Nairobi on L.R. 209/412/1;
 - v. Motor vehicle registration number KCB 750Z Range Rover Vogue.



Vesting Orders transferring the properties listed herein below to the Assets Recovery Agency to be held on behalf of the Government of Kenya;

- i. L.R. No. 14902/38 Muthaiga North, Nairobi
- ii. L.R. No. 8361/12, Thika
- iii. L.R. No. 21/1/97 in Roslyn Estate, Nairobi
- iv. The business known as Eden Times Restaurant situate on the Ground Floor of Mercury Building along Moi Avenue, Nairobi on L.R. 209/412/1
- v. Motor vehicle registration number KCB 750Z Range Rover Vogue.

Any other ancillary orders this court may consider appropriate to facilitate the transfer of the property forfeited to the Government. That costs be provided for.

2. The Application which is brought by way of an Originating Motion supported by the affidavits of Muthoni Kimani and Corporal Sautet Jeremiah both sworn on 14th March 2016 is premised on the following grounds:-

- a) That Sections 53 and 54 of the *Proceeds of Crime and Anti-Money Laundering Act* (hereafter referred to as "Pocamla"), establishes the Assets Recovery Agency (hereafter referred to as "the Agency") as a semi-autonomous body under the office of the Attorney General;
- b) That Section 54 of Pocamla gives the Assets Recovery Agency the mandate to implement the provisions of Parts VII to XII of Pocamla and to exercise the powers set out therein;
- c) That part VIII of Pocamla sets out the procedure for Civil Forfeiture.
- d) That under Section 90 of Pocamla, where a preservation order is in force, the Agency Director 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.
- e) That the application for forfeiture is premised on the investigations conducted by the Directorate of Criminal Department into the allegations of theft and fraud of funds amounting to Kshs. 791,385,000.00 from the State Department of Planning in the Ministry of Devolution which revealed massive fraud and embezzlement of public funds perpetuated by public officials and private persons some of whom have been charged for various offences in Nairobi Chief Magistrate Court (Milimani) Criminal Case no 1905 of 2015 and Nairobi Chief Magistrate's Court (Milimani) Criminal Case No. 301 of 2016
- f) That criminal investigations established that the funds were stolen and/or fraudulently transferred from the NYS to various bank accounts and used to procure the following properties;
 - i. L.R. No. 14902/38 Muthaiga North, Nairobi;
 - ii. L.R. No. 8361/12. Thika;
 - iii. L.R. No. 21/1/97 in Roslyn Estate, Nairobi;



- iv. The business known as Eden Times Restaurant Limited situate on L. R. No. 209/412/1 Mercury Building along Moi Avenue;
 - v. Motor vehicle registration number KCB 750Z Range Rover Vogue.
- g) That financial investigations conducted by the Directorate of Criminal Investigations revealed massive schemes of fraud and money laundering rendering the above properties proceeds of crime liable for seizure and forfeiture under POCAMLA
- h) That on the 25th November 2015 the Assets Recovery Agency (ARA) obtained preservation, seizure and surrender orders against the following properties;
- i) L.R. No. 14902/38 Muthaiga North, Nairobi;
 - ii. L.R. No. 8361/12, Thika;
 - iii. L.R. No. 21/1/97 in Rosslyn Estate, Nairobi;
 - iv. The business known as Eden Times Restaurant Limited situate on L. R. No. 209/412/1 Mercury Building along Moi Avenue;
 - v. Motor vehicle registration number KCB 750Z Range Rover Vogue.
- i) That the preservation order was gazetted on the 11th December 2015 vide Gazette Notice No. 9197 pursuant to section 83(1) of Pocamla;
- j) That it is just and proper that this Honourable court do grant the orders as prayed for.”
3. The 1st and 2nd Respondents opposed the Motion vide the replying affidavit sworn by the 1st Respondent on 12th June 2017 while the 3rd and 4th Respondents relied on their replying affidavits sworn on 12th June 2017 and 13th June 2017 respectively.
4. With the leave of court granted at the behest of the 1st and 2nd Respondents on 19th December 2022, the 1st and 2nd Respondents filed two further replying affidavits sworn by Charity Wangui Gethi and Dr. Njoroge Obadiah Kimani both dated 16th January, 2023.
5. On 14th February 2023, the 1st and 2nd Respondents sought orders that the court should summon the investigating officer for purposes of cross examination on the letters adduced as evidence in the affidavit of Charity Wangui Gethi. The application was declined by this court, for reason that the summoning of the investigating officer would not bring any value to these proceedings and the additional evidence filed would be considered by the court in this Judgment.
6. The Application was canvassed by way of written submissions; The Applicant and the Respondents filed submissions dated 4th May 2022, 10th June 2022, 9th June 2022, 28th June 2022 and 13th February 2023 respectively.

The Applicant’s case

7. The Applicant seeks orders of forfeiture of L.R. No. 14902/38 Muthaiga North, Nairobi, L.R. No.8361/12, Thika, L.R. No.21/1/97 in Roslyn Estate, Nairobi, The Business entity known as Eden



Times Restaurant situate on the Ground Floor of Mercury Building along Moi Avenue, Nairobi on L.R. No.209/412/1, Motor Vehicle registration number, KCB 750Z Range Rover Vogue to the Government of Kenya, on grounds that the Directorate of Criminal Investigations conducted investigations into the theft of funds amounting to Kshs. 791,385,000 stolen from the National Youth State Department of Planning in the Ministry of Devolution in the financial year 2014/2015; That the investigations established that the payments amounting to Kshs. 791,385,000 were unlawfully paid to one Josephine Kabura Irungu through her three business entities Form Home Builders (Kshs 218,925,000), Roof and All Trading (252,300,000) and Reinforced Concrete Technology (Kshs 320,160,000). That the investigations revealed a complex scheme of money laundering which clearly shows that the properties and assets sought to be forfeited were procured using the above funds fraudulently acquired from the National Youth Service through the aforesaid companies of Josephine Kabura Irungu.

8. In its submissions the Applicant framed 4 issues for determination and made submissions thereon as below:
 - i. Whether the properties subject of the Application are proceeds of crime;
 - ii. Whether the properties subject of the Application should be forfeited to the government;
 - iii. Whether the Applicant has complied with section 65 of the *Evidence Act*; and
 - iv. Whether the Application for civil forfeiture is in violation of Respondents' rights to property under Article 40 of *the Constitution*.
9. The Applicant submitted that the sum of Kshs.791,385,000 part of which was used to acquire the impugned properties "was" embezzled from the National Youth Service; that the 3rd Respondent acted as an Agent of the 1st and 2nd Respondents and made the purchases under the instructions and on behalf of the 1st Respondent. That the 3rd Respondent was aware that the properties were proceeds of crime and that it is immaterial in whose possession the properties are in.
10. The Applicant submitted further that the Respondents colluded to conceal the proceeds of crime making it difficult to trace and detect the movement of the funds stolen from the National Youth Service. That as such their conduct constitutes the offence of money laundering under Section 3 of the *Proceeds of Crime and Anti-Money Laundering Act*. That the Respondents did not give a sufficient explanation of the source of funds or prove a legitimate source of the funds that were used to acquire the properties. Learned Counsel for the Applicant relied on the case of Assets Recovery Agency v Pamela Aboo: Ethics and Anti-Corruption Commission (Interested Party) [2018] eKLR to support the foregoing submissions.
11. The Applicant submitted further that the allegation that the Respondents have not been found guilty of money laundering is immaterial as Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* expressly states that the validity of a forfeiture order is not dependent on the outcome of criminal proceedings. That the Applicant has credibly demonstrated that the properties were acquired through the National Youth Service funds. Counsel cited the case of Schabir Shaik & Others v state Case CCT 86/06 (2008) ZACC where it was held that:-

"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.”

12. On the second issue Counsel submitted that this court is empowered under Section 90 and 92 to make forfeiture orders. That the thread of transactions showed the movement of the funds from the National Youth Service and the involvement of the Respondents in the purchase of the properties using the said funds and that the Applicant has proved its case on a balance of probabilities. Counsel cited the case of Prosecutor General v New Africa Dimensions and Others, High Court Namibia Case No. POCA 10/2012.
13. On the third issue the Applicant submitted that the annexures containing electronic evidence were supported by a certificate under Section 65(8) of the *Evidence Act*. Nonetheless, that Section 128 of the *Proceeds of Crime and Anti-Money Laundering Act* and Section 78A of the *Evidence Act* permit this court to admit electronic evidence which is not in its original form and as such the evidence was admissible and it should be admitted.
14. Counsel further stated that forfeiture does not violate the Respondents’ rights to property under Article 40 of *the Constitution* as Article 40(6) contains a proviso that the right to property does not extend to any property that has been unlawfully acquired. To this end Counsel cited the case of Assets Recovery Agency v Lillian Muthoni t/a Sahara Consultants and 5 others eKLR and Teckla Nanjila Lameck v President of Namibia 2012(1) NR 255 (HC).
15. The Applicant also stated that a conviction is not a precondition for civil forfeiture; That the offence of money laundering is a stand-alone offence under Section 3 of the *Proceeds of Crime and Anti-Money Laundering Act* and that it is independent of other criminal charges. Counsel cited the case of Republic v Director of Public Prosecutions & Others J.R. Civil Application No 102 of 2016, the case of Serious Crimes Agency v Gale cited in Assets Recovery Agency and Others v Audrene Samantha Rowe & Others Civil Division Claim No. 2012 HCV 02120 where it was held as follows:

“...that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof...”

16. Lastly, the Applicant submitted that the 3rd and 4th Respondents should be denied audience by this court for having failed to comply with the preservation order. That the 3rd and 4th Respondents failed to surrender the motor vehicle KCB 750 Z Range Rover to the Applicant in contravention of the order of the court dated 25th November 2015 and as such their defenses should be disregarded. To support this submission Counsel cited the case of Nation Media Group Limited v Kamlesh Damji Pattni and 2 others [2013] eKLR and the case of Assets Recovery Agency v Samuel Wachenje alias Samuel Mwadime & 7 others [2016] eKLR.

The 1st and 2nd Respondent’s case

17. The 1st and 2nd Respondents opposed the Application on 7 broad grounds summarized as follows:
 - a. That the purchase of their properties was financed by Horizon Limited, a legitimate company registered and doing business in Kenya, owned by Benson Gethi Wangui who is the son and brother to the 1st and 2nd Respondents respectively.



- b. That the sources of funds used to purchase the subject properties are therefore separate, legitimate, verifiable and not in any way connected to the alleged stolen funds.
- c. That the evidence relied on by the Applicant to connect the 1st and 2nd Respondents to the alleged stolen funds has major discrepancies and misrepresentations arising either out of the investigator's failure to understand and effectively interpret the documents relied on, and or deliberate misrepresentations designed to arrive at a pre-determined outcome prejudicial to the 1st and 2nd respondents.
- d. That a finance and banking expert engaged by the 1st and 2nd respondents to evaluate the transactions presented by the applicant as suspicious has discredited the understanding, interpretation and presentation of the same by the applicant's investigating officer leading to the conclusion that the evidence presented by the applicant is erroneous and grossly inaccurate.
- e. That the 1st and 2nd Respondents do not know and have never, either in person or by proxy, engaged in any business or personal deals nor received any funds from Josephine Kabura the recipient of the alleged stolen funds. They are therefore strangers to all averments relating to Josephine Kabura.
- f. That the 1st and 2nd Respondents are bona fide purchasers for value of the properties and have a right to own property as enshrined by *the Constitution* of Kenya under Article 40.
- g. That the 1st and 2nd Respondent's evidence in relation to acquisition of the subject properties remains uncontroverted."

18. The Respondents framed 4 issues for determination: Whether the 1st and 2nd Respondent's properties were purchased/acquired from a legitimate source or through legitimate means; whether there exists a connection between the 1st and 2nd Respondent's properties and the alleged stolen funds; whether the financial investigation and its resultant findings was fair, accurate and verifiable; and whether or not the properties are proceeds of crime within the meaning of section 2 of Pocamla.

19. They submitted that the purchase of the properties was financed by Horizon Limited, a company owned by Benson Wangui Gethi, the son and brother to the 1st and 2nd Respondents respectively. They gave an explanation of the acquisition of the properties as follows:

- a. Rosslyn Property - L.R No 21/1/97 was the first to be identified in November 2014. However, its conveyance did not commence immediately and took a relatively long duration as the sellers were in Tanzania and communication with them was through their groundskeeper, one John Mwangi. The purchase price of the property was Kshs. 60 million as stated in the sale agreement dated 16th April 2015.
- b. Thika Property - L.R No. 8361/12 The sale agreement for this property is dated 8th May 2015. It was purchased at a consideration of Kshs. 35,000,000.
- c. Muthaiga North Property - L.R No. 14902/38. The property was bought on 10th July 2015 at a consideration of Kshs. 45 million.



- d. Eden Times Restaurant -L.R. No. 209/412/1. The business was bought vide a sale agreement dated 26th June 2015 for a consideration of Kshs. 16 million.
20. They submitted that the source of the funds for the purchase of the properties was an advance by Horizon Limited to the 1st and 2nd Respondents through the 3rd Respondent who was the appointed agent for the 1st and 2nd Respondents for purposes of scouting, identifying and purchasing the properties; that the funds were received through the 3rd Respondent's company Good Luck Twenty Eleven Enterprises and paid to the vendors of the properties through their respective Advocates; that pursuant to the professional engagements by the parties, receipts for the funds were duly issued by Good Luck Twenty-Eleven Enterprises, as opposed to the 3rd Respondent personally.
21. They contended that the company Horizon Limited was incorporated in the year 2012 and has been engaged in supplying goods and services to the Government of Kenya including the Ministry of Devolution and Planning where the funds in issue were obtained from. They referred to a report by one Dr. Njoroge Kimani annexed to their affidavit, which they alleged explained the company's financial dealings. They further referred to a contract for supply of fuel to the National Youth Service and stated that whereas Horizon Limited had similar cash flows to the accounts of the 3rd Respondent and the accounts of Josephine Kabura, the business it did with the Ministry of Devolution and hence the source of funds were distinct and separate. It was submitted that the Directorate of Criminal Investigations confiscated all the deposit slips pertaining to the bank accounts of the Respondents and they were therefore unable to verify the evidence relied upon by the applicant.
22. They explained the source of funds to be as follows: that in the period of interest, that is between 12th November 2014 to 9th June 2015, the 1st Respondent received from Horizon Limited a total sum of Kshs. 302,000,000 while Goodluck Twenty Eleven Enterprises Limited received Kshs. 394,100,000 all of which funds were spent on the purchase of the properties in issue. That the 3rd Respondent received a further sum of Ksh. 102,587,000 which was not spent in the purchase of the properties and that the Applicant did not prove that Josephine Kabura's bank accounts sent any money to the Respondents.
23. They submitted further that there was no connection between the Respondent's properties and the alleged National Youth Service stolen funds. That the 1st and 2nd Respondents are not accused persons in ACC No. 1905 of 2015, a case arising from the loss of Kshs. 791,385,000 by National Youth Service which is the basis of this forfeiture application. They also submit that in his affidavit the 3rd Respondent admitted to have received only cash deposits of Kshs. 60,000,000 from Josephine Kabura which he refunded. That this contradicts the Applicant's assertion that the company Goodluck Twenty Eleven Limited received from Kabura a sum of Kshs.108 Million and that moreover, the cumulative value of the properties subject of these forfeiture proceedings is Kshs. 156,000,000 and that the Applicant also obtained forfeiture orders in Assets Recovery Agency v Charity Wangui Gethi [2021] eKLR, a decision that is pending appeal. It was also submitted that Kshs. 87 Million from the 1st Respondent's Faulu Microfinance and Old Mutual accounts were forfeited and accordingly, the remaining transactions/ properties were genuinely acquired and have no connection with Josephine Kabura.
24. They also submitted that the funds received by Horizon Limited from the National Youth Service were a legitimate and genuine compensation for goods supplied and services rendered; that the funds from Josephine Kabura cannot be traced in any of the Respondents' bank accounts; that the Applicant has not established a link between the Respondents and the alleged Kshs. 791 Million stolen from the NYS and citing the case of State of New Jersey v 4194.00 in U.S Currency argued that as such the Respondents did not have a reverse burden to prove the legitimate source of funds.



25. It was further argued that the funds used to purchase the properties were commingled with the sum of Kshs.60,000,000 received by the 3rd Respondent's Company from Kabura hence the same should be distinguished and the preservation orders lifted; that the 3rd Respondent's transactions with Kabura were different from those with the 1st and 2nd Respondents and that the doctrine of proportionality is applicable to the present case. Counsel cited the case of Prophet v National Director of Public Prosecutions (CCT56/05) [2006] ZACC 17. It was reiterated that the Respondents did not have a criminal conviction or proven civil wrongs and the source of funds was legitimate. This court was urged to dismiss the Application and lift the preservation orders in respect of the properties.

The 3rd Respondent's case*

26. The 3rd Respondent opposed the Application through his replying affidavit sworn on 12th June 2017 and submissions dated 9th June 2022.
27. The 3rd Respondent contended that he was charged in criminal case No. CM (Nairobi) ACC No. 301 of 2016 with the offence of money laundering contrary to Section 3 of the *Proceeds of Crime and Anti-Money Laundering Act*; that the charges are related to CMACC No. 1905 of 2015 where the accused persons are charged with the offence of theft of the said sum of Kshs.791,385,000 and that they have not yet been found guilty of the charges. He submitted that he has never been a supplier or a director of any company that was involved in NYS dealings. That he did not suspect that the Kshs.60,000,000 he received from Josephine Kabura was acquired from the National Youth Service that it was proceeds of crime. He conceded that he was the beneficial owner of the motor vehicle KCB 750Z Range Rover and that he purchased the other impugned properties on behalf of the 1st and 2nd Respondents.
28. Learned Counsel for the 3rd Respondent framed 3 issues for determination: whether the Applicant can proceed with civil forfeiture proceedings whilst criminal proceedings over the same subject matter were pending in Criminal Case No. 301 of 2016; whether the Applicant has satisfied the twin conditions of reasonable suspicion and burden of proof; and whether there is sufficient, sound and clear trail of documentation in support of the transactions.
29. Counsel submitted that the 3rd Respondent has not been charged with the primary offence of theft of the Kshs. 791,385,000 and is not an accused in Criminal Case ACC No. 1905 of 2015. That the institution of these forfeiture proceedings therefore, is a breach of the Respondent's right to fair trial and right to presumption of innocence.
30. Counsel asserted that the standard of proof in the criminal charges is higher than in civil forfeiture and that this court should await the outcome of the criminal cases before determining this case and further that these forfeiture proceedings are premature in light of the pending Chief Magistrates ACC No. 301 of 2016 Republic v Josephine Irungu and 10 others.
31. Counsel further argued that the Applicant has not satisfied the twin conditions of reasonable suspicion and burden of proof. That there is no supporting documentation to show the transactions pertaining to the funds in the Respondents accounts; that CPL Sautet does not possess the professional qualifications to enable him analyze the movement of funds from the accounts Nos. 065000007849, 065000007848 and 065000007847 into account numbers 014000020946 and 0140000044055 which are the basis of the Applicant's claims hence his evidence is misleading.
32. With respect to the properties, counsel stated that motor vehicle KCB 750Z was purchased using funds from Newtool Mart and Highview Trading which he had advanced loans to and that the loans were repaid on 20th January 2015. That he deposited the funds into his account numbers 014000020948/055 at Family Bank Cargen Branch and subsequently paid to RMA Motors for



the purchase of the vehicle; that the landed properties were purchased on behalf of the 1st and 2nd Respondents. That he held the funds thereto on behalf of the 1st Respondent and the remaining funds of Kshs. 128,000,000 was refunded to her vide an RTGS directly to her Faulu and Old Mutual Accounts; that the Applicant has not proved that the properties were acquired from proceeds of crime.

The 4th Respondent's case

33. The 4th Respondent opposed the application through his replying affidavit sworn on 13th June 2017 and submissions dated 28th June 2022.
34. He contended that his law firm Ogola & Mujera Advocates was on 16th March 2015 instructed by one Ben Gethi to represent him in the purchase of a property L. R No. 21/1/97 in Rosslyn Estate in Nairobi; the purchase price was Kshs.60,000,000; That his firm received Kshs. 40,000,000 on the same date and a further Kshs.23,513,000 on 17th March 2015 all from the 3rd Respondent; That he prepared the transfer documents and paid a total of Kshs.50,400,000 to the Seller's Advocates, Michael Daud & Associates and the remaining funds to Faulu Kenya Limited and that a deposit of Kshs. 12,000,000 was paid separately to the vendors by Ben Gethi.
35. The 4th Respondent further stated that on or about 20th May 2015, his firm received an additional Kshs.50,000,000 from the 3rd Respondent for the purchase of a different property but was instructed to transfer the funds to Faulu and Old Mutual Money Market Fund accounts. The 3rd Respondent admitted that he had received an offer to purchase motor vehicle KBZ 750Z from the 3rd Respondent but he was not able to raise the purchase price and hence although that vehicle was registered in his name it was not his. He denied that motor vehicle was in his possession.
36. The 4th Respondent also stated that he had no knowledge of the source of funds paid through his firm and stated that he only acted in his professional capacity on behalf of the Respondents. On the alleged non-compliance with court orders, he submitted that he had no knowledge of the whereabouts of the motor vehicle KBZ 750Z and reiterated that he has never had possession of the vehicle. He prayed that the application be dismissed as against himself.

Analysis and determination

37. I have considered the application, all affidavits, annexures, all submissions and authorities cited. The following issues arise for determination:
 - a) Whether Exhibit SJM 6 annexed to the Applicant's supporting affidavit sworn by CPL Jeremiah Sautet is inadmissible for non-compliance with the [Evidence Act](#).
 - b) Whether the properties the subject of this Application are proceeds of crime.
 - c) If so, whether the properties are liable for forfeiture to the Government of Kenya.
 - d) Costs.

Issue (a) Whether Exhibit SJM 6 annexed to the Applicant's supporting affidavit sworn by CPL Jeremiah Sautet is inadmissible for non-compliance with [Evidence Act](#)

38. The 1st and 2nd Respondent contended in their replying affidavit that the Exh. SJM 6 relied upon by the Applicant is inadmissible as the Applicant has not availed a certificate for computer generated documents contrary to the provisions of the [Evidence Act](#). That the documents cannot be



authenticated and therefore are inadmissible. They cited Section 65 (8) of the Evidence Act which provides as follows:

“In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

- (a) identifying a document containing a print-out or statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.”

39. Exhibit SJM 6 is a computer print-out of, inter alia, the account opening documents, bank statements and records of the 3rd Respondent and the company Goodluck Twenty Eleven Enterprises Limited. No certificate initially accompanied this annexures although the Applicant contended, in its submissions, that a certificate under Section 65(8) had been filed. However, I have perused the court’s record and it is noteworthy that the certificate which is dated 29th May 2015 made under Section 65(8) was subsequently filed by the Applicant through the supplementary affidavit of CPL Sautet as Exh SJM 15. This supplementary affidavit was however expunged from the record of this court vide the Ruling of Hon. Onyiego J, delivered on 31st October 2015 for having been filed out of time and without leave. An appeal filed against the ruling in the Court of Appeal in the case of Assets Recovery Agency v Charity Wangui Gethi & 3 others [2020] eKLR was dismissed and the court’s ruling of Onyiego J, was upheld in a judgment delivered on 8th May 2020 (Karanja, Musinga, Okwengu JJA). There is therefore no certificate under Section 65(8) of the Evidence Act.
40. Nonetheless, Section 128 of the Proceeds of Crime and Anti-Money Laundering Act provides that the provisions of the evidence act do not apply to proceedings under the Proceeds of Crime and Anti-Money Laundering Act in so far as they relate to the production of electronic evidence. It states that “Notwithstanding the provisions of the Evidence Act (Cap. 80), any court hearing any matter in relation to this Act may admit electronic evidence.” It is my finding therefore, that the Exhibit SJM 6 is admissible in evidence by virtue of Section 128 of the Proceeds of Crime and Anti-Money Laundering Act

Whether the properties the subject of this Application are proceeds of crime.

41. The properties names in this case are L.R. No. 14902/38 Muthaiga North, Nairobi; L.R. No. 8361/12, Thika; L.R. No. 21/1/97 in Roslyn Estate, Nairobi; the business known as Eden Times Restaurant situated on the Ground Floor of Mercury Building along Moi Avenue, Nairobi on L.R. 209/412/1; and Motor vehicle registration number KCB 750Z Range Rover Vogue.
42. Preservation orders in respect of the above properties were issued by this court on 25th November 2015, and gazetted on 11th December 2015 vide Gazette Notice Number 9197.



43. The undisputed facts of this suit are that the 1st, 2nd, 3rd and 4th Respondents alongside 7 others have been charged in Chief Magistrates Criminal Case No. 301 of 2016 with 15 counts of the offence of money laundering contrary to Section 3 as read with Section 16(1) of the [Proceeds of Crime and Anti-Money Laundering Act](#). The said charges are related to the Chief Magistrates Criminal Case No. 1905 of 2015 in respect of the alleged loss of Kshs. 791,385,000 from the National Youth Service which the Respondents are alleged to have acquired and laundered. The cases are yet to be concluded. It is the Respondents' contention that that being the case forfeiture orders cannot issue against them. I respectfully disagree. This is because Section 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#) expressly provides that Civil forfeiture is not dependent on the outcome of criminal proceedings: That Section states:-

“The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.”

44. The 1st Respondent had raised a similar argument in a related suit to wit Assets Recovery Agency v Charity Wangui Gethi & another [2021] eKLR where the court rendered itself as follows which finding holds true for this case:

“

“185. This argument, I believe, is answered by past jurisprudence from this court and by the provisions of statute. In *Assets Recovery Agency vs Pamela Aboo* [2018] eKLR, the court considered the issue in relation to the civil proceedings for forfeiture before it and observed as follows:

“63. Forfeiture proceedings are Civil in nature and that is why the standard of proof is on a balance of probabilities. See section 92(1) of *Pocamla*. In the case of *Director of Assets Recovery and Others, Republic vs Green & Others* [2005] EWHC 3168 the court stated as follows:

“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.”

64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of *ARA & Others vs Audrene Samantha Rowe & Others* Civil Division claim No 2012 HCV 02120 the Court of Appeal stated:

“...that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof...”

“187. It is my finding therefore and I so hold that the issuance of a forfeiture order in this matter is not dependent on whether or not anyone is ever convicted in relation to the fraudulent transfer of funds from the NYS. The 1st respondent has not been able to discharge the burden placed on her to demonstrate the source of the funds deposited in her account, and to displace the Agency's evidence that shows it was part of the NYS funds. In



the face of such failure, there is no refuge that the 1st respondent can find in alleging that there has been no conviction in relation to the NYS funds.”

45. A similar holding was reached in the case of Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168 cited with approval in the case of Assets Recovery Agency v Charity Wangui Gethi & another [2021] eKLR where the court stated: -

“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 matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 the Court of Appeal stated:-

“...that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof...”

46. I agree with and reiterate the above findings and hold that these forfeiture proceedings are independent of the pending criminal prosecutions and do not depend on the outcome of Nairobi Chief Magistrate Court (Milimani) Criminal Case No. 1905 of 2015 and Nairobi Chief Magistrate's Court (Milimani) Criminal Case No. 301 of 2016. The current proceedings are intended to prevent and deter any illicit enrichment that may arise from the properties believed to be acquired from corrupt conduct and are not therefore premature.

47. With respect to the properties in issue, the 1st and 2nd Respondents contended that the properties were purchased from funds obtained from Horizon Limited a company owned by one Ben Gethi, the son of the 1st Respondent. They stated the dates of acquisition of the funds and contended that the funds were received in cash and were then passed on to the 3rd Respondent to purchase the properties on their behalf. It is the 1st Respondent's contention that in total she received a sum of Kshs.302,000,000 from Horizon and that the funds were an advance from her son.

48. On its part, the Applicant contended that the funds used to acquire the properties was part of Kshs. 381,000,000 paid into the 3rd Respondent's accounts from the accounts of companies owned by Josephine Kabura. That the funds moved from the accounts of Kabura's companies/businesses to the accounts of the 3rd Respondent's companies. I have carefully perused the bank statements annexed to the Applicant's supporting affidavit and it is evidence that Kshs. 273,000,000 were received in the 3rd Respondent's personal Account number 014000020946 held at Family Bank from the said Kabura's accounts and that Kshs. 108,000,000 was received in the bank account of Goodluck Twenty Eleven Enterprises, a business entity owned by the 3rd Respondent from Kabura's accounts. Subsequently, and as admitted by the 3rd Respondent, he transferred these funds to the vendors and vendor's advocates for the landed properties subject of these proceedings through the firms of Advocates Glinis Kigera and Patrick Onyango Ogola respectively. The properties were then transferred and registered in the names of the 1st and 2nd Respondents.



49. From the evidence in the Quantity Surveyor's Report annexed as SJM 11 in the supporting affidavit of Cpl. Sautet, the quantification of the total works done by the three businesses owned by Josephine Kabura on the Kibera Slum upgrading project was Kshs. 78,857,835 only. The said three businesses, Form Home Builders, Roof and All Trading and Reinforced Concrete Builders however irregularly received a total of Kshs.791,385,000 from the G-pay systems of the government through their bank accounts at Family Bank. The Applicant contended that out of the irregularly acquired funds, a total of Kshs.381,000,000 was transferred to John Kago Ndungu the 3rd Respondent in his personal account and the bank accounts of Goodluck Twenty Eleven Enterprises as aforesaid. These payments to the 3rd Respondent and his company were not supported by any documentation for work done for the said Josephine Kabura or her businesses as would warrant payment to the 3rd Respondent or his company. On their part, as earlier stated the 1st and 2nd Respondents alleged to have carried out all their transactions in cash meaning that there are no records of either the money received by them from Horizon or paid by them to the 3rd Respondent. It is my finding that at the material time, the 3rd Respondent was a driver employed by the Kenya Commercial Bank who with due respect could not have earned a sum of Kshs. 381,000,000/= during the period in issue which is December 2014 and June 2015. On their part, the 1st and 2nd Respondents in their affidavit and submissions did not mention any alternative source of funds except that the funds were from Horizon Limited. They produced an Award for Supply and Delivery of Petrol to the National Youth Service dated 18th November 2013 and a cover page of what seems to be a contract for the same and alleged that that was the business through which Horizon acquired the funds which were then advanced to the 1st Respondent in cash. My finding however is that their evidence as to the source of funds does not controvert that of the Applicant. They have not given any evidence as proof of supply of any goods or services, no delivery notes and/or receipts, no bid documents for any particular tenders and no contracts with between the National Youth Service and Horizon. It has been held in numerous decisions that once the Applicant has discharged the legal burden of proof, it is upon the Respondents to explain the legitimate source of the funds failure to which the tainted funds would be forfeited to the government. Money does not fall from trees. (See the case of Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) [2018] eKLR)
50. Further, Section 44 of the *Proceeds of Crime and Anti-Money Laundering Act* and the Fourth Schedule thereof provide that financial institutions must report all cash transactions exceeding Kshs.1,000,000 to the Financial Reporting Centre. When a person receives a total of Kshs. 302,100,000 in cash as alleged by the Respondents hence escaping the detection of the financial institution then an inference can be reasonably drawn that either they were concealing the source of the funds for an ulterior motive or they were being used to launder the money.
51. Weighing the two accounts presented to this court by the parties this court is persuaded that that of the Applicant is more plausible and credible because as I have stated one would only seek to avoid the detection of their financial transactions by the financial institutions so as not to reveal and hence conceal the source of funds or if they are laundering the funds. As I have already indicated it is the Applicant's case, which case has not been rebutted, that whereas Josephine Kabura, whose companies/businesses were the source of funds used to acquire the landed properties now registered in the names of the 1st and 2nd Respondents, had done work for NYS for a sum of Kshs.78,857,835 she was instead paid Ksh.791,383,000. Such a payment would be unlawful both under the *Anti-Corruption and Economic Crimes Act* and the *Public Finance Management Act* and accordingly the funds are proceeds of crime.
52. It is my finding therefore that the 3rd Respondent, in his capacity as an agent of the 1st Respondent received in his bank accounts proceeds of crime, being Kshs.381,000,000 fraudulently and irregularly acquired from the National Youth Service by Josephine Kabura. The 3rd Respondent was then used



as a conduit, actively participated in money laundering of the said proceeds by purchasing the landed properties. It is instructive that the 4th Respondent stated in his affidavit that in one instance he received monies for purchase of certain property but was later advised to deal with it in a different manner. This in my view was but a complete scheme of money laundering.

53. The new evidence purports to establish that the funds used to acquire the properties in issue were not tainted as they were from Horizon Limited whose proprietor is the son of the 1st Respondent in whose names the properties are registered. However, the 1st Respondent's evidence is that she received money from her son's company in cash. Given that evidence there are no records that prove that she in fact received Kshs.302,100,000 from Horizon. On the contrary, the Assets Recovery Agency/Applicant has evidence which I find cogent, as it is supported by bank statements that the 3rd Respondent received Kshs.381,000,000 from Josephine Kabura and that it is that money that was used to acquire the properties. The Assets Recovery Agency/Applicant gave a detailed trail of the funds and produced bank statements showing that the monies were in fact bank transfers from the account of Kabura's companies to the 3rd Respondent's. The tender document annexed to the replying affidavit of the 3rd Respondent and the Expert Report of Dr. Njoroge Obadiah Kiama do not establish that money was indeed paid or "advanced" to the 1st Respondent by Horizon. In my view they merely demonstrate that Horizon may have come across money from NYS, whether lawfully or not. The evidence that the 1st Respondent got the money from her son (Horizon) is a mere allegation which does not controvert the very cogent evidence of the Applicant. It is clear from the evidence that the acquisition of these landed properties by Kago (3rd Respondent) in the names of the 1st and 2nd Respondents is but a money laundering scheme to conceal or disguise the same. (See Section 3(b) of the [Proceeds of Crime and Anti-Money Laundering Act](#)). The landed properties are therefore proceeds of crime liable for forfeiture to the state and I so hold.
54. As for the motor vehicle KCB 750Z the 3rd Respondent concedes that he is its beneficial owner. The motor vehicle is however registered in the name of the 4th Respondent. This in my view raises suspicion that it was so registered to conceal its real ownership. Indeed, the issue of ownership is not clear as the 3rd Respondent and the 4th Respondent gave contradictory accounts in their affidavits. For the 3rd Respondent it was that he purchased the motor vehicle using monies repaid to him by certain companies he had loaned monies to and that thereafter he entered into a sale agreement to sell and to have the logbook of the motor vehicle transferred to the 4th Respondent who had expressed interest to purchase it, but that he (3rd Respondent) would retain possession of the motor vehicle till full payment of the agreed purchase price which was, as per an agreement marked JK10, Kshs.18,000,000 payable in 18 months (See paragraph 33 (f) of 3rd Respondent's affidavit). This is in contradiction with the 4th Respondent's averments at paragraph 15 of his replying affidavit dated 13th June 2017, that the 3rd Respondent was to maintain ownership (meaning the registration) and possession of the motor vehicle. This contradiction can only mean that the 3rd Respondent and the 4th Respondent were not telling the truth. Moreover, one would wonder why a party would transfer the ownership of such an expensive motor vehicle without receiving a penny from the other party. Also why a person of the caliber of an Advocate of the High Court would agree to have a motor vehicle registered in his name yet he could not have it in his possession. Why the rush to transfer the ownership? My finding is that it was so as to conceal its real ownership. It is even more telling when one considers the admission by the 3rd Respondent that he indeed received a sum of Kshs.60million from Josephine Kabura who is said to have received more money from the NYS than she was entitled to. His allegation that the money was a loan from the said Josephine Kabura was in my view not proved on a balance of probabilities noting that the burden of proof shifted to him under Section 112 of the [Evidence Act](#). It is also my finding that his annexure "JK8" does not disclose that the various deposits received in his accounts were indeed



repayments from his debtors as he alleges. All the annexure shows are deposits from certain sources but it does not indicate the purpose of those deposits.

55. Accordingly, I find and so hold that the Applicant has proved, on a balance of probabilities, that the suit properties are proceeds of crime as defined in Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act*.
56. In the upshot prayers 2 and 3 of the Notice of Motion herein are granted and it is hereby ordered:-
- a. That following properties be and are hereby forfeited to the State;
 - i. L.R. No. 14902/38 Muthaiga North, Nairobi;
 - ii. L.R. No. 8361/12, Thika;
 - iii. L.R. No. 21/1/97 in Roslyn Estate, Nairobi;
 - iv. The business known as Eden Times Restaurant situate on the Ground Floor of Mercury Building along Moi Avenue, Nairobi on L.R. 209/412/1;
 - v. Motor vehicle registration number KCB 750Z Range Rover Vogue.
 - b. That an order(s) do issue vesting the aforestated properties to the Assets Recovery Agency on behalf of the State.
 - c. That the costs of the Originating Motion shall be borne by the Respondents. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF MARCH 2023

E N MAINA

JUDGE

