



**Assets Recovery Agency v Active Electrons Africa Limited & 3 others
(Civil Suit E026 & 1 of 2021 (Consolidated)) [2023] KEHC 1766 (KLR)
(Anti-Corruption and Economic Crimes) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL SUIT E026 & 1 OF 2021 (CONSOLIDATED)**

EN MAINA, J

MARCH 9, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

ACTIVE ELECTRONS AFRICA LIMITED 1ST RESPONDENT

FIRSTLING SUPPLIES 2ND RESPONDENT

AMERI TRADE LIMITED 3RD RESPONDENT

YVONNE WANJIKU NGUGI 4TH RESPONDENT

JUDGMENT

1. The Assets Recovery Agency sued the four Respondents herein in separate Originating Motions which were later consolidated with HCACEC Suit E026 of 2021 becoming the main suit. The two suits were both brought by way of Notice of Motion under Sections 81, 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act*. In HCACEC Suit No E026 of 2021 the ARA/Applicant seeks orders as follows as against the 1st, 2nd and 3rd Respondents:-

1. That this Honourable Court be pleased to issue an order declaring that the following funds are proceeds of crime and therefore liable for forfeiture to the State:

- a. Kshs 3, 648, 158.40 held in Account Number xxxx in the name of Active Electrons Africa Limited held at Standard Chartered Bank.



- b. Kshs 718, 024.35 held in Account Number xxxx in the name of First Supplies held at Standard Chartered Bank.
 - c. Kshs 2, 962, 876.25 held in Account Number xxxx in the name of Ameritrade Limited held at Equity Bank Limited.
2. That this Honourable Court be pleased to issue orders of forfeiture of the following funds to the Applicant:
 - a. Kshs 3, 648, 158.40 held in Account Number xxxx in the name of Active Electrons Africa Limited held at Standard Chartered Bank.
 - b. Kshs 718, 024.35 held in Account Number xxxx in the name of First Supplies held at Standard Chartered Bank.
 - c. Kshs 2, 962, 876.25 held in Account Number xxxx in the name of Ameritrade Limited held at Equity Bank Limited.
 3. That this Honourable Court be pleased to issue an order that the above funds be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency.
 4. That this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.
 5. That costs be provided for.'

2. The case against the 1st, 2nd and 3rd Respondents is based on the following grounds:-

- ' 1) That the Applicant is the Assets Recovery Agency established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering assets which are acquired from or are the profits or benefits of proceeds of crime.
 1. That part VIII of POCAMLA sets out the procedure for Civil Forfeiture.
 2. That pursuant to Part VIII of POCAMLA, Sections 81-89 of POCAMLA, the Agency is authorized to institute Civil Forfeiture proceedings ex-parte and seek orders prohibiting any person, subject to such conditions as the Court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime.
 3. That the Respondents are entities owned and/or associated with one Thuita James Nderitu and were used to embezzle funds from the coffers of the National Youth Service.
 4. That following the arrest and arraignment to court on May 29, 2018 of the National Youth Service staff and suppliers who were charged with various offences including abuse of office and conspiracy to commit a felony among others, the



Agency commenced investigations to recover proceeds of crime in exercise of its mandate.

5. That the application for forfeiture is premised on the investigations conducted by the Directorate of Criminal Investigations into the theft and fraud of public funds amounting to Kshs 467,896,9931- from the National Youth Service (NYS) a State Department in the Ministry of Public Service, Youth and Gender 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 Anti-Corruption Court Chief Magistrates' Court (Milimani) Criminal Case No ACC 8, 10, 12, 13, 16 and 17 of 2018.
6. That financial investigations conducted by the Directorate of Criminal Investigations revealed massive schemes of embezzlements of public funds, fraud and money laundering rendering the above funds proceeds of crime liable for forfeiture under POCAMLA.
7. That investigations further established that the funds were stolen and/or fraudulently transferred from the National Youth Service (NYS) to various suppliers' bank accounts who fictitiously supplied goods and services that were not rendered to the NYS.
8. That on the April 26, 2018 the Agency received information that there were funds held at Equity and Standard Chartered Banks which funds were suspected to be proceeds of crime.
9. That the said bank accounts received suspicious huge cash deposits from the coffers of the National. Further investigations established that there are reasonable grounds to believe that the cash in question is part of the funds stolen from the National Youth Service.
10. That the investigations have revealed that the cash deposits were unlawfully acquired hence proceeds of crime pursuant to the Provisions of [Proceeds of Crime and Anti-Money Laundering Act](#).
11. That as stated above the investigations in this matter has established that the accounts are holding funds suspected to be proceeds of crime which require to be preserved and deposited in the Assets Recovery Agency Account specified above.
12. That on 30th May, 6th June, 25th June and September 7, 2018 the Agency obtained court orders under sections 118 and 121 of the [Criminal Procedure Code](#), section 180 of the [Evidence Act](#) and sections 53A (5) & 54 (2) of the [Proceeds of Crime and Anti-Money Laundering Act](#) for purposes of investigations vide Chief Magistrates Miscellaneous Application Nos. 1833, 1839, 1997



and 2253 of 2018 and Nairobi High Court Anti-Corruption & Economic Crimes Division, Misc, application Nos 33 and 36 of 2018.

13. That on June 9, 2021 the Agency subsequently obtained court orders under section 118, 118A, 119 and 121 (1) of the Criminal Procedure Code, section 180 of *Evidence Act*, section 24 (1) (e) of the *National Police Service Act*, section 53 A of the *Proceeds of Crime and Anti-Money Laundering Act* vide Chief Magistrates Miscellaneous Application Nos E1881 and E1855 OF 2021 to obtain the Respondents' bank.
14. That the investigations conducted by the Agency established that the funds are from illegitimate sources and part of the funds stolen from the National Youth Service (NYS) acquired by the Respondents and deposited in the above accounts.
15. That one James Thuita Nderitu is among suspects who were charged with the theft of funds from the National Youth Service.
16. That Agency obtained forfeiture orders against James Thuita Nderitu vide ACEC Application Number 2 of 2019 Assets Recovery Agency Vs James Thuita Nderitu.
17. That the transactions in the present application arose from the same facts and money laundering schemes in which James Thuita Nderitu is a planner and beneficiary.
18. That the Standard Chartered Bank informed the Agency through a letter dated June 4, 2021 that it is terminating/severing all account relationships with the Respondents by June 30, 2021 hence the funds in issue be forfeited and transferred to the Assets Recovery Agency.
19. That subsequently on June 25, 2020, the Applicant obtained preservation orders Vide Miscellaneous Application number E020 of 2021 of a Total of Kshs 7, 329, 059 held in Bank Accounts Numbers, xxxx, xxxx and xxxx in the name of Active Electrons Africa Limited, First Supplies and Ameritrade Limited held at Standard Chartered Bank and Equity Bank Limited respectively.
20. That the preservation orders were gazetted on July 9, 2021 vide Gazette Notice No 6946 pursuant to section 83 (1) of Proceeds of Crime and Anti-Money Act (POCAMLA).
21. That there are reasonable grounds to believe that the funds held in the Respondents' accounts, are proceeds of crime.
22. That from the investigations the source of the funds was illegal being suspected to be part of the funds stolen from the National Youth Service (NYS) and therefore proceeds of crime liable to be forfeited to the Agency on behalf of the State.



23. That it is in the public interest that the orders sought are granted and the suspect funds be forfeited and transferred to the Applicant on behalf of the State.'

3. In HACEC Civil Suit No 1 of 2021 the Applicant seeks the following orders against the 4th Respondent:

' 1) That this Honourable Court be pleased to issue an order declaring that the following funds are proceeds of crime and therefore liable for forfeiture to the State:

1. Kshs 3,101,269.69 held in Account Number xxxx at Diamond Trust Bank in the name of Yvonne Wanjiku Ngugi.

24. That this Honourable Court be pleased to issue orders of forfeiture of the following funds to the Government of Kenya:

1. Kshs 3,101,269.69 held in Account Number xxxx at Diamond Trust Bank in the name of Yvonne Wanjiku Ngugi.

25. That the funds forfeited in prayer 2 above be deposited in a/c no xxxx held at Kenya Commercial Bank, KICC Branch in the name of the Assets Recovery Agency.

26. That this Honourable court do make any other ancillary orders it may deem fit and necessary for the proper and effective execution of its orders.

27. That there be no orders as to costs.'

4. The case against the 4th Respondent is made on the following grounds:

' 1) That Section 53(A) 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.

2. That the Respondent is a female adult resident of Thika and the account signatory and beneficial owner of funds held in Account Number xxxx held at Diamond Trust Bank (DTB holding funds amounting to 3, 101, 269.69 which the Applicant seeks to forfeit to the Government of Kenya.

3. That following the arrest and arraignment to Court on May 29, 2018 of the National Youth Service (NYS) staff and suppliers, including the Respondent who was charged with various offences, the Assets Recovery Agency commenced investigations to recover proceeds of crime in exercise with its mandate.

4. That the application of forfeiture is premised on the investigations conducted by the Directorate of Criminal Investigations into the theft and fraud of public funds from the National Youth Service (NYS) then a State Department in the Ministry of Public Service, Youth and Gender which revealed massive fraud and embezzlement of public funds perpetuated by public officials and private persons some of whom were charged for various offences in Nairobi



Anti-Corruption Court Chief Magistrate's Court (Milimani) Criminal Case No ACC. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of 2018. THAT the Respondent herein was charged in Nairobi Anti- Corruption Court Chief Magistrate's Court (Milimani) Criminal Case No 12 of 2018 with the offences of fraudulent acquisition of public property contrary to Sections 45(1) (a) and 48(1) of the [Anti-Corruption and Economic Crimes Act](#) among others for the loss of funds at the National Youth Service.

5. That financial investigations conducted by the Directorate of Criminal Investigations revealed massive schemes of fraud and money laundering hence the funds are proceeds of crime and liable for forfeiture under POCAMLA.
6. That the Agency received information that there were funds amounting to Kshs 3, 101, 269 .69 held in Account Number xxxx in the name of Yvonne Wanjiku Ngugi held at Diamond Trust Bank (DTB), Nairobi which funds are suspected to be proceeds of crime and liable for forfeiture to the State under the [Proceeds of Crime and Anti-Money Laundering Act, 2009](#).
7. That the said bank Account received suspicious huge cash deposit in Kenyan Shillings. Further investigations established that there is reasonable grounds to believe that the cash in question is part of the funds stolen from the National Youth Service (NYS) and the Respondent has not given any reasonable explanation to prove any legitimate source of the funds.
8. That the investigations have revealed that the cash deposit was unlawfully acquired hence proceeds of crime pursuant to the provisions of Proceeds of Crime and Anti Money Laundering Act.
9. That the cash transaction was made on April 26, 2018 which was within the period of investigations (2018) under which money was lost from the National Youth Service.
10. That on May 18, 2021, the Applicant filed HCAEC Misc No E016 of 21 Assets Recovery Agency- Vs- Yvonne Wanjiku Ngugi and obtained Court Orders preserving funds in the said account and orders prohibiting the Respondent and /or her agents, representatives from transacting, transferring and /or dealing in any manner with the funds held in the said account.
11. That on May 21, 2021 the Applicant gazetted the Preservation Orders pursuant to Section 83(1) of POCAMLA vide gazette Notice No 5414 of Vol CXXIII No 125.
12. That there are reasonable grounds to believe that the funds held in the Respondent's bank account are proceeds of crime liable for forfeiture to the Applicant under POCAMLA.
13. 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.
14. That Section 90 of the POCAMLA provides that where 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.



15. That it is in the public interest that the orders sought are granted and the suspect assets be forfeited to the Applicant.
 16. That there are justifiable grounds to warrant the issuing of the orders sought.”
5. The 1st and 2nd Respondents opposed the suits vide the Replying affidavit of James Thuita Nderitu sworn on October 8, 2021 while the 4th Respondent filed a Replying affidavit sworn on October 8, 2021.
 6. It is contended that the 1st and 2nd Respondents are legitimate businesses owned by James Thuita Nderitu; That the two are engaged in business with government institutions, individuals or agencies in the private sector; entities that they also did business with the National Youth Service, including supplying hammers, cutting blades and track links. That these supplies were imported and delivered to the National Youth Service; That the 2nd Respondent was awarded a tender for supply of the New Look National Youth Service Uniform, Accessories and Kittings in 2017; as per the two contracts annexed to the affidavit; that the value of the supplies was Kshs 899,036,250 and Kshs 259,000,000 respectively; that the payment to the 2nd Respondent was valid, having been made upon delivery of the items to National Youth Service. Further that the 1st Respondent had a contract with the Kenya Bureau of Standards for supply of structured cabling installation works at the Metrology and Biochemical Laboratories; that it also supplied construction materials to the National Youth Service for the Karen and Ngong Furniture Markets as per a Contract and Local Purchase Orders annexed to the affidavit. It is averred that the payments were therefore legitimate and that James Thuita has filed an appeal in the Court of Appeal Civil Appeal No E321 of 2020 James Thuita Nderitu and Flagstone Merchants & 5 Others vs Assets Recovery Agency, against a previous judgment which forfeited his funds, which appeal is awaiting hearing.
 7. The 3rd Respondent did not participate in these proceedings despite having been served by way of substituted service through advertisements in the Standard and Daily Nation Newspapers of December 7, 2021 and December 21, 2021.
 8. The Originating Motions were canvassed by way of written submissions.

Submissions of the Applicant

9. In the submissions dated December 14, 2022 learned Counsel for the Applicant framed four issues for determination to wit:-Whether the funds specified in the application dated August 13, 2021 are proceeds of crime; if in the affirmative,Whether the said funds should be forfeited to the Applicant;Whether the application for civil forfeiture is in violation of the Respondent’s rights to property under Article 40 of the Constitution;Whether conviction is a precondition for civil recovery proceedings under part VIII of the Proceeds of Crime and Anti Money Laundering Act.
10. Counsel submitted that the application for forfeiture is premised on investigations conducted by the Directorate of Criminal Investigations into the theft of Kshs 467,896,993 from the National Youth Services, which revealed massive fraud and embezzlement of public funds perpetuated by public officials and private persons who have been charged in Nairobi Anti-Corruption Chief Magistrates Court Criminal Case No 8,10,12,13,16 and 17 of 2018.
11. Counsel stated that the funds were acquired and laundered by the Respondents contrary to the provisions of Sections 3, 4 and 7 of the Proceeds of Crime and Anti-Money Laundering Act. The funds in issue constitute proceeds of crime within the meaning of Section 2 of the Proceeds of Crime and Anti-Money Laundering Act; that the Agency needs only to make a prima facie case against the Respondents



for the court to make a forfeiture order; that as the funds are proceeds of crime and it is immaterial in whose hands they are in. Counsel placed reliance on the following cases to support his submissions on issue No 1. *Schabir Shaik & Others v State Case CT 86/06(2008)7 ZACC 7Col Dr Besigye Kiiza v Museveni Yoweri Kaguta, Election Petition No 1 of 2001* cited in the case of *Ethics and Anti-Corruption Commission v Stanley Mombo Amutti [2015] eKLR*.

12. On the second issue, Counsel argued that the offence of money laundering is a standalone offence and that the Applicant need not prove any Criminal charges before obtaining orders for forfeiture; that the court ought to issue forfeiture orders under Section 92 of the *Proceeds of Crime and Anti-Money Laundering Act* so as to deprive the Respondents of ill-gotten wealth. For this Counsel relied on the case of *Assets Recovery Agency v Lillian Wanja Muthoni t/a Sahara Consultants & 5 Others ACEC Misc App 58/2018 [2020] eKLR*.
13. On the third issue, Counsel stated that under Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act*, civil forfeiture is a civil remedy, independent of the outcome of any criminal proceedings and placed reliance on the case of *Serious Organized Crimes Agency v Gale* cited in the case of *Assets Recovery Agency v Audrene Samantha Rowe and another Civil Division Claim No 2012 HCV 02120*.
14. In regard to the 3rd Respondent Counsel stated that the 3rd Respondent did not participate in these proceedings despite having been served. That Section 112 of the *Evidence Act* imposes a burden on the Respondents to rebut the allegations by the Applicant by presenting evidence and as such, due to the failure by the 3rd respondent to rebut the evidence presented, a presumption arises that the Applicant has proven its case against it as required and that the applications against the Respondents are merited and should be allowed.

Submissions of the 1st and 2nd Respondents

15. For the Respondents Learned Counsel filed submissions dated January 9, 2023. No issue for determination were however framed.
16. Counsel submitted that Active Electrons has been able to demonstrate the nature of business(es) it was engaged in for which it was paid monies from the Government. That this was proved through the affidavit of James Thuita wherein two contracts marked as annexures JTN-6 and JTN-7 for supply of construction materials for the proposed Karen and Ngong Road Furniture Market whose value is Kshs 196,407,120 and a contract with the Kenya Bureau of Standards for structured cabling installation works at Metrology & Biochemical Laboratories annexures JTN 8 containing local purchase orders from the NYS and delivery notes. That all these show the nature of business that Active Electrons was engaged in, for which it was paid the monies that the Applicant now wishes to recover. They noted that there is no case against Active Electrons in any criminal court; the funds it received are not a subject of any criminal proceedings.
17. In regard to the 2nd Respondent, it was conceded that Firstling Supplies Limited is a suspect in *Milimani CMCC ACC No 8 of 2018, Republic v Lillian Omollo & Others*. Counsel however submitted that in this case, the issue is whether the funds in the account are proceeds of crime liable to forfeiture which they are not. Counsel stated that in the judgment in the case of *Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eKLR* where the Applicant sought and obtained a judgement for forfeiture of certain sums held in the account of Firstling Supplies Limited was not a judgment in rem as regards all property owned by Firstling Supplies, but only against the properties in that suit. Counsel submitted that the said judgment is currently under appeal. Counsel contended that the replying affidavit of James Thuita Nderitu has explained the nature of business that Firstling was involved in with the National Youth Service. That two contracts were attached one being a contract entered into



on February 28, 2017 for supply of New Look National Youth Service Uniforms to the National Youth Service and the other for supply of uniform, Bedding Linen, Sport Uniforms, Kits and Accessories for Servicemen/Women (annexures ITN-3 and 4 respectively); that the Respondents also provided Local Purchase Orders, delivery notes and acknowledgement receipts (annexures JTN-1 and 5); importation documents (JTN-2). Counsel contended that the funds were in the account at the time when ACEC 2 of 2019 was being instituted. Further that while it is true that Firstling received more than 1 billion from the National Youth Service over the years, only Kshs 115,534,000 is the subject of the criminal case in CM ACC No 8 of 2018.

18. In respect to the case against the 4th Respondent Counsel submitted that though Ms Yvonne Ngugi is an accused person in Milimani CMCC ACC No 8 of 2018, Republic v Lillian Omollo & Others, when the Applicant instituted proceedings ACEC No 2 of 2019 against James Thuita Nderitu and the companies associated with him in ACEC No 2 of 2019, her accounts and money held in them were not a subject of forfeiture proceedings and that the funds herein were in her account at the time when ACEC No 2 of 2019 was instituted. Counsel urged this court to dismiss the Motions.

Issues for determination:

1. Whether a conviction for a criminal offence is a precondition for civil forfeiture proceedings under Part VIII of POCAMLA.
2. Whether the funds in the accounts of the Respondents herein are proceeds of crime liable for forfeiture to the Government.
3. Who shall bear the costs of this case.

Analysis and determination:

Whether a conviction for a criminal offence is a precondition for civil forfeiture proceedings under Part VIII of POCAMLA

19. Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* expressly provides that the validity of a forfeiture order under subsection 92(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.

' 92. Making of forfeiture order

- (1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—
 - (a) Has been used or is intended for use in the commission of an offence;
 - or
 - (b) Is proceeds of crime.
- (2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for andwith respect to facilitating the transfer to the Government of property forfeited to it under such an order.



- (3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.
- (4) 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.'
20. The intention or purpose of Sections 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#) is to ensure that people do not benefit from illicit wealth; that the Agency is able to deal with the incidence of illicit enrichment whether or not the persons involved have been found guilty of criminal offences. Part VII of the [Proceeds of Crime and Anti-Money Laundering Act](#) provides for the alternative avenue of criminal forfeiture (forfeiture upon conviction of a criminal offence) and it is therefore clear that the legislature was aware that there are instances where the Agency could move to recover illicit wealth without having to await the outcome of a criminal prosecution. It is left to the Assets Recovery Agency to determine the manner in which to institute recovery proceedings. It then behoves it to prove on a balance of probabilities that the Respondents are in possession of property or cash whose source is not legitimate. The evidential burden then shifts to the Respondents to prove the source of the funds or property.
21. It is trite that civil forfeiture proceedings target property acquired as a result of criminal conduct but not the culpability of the Respondent. In the case of [Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission \(Interested Party\) \[2018\] eKLR](#) the Court stated:-
- ' 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.'
22. Section 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#) expressly provides that '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 is concerned.' That is the law and evidently an investigation, charge or conviction for a criminal offence is not a precondition for civil forfeiture under Part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) and I do so find and hold.

Whether the funds in the accounts of the Respondents subject of these proceedings are proceeds of crime liable for forfeiture to the Government

23. Section 95 of the [Proceeds of Crime and Anti-Money Laundering Act](#) provides for forfeiture by default it states:-

' 95. Forfeiture order by default

(1) If the Agency Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 91(1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who were served notices in terms of section 83(3) have knowledge of notices given under section 91(2), the High Court may—

(a) Make any order by default which the High Court could have made under sections 88(1) and (2);

(b) Make such order as the High Court may consider appropriate in the circumstances; or

(c) Make no order.'

24. The 3rd Respondent herein did not enter appearance in these proceedings. The Applicant through its affidavit demonstrated that the 3rd Respondent received a total of Kshs 39,990,755 from the State Department of Public Service in its account No xxxx at Equity Bank Limited on various dates between March 13, 2017 to July 4, 2017. Out of that sum Kshs 37,027,879.00 was withdrawn as shown in the bank statement marked annexure IN3 leaving a balance of 2,092,801,360. It is the Applicant's case that those funds were acquired under suspicious circumstances as no goods or services were supplied or rendered to the National Youth Service by the 3rd Respondent.

25. It therefore fell on the 3rd Respondent to explain how or why it received the large deposits from the National Youth Service. The evidential burden of proof fell on the 3rd Respondent to prove to the court the nature of the business it transacted with the National Youth Service as provided in Section 112 of the [Evidence Act](#) which states:

' 112. Proof of special knowledge in civil proceedings.

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'

It did not discharge that burden given that it did not enter appearance or participate in these proceedings.

26. Moreover, whereas the 3rd Respondent has not been charged in the ongoing criminal cases relating to the alleged NYS fraud, it is my finding that in light of the provisions of Section 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#) the Applicant ought to have offered a rebuttal to the



Applicant's allegations more so given that the funds came into its account at the time when large sums of money were being siphoned from the National Youth Service. My so saying finds support in the judgement of the court in the case of Assets Recovery Agency v Lilian Wanja Muthoni Mbogo & Another Misc Application No 58 of 2018 [2020] eKLR cited in the case of Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eKLR where the court stated:-

' 137. 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.'

I am therefore satisfied on a balance of probabilities that the monies in the 3rd Respondent's account are proceeds of crime liable for forfeiture to the State.

27. In regard to the 4th Respondent, she admitted that she received Kshs 5,000,000 in her account No xxxx Diamond Trust Bank. It was her contention that the funds were deposited in her account upon the instructions of James Thuita who she alleges is her estranged husband. The funds which were deposited in cash in her account on April 26, 2018 were allegedly for child upkeep and for the benefit of her own business. It is her case that the funds were not deposited by James Thuita personally but by one of his business associates one Mr Brown Minjire. She also alleged to have been involved in various petty businesses namely a barber shop and boutique and that deposits were being made into her account Jelly Merchants. It was her contention that the funds deposited in her account were legitimate as James Thuita had acquired the same lawfully after being awarded tenders by the National Youth Service.
28. I have carefully considered the evidence adduced by both sides in the case against the 4th Respondent. I am not persuaded that she has discharged on a balance of probabilities the evidential burden placed upon her by the law. To begin with the 4th Respondent conceded that these funds were not deposited in her account by James Thuita. It is her case that they were deposited by one Brown Minjire a business associate of James Thuita. The Applicant annexed a bank statement of her Account Number xxxx at Diamond Trust Bank with a bank balance of Kshs 3,101,269.69 and some payment slips showing that on April 26, 2018 Kshs 5,000,000 was deposited therein by John Brown Minjire the purpose being for business of tax payment and the source of funds being sale of goods which totally contradicts her allegation that the funds were paid into her account for child upkeep. In his statement recorded with the Agency on January 11, 2021 Brown Minjire alleges to have been given that money by a man, not James Thuita, who instructed him to deposit it in the 4th Respondent's account. He also claims to have received a call from the 4th Respondent telling him that a man would contact him and give him money to deposit in her account. He however does not disclose the name of that man. It is also instructive that he claims that upon acting as instructed he could no longer speak with the 4th Respondent as she was not answering his calls. One wonders why the said man could not have deposited the money himself yet he had all the details of the 4th Respondent including the account number. Clearly this was a money laundering scheme and those involved were intent on concealing the real source of the funds. Indeed, Minjire purports not to have known the source of the funds. Given that the funds were deposited in cash there is no evidence that the funds came from James Thuita and even if they did I find that there is no evidence that he was in fact the 4th Respondent's husband. All she did was assert that he was but she did not prove it. I am therefore satisfied that the ARA/Applicant has proved on a balance of probabilities that the funds which were in the 4th Respondent's account are proceeds of crime.



29. Turning to the 1st and 2nd Respondents, in their replying affidavit they attached the following contracts: a contract between the National Youth Service and M/s Firstling Supplies for the supply of kittings, new look uniforms and accessories for Kshs 899,036,250 (annexure JTN 3); a contract between the National Youth Service and M/s Firstling Supplies for the supply of uniform, beddings and linen, sport uniform, kits and accessories for Kshs 2,092,801,360 (annexure JTN 4); a contract between the National Youth Service and Active Electrons for the delivery of construction materials for the proposed Karen and Ngong Road Furniture Market for a sum of Kshs 196,407,120.00 (annexure JTN 7) in the replying affidavit. These contracts are all executed by the Principal Secretary of the State Department of Public Service, the Director General of the National Youth Service and the Directors of the 1st and 2nd Respondents other than the Local Purchase Orders (LPOs) and delivery notes, whose genuineness is questioned by the Applicant the 1st and 2nd Respondents also annexed invoices and Stores Ledgers and Stock Control Cards which seem to indicate that the goods were received in the stores of the National Youth Service. (see for instance the ledgers for August 18, 2015 and August 25, 2015.)
30. The Stores Ledgers and Stock Control Cards appear to me to be genuine and indeed there was no allegation by the Investigator that they are forgeries. Also annexed are Bills of Lading confirming the contention by James Thuita that he imported goods then supplied them to the National Youth Service. In regard to the allegation that goods were supplied or services rendered to other government entities and there is no linkage between them and the funds in issue my finding is that there is evidence on a balance of probabilities, from the Stores Ledger Control Cards, that Firstlings did in fact supply goods to the National Youth Service. The ledgers include the names of the receiving officers and purport to be from the National Youth Service a fact that was not rebutted by the Applicant who during cross examination admitted to not having done any probing of the documents relied upon by the Respondents.
31. In regard to the Applicant's contention that the Local Purchase Order marked annexure JTN 8 on page 209, is questionable, I find that although it is a document exhibited by the 2nd Respondent there was no contention that the said Respondent received funds from the National Youth Service based on that Local Purchase Order and there was no such evidence by the Applicant.
32. It is instructive that in the case of *Assets Recovery Agency v James Thuita Nderitu & 6 others ACEC civil case No 2 of 2019 [2020] eKLR* the ARA/Applicant succeeded because the Respondents did not adduce any evidence to support the payments. To quote Mumbi J, as she then was:-

' 83. There is a very specific allegation by the applicant in this case. This is that the funds received in the respondents account were obtained unlawfully from the NYS. The bank statements placed before the court show that indeed there were funds deposited in the respondents' accounts from the Ministry of Public Service and Youth. These funds were first deposited in the respondents' accounts, but were thereafter transferred to other accounts. In my view, the respondents needed to go beyond the allegation that they have wide ranging businesses and show how these businesses translated to the credits of millions from the State Department of Public Service and Youth, under which the NYS falls, into their accounts.

86. To explain the large deposits from NYS into their accounts, the respondents had the evidential burden of placing before the court the nature of the business they transacted with the NYS. They did not do so, confining their pleadings to assertions that the 1st respondent has had business with other government ministries, and their submissions to an assertion that they have businesses



far and wide. In my view, the applicant has established that the funds in the respondents' accounts are proceeds of crime, and that they should be forfeited to the state.'

In this case the 1st and 2nd Respondents have placed before this court documents through which they have discharged the evidential burden on a balance of probabilities. Each case must be decided on its own merits based on the facts, the evidence and the law. Indeed, PART VIII of the [Evidence Act](#) recognizes that it is not always the case that a judgment of one court is binding on another.

33. From the foregoing, the upshot is that the Application succeeds only partially and the sum of the Kshs 2, 962, 876.25 which was held in Account Number xxxx Equity Bank in the name of the 3rd Respondent and Kshs 3,101,269.69 which was held in Account Number xxxx Diamond Trust Bank in the name of the 4th Respondent are proceeds of crime and the same are forfeited to the State.
34. The Applicant has however not proved on a balance of probabilities that the Kshs 3, 648, 158.40 which was held in Account Number xxxx and Kshs 718, 024.35 which was held in Account Number xxxx Equity Bank are proceeds of crime and as such it is ordered that the same ought to be released to the 1st and 2nd Respondents forthwith.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF MARCH, 2023

E N MAINA

JUDGE

