



Assets Recovery Agency v Makara & another; National Bank Limited (Interested Party) (Anti-Corruption and Economic Crimes Civil Suit 17 of 2019) [2023] KEHC 1643 (KLR) (Anti-Corruption and Economic Crimes) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1643 (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 17 OF 2019**

EN MAINA, J

MARCH 9, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

ANTHONY WAMITI MAKARA 1ST RESPONDENT

ARKROAD HOLDINGS LIMITED 2ND RESPONDENT

AND

NATIONAL BANK LIMITED INTERESTED PARTY

JUDGMENT

1. The Applicant is the Assets Recovery Agency, a body corporate established under Section 53 of the [Proceeds of Crime and Anti-Money Laundering Act](#). By an Originating Motion dated July 3, 2019 supported by an affidavit sworn by S/SGT Fredrick Musyoki sworn on even date, the Applicant seeks the following orders:
 - i. That this Honourable Court be pleased to declare the funds of Kshs.813,597.40 held in account No: 012xxxxxxxxx00 in the name of Arkroad Holdings Ltd held at National Bank of Kenya are proceeds of crime.
 - ii. That the Honourable Court be pleased to issue orders of forfeiture of funds of Kshs.813,597.40 held in AC No: 012xxxxxxxxx00 in the name of Arkroad Holdings Ltd held at National Bank of Kenya.



- iii. That the forfeited funds of Kshs. 813,597.40 held in A/C No. 012xxxxxxxx00 in the name of Ark Road Holdings Ltd be deposited in A/c No 12xxxxxx39 held at the Kenya Commercial Bank, KICC branch, in the name of the Assets Recovery Agency.
 - iv. That there be no order as to costs.”
 2. The Application is made on the following grounds:- that on April 26, 2018 the Assets Recovery Agency received information that funds had been fraudulently stolen from the National Youth Service, a department in the Ministry of Youth and Gender Affairs through collusion of staff at the Ministry and suppliers; that the suppliers were paid for services and goods which were never delivered through their accounts in several banks; that the Assets Recovery Agency opened an Inquiry file No. 15 of 2018 to investigate activities in those accounts, to establish whether an offence of Money Laundering had been committed and for the purposes of identifying and tracking proceeds of crime; that investigations revealed that Anthony Wamiti Makara, the 1st Respondent, is a director of Arkroad Holdings Limited, the 2nd Respondent and that he operated the 2nd Respondent’s account no. 012xxxxxxxx00 held at National Bank of Kenya which received funds from the Ministry of Youth as follows:-
 - a. January 12, 2017 funds of Kshs 5,596,060.35
 - b. March 21, 2017 funds of Kshs. 8,441,314.65
 - c. April 27, 2017 funds of Kshs. 9,543,211.20;
 3. Further, that investigations established that the aforesaid payments were not supported by documentation either in respect of goods supplied or in respect of services rendered to the National Youth Service which was the relevant department and hence the funds are proceeds of crime and liable for recovery by the Applicant under Section 90 of the [Proceeds of Crime and Anti-Money Laundering Act](#). Further, that the 1st Respondent has jointly with others been charged in regard to those funds in the Chief Magistrates Court in ACC case No. 14 of 2018; that there are preservation orders granted through HCCA No. 1 of 2019 and that it is in the public interest that the orders sought are granted and the suspect assets and funds in the aforementioned accounts be forfeited.
 4. The Respondents opposed the Originating Motion vide the replying affidavit of Anthony Wamiti Makara sworn on November 21, 2020. Through the affidavit the respondents aver that the issues raised by the Applicant were canvassed in Misc Criminal Application No.1863 of 2018 and that this Application is an attempt by the Applicant to have a second bite at the cherry; that the 2nd Respondent was involved in legitimate businesses including supply of cutting blades, drilling grease and construction materials; that the 2nd Respondent has business permits from the relevant entities to attest to that; that the impugned funds were obtained from a business contract with the Nyeri County Government which on March 8, 2018 paid the Respondents a deposit of Kshs. 2,038,487 for services rendered (tender documents annexed as AWM 2) and that therefore the Applicant has not proved that the funds were proceeds of crime, that the funds were legally acquired from the County Government of Nyeri and hence not liable for forfeiture.
 5. The National Bank of Kenya Limited who is an Interested Party in the Originating Motion did not enter appearance or participate in these proceedings.

Submissions by the parties

6. Learned Counsel for the Applicant framed one issue for determination: whether the funds identified in prayer No. 2 of the Originating Motion dated July 3, 2019 held in the name of the Respondent are proceeds of crime liable for forfeiture to the Government.



7. Counsel submitted that the 1st Respondent is a Director and beneficial owner of the 2nd Respondent which owns bank account No. 012xxxxxxxxx00 held at National Bank of Kenya. That the funds in that account were received from the National Youth Service but there is nothing to show that there was anything to support the payment; that there was no documentation such as a tender document, an award of tender, delivery and acceptance notes, to show that any goods or services were supplied to the National Youth Service by the Respondents. Counsel stated that investigations established that on 5th May, Kshs. 4,000,000 was transferred from the impugned account to one John Wachira Wahome, who in his statement recorded on November 2, 2018, stated that he had received the said sum of Kshs.4,000,000 as part-payment for a house he had sold to one Evans Kundu and his wife Millicent Matingi Kundu, Title No LR Nakuru East Municipality/8208, at a consideration of Kshs. 25,000,000. Counsel submitted that Evans Kundu was a procurement officer employed by the National Youth Service and that investigations revealed a connection between the said Evans Kundu and the 2nd Respondent and the funds fraudulently lost/embezzled from the National Youth Service and that as a result they were charged in Chief Magistrates ACC No. 14 of 2018.
8. Counsel contended that the 2nd Respondent was used as a conduit by the 1st Respondent and the said Evans Kundu to illegitimately siphon funds from the National Youth Service and that each of the transactions constitute a predicate offence of money laundering as defined in Sections 3, 4 and 7 of the *Proceeds of Crime and Anti-Money Laundering Act*; that the act of transferring funds to the 2nd Respondent's bank account and thereafter utilizing the funds for the purchase of property to which Mr. Evans Wafula Kundu is the ultimate beneficiary constitutes an act of concealment or disguise of the nature, source, location, disposition and movement of funds illicitly acquired from the National Youth Service; that the Respondents have not demonstrated that the funds were a legitimate payment; that the Applicant has on a balance of probabilities proved that the funds are proceeds of crime liable for forfeiture and that Section 90 of the *Proceeds of Crime and Anti-Money Laundering Act* clothes this court with the requisite power to so order. Counsel also submitted that the framework for asset recovery is anchored in Article 40(6) of *the Constitution* as it provides that property that is unlawfully acquired is not protected. Counsel placed reliance on the following cases:- *Assets Recovery Agency v Evans Wafula Kundu & 3 Others (Interested Parties)* [2022] eKLR; *Assets Recovery Agency V James Thuita Nderitu & 6 Others* [2020] eKLR; *Assets Recovery Agency v Fisher Rohan and Miller Delores SC of Jamaica Claim No 2007 HCV 003259*.

Submissions of the Respondents

9. On their part, the Respondents contend that the Applicant has not proved its case beyond reasonable doubt(sic); that the Applicant has not established that the deposits in the accounts arose from suspicious transactions; that the Respondents have explained through their annexures AWM1 and 2 that the source of the funds was the Nyeri County Government but not the National Youth Service and have also provided a comprehensive paper trail on the transactions. Learned Counsel for the Respondents urged that this application must fail as it is a clear manifestation of witch-hunt and harassment of an innocent hardworking citizen; that the respondent has not demonstrated any link between the respondents and any illegal or suspicious monies; further, that whereas the Applicant obtained orders to investigate the impugned account from the lower court it did not report its findings to the lower court instead preferring to file this application for forfeiture and these proceedings are therefore an abuse of the court process. Counsel asserted that the Respondents retain their right to be presumed innocent until proved guilty; that it has not been proved that the funds are proceeds of crime as defined in Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act*; that the Respondents have proved the source of funds. Counsel urged this court not to take into account the criminal proceedings referred to by the Applicant. Counsel relied on the following cases:- *The National Director*



of Public Prosecutions v Carolus and others Bignaut J; (citation not provided) Assets Recovery Agency v Pamela Aboo, Ethics & Anti-Corruption Commission (Interested Party) [2018] eKLR; Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR; Tekla Nandjila Lamech v President of Namibia (2012) (1) NR 255 (HC); Director Assets Recovery Agency and Others v Green and Others [2005] EWHC and the case of ARA & Others v Audrene Samantha Rowe & Others Civil Division claim No. 2012 HCV 02120.

Issue for determination:

Whether the sum of Kshs. 813,597.40 held in account No: 012xxxxxxxxx00 held at National Bank of Kenya in the name of the 2nd Respondent are proceeds of crime liable for forfeiture to the State.

Analysis and determination

11. This court's power to forfeit properties suspected to be proceeds of crime is derived from Sections 90(1) and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* which states:-

“90(1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

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 and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.”

12. Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act* defines proceeds of crime as any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property from the time the offence was committed.” As was stated in the case of Schabir Shark & Others v State cited with approval in the case of Assets Recovery Agency v Quorandum Ltd & 2 Others (Supra) the reasons for the wide ambit of the definition of proceeds of crime is so as to take into account complex systems of camouflage that may be applied by suspects. Indeed Section 3 of the *Proceeds of Crime and Anti-Money Laundering Act* makes if an offence for any person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and who;-

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- “a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or
- b. performs any other act in connection with such property, whether it is performed independently or with any other person whose effect is to—
 - (i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof.”

13. Section 4 of the [Proceeds of Crime and Anti-Money Laundering Act](#) would also be of interest in this case. It states:-

“4. Acquisition, possession or use of proceeds of crime

A person who—

- (a) acquires;
- (b) uses; or
- (c) has possession of,

property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by another person, commits an offence.”

14. It is trite that forfeiture proceedings being civil in nature the onus of proof lies upon the Applicant. The standard of proof is on a balance of probabilities. However it is also trite that once the Applicant has discharged the legal burden of proof, the evidentiary burden shifts to the Respondent to prove that the funds were acquired lawfully. It is also trite that the Applicant is not required to prove the commission of a specific crime in relation to the acquisition of the property (See Section 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#)). The Applicant is required to only set out the matters that are alleged to constitute unlawful conduct by or in return for which the property was obtained. (See the cases of Director Asses Recovery Agency & Others v Green and others (Supra).
15. There is no doubt or dispute that the 2nd Respondent’s bank account received a sum of Kshs. 23, 580,586.20 from the State Department of Youth and Gender Affairs in 3 tranches as follows:
- a. January 12, 2017 funds of Kshs 5,596,060.35
 - b. March 21, 2017 funds of Kshs. 8,441,314.65
 - c. April 27, 2017 funds of Kshs. 9,543,211.20
16. By the time the Applicant received information regarding this and obtained warrants to investigate and thereafter an order to freeze the account, only a sum of Kshs.813,597.40 was remaining in the account.
17. The Respondents argued that the said sums of money and the Kshs. 813,597.40 found in the account was lawfully paid to them by the National Youth Service upon performance of a contract for supply of drilling grease and that some of it was paid by County Government of Nyeri; that the payment from Nyeri County arose from a contract for construction of proposed arena sheds at Kaburuini Show Ground, Shed No. 24, and were paid on March 18, 2018. To prove that the payments were



legitimate, the 2nd Respondent annexed several documents including Bill of Quantities (“AWM3”), Supply Circular No. R 01/2010 2022 dated 20th August from the Ministry of Land, Housing and urban Development (“AWMIA”) which extended contract for various companies, payment vouchers, bank statement (“AWM4”).

18. The documents (payment vouchers and bank statement) relied upon by the Respondents confirm that funds were indeed paid to the 2nd Respondent by the National Youth Service on various dates. The bank statements also show that on March 8, 2018, the account received a sum of Kshs.2,038,487 from Nyeri County. However whereas the Respondents annexed documents evidencing a possible award of tender and contract between the County Government of Nyeri and the 2nd Respondent as would warrant payment of the above sum to it, there were no documents at all to prove a contract between the 2nd Respondent and the National Youth Service such as inter alia advertisement for tender, bid documents, award and contract. It is my finding that even the “Extensions to December 31, 2015” annexed to the circular No. R01/2014-2015 – Supply of Workshop and Agricultural Equipment and Accessories (Annexure AWMIA) which the Respondent seeks to rely on as proof that the payment was lawful, is not supported. An extension of a supply contract would only be valid and lawful if in the first instance there was a valid award of tender and contract in the first place. It is my finding that in the absence of proof of any tender award and contract the payments made to the 2nd Respondent through the various payment vouchers annexed were not based on any/or valid contract between it and the State Department of Public Services and Youth Affairs and were therefore unlawful. Indeed, there is evidence that some of those funds found their way into the account of one John Wachira Wahome for the sale of a house to one Evans Kundu, a procurement officer employed at the National Youth Service. The 1st Respondent, upon who the onus of proof lies under Section 112 of the Evidence Act, has not sought to give an explanation for the payment made from the 2nd Respondent’s account to John Wachira Wahome on May 5, 2017. The averment by the Applicant that the said John Wachira Wahome acted as a conduit of the 2nd Respondent and the said Evans Kundu to siphon money from the National Youth Service was not therefore rebutted. Such a payment perfectly fits into the definition of proceeds of crime as defined in Section 2 of the Proceeds of Crime and Anti-Money Laundering Act.
19. While the Applicant need not prove the commission a specific offence so as to succeed in an application for forfeiture there is in this case more than ample evidence of unlawful conduct by the parties. The payment to the 2nd Respondent by the Nyeri County does not in my view rebut the Applicant’s case. Since the funds acquired from the National Youth Service may have been intermingled with those paid by the County Government of Nyeri so as to conceal the illegality. I am therefore satisfied that the Applicant has proved on a balance of probabilities that the preserved funds are proceeds of crime liable for forfeiture to the State.
20. The upshot is that the sum of Kshs.813,597.40 held in ACC No. 012xxxxxxxxx00, National Bank of Kenya is forfeited to the State. The same shall now be deposited in the Applicant’s Account No. 12xxxxxx39 at the Kenya Commercial Bank, KICC Branch as prayed.
21. The Respondents shall bear the costs of these proceedings. Orders accordingly.

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

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JUDGE

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