



**Kinuthia & another v Attorney General & 2 others; High Court of Kenya & another  
(Interested Parties) (Anti-Corruption and Economic Crime Petition 2 of 2022)  
[2023] KEHC 1785 (KLR) (Anti-Corruption and Economic Crimes) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1785 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 2 OF 2022**

**EN MAINA, J**

**MARCH 2, 2023**

**BETWEEN**

**DESMOND IRUNGU KINUTHIA ..... 1<sup>ST</sup> PETITIONER**

**NELSON KARANJA KINUTHIA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**HIGH COURT OF KENYA ..... INTERESTED PARTY**

**ASSET RECOVERY AGENCY ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioners are jointly with others not parties to this petition facing corruption related charges in Chief Magistrates Anti-Corruption Case No. 28 of 2019. More particularly they are charged with the offence of alleged conspiracy to commit a corruption offence contrary to Section 47A (3) of the *Anti-Corruption and Economic Crimes Act*, 2003. Concurrent with the criminal proceedings, the Ethics and Anti-Corruption Commission (the 3<sup>rd</sup> Respondent) has filed a civil recovery suit to wit HCACEC Civil Suit No. 5 of 2018 where the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are the 14<sup>th</sup> and 15<sup>th</sup> Defendants respectively.
2. By the Petition herein which is dated 20<sup>th</sup> August 2021, the Petitioners challenge the constitutionality of Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* under which they claim the civil



recovery suit in HCACEC Civil Suit No. 5 of 2018 has been filed and particularly Section 92(4) of the Act which states that the validity of a forfeiture order is not affected by the outcome of criminal proceedings, or an investigation with a view to institute such proceedings in respect of an offence with which the property concerned is in some way associated.

3. The Petition is brought under Articles 10, 20, 22, 23, 24, 27, 29, 31, 40, 47, 50, 159, 258 and 259 of the Constitution and Rules 4, 10, 11, 13 and 20 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2013 and seek the following orders:

- “1. A declaration do issue that the Part VIII of the Proceeds of Crime and Anti-Money Laundering Act is a threat to the Constitution as it contravenes the limitation parameter/test set under Article 24 of the Constitution to the extent that the overboard and indiscriminate limitation captured under the impugned sections of law takes away constitutionally guaranteed rights and it is unreasonable, unjust and unfair in our open and democratic society.
2. A declaration do issue that Part VIII of the Proceeds of Crime and Anti-Money Laundering Act establishes a presumption of guilt before trial thereby taking away the right to fair trial and thereby creating a room for unfair and unjustified convictions and loss of hard-earned assets.
3. A declaration do issue that Part VIII of the Proceeds of Crime and Anti-Money Laundering Act specifically violates Articles 31, 40 and 50 of the Constitution and therefore amounts to a breach of basic human rights provided under Chapter IV of the Constitution.
4. A Declaration do issue to the extent that the outcome of criminal proceedings is key in making a decision on the forfeiture or otherwise of assets and money belonging to persons suspected of being involved in corruption activities.
5. Declaration do issue to the extent that the 3<sup>rd</sup> Respondent is barred from moving to the High Court to seek forfeiture orders before the conclusion of criminal proceedings and only in the instance of a guilty verdict.
6. This Honourable Court be pleased to grant such other or further orders as it may deem just and appropriate in the circumstances.
7. This Honourable Court be pleased to order that the Respondents pay the costs of these proceedings.”

4. The Petition is supported by the affidavit of Desmond Irungu Kinuthia dated 20<sup>th</sup> August 2021. The Petitioner avers that the Petition is founded on the following threatened violations of the Constitution:

- “1. Article 50 of the Constitution provides that all accused persons have a right to a fair trial and this includes a right to be presumed innocent until the contrary is proved. That the suspicion of having committed an offence should only be considered as a presumption of guilt until completion of trial and rendering of a conclusive determination.
2. That on the 22 October 2019, the Petitioners were jointly charged together with other persons in Anti-Corruption Case No. 28 of 2019, for the offence of alleged conspiracy to commit an offence of corruption contrary to Section



47A(3) as read with Section 48 of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003.

3. That the *Proceeds of Crime and Anti-Money Laundering Act*, establishes an Assets Recovery Agency whose main function is to recover assets suspected to have been acquired from proceeds of crime, through the 3<sup>rd</sup> Respondent who obtained forfeiture orders from the 2<sup>nd</sup> Interested Party.
4. That even before the commencement of the hearing of Anti-Corruption Case No. 28 of 2019, the 3<sup>rd</sup> Respondent moved to the High Court of Kenya (Anti-Corruption and Economic Crimes Division) vide Acc. Civil Suit No. 5 of 2018 in which the Commission filed the Suit as against the Petitioners as 14<sup>th</sup> and 15<sup>th</sup> Defendants respectively and sought orders allowing it to recover and forfeit to the government assets belonging to the persons charged in Anti-Corruption Case No. 28 of 2019.
5. That the civil proceedings instituted in the High Court for the recovery and forfeiture of the assets are provided under Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* which allows for the forfeiture to the Government of assets belonging to corruption suspects even before conclusion of the anti-corruption case at the trial court and delivery of verdict on their culpability or otherwise.
6. That Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act*, states that the validity of an order forfeiture order 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.
7. That even a layman would understand Section 92 (4) to have a meaning to the effect that as long as a party is suspected of having violated any provisions of the *Anti-Corruption and Economic Crimes Act*, then the 3<sup>rd</sup> Respondent holds an equivocal right to obtain Orders from the High Court thereby forfeiting the assets of mere suspects to the government.
8. The fact that the *Proceeds of Crime and Anti-Money Laundering Act* allows the government to seize the assets of persons against whom a trial for suspected offences is ongoing and without any verdict, amounts to a gross violation of fundamental human rights and specifically the right to property and the right to be presumed innocent until proven guilty.
9. Notably, Article 2 emphasizes the Supremacy of this *Constitution*. It observes that the *Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government. This means that no person, state officer, Act of Parliament, precedent or any other law whatsoever overrides the authority of the *Constitution*.
10. The same Constitution under Article 50 decrees that all persons suspected, accused and/or charged with any offence are entitled to a fair hearing and to be presumed innocent until the conclusion of the trial.



11. Consequently, Part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) that permits forfeiture of assets prior to the conclusion of the anti-corruption proceedings at the trial court with the outcome/verdict notwithstanding is not only unfair, unjust and discriminatory but also contradictory to the Bill of Rights provided in the [Constitution](#).
12. The provisions of the [Proceeds of Crime and Anti-Money Laundering Act](#) that provide for the forfeiture of assets based on allegations and on a balance of probabilities whilst the criminal trial ongoing amounts to condemning the suspects unheard and a severe breach of the principles of Natural Justice.
13. Currently, Anti-Corruption Case No. 28 of 2019 is still before the trial court while the proceedings for civil forfeiture are also ongoing at the High Court. Notably, the forfeiture orders are issued on a balance of probabilities hence there is a high likelihood that the 3<sup>rd</sup> Respondent will obtain the said orders even before the conclusion of the prosecution case in Anti-Corruption Case No. 28 of 2019.
14. The Petitioners herein are innocent and do not have any assets of money that was acquired from proceeds of crime or money laundering yet they now face the danger of losing their hard earned assets if the High Court of Kenya (Anti-Corruption and Economic Crimes Division) grants the forfeiture orders and which probability is high.
15. The Petitioners are ready to defend themselves against the charges leveled against them on the basis of anti-corruption hence it is unfair and unjust for them to lose their assets to the government then an acquittal be entered against them at the conclusion of the trial.
16. The Civil Forfeiture Orders against the assets of the Petitioners are to be issued by the High Court which has both appellate and supervisory jurisdiction over the trial court that is hearing Anti-Corruption Case No. 28 of 2019. This means that the High Court will have already made its mind on the culpability of the accused persons on a balance of probabilities and further the proceedings and/or averments made by the High Court can be used by the prosecution in the ongoing matter at the trial court to the disadvantage of the Petitioners.
17. The questions that arise here are; where will the Petitioners recover their forfeited assets if they are acquitted and further what chances do they stand in the event of an Appeal before a court that already found them guilty on the basis of a balance of probabilities?
18. The Provisions of Part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) are unconstitutional and further offend the principles of Natural Justice hence this Petition herein seeking to have said part declared as unconstitutional so as to protect, guard and anti-corruption crimes in the future. enforce the rights of the Petitioners herein and other citizens who might be suspected of anti-corruption crimes in the future.



19. That the impugned Act continues to be relied upon by the 3<sup>rd</sup> Respondent to the prejudice of innocent citizens who are only suspects with ongoing trials but without any conviction on the table.
  20. That unless this Honourable Court intervenes and tenders as unconstitutional the impugned Part and Sections of the Proceeds of Crime and Anti-Money Laundering Act, innocent citizens will continue to have their right to property, privacy and fair hearing violated on the basis of suspicions and unsubstantiated allegations.
  21. That this Honourable Court bears the duty and burden of protecting and shielding all citizens against blatant violation of constitutionally guaranteed rights by state officials through the reliance of unconstitutional and discriminatory laws.”
5. The Petition was opposed by the 3<sup>rd</sup> Respondent and 2<sup>nd</sup> Interested Party. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 1<sup>st</sup> Interested Party did not file any responses to the Petition.

### Submissions by the Petitioners

6. The Petitioners framed three issues for determination:
  - a. Whether Section 90(1), 92(1) and 92(4) of the Proceeds of Crime and Anti Money Laundering Act are unconstitutional;
  - b. Whether the application for forfeiture violates the Petitioner’s right to property; and
  - c. Whether the application for forfeiture is premature and ought to await the outcome of the proceedings against the Petitioners.
7. The Petitioners contend that the subject matter of the Petition is anchored on the incongruity between Part VIII of the Proceeds of Crime and Anti-Money Laundering Act and the Bill of Rights as provided in the Constitution. That the impugned part of the Proceeds of Crime and Anti-Money Laundering Act unjustifiably takes away rights of the Petitioners and other parties to be tried fairly and the right not to have their property arbitrarily seized; that Section 92 (4) states that the issuance and/or effect of the forfeiture orders is not affected by the outcome of the criminal proceedings hence contradicting Article 50 of the Constitution - the right to be presumed innocent; that further under Part VIII a person suspected of involvement in corrupt activities can lose assets or money as long as the 2<sup>nd</sup> Interested Party concludes that on a balance of probabilities, the said assets are proceeds of crime.
8. Further, Part VIII violates the Bill of Rights on many fronts namely, inter alia, denial of a fair trial, condemning parties unheard and taking away the right to appeal. It is submitted that as far as appealing is concerned, the Constitution guarantees that a party dissatisfied with the decision of the trial court has a right to appeal to the High Court of Kenya (Anti-Corruption and Economic Crimes Division). That however Part VIII and the impugned sections of the Proceeds of Crime and Anti-Money Laundering Act create room for the decision of the High Court in the forfeiture proceedings to be binding on the trial court. That; in demonstrating the unconstitutionality in this aspect, it is important to understand that the burden of proof in civil forfeiture is a balance of probabilities but that in the criminal trial is proof beyond reasonable doubt and accordingly Part VIII and the impugned sections give the prosecution an unfair advantage as the averments of a superior court can be legally adduced in a lower court. Further that the impugned sections openly offend the provisions of Articles 31 and 40 of The Constitution to the extent that innocent parties such as the Petitioners herein are condemned to loss of property



on the reliance of assumptions and unsubstantiated allegations; that the *Proceeds of Crime and Anti-Money Laundering Act* is now being unjustifiably used in anti-corruption proceedings as a broad manifestation of witch-hunt, harassment and intimidation of hard-working citizens by contravening Article 40 (2) of the *Constitution* which decrees that the Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description. It is asserted that this *Act* is a demonstration of an intentional disregard of Article 40 (2) of the *Constitution*.

### Submissions of the 3<sup>rd</sup> Respondent

9. The 3<sup>rd</sup> Respondent filed a list and digest of authorities dated 20<sup>th</sup> January 2023 but did not file a response or written submissions.

### Submissions of the 2<sup>nd</sup> Interested Party

10. The 2<sup>nd</sup> Interested Party filed submissions dated 4<sup>th</sup> November 2022 where three issues for determination were framed as follows: whether the impugned sections of the *Proceeds of Crime and Anti-Money Laundering Act* are unconstitutional; manner of statutory interpretation; whether the identification of any criminal offence is a precondition for civil proceedings under Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act*.
11. Learned Counsel for the 2<sup>nd</sup> Interested Party submitted that the civil recovery proceedings against the Petitioners were filed by the Ethics and Anti-Corruption Commission under the provisions of the *Anti-Corruption and Economic Crimes Act* and not the *Proceeds of Crimes and Anti-Money Laundering Act* and that the Assets Recovery Agency is not a party to the recovery proceedings.
12. On whether the impugned Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* is unconstitutional, Counsel submitted that the Petitioners have not pleaded the alleged violation with precision and specificity as was held in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance* [2013] eKLR.

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

(42) cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”



13. Counsel submitted further that this court should be guided by the principle of presumption of constitutionality of an Act of Parliament; that every Act of Parliament is presumed to be constitutional and the burden of proving the contrary rests upon the person alleging otherwise. Counsel cited the case of *Law Society of Kenya v Attorney General & 2 Others* [2013] eKLR where the court stated:-

“5. There is a general presumption of law that statutes enacted by Parliament are constitutional and the burden falls on the person who alleges otherwise to rebut this presumption. In this respect I would adopt the words of the Supreme Court of India in *Hambardda Wakhana v Union of India Air* [1960] AIR 554 where the learned Judges observed that, “In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.” Thus, this court will start from the presumption that a statute as enacted by Parliament is constitutional and fair unless the contrary is proven (see also *Ndyanabo v Attorney General of Tanzania* (2001) 2 EA 485, *Joseph Kimani and Others v Attorney General and Others* Mombasa Petition No. 669 of 2009 [2010] eKLR, *Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No. 3 of 2011 (Unreported)), *Samuel G. Momanyi v Attorney General and Another* Nairobi Petition No. 341 of 2011 (Unreported)).”

14. On the second issue, Counsel submitted that the principles for interpretation of the *Constitution* are provided in Article 259 of The *Constitution*, which is a purposive liberal approach that promotes the values and principles of the *Constitution*, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights in a manner that promotes good governance. For this proposition Counsel placed reliance on the case of *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR.

15. Counsel also argued that as provided in Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* the making of a forfeiture order is not dependent on any criminal conviction and cited the cases of *Phillip v The United Kingdom* [2001] ECHR cited in *Marin Shalli v Attorney General of Namibia*, *Republic v Director of Public Prosecutions and another ex parte Patrick Ogola Onyango and 8 others* [2016] eKLR and the case of *Stanley Mombo Amuti v Ethics and Anti-Corruption Commission* [2019] eKLR where the Court stated:-

“75. Another ground urged by the appellant is that neither an allegation of corrupt conduct nor abuse of office has been leveled against him; that no criminal charge or conviction has been visited upon him and as such, the trial court erred in making an order for forfeiture without proof of any corrupt conduct or economic crime on the part of the appellant. In rebuttal, the respondent cited the case of *Murphy -v- M (G)* [2001] 1ESC 82, where it was held that in rem proceedings for forfeiture of property is civil in character.

76. The trial court in considering this submission at paragraph 92 of its judgment expressed that a claim for civil recovery of unexplained assets can be determined



on the basis of conduct in relation to property without identification of any particular unlawful conduct; that in the instant matter, the respondent was not required to prove the appellant actually committed an act of corruption in order to invoke the provisions of *ACECA*. The learned judge cited dicta from the case of *Director of Assets Recovery Agency & others -v- Green & Others* [2005] EWHC 3168 where it was stated:

“In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of 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.”

77. We have considered the appellant’s contestation that no allegation of corrupt conduct or abuse of office has been leveled against him and that he has never been charged or convicted of an offence under the *ACECA*.
  78. The concept of “unexplained assets” and its forfeiture under Sections 26 and 55 (2) of *ACECA* is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 of *ACECA* are non-conviction based civil forfeiture provisions. The Sections are activated as an action in rem against the property itself. The Sections require the Anti-Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. Section 55 (2) of the *Act* make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. Section 55 (2) of *ACECA* is in sync with Section 112 of the *Evidence Act*, (Cap 80 of the Laws of Kenya)
16. It is instructive to note that the recovery proceedings in this case are instituted by the Ethics and Anti-Corruption Commission pursuant to its mandate under Article 252 of the *Constitution* and Section 11(1)(j) of the *Ethics and Anti-Corruption Act*. They are not proceedings for civil forfeiture by the Assets Recovery Agency under Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA). Be that as it may the following issues have presented themselves for determination: -
1. Whether Sections 90(1), 90(2) and 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* are unconstitutional
  2. Whether the Application for forfeiture ought to await the outcome of criminal proceedings against the Petitioners



## Analysis and determination

### Whether Sections 90(1), 92(1) and 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* are unconstitutional.

17. The impugned sections 90(1), 92(1) and 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act* provide as follows:

“ 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

- (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.

92

- (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.”

18. From the outset, this court is cognizant of the principle that courts ought to presume that statutes enacted by the legislature are constitutional unless otherwise proved. See the case of *Law Society of Kenya v Attorney General & 2 Others* (supra) where the court stated:-

“6. It is now well settled that in determining the constitutionality or otherwise of legislative provisions, regard must be had to the purpose and effect of the legislation in question. If an authority were required for this proposition, the case of *Olum and Another v Attorney-General of Uganda* [2002] 2 EA 508, 518 is illuminating. It was held that, “To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the *Constitution*, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the *Constitution*, the impugned statute or section thereof shall be declared unconstitutional.”

7. I must also emphasize that it is not for the courts to decide what is the ‘appropriate’ or ‘right’ or ‘wise’ legislative policy to govern various matters for which the legislature is called upon to legislate. This power squarely falls upon the legislature which casts policies into statutes which are then



executed by the executive. This is not in any way to suggest that the courts are powerless in the face of claims that a particular statute or part thereof contravenes the Constitution. The Court does not in doing so infringe on what is purely legislative prerogative, that of deciding which legislative policy is right for its people but by enforcing the sovereign will of the people expressed in the Constitution (See *Commission for the Implementation of the Constitution v Parliament of Kenya and Another*, Nairobi Petition No. 454 of 2012 (Unreported)).

8. The Court will as such not nullify legislation merely because it is thought that such law is in 'bad taste' or 'unconscionable' or 'inconvenient.' As Justice Lenaola stated in *Mount Kenya Bottlers Limited Others v Attorney General Others*, Nairobi Petition No. 72 of 2011(Unreported), the Courts cannot act as "regents" over what is done in Parliament because such an authority does not exist."

19. In the case of *Mark Abuya & Thomas Maara Gichubi Acting for and behalf of the Association of Kenyan Insurers & 5 others v Commissioner of Domestic Taxes & others* [2014] eKLR where the court similarly stated:-

"The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court licence to declare it unconstitutional."

20. In the case of *Republic versus Big M Drug Mart Ltd.*, /1985| 1 S.C.R. 295, the Supreme Court of Canada the court held as follows:-

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

21. This was also the finding in the case of *Law Society of Kenya v Attorney General and 2 others* (*supra*).
22. It is also trite that when determining the constitutionality of a statute or a provision of the law, it is important for the court to consider the object, purpose and effect of enactment of that legislation. If the effect of the impugned law is to violate constitutional rights, then it must be declared so and struck down.
23. The Petitioners allege that the impugned Sections 90(1), 92(1) and 92(4) violate Article 50 as they are an affront to the right of an accused person to be presumed innocent until the contrary is proved and Article 40 on the right to property; That provided that a party is suspected of having violated any provision of the *Anti-Corruption and Economic Crimes Act*, the 3<sup>rd</sup> Respondent holds an unequivocal right to obtain forfeiture orders against the suspects based on suspicion; that an accused person is



presumed to be innocent until proven guilty and as such forfeiture of a person's property without a conviction is a breach of their rights.

24. Article 50 of the Constitution states that:-

“ 50

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- 2) Every accused person has the right to a fair trial, which includes the right-
  - (a) to be presumed innocent until the contrary is proved;
  - (b) to be informed of the charge, with sufficient detail to answer it;
  - (c) to have adequate time and facilities to prepare a defence;
  - (d) to a public trial before a court established under this Constitution;
  - (e) to have the trial begin and conclude without unreasonable delay;
  - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
  - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
  - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (i) to remain silent, and not to testify during the proceedings;
  - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
  - (k) to adduce and challenge evidence;
  - (l) to refuse to give self-incriminating evidence;
  - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;



- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not--
  - (i) an offence in Kenya; or
  - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

25. The argument that Part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) is unconstitutional is not novel. It has been raised before various courts and the decisions of those courts has always been that the [Proceeds of Crime and Anti-Money Laundering Act](#) is not an affront to the rights to fair trial and right to property enshrined in the [Constitution](#). In the case of [Assets Recovery Agency v Quorum Limited and 2 others](#) [2018] eKLR the holding of the court was:-

Issue No (iii) Whether the Respondent’s right to property is violated

103. The 1<sup>st</sup> Respondent contended that his right to property will be violated by the Applicant if the orders sought are granted. Article 40 provides for the right to property and every person has the right to acquire and own property of any description and in any part of Kenya. The said right to property does not extend to property which has been unlawfully acquired and this is provided under article 40(6) which states as follows;

“..the rights under this article do not extend to any property that has been unlawfully acquired...”

The above principal was emphasized in the case of *Teckla Nandjila Lameck -Vs- President of Namibia* (supra) and *Martin Shalli vs A.G. of Namibia* (supra)

104. Furthermore, as correctly submitted by the Applicant, the right to property sought by the 1<sup>st</sup> respondent is not absolute. The limitation of constitutional rights is provided under Article 24 of the [Constitution](#). From the evidence adduced by the Applicant, the 1<sup>st</sup> Respondent’s property known as Duplex Apartment Number C16 situated on L.R No.209/5990/13 Grant Number 18295/9 having been procured through funds fraudulently and unlawfully



obtained from YEDF it is a proceed of crime and is not protected by Article 40 of the Constitution.

Issue no. (iv) Whether the Forfeiture Application violates the Respondent's right to presumption of innocence

105. In his affidavit and submissions, the 1<sup>st</sup> Respondent avers that they are entitled to the right of presumption of innocence which is provided under article 50(2) (a) of The Constitution of Kenya since the criminal proceedings against them are ongoing. My take on this is that civil forfeiture proceedings are proceedings in rem (against the property) and it involves a civil suit being brought in court against the property which is reasonably believed to be a proceed of crime. The proceedings before this Court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondents where presumption of innocence is applicable. Further the application for forfeiture is not made on behalf of the prosecution, but on behalf of ARA as held in *Serious Organized Crime Agency vs Gale* quoted in the case of *Assets recovery Agency & Others –vs- Audrene Samantha Rowe & Others* Civil division claim No 2012 HCV 02120 where 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 conviction of any individual and thus there was no reason to apply the criminal standard of proof...”

See also *Phillips v The United Kingdom* [2001] ECHR437 quoted in *Martin shalir A.G. of Namibia* (supra); *Techla Nadjila Lameck vs President of Namibia* (supra)

106. Simply put civil forfeiture proceedings are not subject to presumption of innocence which is a criminal law phenomenon. In the present case, the proceedings are civil forfeiture pursuant to part VIII of POCAMLA and are in respect of recovery of Duplex apartment number C16 situated on LR No.209/5990/13 grant number 18295/9 procured by the 1<sup>st</sup> respondent using unlawfully obtained funds plus the Kshs 8,800,000/- transferred to the 2<sup>nd</sup> Respondent as a purported loan. The 2<sup>nd</sup> Respondent will pay this money to the Applicant and will be released from any liability in respect of the money he received from the 1<sup>st</sup> Respondent.

107. Lastly, the grant of the forfeiture orders against property known as Duplex apartment number C16 situate on LR No.209/5990/13 grant number 18295/9 and Ksh.8,800,000 is not affected by the



outcome of the criminal proceedings where the 1<sup>st</sup> Respondent has been charged. Section 92(4) of POCAMLA 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.”

26. A similar finding was arrived at in the case of Assets Recovery Agency v Rose Monyani Musanda & 2 Others [2020] eKLR where the court stated:-

“Violation of the Respondents’ Rights

132. The last issue for determination is whether making an order of forfeiture of these assets amounts to violation of the respondents’ right to property. The respondents have submitted that they have a right to property guaranteed under Article 40 of the Constitution, as well as the right to equal benefit of the law guaranteed under Article 27. To make an order of forfeiture of the assets, they submit, would violate these two rights.
133. The applicant responds that while the right to property is guaranteed, it does not extend to property that is found to have been unlawfully acquired as Article 40(6) of the Constitution provides.
134. I believe that I need not belabour this point. Article 40 does protect the right to property. However, as submitted by the applicant, under Article 40(6), property that is found to be unlawfully acquired is not protected. It provides that:
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
135. It is also correct that Article 27(1) guarantees to everyone equality before the law. It provides that
- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
136. The respondents have not placed before me anything that demonstrates a violation of this equal protection provision. The assets and funds at issue in this matter have not been taken arbitrarily. The respondents have been given an opportunity in these proceedings to present their side of the story to the court. The provisions of POCAMLA apply to everyone. There is no basis, in my view, for the respondents to complain about denial of the right to equal protection of the law.”

27. Further in the case of Stephen v. Mangira & Another v Senior Principal Magistrate, Shanzu and 9 others [2020] eKLR Otieno J declined to declare these very provisions unconstitutional and held: -

“The constitutionality of part of POCAMLA, the stature and character of 4<sup>th</sup> and 5<sup>th</sup> Respondents



64. To summarize the grievances of the petitioners against the act and its created institution in the 4<sup>th</sup> and 5<sup>th</sup> respondents, it is said that the act negates on the presumption of innocence; negates on the principle of public finance, encroaches on the prosecutorial province delineated to the 3<sup>rd</sup> respondent and therefore it is in contravention of the Constitution.

Presumption of innocence

65. No emphasis is needed to reiterate that the presumption of innocence is a well-entrenched principle of criminal justice in the commonwealth and now enshrined in the Kenyan constitution as an ingredient of the right to a fair hearing. In my view, it is a presumption that furthers fair hearing and the rule of law by curtailing the operation by whim and arbitrariness. It says that only a judicial process is possessed of the right to say once is guilty of a criminal act.

66. For this petition, it is said that the petitioner's assets have been frozen on the basis of the criminal case at Shanzu when in fact no judicial pronouncement has been made to invoke the provisions of Article 40(6) and that no person has come forward to complain about the property frozen. For those reasons it is asserted that Sections 2, 14, 17, 53, 54, 54A as well as Sections 56 – 80 (Part VII) and (Part VIII) Sections 81 -999 of the Proceeds of Crime and Anti-Money Laundering Act are unconstitutional for negating on the constitutional presumption of innocence and the right to remain silent. The particular grievance is with those provisions which require a citizen to disclose sources of property and those which allow conservation and forfeiture in the absence of a conviction for unlawfully/illegally obtained property.

67. I take the view that the position of the law complained about is not novel with the POCAML alone. Even prior to the advent of organized crimes there was always the doctrine of strict liability where the evidentiary burden was upon the accused person. In such case one may say the burden is shifted. However, in my opinion it is not the burden of proof that is shifted but the evidentiary burden. Like in all criminal case an accused only answers to the case as presented. It is not expected that he helps the prosecution in their mandate by self-incrimination or just filing the blanks in the prosecution's case. The easy example I can give are the traffic offences of driving without a driving license[3].

68. In such case the prosecution is still expected to prove that one was shipped asked to produce a document but failed to do so that it becomes the duty of the accused to prove his being licensed. Such are the situations where the application of Section 111 Evidence Act is called into play. That Section provides: -

111. Burden on accused in certain cases

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden



of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

69. I read the provision to say that in some situation when only the accused has special knowledge of existence of a fact then it becomes his duty to prove such existence. That I find is the same situations with the impugned Provisions of Section of POCAMLA. I understand the provision to say that when one's known income is apparently disproportionate or irreconcilable with his known assets or possessions then he has the onus to prove his other sources. That to me is a provision that sits in consonance with Section III and does not displace the presumption of innocence nor the right to remain silent.
70. It is important to note that the two rights are in the realm of criminal proceedings. As explained before, it remains the duty of the prosecution to place a case before the court to the satisfaction of the court that the accused has a case to answer.
71. I do find that there's nothing in the statute that neither infringes nor violates on the various provisions of the Constitution cited and regarding right to be presumed innocent till proven guilty and the right to remain silent.”
28. The Court of Appeal also maintained this position in the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR where it stated in regard to forfeiture under the Anti-Corruption and Economic Crimes Act:-
- “72. In the instant matter, one of the grounds urged by the appellant is that his right to property as guaranteed by Article 40 of the Constitution as well as the right to fair hearing under Article 50 were violated by the learned judge. The appellant urged his right to be presumed innocent under Article 50 (2) (a) of the Constitution was violated as the court shifted the burden of proof and required him to prove his innocence. It was submitted that the appellant was not informed in advance of the evidence in possession of the respondent because the forfeited properties were neither listed nor enumerated in the Notice dated 9<sup>th</sup> July 2008.
73. We have considered the appellant's contention that the requirement to give explanation for unexplained assets interferes with his constitutional right to property. The protection of the right to property has socio-political, moral, ethical, economic and legal underpinning. The right protects the sweat of the brow - it does not protect property acquired through larceny, money laundering or proceeds of crime or any illegal enterprise. When an individual



is alleged to have assets disproportionate to his known lawful source of income, is asking such a person to explain and account for the unexplained disproportionate assets a violation of the constitutional protection of the right to property? The answer is in the negative. There is no violation of the right to property if an individual is requested to explain the source of his assets that is disproportionate to his legitimate source of income. Comparatively, while considering a similar contestation, the UK court in *National Crime Agency--v- Mrs. A* [2018] EWHC 2534, rejected submission that requirement to clarify unexplained wealth violates property rights. The court expressed that if there is any interference with property rights, such interference is proportionate and strikes a "fair balance"; that where there are grounds to believe a property has been obtained through unlawful conduct, the requirement to explain is justifiable.

74. In this matter, persuaded by the merits of the UK comparative jurisprudence, we are satisfied that the provisions of Sections 26 and 55 (2) of the [ACECA](#) do not violate the right to property as enshrined in Article 40 of the [Constitution](#). In any event, constitutional protection of property does not extend to property that has unlawfully been acquired. If it were to be held that the requirement to explain violates the right to property under Article 40 of the [Constitution](#), enforcement of a Notice issued under Section 26 of [ACECA](#) and the requirement to explain the source of disproportionate assets would be rendered nugatory. We decline to so hold.
75. Another ground urged by the appellant is that neither an allegation of corrupt conduct nor abuse of office has been leveled against him; that no criminal charge or conviction has been visited upon him and as such, the trial court erred in making an order for forfeiture without proof of any corrupt conduct or economic crime on the part of the appellant. In rebuttal, the respondent cited the case of *Murphy -v- M (G)* [2001] 1ESC 82, where it was held that in rem proceedings for forfeiture of property is civil in character.
76. The trial court in considering this submission at paragraph 92 of its judgment expressed that a claim for civil recovery of unexplained assets can be determined on the basis of conduct in relation to property without identification of any particular unlawful conduct; that in the instant matter, the respondent was not required to prove the appellant actually committed an act of corruption in order to invoke the provisions of [ACECA](#). The learned judge cited dicta from the case of *Director of Assets Recovery Agency & others -v- Green & Others* [2005] EWHC 3168 where it was stated:
- In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of 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.”
77. We have considered the appellant’s contestation that no allegation of corrupt conduct or abuse of office has been leveled against him and that he has never been charged or convicted of an offence under the [ACECA](#).



78. The concept of “unexplained assets” and its forfeiture under Sections 26 and 55 (2) of *ACECA* is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 of *ACECA* are non-conviction based civil forfeiture provisions. The Sections are activated as an action in rem against the property itself. The Sections require the Anti-Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. Section 55 (2) of the *Act* make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. Section 55 (2) of *ACECA* is in sync with Section 112 of the *Evidence Act*, Cap 80 of the Laws of Kenya. Section 112 of the *Evidence Act*, (Cap 80 of the Laws of Kenya) provides:

“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.”

79. Under Section 55 (2) of *ACECA*, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under *ACECA* is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired.”

29. Further afield in the South African case of *NDPP v Prophet* (5926/01) (2003) ZAWCHC 16 the court observed as follows regarding Section 48(1) of the *Prevention of Organized Crime Act* (POCA) which is similar to our Section 92(4) of the *Proceeds of Crime and Anti-Money Laundering Act*:

“(2) If a preservation order is in force, the NDPP may in terms of section 48 apply to the High Court for an order for the forfeiture of 'all or any of the property' concerned. In terms of section 50(1), the High Court 'shall' grant the forfeiture order applied for by the NDPP if it 'finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities.'

The Statute

(3) The *Act* as a whole is a response to a perceived growth in organized and related criminal activities. It was enacted in response to a belief that 'South



African common law and statutory law had failed to deal effectively"<sup>2</sup> with such criminal activities. In this regard the *Act* is in line with international trends, as it encompasses not only criminal forfeiture but also the relatively new concept, to South Africa at least, of civil forfeiture. The intent behind the inclusion of civil forfeiture appears to be twofold. To provide the means to forfeit the proceeds of crime and in the process remove the incentive for crime and to seize assets that are used to facilitate unlawful activities and thus remove these instrumentalities from criminal control.

- (4) The present application involves Chapter 6 of the *Act*, which bears the heading "Civil recovery of property" and thus provides for civil forfeiture, as opposed to criminal forfeiture, which is regulated by Chapter 5. As the proceedings under Chapter 6 are deemed to be civil proceedings they are governed by the rules of evidence and procedure applicable to proceedings of that kind. Clearly the purpose of Chapter 6 is to target the asset bases of criminal enterprises, independent of criminal proceedings. In the words of Ackerman J, "Chapter 6 (comprising sections 37 to 62) provides for forfeiture of the proceeds of and instrumentalities used in crime, but it is not conviction based: it may be invoked even where there is no prosecution."<sup>3</sup> In fact the Act explicitly separates the criminal process from the civil forfeiture process. Therefore Chapter 6 is focused not on "wrongdoers, but on the property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owner or possessors of the property is, therefore, not primarily relevant to the proceedings."<sup>4</sup>
- (5) Section 37 of the *Act* entrenches the distinction between civil proceedings and criminal proceedings<sup>5</sup>. Section 50(4) of the Act expressly states that the validity of an order made in terms of s50(1), forfeiting to the state property that is subject to a preservation of property order made in terms of s39(2) is not affected by the outcome of, any related criminal proceedings,<sup>6</sup> This section sanctions the granting of an order for the forfeiture to the state of property that is an 'instrumentality of an offence referred to in Schedule 1 to the Act' before any criminal proceedings in respect of that offence are instituted or, if instituted, determined.
- (6) To delay the determination of civil forfeiture proceedings until the finalisation of related criminal cases would have a dramatic impact on the purpose of an asset forfeiture programme. After all the "present Act (and particularly Chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international  
.....
- (10) The third point is that the respondent cannot be, allowed to rely on the potential loss of an ill-defined 'tactical advantage' at criminal trial to escape responding to matters pertaining to the civil proceedings. a Thus, as was pointed out by Navsa J in the Seapoint case it is a matter not of compulsion but of choice, "hard as the choice may be, it is a legitimate one"<sup>13</sup> which the respondent in this matter is called upon to make, In *Nedcor Bank v Behardien*



2000 (1) SA 307 (C), Cleaver J approved of the view expressed by Nugent J in the Davis v Tip Case;

“civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those Inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings the Preservation of the applicants rights lies entirely in his own hands, and there is no such element of compulsion. What the applicant seeks to be protected against is the consequence of the choices he may be called upon to make.”

.....

(28) There is no doubt that civil forfeiture is a controversial mechanism but it has been accepted by many nations as a legitimate law enforcement tool to combat serious crime. Forfeiture both prevents further illicit use of the property and imposes an economic penalty, thereby rendering illegal behaviours unprofitable. It has been argued that south Africa has managed to avoid some of the worst of the US forfeiture laws by providing for an ‘innocent owner’ defence and recourse to appeal.<sup>24</sup> The Constitutional Court has referred to the ‘important public interest objectives of the Act.’ Various international instruments deal with the problem of international instruments deal with the problem of international crime in this regard and it is now widely accepted by the international community that criminals should be stripped of the proceeds of their crimes 25, the purpose being to remove the incentive for crime. This approach has similarly been adopted by our legislature<sup>26</sup>.”

30. I agree with all the above findings. The right to a fair hearing is non-derogable (See Article 25(c) of The The *Constitution*). In civil recovery proceedings, this right is safeguarded by giving parties an opportunity to file pleadings, to adduce evidence and to challenge the evidence of their adversary through cross examination. The proceedings are governed by the *Civil Procedure Act* and Rules and the *Evidence Act* which provide a level playing field for the parties and which guarantee that no party has an upper hand and no party is condemned unheard. The Petitioners’ contention that their right to a fair hearing in the civil recovery suit is threatened is therefore a premature and unfounded apprehension. Moreover, the rule of evidence that he who asserts must prove is strictly observed and the burden of proof only shifts once the Plaintiff has established a prima facie case and where facts are within the special knowledge of the Defendant. The burden is otherwise always upon the Plaintiff to prove its case on a balance of probabilities.

31. On whether the civil forfeiture proceedings are an infringement of the Petitioners’ right to property, it is trite that the right to property is not an absolute right. Article 40 (6) provides that this right does not extend to property that has been unlawfully acquired. The sub-article states:-

“ 40

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”



32. In the case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR the court affirmed that constitutional provision and held that:-

“ 65. Forfeiture under *POCAML A* is not a violation of an individuals’ right to property. Article 40(6) of The *Constitution* is clear that rights acquired under article 40 do not extend to any property that is found to have been unlawfully acquired.”

33. In my view therefore, the assertion that the civil recovery proceedings are an affront to the right to property is unfounded. If the *Constitution* has limited that right, then that limitation cannot be unconstitutional. In any event the property that is forfeited is only that which is found to have been unlawfully acquired. The allegation that Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* is unconstitutional on that ground therefore lacks basis.

34. As for the right to be presumed innocent it is a rule of evidence that in civil proceedings the onus to prove something within the special knowledge of any party lies upon that party – (See Section 112 of the *Evidence Act*). As far as I am aware the said section has never been declared unconstitutional. It would in my view therefore be an oxymoron for this court to declare that the impugned sections of the *Proceeds of Crime and Anti-Money Laundering Act* are unconstitutional simply because the civil suit was filed while the criminal proceedings are still pending. It is to be noted that civil forfeiture proceedings are distinct from criminal proceedings as they target the property but not the conduct of the defendant. Even the Standard of proof is different.

35. Moreover, our *POCAML A* was enacted pursuant to the *United Nations Convention Against Corruption* (UNCAC) which at Article 31 stipulates:-

“ Article 31. Freezing, seizure and confiscation

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
  - (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
  - (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.
2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.
4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.



5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.
9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.
10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.”

36. The *UNCAC* is one of the conventions that form part of our law under the *Constitution* (See Article 2(6) of the *Constitution*). Clearly therefore the impugned sections of the *Proceeds of Crime and Anti-Money Laundering Act* are not unconstitutional. They are after all consistent with the fundamental principles of our law both under statute and case law.

**Whether the Application for forfeiture ought to await the outcome of criminal proceedings against the Petitioners.**

37. On the second issue of whether civil forfeiture is dependent on the outcome of criminal proceedings, 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 concerned is in some way associated. In my view the purpose of this section is to ensure that one does not benefit from crime more so given that corruption is a crime that is often times difficult to detect as in most cases it is usually a conspiracy between parties who are more than willing and therefore there is no one to make a complaint. The crime of corruption has at times been referred to as a “happy” crime. To say therefore that a crime must first be established before recovery or forfeiture proceedings can be instituted would mean that many would get away with it and continue enjoying the fruits of their illicit conduct and proceeds. My so saying finds support in the case of *Republic v Director of Public*



Prosecutions & Another Exparte Patrick Ogola Onyango & 8 Others [2016] eKLR where the court held as follows:-

“ 150. It would appear to me therefore, and I so hold, that the prosecution need not prove, prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court of law that there was theft or forgery or fraud that led to the acquisition of the proceeds or property the subject of the money laundering proceedings.

151. The criminal origins of the proceeds may be proved in the same way as any other elements of an offence can be proved. The offence of money laundering must be deemed as ‘stand alone’ offence. In proving that the proceeds or property are proceeds of crime even circumstantial evidence will be crucial. There is in my view no need to await any prior convictions of other offences before launching the prosecution of alleged money launderers. It is thus of little wonder that ‘proceeds of crime’ as defined under POCAMLA 2009 as

“proceeds of crime” means 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 successfully converted transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.” (emphasis)

152. I have added the emphasis to illustrate that even the legislators appreciated instances when there may be no one to prosecute hence there may be no conviction for a predicate offence or crime. The need to prove a predicate offence before laying a charge of money laundering was effectively dispensed with.

153. The principal offender who committed the predicate offence may never be there to be prosecuted, yet access to the proceeds of crime would have been achieved. He may have left jurisdiction with assistance of others. He may be a fugitive. He may have passed on. Behind him though, he would have left money launderers. If the principal offender may not be indicted, would it then mean that the money launderers would never be prosecuted? In my view, that certainly cannot be what the legislators intended. They, in my view, intended to ensure that in a money laundering offence both the *actus reus* and the *mens rea* of the principal offences were strictly proven by the prosecution and not by mere reliance on previously held proceedings.”

38. It is my further finding that the intended purpose of the impugned Section 92(4) of the Proceeds of Crime and Anti-Money Laundering Act is to enable the Agency to recover ill-gotten wealth, even though the person(s) concerned have not been convicted, where there is evidence to the satisfaction of the court that the person(s) cannot explain the source of that wealth. In other words, it gives the Plaintiff power to deal with illicit enrichment whether obtained through corruption or commission



of any other offence. Part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) provides for criminal forfeiture where one has been convicted separately and the legislature's intention and purpose in enacting Section 92(4) is therefore clear. Section 193A of the Criminal Procedure Code implies that criminal and civil proceedings can continue simultaneously. In the case of [Ethics and Anti-Corruption Commission v Judith Marilyn Okungu & Dakane Abdullabi Ali](#) [2017] eKLR the Court of Appeal stated:-

“This finding ought to dispose of this appeal but we need to state also that the learned judge was clearly wrong to conclude, as he did, that the proceedings before him amounted to harassment of the 1<sup>st</sup> Respondent merely because there was a pending criminal case before the Anti-Corruption Court. The matters forming the basis of the litigation traversed both the civil and criminal terrain. There is no law stating that the two types of proceedings cannot be carried out concurrently. It is spelt out expressly in Section 193A of the [Criminal Procedure Code](#) that the existence of the one should not lead to a stay of the other. ....”

39. More recently in the case of [Evans Kidero Vs Ethics & Anti-Corruption Commission & 13 others](#) (Civil Application E003 of 2022 [2023] KECA 62 (KLR) (3 February 2023) the Court stated:-

“20. The 1<sup>st</sup> respondent's counsel's argument was that the law permits the existence of parallel criminal and civil proceedings. A similar line reasoning was adopted by counsel for the DPP who relied on section 193A of the [Criminal Procedure Code](#) in opposing the stay sought. On the other hand, the applicant's counsel's key argument as we glean it from his submissions is what he sees as the danger of conflicting decisions by the three different courts hearing the criminal case, the civil suit and the constitutional petition. He also argued that if the civil court finds against the applicant, his innocence in the criminal case risks being compromised.

.....

25. Notwithstanding the above finding, and conscious that the draft memorandum of appeal and the submissions before us deviated into the criminal proceedings, we will address the said ground also on merit, at least to satisfy ourselves whether the applicant has raised an arguable ground. For starters, section 193A of the [Criminal Procedure Code](#) provides for concurrent criminal and civil proceedings. The Singapore High Court in a 2022 decision in [Debenho Pte Ltd and another v Envy Global Trading Pte Ltd and another](#) [2022] SGHC 7, though not binding to this court is worth quoting. It held that the existence of parallel criminal proceedings per se is not sufficient as a ground to obtain a stay of the civil proceedings.

26. In India, both civil and criminal proceedings can be initiated simultaneously with distinct impetus and objective. The Supreme Court of India in [P. Swaroopa Rani v M. Hari Narayana](#) (AIR 2008 SC 1884) held that it is well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. It further cautioned that whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case.

27. [Randy S. Eckers in an article entitled Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules, 1998, Hofstra Law](#)



Review, Volume 27, defines parallel proceedings as: “Parallel proceedings are independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.” At page 112, he proceeds to elucidate circumstances under which a court can stop parallel civil and criminal proceedings. He states as follows:

“...The courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process or Fifth Amendment violation.’ Even if a defendant meets one of these requirements, a stay is not guaranteed. The court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment.” Absent special circumstances, both cases will probably proceed.”

28. In short, courts will not ordinarily grant a stay of civil proceedings simply by virtue of the existence of parallel criminal proceedings arising out of the same events or subject matter. This is the import of section 193A of the [Criminal Procedure Code](#) which expressly permits parallel criminal and civil proceedings. The above being the general proposition of the law, to surmount the arguability threshold, an applicant bears the burden of showing how the continuance of the civil action will lead to a “real danger of prejudice” against him in the concurrent criminal and civil proceedings. As was held by a Constitutional Bench of the Supreme Court of India in *M. S. Sheriff v The State of Madras and Others* (AIR 1954 SC 379):

“No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.”

40. The [Constitution](#) has guaranteed citizens the rights set out in Chapter Four of the [Constitution](#). It has given the court the jurisdiction to intervene where a violation of those rights has been demonstrated. However, the same Constitution has given other constitutional bodies certain mandates, among them the power to carry out investigations and to institute civil proceedings and it is in the public interest that the said bodies be allowed to carry out their mandates without interference. There must be very clear and cogent grounds for the court to interfere with the exercise of those powers (See [Benson Muteti Masila & 5 others v Chief Magistrate Milimani Law Courts & 4 others](#) [2020] eKLR.)
41. From the foregoing, it is my finding that this Petition has no merit. It is therefore dismissed with costs to the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party.



**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF MARCH 2023.**

**E N MAINA**

**JUDGE**

