



**Assets Recovery Agency v Adan; Guma & another (Interested Parties) (Anti-Corruption and Economic Crimes Civil Suit 10 of 2020) [2023] KEHC 3123 (KLR)  
(Anti-Corruption and Economic Crimes) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3123 (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 10 OF 2020**

**EN MAINA, J**

**APRIL 13, 2023**

**BETWEEN**

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

**AND**

**HUSSEIN ALI ADAN ..... RESPONDENT**

**AND**

**TARIQ HAMADA GUMA ..... INTERESTED PARTY**

**HUSSEIN ALI ADAN ..... INTERESTED PARTY**

**JUDGMENT**

1. The Applicant filed an Originating Motion dated 27<sup>th</sup> March 2020 supported by an affidavit by CPL Isaac Nakitare sworn on the same date.
2. The Application is made under Sections 90 and 92 of the Proceeds of Crime and Anti- Money Laundering Act and Order 51 of the Civil Procedure Rules and seeks the following orders:
  1. THAT this Honourable Court be pleased to issue an order declaring that motor vehicle registration number KCM 922Y Isuzu CXZ is an instrumentality of crime and therefore liable for forfeiture to the Government of Kenya.
  2. THAT this Honourable Court be pleased to issue an order of forfeiture in respect of motor vehicle registration number KCM 922Y Isuzu CXZ to the Government of Kenya.



3. THAT this Honourable Court be pleased to issue a vesting order transferring motor vehicle registration number KCM 922Y Isuzu CXZ to the Assets Recovery Agency to be held on behalf of the Government of Kenya.
  4. THAT this Honourable Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government of Kenya
  5. THAT there be no order as to costs.
3. The Application is made on the grounds stated on the face of it and the supporting and further affidavits of Isaac Nakitare as follows:
  1. THAT the Assets Recovery Agency is established under Section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML) as a body corporate with the mandate of identifying, tracing, freezing and recovering of proceeds of crime.
  2. THAT Sections 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* authorizes the Agency to institute Civil Forfeiture proceedings for the recovery of proceeds of crime.
  3. THAT the Interested Party is an adult of sound mind and the beneficial owner of the assets/motor vehicles specified in prayers 1 and 2 above.
  4. THAT on 20<sup>th</sup> May 2019 the Respondent was intercepted at Eagles Petrol Station along the Nairobi-Nakuru Highway while using the motor vehicle registration number KCM 922Y to ferry narcotic substance contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994.
  5. THAT the Respondent was charged inter-alia with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 vide Criminal Case No C.R. 1580 of 2019.
  6. THAT on or about 7<sup>th</sup> October 2019, the Agency received information from DCI that police officers had intercepted the Respondent at Eagles Petrol Station along the Nairobi-Nakuru Highway and found him in the possession of 135 bales of narcotics with a market value of Kshs. 3,375,000/-.
  7. THAT the Agency opened an inquiry file No. 62 of 2019 to investigate and inquire into the activities of the Respondent herein in respect to the above offence and any predicate offence under the *Proceeds of Crime and Anti-Money Laundering Act*.
  8. THAT the motor vehicle registration numbers KCM 922Y Isuzu CXZ in the name of the interested party is a realizable property pursuant to Section 2 of the POCAML which defines "realizable property" to include proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences.



9. THAT the investigations conducted by the DCI further established that the Respondent also gave false information about his identity purporting to be Hassan Ali Adan holder of National Identity Card No. 27608424 in a bid to conceal and disguise his identity contrary to Section 129(a) of the Penal Code.
10. THAT the investigations have established that there are reasonable grounds to believe that the vehicle constitutes an instrumentality of crime pursuant to Section 92(1)(a) of [Proceeds of Crime and Anti-Money Laundering Act](#) 2009.
11. THAT on 10<sup>th</sup> of December 2019, the Agency obtained preservation orders, which were subsequently issued on 17<sup>th</sup> December 2019 vide Civil Application No. 47 Of 2019, Assets Recovery Agency Vs Hussein Ali Adan & Tariq Hamada Guma pursuant to Sections 81, 82 and 83 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAML) prohibiting the Respondents and or their agents or representative from transferring or dealing in any manner with the assets identified in prayer 1 and 2 of the application.
12. THAT the preservation order was gazetted by the Applicant on 27<sup>th</sup> December 2019 vide Gazette Notice Vol. CXXI No. 176 pursuant to section 83 of the Proceeds of Crime and Anti- Money Laundering Act.
  13. THAT Section 90 of the Proceeds of Crime and Anti- Money Laundering Act provides that where a preservation order is in force, the Agency may apply to the High Court for an order of forfeiture to the Government all or any of the property that is subject to the preservation order.
  14. THAT it is in the public interest that the orders sought are granted and the suspect assets be forfeited to the Applicant.
  15. THAT there are justifiable reasons and grounds to warrant the issuing of the orders sought.

### **Response by the Respondent**

4. The Respondent opposed the Application through his Grounds of Opposition dated 6<sup>th</sup> October 2022 and a replying affidavit sworn on 20<sup>th</sup> January 2023.
5. The Respondent contends that the Application is misconceived, incurably defective, incompetent frivolous, vexatious and therefore an abuse of the process of this Honourable Court.
6. The Respondent contends that the forfeiture of the motor vehicle prior to the determination of the criminal case pending before the Chief Magistrate's Court at Nakuru shall be tantamount to adjudging the respondent guilty without according him a fair hearing as the charges levelled against him are purely criminal and a determination on his guilt cannot be assumed before witnesses are presented before a competent court of law; that the suit suffers a misjoinder as the owner of the subject motor vehicle sought to be forfeited had not been joined to the proceedings and his interests would be extinguished without being given an opportunity to be heard .
7. They averred further that the purpose of the Application was to frustrate the respondent as it seeks to impose a guilty verdict on him without adhering to the due procedure of the law and according the respondent an opportunity to test the veracity of the allegations set out in the supporting affidavit and the annexures thereto through cross-examination.



8. They averred that there is no evidence confirming that the subject motor vehicle is an instrumentality of crime and the evidence relied upon are mere speculations which are not sanctioned by the *Evidence Act*; that the realization of motor vehicle registration number KCM 922Y as sought is in violation Section 83 of the *Proceeds of Crime and Anti-Money Laundering Act* 2009 which mandatorily requires service of a preservation notice upon all persons known to have interests over the subject property: there was no service of any notice upon the respondent and/or the owner of the subject vehicle.
9. They aver further that at the time of filing the Application, the preservation order had lapsed and it was therefore a non-starter, time barred and ought to be dismissed. The suit is improperly before this Honourable court as it is time barred.
10. THAT the originating summons lacks merit by delving into unsubstantiated findings in an alleged investigation but which form no factual basis of the case as presented. Lastly, that the originating summons suit is devoid of any merit as against the Respondent, it is fatally defective, unsustainable. Misconceived, incompetent and an abuse of the court process and should be struck out.

### **Response by the 2<sup>nd</sup> Interested Party**

11. The 2<sup>nd</sup> Interested Party was joined to these proceedings by an order of this court made on 23<sup>rd</sup> November 2022. They opposed the Application vide the replying affidavit sworn 20<sup>th</sup> January 2023.
12. The 2<sup>nd</sup> Interested Party avers that he purchased the motor vehicle registration number KCM 922Y from the 1<sup>st</sup> Interested Party on 10<sup>th</sup> of December, 2018 at a consideration of Kshs. Two million, eight hundred thousand shillings. That he purchased the motor vehicle for purposes of transporting petroleum products, operating across Nakuru, Nairobi and Marsabit. The proceeds were used to support his family.
13. He averred that the vehicle has never transported illegal goods. That since the 20<sup>th</sup> of May, 2019 when the respondent in this cause was arrested, the vehicle has remained in custody of the investigative agencies and his ability to provide for my family has greatly been affected. That he has school going children and has been heavily constrained in effectively paying their school fees as the subject motor vehicle was his major source of income.
14. Further, that he has never been served or informed of the proceedings in this cause and he have never been served with any notices relating to this suit or the suit through which the agency obtained the preservation orders of his motor vehicle. That if indeed an investigation was undertaken as stated in the affidavit of CPL Isaac Nakitare, the agency must have found out that he was the owner of the motor vehicle having purchased it from the 1<sup>st</sup> Interested party.
15. Further that the continued detention of the vehicle has greatly infringed his right to property; that the Respondent's possession of the motor vehicle at the time of impoundment was not with his authority. Immediately the motor vehicle was impounded along the Nakuru Nairobi Highway, his driver Muhamud Iyoow went missing and to date he has never been able to know what the reason for impounding the vehicle was or even if he was involved. That the said driver has never been charged with any offence relating to the allegations for which the car has been detained neither has anyone been convicted for related offences and therefore forfeiture of the vehicle shall not only be unjust but also unfair.
16. That the 2<sup>nd</sup> Interested Party has never been in any way involved in the commission of any offence or authorized the use of the subject motor vehicle in anyway that could render it an instrumentality of crime.



17. He urged the court to order the release of his Motor Vehicle in fulfilment and protection of his constitutional rights to property, right to be free from hunger and right of access to adequate housing as enshrined in Article 40 and 43 of *the Constitution*. That he does not intend to dispose off the subject motor vehicle and the release of the same shall not occasion any prejudice on the state and is willing to always avail the vehicle whenever required. He urged the court to order the release of the vehicle.
18. The Applicant and the 2<sup>nd</sup> Interested Party filed written submissions dated 9<sup>th</sup> February 2023 and 27<sup>th</sup> February 2023 which I have considered.

**Issues for determination:**

19.
  1. Whether the motor vehicle registration number KCM 922Y Isuzu CXZ is an instrumentality of crime liable for forfeiture to the State
  2. Whether the 2<sup>nd</sup> Interested Party has met the threshold for protection under Section 93 of the Proceeds of Crime and Anti- Money Laundering Act.

**Analysis and determination**

**Whether the motor vehicle registration number KCM 922Y Isuzu CXZ is an instrumentality of crime liable for forfeiture to the State**

20. The Applicant’s main contention is that the motor vehicle KCM 922Y is an instrumentality of crime and therefore realizable property. The Applicant in its submissions has relied on the definition of realizable property under Section 2 of the Proceeds of Crime and Anti- Money Laundering Act which states as follows:

“realizable property” means:

  - (a) property laundered;
  - (b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences;
  - (c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and
  - (d) property of corresponding value;
21. The realization of “realizable property” is provided for under Section 75 in Part VII of the Proceeds of Crime and Anti- Money Laundering Act which is headed “criminal forfeiture”. This court is however cognizant that Section 92 of Proceeds of Crime and Anti- Money Laundering Act grants this court authority to issue forfeiture orders in respect of any property that has been used or is intended for use in the commission of an offence or that is a proceed of crime.
22. Section 75 of Proceeds of Crime and Anti- Money Laundering Act provides thus:
  75. Realization of property
    - (1) A court may exercise the powers conferred upon it by subsection (2) when—



- (a) a confiscation order has been made against the defendant concerned;
  - (b) that confiscation order is no longer subject to review or appeal; and
  - (c) the proceedings against that defendant have been concluded.
- (2) A court may, on the application of the Agency Director—
- (a) if a receiver has not been appointed in respect of any of the property concerned, appoint a receiver in respect of the realizable property;
  - (b) subject to subsection (3), authorise a manager appointed under section 72(1)(a) or a receiver appointed under paragraph (a) of this subsection, as the case may be, to realize any realizable property in such manner as that court may determine;
  - (c) order any person who holds realizable property to surrender the said property forthwith into the custody of a manager appointed under section 72(1)(a) or a receiver appointed under paragraph (a) of this subsection, as the court may determine.
- (3) A court shall not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realization of that property.
- (4) If the court is satisfied that a person—
- (a) is likely to be directly affected by the confiscation order; or
  - (b) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 61(1) which was committed by the defendant, the court may allow that person to make representations in connection with the realization of that property.”

23. The Applicant contends that the motor vehicle was impounded in the possession of the Respondent on 7<sup>th</sup> October 2019; that it was searched and found to have 135 bales of suspected narcotics with a market value of Kshs. 3,375,000; that the Respondent was charged with the offence of trafficking cannabis contrary to Section 4(a) of the Narcotics Drugs and Psychotropic Substances Act (Control) Act, 1994, in Nakuru CMS CR NO. 1580 of 2019 which proceedings are still pending; That therefore the vehicle is an instrumentality of crime liable for forfeiture.

24. On their part, the Respondents contend that they are innocent until proven guilty; that the forfeiture of an instrumentality of crime is dependent on the conviction of the Respondent of the alleged offences in the trial court.

25. I have carefully considered the Originating Motion herein and it is my finding that it would be premature for this court to make a determination that the motor vehicle is liable for forfeiture as the proceedings in Nakuru CMCRC No. 1580 of 2019 are still pending. There must be a finding on whether the 135 bales or goods impounded at the time of the arrest of the Respondent was indeed



bhang, and whether the facts in the case constituted a crime, prior to making a finding that the motor vehicle is an instrumentality of crime. The duty to make that determination remains within the jurisdiction of the court in conduct of the proceedings in Nakuru CMCRC No. 1580 of 2019 upon hearing and evaluating evidence by the prosecution and the defence. (See the decision of this court in the case of Assets Recovery Agency vs Barak Abdullahi Boru and 3 Others; Equity Bank and another [Interested Parties] 2022 eKLR).

26. Indeed, the Narcotics and Psychotropic Substances (Control) Act under which the Respondent has been charged has a procedure for forfeiture of conveyances of drugs. The said Act states at Section 20:-

“ 20. Forfeiture of conveyance, implement, etc.

- (1) Any machinery, equipment, implement, pipe, utensil, or other article used for the commission of any offence under this Act shall be forfeited to the Government.
- (2) Every conveyance used for the commission of any offence under this Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under this Act, or any narcotic drug or psychotropic substance, shall be forfeited to the Government: Provided that where, on application made by the person who was the owner of the conveyance to the court in which any prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under Part IV is pending, the court is satisfied beyond reasonable doubt that—
  - (a) the person who was the owner of the conveyance; and
  - (b) in the case of an aircraft or ship, every person who was a responsible officer thereof, when it was made use of for such conveyance, was not concerned in or privy to such use, the conveyance shall be restored to the owner by the court.”

27. It would therefore be in the interest of justice that the issue of forfeiture of the motor vehicle be left to the trial court as it has jurisdiction to do so under the Narcotics and Psychotropic Substances (Control) Act

**Whether the 2<sup>nd</sup> Interested Party has met the threshold for protection under Section 93 of the Proceeds of Crime and Anti- Money Laundering Act**

28. Section 93 of the Proceeds of Crime and Anti- Money Laundering Act enjoins this court with the obligation to protect third party interests in forfeiture proceedings. The law states:

Protection of third parties

- (1) Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—



- (a) that the person was not in any way involved in the commission of the offence; and
- (b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—
  - (i) for sufficient consideration; and
  - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property, the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

29. The 2<sup>nd</sup> Interested Party contends that he is the owner of the motor vehicle registration number KCM 922Y Isuzu CXZ, having purchased it from the 1<sup>st</sup> Interested Party for a consideration of Kshs 2,800,000. He has produced an Agreement for Sale to that effect and stated that the continued detention of the vehicle is prejudicial to him. The Respondent has in his replying affidavit also contended that the vehicle belongs to the 2<sup>nd</sup> Interested Party. The 1<sup>st</sup> Interested Party, as the registered owner of the motor vehicle as per the official National Transport and Safety Authority (NTSA) search produced as IK 1 in the supporting affidavit did not participate in these proceedings and neither did he file any response to the Application to deny or admit the allegations. He had however sought the Nakuru CMCRC No. 1580 of 2019, which the court declined in its Ruling of 11<sup>th</sup> December 2020 due to the preservation orders issued by this court. It is my finding that the concern of the Interested Party is also an issue for the trial court under Section 20(2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*.

30. Accordingly, the application herein is struck out with liberty being granted to the Applicant to apply in the trial court.

31 It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 13<sup>TH</sup> DAY OF APRIL, 2023**

**E. N. MAINA**

**JUDGE**

