



Assets Recovery Agency v Kamau & another; Sheikh (Interested Party) (Anti-Corruption and Economic Crimes Civil Suit E029 of 2021 & E003 of 2022 (Consolidated)) [2023] KEHC 4043 (KLR) (Anti-Corruption and Economic Crimes) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4043 (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 E029 OF 2021 & E003 OF 2022 (CONSOLIDATED)**

EN MAINA, J

MAY 4, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

PETER MUGI KAMAU 1ST RESPONDENT

CONSOLATA NDUNGE MUSAU 2ND RESPONDENT

AND

HASSAN AHMED SHEIKH INTERESTED PARTY

JUDGMENT

1. This Judgment is in respect of the forfeiture proceedings filed by the Applicant against the Respondents and the Interested Party in HC ACEC Suit No. E029 of 2021 and ACEC Suit No. E003 of 2022. The two suits were consolidated by an Order of this court made on 7th November 2022 with ACEC Suit No. E003 of 2022 becoming the lead file.
2. In the Originating Motion dated 5th October 2021(ACEC Suit No. E029 of 2021), the Applicant sought the following orders against the 1st Respondent and the Interested Party:
 - “a. That this Honourable Court be pleased to issue an order declaring that the funds held in the following bank accounts are proceeds of crime.
 - i. KSH 157,633.00 in bank account No.0320190240971 held at Equity Bank Ltd in the name of PEter Mugi Kamau.



- ii. KSH 200,000.00 or thereabout in bank account No.041000018442 held at Family Bank Ltd, in the name of Peter Mugi Kamau.
- iii. KSH 29,573,00 in bank account No. 01109486263100held at Cooperative Bank Ltd in the name of Peter Mugi Kamau.
- a. That this Honourable Court be pleased to issue an order declaring that the following motor vehicles are proceeds of crime.
 - i. KCL 704Z Toyota Wish,
 - ii. KBK 017B Toyota Hiace,
 - iii. KBH 815V Nissan Caravan
 - iv. KCB 520Y Toyota Dbā-Nze10g
- b. Thatthis Honourable Court be pleased to issue an order declaring that motor vehicles registration number KCY 752K Toyota Succeedis an instrumentality of crime.
- c. Thatthis Honourable Court be pleased to issue an order that the funds and motor vehicles listed in prayer 1, 2 and 3 be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency (the Applicant herein).
- d. Thatthis Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.
- e. Thatcosts be provided for.”

3. In the second suit (ACEC Suit No. E003 of 2022), the Applicant by an Originating Motion dated 15th February 2022 sought Orders against the 2nd Respondent as follows:-

- “a) Thatthis Honourable Court be pleased to issue an order declaring that Land Parcel Mlolongo/Ngwata Phase Iii/Plot No.1264 and Developments Thereonis are proceeds of crime.
- b. Thatthis Honourable Court be pleased to issue an order that Land Parcel Mlolongo/Ngwata Phase Iii/Plot No.1264 and Developments Thereon be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency (the Applicant herein).
- c. Thatthe Honourable court be pleased to issue an order to the Chief Land Registrar at Mavoko Lands Registry to issue a vesting order transferring Mlolongo/Ngwata Phase Iii/Plot Developments Therkonto to the applicant.
- d. Thatthis Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.
- e. Thatcosts be provided for.”

4. The Applications are both supported by the affidavits of CPL Jeremiah Sautet sworn on 5th October 2021 and 15th February 2022 respectively and are made on grounds that:- That the Applicant is the Assets Recovery Agency 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 proceeds of crime; that pursuant to Part VIII of POCAML, Sections 81-89 of POCAML, the Agency is authorized to institute Civil Forfeiture proceedings and seek orders prohibiting any person, subject to such conditions as the Court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime; that the 1st Respondent is a Male Adult of sound mind residing within Nairobi County and the owner of the funds and motor vehicles the subject of the application in ACEC Suit No. E029 of 2021; that the 1st Respondent was arrested on the 7th October, 2020 in Huruma area, Nairobi County on suspicion for the offence of trafficking in persons and was subsequently arraigned in the Chief magistrate's court in Kiambu on 13th October, 2020 charged with the offence of trafficking in Persons Contrary to Section 3(1) (d) as read with Section 5(1) (d) of the Counter Trafficking in Persons Act No. 8 of 2010 in criminal case No C.R.430 of 2020; that during the arrest, a search was conducted at a house the 1st Respondent had rented within Umoja Estate, Mwioko area in Kiambu County which search yielded twenty-two (22) Ethiopian citizens who are reasonably believed to be victims of trafficking in persons who had been detained by the Respondent and his agents/associates; that during the arrest and search, a motor vehicle registration number KCY 752K Toyota Succeed which was used as an instrument to ferry the illegally trafficked persons by the Respondent was impounded. The motor vehicle is registered in the name of the Interested Party; that the Assets Recovery Agency/Applicant commenced investigations to recover proceeds of crime accrued to the Respondent through the illegitimate trafficking in persons; that the Agency received information that the 1st Respondent acquired assets/properties using the proceeds obtained from the illegal trafficking in persons to wit motor vehicle registration number: KCL 704Z Toyota Wish, Motor vehicle registration number KBK 017B Toyota Hiace, Motor vehicle registration number KBH 815V Nissan Caravan, Motor vehicle registration number KCB 520Y Toyota DBA-NZE 10G and Motor vehicle registration number KCY 752K Toyota Succeed, are proceeds of crime contrary to the provisions of the Counter Trafficking in Persons Act No. 8 of 2010, the Proceeds of Crime and Anti-Money Laundering Act 2009 and the Preventions of Organized Crimes Act 2010. Further; that the Agency opened an inquiry file No. 62 of 2020 to investigate and inquire into the activities in the bank accounts of the 1st Respondent for purposes of ascertaining whether they hold any funds that are proceeds of crime and established that the funds in issue are proceeds of crime obtained from the illegally trafficking in persons which is an offence under the Counter Trafficking in Persons Act No. 8 of 2010, the Proceeds of Crime and Anti-Money Laundering Act 2009 and Preventions of Organized Crimes Act; that the Agency opened an inquiry file No. 62 of 2020 to investigate and inquire into the activities in the above accounts for purposes of ascertaining whether they hold any funds that are proceeds of crime; that it is also, reasonably believed that the property known as Mlolongo/Ngwata Phase III/plot No. 1264 and the developments thereon and which is registered in the name of Consolata Ndunge Musa, the 2nd Respondent was acquired and developed using funds from the illegitimate business of trafficking in persons; that in her statement the 2nd Respondent admitted receiving money from the 1st Respondent which she used in the development of the five storey apartments and that the 1st Respondent acquired the funds he contributed to the construction from the business of trafficking in persons and hence the property was developed with proceeds of crime. Further, the Investigating Officer established there were suspicious deposits and withdrawals in the accounts of the 1st Respondent as follows:-

Equity Bank Acc. No.	Date	Deposits	Withdrawals
032019240971	29/11/17	128,000.00	30,000.00
	08/12/17		30,000.00
	14/12/17		30,000.00
	16/12/17	30,000.00	
	16/5/19	300,000.00	
	16/5/19	500,000.00	
	17/5/19	100,000.00	
	17/7/19		120,000.00
	18/09/19	200,000.00	
	23/09/19	200,000.00	
	28/12/19		100,000.00
	30/12/19		100,000.00
	26/6/20	70,000.00	
	03/07/20	80,000.00	
		Grand Total	2,861,457.05



2,703,823.13

Family Bank Acc. No. 01109486263100

Date Deposits Withdrawals

6/09/20 40,000.00

3/09/20 40,000.00

11/03/20 23,000.00

05/02/20 20,000.00

27/01/20 19,500.00

30/12/19 30,000.00

23/11/29 20,000.00

18/11/19 21,000.00

23/11/13 125,000.00

21/11/13 40,000.00

16/11/13 3,000.00

15/11/13 34,000.00

15/11/13 40,000.00

Grand Total 409,845.00 380,272.00

5. Further that on diverse dates the 1st Respondent received money through his mobile phone No. +254707312787 from his Associates/collaborators from Ethiopia Namely: GadoroWotamu, MeseretKeneBalcha, Bereket Degu Aredo, SbriaHache, Ibrahim ShanqoKadiro, AbdubGuyo, Emanuel Mota, TekabTekelSifiso, Adan Kalla and AkbruAlemuLemibemo all Ethipian citizens which money is reasonably believed to have been obtained for the illegal human trafficking syndicate; that investigations have established that the 1st Respondent received money from his associates and collaborators through his mobile phone number 0707312787 and used some of the money to facilitate the movement of the victims of human trafficking within the Kenyan borders; that investigations established that the victims of illegal human trafficking are transported through undesignated porous borders between Kenya and Ethiopia in groups by the 1st Respondent using his agents and are harboured in various hide-outs within Kenya and subsequently transported to various international destinations such as Tanzania and South Africa; that the 1st Respondent facilitated the movement of the victims by paying for their transportation, food and temporary accommodation in various safe houses littered along the corridor from Moyale to the Kenya/Tanzania boarder; that the payments used to facilitate the movement of the victims are discernible in the Mpesa transactions of the 1st Respondent's mobile phone account; that part of the money received by the 1st Respondent from his human trafficking collaborators would then be deposited in this bank accounts listed in paragraph 9 of the affidavit and was subsequently used to acquire the impugned properties; that investigations have established that there are reasonable grounds to believe that the Mlolongo/Ngwata Phase III/Plot No.1264 and developments thereon was acquired using proceeds obtained through the illegal trafficking in persons conducted by the 1st Respondent contrary to the provisions of the Counter Trafficking in Persons Act No. 8 of 2010; that investigations have established that Mlolongo/Ngwata Phase III/Plot No.1264 and developments thereon are also proceeds of crime contrary to the



provisions of the *Proceeds of Crime and Anti-Money Laundering Act* and the same should be forfeited to the government.

6. It is contended that the 1st Respondent in an attempt to conceal and disguise the source of funds from illegal trafficking in persons, mingled the proceeds with the 2nd Respondent by using the illegitimate money to develop the five storey apartments on Mlolongo/Ngwata Phase III/Plot No.1264; that on 28th July 2021 the 1st Respondent recorded a statement at the Assets Recovery Agency Chambers and admitted to have contributed a sum of Kshs.6,400,000/= towards the construction of the apartments/ the property in issue; that the 1st Respondent stated that he got the money he contributed for the construction of the five storey apartments from loans and sale of two of his motor vehicles but failed to provide evidence of existence of same; that the 1st Respondent stated that he had no formal employment but eked a living from operating a matatu business as his primary source of income but failed to provide proof of the existence of this business; that the 1st Respondent did not reasonably explain how he acquired the funds in his accounts and that there are reasonable grounds to be believe that the accounts are holding Proceeds of crime and are used as conduits of money laundering contrary to Sections 3, 4, 7 and 16 of *Proceeds of Crime and Anti-Money Laundering Act* 2009; that it is in the interest of justice therefore that forfeiture orders do issue forfeiting the assets and funds specified above to the Applicant; that unless this Honourable Court grants the orders sought, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of national security, interest of the public and the economy. It is further argued that it is in the public interest that the orders sought are granted and the suspect assets and funds in the aforementioned accounts be forfeited to the Applicant on behalf of the Government of Kenya.

The Response of the 1st and 2nd Respondents and the Interested Party

7. The 1st and 2nd Respondents opposed the applications through their replying affidavits both sworn on 27th February 2022. They relied further on an affidavit sworn by one Richard Ndolo Kivuva, chairperson of Jonsaga Flats Savings and Credit Co-operative Society dated 7th March 2023. In opposition to ACEC Suit No. E029 of 2021, the 1st Respondent filed a replying affidavit sworn on 15th November 2021.
8. The Interested Party neither entered appearance nor filed any documents in respect of these proceedings despite being served by the ARA/Applicant.
9. The 1st Respondent contended that during the period in issue, he was engaged in the matatu business using motor vehicle Registration No. KBL 070H Toyota Hiace; that he used to deposit his daily or weekly earnings in the Equity Bank Account Number 032019024097 and Co-operative Bank Account Number 01109486263100; that he also operated a commercial restaurant and an alcoholic drink business known as Site Annex Bar and Restaurant situated in Huruma and that the savings generated from the business were deposited in his bank accounts or in his Sacco savings accounts. Further, that that he had also been sub-licensed to operate an Mpesa shop Account Number +254707312787 and that it was true that he received funds from Gadoro Wotamu, Meseret Kene Balcha, Bereketu Degu Aredo, Sabria Hache, Ibrahim Shango Kadiro, Abdub Guy Emanuel Mota, Tekab Teketel Sifiso, Adan Kalla and Akbru Alemu Lemibemo, who the ARA/Applicant alleges were involved in trafficking of persons and money laundering activities. He contended that the money from the said persons was received during the covid-19 pandemic when movement of persons was restricted and therefore the alleged business of human trafficking was impracticable; that whereas the Applicant contends that the said persons were all Ethiopians, no evidence in support of this claim was tendered; that as an Mpesa Account service provider at Huruma estate in Nairobi, he often interacted with persons of different



nationalities; (he tabulated a list of Mpesa transactions and Deposits and gave explanations on the expenditure of the funds).

10. The 1st Respondent contended that the application was an abuse of court process and an attempt to emasculate him financially and render him incapable of defending himself before the subordinate court in the ongoing criminal proceedings.
11. On her part, the 2nd Respondent contended that between 2002 and 2007 she worked at the Kenya Revenue Authority (KRA) as a casual worker; that in the course of her employment she accumulated savings of Kshs 110,000 through which she purchased the property Mlolongo/Ngwata phase III/Plot No. 1264 the subject of these proceedings; that she was also engaged in other businesses including a kerosene pump and a matatu transport business.
12. Further that she joined Tumaini self-help group, affiliated with PREMAP self-help project fund where she borrowed loans for developing the building now erected on the property; that her merry-go-round (chama) contributions were Kshs 5,000 per month out of which each member received Kshs 60,000. She stated that she also obtained funds from her savings accounts in Post Bank and Equity Bank Limited and loans from Jonsaga Flats Sacco. She contended that the building was constructed between the years 2016 and 2019. That Jonsaga Sacco advanced her a loan of Kshs 4,500,000 in eight tranches between 16th January 2016 and 20th June 2019. (She produced a copy of the Sacco statement). She also stated that she constructed the building in five phases with each completed phase of the building generating Kshs. 39,500 per month; that the rent proceeds were paid through her Family Bank and Equity Bank accounts; that the allegation that her husband, the 1st Respondent was involved in criminal activities were made after the house was built and completed and therefore it is not a proceed of crime and the application to forfeit the property should be dismissed.
13. The Originating Motions were canvassed through written submissions dated 21st March 2023 and 23rd March 2023 respectively. I shall consider the rival submissions in the analysis and I need not replicate the same at this stage.

Issues for determination:

14. The following issues arise for determination:
 - a. Whether this forfeiture suit is dependent on the outcome of the criminal proceedings against the 1st Respondent in Kiambu CMCR 430/2020.
 - b. Whether the Respondents' properties subject of the consolidated suit are proceeds of crime liable for forfeiture to the State.
 - c. Costs.

Analysis and determination

Issue (a) Whether this forfeiture suit is dependent on the outcome of the criminal proceedings against the 1st Respondent in Kiambu CMCR 430/2020

15. The Respondents contended that the criminal proceedings against the 1st Respondent in Kiambu CMCR 430/2020 where he is charged with the offence of trafficking in persons were still pending and that these proceedings ought to be dependent on the outcome of the criminal case.



16. It is however trite that civil forfeiture proceedings are not dependent on the outcome of criminal investigations or proceedings. Section 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#) makes that expressly clear as it provides that:

“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.

.....

- (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.”

17. There is also a long line of court decisions which address this issue, including *Assets Recovery Agency v Quorum Limited and 2 Others* [2018] eKLR, *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR and *Kenya and Anti-Corruption Commissions vs Stanley Mombo Amuti* [2017] eKLR and *Assets Recovery Agency v Rose Monyani Musanda & 2 others* [2020] eKLR.

18. In the case of *Assets Recovery Agency v Rose Monyani Musanda* (Supra), the court while citing the decision of the Namibian court in *Teckla Nandjila Lameck -vs- President of Namibia 2012(1) NR 255(HC)* held thus:

“...Asset forfeiture is, as is stated in section 50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution.

...even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above.”

19. While it is not in dispute that the 1st Respondent has been charged in Kiambu CMCR 430/2020 with inter alia, the offence of trafficking human persons contrary to Section 5(1)(d) of the Counter Trafficking in Persons Act, the conclusion or determination of the criminal case is not a pre-condition for the filing of a civil recovery suit against the Respondent. The answer to issue number (a) is therefore in the negative.

Issue (b) Whether the Respondents’ properties subject of the consolidated suit are proceeds of crime liable for forfeiture to the State

20. The consolidated suit is brought under Sections 81 and 90 of the [Proceeds of Crime and Anti-Money Laundering Act](#). The Act proscribes illicit enrichment and introduces measures for forfeiture of properties acquired from proceeds of crime and instrumentalities of crime through civil and criminal forfeiture proceedings. It also provides measures for the offence of money laundering and the



punishment of the same. In seeking forfeiture orders the Applicant relies on the case of Schabir Shaik & Others v State Case CCT 86/06[2008] ZACC 7 where it was held that:

“... the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realization that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order...”

21. The Applicant contends that the following properties registered in the name of the 1st and 2nd Respondents are proceeds of crime or are instrumentalities of crime and/or were used for money laundering:-

- a. Land Parcel Mlolongo/Ngwata PhaseIII/Plot No.1264 and developments thereon.
- b. KSH 157,633.00 in bank account No. 0320190240971 held at Equity Bank Ltd in the name of Peter Mugi Kamau.
- c. KSH 200,000.00 held in bank account No. 041000018442 held at Family Bank Ltd, in the name of Peter Mugi Kamau.
- d. KSH 29,573,00 in bank account No.01109486263100 held at Cooperative Bank Ltd in the name of Peter Mugi Kamau.
- e. Motor vehicle registration number KCL 704Z Toyota Wish.
- f. Motor vehicle registration number KBK 017B Toyota Hiace.
- g. Motor vehicle registration number KBH 815V Nissan Caravan.
- h. Motor vehicle registration number KCB 520Y ToyotaDBA-NZE 10G.

22. The Applicant also contends that the motor vehicle registration number KCY 752K Toyota Succeed which is registered in the name of the Interested Party is an instrumentality of crime liable for forfeiture to the State.

23. Section 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) vests this court with jurisdiction to make forfeiture orders where it finds on a balance of probabilities that the property concerned has been used or is intended for use in the commission of an offence or is proceeds of crime. The Section states:-

“92. Making of forfeiture order

(1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—

- (a) has been used or is intended for use in the commission of an offence; or
- (b) is proceeds of crime.



- (2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.
- (3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.”

24. Section 2 of the [Proceeds of Crime and Anti-Money Laundering Act](#) defines proceeds of crime as follows:-

“2. “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 successively 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;

25. On the other hand the offence of money laundering is prescribed in Section 3 of the [Proceeds of Crime and Anti-Money Laundering Act](#) the relevant parts of which state:-

- “3. A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—
 - a.
 - (b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to—
 - (i)
 - (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or”

26. With respect to the property Mlolongo/Ngwata Phase III/Plot No.1264, the Applicant alleges that though the property is owned by the 2nd Respondent, the same was developed using tainted funds contributed by the 1st Respondent as her husband. That the 1st Respondent did not sufficiently explain his contributions of Kshs.6,400,000 towards the construction of the property. On her part, the 2nd Respondent annexed to her replying affidavit, a handwritten agreement for sale dated 18th March 2007 and alleged that she purchased the property for a consideration of Kshs 110,000 paid in two installments. She also produced a loan application form dated 16th December for a sum of Kshs 200,000 from Premap agreement for sale of a m/v KBQ 079 for a consideration of Kshs 600,000, bank statements for her account No. 058000010027 in Family Bank, Kariobangi Branch and Account No. 0840193422756 in Equity Bank, Kariobangi Branch for the periods between 2014 to 2019, she also annexed tenancy agreements for twenty four tenants on the property Megahit Apartments, Kenya Revenue Authority (KRA) Income Tax Slips for rental income for various months between the years 2019 and 2020 and a Nairobi City County business permit for Site Annex Bar and Restaurant for the year 2019. She also produced a letter of temporary employment with the Kenya Revenue Authority dated 30th August 2006. In sum, she argued that the property was built and developed in five phases



gradually from the year 2007 using the rental income derived thereat, loans from PREMAP Sacco and funds from her matatu business.

27. The 1st Respondent on his part contended that none of the funds he had received in his Mpesa account was used to develop the property; that he conducted Mpesa business with various customers including foreigners and that none of the funds were derived from human trafficking; that the funds were from his bar and restaurant businesses, farming and Mpesa businesses. He exhibited business permits, a liquor licence for the bar, his bank statement for Equity Bank Account No. 0320190240971 and a statement for Sumat Sacco Society.
28. From an analysis of the material placed before this court it is not in doubt that the property Mlolongo/ Ngwata Phase III/Plot No.1264 was acquired by the 2nd Respondent on 18th March 2007. This is quite plainly evidenced by the sale agreement between her and one Kioko Mutisya. There is also evidence that as at that time she was formally employed by the Kenya Revenue Authority and hence in a position to acquire a property of that value. It is however instructive that the property was not developed as at the point of sale. It is indeed her evidence that she developed the property in phases between 2016 and 2019. There is also evidence on a balance of probabilities and this is admitted by both the 1st Respondent and herself that the construction/development of the property was contributed by both of them. The admission is contained not only in their affidavits but also in the statements which they recorded at the Assets Recovery Agency and which now form an admission in these proceedings by dint of Sections 17, 18 and 19 of the *Evidence Act*. That being the position, the property although it was acquired by the 2nd Respondent and developed partly with her funds it would be tainted property if it is shown that funds from an illegal enterprise such as trafficking in persons were injected into its development. This finding would find basis from the definition of proceeds of crime as including “property into which any property derived of 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”. It would also derive from the definition of tainted property to include “proceeds of the offence”. Therefore, to determine whether this landed property is proceeds of crime or tainted property one has to determine whether the funds contributed by the 1st Respondent towards its construction are proceeds of crime. One must do so bearing in mind that the Applicant is not required to prove the commission of an offence and also that the standard of proof is on a balance of probabilities but not beyond reasonable doubt.
29. The Applicant contends that the funds held in the 1st Respondent’s bank accounts were suspicious deposits and are suspected to be proceeds of crime arising from the alleged illegal trafficking of persons, an offence for which the 1st Respondent has been charged with in Kiambu CMCR 430 of 2020; that the 1st Respondent is part of a complex international network of human traffickers in the business of luring unsuspecting victims with jobs in Kenya and South Africa; that the Respondent’s role is to provide transport, food accommodation and harboring the victims and that he received the funds from his associates through his Mpesa phone number +254707312787.
30. The deposits highlighted by the Applicant in the three accounts are as follows;
 - i. In a/c No.0320190240971 Kshs. 128,000, Kshs. 300,000, Kshs. 100,000, Kshs. 200,000, Kshs. 200,000 Kshs. 100,000, Kshs. 70,000;
 - ii. In a/cNo.01109486263100 Kshs. 40,000, Kshs. 23,000 Kshs. 19,500 Kshs. 21,000 Kshs. 40,000 Kshs. 43,000 Kshs. 34,000 and Kshs. 40,000; and
 - iii. Kshs 200,000 in a/c no. 041000018442.



31. The Applicant seeks the forfeiture of the following amounts: Ksh.157,633.00 in bank account No. 0320190240971 held at Equity Bank Ltd in the name of Peter Mugi Kamau, Ksh.200,000.00 held in bank account No. 041000018442 held at Family Bank Ltd, in the name of Peter Mugi Kamau and Ksh.29,573,00 in bank account No. 01109486263100 held at Cooperative Bank Ltd in the name of Peter Mugi Kamau.
32. On his part, the 1st Respondent contends that he runs an Mpesa business through which he transacts with various customers including foreigners. He explained that the funds in his bank accounts were not from Mpesa, but received from his Jonsaga Sacco, his bar and restaurant business and his matatu businesses. That none of the funds were from the alleged Ethiopian associates. He drew a table to show the receipt of loans from Jonsaga Sacco and referred to the affidavit of the Sacco Chairman Richard Ndolo Kivuva in support. He also produced business permits and bank account statements for the specified accounts and explained that he received the funds from legitimate sources and further that the funds were acquired before the offence allegedly committed in October 2020.
33. I have carefully considered the evidence by both sides carefully and it is my finding that the Assets Recovery Agency/Applicant has proved on a balance of probabilities that the 1st Respondent received suspicious deposits in his accounts. The Applicant has demonstrated that the deposits were from persons of Ethiopian descent and this coupled with the evidence that twenty-two persons of Ethiopian descent were found in a residence owned by him can only mean that these funds were deposited in his account in connection with those persons. The 1st Respondent admitted having received funds from the persons of Ethiopian Origin and the Applicant's case cannot therefore be said to be mere speculation. The Assets Recovery Agency/Applicant having discharged its legal burden the evidential burden shifted to the 1st Respondent to prove that the funds were legally acquired. It is my finding however that he did not discharge this burden on a balance of probabilities. Although he alleges to have been involved in a matatu, diesel and Mpesa business, he did not produce any documents that would satisfy this court that that was the position or that he was engaged in any legitimate business at all. He did not for instance exhibit any PSV or any licences authorizing him to engage in the business of mpesa or sale of petroleum products. Neither did he produce records evidencing that the funds were from the alleged businesses. Even for the Bar and Restaurant all he annexed was a Nairobi City County Liquor Licence and a Business Permit but no statements accounts, business accounts and business records. As for the loans I find that for as long as they were intermingled with or paid through funds from proceeds of crime they too are proceeds of crime. It is also my finding and I am so persuaded on a balance of probabilities that not only were the funds in the 1st Respondent's accounts acquired from the illegal business of trafficking in persons but that he used those funds to acquire to aid his wife the 2nd Respondent in putting up apartments on the landed property hence rendering the property a proceeds of crime as defined in Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act*. He also used the construction to launder funds acquired from the illegal business by intermingling it with the rent obtained from the apartments. Money laundering is also an offence and hence making the property tainted liable for forfeiture to the State. As for motor vehicle KCY 751K Toyota Succeed this court was informed that it was used to transport the Ethiopians who were being harboured by the 1st Respondent. The person in whose name the vehicle is registered did not enter appearance in these proceedings and hence that evidence was not rebutted. I find therefore that the motor vehicle is an instrumentality of crime.



34. The Interested Party, as owner of the motor vehicle KCY 752K Toyota Succeed, failed to enter appearance or file a response. Section 95 of the *Proceeds of Crime and Anti-Money Laundering Act* makes provision for forfeiture by default of appearance of parties:

“95. Forfeiture order by default

1. If the Agency Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 91(1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who served notices in terms of section 83(3) have knowledge of notices given under section 91(2), the High Court may—
 - a. make any order by default which the High Court could have made under sections 88(1) and (2);
 - b. make such order as the High Court may consider appropriate in the circumstances; or
 - c. make no order.”

35. In regard to the other vehicles the 1st Respondent did not prove the manner in which the funds used in the acquisition of the motor vehicles were obtained and this court is therefore persuaded that the applicant has established, on a balance of probabilities, that the motor vehicles registration numbers KCL 704Z Toyota Wish, KBK 017B Toyota Hiace, KBH 815V Nissan Caravan, KCB 520Y Toyota DBA-NZE 10G are also proceeds of crime.

36. The upshot is that the Assets Recovery Agency/Applicant has proved its case against the Respondents and the Interested Party on a balance of probabilities; that the landed property LR Mlolongo/Ngwata Phase III/Plot No. 1264, the funds in the cited bank accounts of the 1st Respondent and the motor vehicles KCL 704Z, KBK 017B, KBH 815V, KCB 520Y are all proceeds of the illegal business of trafficking in persons hence tainted property. They are therefore all liable for forfeiture to the State.

37. Accordingly, judgment is entered for the Assets Recovery Agency/Applicant against the Respondents and the properties as listed below be and are hereby forfeited to the State.

- a. Land Parcel Mlolongo/Ngwata PhaseIII/Plot No.1264 and developments thereon.
- b. Motor vehicle registration number: KCL 704Z Toyota Wish.
- c. Motor vehicle registration number KBK 017BToyota Hiace.
- d. Motor vehicle registration number KBH 815VNissan Caravan.
- e. Motor vehicle registration number KCB 520Y ToyotaDBA-NZE 10G.
- f. Motor vehicle registration number KCY 752K Toyota Succeed.
- g. Ksh.157,633.00 in bank account No.0320190240971 held at Equity Bank Ltd in the name of Peter Mugi Kamau.
- h. Ksh.200,000.00 held in bank account No. 041000018442 held at Family Bank Ltd, in the name of Peter Mugi Kamau.



- i. Ksh.29,573,00 in bank account No.01109486263100 held at Cooperative Bank Ltd in the name of Peter Mugi Kamau.

38. The Respondents and the Interested Party shall bear the costs of these proceedings.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 4TH DAY OF MAY 2023

E. N. MAINA

JUDGE

