



**Assets Recovery Agency v Mwangi (Anti-Corruption and Economic Crimes Civil Suit E005 of 2023) [2023] KEHC 19768 (KLR) (Anti-Corruption and Economic Crimes) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19768 (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 E005 OF 2023**

**EN MAINA, J**

**JULY 6, 2023**

**BETWEEN**

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

**AND**

**PETER MUNGAI MWANGI ..... RESPONDENT**

**JUDGMENT**

1. The Assets Recovery Agency/applicant filed an originating motion dated February 7, 2023 under sections 81, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (the POCAMLA) seeking orders as follows:
  - 1) That this honourable court be pleased to issue an order declaring that motor vehicle registration number KCV 877W Nissan March is an instrumentality of crime and therefore liable for forfeiture to the applicant on behalf of the State.
  2. That this honourable court be pleased to issue orders of forfeiture of the following motor vehicles KCV 877W Nissan March
  3. That this honourable court be pleased to issue an order that the above motor vehicle be forfeited to the State and transferred to the Assets Recovery Agency (the applicant herein).
  4. That the respondent be directed to surrender the original logbook of the motor vehicle registration number KCV 877W Nissan March to the applicant.
  5. That an order directing the Director General of National Transport and Safety Authority to transfer motor vehicle registration number KCV 877W Nissan March to the applicant.



6. That costs be provided for.”
2. The gist of the application is that; that on January 31, 2020 police officer acting on intelligence intercepted motor vehicle registration number KCV 877W Nissan March at Jomvu area in Jomvu Sub-County within Mombasa County; that upon searching the motor vehicle the police recovered a substance suspected to be narcotic drugs namely cannabis sativa to wit 111.40 kilograms with a street value of 2,228,000/- that was concealed in the vehicle; that on the February 3, 2020 the respondent was charged 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 in the Chief Magistrates Court at Mombasa vide criminal case No CR No 235 of 2020; that the Assets Recovery Agency commenced investigations to recover the instrumentality of crime used in the illicit trafficking and trading of narcotic drugs in accordance with its mandate; that investigations established that there are reasonable grounds to believe that the suit motor vehicle was used as an instrument in transporting and concealment of narcotics in the illicit trade of narcotic drug substances contrary to the provisions of the *Narcotic Drugs and Psychotropic substances (control) Act* No 4 of 1994 and the *Proceeds of Crime and Anti-Money Laundering Act 2009*; that investigations established that the suit motor vehicle KCV 877W Nissan March is an instrumentality of crime as defined by the provisions of the *Proceeds of Crime and Anti-Money Laundering Act 2009*; that the applicant obtained orders of preservation of the suit motor vehicle registration number KCV 877W Nissan March in Nairobi High Court Miscellaneous Application number E058 of 2022 Assets Recovery Agency vs Peter Mungai Mwangi; that the applicant is mandated under *POCAMLA* to trace, identify and make an application for forfeiture of instrumentalities of crime and proceeds of crime and that it is in the interest of justice and in the public interest that forfeiture orders do issue forfeiting the motor vehicle registration number KCV 877W Nissan March to the state.
3. The respondent through an undated replying affidavit sworn by the respondent and filed herein on May 24, 2023 avers that the application is bad in law, is defective and an abuse of the court process; that he is a taxi driver by profession and he purchased the motor vehicle on August 6, 2019 for a consideration of Kshs 450,000/- through his savings, proceeds of sale of one of his other motor vehicles KCK 092Y Toyota Probox and a loan from Kigumo Self Help Group for Kshs 54,708.20/-
4. He avers that on January 30, 2020 at around 2200hrs, he had stopped the motor vehicle along Jomvu-Changamwe road to relieve himself when four men armed with guns emerged from a Toyota Probox and accosted him; that the men searched his vehicle but did not find anything; that the men however found three (3) sacks in a bush across the place he had stopped which they alleged were sacks of bhang and said they were his. He was then arrested and his vehicle impounded and taken to Mikindani Police Post. He deposed that his vehicle has never been used as an instrumentality of crime and neither was it purchased using proceeds of crime.

### **Submissions by the Parties**

5. Learned Counsel for the applicant framed the following issues for determination:- whether the motor vehicle registration number KCV 877W registered in the name of the respondent is an instrumentality of crime; and if in the affirmative, whether the motor vehicle registration number KCV 877W registered in the name of the respondent should be forfeited to the State.
6. Counsel submitted that the respondent was arrested on January 31, 2020 at Jomvu-Changamwe road and upon searching his motor vehicle registration No KCV 877W at the scene, the officers found 204 rolls of dry green material suspected to be a narcotic substance wrapped in khaki paper; that the respondent was arrested and the motor vehicle and the exhibits taken to Mikindani Police Station. That



a subsequent analysis of the green substance by the government chemist revealed that the 204 rolls weighing 111.40 kilograms were cannabis sativa, a narcotic drug with a street value of Kshs 2,200,000. The respondent was then charged in the Senior Principal Magistrates Court at Shanzu Law Courts in Criminal Case No 88 of 2019 and CR Case No E1177 of 2021.

7. Counsel stated that the agency's investigations therefore revealed that the motor vehicle was an instrumentality of crime; that on September 10, 2020 the respondent recorded a statement at the agency's chambers and stated that he purchased the vehicle from one Suleiman Raja on August 6, 2019 at a price of Kshs 600,000/-. Counsel asserted that there is a nexus between the respondent and the motor vehicle which was impounded while ferrying narcotics; that the crime of ferrying narcotics is a threat to national security, public good and order, public interest and leads to erosion of societal values by rendering the youth unproductive and that the motor vehicle should be forfeited to the state so as to deprive the respondent the benefit of using it to transport narcotic substances.
8. Counsel further submitted that the motor vehicle is a "realizable property" within the meaning of section 2 of the [POCAML](#) and as such, liable for forfeiture under section 92 (1) of that Act; that the civil forfeiture proceedings are not the same as the proceedings in the criminal court as the court is only required to determine on a balance of probabilities whether the motor vehicle is an instrumentality of crime. Further, that section 92(4) of the [POCAML](#) provides that the validity of a forfeiture order is not affected by the outcome of criminal proceedings. For this Counsel relied on the cases of [Kenya Anti-Corruption Commission v Stanley Mombo Amuti](#) [2017] eKLR and [Teckla Nandjila Lameck v President of Namibia](#) 2012 (1) NR 255(HC).
9. Counsel argued that under section 131 of the [POCAML](#), the provisions of the Act supersede those in any other written law in the event of conflict, including the [Narcotics Drugs and Psychotropic Substances Control Act](#).

### Submissions by the Respondent

10. The respondent in opposing the originating motion filed submissions dated May 24, 2023.
11. The respondent while citing section 92 of the [POCAML](#) submitted that it is the duty of the applicant to prove on a balance of probabilities that the properties in question are proceeds of crime. That the applicant has not placed any evidence before court to prove that the vehicle was acquired from proceeds of crime; that the only evidence filed in court is that the respondent was arrested and charged. They relied on the case of [EACC vs Ministry of Medical Services and another](#) [2012] eKLR.

### Issues for Determination

12. The issue arising for determination is :Whether this court should make a declaration that the motor vehicle registration number KCV 877W Nissan March is an instrumentality of crime liable for forfeiture to the State.

### Analysis and Determination

13. The applicant seeks the forfeiture of the motor vehicle registration number KCV 877W Nissan March to the State under sections 92 of the [POCAML](#) whose relevant provisions state: -
  - " 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.

.....

(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.”

14. The forfeiture of properties “used or intended for use in the commission of an offence” are ordinarily referred to as “instrumentalities of crime”, which terms have been borrowed from International and Regional treaties and conventions that Kenya has ratified, including the [United Nations Convention against Corruption](#) (UNCAC), [United Nations Convention against Transnational Organized Crime](#) (UNCTAOC), [AU Convention for Combating Corruption](#). Such forfeiture is essential in the fight against crime as they deprive criminals of resources and instruments used in commission of crimes. See the case of [Letiyia ole Maine v Republic](#) [2021] eKLR.
15. In determining applications for forfeiture of instrumentalities of crime such as in this case, the court must, in my opinion, be satisfied that the property was used or was intended for use in the commission of a crime.
16. This court is also alive to the principles that these being civil proceedings the burden of proof is on a balance of probabilities and that as provided in sub-section (4) of section 92 the applicant need not prove the commission of a specific offence. It is however instructive that in this case the specific offence it is alleged was committed by the respondent is stated to be trafficking/ferrying narcotic drugs. The court has also been told that as a matter of fact the respondent was arraigned in a court in Mombasa for that offence. The respondent has vehemently disputed that he committed that offence and stated that the suspected narcotics were found not in his vehicle but in a bush across from his vehicle. He has however admitted that the motor vehicle is his. There is therefore an issue in dispute as to whether the narcotic drugs were found in his vehicle and that must be determined before an order for forfeiture can be made.
17. In my view a case for forfeiture of an instrumentality of crime is very different from the case of proceeds of crime where once the applicant has demonstrated on a balance of probabilities that the respondent was found in possession of property, say large sums of money, in circumstances that lead to a “suspicion” that the property is proceeds of crime then the evidential burden shifts to the respondent to prove that the property was acquired lawfully. Here we have a person who is accused of trafficking in narcotics which he vehemently denies and indeed the deponent of the applicant’s supporting affidavit stated that the narcotics were not in the vehicle but in the vicinity of the vehicle and therefore that fact must be proved first. Trafficking in narcotics is of course a crime and a very serious one at that and should it be proved to the satisfaction of this court that the respondent’s vehicle was used to traffick the narcotic drugs then this court would certainly forfeit the vehicle. However, the court to determine that issue cannot be this court but the Magistrate Court where the respondent is being tried for this offence. While the burden of proof in these proceedings is lower it is important that this court allows the trial magistrate to determine the case before it. It after all also has jurisdiction under section 20 of the [Narcotic Drugs and Psychotropic Substances Act](#) to make orders for forfeiture of the motor vehicle should it find the accused culpable.
18. There is, in my view, no conflict between the [POCAMLA](#) and the [Narcotic Drugs and Psychotropic Substances Act](#) in so far as the issues in this case are concerned and section 131 of the [POCAMLA](#) is of no relevance.



19. As I have always found and held as both this court and the Magistrates Courts both have jurisdiction to forfeit the conveyances of illicit drugs the court best suited to do so is the magistrates court and if any party be aggrieved by the decision of that court they can exercise their right of appeal to this court.
20. For the avoidance of doubt, it is to be noted that this court is not saying that the motor vehicle is not an instrumentality of crime. What it is saying is that the best suited court to determine whether his vehicle was used to commit a crime is the court trying the case. The right to fair trial requires that an accused be given an opportunity to call evidence and to cross examine the witnesses called by the prosecution which cannot be done in this court.
21. The upshot is that this application is struck out with liberty granted to the applicant through the State Agency is seized of that power, to make the application in the Magistrates' Court.
22. In regard to costs the order that commends itself to me is that each party shall bear its own costs.

Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 6TH DAY OF JULY 2023.**

**E. N. MAINA**

**JUDGE**

