



**Assets Recovery Agency v Waithira; Co-operative Bank of Kenya Ltd
(Interested Party) (Civil Suit E006 of 2023) [2023] KEHC 22509 (KLR)
(Anti-Corruption and Economic Crimes) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL SUIT E006 OF 2023
EN MAINA, J
SEPTEMBER 21, 2023**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

BETH WAMBUI WAITHIRA RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LTD INTERESTED PARTY

JUDGMENT

1. The Assets Recovery Agency, the applicant herein, filed an originating motion dated February 9, 2023 supported by an affidavit by Jackson Kimani, an investigator with the applicant sworn on an even date.
2. The originating motion is brought under the provisions of sections 81, 90 and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAMLA) and seeks the following orders:-

- “(1) That this Honourable Court be pleased to issue an order declaring that motor vehicle registration number KCT 654R, Toyota Ractis, Chàssis/frame Number Ncp120-2034061, Engine Number INZ-D965239 is proceeds of crime liable for forfeiture to the applicant.
2. That this Honourable Court be pleased to issue orders of forfeiture of the following motor vehicle to the Assets Recovery Agency on behalf of the Government; KCT 654R, Toyota Ractis, Chassis/frame Number NCP120-2034061, Engine Number 1NZ-D965239.



3. That this Honourable Court be pleased to issue an order that the above motor vehicle be forfeited to the Government of Kenya and transferred to the Assets Recovery Agency (the applicant herein).
4. That this honourable Court to issue an Order directing the Director NTSA to transfer ownership in the Logbook of the motor vehicle in prayers 1 and 2 above in the name of the Interested Party in favour of Assets Recovery Agency.
5. That this court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the applicant.
6. That costs be provided for.”

3. The application is based on the following grounds stated on the face of it and the supporting affidavit of Jackson Kimani, Investigating Officer:

- “(1) 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 assets which are acquired from or are the profits or benefits of proceeds of crime.
2. 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.
 3. That undersection 90 of POCAML, 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.
 4. That the respondent is a female adult of sound mind residing within Nairobi County and the registered owner of the motor vehicle specified under prayer 2 which the applicant seeks to be forfeited to the Government.
 5. That the Interested Party the Co-operative Bank of Kenya Limited is incorporated in Kenya under the Company Act and is also licensed to do the business of banking under the *Banking Act* and also the registered owner of the asset specified under prayer 2.
 6. That the Agency opened an Inquiry File 15 of 2022 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*.
 7. That on or about February 15, 2022, the Agency received information from the Directorate of Criminal Investigations, on suspected dealing in endangered wildlife species by the respondent.
 8. That on or about December 7, 2021 the respondent was arrested at Athi River within Machakos County transporting endangered wildlife species namely



sandalwood conveying them in a motor vehicle registration KCT. 654R, Toyota Ractis.

9. That the respondent was arrested and interrogated and a search conducted on the motor vehicle registration number KCT 654R, Toyota Ractis and four sacks fully filled with wood contents were recovered from the said motor vehicle.
10. That the police further extended the search on the motor vehicle registration KCT 654R, Toyota Ractis which at the time of the arrest of the respondent was in her possession and four sacks fully filled with wood contents concealed with a sheet from the front side and a car mat from the rear side were recovered from the motor vehicle registration number KCT 654R, Toyota Ractis.
11. That preliminary investigations established that at the time of the arrest of the respondent, she was in control and possession of the motor vehicle registration number KCT 654R, Toyota Ractis.
12. That the respondent was charged on December 20, 2021 before the Chief Magistrate's Court, Kahawa with the offence of dealing in endangered wildlife species contrary to section 92(2) as read with section 105 (1) (b) of [Wildlife Conservation and Management Act](#), 2013 Kahawa Chief Magistrate's Criminal Case No. E046 of 2021.
13. That the motor vehicle registration KCT 654R, Toyota Ractis was towed to DCI Head Quarters, Kiambu Road.
14. That our preliminary investigations established that the respondent is the registered Owner of the motor vehicle registration number KCT 654R, Toyota Ractis together with the Interested Party, Cooperative Bank of Kenya Limited.
15. That the motor vehicle registration number KCT 654R, Toyota Ractis is reasonably suspected to be proceeds of crime purchased using illicit funds.
16. That the motor vehicle registration number KCT 654R, Toyota Ractis is an instrumentality used in the commission of an offence and that there are reasonable grounds to believe that the motor vehicle is also a proceed of crime contrary to section 3, 4 and 7 as read together with section 16 of [Proceeds of Crime & Anti-Money Laundering Act](#).
17. That the motor vehicle registration number KCT 654R, Toyota Ractis having been procured using proceeds from the illicit trade in endangered wildlife species and used for commission of a crime, the assets are liable for confiscation by the State under the [Proceeds of crime and Anti Money Laundering Act](#) 2009.
18. That investigation established that there are reasonable grounds to believe that the asset/property was obtained through the illegitimate scheme of dealing in endangered wildlife species and the motor vehicle is a benefit of an illegal act.
19. That it is in the interest of justice that this Honourable Court grants the forfeiture orders sought.



20. 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 the general public interest.
 21. That there attaches an international obligation for every state to combat illegitimate trade in endangered Species and laundering of proceeds of crime by proper implementation of their national domestic laws.
 22. That it is in the interest of justice that forfeiture orders do issue forfeiting the motor vehicle specified above to the applicant.”
4. The application was opposed by the respondent and the interested party vide the replying affidavits dated March 18, 2023 and April 25, 2023 sworn by the respondent and one Jackson Oire respectively. The respondent also relied on a further affidavit sworn on April 25, 2023.
 5. The applicant and the interested party filed written submissions dated June 15, 2023 and 8th August 2023 respectively. The respondent did not file written submissions to the Application.

The applicant’s case

6. The crux of the applicant’s case is that the respondent was charged, and was convicted for the offence of dealing in endangered wildlife species contrary to section 92(2) as read with section 105 (1) (b) of the *Wildlife Conservation and Management Act*, 2013 on her own plea of guilty in Kahawa CMCC No. E046 of 2021. The respondent was subsequently sentenced to a fine of Kshs. 200,000 in default to serve imprisonment for a term of 12 months.
7. The applicant contends that in the period between April 8, 2021 and December 2021 the respondent’s account No. 0110XXXXXXXXXXXX at Cooperative Bank received suspicious cash deposits amounting to Kshs. 2,789,250 and Mpesa deposits from No. 0720644XXX of Kshs. 2,666,405 respectively. That in the period 1st January 2016 to December 31, 2022 the said phone number which was registered in the name of the respondent received Kshs. 17,322,191 through Mpesa from various numbers; that the respondent was in communication with one Morris Maina Njuguna and Agnes Nasieku, individuals who were also charged with the offences of dealing in endangered wildlife species and possession of wildlife trophy respectively.
8. Learned Counsel for the applicant submitted that section 92(1) of the *Proceeds of Crime and Anti-Money Laundering Act* empowers this court to make an order for forfeiture of property that has been used or intended for use in the commission of an offence or is a proceed of crime; that the right to property under article 40 of *the Constitution* excludes property found to have been unlawfully acquired.
9. Counsel stated that forfeiture proceedings are civil in nature and the standard of proof is on a balance of probabilities as held in the case of *Director of Assets Recovery and Others, Republic vs Green & Others* (2005) EWHC 3168 cited in the case of *Assets Recovery Agency -v- Pamela Aboo; Ethics & Anti-Corruption commission (Interested Party)* (2018) eKLR where it was stated:-
 - “ 63. In civil proceedings for recovery under part 5 of the Act, the Director need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained. The proceedings before this court are to determine the criminal origins of the property in



issue and are not a criminal prosecution against the respondent where the presumption of innocence is applicable.”

10. Counsel also placed reliance on the cases of Director of Assets Recovery and Others [2005] EWHC and *ARA v Audrene Samantha Rowe & Others* Civil Division Claim No. 2012 HCV02120 Court of Appeal of Jamaica and submitted that the motor vehicle KCT 654R Toyota Ractis is a proceed of crime having been bought from the proceeds of illicit trade in endangered wildlife species; that the EA Sandalwood tree (*Osyris lanceolata*) was listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in 2013 and in schedule 6 of the *Wildlife Conservation and Management Act*, 2013, the species is listed as critically endangered, vulnerable and nearly threatened, hence protected. Counsel asserted that Kenya, as a signatory of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* is obligated under article 2 of *the Constitution* to enforce the obligations under the convention.
11. Counsel contended that the respondent is part of a complex network of individuals dealing in endangered wildlife species and sandalwood for purposes of exploiting and obtaining gain from the illegal trade; that she used the proceeds to purchase the motor vehicle KCT 654 R Toyota Ractis; that the use of the motor vehicle as a collateral for her loan with the Interested Party was a decoy to enable her launder the proceeds and introduce it to the financial system. That there is no evidence to show whether the vehicle was acquired through legal means. That the evidential burden of proof had shifted to the to the respondent to explain the source of funds in the purchase of the vehicle, which she had failed to discharge.
12. With respect to the claim by the Interested Party, Counsel conceded that the Interested Party was a joint owner of the impugned motor vehicle; that the Interested Party had advanced a loan of Kshs. 250,000 to the respondent on March 9, 2021 and that the motor vehicle was used as a collateral for the loan. Counsel however contends that the proprietary interests of the interested party are commercial in nature and as such, they can pursue a claim against the respondent in a commercial suit; that forfeiture is a fair remedy and the release of the motor vehicle will only have facilitated the respondent’s illegal activities. Counsel urged the court to allow the Originating Motion.

The respondent’s case

13. The respondent opposed the originating motion through a replying affidavit sworn by herself on March 18, 2023.
14. The respondent contends that she is registered as a joint owner of the subject motor vehicle alongside the Interested Party. That she purchased the vehicle through a Cooperative Bank loan for which she had an outstanding balance of KShs. 198,144 as at the date of the order for preservation; that she is a business lady earning an income from businesses and the confiscation of the vehicle led to her defaulting in the loan repayments.
15. She contended that having been purchased through a loan, the motor vehicle cannot be a proceed of crime. She relied on the case of *Assets Recovery Agency vs Rose Monyani Mosanda: Sidian Bank Limited (Interested Party)* [2020] eKLR. She further contended that the mere fact that she was arrested with the vehicle and that she pleaded guilty in Kahawa CMCC No. E046 of 2021 is not sufficient proof that the vehicle is a proceeds of crime and that the vehicle is her only source of livelihood. She urged this court to dismiss the Originating Motion and order the release of the motor vehicle to her.



The Interested Party's case

16. The interested party opposed the originating motion vide the replying affidavit of Jackson Oire sworn on April 26, 2023. It also relied on the written submissions of its learned Counsel dated August 8, 2023.
17. The interested party's contention is that the bank is a joint owner of the subject property, having registered its interest under the Moveable Property Security Rights Act; that its interest is enforceable against third parties under section 6 and 15 of the aforesaid Act as well as under section 93 of the *Proceeds of Crime and Anti-Money Laundering Act*; that it advanced a loan of Kshs. 250,000.00 to the respondent on March 8, 2021 through a loan account No. 016F4145451301 as working capital to buy more stock; that the motor vehicle was purchased before the Bank advanced the loan; the Bank perfected the collateral by registering its interests against the vehicle; that the vehicle KCT 645R is now registered in the joint names of the respondent and the Bank following the due process of the law; that section 8 of the *Traffic Act* provides that the registered owner is deemed to be the owner; that the respondent was repaying the loan advanced in line with the terms of the letter of offer up until November 30, 2021 when she made the last instalment; that since then the respondent has defaulted in the loan repayment and that the preservation orders were made during the default period.
18. The Bank contends that it has proven that it acquired an interest in the motor vehicle as collateral for a loan and the forfeiture orders if made, would disenfranchise the Bank from its legal right over the property; that the applicant is not entitled to the orders sought and that the Originating Motion should be dismissed. Learned Counsel for the Bank placed reliance on the case of *Assets Recovery v Quorum Limited & Another; Duchess Park Limited (Interested Party)* [2018] eKLR.
19. Issues for determination
 1. Whether the motor vehicle registration number KCT 654R, Toyota Ractis, is a proceed of crime liable for forfeiture to the State; and
 2. Whether the interested party has met the threshold for protection under section 93(1) of the POCAMLA.

Analysis and determination

Whether the motor vehicle registration number KCT 654R, Toyota Ractis, is a proceed of crime liable for forfeiture to the State

20. The applicant's originating motion invokes the jurisdiction of this court under section 90(1) and 92(1) of the *Proceeds of Crime and Anti-Money Laundering Act*. The law provides:-
 - “ 90. Application for forfeiture order
 - (1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.
 92. Making of forfeiture order
 - (1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—



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

21. It is not disputed that the respondent was charged in Kahawa Chief Magistrate's Criminal Case No. E. 046 of 2021 and convicted on her own plea of guilty, for the offence of dealing in endangered wildlife species contrary to section 92(2) as read with section 105 (1) (b) of [Wildlife Conservation and Management Act](#).

22. The particulars of the charge were that:-

“Beth Wambui Waithira (the respondent herein), on 7th December 2021 at Athi River area in Machakos County within the Republic of Kenya, was found transporting endangered wildlife species namely sandalwood to wit 300.15kgs valued at Kshs. 900,450/- in a motor vehicle registration number KCT 654R make Toyota Ractis maroon in colour without a permit from the director of wildlife service.”

23. The respondent having pleaded guilty to the charge leaves no doubt that the motor vehicle, the subject of these proceedings, was used in the commission of the offence. In other words, it is an instrumentality of crime.

24. The respondent had not filed an appeal against the conviction or sentence as at the date of the filing of this suit. Under section 47A of the [Evidence Act](#) this court is left with no alternative but to find that she committed the offence which in any case she continues to admit. The section states:-

“47A. Proof of guilt

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

25. The respondent's contention is that the motor vehicle is not a proceed of crime, that it was purchased from a loan from the Interested Party. That is of course not true because according to the Interested Party the respondent used the vehicle as collateral/security for a loan to increase her stock. This means that she already had the vehicle when she took the loan. It is my finding that there was no evidence to rebut that of the applicant that she received huge deposits in her account which were suspected to be proceeds of the illegal trade. It is therefore highly probable that the vehicle was acquired through those funds and is therefore a proceed of crime. Even if it were not it would still be liable for forfeiture for being an instrumentality of crime.

26. Accordingly, guided by the provisions of section 47A of the [Evidence Act](#) and section 92(2) of the [Proceeds of Crime and Anti-Money Laundering Act](#) this court makes the finding that the applicant has proved on a balance of probabilities that the motor vehicle KCT 654R Toyota Ractis was used in the commission of an offence and is therefore liable for forfeiture to the state.



Whether the Interested Party has met the threshold for protection under Section 93(1) of the POCAMLA

27. The interested party herein claims a legal and beneficial interest in the motor vehicle KCT 654R by virtue of being a joint owner of the vehicle. The interested party alleges to have advanced a loan of Kshs. 250,000 to the respondent on March 8, 2021 through a/c No. 016F4145451301 for the purpose of working capital, which loan was secured by the motor vehicle KCT 654R; that, the vehicle was registered jointly between the Bank and the respondent as security for the loan, and the respondent has defaulted in the repayment since November 30, 2021 and hence it is entitled to have the vehicle released to it under section 6(4) and 15 of the *Moveable Property Securities Rights Act* 2017 and 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* protects the interest of third parties in civil forfeiture proceedings provided that they were not involved in the commission of the offence in question or had no knowledge of the commission of the offence or unlawful activity. The law provides as follows:

“93.

- (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. There is no doubt that the motor vehicle KCT 654R is jointly registered in the names of the respondent and the interested party. The interested party produced a loan application, loan agreement and security agreement dated March 8, 2021 and March 9, 2021 respectively between it and the respondent. It also produced a statement of the respondent's account No. 016F4145451301 described as MSME term loan showing an outstanding balance of Kshs. 116,666.64 as at December 15, 2021. The applicant does not contest that the motor vehicle is jointly owned by the respondent and the interested party and neither does it contest the evidence produced by the Interested Party. There is therefore no dispute that the Interested Party has an interest in the motor vehicle. From the material placed before it, this court



has no doubt that the interested party was not in any way involved in the commission of the offence and neither was it aware that the vehicle was being used for an illegal purpose.

30. The above be as it may, the bank's interest does not outweigh the public interest that criminals should not get away with crime. Should this court release the vehicle to the interested party it will be tantamount to giving licence to would be criminals to go to financial institutions for funding to buy vehicles which they then use to commit crimes as they shall get away with it. In my view the interested party is not left without a remedy as it can pursue a claim against the respondent for the balance. That way the respondent shall loose the motor vehicle and still pay the balance and that will serve as a deterrence.
31. The upshot is that the Assets Recovery Agency's/applicant's claim against the respondent succeeds and the Motor Vehicle Registration No. KCT 654R shall be forfeited to the State. The Interested Party's claim to the motor vehicle however fails and it shall be left to pursue the respondent for the balance of sum advanced to her.
32. The costs of the proceedings for the ARA/applicant as well as for the Interested Party shall be met by the respondent. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2023.

E N MAINA

JUDGE

In the presence of:-

Ms Irari for ARA/applicant

Ms Mulwa for Oscar Otieno for respondent

No appearance for the Interested Party

