



**Asset Recovery Agency v Ngugi (Anti-Corruption and Economic Crimes Application E030 of 2023) [2024] KEHC 13959 (KLR) (Anti-Corruption and Economic Crimes) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13959 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES APPLICATION E030 OF 2023**

**PJO OTIENO, J**

**NOVEMBER 7, 2024**

**BETWEEN**

**ASSET RECOVERY AGENCY ..... APPLICANT**

**AND**

**CAROLINE NYAMBURA NGUGI ..... RESPONDENT**

**JUDGMENT**

1. By way of an originating motion dated 24.10.2023 brought premised upon sections 81, 90 & 92 of the Proceeds of Crime and Anti Money Laundering Act (henceforth, POCAMLA) as well as Order 51 of the Civil Procedure Rules, the applicant has moved the court for the following orders and reliefs against the respondent;
  - a. That this Honourable Court be pleased to issue an order declaring that motor vehicle registration number KDA XXXX, Mercedes Benz, Station Wagon, Chassis/Frame Number WDD24624XXXX, Engine Number 270 91XXXXX is a proceed of crime liable for forfeiture to the applicant.
  - b. 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; KDA XXXX, Mercedes Bens, Station Wagon, Chassis/Frame Number Wdd24624xxxx, Engine Number 270 91XXXXX
  - c. 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.



- d. That this Honourble, 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 the Assets Recovery Agency.
  - e. That this court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the applicant.
  - f. That costs be provided for.
2. The application is premised on the grounds that the agency received information that motor vehicle registration number KDA XXXX, registered in the name of the respondent, had been intercepted trafficking in narcotic drugs contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 and being in possession of wildlife trophy contrary to section 95(d) as read with section 92 of the *Wildlife Conservation and Management Act*, 2014. In line with its mandate under section 53 of POCAMLA, the agency conducted investigations to identify, trace and recover proceeds of crime accrued by the respondent through illegitimate trafficking and trading of narcotic drugs and wildlife trophy.
  3. The investigations revealed to the applicant that at the time of the interception of motor vehicle registration number KDA XXXX, it carried 251.09 grams of heroin with a market value was Kshs. 753,270.00. Consequently, the agency opened Inquiry File No. 12 of 2022 to inquire into the activities of the respondent and the inquiry revealed that the motor vehicle was impounded while in the custody and control of one Ian James Omenda, an individual who was established to be well known to the respondent and was using the motor vehicle with the authority of the respondent. The agency further established that the motor vehicle was obtained through the illegitimate trade in narcotic drug substances and dealing in wildlife trophies.
  4. The application is supported by the affidavit, supplementary Affidavit, Affidavit in Response to Mr Omenda's Affidavit and a Further supplementary Affidavit all sworn by the same person, Mr. Alfred Musalia, an investigator with the agency, sworn on different dates. Unusually and strangely, the applicant even filed Grounds of Opposition to the Respondents Grounds of opposition. That is a document the court considers unknown to the law and deserves no consideration by the court.
  5. In the affidavits he reiterates the grounds on the face of the application, responds to the depositions by the respondent and asserts to correct misstatements. He asserts that the information leading to the investigations was received by the agency on or about 07.02.2022. He added vide Misc. Criminal application No. E094 of 2024, the applicant was granted orders to investigate the respondent's KCB Bank Account Number 1138XXXX which was then analyzed for the period between 12.01.2013 to 20.08.2022. The analysis established that the respondent received funds amounting to Kshs. 1,030,400.00 from the said Ian James Omenda in 31 transactions during the period. Again on 12.08.2020, the respondent received a further sum of Kshs. 2,856,600.00 out of which she transferred a sum of Kshs. 500,000.00 to Ian James with the narration "car purchase".
  6. It is further revealed that vide Misc. Criminal Application No. E095 of 2022, the agency obtained orders to investigate Mpesa accounts for the following numbers; 0715XXXX, 0795XXXX and 0710XXXX owned and controlled by the respondent and Ian James Omenda, respectively. The ensuing investigation established that mobile number 0715XXXX was registered in the name of the respondent and that between 14.01.2020 and 15.04.2020, the account received a total sum of Kshs. 1,369,158.00 in 180 transactions from Mpesa account numbers 0795XXXX, 0723XXXX and 0746XXXX all registered in the name of Ian James Omenda.



7. He added that the respondent's Mpesa Number 0715XXXX had sent suspicious funds to numbers registered in the name of Ian James Odhiambo Omenda that is, 0795XXXX, 0723XXXX and 0746XXXX amounting to Kshs. 603,410.00.
8. He averred that the respondent recorded a statement with the applicant on 03.08.2022 where she declared that she bought the motor vehicle in question from a dealer and that she paid for the purchase price in cash which money was given to her by her mother. The respondent asserted that she did not operate any bank account which fact when taken in the totality of surrounding information, the agency had reasons to believe that the motor vehicle was acquired through proceeds of illegitimate trade of narcotic drugs and illegal dealings with endangered wildlife species.
9. It was added that, the agency, vide HCAEC Misc. No. E022 of 2023 (Assets Recovery Agency v Caroline Nyambura Ngugi) obtained orders to preserve the motor vehicle which order was gazette on 01.08.2023 vide gazette notice no. 10289 of Vol. CXXV No. 175.
10. It was in conclusion, underscored that section 90 of POCAMLA provides that where a preservation order is in force, the agency may apply to the High Court for an order of forfeiture hence it is in the interest of justice that the motor vehicle be forfeited.
11. On being served with the Replying Affidavit, the applicant with the leave of the court filed two affidavits, both by the same deponent, as said before.
12. In the Further Affidavit the investigator avers that the position taken by the respondent in the Replying Affidavit is an afterthought as it contradicts the statement the respondent recorded with the applicant on 03.08.2022 in which she stated that she knew Ian James Omenda casually from a social place and did not know much about his life.
13. On the sources of funds employed for the purchase, the deponent points out that the respondent was never a beneficiary of the asset in the succession cause and that even the entity alleged to have bought the property and provided the funds had denied ever transacting.

#### **Supplementary Affidavit of Alfred Musalia Sworn On 22.04.2024**

14. In the further supplementary affidavit, it is averred that the respondent's assertion that she purchased the subject motor vehicle at a price of Kshs. 1,400,000.00 is an afterthought and it contradicts her statement where she stated that the purchase price for the motor vehicle was Kshs. 900,000.00. He disputes the sale agreement that was tendered by the respondent and details that Miriam Wanja Kamau is not a beneficiary of Land Reference Number 100XXXX and hence he questions the authenticity of the sale agreement. He avows that the entries in the title show that Naomi Mumbi Ngugi and Caroline Nyambura Ngugi only became beneficiaries of the land after completion of succession proceedings and issuance of the Certificate of Grant on 18.05.2022. He adds that the applicant sought to confirm whether such transaction took place and they wrote to the director, Acacia Green Limited, vide a letter dated 21.03.2024 and Kinyanjui Theuri, a director thereof, responded on email and stated that the company, Acacia, had not purchased the stated parcel.

#### **Opposition**

15. The respondent resisted the application for forfeiture by filling Grounds of opposition, Replying Affidavit and a Further Replying Affidavit.
16. In the grounds of opposition dated 29<sup>th</sup> February, 2023, the respondent opposed the motion on the grounds that; the subject motor vehicle cannot be deemed to be a proceed of crime or offence unless and



until the alleged offence is conclusively proved and secondly, that the respondent was never involved and/or informed of the proceedings leading up to the preservation orders and thirdly, that the applicant failed to disclose that the court in JKIA CMC Criminal Case No. E076 of 2022 in a ruling delivered on 12<sup>th</sup> May, 2022 gave orders to the effect that orders regarding motor vehicle registration no. KDA XXXX would be issued in its final judgment.

17. In the Replying Affidavit sworn on 13.03.2024, the respondent avers that she is the registered owner of motor vehicle registration number KDA XXXX which was seized on 30.11.2021 while in the custody and control of Ian James Omenda. She explained that she purchased the subject motor vehicle at a price of Kshs. 1,400,000.00 from her share of the sale proceeds of a parcel of land inherited and owned jointly with her mother and sister. From the sale of the said property, she asserted, she on 12.08.2020 received a sum of Kshs. 2,856,600.00 from a joint family account being her share.
18. Using such proceeds, she on 17.11.2020, made a cash withdrawal of Kshs. 140,000.00 which she paid to Benard Ochieng Ouma, from whom she was buying the subject motor vehicle, being 10% deposit of the purchase price. She narrated that on 18.11.2020 after confirming the ownership of the subject motor vehicle, she made a further withdrawal of Kshs. 800,000.00 out of the land proceeds and paid to Benard Ochieng Ouma. On the same day, upon satisfactory handover of the transfer documents, she paid the seller the balance of the purchase price in the sum of Kshs. 460,000.00 through a SWIFT/RTGS bank transfer.
19. She stated that at the time of the arrest of Ian James Omenda, she had given him the subject motor vehicle to go to hospital. She further stated that she cohabited with Ian James Omenda and because they shared house utilities, they borrowed money from each other from time to time and that on 12.08.2020 she lent Ian James Omenda a sum of Kshs. 500,000.00 from the proceeds of the land sale to enable him pay off a car loan he had at the time and which sums he repaid in instalments. She asserts that the source of all her funds which she sent to Ian James Omenda can be traced to the land sale proceeds and to Fuliza borrowings from Safaricom Mpesa. She proclaims that she lawfully acquired the subject motor vehicle from the disclosed legitimate sources.
20. Part of her annexures is the affidavit of Ian James Omenda sworn on 10.02.2024 in which the deponent notably fails to disclose his relationship with the respondent. Mrs Omenda depones and asserts that he is well known to the respondent who lent him the car to go to hospital on the material day when he was ambushed, blindfolded, driven around for hours before being handed over to police officers at Muthangari police station with the trumped-up charges. He alleges that the abduction and related charges was a revenge action by the same police officers who had, barely six months before, arrested him and charged him with another false charges of fraud and were embarrassed when the named complainant denounced the charges in court and he was discharged after the charges were withdrawn.
21. He asserted that any monies he gave to the respondent came from lawful earnings and emoluments which he made working for a company owned by his mother and sister and where he had been working since the year 2020 as the officer in charge of workers.
22. In the Further Replying Affidavit, whose purpose was to respond to the Supplementary Affidavits, the respondent asserted that only a portion of the land was sold to acacia and that being a lawyer, the director of the purchaser never wished to entangle with the applicant in the matter hence the cautious response which she asserted was true because not the entire piece was sold. He dubbed the claim a false one and reiterated that she bought the motor vehicle from legitimate proceeds from sale of land whose deposit, she asserted, was credited to the joint account by one John Kinyanjui in the sum of Kshs 10,000,000.



23. Parties have filed their respective submissions which the court has derived immense benefit from reading and it suffices to rehearse the same in summary as below;

### **Applicant's Submissions**

24. The applicant identifies three issues for determination by this court to be; a) whether the motor vehicle in the name of the respondent is a proceed of crime;
- b) Whether the preserved motor vehicle should be forfeited to the Government, and;
  - c) Whether criminal culpability is a precondition for civil proceedings under part VIII of the proceeds of Crime and Anti Money Laundering Act.
25. On whether the subject motor vehicle registered in the name of the respondent is a proceed of crime, the applicant submits that the respondent was aware of the criminal background of one Ian James Omenda who was arrested conveying narcotic drugs and wildlife trophies using the suit motor vehicle and that the respondent's Mpesa account No. 0715XXXX received money from Ian James Omenda which was not sufficiently explained by the respondent. It is reiterate the averments in the supporting affidavit and supplementary affidavits sworn by Mr. Alfred Musalia and argue that with the inconsistencies in the respondent's statement and affidavit, the respondent cannot be trusted. The decision in *Susan Wangui Gakula v Stephen Mwangi Gakuha (2016) eKLR* is cited for the proposition in that inconsistencies by a party are sufficient to create doubts in the mind of the court as they cast serious doubts as to the credibility of the party and therefore the court cannot shut its eyes to such serious contradictions and inconsistencies emanating from the same person.
26. The applicant further refers the court to the case of *Assets Recovery Agency v Evans Wafula Kundu & 3 others (Interested Parties) [2022] eKLR* where it was observed that;
- “ 42. The 2<sup>nd</sup> Interested Party, after denying owning any properties in her initial statement made a U-turn and changed her position and claimed ownership of LR No. Njoro/ngata BlocK 1/868 (Kiamunyi) and LR No. Kitale Municipality Block 13/Gatua/393. (See Annexure FM 30 in the Applicant's bundle of documents). It is not clear what informed her to change her mind. It is however clear that the two statements are completely at cross-purposes and cannot convincingly explain her interest as alleged. It is also instructive that in her statement to the Applicant she categorically denied she was the Respondent's wife and claimed to be a widow. How then can this court rely on her evidence to make a finding that she was the owner of the properties. My finding is that she cannot be relied upon as she is untrustworthy. I therefore find that the two properties are also unexplained assets and are proceeds of crime liable to forfeiture.”
27. It is then contended that having failed to plausibly explain the sources of funds used in the acquisition of the asset, the same passes as a proceed of crime and the same should be forfeited to the state.
28. On whether criminal culpability is a precondition for civil proceedings under part VIII of the proceeds of Crime and Anti Money Laundering Act, the applicant submits that it is now trite law that civil forfeiture proceedings are proceedings in rem in which a civil suit is brought for recovery of property reasonably believed to be a proceed of crime and that this was the decision in *Assets Recovery Agency*



v Quorum Limited & 2 others (2018) eKLR. Further reference is made to the court decision in Kenya Anti-Corruption Commission v Stanely Mombo Amuti [2017] eKLR where the court held;

“92. This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168, the court stated that:

“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 matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

93. The Defendant was a public official with known sources of income, as stated in his declaration under the *Public Officer Ethics Act*, 2003. He suddenly and inexplicably amassed wealth within the relatively short period between September 2007 to June 2008. Only he could explain his wealth and he was afforded this opportunity when he was issued with a statutory notice.

94. I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR.”

29. It is thus argued that even in the event that Ian James Omenda is ultimately acquitted in the criminal case, the same does not have a bearing on this forfeiture application for the recovery of the subject motor vehicle provided a reasonable suspicion and belief persists that it is a proceed of crime.

### **Respondent's Submissions**

30. The respondent begins by submitting that from the definition of what constitutes proceeds of crime under section 2 of POCAMLA, the establishment of the alleged crime as a crime is paramount before any property or economic advantage can be said to have been realized or acquired through the crime and that a determination ought to be made through a judicial process that the alleged offence was committed. The respondent contends that she acquired the subject motor vehicle long before the commission of the alleged offence. She argues that notwithstanding the production of a bank statement that shows how the subject motor vehicle was purchased, the legal burden still remains on the applicant to provide evidence that gives probable cause for the suspicion that the funds in the respondent's bank account are traceable to crime.

31. The respondent reiterates the averments in the replying affidavit and adds that together with her mother Mariam Wanja Kamau and sister Naomi Mumbi Ngugi, she entered into an agreement for the sale of a portion of land known as LR No. 100XXXXX measuring approximately 0.265 acres and that at



the time of the sale, the subdivision was not complete. She argues that nothing adverse can be inferred from the purchaser's response denying purchase of LR No. 100XXXX.

32. On the allegation that the agreement is a forgery because the respondent's mother Mariam Wanja Kamau is not a beneficiary of the Estate of Zakariah Njenga Mwangi, the respondent contends that there is no dispute that the respondent and her sister are beneficiaries of the Estate of Zakariah Njenga Mwangi and by virtue thereof they were bequeathed 2½ of the land known as LR No. 100XXXX and that the mere inclusion of their mother in the agreement for sale does not render the agreement a forgery. She submits that the applicant failed to discharge the burden of proving that the funds in the respondents account which were used to obtain the subject motor vehicle were proceeds of crime.
33. The respondent further argues that whereas the proceedings before this court for forfeiture are civil in nature, investigations conducted by the applicant are criminal in nature and therefore any statements recorded by the applicant are to be treated as statements recorded from accused persons and because the respondent was not informed of her rights under article 50(2)(i) of *the Constitution* when recording her statement, the same is inadmissible. The respondent adds that section 64 of POCAMLA only contemplates the requisition of an affidavit and not a statement.
34. The respondent submits that the Bank and Mpesa statements adduced by the applicant constitute electronic evidence and must therefore abide by the provisions of section 106B of the *Evidence Act* on the admissibility of electronic records and that in this case the applicant has failed to produce certificates to vouch for this evidence.
35. Lastly, the respondent maintains that she was not involved and/or informed of the proceedings leading up to the preservation orders and that the applicant failed to disclose that the court in JKIA CMC Criminal Case No. E076 of 2022 in a ruling delivered on 12<sup>th</sup> May, 2022 gave orders to the effect that the orders in regards to motor vehicle registration no. KDA XXXX would be issued in the final judgment.

### Issues

36. The court has dutifully perused the originating motion and the three affidavits sworn and filed in support thereof, the responses to the summons and the submissions by the parties and identifies the following issues for determination;
  - a. whether criminal culpability is a precondition for civil proceedings under part VIII of POCAMLA?
  - b. Whether the provisions of section 106B of the *Evidence Act* applies in claims brought under POCAMLA?
  - c. Whether the statement made by a respondent to the agency must be in the form of an affidavit?
  - d. Whether motor vehicle registration number KDA XXXX registered in the name of the respondent and which the applicant seeks to be forfeited is a proceed of crime as defined in law?
  - e. Whether the said motor vehicle is subject to forfeiture?
  - f. What are the appropriate orders on costs?



## Analysis and Determination

### Whether criminal culpability is a precondition for civil proceedings under part VIII of POCAMLA

37. It is now settled law that a claim under POCAMLA is a civil recovery claim which can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. See the case of Kenya Anti-Corruption Commission v Stanely Mombo Amuti [2017] eKLR.
38. The agency is therefore not required to prove that the respondent or her associate, Ian James Omenda, had actually committed the offences he is facing in JKIA CMC Criminal Case No. E076 of 2022 for this suit to stand. That is the bare and plain interpretation of section 92(4) of the Acts. Also see [\*ASSET RECOVERY Agency Vs Pamela Aboo, Accc Misc App No 73 of 2017\*](#), for the law that there is no obligation on the agency to allege commission of an offence and that where the respondent fails to give an explanation in rebuttal of the allegations, the allegations remain true.
39. The court thus finds that law on forfeiture under the Act expressly exclude proof of an offence against the respondent.

### Whether provisions of section 106B of the [\*Evidence Act\*](#) applies in claims brought under POCAMLA

40. On the admissibility of electronic evidence, section 128 of POCAMLA permits the production of electronic evidence by the court hearing any matter in relation to the Act notwithstanding the provisions of the [\*Evidence Act\*](#) (Cap. 80). The court reads the provision do excuse strict application of the rules of evidence.
41. In any event, in a matter where direction that the matter be heard by way of submissions were given in the presence of counsel, it was the duty of the party through the counsel to raise objection to the reliance on documents not strictly produced in accordance with the [\*Evidence Act\*](#). No such objection was recorded. Moreover, even the respondent has relied on documents annexed to the Affidavits filed without more. To sustain the objection would mean that even the respondent's documents are disregarded. That would not serve the interests of substantive justice between the parties. That objection id held to lack merits.

### Whether the statement made by a respondent under section 64 of the Act to the agency must be in the form of an affidavit?

42. The respondent has argued that the initial report recorded with the agency was in the form of a statement and not an affidavit as required by section 64 of POCAMLA. The section provides that the agency director may or, if so directed by the court, tender to the court an affidavit by the defendant or any other person in connection with any matter which is being inquired into by the court under section 61(1), or which relates to the determination of the value of a defendant's proceeds of crime.
43. What is envisaged under section 61(1) in a situation where a defendant has been convicted of a crime and criminal confiscation is being pursued. That is not the scenario in the present case. One must distinguish between criminal and civil forfeiture under the Act. Section 61 referred to by 64 concerns criminal forfeiture with provisions and rule distinctly different from civil forfeiture under PART VIII of the Act.
44. The statement exhibited in the affidavit in support of the application and marked AM6 a statement recorded by the agency as part f its investigations and purposed to accord the subject under investigation and opportunity to explain the sources of the asset targeted for investigations. The statement is not the kind of evidence the court may require for purposes of making a confiscation order.



45. To the extent explained above, the position taken by the respondent is misconceived and does not affect the admissibility of the statement for the purposes intended by the applicant. The court thus answers the issue in the negative.

**Whether motor vehicle registration number KDA XXXX targeted for forfeiture is a proceed of crime as defined in law?**

46. Section 2 of POCAMLA widely defines what constitutes proceeds of crime to mean 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.
47. Section 81 of POCAMLA recognizes forfeiture proceedings to be civil in nature and section 92 goes further to provide that the standard of proof is on a balance of probabilities. A wholesome reading of part VIII of the POCAMLA is that in order to discharge its burden of proof under section 107 of the *Evidence Act*, what is required of an applicant is to demonstrate that there are reasonable grounds to believe that funds or property held by a respondent are proceeds of crime.
48. To discharge this burden, the applicant stated that it received information that motor vehicle registration number KDA XXXX, registered in the name of the respondent, had been intercepted trafficking in narcotic drugs contrary to section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 and being in possession of wildlife trophy contrary to section 95(d) as read with section 92 of the *Wildlife Conservation and Management Act*, 2014.
49. The investigations revealed that at the time of the interception of motor vehicle registration number KDA XXXX, it was conveying 251.09 grams of heroin whose market value was Kshs. 753,270.00. Consequently, the agency opened Inquiry File No. 12 of 2022 to inquire into the activities of the respondent and they established that the motor vehicle was impounded while in the custody and control of one Ian James Omenda, an individual the investigations established was well known to the respondent, a person who had regular exchange of substantial amount of money with the respondent and who was using the motor vehicle with the authority of the respondent.
50. The respondent's KCB Bank Account Number 1138XXXX was analysed for the period between 12.01.2013 to 20.08.2022 and established that the respondent received funds amounting to Kshs. 1,030,400.00 from Ian James Omenda in 31 transactions during this period. On 12.08.2020, the respondent received a sum of Kshs. 2,856,600.00 out of which she transferred a sum of Kshs. 500,000.00 to Ian James with the narration "car purchase".
51. The agency also investigated Mpesa accounts for phone numbers 0715XXXX, 0795XXXX and 0710XXXX owned and controlled by the respondent and Ian James Omenda and established that mobile number 0715XXXX was registered in the name of the respondent and between 14.01.2020 and 15.04.2020, the account received a total sum of Kshs. 1,369,158.00 in 180 transactions from Mpesa account numbers 0795XXXX, 0723XXXX and 0746XXXX all registered in the name of Ian James Omenda.
52. They added that the respondent's Mpesa Number 0715XXXX had sent suspicious funds to numbers registered in the name of Ian James Odhiambo Omenda that is, 0795XXXX, 0723XXXX and 0746XXXX amounting to Kshs. 603,410.00



53. The respondent was summoned by the applicant and her initial statement was that her mother sold a piece of land in Karen and gave her a sum of Kshs. 900,000.00 which she used to pay for the suit motor vehicle from a car bazaar in the year 2020. She disputed owning a bank account and further stated that she worked in the family business earning a salary of Kshs. 200,000.00 though the salary was not regularly paid. She stated that on 30/11/2021, she gave the suit motor vehicle to Ian James Omenda to go to hospital and return in the evening. She added that she lived with her parents and did not therefor share any form of living expenses with Ian James Omenda. He denied any deep acquaintance with Ian Omenda stating that she had only met him socially at the mall and did not know his family, where he lived or what he did to earn a living.
54. However, when served with the application for forfeiture, she changed the account and contended that she had dated Ian Omenda from 2017 and had been living together for which reason the man would send her insignificant amounts of money earned from his salary from a family business the respondent had never bother to know much about. She also asserted that the motor vehicle was bought at Kshs 1,400,000 and paid the price in three instalments out of the share of the money obtained from an inherited land. The affidavit also affirms that she had operated an account at KCB bank into which the money was transferred and from where he withdrew and paid for the motor vehicle. On the two accounts, the applicant views the respondent as uncandid and incapable of credibility. In fact, the applicant sought to establish if indeed the land was sold to Acacia as alleged and the director of the said company, who the respondent asserts to be a lawyer denied any such transactions. To the applicant, no land was sold for the respondent to have received the sum of Kshs 2.8 million and that such money was thus unexplained.
55. All the applicant is required to establish in a civil forfeiture proceedings is reasonable suspicion that the asset could have been acquired through criminal conduct. Once there is established reasonable suspicion, the evidential burden is shifted to the respondent to substantiate the source of funds used to purchase the suit motor vehicle.
56. The double explanation offered by the respondent is that she purchased the subject motor vehicle at a price of Kshs. 900,000 or 1,400,000.00 from her share of the sale proceeds of a parcel of inherited land which she jointly owned with her mother and sister.
57. She stated that on 12.08.2020 she received a sum of Kshs. 2,856,600.00 from a joint family account being her share of the initial land sale proceeds. In order to confirm whether such a transaction took place, the applicant wrote a letter dated 21.03.2024 to the director, Acacia Green Limited and the director by the name of Mr. Kinyanjui Theuri responded by way of an email and stated that the company, Acacia, had not purchased the stated parcel. To counter that rebuttal the respondent swore the Further Replying affidavit and exhibited a bank statement to show that the money was in fact transferred to the joint account by one John Kinyanjui. That account entry has no narration for what purpose the money was. It also shows that the money was from John Kinyanjui yet the respondent named the director of Acacia as Kinyanjui Theuri. To the courts mind, if there was a sale of land to Acacia Green Ltd, then the purchase price was prima facie payable by the company and not its director. In any event, the director of Acacia is identified as Kinyanjui Theuri and no attempt was made to prove that the said Kinyanjui Theuri is also called John Kinyanjui.
58. The court finds that there is no credible evidence that the sum transferred into the respondents account and admitted by her to have funded the purchase of the car came from the legitimate sale of the said parcel of land. Other than the contradictions in the accounts given by the respondent, the court further appreciates that the respondent only became registered as a proprietor of the land on the 18.5.2022



and thus had no interest to sell as at 7.8.2020. The court consequently finds that there has not been demonstration that the money was legitimately derived but remains suspected as a proceed of crime.

59. It is a further finding by the court that the agreement for sale and the bank statements could have been a disguise of illicit property whose source remain unexplained.
60. With the respondent having failed to plausibly explain the source of funds used to purchase motor vehicle registration number KDA XXXX, this court finds that motor vehicle is a proceed of crime.
61. The end result is that the application dated 24.10.2023 is allowed and the following orders are made;
  - a. A declaration that Motor Vehicle Registration Number KDA XXXX is a proceed of crime and is hereby forfeited to Government of the Republic of Kenya.
  - b. The Director General, National Transport and Safety Authority is hereby directed to transfer to the Asset Recovery Agency and register the proprietary interest in respect of Motor Vehicle Registration Number KDA XXXX and issue a registration certificate thereto.
  - c. Costs of the suit are awarded to the applicant.

**DATED, SIGNED AND DELIVERED, VIRTUALLY, THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**PATRICK J O OTIENO**

**JUDGE**

