



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CIVIL APPLICATION NO. 13 OF 2020**

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

**VERSUS**

**JOSPHAT KAMAU.....RESPONDENT**

**JUDGMENT**

1. The Applicant through an Originating Summons dated 2<sup>nd</sup> day of April, 2020 moved the court to find that funds held in the Respondent's named bank account to be declared as proceeds of crime and therefore liable for forfeiture to the Government.
2. It was pleaded that the Honourable Court be pleased to issue an order of forfeiture of the following funds;
  - 1) Kshs. 43,122,454.92 held at Equity Bank in the name of the respondent.
  - 2) USD 16,344.80 held at Equity Bank in the respondent's name.
  - 3) Kshs. 389,780.00 held at Equity Bank in the Respondent's name.
3. That the said fund be deposited in the Asset recovery Agency account held at Kenya Commercial Bank KICC branch.
4. The application was supported by an affidavit sworn by S/SGT. FREDRICK MUSYOKI in which it was stated that the applicant had received information and conducted investigations which established that on 26<sup>th</sup> October, 2019, the respondents motor vehicles registration numbers KBY 556E Mercedes Prime Mover hauling trailer registration number ZC588 and KCQ156B were impounded smuggling 240 cartons and 150 cartons respectively of super match cigarettes made in Uganda with a combined value of Kshs 9.750,000, which had been concealed in a disguised place customized for smuggling goods .
5. The driver of the said motor vehicle recorded a statement on 27<sup>th</sup> October, 2019, in which he stated that on 25<sup>th</sup> October, he proceeded to Kampala Uganda to purchase cigarettes from the local shops for cash and upon his return to Kenya, he made a custom declaration to the effect that the subject motor vehicle was empty, which was false.
6. The respondent was subsequently charged jointly with another for the offences of smuggling of goods and importing of restricted goods, contrary to sections 199(a), 200(a) as read with section 210 of the East African Community Customs Management Act 2004 in ELDORET Chief Magistrates Court criminal case No 3288 of 2019
7. It was stated further that an analysis of the respondent's bank statements revealed several suspicious transactions which coincided with the border crossing of his two motor vehicles totalling to Grand total of Kshs, 24, 290,000 and that the deposits were mainly made in tranches below the Kshs. 1,000,000/ to evade the reporting threshold as per sections 44 and 4<sup>th</sup> schedule of PROCAMLA.
8. It was the Applicant's case that the Respondent, when requested to offer an explanation stated that he was a businessman dealing with cereals and transportation and a proprietor of Tiphath Transporters operating without registration, leading to reasonable ground to believe that the respondent had no known source of legitimate business.
9. It was stated further that the respondent was unable to identify the locations where his main suppliers operated from and further that he was not aware that his motor vehicle had been modified to include a concealed compartment/cabin and or having authorised the construction

of the same.

10. It was the applicants case that it applied for and obtained a preservation order on 17<sup>th</sup> December 2019, which order was dully gazetted.
11. In response to the application, the respondent filed a replying affidavit in which he stated that he was a registered business in Nakuru trading under the business name of TIFPHAT TRANSPORTERS and that he was the registered owner of motor vehicles registration numbers KCQ156B, KBP308K, KCX172S and KBY556E jointly owned with Equity Bank Ltd as the Financier for the use in his transportation and cereal business.
12. It was deposed that his trade assets were financed through loans which he was straggling to offset taking into account that his accounts had been frozen and motor vehicles held pending the hearing and determination of Eldoret CMCR NO 3368/2019 wherein he had been charged for being the owner of the subject motor vehicle, which were allegedly detained for transporting restricted goods and concealment of the stated goods.
13. It was contended that there was no factual basis for the Applicants contention that he was involved in illicit trade of smuggling based on declarations which he had made at the border crossing that the motor vehicles were empty. It was his case that whereas both of his motor vehicles were impounded, only the driver of one was arraigned in court.
14. It was stated that the Driver of the said motor vehicle had in statement confirmed that he was dealing mainly with the transportation of timber and maize and was operating without physical office and KRA PIN, since he had been registered as a business name and was therefore using his personal KRA PIN.
15. It was his contention that he had supplied the applicant with the details of his of his principle supplier who was not contacted by the applicant save for Osman Abdi the Director of Ken horn juba ltd who provided all the invoices in his possession in respect of their business dealings.
16. He stated further that he held a valid Tax Compliance Certificate from KRA and there was no evidence that he was being investigated for Tax evasion, with no demand being made on his account.it was his further case that he was engaged in legitimate business with transactions being made on Eazzy Fund a mobile phone application by Equity Bank with a single transaction being limited to Kshs. 300,000 with a daily limit of ksh. 1,000,000.
17. It was contended that there was no evidence tabled by the applicant to support the allegation that the funds deposited in his accounts were proceeds of crime as the applicant did not question the third party depositors to his account and therefore the applicant had not proved its case against him.
18. The applicant filed a further affidavit in response to the replying affidavit in which it was stated that the respondent did not support his allegation that he was engaged in cereal business and that there were glaring discrepancies on the invoices produced by the respondent in support of attempt to offer an explanation of the funds in his account without the support of any accounting documents.
19. It was further stated that the respondent received funds in one of his account totalling Kshs. 40,613,500 two days prior and two days after the date his motor vehicle crossing the Lwakhakha border point on 13 occasions and on all the occasions the driver declared that the subject motor vehicle was empty.
20. It was contended that a tax compliance certificate itself does not immunize the respondent from investigation and forfeiture proceedings as it is not evidence that the same was engaged in legitimate business as the investigations revealed that he was not engaged in any legitimate income or source of business and therefore the funds were proceeds of crime.

## **SUBMISSIONS**

21. Directions were issued that the Originating Summons herein be determined by way of written submission.

### **Applicant's Submissions**

22. On behalf of the applicant, it was submitted that Article 40 of the Constitution of Kenya 2010 provides for the framework on asset recovery as it does not extend the right to property envisaged under Article 40 to any property that has been found to have been unlawfully acquired.
23. It was submitted further that section 92(1) of the PROCAMLA provides that the High Court shall make an order for forfeiture 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
  - b) is proceeds of crime.

It was submitted that forfeiture proceedings are Civil in nature and the standard of proof therein is on a balance of probability as was stated in the case of **Director of Asset Recovery and others, Republic vs Green & others [2005] EWHC 3168**.

24. It was submitted further that the validity of the forfeiture order was not affected by the outcome of the of the criminal proceedings as

provided for under section 92(4) of the Act for which the following cases were submitted in support: **ARA & others vs Audrene Rowe & others Civil Division Claim NO2012 HCV02120 the Court of Appeal of Jamaica** where the court stated:-

***“that in deciding whether the matters alleged constituted unlawful conduct when civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of the property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof”.***

25. Reference was made to the case of **Abdurrahman Mahmoud Sheikh & 6 others vs Republic & others [2016] eKLR** where the Court stated that the letter, spirit and gravamen of the Proceeds of Crime and Anti-Money Laundering Act is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after due process, to the State, on behalf of the public which is deemed to have suffered some injury by the criminal conduct.

26. It was submitted that the proceeds of crime are defined under section 2 of PROCAMLA in a wider manner because sophisticated criminal will seek to avoid proceeds being confiscated by creating complex systems of camouflage as was stated in **SCHABIR SHAIK & Others vs State Case CCT 86/06(2008) ZACC7**.

27. It was submitted that the applicant, through affidavit evidence was able to demonstrate on a balance of probabilities the nexus and linked the funds in the respondent accounts with the dates when his motor vehicles registration numbers KCQ 156 b and KBY 556 E, which had concealed compartments designed for smuggling of goods, made their crossing at Lwakhakha border crossing point.

28. It was submitted that at the time the respondent motor vehicles were impounded on the 26<sup>th</sup> day of October 2020, the cigarettes impounded had a combined duty of Kshs. 9,750,000 and taking into account the 13 times the motor vehicles crossed the border, that would total to Kshs, 126,750,000 in a period of five months.

29. It was submitted further that the respondents three accounts, had received as deposits/credit in the aggregated sum of Kshs. 414,706,812.22. It was therefore submitted that the Tax Compliance certificate issued to the respondent which has a caveat in section 72 (3) of the Tax Procedure Act, in view of the evidence submitted by the applicant, and an admission by his driver Moses Muriithi Waweru in his statement that that he was cleared as an empty lorry upon crossing, was not sufficient evidence that the respondent was a law abiding citizen. In support of this prepossession, the case of **NAVCOM LTD vs KRA & 3 OTHERS [2013] eKLR**, was submitted.

30. It was stated on the authority of **ASSET RECOVERY AGENCY vs PAMELA ABOO ETHICS & ANTI-CORRUPTION COMMISSION [2018] eKLR**, that where the person against whom allegations have been made does not give satisfactory explanation to rebut the allegations, it means what has been presented is not challenged and the moment the applicant establishes through bank statements that there were huge cash deposits, the burden shifts to the Respondent to explain the sources.

31. It was submitted that civil forfeiture proceedings are proceedings in rem against the property and are civil in nature, for which the cases of **ASSET RECOVERY AGENCY v QUORANDUM LTD & 2 OTHERS [2018] eKLR** and **KENYA ANTI-CORRUPTION COMMISSION v STANLEY MOMBO AMUTI [2017] eKLR** were submitted in support.

32. The applicant, therefore submitted that it had established a clear case of money laundering and therefore demonstrated that the funds held at Equity bank in the respondent's name were proceeds of crime and should be forfeited.

### **Respondent's Submissions**

33. On behalf of the respondent, it was submitted that the crux of the matter was that the respondent's two motor vehicles were impounded containing 240 and 150 cartons of super match cigarettes with a combined dutiable value of kshs. 9,750,000/for which the respondent and his driver were charged in criminal case No. 3288/2019 Eldoret.

34. It was the respondents case that he had been allowed access to Kshs 8,000,000 vide a ruling of the court in **ACEA MISC NO. 50 of 2020 ASSETS RECOVERY AGENCY v JOSPHAT KAMAU**.

35. For the purposes of the case the respondent identified the following issues for determination;

***a) whether the respondent being the owner of motor vehicle registration number KCQ 156B and KBY 556E was liable for the unsanctioned action of the driver.***

***b) whether the applicant had established failure of the respondent to meet his tax obligations and tax treatment of TIFPHAT TRANSPORTERS.***

***c) whether the respondent had established on a balance of probability that the funds held in accounts do not constitute proceeds of crime and therefore not liable to forfeiture***

35. It was submitted that the respondent had demonstrated that there were several instances when the motor vehicle registration No. KCQ156B crossed the border points carrying goods, which was proof that he was engaged in transportation business and that the fact that the driver Moses Muriithi stated in his statement that he had purchased cigarettes worth 3.7 million in cash, without corresponding withdrawals from the respondent's account, was proof that he was on frolic of his own, outside the scope of his duties with the respondent.

36. It was the respondent's submission that the unlawful act of the driver did not fall within the scope of his duties and was therefore

engaged on a purely personal business which had nothing to do with the respondent.

37. It was stated that the applicant should have obtained records from KRA on the tax status of the respondent and his firm TIFPHAT TRANSPORTERS in the course of its investigations and failure to do so was fatal to the application herein as was stated in **ARA v PAMELA ABOO** (supra), **MACFOY v UNITED AFRICA CO LTD [1961] 3 ALLER 1172** and **NGUKU v REPUBLIC [1985] KLR 412**, to the extent that were a party fails to produce certain evidence, a presumption arises that the evidence if produced would be unfavourable to that party.

38. It was submitted that whereas the crux of the proceeding was that the funds were suspected to be proceeds of crime resorting from tax evasion, nothing was tabled from KRA on the status of the respondent's tax, thereby confirming that the applicant had not done more in investigating the matter.

39. It was submitted that asset forfeiture laws are powerful tools provided to law enforcement agencies in their quest to tackle crime and corruption, however the shifting of the burden of proof upon the respondent in the absence of protections was problematic in as far as it encroaches on the property rights while relying on lower procedural safeguards and human rights protections than those applied to criminal proceedings.

40. It was submitted that whereas civil forfeiture proceeding can be lodged without criminal conviction, it does not take away the basic legal obligations on the applicant to establish the foundational elements of a crime by way of evidence as required under the provisions of Sections 109 and 112 of the Evidence Act, without shifting the burden to the respondent as the law now stands to demonstrate the lawful origin of the property alleged to be liable to confiscation.

41. It was submitted that Section 2 of ACECA defines the term unexplained assets as:-

- a) acquired at or around the time the person was reasonably suspected of corruption or economic crime and
- b) whose value is disproportionate to his known source of income at or around that time and or which therein no satisfactory explanation.

42. It was contended that the dates identified by the applicant did not coincide with any major abnormal large transactions in his principle account and that ordinarily a business should require money as was stated in the case of **PAMELA ABOO** (supra). It was submitted further that in the case of **ASSET RECOVERY AGENCY v ROHAN ANTHONY FISHER AND OTHERS, Supreme Court of Jamaica, Claim No. 2007 HCV003259** the court while forfeiting the respondent's assets was informed by the fact that there was no indication of any work or enterprise on the part of the respondent.

43. It was the respondent submissions that he had proved industry and enterprise by securing loans to purchase several heavy commercial vehicles which he uses in his transport business under the business name of TIFPHAT TRANSPORTERS and that transactions in his account were not in any way suspicious as the Prudential Regulation for Banking institutions (September, 2000) prescription pertaining reporting threshold was never done in respect to his accounts.

#### **ANALYSIS AND DETERMINATION**

44. From the pleadings and submissions herein, the factual basis of the suit herein is not disputed. The respondent is the registered owner of the subject motor vehicles and the account holder of the accounts herein domiciled at Equity bank, which are the subject matter of this forfeiture proceedings.

45. The fact that the respondent has been charged with the offense of smuggling goods contrary to section 199(a), importing restricted goods contrary to section 200(a)(ii) as read with section 210(b) and importing goods which are concealed of the East African Community Customs Management Act, is also not disputed.

46. It is further not disputed that while this suit was pending, the respondent was allowed access to the sum of Kshs. 8,000,000 to cater for his legal and related expense from one of the Accounts

47. For the purpose of this judgement, I have adopted the detailed financial analysis of the Respondents bank transaction as the same has not offered any alternative, which I take as a true reflection of the financial affairs of the respondent.

48. This Originating Summons was heard by way of written submissions, by the consent of the parties and I have therefore taken time to scrutinize all the documents filed by the parties and taken into account the difference between the facts, arguments and submissions put forward by each party as if each party were present in person.

49. This cause is founded on the provisions of The Proceeds of Crime and Anti Money Laundering Act, which at Section 92 thereof provides for forfeiture in the following terms:

***“(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.*

(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.”*

50. The proceeds of crime is defined in Section 2 of the Act to mean the following:-

*“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.”*

51. In the case OF **ABDULRAHMAN MOHMOUD SHEIKH & 6 OTHERS v REPUBLIC & OTHERS** (supra) it was stated that:-

*“the letter, the spirit purpose and the gravamen of the proceeds of crime and anti –Money Laundering Act is to ensure that one does not benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after a process to the state on behalf of the public which is deemed to have suffered some injury by the criminal conduct”.*

52. The proceedings herein are civil in nature as was stated in the case of **Kenya Anti- Corruption Commission v Stanley Mombo Amuti** (supra) where the court stated as follows:-

*“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 Mwachethe Mulewa & another [2017] eKLR.”*

53. This position was further confirmed in the case of **ASSETS RECOVERY AGENCY v PAMELA ABOO [2018] eKLR** where the Court pronounced itself thus:-

*“63. Forfeiture proceedings are Civil in nature and that is why the standard of proof is on a balance of probabilities. See section 92(1) of POCAMLA. In the case of Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168 the court stated as follows:*

*“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.”*

*64. 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 presumption of innocence is applicable. In the case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 the Court of Appeal stated:*

*“... that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof.”*

see also *Phillips v The United Kingdom [2001] ECHR 437; Techla Nandjila Lameck v President of Namibia 2012 (1) NR 255 (HC)*

**65. Forfeiture under POCAMLA is not a violation of an individual's right to property. Article 40(6) of the Constitution is clear that rights acquired under article 40 do not extend to any property that is found to have been unlawfully acquired."**

54. It is therefore clear that being civil in nature, the burden of proof on the part of the applicant is on a balance of probability to prove that the assets in dispute are proceeds of crime or instrumentality of crime. Once evidence is placed before the court in terms of Section 65 of the Act, it is for the Respondent to show that the same has a legitimate source of income sufficient to justify the interest in the any property which he claims.

55. In this matter there is evidence placed before the court that the respondent's motor vehicles herein were modified to create a secret compartment where the illicit goods were hidden in and the respondent answer to the same was that he was not aware that the motor vehicles had been modified, yet he had the control of the said motor vehicles and the nature of the modification in question could not be done without his knowledge.

56. Even if the said modifications were done without his knowledge, the proceedings of this nature are in rem, against the property and since it was proved that the same were converted for the purpose of conducting criminal undertaking, it logically follows that the said motor vehicles are instrumentality of crime and are therefore liable to forfeiture.

57. On the funds in the Respondents bank account, from the financial statements as analysed by the applicant, it is not in dispute that there were deposits made into the respondent bank account two days before and two days after the subject motor vehicle had crossed over into Uganda and when the same were found with un-customed cigarettes. Further the said deposits were made in trenches just below the mandatory reporting figures.

58. From the bank statements it is also clear that the deposits were made in respect of each day by the same individuals all who made deposits three times a day, so as to defeat the reporting requirements within the Act of transactions above the Kshs.1,000,000 threshold. From the evidence tendered by the applicant the following transactions were made into the respondent's subject account:-

Date	Reg. no	Declara-tion	Date	Description	Debit	credit
22 <sup>nd</sup> June 2019	KCQ 156B	Empty		Eazzy- Funds Transfer From Gerald Mitheu Mathi		300,000
			18/6/ 2019	Eazzy-Funds Transfer From Gerald Mitheu Mathi		300,000
			(Refer to P.000326)	Eazzy-Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy-Funds Transfer From Gerald Mitheu Mathi		100,000
			19/6/2019 Refer to P. 000351-000351A)	Eazzy-Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy-Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy Funds Transfer From Gerald Mitheu Mathi		100,000
				Eazzy-Funds Transfer From Gabriel Nganga Njenga		300,000
				Eazzy Funds Transfer From Gabriel Nganga Njenga		300,000
				Eazzy Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy Funds Transfer From Gerald		90,000

				Mitheu Mathi		
			21/6/2019 (Refer to P.000351A)	Eazzy-Funds Transfer From Gabriel Nganga Njenga		300,000
				Eazzy-Funds Transfer From Gabriel Nganga Njenga		150,000
				Eazzy Funds Transfer From Thomas Githangi Kanyi		300,000
				Eazzy Funds Transfer From Thomas Githangi Kanyi		300,000
				Eazzy Funds Transfer From Thomas Githangi Kanyi		300,000
			22/6/2019	Eazzy Funds Transfer From Issac Kariuki & Damaris Nyam		300,000
				Eazzy Funds Transfer From Issac Kariuki & Damaris Nyam		300,000
				Eazzy Funds Transfer From Issac Kariuki & Damaris Nyam		300,000
				Eazzy Funds Transfer From Issac Kariuki & Damaris Nyam		100,000
				Eazzy Funds Transfer From Stephen Kimani Karanja		290,000
						<b><u>5,630,000</u></b>
25 <sup>th</sup> June, 2019	KCQ 156B	MAIZE	24/6/2019 (Refer to P.000351A)	Eazzy Funds Transfer To Simon Njoroge Mburu	300,000	
				Eazzy Funds Transfer To Simon Njoroge Mburu	300,000	
				Eazzy Funds Transfer To Simon Njoroge Mburu	300,000	
				Eazzy Funds Transfer To Simon Njoroge Mburu	100,000	
			25/6/2019 (Refer to P.000351A-000352)	Eazzy Funds Transfer To Simon Njoroge Mburu	210,000	
				Eazzy Funds Transfer To Benard Mokaya Ombongi	300,000	
				Eazzy Funds Transfer To Benard Mokaya Ombongi	200,000	
			26/6/2019 (Refer to P.000352)	Eazzy-Funds Transfer From John Nganga		300,000
				Eazzy-Funds Transfer From John Nganga		294,000

				Eazzy-Funds Transfer To Salome Wambui Wanjiru	300,000	
				Eazzy-Funds Transfer From Stephen Kimani Karanja		260,000
				Eazzy-Funds Transfer From Isaac Kariuki & Damaris Nyam		100,000
			27/6/2019	Debit Transfer	6,252,500	
	<b>Total</b>				<b>8,262,500</b>	<b>954,000</b>
4 <sup>th</sup> July 2019	KCQ 156b	Green Bananas		Eazzy-Funds Transfer From Joseph Mwangi Njuguna		300,000
			2 <sup>nd</sup> July 2019 (Refer to p.000353)	Eazzy-Funds Transfer From Joseph Mwangi Njuguna		300,000
				Hellen Wanjiru 22335503		400,000
				Eazzy-Funds Transfer From Joseph Mwangi Njuguna		300,000
				Eazzy-Funds Transfer From Joseph Mwangi Njuguna		50,000
			3/7/2019 Refer to p.000353-000354)	Eazzy-Funds Transfer From Stephen Kimani Karanja		300,000
				Eazzy-Funds Transfer From Stephen Kimani Karanja		300,000
				Eazzy-Funds Transfer From Stephen Kimani Karanja		25,000
				Eazzy Funds Transfer From Simon Kuria Kiragu		250,000
				Eazzy Funds Transfer From Purity Kanario		300,000
				Eazzy Funds Transfer From Purity Kanario		300,000
				Eazzy Funds Transfer From Purity Kanario		200,000
				Eazzy Funds Transfer From Purity Kanario		200,000
				Eazzy Funds Transfer From Peter Ndungu		300,000
				Eazzy Funds Transfer From Peter Ndungu		225,000
			4/7/2019	Eazzy Funds Transfer From Purity Kanario		300,000

			Refer to p.000354)	Eazzy Funds Transfer From Purity Kanario	200,000
			5/7/2019 (Refer to p.000354)	Eazzy Funds Transfer From Gerald Mitheu Mathi	300,000
				Eazzy Funds Transfer From Gerald Mitheu Mathi	300,000
				Eazzy Funds Transfer From Gerald Mitheu Mathi	100,000
				Eazzy Funds Transfer From Moses Mbaabu	300,000
				Eazzy Funds Transfer From Moses Mbaabu	55,000
			6/7/2019 (Refer to p. 000354)	Mohamed Abdi Osman	1,000,000
	<b>Total</b>				<b>6,305,000</b>
31 <sup>st</sup> July, 2019	KCQ 156B	Empty	29/7/2019 (Refer to P.000360)	Eazzy-Funds Transfer From Simon Kuria	50,000
				Eazzy-Funds Transfer From Joseph Nganga	300,000
				Eazzy-Funds Transfer From Joseph Nganga	200,000
				Eazzy-Funds Transfer From John Nganga	300,000
				Eazzy-Funds Transfer From John Nganga	300,000
				Eazzy-Funds Transfer From Emrays Muteria Kaburia	300,000
				Eazzy-Funds Transfer From Emrays Muteria Kaburia	240,000
				Eazzy-Funds Transfer From Willy Macharia Ndugutu	100,000
			31/7/2019 (Refer to P.000360)	Eazzy-Funds Transfer From John Nganga	211,000
				Eazzy-Funds Transfer From Thomas Githangi Kanyi	300,000
				Eazzy-Funds Transfer From Thomas Githangi Kanyi	300,000
				TPG 921214927347 Goods Payment Evans MU/921214	500,000
				Eazzy-Funds Transfer To Salome	200,000

				Wambui Wanjiru		
				Credit Transfer		2,000,000
				Eazzy-Funds Transfer To Julia Wambui Mwangi	300,000	
				Eazzy-Funds Transfer To Julia Wambui Mwangi	300,000	
				Eazzy-Funds Transfer To Julia Wambui Mwangi	300,000	
			2 <sup>nd</sup> August, 2019 (Refer to P.000361)	Eazzy –Funds Transfer To Lawrence Muchiri Maina	43,000	
				<b>Total</b>	<b>1,143,000</b>	<b>5,101,000</b>
7 <sup>th</sup> August, 2019	KBY 556E	Empty		Eazzy-Funds Transfer To Lawrence Muchiri Maina	56,000	
				Eazzy-Funds Transfer To Julia Wambui Mwangi	300,000	
			5/8/2019 (Refer to P.000361)	Eazzy-Funds Transfer To Julia Wambui Mwangi	300,000	
				Eazzy-Funds Transfer To Julia Wambui Mwangi	300,000	
				Eazzy-Funds Transfer From John Nganga		300,000
				Eazzy-Funds Transfer From John Nganga		300,000
				Eazzy-Funds Transfer From John Nganga		300,000
			6/8/2019 (Refer to P.000361)	Eazzy-Funds Transfer From John Nganga		88,000
				Eazzy-Funds Transfer From John Nganga		1,200,000
				Debit Transfer	7,999,992	
				Eazzy-Funds Trabsfer To Salome Wambui Wanjiru	100,000	
			7/8/2019	Eazzy-Funds Transfer From Julius Mugo Kagwi		100,000
				0721352543		440,000
			8/8/2019	Joseph Nganga		1,000,000

			(refer to P.00361-P.000362)	Eazzy-Funds Transfer From Willey Macharia Ndugutu	90,000	
				Moses Sirkoi Ndt-By:/922013628722/08/08/2019	23,000	
	<b>Total</b>				<b>9,055,992</b>	<b>3,841,000</b>
			9/8/2019 (refer to	Virginia Wangari 10228287	760,000	
10 <sup>th</sup> August, 2019	KCQ 156B	Maize	P. 000362)	Eazzy-Funds Transfer From Joseph Nganga	300,000	
			10/8/2019 (refer to	Eazzy-Funds Transfer From Joseph Nganga	300,000	
			P. 000362)	Eazzy-Funds Transfer From Stephen Kimani Karanja	300,000	
	<b>TOTAL</b>				<b>1,660,000</b>	
18 <sup>TH</sup> August, 2019	KCQ 156B	Maize	16/8/2019 (Refer to P.000363)	Eazzy-Funds Transfer From John Nganga	300,000	
				Eazzy-Funds Transfer From John Nganga	200,000	
				Eazzy-Funds Transfer From Willey Macharia Ndugutu	150,000	
				<b>DEBIT TRANSFER</b>	<b>6,533,100</b>	
				Eazzy-Funds Transfer From Alice Njeri	300,000	
				Eazzy-Funds Transfer From John Kariuki Kinyua	300,000	
				Eazzy-Funds Transfer From John Kariuki Kinyua	300,000	
	<b>TOTAL</b>				<b>6,533,100</b>	<b>1,550,000</b>
19 <sup>th</sup> August, 2019	KCQ 156B	MAIZE	19/8/2019 (Refer to P.000363-000364)	Eazzy-Funds Transfer From Simon Kuria Kiragu	50,000	
				Eazzy-Funds Transfer From Isaac Kariuki & Damaris Nyam	25,000	
				Eazzy-Funds Transfer From Emrays Muteria Kaburia	300,000	

				Eazzy-Funds Transfer From Emrays Muteria Kaburia		200,000
				Eazzy-Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy-Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy-Funds Transfer From Gerald Mitheu Mathi		300,000
				Eazzy-Funds Transfer From Gerald Mithue Mathi		100,000
			20/8/2019 (Refer to p.000364)	Eazzy-Funds Transfer From Alice Njeri		300,000
			<b>21/8/2019</b> (Refer to p.000364)	Cash withdrawal from NAKURU 2	900,000	
			<b>21/8/2019</b> (Refer to p.000364)	SELF	8,735,400	
	<b>TOTAL</b>				<b>9,635,400</b>	<b>1,875,000</b>
18 <sup>th</sup> Septe-mber 2019	KCQ 156B	Empty		Eazzy-funds transfer from John Nganga		300,000
			16/9/2019	Eazzy-funds transfer from John Nganga		300,000
			(Refer to p.000368 – 000369)	Eazzy-funds transfer from John Nganga		300,000
				Eazzy-funds transfer from John Nganga		100,000
				Eazzy-funds transfer to Salome Wambui Wanjiru	20,000	
				Eazzy-funds transfer to Salome Wambui Wanjiru	180,000	
			16/9/2019 (refer to p.000369)	Eazzy-funds transfer from Obadiah Gatimu Ngiri		300,000
			18/9/2019 (refer to p.000369)	EAZZY-AGENT DEPOSIT		100,000
			18/9/2019 (refer to p.000369)	EAZZY-AGENT DEPOSIT		100,000

				Eazzy-funds transfer from John Kariuki Nganga		300,000
				ANGAZA COMMS LTT		100,000
				ANGAZA COMMS LTT		52,000
				Eazzy-funds transfer from John Nganga		300,000
				Eazzy-funds transfer from John Nganga		300,000
				Eazzy-funds transfer from John Nganga		200,000
				<b>SELF</b>	5,210,000	
			19/9/2019(refer p.000369-000370)	to Eazzy-funds transfer from Gerald Mitheu Mathi		300,000
				Eazzy-funds transfer from Gerald Mitheu Mathi		300,000
				Eazzy-funds transfer from Gerald Mitheu Mathi		300,000
				Eazzy-funds transfer from Gerald Mitheu Mathi		100,000
				Eazzy-funds transfer to Lawrence Muchiri Maina	56,000	
				Eazzy-funds transfer from John Kariuki Kinyua		300,000
				Eazzy-funds transfer from John Kariuki Kinyua		300,000
				Eazzy-funds transfer from John Kariuki Kinyua		300,000
				<b>TOTAL</b>	5,466,000	4,652,000
12 <sup>TH</sup> 2019	October	KBY 556E & KCQ 156B	Empty	11 <sup>th</sup> October, 2019 (Refer to p.000374)	Loan recovery for 0310577112435	150,576
					Eazzy-funds transfer from John Nganga	300,000
					Eazzy-funds transfer from John Nganga	300,000
					Eazzy-funds transfer from John Nganga	300,000
					Eazzy-funds transfer from Gerald Mitheu Mathu	300,000
					Eazzy-funds transfer from Stephen	300,000

				Kimani Karanja		
				Eazzy-funds transfer from Stephen Kimani Karanja		30,000
				JOAN KEYA OBWOCHA 0729992027 23683247		265,000
				Eazzy-funds transfer from Stephen Kimani Karanja		44,000
				Eazzy-funds transfer from Stephen Kimani Karanja		11,000
				LOAN ACCOUNT PAYMENTS FOR 0310577112435 23221417/0725921266/JOSEPH	1,000,000	
				Eazzy-funds transfer from Isaac Kariuki & Damaris Nyam		300,0000
				Eazzy-funds transfer from Isaac Kariuki & Damaris Nyam		300,0000
				Eazzy-funds transfer from Isaac Kariuki & Damaris Nyam		150,0000
				Eazzy-funds transfer from Joseph Mwangi Njuguna		160,000
			12/10/2019 (Refer to p.000374-000375)	JOSEPH NGANGA		1,200,000
				Eazzy-funds transfer from Joseph Mwangi Njuguna		160,000
				Eazzy-funds transfer from Simon Kuria Kiragu		29,000
				Eazzy-funds transfer from John Nganga		90,000
				JOAN KEYA OBWOCHA 0729 992027 23683247		166,500
			14/10/2019 (Refer to	JOSEPH NGANGA		700,000
			p. 000375)	Eazzy-funds transfer from Joseph Mwangi Njuguna		50,000
				TPG 928713189495 FB Goods payment EVANS MU/928712		200,000
				<b>TOTAL</b>	1,150,576	6,095,500

20 <sup>TH</sup> 2019	October	KBY 556E & KCQ 156B	Empty	18/10/2019  (Refer to p.000375)	Cash withdrawal from Nakuru 2	900,000	
				22/10/2019  (Refer to p.000376)	Eazzy-funds transfer from John Nganga	300,000	
					Eazzy-funds transfer from Willey Macharia Ndugutu	30,000	
					Eazzy-funds transfer from John Nganga	300,000	
					Eazzy-funds transfer from John Nganga	172,500	
		<b>TOTAL</b>				<b>900,000</b>	<b>802,500</b>
26 <sup>TH</sup> 2019	October	KCQ  156 B & KBY  556E	Empty	24/10/2019  (Refer to p.000376)	ALMASI  0702 049 790  30777513	320,000	
				25/10/2019  (Refer to p.000376)	ALMASI  0702 049 790  30777513	403,000	
					Eazzy-funds transfer from Alice Njeri	230,000	
				26/10/2019  (Refer to p.000376)	Eazzy-funds transfer from Joseph Mwangi Njuguna	300,000	
					Eazzy-funds transfer from Gabriel Nganga Njenga	300,000	
					Eazzy-funds transfer from Gabriel Nganga Njenga	300,000	
		<b>TOTAL</b>					<b>1,853,000</b>
30 <sup>th</sup> October 2019		KCQ 156B	EMPTY	29/10/2019  (REFER TO P.000376)	ALMASI  0702049790  30777513	234,500	
				1/11/2019  (REFER TO P.000376)	Eazzy-funds transfer from Happy Felix W. Mulei	60,000	
		<b>TOTAL</b>					<b>294,500</b>
		<b>GRAND TOTAL</b>					<b>40,613,500</b>

59. The Respondent to prove that he was engaged in legitimate business has only presented invoices generated by himself without the supporting LPOs and delivery notes, the respondent further failed to get any confirmation from the people he allegedly supplied with maize nor did he provide any evidence of where the said maize was sourced from. It was not for the Applicant to prove that the Respondent made the supplies. That burden was upon the Respondent.

60. Whereas the respondent submitted that he had a tax compliance certificate issued by KRA, the same failed to tender in evidence his audited statement of account as proof of the nature of his business undertaking, which would have satisfied the court that he was engaged in legitimate business undertaking. I agree with the submissions by the Applicant that Tax Compliance certificate is proof that the Respondent was engaged in legitimate business undertaking.

61. From the evidence on record, the respondent contended that he had been in business since the year 2014 and that he had been receiving large sums of money but has failed to sufficiently account for the sources of the said sums of money. It was upon him to show that he was engaged in some legitimate business with records of the transactions if any, for the period under inquiry he has failed to sufficiently account for the sums of money received as evident from the bank records and also the large cash withdrawals from the said accounts. He needs to place before the court evidence in support of the said deposit and in the absence thereof, the only logical conclusion is that the payments were in respect of criminal undertaking of proceeds of crime.

62. Any business concern must have records in support of its or his operations, it is not enough for the respondent to state that he has been in business since 29<sup>th</sup> October, 2014 and that he owns heavy commercial vehicles for commercial use finance by financial institutions. The same was under an evidential burden to show to court how the said loans are serviced and the sources of the funds used in servicing the same

63. Having been granted that opportunity, the respondent failed to so do against uncontroverted evidence that his said motor vehicles were modified for the purposes of concealing unaccustomed goods and the bank statements confirming cash deposits over the period under inquiry. In this I find support in the case of **Asset Recovery Agency –v- Fisher, Rohan and Miller Delores, Supreme Court of Jamaica Claim no 2007 HCV003250** where the court had this to say:

*“.....Even though these proceedings are quasi Criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousands of United States dollars without more.*

*There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence. is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.*

*This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 14th August, 2007.*

*This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The money was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets.....”*

64. The applicant having placed evidence before me showing that the respondent was engaged in smuggling for which he has been charged, the burden therefore shifted upon the respondent to show that his was a legitimate business undertaking through proper accounting documents including local purchase orders, receipts for purchases made delivery notes to his clients audited statements of account reflect profit and loss and corresponding taxes paid.

65. The Respondent further failed to produce any licenses issued to him by relevant authorities in support of the undertakings he was engaged in, leading to the only logical conclusion, that his motor vehicles having been converted to create a concealed compartment for the purposes of smuggling goods for which he has been charged, the said motor vehicles were an instrumentality of crime and all the funds in the designated banks accounts are proceeds of crime and therefore the proper subject of the proceedings herein.

66. I am therefore satisfied that the Applicant has proved based on evidence that the funds held in the Respondent’s bank account in the absence of any rebuttable evidence to the contrary are proceeds of crime and are therefore liable to forfeiture to the state

67. I therefore issue an order of forfeiture of the following funds:-

**a) Kshs.43,122,454.92 or there about in account no 0130190481767 in the name of Josphat Kamau held at Equity Bank.**

**b) USD 16,344.80 in Account No. 0310176621397 held at equity Bank in the name of Josphat Kamau.**

**c) Ksh.389,780.00 in account No. 1460178607712 held at Equity Bank in the name of Josphat Kamau.**

68. The funds forfeited herein be deposited in the Assets Recovery Agency Account No.1240221339 held at Kenya Commercial Bank Ltd KICC Branch.

69. Whereas cost follows the event, in this case having taken into account the ruling delivered in favour of the Respondent to access

Kshs.8,000,000 to cover for his legal expenses, each party shall in this cause bear their own cost.

70. And it is ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF JUNE, 2021.**

.....

**J. WAKIAGA**

**JUDGE**

**IN THE PRESENCE OF:-**

*Ms Wairimu for the Respondent*

*Mr. Githinji for the Applicant*

*Court Assistant - Hope*