



Asset Recovery Agency v Ali & another (Anti-Corruption and Economic Crimes Application 19 of 2020) [2021] KEHC 12534 (KLR) (Anti-Corruption and Economic Crimes) (14 July 2021) (Judgment)

Neutral citation: [2021] KEHC 12534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES APPLICATION 19 OF 2020**

**M NGUGI, J
JULY 14, 2021**

BETWEEN

ASSET RECOVERY AGENCY APPLICANT

AND

ADBI MOHAMMED ALI 1ST RESPONDENT

SAADIA SHEIKH OSMAN 2ND RESPONDENT

JUDGMENT

1. The applicant, the Asset Recovery Agency (hereafter ‘the Agency’), is a body corporate established under section 53 of the *Proceeds of Crime and Anti-money Laundering Act* (POCAMLA). It has the mandate under *POCAMLA* to identify, trace, freeze and recover proceeds of crime. Pursuant to Part VIII of *POCAMLA* it is authorized to institute civil forfeiture proceedings and seek orders forfeiting funds to the government where there are reasonable grounds to believe that the said funds are proceeds of crime.
2. The Agency has filed the present proceedings against the respondents by way of Originating Summons dated July 2, 2020. The application is premised under sections 90 and 92 of the *POCAMLA* as read with Order 51 of the *Civil Procedure Rules* and seeks the following orders:
 - i. That this Honourable Court do issue orders declaring that the funds held in the following bank accounts are proceeds of crime and liable for forfeiture to the Government;



- i. Ksh 40,806,532 held in account number 100026128XXXX in the name of Abdi Mohammed Ali at Equity Bank, Mandera Branch.
 - ii. Ksh 21,448,100 held in account number 058027748XXXX in the joint names of Abdi Mohammed Ali & Saaida Sheikh Osman at Equity Bank, Mandera Branch.
 - ii. That this Honourable Court do issue forfeiture orders forfeiting the said funds to the government and transferred to the Applicant.
 - iii. That this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.
 - iv. That costs be provided for
3. The application is supported by an affidavit sworn on July 2, 2020 by S/Sgt Fredrick Musyoki, an Investigating Officer attached to the Agency and is based on the grounds set out on the face of the application. S/Sgt Musyoki also swore a supplementary affidavit on May 7, 2021 in response to the respondents' replying affidavit sworn by the 1st respondent in opposition to the application.
 4. The application is lodged against the 1st and 2nd respondents who are husband and wife and are both residents of Mandera County. The 1st respondent was an employee of the Mandera County Government and is the holder of bank account number 100026128XXXX at Equity Bank Limited Mandera Branch which holds funds amounting to Kshs 40,806,532. The 2nd respondent is a joint account holder with the 1st respondent of bank account number 058027748XXXX at Equity Bank Limited, Mandera Branch, holding funds amounting to Kshs 21,448,100.
 5. The Agency's case as it emerges from its pleadings is that on February 20, 2020, it received information that there were funds at Equity Bank, Mandera Branch, that were suspected to be proceeds of crime. It conducted investigations and established that the respondents' accounts set out above were holding a total of Ksh 62,254,632. The accounts had received suspicious huge cash deposits from the respondents, their agents, associates and conduits which the Agency had reasonable grounds to believe were stolen and or fraudulently acquired from illegitimate sources. The Agency contends that its investigations have revealed that the cash deposits were unlawfully acquired and were therefore proceeds of crime as defined in POCAMLA.
 6. The Agency contends that there is reasonable ground to believe that the accounts are used as conduits for money laundering contrary to sections 3, 4 and 7 as read with section 16 of POCAMLA. The Agency states that it believes that the accounts are holding funds suspected to be proceeds of crime which ought to be forfeited to the state. It had therefore, on December 13, 2019, obtained preservation orders against the funds in the said accounts. The preservation orders were gazetted on April 3, 2020 *vide* Gazette Notice No 2838 pursuant to section 83(1) of POCAMLA. The Agency pleads that it is in the public interests that the orders that it seeks against the respondents be granted.
 7. In his affidavit in support of the application, No 60040 S/SGT Fredrick Musyoki, a police officer attached to the applicant as an investigator, reiterates the Agency's contention that it had, on February 20, 2020, received information that the respondents' accounts were holding money suspected to be proceeds of crime. He had opened an inquiry file No 7 of 2020 to investigate and inquire into the activities in the accounts for the purpose of ascertaining whether they hold any funds that are proceeds of crime.



8. On March 20, 2020, he had obtained court orders (“FM 1”) freezing the accounts for 14 days under section 118, 118A, 119 and 121 of the Criminal Procedure Code (CPC), section 180 of the Evidence Act and section 53 of the POCAMLA for purposes of investigation *vide* Chief Magistrate Miscellaneous Application No 685 of 2020.
9. Upon analysing the bank statements, S/Sgt Musyoki established that there were suspicious huge cash deposits made from different locations into the bank accounts. These deposits, in his view, indicated activities of money laundering. Further, investigations established that the deposits were made in tranches below Ksh 1,000,000/= to evade the reporting threshold set in section 44 and the 4th schedule of POCAMLA and the Central Bank of Kenya Prudential Guidelines which require that account holders declare the sources of their money.
10. S/Sgt Musyoki further avers that the amount of Kshs 40,806,532.00 held in account number 100026128XXXX in the name of Abdi Mohammed Ali at Equity Bank, Manderu Branch and Kshs 21,448,100.00 held in account number 058027748XXXX in the joint names of Abdi Mohamed Ali and Saadia Sheikh Osman are funds which there is reasonable cause to believe were proceeds of crime from illegitimate sources and should be forfeited to the state. He further deposes that he analysed the bank statement of account number 100026128XXXX in the name of Abdi Mohammed Ali (“FM 5”) and noted that on diverse dates between November 13, 2013 and December 9, 2019, the account received seventy-seven (77) suspicious cash deposits amounting to Ksh 40,360,500/-. Further, between November 20, 2015 and October 17, 2017, the account received twenty-three (23) suspicious deposits amounting to Kshs 609,600/- from the State Department of Livestock.
11. It is the Agency’s deposition that between June 2014 and January 2020, the 1st respondent received Kshs 9,949,243.50/- as salary from the Manderu County Government and in the same period he made withdrawals amounting to Ksh 10,410,574.50/-.
12. S/Sgt Musyoki deposes further that an analysis of the bank statement of account number 058027748XXXX in the joint names of Abdi Mohamed Ali & Saadia Sheikh Osman (“FM 6”) shows that on diverse dates between July 27, 2018 and February 8, 2020, the account received suspicious cash deposits totalling Ksh 21,448,100/-. There was no single withdrawal made from the bank account.
13. It is the Agency’s case that it summoned the 1st respondent to record a statement. In his statement (“FM 4”), the 1st respondent confirmed that he is an employee of Manderu County Government and that he was the Director of Livestock Production since February 2013. The Agency asserts that there are reasonable grounds to believe that the funds in the respondents’ accounts are proceeds of crime and it is therefore in the greater public interest that the court issues the forfeiture orders that the applicant seeks.
14. In response to the respondents’ affidavit sworn in opposition to the application, the Agency filed a supplementary affidavit sworn by S/Sgt Musyoki. He reiterates that account number 100026128XXXX in the name of the 1st respondent held at Equity Bank, Manderu Branch received suspicious cash deposits amounting to Kshs 40,360,500/= on diverse dates between 2013 and 2019. He deposes that while the 1st respondent avers that he had been able to deposit funds in his account through the sale of livestock, he has not provided any evidence to substantiate that claim such as the dates when the sales were made, businesses traded with or proof of taxes paid to the Kenya Revenue Authority. While he had annexed a letter (AMA-1) from the Ministry of Agriculture, Irrigation, Livestock and Fisheries, Manderu County, the said letter does not bear the name of the 1st respondent, is addressed “To Whom It May Concern” and introduces one Murkani Abdi Mohamed of ID number 3299XXXX.



15. S/Sgt Musyoki further notes that the 1st respondent contends that he makes about Kshs 6.4 million from the sale of honey. That in support of this contention, he annexes a letter (AMA-2) from the Ministry of Agriculture, Irrigation, Livestock and Fisheries, Mandera Country addressed “To Whom It May Concern” as proof of the purported bee farming business. S/Sgt Musyoki notes that the said letter is dated April 1, 2020 while the suspicious deposits were made between 2013 and 2019. Further, that the 1st respondent had also not demonstrated that the deposits made into his accounts were from bee farming not was there evidence of any sales made or taxes paid from the income of the purported bee farming.
16. The Agency disputes the contention by the 1st respondent that the funds were from his commission as an agent of Moyale Pulse and Cereal Distributors in Mandera Count, noting that there was no evidence in support of this contention. S/Sgt Musyoki observes that the respondents have relied on a letter from the Ministry of Agriculture, Irrigation, Livestock and Fisheries, Mandera Country. Mandera County Government (AMA-3), which he notes has no legal basis as the County Government cannot speak on behalf of the Moyale Pulse and Cereal Distributors. It is also his averment that it is curious that the letters that the respondents rely on are from the Ministry of Agriculture, Irrigation, Livestock and Fisheries, Mandera Country, where the 1st respondent used to work as the County Director of Livestock. This, the Agency avers, poses a serious conflict of interest in contravention of the requirements of Chapter Six of the *Constitution* and the provisions of the *Public Officers’ Ethics Act*.
17. With regard to account number 058027748XXXX held in the joint names of the 1st and 2nd respondents at Equity Bank, Mandera Branch. S/Sgt Musyoki notes that it received suspicious cash deposits amounting to Ksh 21,448,100/= on diverse dates between July 27, 2018 and February 8, 2020, while no withdrawals were made from the account. On a single day, July 27, 2018, the account received a cash deposit of Ksh 6,000,000/= in three (3) tranches without reasonable explanation, and the bank statements of the accounts revealed that the 1st respondent was making most of the cash deposits. The Agency also disputes the averments by the 1st respondent with regard to the businesses allegedly carried out by the 2nd respondent, noting that there are no documents to support the alleged businesses.
18. Regarding the averment by the 1st respondent that he had supplied honey to Al-Kowthar Company Limited worth Kshs 1,900,000/= on June 21, 2016 and to Platinum International Company Limited worth Ksh 2,140,000/= on June 23, 2016, S/Sgt Musyoki deposes that there is no evidence of any invoices, delivery notes and the quantity of honey supplied to these companies. He deposes that his investigations had established that Al-Kowthar Company Limited is a construction company which has been archived by the Business Registration Services for suspected fraudulent changes, supporting this averment with annexure FM1, a copy of the business details of the said company.
19. S/Sgt Musyoki deposes further that tax records from the Kenya Revenue Authority (FM2, FM3, FM4, and FM5) demonstrate that the 1st respondent has never declared any income from farming or any other business whatsoever. The same records also show that the 2nd respondent is a non-filer and does not pay any taxes.
20. In its written submissions dated April 16, 2021 and its supplementary submissions dated May 11, 2021, the applicant identifies three issues for determination. The first is whether the funds and assets in issue are proceeds of crime. Its submission is that the 1st respondent’s bank account between November 2013 and February 2020 received suspicious funds amounting to Kshs 51,413,495.50/-. Its analysis of the bank statements established that he had received Kshs 10,558,843/- as salary and other emoluments from Mandera County Government and that in the said period he withdrew Ksh 10,410,574.50/- leading to an inference that he had withdrawn and spent what he had genuinely earned from Mandera County Government.



21. The applicant submits that its investigations revealed 77 suspicious cash deposits in the 1st respondent's bank statements. However, the 1st respondent only attempted to justify 16 transactions without providing any evidence. According to the Agency, the 1st respondent's averment that he makes Kshs 6.4 million per year from the sale of honey is not reflected in his bank statement. Further, that the 1st respondent's assertion appears in respect of two alleged sales of honey, two days apart, on 21st and June 23, 2016, for Kshs 1,900,000 and 2,140,000 respectively. The Agency submits that the respondents' assertion that they are involved in livestock, bee keeping, fresh farm produce, clothing and jewellery are mere assertions with no probative value and should be dismissed. It notes that the respondents have not given a reasonable explanation that shows that they have a legitimate source of the funds and assets. They have not tendered any reasonable evidence of the businesses they allege they are involved in such as licenses, permits, invoices, receipts or tax returns.
22. The Agency submits that while the 1st respondent declared his income on PAYE, he failed to file tax returns from his business. The 2nd respondent did not declare any income or pay any taxes and in its view, the failure by the respondents to file tax returns is a clear indication that they do not have any source of legitimate income.
23. The Agency cites sections 109 and 112 of the *Evidence Act* and the decision of the court in *Assets Recovery Agency v Lillian Wanja Muthoni Mbogo & Others*, (2020) eKLR and *Assets Recovery Agency vs James Thuita Nderitu* [2020] eKLR to support its contention that the 1st respondent has not been able to show the source of the funds deposited in his accounts.
24. With regard to account number 058027748XXXX held jointly by the 1st and 2nd respondents, the Agency submits that it received suspicious deposits amounting to Kshs 21,448,100/- on diverse dates between July 27, 2018 and February 8, 2020. It observes that there was no single withdrawal from the bank account, which was not reflective of genuine business that involved buying and selling. The Agency relies on the decision in *Asset Recovery Agency vs Pamela Aboo* [2018] eKLR in support of its contention that a business should have transactions into and out of the account reflected in the bank statement.
25. The Agency submits that the letters produced by the 1st respondent from the Ministry of Agriculture, Irrigation, Livestock and Fisheries, Mandera County, where he also worked as the County Director of Livestock Production, amounted to a conflict of interest in contravention of Chapter Six of the *Constitution* and section 12 of the *Public Officers Ethics Act*.
26. The second issue addressed by the Agency is whether the assets should be forfeited to the State. Its submission is that the response to the issue is in the affirmative, noting that it has demonstrated on a balance of probabilities that the funds in the respondents' accounts are proceeds of crime and subject to be forfeited to the state. The Agency relies on the case of *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 to support its contention that it has established its case on a balance of probabilities. It is its contention that the respondents have failed to prove why and how the suspicious cash transactions were deposited into their accounts, their explanations, in the Agency's view, being unfounded and without evidence.
27. The Agency relies on the decision in *Assets Recovery Agency v Pamela Aboo* [2018] eKLR for the proposition that lack of documentary proof of transactions was reasonable ground to believe that monies may have been proceeds of crime. Reliance is also placed on Mombasa High Court Petition No 4 of 2019 *Stephen Vicker Mangira & Anor v Assets Recovery Agency & others* (unreported) where the court stated that the doctrine of strict liability applied and the evidentiary burden was on the accused person. Reliance is also placed on the decision of the court in *Abdurahman Mahmoud Sheikh & 6*



Others v Republic & Others (2016) eKLR in which the court underscored the legislative purpose and intent in the enactment of *POCAMLA*

28. The third issue addressed by the Agency is whether criminal conviction or evidence of criminal activity is a precondition for forfeiture. It submits that its application is for the forfeiture of the funds in issue pursuant to section 92 of *POCAMLA* and the court is only required to determine, on a balance of probabilities, whether the funds sought to be forfeited are proceeds of crime. The Agency submits, on the authority of the decision in *Assets Recovery Agency v James Thuita Nderitu & 6 others* (supra) and *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* [2017] eKLR that the validity of the forfeiture order is not in any way affected by the outcome of criminal proceedings.
29. To the respondents' contention that they have a right to property which will be violated by an order of forfeiture, the Agency concedes that Article 40 of the *Constitution* does protect the right to property and guarantee to every person the right to acquire and own property of any description and in any part of Kenya. It submits, however, that at Article 40(6), the protection does not extend to property which has been unlawfully acquired, and the right to property is not absolute. Support for this submission is sought in the case of *Lameck vs President of Namibia* 2012(1) NR 255(HC) and *Martin Shalli vs Attorney General of Namibia & Others* High Court of Namibia Case No: POCA9/2011.
30. Finally, the Agency addresses itself to the question whether the forfeiture application violates the respondents right to the presumption of innocence. It is its submission that under Part VIII of *POCAMLA*, civil forfeiture proceedings are directed at recovery of the funds or any other benefit where there is reasonable ground to believe that it is proceeds of crime irrespective of whether or not criminal proceedings have been instituted. Support for this submission is sought in the case of *Gale vs Serious Organized Crime Agency* quoted in the case of *Assets Recovery Agency & Others vs Audrene Samantha Rowe & Others* Civil Division Claim No 2012 HCV 02120. The Agency further relies on section 92(4) of the *POCAMLA* and Misc App No 46 of 2018 *Assets Recovery Agency vs Felix Obonsi Onganga & 3 others* and *Stephen V Mangira & Anor v Senior Principal Magistrate, Shanzu & 9 others* [2020] eKLR to argue that the forfeiture proceedings are not a violation of the respondents' right to the presumption of innocence.

The Response

31. In opposing the application, the respondents filed an affidavit sworn by the 1st respondent, Abdi Mohammed Ali, on February 15, 2021. The respondents had also filed a further affidavit, sworn on May 5, 2021 by the 1st respondent. This affidavit, however, was filed without the leave of the court and was accordingly struck out.
32. The 1st respondent deposes that the monies in the subject accounts are not proceeds of crimes since he runs legitimate businesses with his wife, the 2nd respondent. He also has savings having been employed for a period of 36 years from 1984. He is also a livestock trader in Mandera, and he acts as an agent for Moyale and Northern Kenya region as evidenced by a letter from the Ministry of Agriculture, Irrigation, Livestock and Fisheries (AMA-1). Through the sale of livestock including camels, cattle and goats, he deposited into his account number 100026128XXXX Kshs 2,400,000/- between July 10, 2014 and June 7, 2017.
33. The 1st respondent further avers that he is a bee farmer in Banisa Sub-County in Mandera as evidenced by a letter from the Ministry of Agriculture, Irrigation, Livestock and Fisheries (AMA-2). He owns 200 beehives which produce 20kgs of honey per beehive bi-annually, and each kilogram of honey retails at Ksh 800/-. It is his deposition that he therefore makes Kshs 6.4 million per year from the honey.



34. According to the 1st respondent, a company known as Al-Kowthar Company Limited made a payment of Ksh 1,900,000/- on June 21, 2016 in respect to honey that he had supplied to it. On June 23, 2016, another company, Platinum International Company Limited, made a payment of Ksh 2,140,000/-, also in respect of honey that he had supplied to it.
35. The 1st respondent further avers that he is an agent of Moyale Pulses and Cereal Distributors as evidenced by a letter from the Ministry of Agriculture, Irrigation, Livestock and Fisheries (AMA-3). He also earns a commission from the sale of products across the county.
36. The 1st respondent confirms that he was deployed by the National Government to Mandera County Government as the County Director of Livestock production until his retirement. His monthly salary and top ups were regularly deposited into his account number 100026128XXXX and he had received a cumulative sum of Ksh 10,816,226.65/- since June 2014.
37. The 1st respondent makes various averments on behalf of the 2nd respondent. He states that she trades in clothes, particularly wedding dresses from Dubai, which she sources from distributors in Nairobi. He supports this averment by a letter from the Garissa County Department of Trade, Tourism and Enterprise (AMA-4). The business, he avers, has enabled the 2nd respondent to deposit, on diverse dates between September 28, 2018 and February 8, 2020, cash totalling Kshs 2,050,000/- into their joint account number 058027748XXXX.
38. The 1st respondent further avers that the 2nd respondent is also a livestock trader in Garissa County. Support for this deposition is sought in a letter from the Ministry of Agriculture, Irrigation, Livestock and Cooperatives (AMA-5). She is also, he avers, an agent for export butchers in Nairobi and Mombasa. Through trade in camels and cattle, the 2nd respondent had, on diverse dates between July 27, 2018 and February 8, 2020, made deposits into their joint account number 05802774XXXX totalling Ksh 13,400,000/-. The 1st respondent also deposes that the deposit of Kshs 6 million into their joint account number 058027748XXXX on July 27, 2018 was an inheritance by the 2nd respondent from her late father following the sale of 60 camels at Ksh 100,000/- each.
39. The 1st respondent avers that the application is based on suspicion that the funds in the respondents' accounts are proceeds of crime. It is his averment that the Agency has no proof that the funds are proceeds of crime and has failed to establish a link between the funds and any criminal activity. He asserts that the only deposits made were honest payments from legitimate and lawful trading activities jointly owned with the 2nd respondent, and his salary and allowances.
40. The respondents filed submissions dated May 5, 2021 in which they address themselves to three issues. The first is whether the funds held in account number 100026128XXXX and 058027748XXXX are proceeds of crime and liable for forfeiture to the government. The second issue identified is whether a forfeiture order should be made. Finally, they address the question of who should bear the costs of the application.
41. The respondents submit that they are entitled, under Article 40, to the funds held in the two accounts. It is their submission that for a forfeiture order to be made, the court must be satisfied that the assets at issue are proceeds of crime as defined under section 2 of *POCAMLA*. They submit that section 55(2) of *POCAMLA* establishes a threshold for existence of unexplained assets, which is that there must be a period of investigation; that the person must be reasonably suspected of corruption or economic crimes; and that the person must have assets disproportionate to his known sources of income around the period of investigation for which there is no satisfactory explanation. It is their submission that this threshold has not been met since they have satisfactorily explained the sources of assets as well as proved the source of the funds. He has also given a chronological order of how they acquired the money and



had produced documentary evidence showing the incorporation of the said businesses. He submits further that there is no evidence to support the allegation that the monies are proceeds of crime.

42. The respondents submit therefore, in response to the second issue whether a forfeiture order should be made, that there was no evidence of commission of criminal conduct or that they benefited directly or indirectly from such conduct. They reiterate the 1st respondent's averment that the Agency is working on suspicion due to the funds in their account and that there are no records of tax returns from their businesses. It is their submission that they have been able to show clear, cogent and irrefutable evidence of the legitimate and lawful source of their funds. It is their submission that only proceed of crime can be forfeited to the government, support for this argument being sought in the case of *Abdurahman Mahmaoud Sheikh & 6 Others v Republic & Others* (supra).
43. The respondents submit that they should not be denied enjoyment of the right to own property and privacy. They seek support for this submission in *EACC vs Jimmy Mutuku Kiamba* Misc Civil Application No 804 of 2014. The respondents further argue that forfeiture of their funds to the state violates their right to be presumed innocent until proven guilty guaranteed under Article 50 of the *Constitution*. Forfeiture orders, they submit, will adversely affect the funds that the 1st respondent has acquired as salary as well as from the businesses they legally run.

Analysis and Determination

44. From the pleadings and submissions of the parties, I believe four main issues arise for determination:
- i. Whether the funds held in the respondents' accounts are proceeds of crime;
 - ii. Whether a criminal conviction is a necessary pre-condition for issuance of an order of forfeiture;
 - iii. Whether the funds in the respondents' accounts should be forfeited to the state;
 - iv. Whether the application for forfeiture violates the respondents' constitutional right to property and presumption of innocence.

Whether the funds held in the respondents' accounts are proceeds of crime;

45. Part VIII of *POCAMLA*, under which the present application has been lodged, provides for civil forfeiture of assets where there is reasonable ground to believe that the assets are proceeds of crime. Section 92(1) of *POCAMLA* provides that:

“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”.
46. The burden placed on the Agency in an application such as this is to establish, on a balance of probabilities, that the assets at issue are proceeds of crime. It will have done so if it places before the court evidence that shows, on a balance of probabilities, that the respondents have funds or assets in excess of their known legitimate sources of income. Where the Agency meets this burden, the respondents are under an evidential duty to demonstrate that they have a legitimate source of the assets at issue. Should they fail to do this, then forfeiture orders would issue. The Court of Appeal explained this succinctly



in its decision in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2019] eKLR when it considered section 55 of the *Anti-corruption and Economic Crimes Act* and stated as follows:

“Section 55 (2) of *ACECA* is in sync with Section 112 of the *Evidence Act*, Cap 80 of the Laws of Kenya. Section 112 of the *Evidence Act*, (Cap 80 of the Laws of Kenya) provides:

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.”

47. Once the Agency has established, on a balance of probabilities, that a party has funds or other assets reasonably suspected to be proceeds of crime, such a party has to prove that the funds or assets are from a legitimate source. In the words of the Court of Appeal in Amuti: ‘prove it or lose it.’
48. The evidence placed before this court by the Agency is that on diverse dates between November 2013 and February 2020, the 1st respondent’s account number 100026128XXXX received suspicious funds in cash amounting to Kshs 51,413 495.50. Out of this amount, only Kshs 10,558,843.00 was from the 1st respondent’s salary with the County Government as an analysis of his bank statements revealed. The 1st respondent had, in the same period, withdrawn Kshs 10, 410,574.50. The inference that the Agency asks the court to draw, which I find reasonable, is that the 1st respondent had withdrawn and spent the entire amount that he legitimately earned from the Mandera County Government.
49. An analysis of the tabulation of the receipt of funds in the 1st respondent’s account set out in Cpl Musyoki’s affidavit, which has not been controverted, shows that the 1st respondent received into his account a total of Kshs 40,360,500 between November 2013 and December 2019 whose source is not indicated. A sampling of the deposits indicates that funds were deposited, sometimes only days apart, in tranches ranging from Kshs 50,000 to Kshs 5,000,500. During that same period, the 1st respondent, who was employed as the Director of Livestock Production by the Mandera County Government, received Kshs 10,558,843/- as salary and other emoluments.
50. It is the Agency’s evidence further that within a period of 19 months, the 1st and 2nd respondents’ bank account number 058027748XXXX held at Equity Bank, Mandera Branch, received suspicious cash deposits totaling to Kshs 21,448,100.00. This amount was received between July 27, 2018 and February 8, 2020. The evidence shows that on a single day, July 27, 2018, the same day that the account appears to have been opened, three deposits of Kshs 2,000,000 were made in the said account. On September 26, 2018, October 17, 2018, and November 20, 2018, Kshs 900,000 were deposited into the said account, while Kshs 800,000 was deposited into the account on October 26, 2018. Similar deposits were made throughout 2018 and 2019, the last deposit into the account being on February 8, 2020. From the time the account was opened and throughout this 19-month period, the evidence presented by the Agency shows that no single withdrawal was made from the account.
51. The 1st respondent explains the source of the funds in his account number 100026128XXXX as being from his salary from the Mandera County Government, his business as a livestock trader, bee keeper, a cereal agent and from the importation and selling of beans. The explanation with respect to the funds held in account number 058027748XXXX held jointly with his wife, the 2nd respondent, is that the funds are from her businesses. The 2nd respondent, he avers, is a clothes trader in Garissa who specialises in wedding dresses imported from Dubai through agents in Nairobi. She is also a livestock trader and is an agent for export butchers in Nairobi and Mombasa. Regarding the Kshs 6 million deposited in the joint account on July 27, 2018, the explanation from the respondents is that it is an inheritance that the 2nd respondent received from her late father after the sale of 60 camels. No evidence is placed before the court to show that the estate of the 2nd respondent’s father was distributed and to whom, that part of the estate comprised 60 camels, and to whom the said camels were sold.



52. In support of their contentions that the funds in their accounts are from their livestock businesses, bee keeping and inheritance, the respondents have only placed before the court letters from the Mandera and Garissa County Government stating that they are known them. The letters are from the Ministry of Agriculture, Irrigation, Livestock and Fisheries, Mandera Country. As noted by the Agency in its deposition, this is where the 1st respondent used to work as the County Director of Livestock, and the probative value of such letters is highly debatable. That notwithstanding, however. such documentation, in my view, are not evidence of business, nor do they support the very substantial deposits made into the respondents' accounts. There is nothing before me that shows that the respondents were engaged in any business that would generate the kind of funds deposited in their accounts.
53. The Agency seeks forfeiture of the funds in the two accounts the subject of this application on the basis that such funds are proceeds of crime. Section 2 of POCAMLA defines 'proceeds of crime' as follows:
- “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; (Emphasis added)
54. In Abdulrahman Mahmoud Sheikh & 6 others v Republic & others (*supra*) the court stated as follows with respect to the legislative intent behind POCAMLA:
- “The letter, spirit purpose, 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.”
55. In Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7 it was held that:
- “... the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order...”
56. In issuing an order for recovery of money found to be proceeds of crime, the court in Assets Recovery Agency -vs- Rohan Anthony Fisher and & Others (*supra*) observed that:
- “...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 August 14, 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...”

57. A burden is placed on a party against whom proceedings such as are presently before me are brought to show a legitimate source of funds once the agency places evidence before the court that shows, on a balance of probabilities, that the funds or assets at issue are proceeds of crime. In *Asset Recovery Agency v Lillian Wanja Muthoni Mbogo & others* [2020] eKLR, this court observed that:

“...money and assets are not plucked from the air or, like fruits, from trees. They can be traced to specific sources- salaries, businesses in which one sells specific items or goods, or provides professional services. There must be books of accounts, stock registers, local purchases orders and delivery notes showing to whom goods are sold, deliveries made and payment receipts showing from whom payment has been received.”

58. Having considered the respondents’ pleadings and documents in support of their case, I am constrained to find that they have been unable to place before the court any evidence that shows a legitimate source of the funds in their accounts. In support of their contention that they are livestock dealers, they have annexed letters from the County Governments of Mandera and Garissa, as well as livestock movement permits. These are not evidence of a business dealing in livestock, let alone such a lucrative one as would generate the funds in the subject accounts. The respondents have also claimed to be agents of Moyale Pulse and Cereals Distributors. If indeed the 1st respondent was an agent of this company or any other, nothing hindered their business associates from swearing affidavits to support the respondents’ claims and place evidence before the court that they pay them a commission.

59. In its decision in *Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)* [2018] eKLR, the court observed as follows:

57. I have done an analysis of the deposits above and shown how much was being deposited in a day or so for the Respondent. Even with all this, the Respondent has not attempted to explain the source of this money either through the replying or supplementary affidavit. It could be true that she does business with Samson Waweru, Jonathan Kimindu and her own business but where is the evidence?

58. There is nothing that stopped Samson Waweru and other business partners from swearing affidavits to support her claims. If indeed Samson Waweru and Jonathan Kimindu were among the cash depositors based in Mombasa, could they not have come out to specifically state on oath when and how much they deposited? The Respondent did not support the claim that she gave Kshs 1 million to Samson Waweru. That sum of money must have come from somewhere if the allegation is anything to go by.

60. The respondents have also deposed that the funds in their joint account are from the 2nd respondent’s business and other businesses that they engage in. A scrutiny of the statements of account in respect



of this account reveals, however, that there have been no withdrawals from the said account since it was opened, which begs the question: how do the respondents purchase the goods that they allege that they trade in? A similar scenario played out in the case of *Assets Recovery Agency v Pamela Aboo; Ethics & Anti Corruption Commission (Interested Party)* (*supra*) in which the court made the following observation:

Mr Odoyo in his submissions has asked what law prohibits one from depositing money and if there is any offence in not withdrawing the same. My quick answer to that is that there is no law that prohibits one from depositing money and there is also no offence committed if one fails to withdraw their money. How was she running her business without making any withdrawals” Even as one fails to withdraw it must be shown how they are surviving. One is at liberty to deposit even a billion shillings but the person must be ready to share the source of such huge deposits with the relevant authorities. When no satisfactory explanation is forthcoming the court will take it that the same was not lawfully acquired”. (Emphasis added).

61. Having considered all the evidence and submissions on this issue, I am satisfied that the applicant established, on a balance of probabilities, that the funds in the respondents’ account are proceeds of crime. The respondents have not placed any evidence before me that would show that the funds have a legitimate source.

Whether a criminal conviction is a necessary pre-condition for issuance of an order of forfeiture

62. I observe from the respondents’ submissions that they make reference to section 55 of *POCAMLA*. This section is to be found in Part VII of *POCAMLA* which deals with cases of criminal forfeiture following a trial and conviction. It is not applicable to the present proceedings.
63. Part VIII of *POCAMLA* sets out the procedure to be used in cases of civil forfeiture under which the present proceedings have been lodged. Section 92(4) thereof provides that:
- (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.”
64. In the case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* (*supra*) the court stated that:

“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.” 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.” (Emphasis added).

65. The issue was also considered in *Assets Recovery Agency vs Pamela Aboo* (*supra*). In concluding that the making of a forfeiture order did not require a criminal conviction as a pre-requisite, the court observed as follows:

“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...”

66. The principle that is established by the jurisprudence that has emerged from our courts with regard to civil forfeiture is that in order for the court to make orders of forfeiture under the civil forfeiture process set out in Part VIII of *POCAMLA*, the applicant need not establish that there were criminal proceedings related to the property at issue or that any person has been convicted with regard thereto. Once the applicant establishes, on a balance of probabilities, that the assets in questions are suspected to be the proceeds of crime, a duty is cast on the respondent to establish the contrary. Where the respondents, as in this case, fail to discharge the burden of showing that the assets have a legitimate source, then such assets are deemed to be proceeds of crime. Which leads to a consideration of the third issue that this application raises.

Whether the funds in the respondents’ accounts should be forfeited to the state

67. Having found that the assets in this matter are proceeds of crime, the next issue to consider is whether they should be forfeited to the state. The response to this issue follows naturally from the findings of the court on the first issue addressed in this analysis. Under section 92(1) of *POCAMLA*, if the court finds that the assets at issue are proceeds of crime, then it shall, subject to section 94, make the order for forfeiture applied for under section 90(1). The respondents have large sums of money deposited in their accounts which they have not been able to show a legitimate source in respect of. The only conclusion that can be arrived at is that the funds are proceeds of crime as defined in *POCAMLA* and are therefore liable to forfeiture to the State.



Whether an order for forfeiture violates the respondents' constitutional right to property and presumption of innocence

68. The respondents contend that an order for forfeiture in respect of the funds held in their accounts violates their constitutional rights. They allege a violation of their right to property under Article 40 and the presumption of innocence under Article 50(2)(a).
69. It cannot be disputed that Article 40 of the Constitution guarantees to all the right to property. However, Article 40(6) provides that “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”
70. In the case of *Teckla Nandjila Lameck vs President of Namibia* (supra) the court held that:
- “ The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity which is defined to “constitute an offence or which contravenes any law...”
71. A similar finding was made in the case of *Martin Shalli vs-Attorney General of Namibia* (supra) in which the court stated that:
- “...the proceeds of unlawful activity would not constitute property in respect of which constitutional protection is available. This court in that matter further held that the protection of property under art 16 is in any event not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate purpose...
- ...I accordingly conclude that chapter 6 does not violate the right to property under article 16 of the Constitution because art 16 does not protect the ownership or possession of the proceeds of crime. I further reiterate the approach of the court in Lameck that even if chapter 6 were to infringe upon art 16, then it would in my view be a proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrongdoing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose...”
72. The two decisions that I have cited above are only of persuasive authority as they are from other jurisdictions. However, the reasoning therein resonates with the legislative and constitutional intent in this jurisdiction, and they have been cited with approval in civil recovery proceedings in our courts- see *The Assets Recovery Agency v Quorandum Limited & 2 others* [2018] eKLR and *Assets Recovery Agency v Pamela Aboo* [2018] eKLR.
73. As this court has found earlier in this analysis, the respondents have funds in their accounts which the Agency has shown, on a balance of probabilities, are proceeds of crime. The respondents have not been able to demonstrate that they have a legitimate source of these funds. Such funds are therefore not protected under the constitutional guarantee in Article 40. Their forfeiture to the state does not therefore violate the constitutionally guaranteed protection of property.
74. The respondents have also submitted that issuance of forfeiture orders will violate their constitutional guarantee to presumption of innocence. Again, there can be no dispute that under Article 50(2)(a), every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved. This right, however, like the other rights guaranteed under Article 50(2), relates



to a criminal trial. It has no application in civil proceedings such as are currently before me, which are civil in nature. As stated earlier, the Agency is required to show, on a balance of probabilities, that the assets at issue are proceeds of crime, thereby casting the reverse burden on the respondents to show that the assets have a legitimate source- see *Assets Recovery Agency v Pamela Aboo* [2018] eKLR).

75. In her decision in *Assets Recovery Agency v Quorum Limited & 2 others* (*supra*), Ong’udi J stated as follows:

“105 In his affidavit and submissions, the 1st Respondent avers that they are entitled to the right of presumption of innocence which is provided under article 50(2) (a) of the *Constitution* of Kenya since the criminal proceedings against them are ongoing. My take on this is that civil forfeiture proceedings are proceedings in rem (against the property) and it involves a civil suit being brought in court against the property which is reasonably believed to be a proceed of crime. The proceedings before this Court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondents where presumption of innocence is applicable. Further the application for forfeiture is not made on behalf of the prosecution, but on behalf of ARA as held in *Serious Organized Crime Agency vs Gale* quoted in the case of *Assets recovery Agency & Others vs Audrene Samantha Rowe & Others* Civil division claim No 2012 HCV 02120 where 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 conviction of any individual and thus there was no reason to apply the criminal standard of proof...”

See also *Phillips v The United Kingdom [2001] ECHR437* quoted in *Martin Shalli vs A.G. of Namibia (supra)*; *Techla Nadjila Lameck vs President of Namibia (supra)*.”

76. In declining to find that the issuance of a forfeiture order would violate the constitutional right to be presumed innocent, Ong’udi J concluded that:

“106. Simply put civil forfeiture proceedings are not subject to presumption of innocence which is a criminal law phenomenon. In the present case, the proceedings are civil forfeiture pursuant to part VIII of *POCAMLA* and are in respect of recovery of [property].”

77. In *Stanley Mombo Amuti v Kenya Anti-Corruption Commission (supra)*, the Court of Appeal was confronted with the question whether forfeiture proceedings brought under the *Anti-Corruption and Economic Crimes Act* (ACECA) violated the presumption of innocence guaranteed in the *Constitution*. In answering the question in the negative, the Court stated as follows:

“A forfeiture order under *ACECA* is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired”.

78. The Agency seeks in this application civil forfeiture of funds reasonably believed to be proceeds of crime. The respondents have been afforded an opportunity to explain the legitimate source of their



funds as required under Part VIII of POCAMLA. The process of civil forfeiture, as expressly provided under section 92(4) of POCAMLA, is not dependent on the outcome of a criminal prosecution or investigation. It is therefore my finding and I so hold that there is no violation of the provisions of Article 50(2) (a).

Disposition

79. Having reached the conclusions set out above in respect of the issues falling for determination, it is my finding and I so hold that the application dated July 2, 2020 is merited and is accordingly allowed. The orders that commend themselves are as follows:
- i. That a declaration be and is hereby issued that the funds held in the following bank accounts are proceeds of crime and liable for forfeiture to the government:
 - a. Kshs 40,806,532 held in account number 100026128XXXX in the name of Abdi Mohammed Ali at Equity Bank, Mandera Branch.
 - b. Kshs 21,448,100 held in account number 058027748XXXX in the joint names of Abdi Mohammed Ali & Saaida Sheikh Osman at Equity Bank, Mandera Branch.
 - ii. That an order be and is hereby issued that the funds the subject of order i. above be and are hereby forfeited to the state and transferred to the Agency.
 - iii. That the respondents shall bear the costs of the application.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF JULY 2021.

MUMBI NGUGI

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2021.

JAMES WAKIAGA

JUDGE

