



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISCELLANEOUS APPLICATION NO. 16 OF 2016

(FORMERLY MISC APPLICATION NO 221 OF 2016)

IN THE MATTER OF: AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR ORDERS UNDER SECTIONS 81, 90, 92 AND 100 OF THE PROCEEDS OF CRIME AND ANTI MONEY LAUNDERING ACT READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF: ARTICLES 2(5) & (6) OF THE CONSTITUTION OF KENYA AND FINANCIAL ACTION TASK FORCE (FATF) RECOMMENDATIONS, 2012

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF FORFEITURE TO THE GOVERNMENT OF KENYA AGAINST MOTOR VEHICLE REGISTRATION NUMBER KCE 241Q JEEP CHEROKEE CURRENTLY PRESERVED PURSUANT TO ORDERS ISSUED IN NAIROBI HIGH COURT MISCELLANEOUS APPLICATION NO 30 OF 2015

BETWEEN

THE ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

CHARITY WANGUI GETHI.....RESPONDENT

JUDGMENT

1 The Asset Recovery Agency (ARA) is established as a semi autonomous body under the office of the Attorney General (A.G) under section 53 of the Proceeds of Crime and Anti Money Laundering Act (POCAML A). It filed an originating Motion dated 23rd May 2016 under sections 81, 90, 92 & 100 of POCAML A as read together with order 51 of the Civil Procedure Rules (CPR) seeking the following orders.

i. *Spent*

ii. *That this Honourable court be pleased to issue an order of forfeiture against motor vehicle registration number KCD 241Q Jeep Cherokee to the Government of Kenya.*

iii. *That this Honourable court be pleased to issue vesting orders transferring motor vehicle registration number KCD 241Q Jeep Cherokee to the ARA to be held on behalf of the Government of Kenya*

iv. *That this court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.*

v. *That cost of the Application be provided for.*

2 The Application was supported by the affidavits of Muthoni Kimani (Director of ARA) and Cpl Sautet Jeremiah Matipei and the grounds of its face.

3 M/s Muthoni Kimani has set out the mandate of ARA under sections 53, 54 & 55. She deponed that the application herein is premised on the investigations conducted by the Directorate of Criminal Investigations (DCI) into allegations of theft and fraud of funds amounting to KShs 791,385,000/- from the state department of Planning in the Ministry of Devolution which revealed massive fraud and embezzlement of

public funds perpetuated by public officials and private persons some of whom have been charged for various offences in **Nairobi Chief Magistrate's Court criminal case No. 1905 of 2015 and 301 of 2016 (MKIA & B)**

4 She further deponed that the investigations revealed a complex web of persons acting together with their relatives/ associates in acts of money laundering in order to conceal their activities. That the Respondent is a beneficiary of some of this laundered money from which she purchased a motor vehicle registration No. KCD 241Q Jeep Cherokee.

5 The Applicant obtained a preservation, seizure and surrender Order on 5th February 2015 against the said motor vehicle (**MK2**). The said order was gazetted on 19th February 2016 vide Gazette Notice No 1046 pursuant to section 83(1) POCAMLA (**MK3**) while section 55 POCAMLA was also complied with.

6 **Cpl Sautet Jeremiah Matipei** is a police officer attached to the banking fraud unit of the **DCI**. He averred that investigations into the fraud at National Youth Service (**NYS**) revealed that 3 companies namely:-

i. Form Home Builders

ii. Roof and all trading

iii. Reinforced concrete trading all belonging to one Josephine Kabura Irungu received a total of Kshs 791,385,000 from the NYS through account numbers 065000007848; 065000007847 & 065000007849 at family bank at **KTDA** plaza Nairobi.

7 The investigations further revealed transfer of money by Josephine Kabura Irungu to John Kago Ndungu account No 0140000020948 (Family Bank) in the sum of Kshs 273,000,000/- plus another transfer of Kshs 108,000,000/- to GoodLuck Twenty eleven company of the said John Kago Ndungu (SJM2)

8 **John Kago Ndung'u** in turn transferred money as follows:

- Kshs 103,000,000/- to Account No 0103610020010699-K- Rep (Ogolla & Co Advocates SJM 3)
- Kshs 78,000,000/- to M.M. Gitonga & Co Advocates account No 3000096044 Prime Bank Ltd Nairobi (SJM5).
- Ogola & Mujera Co Advocates transferred Kshs 28,000,000/- to Old Mutual investments for shares bought in the name of Charity Wangui Gethi (Respondent) SJM4.
- Kshs 77,600,000/- transferred from M.M. Gitonga to Charity Wangui Gethi at Faulu Kenya Ltd which on diverse dates transferred monies to account No. 0152510502800 at Standard chartered bank belonging to Charity Wangui Gethi.

9 Following these revelations a number of suspects were arraigned in court vide chief magistrate's criminal case no 1905 of 2015 (SJM6). It was further revealed that the Respondent paid D.T. Dobie Kshs 6,390,000/ from her standard chartered bank account for purchase of a motor vehicle KCD 241Q (SJM 8).

10. In a further affidavit sworn on 5th April 2017 he produced business registration certificates, account opening forms and copies of bank statements, tellers transactions details for call over – SJM – 1a, b & c). He deponed that on 11th June 2015 M.M. Gitonga & Associates transferred Kshs 17.6M from his account No 3000096044 at Prime Bank to the Respondent's Old Mutual Money Market fund account no 80356 (**SJM3**). That the Respondent's agent called **Martin Wanjohi** presented to Old mutual kenya a sale agreement for residential property known as utawala block 11/38 between kilele investment group and Respondent as proof of the source of the money. It was however confirmed that there was never such a sale (**SJM4a-d**).

11 On 2nd January 2015 the Respondent deposited Kshs **10M** in her Old Mutual account no 80356 and presented another sale agreement dated 24th December 2015 for land parcels Mwega, Thungare/block1 /4877 Mweiga, Thungare/Block1/488 between the Respondent and Evanson Githinji Kinyanjui to support the source of the Kshs. **10M (SJM3)**. She made a similar deposit on 13TH February 2015 using similar documents in support. Investigations revealed that there was no such sale and the said sale documents were fake (SJM 6a-c & SJM 7).

12 Later on 19th February 2015 the Respondent deposited Kshs 15 M into her old mutual account. It was supported by a purported sale agreement between **Evanson Githinji Kinyajui** and the Respondent in respect of parcels Mweiga, Thungare/Block1/465 & Block 1/47. Investigations revealed that there was never such a sale (SJM -3, 6, 7 8a&b). **Mr Wilson Muigai Kamaru** an advocate from Kibanya & Kamau advocates denied having drawn the said sale agreement (SJM10). **Evanson Githinji** denied having bought any such land.

13 There were several other deposits and fake sale agreements which were denied by the alleged purchasers and Advocates (**SJM 3, 6, 10, 12**). On 26th March 2015 the Respondent redeemed Kshs 14M from her account no. 80356 at Old Mutual which was transferred to her Standard Chartered Bank account No. 0100231918400- Ruaraka branch whose balance had been zero (SJM 3 & 13).

14 It was established that on 5th June 2015 the Respondent transferred Kshs 6,300,000 from the Standard Chartered Bank account to D.T Dobie for purchase of motor vehicle registration no. KCD 241Q Jeep Cherokee. It is this motor vehicle that is the subject of this originating motion.

15 The Respondent in her replying affidavit deponed that her motor vehicle KCD 241Q was the subject of this matter. She confirmed having surrendered the motor vehicle and its documents to Cpl Sautet Jeremiah on 8th March 2016 in compliance with the orders of the court. She

averred that she bought the vehicle using part of Kshs 10M she had sourced from a company called horizon ltd owned by her son.

16 Since she was not buying the vehicle immediately she deposited the money with Old Mutual where she had opened an account on 22nd December 2014. The deposit of Kshs 10M was made on 2nd January 2015 but credited on 5th January 2015 in the Money Market.

17 She deponed that one Martin Wanjohi an employee of Old mutual deposited kshs 10M in her Old Mutual account on 13th February 2015, Kshs 15M 19th February; Kshs 2M on 12th March 2015; Kshs 10M on 12th March 2015; Kshs 20M in two installments of Kshs 10M on 20th March 2015. The said **Martin** explained to the officers the reason for the deposits and that's why he was never charged. She then redeemed Kshs 3M from the said account on 23rd February 2015. Further on 26th March 2015 she made a request to redeem Kshs 14M from the same account to her Standard Chartered Bank account.

18 The extra Kshs 7M was used to pay fees for her daughter. She later refunded **Martin Wanjohi** Kshs 5M. She deponed that Horizon Ltd has never been involved in any fraudulent business and so denied that the motor vehicle was purchased with proceeds of crime.

19 She further deponed that she has never been investigated by anyone or any agency on the issue of this vehicle. That she is not aware of investigations in the NYS, case. She stated that John Kago was her agent for purposes of scouting, identifying and purchasing some property and she was not privy to any dealing he may have had with other persons. She annexed a report by a banking expert (**Dr. Njoroge O. Kimani**) on the alleged transactions.

20 She denied the allegations in paragraph 7 of Cpl Sautet's affidavit and explained that:

- She gave John Kago Kshs 302M sourced from Horizon Ltd for investment.
- On her instructions John Kago sent Patrick Ogolla (advocate) Kshs 113M for investment (SJM2). That John Kago sent 40M, 23,513,000/-; 40M and 10M on 16th March 2015, 17th March 2015 and 25th March 2015 respectively for purchase of two properties namely;
- L.R. No 21/1/97 in Rosslyn Estate Nairobi at Kshs 63,513,000
- Kshs 50,000/- for a property whose deal failed.

21 She further explained that none of the money transferred by Patrick Ogola advocate was for the purchase of the vehicle in issue (SJM3). That due to the failed purchase of property of Kshs 50 M counsel transferred money into her accounts at Faulu on 28/5/15 (Kshs 20M) Old Mutual on 28/5/15 (Kshs 18M) Old Mutual on 3/6/15 (Kshs 10M).

22 The money sent to her Faulu and Old Mutual accounts by M.M. Gitonga Advocates was in respect to a failed purchase deal. The initial amount sent to M.M. Gitonga was Kshs 78M in their account at Prime bank by John Kago. She explained that the refunds were done on 5th June 2015 and 11th June 2015 respectively less Kshs 400,000/- which was Advocate's fees.

23 She confirmed being aware of Nairobi Chief Magistrate's Criminal cases no 1905 of 2015 and no. 301 of 2015. The said cases are in respect of the alleged theft from NYS and money laundering but are yet to be finalized. Her name she said had been struck out from the proceedings in misc. application No. 60/2015. To her it meant she was not involved in the matter.

24 She has denied having any dealings with Josephine Kabura Irungu. She says she took possession of the motor vehicle in issue on 5th June 2016. That in order to transfer Martin Wanjohi's money from the Old mutual account they opened a joint account at Barclays Bank Ruaraka, where the money was sent and Martin was then able to transfer the money to the original owner.

25 She avers that the computer generated bank statements relied on by the Applicants have not been certified in accordance with section 65(8) Evidence Act. That the same have varied dates and they appear to have been created solely for this purpose. She denied knowledge or signing of any sale agreements.

26 Cpl Sautet in his supplementary affidavit deponed that there was no evidence to show that the Respondent received any money from Horizon Ltd. Further that his investigations revealed that Horizon Ltd have received several millions of shillings for purported delivery of litres of fuel which was never delivered.

27 He averred that Dr. Njoroge Kimani's qualifications could not be verified as he has not produced any certificate. Secondly that the figures and totals of the sum of money received/deposits was a total variance with what was in the statements from the bank. He went on to say that the bank statements were proper as they were obtained pursuant to court orders and the bank had issued a certificate under section 65(8) of the Evidence Act (**SJM 20**).

28 The Respondent filed a further affidavit in response to Cpl Sautet's supplementary affidavit. In it she disputes all the averments in the supplementary affidavit. She deponed to having annexed bank statements from Horizon Ltd and an affidavit by the managing director of the said company to her replying affidavit. (**CWG -1**) to confirm receipt of Kshs 10M which was by cash.

29 She said **Martin Wanjohi** too had sworn an affidavit to confirm what he had been depositing on her Old mutual account (**CWG-2**). She further denied all the other allegations in the supplementary affidavit of Cpl Sautet.

30 She referred to the affidavits of Peter Mathenge **CWG -1**; Hendrick Pilisi, James Gitu and Evans Kundu-SWG-5; Peris Wanjiku-CWG 8; John Kago CWG-9 and other documents of Horizon Bank statement and expert report CWG -2; cash acknowledgement receipts CWG -9; Through all these she depones that there is proof of the source of the Kshs 10M from which she purchased the vehicle in issue.

31 She reiterated that she was given the Kshs 10M by Horizon Ltd in cash. Secondly that the said company is not one of those charged with money laundering in the on going criminal cases.

32 The counsel appearing agreed and filed written submissions, which they highlighted.

The Applicant's Submissions

33 The Applicant raised 5 issues namely:

- i. Whether motor vehicle KCD 241Q Jeep Cherokee was procured using funds which are proceeds of crime
- ii. Whether the applicant has complied with section 65 of the Evidence Act.
- iii. Whether motor vehicle KCD 241Q Jeep Cherokee is liable for civil forfeiture under POCAMLA.
- iv. Whether the Application for civil forfeiture is in violation of respondent's right to property.
- v. Whether these proceedings will affect the criminal proceedings where the respondent has been charged.

34 Counsel referred to all the money transactions between Josephine Kabura Irungu John Kago Respondent. He referred to the forged sale agreements allegedly presented to Old Mutual by the Respondent to show her source of the money deposited. That the vehicle in question was bought using part of the deposited money.

35 Counsel further submitted that there was nothing to show any transfer of money from Horizon Ltd to the Respondent as claimed. Further that the said Horizon had itself been fraudulently paid lots of money for delivering nothing to the NYS. He therefore submitted that this was a clear case of fraud and theft of public funds resulting in the prosecution of the Respondent and others in a criminal case. He countered the contention by the Respondent that the offence of money laundering cannot suffice where the predicate primary offence has not been established.

36 He submitted that the offence of money laundering is a "stand alone" offence and one need not prove any charges prior to the charges of money laundering. He referred to the case of **Republic vs DPP & Others J.R. civil Application No 102 of 2016** where the court stated that:

150 " It would appear to me therefore, and I so hold, that the prosecution need not prove prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court of law that there was theft or forgery or fraud that led to the acquisition of the process or property the subject of the money laundering proceedings.

151. The criminal origins of the proceeds may be proved in the same way as any other elements of an offence can be proved. The offence of money laundering must be deemed as 'stand alone' offence. In proving that the proceeds or property are proceeds of crime even circumstantial evidence will be crucial. There is in my view no need to await any prior convictions of other offences before launching the prosecution of alleged money launderers.

152.I have added the emphasis to illustrate that even the legislators appreciated instances when there may be no one to prosecute hence there may be no conviction for a predicate offence or crime. The need to prove a predicate offence before laying a charge of money laundering was effectively dispensed with.

153.The principal offender who committed the predicate offence may never be there to be prosecuted, yet access to the proceeds of crime would have been achieved. He may have left jurisdiction with assistance of others. He may be a fugitive. He may have passed on. Behind him though, he would have left money launderers. If the principal offender may not be indicted, would it then mean that the money launderers would never be prosecuted? In my view, that certainly cannot be what the legislators intended. They, in my view, intended to ensure that in a money laundering offence both the actus reus and the mens rea of the principal offences were strictly proven by the prosecution and not by mere reliance on previously held proceedings....."

37 He therefore submitted that the Applicant had demonstrated that the motor vehicle in issue was purchased from funds stolen from NYS, and is therefore a proceed of crime. Counsel referred to section 2 of POCAMLA and the case of **Schabi Shaik & Others vs State** case **CCT 86/06 (2008) ZACC 7** where proceeds of crime is defined.

38 On the 2nd issue counsel submitted that there was compliance with section 65 of the Evidence Act, supported by section 78A Evidence Act and section 128 of POCAMLA. He contends that the Respondent has similarly relied on the same electronic evidence without producing a certificate. To him the issue should be whether the evidence being adduced and relied on is genuine.

39 On the 3rd issue he submitted that the Applicant had shown that the subject vehicle is a proceed of crime. Further that under section 90 of POCAMLA the Applicant is empowered to apply for forfeiture orders which the court grants under section 92 (1) of POCAMLA. He said the Respondent had not controverted the flow of the money and she has not shown that the money used to purchase the car was from other sources.

40 He invited the court to apply the findings in the cases of

i. Prosecutor general vs New Africa Dimensions & Others, High Court of Namibia case No. POCA 10/2012.

ii. Assets Recover Agency vs Rohan Anthony Fisher, & Others Supreme court of Jamaica, claim No 2007 HCVOO 3259 where the court stated in issuing an order of recovery of money obtained through crime as follows:

“..... 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 thousand 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.

22. 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.....”

41. On the 4th issue he submitted that article 40 of the Constitution provides for a right to acquire and own property. However article 40 (6) provides that the right to property does not extend to property which has been unlawfully acquired. Relying on the cases of Tekla Nandjila Lameck vs President of Namibian 2012 (1) NR 255 9HC and Martin Shalli v Attorney General of Namibia High Court of Namibia case NO POCA 9/2011 he submitted that the grant of forfeiture order in respect to the motor vehicle in issue would not violate the respondent’s right to property.

42. On the 5th and last issue on whether these proceedings would affect the criminal proceedings where the respondent has been charged Counsel submitted that civil proceedings are expressly provided for under POCAMLA, and are in respect of recovery of proceeds of crime. They are not about the criminal liability of the Respondent for an offence of money laundering.

43. He invited the court to consider what the court in the cases of Tekla Nandjilla Lamek (supra) and Martin Shalli (supra) and serious Organized Crime Agency vs Gale quoted of in ARA and Others vs Audrene. Samantah Rowe and Others Civil Division Claim No 2012 HCV 02120 on what asset forfeiture entails. He further referred to what section 92(4) of POCAMLA provides which is as follows:-

“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”

The Respondent’s submissions.

44. The Respondent raised four (4) issues for determination namely:

- i. *Whether the motor vehicle registration number KCD 241Q Jeep Cherokee was purchased from the alleged stolen funds from NYS Kshs. 791 M paid to Josephine Kabura Irungu through three companies.*
- ii. *Whether the Respondent has a legitimate source of income.*
- iii. *Whether the financial investigation was fair, transparent and judicious.*
- iv. *Whether motor vehicle registration number KCD 241Q jeep Cherokee is a proceed of crime within the meaning of the Proceeds of Crime and Anti Money Laundering Act.*

45 Mr Muriungi for the respondent submitted that there was no connection between the Kshs 791 M and the money used to purchase the vehicle. That an offence has been established and several persons charged in respect to this amount in Chief Magistrate’s court Nairobi criminal case no 1905 of 2015, but the respondent, **Martin Wanjohi** and Horizon Ltd are not among the accused persons therein. That the applicant’s attempt to connect the Respondent to this offence is an indirect one, hence the need to prove that the motor vehicle is a proceed of crime.

46. Counsel submitted that the motor vehicle was purchased using funds from Standard Chartered Bank account No 0100231918400 on 5th June 2015. The said account has only one debit emanating from Old mutual account no 80356 on 31st March 2015. He argues that the first deposit was done by **Martin Wanjohi** on 2nd January 2015. This was Kshs 10M from Horizon Ltd. The other deposits were by **Mr. Martin Wanjohi** through some agreement the two of them had, and she had no role in explaining that.

47 He further submitted that the funds sent to the Old Mutual account by M.M Gitonga & Co Advocates on 11th and 12th June 2015; and by Ogola and Co Advocates on 28th May 2015 were never used to purchase the motor vehicle in issue. That there was no evidence whether direct or indirect to link the Respondent to the allegedly stolen funds from NYS and paid to Josephine Kabura Irungu’s three companies.

48 Counsel submitted that the Respondent has shown the source of her money, which source was legitimate. He referred to the case of Ethics & Anti corruption Commission vs Jamal Bare Mohamed [2018] eKLR where Achode J, considered whether there were withdrawals and deposits into the account of the respondent to determine whether they had a legitimate source of funds. Still on a legitimate source he referred

to the case of **ARA vs Ralph Greg [2018] JMJC crim 1**. Counsel submitted that the money used to purchase the vehicle was already in the account before the alleged money came into issue.

49 It was further submitted that horizon Ltd was investigated by the DCI and found to be duly incorporated and doing genuine business. That the Director of Public Prosecution (DPP) agreed with this finding. Further that the said company had submitted its documents, tax returns and bank statements, award to supply fuel to NYS among others to this court. He therefore submitted that the respondent sourced money from a legitimate source and used it to purchase the motor vehicle.

50 On whether the investigation was fair, transparent and judicious he submitted that Cpl Sautet Jeremiah was both the complainant and investigator. He referred to paragraph 3 of Cpl Sautet's supporting affidavit of 23rd May 2016, and argued that such biased investigations would not lead to a fair outcome.

51 On the 4th and last issue it was submitted that from the definition under section 65 of POCAMLA the Applicant must first establish that an offence was committed and secondly that the property the subject of the forfeiture proceedings was acquired through that offence. He cited the case of **State of New Jersey v 4194.00**. In U.S. currency where it was held:

“We find that the evidence at the close of the State’s case-in-chief, giving all reasonable inference in favor of the State, failed to establish the requisite connection between the money and criminal activity, thereby making a directed verdict appropriate. See Dolson, supra, 55 N.J. at 5. Since the directed verdict motion should have been granted, the evidence Barnes presented regarding his trip to Atlantic City should never have been considered by the judge. Thus, the trial judge’s credibility determination regarding the proffered legitimate origin of the money is not relevant to our determination. In sum, the State did not meet its burden of proving that the seized money was proximately and substantially connected to criminal activity. Thus, Barnes had no burden to prove a legitimate source. Reversed and remanded to the Law Division for entry of an order vacating the order for forfeiture of the \$4194 and returning the currency to Barnes.”

52. Further he submitted that in the case of **Republic vs Dicken [1990] EWCA Crime 4**; the England and Wales Court of Appeal, stated that the court should not apply the assumptions if they are proved to be incorrect. That the burden of proving that the assumptions are incorrect rests with the defendant on a balance of probabilities.

53 It was therefore his submission that the Respondent had availed all material evidence of transactions leading to the purchase of the vehicle. Further that the Applicant had failed to establish that the motor vehicle in issue is a proceed of crime.

Determination

54 The application before this court seeks the forfeiture of a motor vehicle registration no. KCD 241Q JEEP CHEROKEE to the government of Kenya. The main ground for this prayer is that investigations conducted by the DCI into allegations of theft and fraud of funds amounting to Kshs 791,385,000 from the state Department of Planning in the Ministry of Devolution revealed massive fraud and embezzlement of public funds.

55 The investigations further revealed fraudulent transfers of funds from the NYS to various bank accounts and part of the funds used to purchase the motor vehicle registration no KCD 241Q Jeep Cherokee.

56 I have considered the application, all affidavits, annexures, all submissions and authorities cited. The main issue falling for determination is whether the Applicant has proved on a balance of probabilities that the money used to purchase this motor vehicle is part of the money stolen or fraudulently acquired from the NYS. In other words was the purchase price part of the Kshs 791,385,000/- fraudulently acquired from the NYS?

57 Before any forfeiture order is made, the court must be satisfied that the property sought to be forfeited is a proceed of crime or is to be used to perpetuate a crime. Section 92 of POCAMLA provides:

(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.

(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.

58 From the material presented to this court by the Applicant the narrative is that the Respondent is not a direct beneficiary of the proceeds

from the NYS scam. According to Cpl Sautet who investigated this case the direct beneficiary is one **Josephine Kabura Irungu** who received a total of Kshs 791,385,000/- from the NYS, out of which she transferred Kshs 273M to John Kago Ndungu's account No 014000020948 at Family Bank. She further transferred Kshs 108M to Goodluck Twenty Eevelen Company owned by the said John Kago Ndung'u. (SJM2)

59 After John Kago Ndung'u received his share he made the following transfers;

- Kshs 103M to Ogolla & Co advocates (SJM3) K-Rep account
- Kshs 78M to M.M. Gitonga & Co Advocates (SJM5) Prime Bank.

60 Ogola & Co Advocate in turn transferred Kshs 28M to the Respondent's account with Old mutual Investments for shares bought in her name. At the same time M.M. Gitonga & Co Advocates who had received Kshs 78 M from John Kago transferred Kshs 77.6M to the Respondent's account at Faulu Kenya Ltd which was on diverse dates transferred to the Respondent's account No 0152510502800 at Standard Chartered bank.

61 It is the Applicant's contention that the Respondent later redeemed money from her old Mutual account to her Standard Chartered Bank account part of which she used to purchase the motor vehicle in issue.

62 John Kago's Family Bank Statement shows that there were four cash deposits totaling Kshs 80M. The deposits were made by one **Josephine** with no second name on 26th March 2015 and 31st March 2015.

63 There is no dispute that the Respondent made several deposits in her account No 80356 at Old Mutual. According to the statement by Harrison Gongo (SJM3), the transactions by the Respondent of frequent and huge deposits raised some concern in the establishment. A report was accordingly launched with the Financial Reporting Centre on 30th March 2015.

64 Of interest to this court is the issue of the deposit of Kshs 17.6 M by M.M. Gitonga advocates with Old Mutual which money is suspected to have originated from Josephine Kabura and part of it used to purchase of the motor vehicle in issue using funds from the Respondent's account. Old Mutual's quality assurance will always require that the source of such funds be verified. For this purpose a sale agreement dated 5th June 2015 between Kilele Investment Group and the Respondent drawn by M.M. Gitonga and Associates for Kshs 17,6M for residential property known as utawala block 11/38 on LR. 1132 NRB was provided by her agent Martin Wanjohi.

65 There were many other deposits and annexed sale agreements which I will not get into as they are not part of the Kshs 17.6M. According to Cpl Sautet this particular agreement was found to have been a forgery as there was no such sale agreement presented to Old Mutual by her.

66 When called upon to explain the issue of the purchase of this vehicle, the respondent explained that she was given money Kshs 10M by Horizon Ltd a company owned by her son. This was cash money and so did not go through any bank transactions. She further stated that the Kshs 10M was already in her account as at the time these other deposits were being made.

67 Again going by Mr. Harrison Gongo's statement the Respondent opened the Old Mutual account on 6th January 2015, through her intermediary one Martin Wanjohi. There was a cash deposit of Kshs10M on 2nd January 2015 confirmed by a slip of the same date. A further deposit of Kshs 10M was made on 13th February 2015.

68 The Kshs 17.6M was received by old Mutual on 11th June 2015 while Kshs 18 M from Ogola & Co Advocates was received on 28th May 2015. By this time there was already over Kshs 100 M in the Respondent's Old Mutual account.

69 According to Harriosn Gongo of Old Mutual the first redemption of Kshs 3 M was made by the Respondent on 23rd February 2015 while the 2nd one of Kshs 14 M was made on 26th March 2015. It is therefore clear that as at the time the Kshs 17.6M and 18M were hitting the Respondent's account at Old mutual the money from which the motor vehicle was bought was not in that account.

70 Secondly the money from Josephine Kabura which the Applicant is relying on to pin down the Respondent hit John Kago's accounts on 26th and 31st March 2015. The same was also not transferred to the Respondent's Old Mutual account immediately. It was transferred after 26th March 2015

71 Its therefore clear that whatever the Respondent may have received indirectly through John Kago did not form part of what the Respondent transferred/redeemed from her Old mutual account to her Standard Chartered Bank account. It is not disputed that the money that was used to purchase the Jeep Cherokee vehicle was from the Respondent's Standard Chartered bank account.

72 The question that then behoves this Court to answer is whether the motor vehicle Jeep Cherokee KCD 241Q is a proceed of crime or not. POCAMLA defines proceeds of crime as:

“ 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;

section 107 (1) evidence Act provides:

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

73 In this case the Applicant had a duty to prove that indeed this vehicle in issue was procured by use of money fraudulently acquired from the NYS. Indeed it has been shown that if any fraudulent money from NYS reached the Respondent's account it was after the redemption of the Ksh 3M plus 14M which left the old Mutual account No 80356 to Standard Chartered Bank Nyeri branch account no. 0152510502800, on 23/2/15 and Standard Chartered Bank Account No. 0100231918400 Ruaraka branch on 26/3/15.

74 How then can the Respondent's money at the Standard chartered bank account be connected to the NYS money? It was the Applicant's duty to connect these two different transactions. The Respondent said the money used to buy the Jeep Cherokee was given to her by Horizon Ltd and it was in cash. The Applicant responded by submitting that Horizon Ltd was one of the companies that fraudulently fleeced NYS.

75 The record however shows and which has not been rebutted by the Applicant that the said company was investigated and was not found to have been involved in the NYS scandal, and has never been charged. It's not however for this court to make any finding on this at this time.

76 Even if the Respondent may have been shown to have received questionable amounts in her account, it must be appreciated that, that in itself cannot lead to the conclusion that the Jeep Cherokee was bought using funds from NYS which John Kago Ndung'u deposited in her account long after the redemption of 26/3/15.

77 Material had to be placed before this court to show how the money used to purchase the motor vehicle was connected with the Kshs 791,385,000/- and in particular the moneys released by John Kago, Ogolla and Co Advocates and M.M. Gitonga and Co Advocates. The Applicant tried their best to do so but the Respondent has clearly shown that her source of money for purchase of the vehicle is not linked with the Kshs 17.6M and 18M deposited into their account by M.M. Gitonga and Co Advocates and Ogola and Co Advocates. The other issues raised herein about the other deposits and forged sale agreements will be dealt with at another forum.

78 All in all I find that the Applicant has failed to prove on a balance of probabilities that the motor vehicle Jeep Cherokee KCD 241Q was bought from proceeds of crime. I have no choice but to dismiss the Application with costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 20th day of November 2018.

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HEDWIG I. ONG'UDI

JUDGE