

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC SUIT NO. E026 OF 2025

ASSET RECOVERY AGENCY.....
RESPONDENT

-VERSUS-

ASIF AMIRALI ALIBHAI JETHA.....1ST
RESPONDENT
KYN HENDERSON.....2ND RESPONDENT

RULING

In a notice of motion dated 24th July 2025, the respondents have prayed as follows;

- a. Spent.
- b. The originating motion dated 25/6/2025 be struck out with costs to the respondents/applicants and the preservation orders given on 28/3/2025 in HCACEC misc. application no. E012 of 2025 upon which these proceedings are based, be set aside.
- c. In the event, and only if this suit is not struck out, this court be pleased to transfer it to the High Court at Mombasa for hearing and determination through a full trial.

d. The costs of this application be paid by the applicant/respondent, Assets Recovery Agency.

The grounds upon which the application is premised are on the face of it and are basically that the applicant has no locus to file civil proceedings for preservation and forfeiture which powers are preserved for the Agency Director, Assets Recovery Agency under Section 82 and 90 of the Proceeds of Crime and Anti-Money Laundering Act (hereinafter referred to as 'POCAMLA') and that by filing this matter in Nairobi instead of Mombasa, the respondents have been denied their rights to fair hearing and access to justice.

The application is supported by affidavit of the 1st respondent sworn on 24th July 2025 and opposed through replying affidavit of Chief Inspector Bernard Gitonga sworn on 11th of August 2025. In addition to what the parties have stated in their respective affidavits, I have read submissions of the respondents dated 18th September 2025 and those of the applicant dated 2nd October 2025 together with the respondent's rejoinder submissions dated 6th October 2025.

The respondents argue that under Section 82 of POCAMLA, the powers, authority, locus and capacity to commence recovery proceedings are vested on the Agency Director and not the applicant. They claim that the two are different entities by the fact that Section 53 of POCAMLA makes reference to the Agency and its Director meaning that the two cannot be one. They add that there was no Agency Director in March 2025 when the preservation orders were made and in absence of the said Director, the applicant could not usurp his powers. In their repetitive submissions, the respondents in summary argue that, the fact that this suit was commenced in the name of the applicant instead of the Agency Director divests jurisdiction of this court from entertaining the matter since it cannot preside over a case which has been commenced by a party that does not have a mandate in law.

By extension, the applicant has argued that since the preservation orders were invalid for having been applied for by a party without mandate, there cannot be a valid application for forfeiture hence the originating motion should be struck out.

On the prayer for transfer of the matter to High Court at Mombasa, the respondents submit that the properties which are subject of the proceedings are situated in Mombasa where there is a High Court station manned by competent Judges and maintaining the matter in Nairobi will result to limitation to their rights to access to justice and fair hearing. They contend that the cost of travelling and subsistence in Nairobi during the hearing will be an impediment to access to justice and unfair to them.

In its rejoinder, the respondent has maintained that this court has jurisdiction to hear and determine the matter. It has also argued that the matter was properly filed in compliance with Section 90 of POCAMLA and cites Section 53(5) of the same Act and adds that the applicant is a body corporate which is empowered under Section 54 to implemented PART VII and XII of POCAMLA which includes proceedings such as these ones.

The applicant has submitted further that the issue of the capacity of the applicant vis a vis the Agency Director has been litigated before in a matter where the respondents' advocate has participated. This is this courts' civil application number 269 of 2017; ARA vs Stephen Vicker Mangira where the court found that the applicant was competent to file for forfeiture which ruling the respondent in the suit appealed through civil appeal number 132 of 2023. The High Court's decision was affirmed by the Court of Appeal upon which the respondent approached the Supreme Court through petition number E015 of 2025 which is pending for hearing.

On the issue of transfer, the applicant has cited the Chief Justice's practice directions dated 9-12-2016 which directed that all matters involving corruption should be filed in the principal registry in Nairobi. It has also submitted that the respondents' right to access to justice has not been curtailed by filing of this suit in Nairobi as they can prosecute it from anywhere without necessarily travelling to Nairobi. The applicant has countered this argument in his rejoinder by stating that the Chief Justice's practice directions cannot override the clear provisions of a Statute and this court should consider Section 12 of the Civil Procedure Act which provides for the place of suing.

I have given due consideration to the positions taken by the parties in this matter. There are only two issues for consideration, that is, whether the applicant had locus standi or capacity to file the suit and whether the case should be transferred to Mombasa.

It is an admitted fact that the issue of the applicant's capacity to file suits for civil forfeiture has been litigated before in another matter. The fact is admitted because at paragraph 10(e) of their submissions, the respondents have stated that the applicant had argued elsewhere that its functions and powers under Section 54(1) of POCAMLA are to implement Part VII and XII inclusive and when the applicant in its submissions raised the issue of the previous suits, the respondents in its rejoinder submissions urged me not to follow the decisions in those cases.

I have looked at the judgements in the High Court and the Court of Appeal in matters referred to above. It is clear from the judgements of the two courts that the respondent in the matter had raised the same issue of the applicant's capacity to file civil recovery proceedings under Section 82(1) of POCAMLA and while answering that question, the High Court held that the same was a matter of misjoinder and was taken care of by Order 1 Rule 9 of the Civil Procedure Rules and Article 159(2)(d) of the Constitution.

When the Court of Appeal got to the issue, it observed that the supporting affidavit in support of the application had been sworn by the Director of the Agency and description of the applicant as the originator of the suit was an infraction which did not render the suit fatal. It would therefore appear to me that there was no definite holding as to whether the applicant had capacity to bring the suit. The Court of Appeal seems to have been saying that since the affidavit in support of the application was executed by the Director, it was not fatal if the heading of the pleadings showed that the Agency was the applicant.

Be the above as it may, I will proceed to give my position on the issue. Section 53(5) of the POCAMLA provides that functions of the Director can be performed by a member of staff of the Agency. It states;

Anything which the Agency Director-General is authorised or required to do may be done by-

(a) a member of staff of the Agency, or

(b) a person providing services under arrangements made by the Agency Director-General, if authorised by the Agency Director-General (generally or specifically) for that purpose.

There is nothing to show that the person who signed the originating motion herein was not a staff of the applicant. The respondents have given general statements that there is no evidence that the person who executed the motion and the supporting affidavit had been delegated powers to file. This is the respondents' application and they have the burden of proving that the person who brought the motion was not a person qualified under Section 53(5) of POCAMLA. He who alleges must prove. The originating motion is signed by a Principal State Counsel in the applicant's office.

I find the argument by the respondents on this point to be semantics since the office of the Director is not a personal position but a position in public service. The Director is not a body corporate but the applicant is. Going by provision of Section 54(1) of POCAMLA, the Agency has the mandate to implement Parts VII to XII of the Act. Section 82(1) which the respondent has leveraged his application on and Sections 90 and 91 fall under Part VIII which deals with civil forfeiture. In my view, reading the Part, Section 53(5) and Section 54(1) together and purposively rather than in isolation and academically, the applicant has the mandate to file forfeiture proceedings. Otherwise, how will it be able to implement Part VIII if we were to separate the Director or Director-General as latter renamed from the applicant.

I wish to add that the Director-General works for the Agency and for the benefit of the public in the office he holds and failure to mention the office in the heading of the pleadings would be a matter of misdescription. The court should be concerned and deal with the main issues in contest which is that the forfeiture proceedings are meant to pursue proceeds of crime and the title of the parties does not matter as long as the real issues can be isolated and are understood.

I now turn to the prayer for transfer. It is not in dispute that the property which are subject of these proceedings are situated in Mombasa. The 1st respondent has deponed and it has not been controverted that he lives in Mombasa. He has expressed his wish to cross-examine the deponent of the supporting affidavit and pleaded necessity for physical court attendances. He has relied on provisions of the Civil Procedure Act that provide that suit shall be instituted where the cause of action arose or where the property in dispute is situated or where the defendant resides. All these conditions are favourable to the prayer for transfer. However, this should not be the only point of consideration.

The applicant has stated that the suit was filed in Nairobi pursuant to the then Chief Justice's practice directions contained in Gazette Notice number 10263 dated 9-12-2016. These directions were to the effect that cases relating to corruption and economic crimes filed under POCAMLA shall be heard by the Anti-Corruption and Economic Crimes Division of the High Court. There is no such division in Mombasa. I have not been shown any directions or notice revoking this Gazette Notice.

The respondents have argued that the Gazette Notice cannot override the provisions of an Act of Parliament. It is notable that these directions were not made from the blues but pursuant to Section 16 of the High Court (Organization and Administration) Act Chapter 8C of the Laws of Kenya which is a substantive Act of Parliament. That Section has not been declared invalid neither have the practice directions which means that the Gazette Notice have force of the law. Article 163(3)(a) gives this court unlimited jurisdiction in civil and criminal matters. Territorial jurisdiction in my view is an administrative issue.

The above is not to say that Sections 11 to 15 of the Civil Procedure Act are inoperative. They are indeed operative but where the category or classes of cases are required to be instituted in a specific division, place or tribunals, the parties will have no liberty to choose the forum for their litigation.

The argument by the respondents that they will incur expences and costs in travelling does not in my view hold water. Cases are not instituted for convenience of the parties but enforcement of the law especially where they involve public interest. The respondent can choose to defend the matter through the available technology without the need of traveling to Nairobi.

Based on the above, I find the application lacking in merits and the same is hereby dismissed with cost to the applicant.

Dated, signed and delivered at Nairobi this **28th** day of **November** 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Ruling delivered in presence of;
Miss Muchiri for the applicant; and
Miss Muyaa for the respondents.