

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC SUIT NO. E020 OF 2024

ASSET RECOVERY AGENCY.....APPLICANT

-VERSUS-

JACKSON MBUGUA BURUGU.....RESPONDENT

AND

JOHN MBUGUA MAINA.....INTERESTED PARTY

RULING

This ruling relates to a notice of motion dated 27th August 2025 filed by the applicant which seeks orders in the following terms;

- a. This Honourable Court be and is hereby pleased to grant the applicant leave to amend the originating motion dated 19th June 2024.
- b. This Honourable Court be and is hereby pleased to grant the applicant leave to adduce additional evidence.
- c. Costs of this application be in the cause.

The notice of motion was supported by affidavit of Fredrick Muriuki sworn on the 27th August 2025. The deponent repeats part of what is contained in his affidavit dated 10th June 2025 in support of the originating motion and adds that it is in the interest of justice that the leave to amend be granted. The affidavit states further

that after the filing of the originating motion, the applicant received further evidence which is relevant to the just determination of the proceedings and demonstration of how the assets it seeks to forfeit were acquired. This new evidence has not been disclosed in the said supporting affidavit.

The respondent and the interested party have opposed the application by stating that the application for amendment was filed out of the seven days period this court granted on 30-07-2025. The interested party states that the amendments are unnecessary since there is no prejudice which the applicant will suffer if the application is prosecuted in its current form. He adds that the application is brought to delay quick disposal of the matter as the applicant has failed to comply with this court's directions including the ones dated 6-05-2025 where the court gave parties leave to pursue amicable settlement.

The respondent has in addition to what the interested party has stated argued that the amendment is seeking to introduce a new cause of action which departs from the original pleadings. According to the respondent, the application is a delaying tactic noting that he had filed his submissions following this court's directions. In view of this, the respondent believes that it will be prejudiced if the application is allowed.

It is true that on 30-07-2025, this court granted the applicant seven days to file and serve the application for amendment and it was not until 5-09-2025 that the same was filed. Parties should know that the court does not give timelines in vain or as a matter of procedure or formality. I do not see anything in the application that would justify the delay of more than a month. The applicant is hereby reprimanded and warned that this court will not entertain disobedience of its directions on

timelines noting that forfeiture proceedings generally interfere with the lives and operations of the respondents. For this one, I will reluctantly exercise my discretion under Order 50 Rule 6 of the Civil Procedure Rules and extend the time for filing and accept the application as having been properly filed. The applicant should however note that, this will not be the norm in future.

I note that the amendment sought is to strike out the words 'proceeds of crime' and insert instead 'instrumentality of crime' in prayer 2 of the originating motion. The respondent has argued that the proposed amendment introduces a completely new cause of action and as a result, it will prejudice his defence as he has already filed submissions. According to the respondent, the two terminologies are different and distinct causes of actions.

Section 92(1) of the Proceeds of Crimes and Anti-Money Laundering Act 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.

Proceeds of crime is defined under Section 2 of the Act as;

"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.

The distinction between proceeds of crime and instrumentality of crime in my view is that; proceeds of crime constitutes asset which is derived from acts perceived to constitute an offence whether the same is in the same status or form traceable directly from the offence or has been converted while instrumentality of crime is an asset or property found to be used in commission of an offence. In that regard, instrumentality of crime falls under Section 90(1)(a) aforesaid. In my view the two are definitions towards the same end and with the same objective of denying criminals use of proceeds and benefits of their criminal industry. As rightly put by the interested party, the two are separated by mere terminology. I therefore do not think that the amendments will be introducing a different cause of action.

I do not see any prejudice the respondents or the interested party are likely to suffer if the application is allowed. I have looked at the affidavit in support of the originating motion and the draft intended to be in support of the proposed amended originating motion. The issues raised in the affidavits are fundamentally and materially the same. Any new matter can be responded to because the court is yet to make a final decision. In order to cure any possibility of prejudice, the court will grant the respondent and the interested party an opportunity to file a further affidavit. I believe that will be the best route for the ends of justice to be met.

On prayer (b) of the application, I note that the draft amended originating motion has a supporting affidavit sworn on 27th August 2025. The applicant shall be restricted to the issues deponed in that affidavit as it cannot keep on bringing

evidence in court in piecemeal. The amended originating motion shall be filed together with the same supporting affidavit.

In view of what I have stated above, my final orders are as follows;

- a. The applicant is granted leave to amend its originating motion in terms of the draft annexed to the supporting affidavit of Fredrick Muriuki sworn on 27th August 2025.
- b. The applicant shall file and serve the amended originating motion within the next seven (7) days from today failure to which the application shall stand disallowed.
- c. The respondents will have leave to file any further affidavit in reply to the amended originating motion.
- d. Further directions on the expeditious disposal of this matter shall be given immediately upon delivery of this ruling.

Dated signed and delivered at Nairobi this **18th** day of **December** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of;

Miss Muthee for the respondent;

Mr. Odongo for the interested party; and

In absence of the applicant.

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