

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC SUIT NO. E034 OF 2024

ASSETS RECOVERY AGENCY.....APPLICANT

-VERSUS-

ANTONY NYAGA MWANGI.....1ST RESPONDENT
PETER MUKANGU MWANGI.....2ND RESPONDENT
ERNEST GITHINJI WAWERU.....3RD RESPONDENT

JUDGMENT

The applicant, a statutory body established under Section 53 of the Proceeds of Crimes and Anti-Money Laundering Act (hereinafter referred to as ‘POCAML A’) has approached this court under Sections 81, 84, 90 and 92 of the said Act asking the court for the following orders;

1. **THAT** this Honourable Court be pleased to issue an order declaring that the following assets are proceeds of crime and are liable for forfeiture to the Government:
 - a. L.R No. Ruiru East Block 1/5093 registered in the name of the 1st respondent, Antony Nyaga Mwangi.
 - b. L.R No. Kiambaa/Thimbigua/6503 registered in the name of the 3rd respondent, Ernest Githinji Waweru.

2. **THAT** the Honourable Court be pleased to issue an order declaring that any rental income, benefit, profit generated from the following properties are proceeds of crime and therefore liable for forfeiture to the Government;
 - a. L.R No. Ruiru East Block 1/5093 registered in the name of the 1st respondent, Antony Nyaga Mwangi.
 - b. L.R No. Kiambaa/Thimbigua/6503 registered in the name of the 3rd respondent, Ernest Githinji Waweru.
3. **THAT** this Honourable Court be pleased to issue vesting orders transferring the following assets to the applicant;
 - a. L.R No. Ruiru East Block 1/5093 registered in the name of the 1st respondent, Antony Nyaga Mwangi.
 - b. L.R No. Kiambaa/Thimbigua/6503 registered in the name of the 3rd respondent, Ernest Githinji Waweru.
4. **THAT** this Honourable Court be pleased to issue an order that the assets, rental income, benefits generated from the assets in prayers 1 & 2 be forfeited to the government and transferred to the applicant.
5. **THAT** the Honourable Court make any other ancillary orders that it may deem fit and just for proper and effective execution of its orders.
6. **THAT** costs be provided for.

The grounds upon which the application is based are on the face of the same and in the supporting affidavit of CPL Isaac Nakitare sworn on 30th September 2024. The deponent has also in response to the replies filed by the respondents sworn three supplementary affidavits dated 5th May 2025. The said affidavits give a chronology of events leading to the applicant to believe that the properties it seeks to forfeit are proceeds of crime. The summary of the parties' cases is as below.

The applicant's case

It is deponed by the applicant's investigator that the Agency received information on the theft of funds from Information and Communication Technology Authority (hereinafter referred to as ICTA) bank accounts by the 1st and 2nd respondents and other employees of ICTA upon which it commenced its own investigations which started with obtaining warrants to investigate in the Chief Magistrate Court miscellaneous criminal applications numbers E0340 of 2023, 2348 of 2017, 2449 of 2017 and 2350 of 2017.

The investigator identified four bank accounts the ICTA held in Citi Bank headquarters branch whose signatories were the former acting Chief Executive Officer Mr. Robert Kariuki Mugo (hereinafter referred to as Mr. Robert), former Director Corporate Services Mr. Felix Obonsi Ongaga (hereinafter referred to as Mr. Felix) and former acting Manager Finance a Mr. Daniel Stephen Ouma (hereinafter referred to as Mr. Stephen). There was a resolution of the ICTA Board that Mr. Robert and Mr. Felix should sign and approve payments of amounts above Kshs 500,000.00 while Mr. Felix and Mr. Daniel should sign for amounts and approve payments below Kshs 500,000.00.

The deponent added that it was discovered that there were numerous withdrawals of amounts below Kshs 500,000.00 which raised suspicions which prompted commencement of investigations by the ICTA. The inquiries revealed that cash transactions were created in the ICTA system by the 1st and 2nd respondents and approved by Mr. Felix and Mr. Daniel. The transactions were between four to thirteen times a day which were all split into tranches of below Kshs 500,000.00

Thereafter, ICTA called for an internal audit due to these discoveries which showed that there were unsupported cash withdrawals of Kshs 78,019,231.00 between 10th January 2017 and 6th July 2017. It also revealed that between 24th January 2017 and 31st May 2017, there were direct bank transfers to the 1st and 2nd respondents, Mr. Felix and Mr. Daniel totaling to Kshs 20,801,106.00. This amount was split as follows;

- a. Kshs 5,416,255.00 to the 1st respondent's account number 0150100068045 held at Equity Bank.
- b. Kshs 5,416,210 to the 2nd respondent's accounts numbers 0020196799152 and 0260190780201 held at Equity Bank.
- c. Kshs 4,485,610 to Mr. Felix's account number 0101776457300 held at Standard Chartered Bank; and
- d. Kshs 5,458,061 to Mr. Daniel through his accounts numbers 01109160651400 held at Cooperative Bank and 016000001355 held at Family Bank.

The internal audit report showed that between 24th January 2017 and 6th July 2017, the ICTA lost Kshs 155,838.193.00 which was executed through carefully crafted scheme involving the ICTA employees. The deponent stated further that, he established from Wells Fargo Limited employees that between January and July

2017 they delivered cash to the 1st and 2nd respondents at the ICTA office. He also established that the 1st respondent received suspicious Kshs 24,733,725.00 which was delivered to him by officers of Wells Fargo Company which was part of the funds withdrawn from ICTA bank account number 3000850016.

The applicant added that the above amounts were shown to have been for project launch and field inspections. It is also deponed that the 2nd respondent received Kshs 49,443,273.00 withdrawn from the ICTA bank account number 300085016 and delivered to him by Wells Fargo Company employees at the ICTA offices or withdrawn over the bank counter. The funds were shown to be for field and project inspection, DLP launch, travelling and sitting allowances, county assessment and project monitoring.

The investigator depones further that he established from former programs manager one Mr. Thomas Oganga Odhiambo who was in charge of all the ICTA projects that he did not initiate any request for payments or carry out DLP launches that would require payments as indicated by the 1st and 2nd respondents. One Mark Murithi Mwirigi who was the projects manager of County Connectivity Project informed the applicant that he did not initiate any fields work activities or process any payments for the field activities.

It was also deponed that in 2017, the 2nd respondent received in his bank account number 0020196799152 held at Equity bank suspicious funds amounting to Kshs 2,741,990.00 and another sum of Kshs 4,944,670.00 in his account number 0260190780201.

Upon revelation of the above, the ICTA Board resolved to have the investigations expanded to the period prior to 2017 following which an audit for the period between 1-01-2014 and 31-12-2016 was carried out. The investigator deponed that the latter audit revealed that between 1-01-2016 and 31-12-2016, there were suspicious cash withdrawals from the ICTA account number 300085016 where the 1st and 2nd respondents received Kshs 3,659,177/= with the 1st respondent receiving Kshs 2,308,939.00 and the 2nd respondent receiving Kshs 1,350,238.00. However, the table showing the dates of withdrawals reveals that these funds were received between 2-06-2016 and 22-12-2016.

It is alleged further that the 1st respondent's property known as L.R No. Ruiru East Block 1/5093 (hereinafter referred to as 'the Ruiru property') was reasonably suspected to have been developed using the stolen funds and therefore the same which is five storey and the rental income therefrom is proceeds of crime. Similarly, LR No. Kiambaa/Thimbigua/6503 (hereinafter referred to as 'the Kiambaa property') which was registered to the 3rd respondent was developed using the stolen funds. It is further alleged that in a well-orchestrated scheme of money laundering designed to conceal, hide and disguise ownership of the Kiambaa property, the 2nd respondent transferred it to the 3rd respondent during the period of investigations.

The investigator has stated further that he summoned the 3rd respondent to explain the acquisition of the property and the 3rd respondent explained that he bought it from the 2nd respondent at Kshs 6,000,000.00 which was paid by installments but the 3rd respondent could not explain the source of funds used to develop the property.

He alleged that the investigations sought to inquire from the land registrar who stated that the 2nd respondent and his wife Stela Eve Mukangu applied for consent to transfer the property and they appeared before the Board on 13th June 2017 where the transfer was approved and the 2nd respondent transferred the property during the period of investigations.

It is also deponed that the net salary for the 1st respondent between May 2015 and June 2017 was Kshs 289,064.30 while the 2nd respondent's was Kshs 1,124,942.00. These salaries could not support the developments or construction of the properties and therefore the only reasonable position is that the properties were developed using funds stolen from the ICTA.

The applicant claims further that the 1st and 2nd respondents were invited to a disciplinary meeting before the ICTA staff disciplinary committee to answer charges of gross misconduct and misappropriation of funds which they failed to attend after which the committee found them guilty and recommended their summary dismissal. Thereafter, the 1st and 2nd respondents among the other employees involved were charged with offence of stealing by servant.

It is deponed further that on 12th October 2018, the applicant vide miscellaneous application number 46 of 2017 sought to forfeit Kshs 6,488,736.00 which was the only assets traced in the 1st and 2nd respondent's accounts and those of Felix and Daniel which was successful.

1st respondent's case

The 1st respondent admitted that he was the registered owner of the Ruiru property which he alleged he held on behalf of himself and his spouse Margaret Wangu

Muriithi. He added that he bought the property before the time of the alleged corrupt dealings. He depones that there were no links established between the property and the alleged stolen funds.

He deponed further that the funds received to his account between 24th January and 31st May 2017 were meant for the ITCA's projects launch, inspection and allowances within the normal cause of his duties as an employee. He added that the issue of whether these funds were legitimate or not was *res judicata* as the same was answered in this court's miscellaneous application number 46 of 2018. He argues that the issue of the funds having been used to acquire property cannot attach retrospectively to any property that was already purchased, developed and occupied at the time of the alleged corrupt conduct.

He has gone on to explain the acquisition of the property as dating back to 13th October 2014 having bought it from one Patrick Kibugi Mukubwa. After the full payment of the purchase price which was done in installments up to 27th October 2014, he developed it using legitimately earned funds and loans facilities to himself and his spouse with the title deed to the property being registered on 12th March 2015. He explained that he was advanced Kshs 4,000,000.00 by John Kamau Kibugi which was processed through his bank account number 0870198700958.

It is also explained that development plans for the property were registered on 22nd January 2015. His wife also obtained a friendly loan of Kshs 7,000,000.00 from one Joseph Wachira Githinji which she repaid with earnings from her business proceeds which loan was processed through her bank account number 012000026377. He adds that due to this contribution, his wife has a matrimonial stake in the property.

He adds that he also used proceeds from his chicken business in partnership with Kuchopnet Technologies that commenced in 2013 which generated substantial income from their main client San Valencia Catering Company. He also operated Antoya Investment Agency which generated enough to fund the development of the property. He also alleged to have gotten a top up of an existing loan facility from the cooperative bank which were processed through accounts numbers 016C7168292201 and 016C7168292200.

He has further stated that the electricity supply to the property was installed by September 2015 and that in the month of September 2016, he engaged a property manager who got tenants into the property from 2016.

The 2nd respondent's case.

The 2nd respondent swore an affidavit dated 18th February 2025 in which he accuses the applicant of failure to disclose that it had on 17th August 2017 placed a caveat in form of a restriction on the Kiambaa property during which time he had extinguished his rights over the property and for that reason, the applicant does not deserve equitable remedy. He also depones that the applicant is guilty of inordinate delay for having brought this application seven years after the alleged discoveries of theft.

The 2nd respondent avers that he acquired the property on 19-09-2014 which was long before the stated corrupt activities. He states that the acquisition of the property has not been linked to any corrupt activities and was not subject of any investigations. He adds that upon acquisition of the property, he had a desire to develop it and proceeded to apply for change of user from agricultural to

residential and got a certificate of compliance from National Construction Authority on 3rd February 2016. He however changed the plans to develop after a family medical emergency arose forcing him to sell the property and its good will to the 3rd respondent at Kshs 7,275,000.00. This amount was paid in installments with the last one being on 1st March 2017 through his nominated bank account of Apem Investments which he owns.

The 2nd respondent added that, he and his wife appeared before the land control board to confirm the sale with his wife giving spousal consent and the Board gave its consent to the transaction on 13th June 2017 and the 3rd respondent acquired title to the property on 1st August 2017. He admits that he is defending himself in anti-corruption case number 1 of 2019 and adds that the monies he received from the ICTA were for projects inspection and allowances in which his task as an accountant was to receive funds for and on behalf of the ICTA.

He has questioned the witness statements exhibited by the applicant which he maintains must stand the test of truthfulness through cross-examination in the anti-corruption case. He added that the money he received from the ICTA were recovered in forfeiture proceedings in this court's application number 46 of 2018 where Kshs 4,860,633.51 being part of Kshs 7,686,600.00 he received from ICTA was recovered. He points out that Kshs 2,741,990.00 traced into his account contains Kshs 1,651.870 that did not originate from the ICTA and thus does not constitute lost funds.

The 3rd respondent's case

By a replying affidavit dated 18th February 2025, the 3rd respondent stated that the applicant had willfully misrepresented the facts in order to obtain preservation

orders and denied that the Kiambaa property was proceeds of crime. He protested that he had not been charged in the criminal proceedings neither was he an employee of the ICTA.

He added that the applicant had not established nexus between the alleged stolen funds and the property neither was there link between him and the 2nd respondent to justify the allegations of money laundering between the two. He added that the applicant investigated him since 2017 but had not reported the results of the investigations.

The 3rd respondent explained that the property was registered to him on his behalf and that of his wife Maureen Wanjiru Munju who has a matrimonial and beneficial interest in it. He added that he purchased the property from the 2nd respondent on 1-03-2016 for Kshs 7,275,000.00 and paid in nine installments through bank account of Apem Investments after which he took possession and continued to develop the same slowly due to limited funds. He eventually had the property registered to him on 1st August 2017.

According to the 3rd respondent, he had before purchasing the property done due diligence and established that the 2nd respondent had acquired it on 19th September 2014 long before the timelessness of the alleged corrupt conduct. He insisted that the money used to purchase the property was from his income and that of his spouse.

The 3rd respondent explained further that he engaged a property manager to get tenants for him in September 2018 when the property was partially complete after which it was occupied and he started receiving rental income from which he paid statutory taxes and utility bills.

He avers that he supplied the information on the acquisition of the property to the applicant's investigator and that he had no idea of any pending investigations when the property was transferred to him. He reiterated that the transfer to him was completed even before the investigations by the applicant began.

Analysis and determination

I have read the notice of motion and affidavits in support of the same, the supplementary affidavits and the respondents' replying affidavits. I have also gone through the submissions dated 5th May 2025 by the applicant, 14th July by the 1st respondent, 14th July 2025 by the 2nd respondent and 11th July 2025 by the 3rd respondent. I have also read the applicant's supplementary submissions dated 30th July 2025.

There is consensus that money was lost during the period between January and July 2017 which in fact resulted to criminal charges against the 1st and 2nd respondent. It also gave rise to forfeiture proceedings against the 1st and 2nd respondents and others in this court's application number 46 of 2018. The respondents have not denied these facts and actually the 1st respondent states, which I agree with, that the issue of whether the funds received by them in this period were legitimate or not is *res judicata*. A court of competent and concurrent jurisdiction with this court found that the funds were illegitimate and forfeited what the applicant could trace then. There is no evidence that, the finding was reviewed or set aside and I will not go into analyzing the same. The question calling for answer is whether the properties which the applicant seeks to forfeit were bought and developed using these proceeds of the stolen funds.

An asset will become proceeds of crime if it is acquired using illegitimate means or intermingles with illegitimately acquired property or it is used or is intended to be used to commit an offence. This is the purport of Section 92(1) of the POCAMLA which 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.

It is notable that the applicant has not attributed its suspicion on the properties being proceeds of crime on any other conduct other than the events leading to the loss of funds between 24th January 2017 and 31st July 2017. It should also be noted that the forfeiture applications are different from unexplained wealth which is recoverable under Section 55 of the Anti-Corruption and Economic Crimes Act.

Whereas the mandate donated to the applicant herein under Part VIII of POCAMLA is to trace and forfeit assets which are perceived to be proceeds of crime, the mandate to recover assets under Section 55 of ACECA is given to Ethics and Anti-corruption Commission. The EACC's mandate entails investigations and forfeiture of wealth which a person suspected to be engaged in corrupt conduct cannot account for. As much as corruption can breed proceeds of crime, the applicant can only come in to forfeit such if the assets it seeks to forfeit can be attributed to the corrupt conduct. EACC has a broader ground to cover by going for any wealth which does not have to be attributed to a crime as long as it cannot be

accounted for where someone is suspected to be engaged in corruption. That process will have a longer route as envisaged under Section 55(2) of ACECA.

In the case before me, the applicant has claimed that the properties in question were developed using the funds stolen from the ICTA between 24th January 2017 and 31st July 2017. The respondents have argued that the properties were acquired before the acts leading to the loss of the funds at the ICTA. I do not think I need to take much time discussing the acquisition of the properties as it is clear to me that the 1st and 2nd respondents acquired the properties in 2014 while the stolen funds are said to have landed in the hands of the said respondents between January 2017 and July 2017.

There is no evidence to show that the person from whom the 1st and 2nd respondents bought the properties had had acquired them through illegitimate means. Even if there was such evidence, the same would not be admissible in the circumstances of this case as the applicant has zeroed the period of interests starting from a time long after acquisition of the properties. That being the case, this court will focus on the period the applicant has chosen as parties are bound by their pleadings. I will proceed with assumption that the funds used in acquiring the properties were legitimate.

Forfeiture proceedings of the nature as the one before me are focused and goes for the property rather than the offender. It has been held so in many courts' pronouncements way back to *Aboo v Assets Recovery Agency; Ethic and Anti-Corruption Commission (Interested Party) (2023) KECA 1658 (KLR)* where it was held that;

‘Civil forfeiture is not tied to the identification, charging, prosecution, conviction or punishment of any offender. Civil forfeiture therefore denotes an action in rem, that is as against the property in contrast with in personam actions which are actions against individuals.’

The properties in this matter would be liable to forfeiture if it were to be proved that they were acquired through illegitimate means or if it is proved that the transactions involving change of ownership were meant to launder money or where they were used to commit or were intended to be used to commit an offence, or if they were developed using illegitimate sources of income. In the circumstances stated above, if the applicant succeeds in convincing this court that the development of the properties was undertaken using money stolen from the ICTA between the period of interest.

The applicant has submitted that the transfer of the Kiambaa property from the 2nd to the 3rd respondent was a scheme to hide or conceal the real owner and in effect clean the stolen money which would in my view translate to money laundering. I understand the applicant as saying that despite the transfer, the 3rd respondent was just a proxy of the 2nd respondent which would mean that the development on the property was sponsored or funded by the 2nd respondent using the stolen funds.

The 3rd respondent has exhibited a sale agreement dated 1-03-2016 showing that he purchased the property from the 2nd respondent and paid in three installments. To his replying affidavit are annexures 5a and 5b. The 2nd respondent has also produced a bank statement of Apem Investments showing the deposit of two installments of Kshs 975,000.00 on 1-03-2017. The 2nd respondent is the registered

proprietor of this business. In my view, if the 3rd respondent was a proxy as it is claimed, he would not have paid these deposits.

The 3rd respondent has exhibited documents showing that he engaged an agent to scout tenants for him and in fact he has been receiving rent since 2018. There is nothing before me to show that after the property was transferred to him, the 3rd respondent continued engaging with the 2nd respondent neither is there anything to show that there was a relationship between the two that went beyond buyer and seller.

I find no reason to doubt the transfers shown to have been made by the 3rd respondent to Apem Investment which is shown to be owned by the 2nd respondent. I am satisfied that the transfer of the Kiambaa property to the 3rd defendant had nothing to do with the loss of funds from ICTA and if it is proved that the 2nd respondent caused loss to the ICTA, the proper procedure is to go for restitution of the loss and not forfeiture of the property whose current ownership and acquisition had no bearing or connection with the proceeds of crime.

In its submissions and affidavits, the applicant has repeatedly stated that its investigations showed that the funds stolen from ICTA were used to develop the properties without showing the court details of the investigations. It is not enough for the applicant to state that they conducted investigations then expect the court to take that to justify a positive finding in its favour. The applicant must be able to show the court the process of investigations, details and results thereof.

The applicant attributes the development of the Kiambaa property to the stolen funds on argument that it called upon the 3rd respondent to explain the source of

funds he used to develop the same but gave contradicting explanation. The applicant points out that the statement recorded by the 3rd respondent contradicts what he averred in the replying affidavit. One of the contradictions is the year of the purchase, the number and amount of installments paid and the claim by the 3rd respondent that he exchanged a plot in Kajiado to cover for the balance of the purchase price.

The above may be so but I don't think such contradictions can found a case of forfeiture. What matters is whether what has been brought to court as an explanation is sufficient unless the contradictions are so grave as to depict the 3rd respondent as a person intending to hide or twist the truth. Even then where a respondent brings to court evidence he may have failed to provide to the applicant during investigations and that evidence is found credible, the applicant has the burden to rebut the evidence to the required standards.

Although it has not come out clearly how the balance of the purchase price was paid, I consider that issue as irrelevant because what is of importance here is not the 3rd respondent's source of income for purchasing the property but the funds used in developing the same. Of much note is that the 3rd respondent was not under investigations for stealing the funds and his only connection to this matter is his acquisition of the Kiambaa property from the 2nd respondent.

The applicant has argued that the respondents have not produced evidence to show that they paid skilled workers, professionals, service providers and proof of other construction expences. In my view and as earlier observed, what is in question is the source of the funds to develop the property and not whether the construction costs were paid. Failure to produce evidence of payment of the expences does not

turn otherwise legitimate income to illegitimate. What makes income legitimate or illegitimate is the source and not the end expenditure.

The 3rd respondent has produced annexures EGW 6a and 6b which are a letter of promotion, payslip and employment agreement of himself and his wife. There has been no rebuttal that these documents originated from Barclays Bank and Hivos Foundation who are stated therein as the employers of the 3rd respondent and his wife.

It would have been a different thing if the property was transferred to the 3rd respondent when it was fully constructed. There being evidence that the property was not bought using funds stolen from the ICTA and the 3rd respondent having not been connected to the stolen funds and there being evidence of payment of the purchase price, this court has no reason to conclude that the construction was done by the 2nd respondent through the 3rd respondent.

The applicant placed caveat over the Kiambaa property after the sale had completed. The previous forfeiture proceedings were filed after the caveat and there is no explanation why the Kiambaa property was not made subject of forfeiture proceedings which were filed a year later. To me, this is pure case of afterthought and conjecture and should not be entertained. The development plan for the Kiambaa property was approved on 8-06-2017 with NCA compliance certificates being issued on 3-02-2016.

The 1st respondent has demonstrated that he had the Ruiru property registered to him on or about 12th March 2015 and that is not in dispute. He has averred that he completed construction of the same in 2016 and has produced approved

developments plans registered on 22-01-2015 and some payment receipt for electricity power supply dated 15-09-2015 and power utility bills running from 23-12-2015 to 10-07-2016. I take judicial notice that electricity power cannot be supplied to an undeveloped property. At least there must be some development for the supply to be connected.

There are also annexures ANM12a to AMN12c which are a property management contract between the 1st respondent and Key Nelson Shelters, schedule of rent analysis and bank statement showing that there were rent deposits in the 1st respondent's bank account. It is obvious that the property could not have been occupied by tenants without there being substantial completion. At this time, the funds had not been lost at the ICTA and in the circumstances, the construction could not have been financed by the stolen funds.

The issue before me is not to audit the integrity of the development and I have no reason to doubt the state or status of the completion of the property. What is clear to me is that the property was occupied in 2016. The applicant has submitted that the utility bill statements and the receipt for connection do not bear the plot number. That plot number may not be clear but the bills and receipt taken in totality with other factors obtaining in this matter convinces me that there were developments in the property as at the end of 2016.

I have also given consideration to the averments by the 1st respondents that the construction of his property was financed by loans from their friends and some business he was running even before he bought the property. One of the lenders was one Joseph Wachira Githinji vide agreement dated 28-12-2015 in which Kshs 7,000,000.00 was advanced to the 1st respondent's wife. The 1st respondent also

produced an agreement dated 28-12-2014 between him and one John Kamau Kibugi for a loan of Kshs 4,000,000.00. Together with this agreement is a bank statement for bank account for John Kamau Kibugi showing withdrawal of Kshs 4,000,000.00 on the same date.

The 1st respondent has also attached invoices which show that he supplied chicken to San Valencia Catering Company in conjunction with an entity known as Kuchopnet Technologies. There are also statements for an entity known as Antoya Investment Agency which the 1st respondent maintains was his business engaged in supply of building materials. The said bank account statement shows that the business was earning income which has not been questioned and not subject of this case.

There is also attached a log book for motor vehicle registration number KBJ 139W a Mitsubishi canter which is a commercial vehicle. This log book was registered to the 1st respondent on 5-10-2011. The bank statement for Antoya Investments Agency which was produced as the 1st respondent's annexure ANM 10 runs from 4-01-2013 to 31-12-2015 long before the period the audit report by the Board of ICTA covered. This in my view is an indication that the 1st respondent was in business which was earning him income other than his salaries from the ICTA.

I have also seen the 1st respondent's annexure ANM11A which is a loan account statement showing that the 1st respondent had a running loan which as at 15-02-2013 had a debit of Kshs 632,235.55 which he kept on servicing. Annexure ANM11B shows that the 1st respondent took another loan on 2-09-2016 which he serviced up to 2-10-2021 which tallies with what he has deponed at paragraph 35 of his replying affidavit.

The totality of the above convinces me that the 1st respondent had legitimate resources including lawful loans to finance acquisition and development of the Ruiru property. After the applicant was served with replying affidavits, it opted to file supplementary affidavits. In the supplementary affidavits, the applicant did not depone or show that it had followed or made inquiries about the property management agreements with Key Nelson Shelters to discredit the agreement. The applicant has powers which allows it to vary out satisfactory investigations. There is no indication in the supplementary affidavit that the account shown in the power utility statement does not exist or is not related to the 1st respondent's property. It seems that the applicant made assumptions that the respondents had a duty to proof their innocence. The respondent's burden is to produce evidence to rebut the applicant's case or allay the reasonable suspicion established by the applicant. In ***Assets Recovery Agency v Sharif (2025) KEHC 13774 (KLR)***, it was held that;

'Applying this to civil forfeiture proceedings, I take the view that the standard of proof on a balance of probability, applies to both parties, and is the same for both of them. For the Agency it has to establish a prima facie case on a balance of probabilities; and so is the case with any explanation offered by the subject on the source of funds or how an asset was acquired. If at the close of the evidence, an objectively-minded person seized of the facts will say this fact is more probable than not, this standard will have been attained.'

I believe that the investigative role of the applicant does not end with filing the originating motion. Once confronted with new evidence which seems to rebut its reasonable suspicions, the applicant has a duty to make further enquiries and verify or discredit any new evidence or information it discovers during the pendency of

the suit. This is what the applicant should have done in respect of the evidence produced by the respondents in respect of the timing of the completion of the developments and occupancy of the properties. For lack of this, I must presume that if indeed the applicant had done so, the evidence gathered therefrom would be against its case.

The applicant had claimed that after discovery of the theft of between 10th January 2017 to 31st July 2017, the ICTA Board resolved to go further to years prior to 2017 upon which they went back to 2016 where the respondents were shown as having received a cumulative sum of Kshs 3,659,177.00 over a period of six months. I do not see any reason for suspicion of this amount noting that the respondents were accountants and cashiers in the ICTA. The figure in my view is not too much as compared to the 1st and 2nd respondents' roles neither could it support construction of the four and five story buildings.

The upshot of the above discussion is that the originating motion lacks merits. I proceed to dismiss it with costs to the respondents.

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

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of;
Miss Muchiri for the applicant;
Miss Nyunguto for the 1st respondent;

Mr. Kirwa for the 2nd respondent; and
Mr. Awiti for the 3rd respondent.

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