Assets Recovery Agency v Gethi (Civil Appeal 40 of 2019)
[2026] KECA 473 (KLR) (6 March 2026) (Judgment)

Neutral citation: [2026] KECA 473 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 40 OF 2019

MS ASIKE-MAKHANDIA, K M'INOTI & JW LESSIT, JJA

MARCH 6, 2026

BETWEEN

THE ASSETS RECOVERY AGENCY ..... APPELLANT

AND

CHARITY WANGUI GETHI ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi, Anti-Corruption and Economic Crimes Division (Milimani Law Courts) (Ong'udi, J) dated 20th November, 2018 in Misc. Application No. 16 of 2016 formerly Misc. Application No. 221 of 2016)

JUDGMENT

1. This is an appeal by The Assets Recovery Agency "the appellant" against the Judgment and decree of Ong'udi, J. (as she then was) in the Anti-Corruption and Economic Crimes Division of the High Court of Kenya at Milimani Law Courts, delivered on 20th November, 2018 in Miscellaneous Civil Application No. 221 of 2016 where she dismissed the appellant's suit with costs.

2. The facts preceding this appeal are that the appellant, a statutory body established under section 53 of the Proceeds of Crime and Anti- Money Laundering Act ("POCAMLA"), moved the court by way of an originating motion dated 23rd May 2016 seeking forfeiture orders in respect of motor vehicle registration number KCD 241Q Jeep Cherokee, "the motor vehicle" belonging to Charity Wangui Gethi, "the respondent". The application was predicated upon investigations by the Directorate of Criminal Investigations "DCI" into the infamous National Youth Service "NYS" scandal, wherein colossal sums of money amounting to Kshs.791,385,000 were siphoned from the State Department of Planning, Ministry of Devolution, through fraudulent schemes orchestrated by public officials and private persons.

3. The investigations revealed that one, Josephine Kabura Irungu, through her companies, received the said funds and subsequently transferred substantial amounts to John Kago Ndung'u, who in turn channeled portions thereof to various advocates' accounts. From these accounts, significant sums were traced to the respondent, including deposits into her Old Mutual investment account and Standard Chartered Bank account. The respondent thereafter purchased the motor vehicle for Kshs.6,390,000, allegedly using funds emanating from these deposits. The appellant contended that the vehicle constituted proceeds of crime within the meaning of section 2 of POCAMLA, having been acquired through laundered monies linked to the NYS scandal.

4. The respondent, however, denied any complicity in the NYS scandal, asserting that the purchase price was sourced legitimately from Horizon Ltd, a company owned by her son, and further deposits made by one Martin Wanjohi, an agent of Old Mutual. In support thereof the respondent tendered in evidence affidavits, expert reports, and documents to show legitimate sources of funds, insisting that Horizon Ltd was duly incorporated and engaged in genuine business.

5. The central issue for determination before the trial court was whether, on a balance of probabilities, the motor vehicle in question was procured using funds constituting proceeds of crime, thereby rendering it liable to forfeiture under sections 90 and 92 of POCAMLA.

6. Upon a full consideration, the trial Court held that the appellant had failed to discharge its evidential burden on a balance of probabilities. It observed that although the respondent had indeed received substantial deposits into her Old Mutual account, the specific funds redeemed and subsequently transferred to her Standard Chartered Bank account from which the purchase price of the motor vehicle was paid were not shown to be directly or indirectly connected to the fraudulent sums siphoned from the NYS.

7. The Court noted that the deposits of Kshs.17.6 million and Kshs.18 million from M.M. Gitonga & Co Advocates and Ogola & Co Advocates respectively, which the appellant sought to rely on, were credited into the respondent's account after she had already redeemed Kshs. 3 million and Kshs.14 million on 23rd February and 26th March 2015 respectively. It was from these earlier redemptions that the funds used to purchase the motor vehicle emanated. Consequently, the Court found that the applicant had not established the requisite nexus between the purchase price of the motor vehicle and the Kshs.791,385,000/- fraudulently obtained from the NYS.

8. The Court further observed that although the respondent may have received questionable deposits at later dates, such circumstances alone could not sustain the conclusion that the motor vehicle was acquired using proceeds of crime. The appellant bore the burden of proof under sections 107–109 of the *Evidence Act*, and in the trial Court's view, this burden was not discharged. Accordingly, the Court held that the appellant had failed to prove, on a balance of probabilities, that the motor vehicle was purchased using proceeds of crime. The application for forfeiture was therefore dismissed with costs to the respondent.

9. The appellant, aggrieved by the said judgment and decree, filed this appeal on five grounds, namely, that the trial court erred in finding that: the appellant had not discharged its burden of proof in respect to the forfeiture of the motor vehicle as a proceed of crime as provided in section 92 of the POCAMLA; the motor vehicle was not purchased from illicit funds which constituted acts of money laundering as per section 3, 4 and 7 of the POCAMLA; the motor vehicle did not constitute proceeds of crime within the meaning of section 2 of POCAMLA; the motor vehicle was not procured from proceeds of crime within the meaning of section 2 as read together with section 92 of the POCAMLA and that the appellant had failed to prove on a balance of probabilities that the motor vehicle was bought from proceeds of crime.

10. The appeal was canvassed by way of written submissions with limited oral highlights. The appellant, crystallized the grounds of appeal into two principle issues for determination; whether the motor vehicle, constituted proceeds of crime and whether the motor vehicle was liable for forfeiture under POCAMLA.

11. On the first issue the appellant submitted that the originating motion, together with the supporting affidavits, was predicated upon investigations conducted by the DCI into the theft of public funds amounting to Kshs.791,385,000 from the NYS. These investigations revealed massive fraud and embezzlement of public funds perpetrated by public officials and private persons.

12. The appellant asserted that the investigations established that Josephine Kabura Irungu fraudulently received the said sums of money through her business entities; Form Home Builders, Roof and All Trading, and Reinforced Concrete Technology, all operating accounts at Family Bank, KTDA Branch. She thereafter transferred Kshs.273,000,000 to the personal account of John Kago Ndung'u and Kshs.108,000,000 to his business entity, Good Luck Twenty Eleven. In turn, John Kago transferred Kshs.113,000,000 to Ogola & Company Advocates, who subsequently remitted Kshs.18,000,000 to the respondent's Old Mutual Money Market Fund Account No. 80356. On 5th June 2015, the respondent purchased the motor vehicle for Kshs.6,390,000, which the appellant contended was part of the funds stolen from NYS.

13. The appellant submitted that these facts constituted reasonable grounds to believe that the funds used to purchase the motor vehicle were fraudulently acquired from NYS, and that the respondent was actively involved in a complex money-laundering web designed to conceal and disguise the illicit origin of the funds. Reliance was placed on Schabir Shaik & Others v State CCT 86/06 (2008) ZACC 7, to argue that the motor vehicle therefore constituted proceeds of crime within the meaning of section 2 of POCAMLA.

14. The appellant faulted the trial Court's judgment and decree, arguing that although the trial court properly posed the question of whether the motor vehicle was a proceed of crime, it misapplied itself on the facts and evidence adduced. Specifically, the Court erred in seeking to establish a direct link between the purchase of the motor vehicle and the entire sum of Kshs.791,385,000 lost at NYS, rather than determining whether the motor vehicle was purchased with funds constituting proceeds of crime.

15. The appellant emphasized that its investigations were not limited to the loss of Kshs.791,385,000/- but extended to tracing, freezing, and confiscating proceeds of crime emanating from NYS scandal. The investigating officer's affidavits demonstrated that the respondent deposited Kshs. 67 million into her Old Mutual account between January and March 2015, supported by forged sale agreements for non- existent land transactions. The respondent's claim that the funds originated from Horizon Ltd, a company owned by her son, was unsupported by credible evidence. Supplementary investigations revealed that Horizon Ltd had been fraudulently paid by NYS for fuel supplies that were never delivered, and that the supporting vouchers were themselves irregularly issued.

16. On the second issue, it was submitted that section 90 of POCAMLA empowers the appellant to apply for forfeiture of property constituting proceeds of crime, and section 92(1) obliges the Court to grant forfeiture orders where such property is established on a balance of probabilities that if it constituted proceeds of crime. The appellant argued that the motor vehicle was purchased from funds stolen from NYS, and was therefore liable to forfeiture. In conclusion, the appellant urged this Court to find that it had discharged its burden of proof on a balance of probabilities, that the motor vehicle was procured from proceeds of crime, and that it was liable for forfeiture under POCAMLA.

17. The respondent, in opposing the appeal, submitted that the trial court properly analyzed the facts, evidence, and the law and correctly found that the appellant had failed to discharge its burden of proof. The respondent argued that the trial court did not err in finding that the appellant had not discharged its burden of proof under section 92 of POCAMLA. In countering the appellant's case, which was premised on the alleged loss of Kshs. 791,385,000/= from the NYS, the respondent submitted that having linked the purchase of the motor vehicle to those alleged stolen funds, the appellant bore the duty of proving the nexus between the respondent and the said sums which it failed to do.

18. The respondent relied on section 107 of the *Evidence Act*, which places the burden of proof on the party asserting a fact, and cited Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where this Court held that the legal burden of proof lies upon the party who invokes the aid of the law and asserts the affirmative of an issue. It was submitted that the appellant failed to establish this link, as the bank statements and documents presented were voluminous but lacked analysis to connect the alleged NYS funds to the purchase of the motor vehicle. The trial court therefore correctly found that by the time Kshs.17.6 million was deposited into the respondent's Old Mutual account in June 2015, the funds used to purchase the vehicle had already been redeemed earlier in February and March 2015.

19. On the second issue, the respondent reiterated that the motor vehicle was not purchased from illicit funds but from legitimate sources, specifically Horizon Limited. She emphasized that Horizon Limited had been investigated and cleared of any wrongdoing by the DCI and the Director of Public Prosecutions "the DPP". She dismissed the appellant's allegations that Horizon Limited was paid for fuel supplies never delivered, terming them falsehoods supported by forged documents. The respondent argued that if such allegations were true, Horizon Limited would have been charged, which was not the case here.

20. The respondent submitted that for property to constitute proceeds of crime, it must be linked to an offence. She emphasized that the appellant failed to demonstrate such a link. She referred to section 65 of POCAMLA, which provides that where a defendant lacks legitimate sources of income sufficient to justify property held, the court may infer criminal benefit. She argued that this provision did not apply to her case, as she had demonstrated legitimate sources of income through Horizon Limited. The respondent analyzed the bank statements of Josephine Kabura Irungu's companies and John Kago Ndungu, showing that the alleged transfers did not correspond with the funds used to purchase the motor vehicle. She explained that she had sourced Kshs.10 million from Horizon Limited in January 2015, supported by affidavits and acknowledgement receipts, and that this money was legitimately used towards the purchase of the motor vehicle.

21. The respondent reiterated and emphasized that the appellant failed to discharge its burden of proof. She referred again to section 92 of POCAMLA, which requires the trial court to make a forfeiture order if it finds, on a balance of probabilities, that the property concerned has been used in the commission of an offence or is proceeds of crime. The respondent argued that the appellant failed to meet this threshold, while she had gone further to demonstrate that the funds used were legitimate and had already left her account before the alleged NYS- related deposits.

22. The respondent submitted that the trial court's findings were based on sound reasoning and proper application of the law. She urged this Court therefore not to disturb those findings and prayed that the appeal be dismissed with costs.

23. We have considered the appeal, submissions by both parties, the authorities relied on and the law. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination thereon by this Court with reasons for such determination. In

other words, a first appeal is by way of retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. See Gitobu Imanyara & 2 others v Attorney General [2016] e KLR.

24. In light of the above mandate, and having considered the record of appeal, the judgment of the trial court, the submissions of both parties and the law, the issues that we discern for our determination or consideration are whether the motor vehicle: constituted proceeds of crime under section 2 of POCAMLA; was liable to forfeiture under sections 90 and 92 of POCAMLA; and whether the trial court erred in its evaluation of the evidence and application of the burden of proof under sections 107–109 of the *Evidence Act*.

25. On the first issue, was the motor vehicle constitute proceeds of crime under section 2 of POCAMLA? To get an answer, it is necessary to begin by restating the law and settled principles before turning to the facts. Section 2 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."

26. This definition is deliberately broad to capture both direct and indirect benefits of criminal conduct, and to prevent sophisticated schemes of concealment. The courts have consistently emphasized this wide ambit. In Schabir Shaik & Others v State (CCT 86/06) [2008] ZACC 7, the South African Constitutional Court held that the definition of proceeds of crime is intended to encompass complex camouflage schemes by sophisticated criminals, and that indirect benefits derived from crime are equally recoverable. Similarly, in National Director of Public Prosecutions v Rebuzzi (94 of 2000) [2001] ZASCA 127; 2002

    (1) SACR 128 (SCA), the Supreme Court of Appeal of South Africa underscored that the primary object of confiscation is not to enrich the State but to deprive criminals of ill-gotten gains, with secondary purposes of deterrence and prevention.

27. Closer home, the Supreme Court of Kenya in Republic v Mohammed & Another, [2019] KESC 48 (KLR) emphasized that forfeiture proceedings under POCAMLA are civil in nature, and the evidential burden rests on the applicant to demonstrate, on a balance of probabilities, that the property in question constitutes proceeds of crime. The Court stressed that suspicion, however strong, cannot substitute proof, echoing the Court of Appeal's position in Kuria & 3 Others v Attorney General [2002] 2 KLR 69.

28. Applying the facts of this case against this legal backdrop, the appellant argued that investigations revealed a complex web of fraudulent transactions involving NYS funds, traced through accounts of Josephine Kabura Irungu, John Kago, and the respective advocates, eventually to the respondent's Old Mutual account. It contended that the motor vehicle was purchased using part of these illicit deposits. The respondent countered that the appellant failed to establish a nexus between the alleged NYS funds and the purchase of the motor vehicle. She relied on section 107 of the *Evidence Act*, which places the burden of proof on the party asserting a fact, and on Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where this Court held that the legal burden of proof lies upon the party who invokes the aid of the law and asserts the affirmative of the issue.

29. The trial court found, and upon our own re-evaluation of the evidence, we agree, that by the time deposits of Kshs.17.6 million and Kshs.18 million alleged to have been from the NYS scandal were made into the respondent's said account, the funds used to purchase the vehicle had already been redeemed earlier in February and March 2015. The nexus between the alleged NYS funds and the purchase of the motor vehicle was therefore not established. We are satisfied that in the light of the statutory definition under section 2 of POCAMLA, the principles laid down in Schabir Shaik, Rebuzzi (supra), and Republic v Mohammed & Another, (supra) that the appellant did not discharge its burden of proof to demonstrate that the motor vehicle constituted proceeds of crime. The evidential threshold of proof on a balance of probabilities was not met, and suspicion alone, however strong as in this case, could not suffice.

30. On the second issue, whether the motor vehicle was liable to forfeiture under POCAMLA, the appellant invoked sections 90 and 92 of POCAMLA, which empower the trial court to order forfeiture of property shown, on a balance of probabilities, to be proceeds of crime. Comparative jurisprudence was cited, including Prosecutor General v New Africa Dimensions & Others (POCA 10/2012, Namibia), in which forfeiture orders were granted where assets were shown to be proceeds of unlawful activities; Assets Recovery Agency v Fisher & Miller (Supreme Court of Jamaica, Claim No. 2007 HCV003259), where the court held that defendants bear an evidential burden to demonstrate lawful acquisition of assets; and National Director of Public Prosecutions v Rebuzzi (94 of 2000) [2001] ZASCA 127; 2002 SACR 128 (SCA), in which the South African Supreme Court of Appeal held that the primary object of confiscation is to deprive criminals of ill-gotten gains, not to enrich the State.

31. The respondent maintained that Horizon Limited was a legitimate company, duly incorporated and cleared of wrongdoing by the DCI and DPP, and that the appellant's reliance on forged vouchers and documents was unfounded. We note that forfeiture under POCAMLA is civil in nature and requires proof on a balance of probabilities. In Pamela Aboo v Assets Recovery Agency & Another [2018] KEHC 1845 (KLR), this Court underscored the proper construction of sections 92 and 94 of POCAMLA. The Court affirmed that these provisions empower the trial court to issue an order of forfeiture where, on a balance of probabilities, it is demonstrated that the property in question has either been used or is intended for use in the commission of an offence, or constitutes proceeds of crime. The Court clarified that the applicable standard of proof in such forfeiture proceedings is the civil standard namely, proof on a balance of probabilities.

32. On the burden of proof, the Court emphasized that the legal burden rests with the applicant throughout the proceedings. However, the evidential burden may shift intermittently to the respondent, requiring him or her to provide explanations or rebuttals once the applicant has established a prima facie case. In this way, the Court delineated the dual structure of burdens in forfeiture proceedings: the applicant must consistently discharge the legal burden, while the respondent bears the evidential burden at intervals to counter the applicant's case.

33. The threshold for property to be adjudged as proceeds of crime was lucidly articulated in Director of Assets Recovery Agency & Others v Green & Others [2005] EWHC 3168. The Court therein clarified that, in civil recovery proceedings under Part V of the Act, it is not incumbent upon the Director to allege or prove the commission of a specific criminal offence. Rather, the Director must set out the factual matters alleged to constitute the particular species of unlawful conduct by, or in return for which, the property was obtained.

34. As was emphatically held in Kuria & 3 Others v Attorney General [2002] 2 KLR 69, mere suspicion, however grave or compelling, cannot substitute for proof. The Court therein cautioned that conjecture or speculative inference is insufficient to discharge the evidential burden required in judicial

proceedings. Applied to the instant matter, this principle resonates with the trial court's finding that the appellant's evidence fell short of the requisite threshold.

35. We note that, while the appellant sought to demonstrate that the motor vehicle was procured from proceeds of crime, the factual matrix revealed otherwise. The respondent had redeemed Kshs.3 million on 23rd February 2015 and Kshs.14 million on 26th March 2015 from her Old Mutual account, which were transferred into her Standard Chartered Bank account. It was from this account that the purchase price of Kshs.6,390,000 was paid to D.T. Dobie company Ltd for the motor vehicle. Crucially, the deposits of Kshs.17.6 million and Kshs.18 million, which the appellant alleged were tainted funds traceable to NYS scandal, were credited into the respondent's account only after the redemptions had already been made as aforesaid.

36. Thus, the temporal sequence of transactions undermined the appellant's case. The funds alleged to be proceeds of crime were not in the respondent's account at the time she redeemed the money used to purchase the motor vehicle. The appellant therefore failed to establish a nexus between the NYS scandal and the specific funds applied in the acquisition of the motor vehicle. In line with Kuria & 3 others V Attorney General (supra), suspicion arising from the respondent's later questionable deposits could not substitute for proof that the motor vehicle itself was procured from illicit funds. Accordingly, we are satisfied just like the trial court, that the appellant did not prove, on a balance of probabilities, that the motor vehicle was bought from proceeds of crime.

37. On the third issue, concerning the evaluation of evidence and the burden of proof, the appellant contended that the trial court misdirected itself by insisting upon a direct nexus between the purchase of the motor vehicle and the sum of Kshs.791 million lost at the NYS. The respondent, on the other hand, maintained that the trial court correctly applied the law, pointing out that the funds used to purchase the motor vehicle had already been redeemed from Old Mutual and transferred to the respondent's Standard Chartered Bank account prior to the alleged NYS-related deposits.

38. Upon re-evaluation of the record, we are satisfied that the trial court properly analyzed the evidence and correctly applied the provisions of sections 107–109 of the *Evidence Act*. The court was right to conclude that the appellant bore the legal burden of proof throughout the proceedings, and that the evidential burden could only shift once a prima facie case had been established. In this instance, the appellant failed to demonstrate, on a balance of probabilities, that the specific funds used to acquire the motor vehicle were proceeds of crime. The trial court's insistence on a demonstrable link between the impugned property and the alleged unlawful conduct of the respondent was consistent with the principle that suspicion, however strong, cannot substitute proof. Going by the dictates set out in Gitobu Imanyara & 2 Others v Attorney General (supra), which requires a first appellate court to re-evaluate the evidence afresh while giving due allowance for not having seen the witnesses, we are satisfied that the trial court's evaluation of the evidence was sound and its conclusions properly grounded in law and fact.

39. In conclusion, we are satisfied that the appellant failed to prove, on a balance of probabilities, that the motor vehicle was purchased using proceeds of crime. The vehicle was therefore not liable to forfeiture under sections 90 and 92 of POCAMLA. The trial court properly evaluated the evidence and properly applied the burden of proof under the *Evidence Act*.

40. Before we sign off, we need to point out that this judgment should not have taken this long to craft and deliver. The delay was not intentional and deliberate. It was as a result of the file falling through the cracks after the hearing never to be retrieved until the court undertook a physical audit of the pending rulings and judgments. Going forward, perhaps time is now nigh for the judiciary to come up with a tool that will prompt or alert the judge or indeed any judicial officer whenever a judgment or ruling is

due. Otherwise, we are extremely sorry for the delay and the inconvenience or prejudice that the delay may have caused to the parties.

41. Ultimately, the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR