

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

RULING

This is a combined ruling for two applications. The first one is by the 1st respondent dated 12th January 2026 which prays for the following;

1. Spent.
2. The applicant provides the 1st respondent with an account to ascertain the amount collected as rental income, benefit and profit from LR Ruiru East Block 1/5093 and deposited to the applicant's criminal assets recovery fund account number 1240221339 held at Kenya Commercial Bank.
3. The applicant deposits the entire accounted rental income, benefit and profit collected from LR Ruiru East Block 1/5093 collected in applicant's criminal assets recovery fund account number 1240221339 held at Kenya

Commercial bank to the 1st respondent's advocate's client account number 05507296656350 held at I & M Bank of Kenya, Ruiru branch.

4. Any other relief that this Honourable Court may deem fit and just to grant.
5. Costs of the Application.

The second application is by the 3rd respondent dated 5th February 2026 and prays for the following orders;

1. Spent.
2. That the applicant provides the 3rd respondent with a record of account to ascertain the amount collected as from 1st July 2024 as rental income, benefit and profit from L.R No. Kiambaa/Thimbigua/ 6503 and deposited to the applicant's criminal asset recovery fund account number 1240221339 held at Kenya Commercial Bank.
3. That the applicant deposits the entire accounted rental income, benefit and profit collected as from 1st July 2024 from L.R. No. Kiambaa/Thimbigua/6503 collected in applicant's criminal asset recovery fund account number 1240221339 held at Kenya Commercial Bank to the 3rd respondent's Advocate's account particulars; SBM bank, Corner house branch, Omondi Awiti Advocates, Account number 0632381022001.
4. The applicant/respondent be ordered to remove the restriction placed on Kiambaa/Thimbigua/6503 on 17th August 2017.

5. Any other relief that the Honourable Court may deem fit and just to grant.
6. Costs of the Application.

The two applications followed this court's judgement dated 18th December 2025 in which the applicant's originating motion dated 30th September 2024 seeking to forfeit the respondent's respective assets was dismissed. The two applications are supported by affidavits sworn by the 1st and 3rd respondents and based on similar grounds which are mainly that; upon dismissal of the originating motion, the applicant has no basis of enjoying the preservation orders and that the respondents are entitled to enjoy the benefits of their property.

The 1st respondent has averred that after dismissal of the originating motion, the applicant was granted an order for stay of execution for twenty one days which has since expired. He avers that the continued retention of the rental income is a violation of his right to property and since the applicant has not made a formal application for stay of execution pending appeal, there is no reason for the money to be retained in the applicant's account and encumbering of the property.

In his supporting affidavit, the 3rd respondent repeats what the 1st respondent has stated and emphasizes that the applicant has neither filed an appeal nor made an application for extension of stay of execution and the continued operation of the preservation orders is causing him unconscionable financial distress and prejudice without any legal justification as the preservation orders expired by virtue of Section 84 of Proceeds Of Crime and Anti-Money Laundering Act (POCAMLA).

In reply to the two applications, the applicant has filed four affidavits sworn by Alfred Musalia and Dr. Kennedy O. Ogwengo. They are dated 30th January 2026, 23rd February 2026 and 24th February 2026. The gist of the replying affidavits is that the applicant filed a notice of appeal dated 18-12-2025 which was followed by filing of substantive appeal in the Court of Appeal vide civil appeal number E135 of 2026.

The applicant adds that it had filed a letter seeking for a mention of the matter for purposes of extending the order for stay of execution of the decree which was not acted upon. The applicant avers that by virtue of Section 97 of the POCAMLA, the funds and the property should remain preserved and under its control pending hearing and determination of the appeal. The applicant has also given account of the rental income it has so far collected from the properties.

The 1st and 3rd respondents have in addition to the contents of the replying affidavit argued in their submissions that by virtue of Section 84 of POCAMLA, the preservation orders have expired following the judgment of the court and that this court has powers under Section 89(1)(b) of POCAMLA to vary and rescind the preservation orders. The 1st respondent has also confirmed that he has verified the accounts as presented by the applicant in the affidavit of Dr Kennedy O. Ogwengo.

The respondents argue that Section 97 of POCAMLA was not intended to substitute the legal process of obtaining stay of execution as provided under Order 42 Rule 6 of the Civil Procedure Rules and the applicant's failure to file an application for stay of execution cannot be cured by application of Section 97 of POCAMLA. On this point, he cites the holding of the court in **Assets Recovery**

Agency v Charity Wangui Gethi [2020] KEHC 4431 (KLR) where it was held that:

‘Reliance on Section 97 of POCAMLA as an automatic stay will defeat the objective of Section 89(1)(b) of POCAMLA which provides that a preservation order shall be rescinded upon conclusion of the proceedings against the defendant. In my view, parliament did not envisage a situation where the two provisions would operate parallel to each other.’

On its part, the applicant submits that the issues of whether the property and the rental income are proceeds of crime or not are subject of civil appeal number E135 of 2026 and therefore the respondents should not assume control of the properties and the rental income. It adds that, the appeal was filed within time in accordance with the Court of Appeal Rules and by virtue of Section 97 of POCAMLA, the order for preservation should subsist until the appeal is heard and determined.

The applicant explains that there has been no delay on its part as it had diligently followed up typed proceedings for purposes of appeal and had also written letters to this court for a mention date. It submits further that, Section 89 of POCAMALA can only apply if there is an application filed which is not the case in this matter. It has made reference to the case of ***Asset Recovery Agency v Shande & 2 others [2024] KEHC 6261 (KLR)***.

I have considered the application alongside the submissions and affidavits of the parties. It is common ground that the applicant filed a notice of appeal dated 18-12-2025. As at the time the 1st respondent filed his application, the appellant had not filed the substantive appeal. The substantive appeal was filed on 18-02-2026 which in my calculation was within time as provided for in Rule 84(1) of the Court of

Appeal Rules. It is therefore my holding that a substantive appeal exists and the Court of Appeal which is now seized of the issue of merit or otherwise of the judgement of this court.

It has been argued that the preservation orders expired upon dismissal of the suit. When this court delivered its judgment, it granted a stay of execution of the same for 21 days which was lapsing on 1-02-2026 or thereabout. In my considered view, the purport of Section 97 of POCAMLA is that where there exists an appeal, the preservation orders shall remain in force until the appeal is disposed of. This in my opinion means that even where the applicant succeeds and the respondent appeals, the applicant cannot enforce the judgment until the appeal is heard and determined. The said Section provides that;

‘Any preservation order and any order authorizing the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under section 92(1) shall remain in force pending the outcome of any appeal against the decision concerned.’

The authority cited by the respondents is not binding on me and I respectively differ with the position taken by the Honourable Judge. Section 97 of POCAMLA is a substantive Section of an Act of Parliament while Order 42 Rule 6 of the Civil Procedure Rules is a subsidiary legislation. The position in law is that where a subsidiary legislation is in conflict with an Act, the provisions of the Act take precedence. I still hold the position I held in ***Assets Recovery Agency v Gamada [2025] KEHC 19418 (KLR)*** where I stated that;

‘Even if one were to say that there was a conflict between the Act and the Rules, which I do not see, the position of the law in such cases would be that

POCAML A should take precedence because it is a substantive Act of Parliament while the Rules are subsidiary legislations. An Act of Parliament should prevail where there is a conflict between it and a subsidiary legislation.'

Honourable Justice A.C. Mrima also held the same position in ***Sumba & 4 others v Independent Electoral & Boundaries Commission & another [2022] KEHC 13196 (KLR)*** where he stated that;

'Courts have also dealt with instances where a subsidiary legislation is at variance with a parent Act. Accordingly, the general legal principle seems to be that no subsidiary legislation shall be inconsistent with an Act of Parliament.'

In addition, whether or not to grant stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules is a discretionary decision while the provision of Section 97 of POCAML A is a dictate of a Statute with a command. Where the law makes provisions for acts or things to be done in a certain way or preserving some state of affairs, the court cannot exercise discretion in a manner that negates the purpose of the statutory provisions. The purpose of Section 97 of POCAML A is to provide a safety net for the parties owing to special character of the proceedings. In fact, it serves the purpose meant to be served by the principles of substantial loss and provision of security which are required for a court to grant an order for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules.

I see no conflict between Sections 89 and 97 of POCAML A as each is meant for separate purpose. While Section 97 provides for preservation of the property so

that none of the parties is prejudiced after the outcome of the appeal, Section 89 is meant to rescind or discharge the preservation orders where there is no appeal or any obstacle that inhibits execution of the decree. The latter is definitely not the case in this matter.

In the circumstances and for the reasons given above I find the two applications lacking in merits. They are dismissed with no orders as to costs,

Dated, signed and delivered at Nairobi this 17th day of April 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Ruling 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.