Mozzartbet Kenya Limited v Assets Recovery Agency & 2 others (Civil Appeal E250 & E313 of 2022 (Consolidated)) [2025] KECA 897 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 897 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E250 & E313 OF 2022 (CONSOLIDATED)

F TUIYOTT, FA OCHIENG & AO MUCHELULE, JJA

MAY 23, 2025

BETWEEN

MOZZARTBET KENYA LIMITED .... APPELLANT

AND

ASSETS RECOVERY AGENCY .... 1ST RESPONDENT

PETER KIILU MAKAU T/A PESCOM KENYA .... 2ND RESPONDENT

KIMACO CONNECTIONS LIMITED .... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya Anti- Corruption and Economic Crimes Division (E.N. Maina, J.) dated 1st April 2022 in ACEC NO. E004 OF 2021)

JUDGMENT

1. The appellants in these two consolidated appeals invite us to consider the status of third party protection under the Proceeds of Crime and Anti Money Laundering Act, 2009 (POCAMLA); the bona fides of the contract between Mozzartbet Kenya Limited (1st appellant or Mozzartbet) and Kimaco Connections Ltd (the 2nd appellant or Kimaco) and the role of the directors or alleged directors of the two entities.

2. The Assets Recovery Agency (the respondent or ARA) is established under section 53 of POCAMLA. It is a body corporate given statutory mandate of identifying, tracing, freezing and recovering assets which have accrued from or are profits or benefit of proceeds of crime or from money laundering.

3. In an originating motion dated 12th March 2021 (the Forfeiture application) ARA sought forfeiture of sums held in the accounts of Kimaco and Peter Kiilu Makau trading as Pescom Kenya (the 3rd respondent or Pescom) in Diamond Trust Bank, Co-operative Bank and NCBA Bank. The High Court (E.N. Maina, J.) allowed the forfeiture motion after dismissing an application by Mozzartbet

dated 26th May 2021 (the Exclusion application) seeking to exclude a sum of Kshs.256,051,910 it lay claim over as payments allegedly made to Kimaco under agreements for the development, supply and commissioning of customised betting software from any forfeiture order.

4. In that judgment, dated 1st April 2022, the learned judge made the following fundamental findings: that Kimaco was a shell company lacking in financial capacity to undertake the alleged contract; ARA had proved, on a balance of probabilities, that the funds in the bank accounts were proceeds of crime; the appellants did not provide a convincing explanation as to why they received such colossal amounts of money; some of the money ended up in the pockets of directors of Mozzartbet; the fact that Kimaco filed a nil return with Kenya Revenue Authority(KRA) during the period in issue was sufficient proof that it was not engaged in any business; and payment to KRA upon demand did not legitimize money whose source was illicit.

5. The proceedings for forfeiture were brought under the provisions of section 92 of POCAMLA which reads:

> " 92. Making of forfeiture order
>
> 1. 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.
>
> 2. The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.
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> 3. The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.
>
> 4. The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.
>
> 5. The Registrar of the High Court making a forfeiture order shall publish a notice thereof in the Gazette as soon as practicable but not more than thirty days after the order is made.
>
> 6. A forfeiture order shall not take effect—
>
>   a. before the period allowed for an application under section 89 or an appeal under section 96 has expired; or

b. before such an application or appeal has been disposed of.”

6. Mozzartbet seeking third party protection sought refuge under the provisions of section 93 of the Act;

“ 93. Protection of third parties

1. Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—

   a. that the person was not in any way involved in the commission of the offence; and

   b. where the person acquired the interest during or after the commission of the offence, that he acquired the interest—

      i. for sufficient consideration; and

      ii. without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property, the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person’s interest.

2. Subject to subsection (3), where a forfeiture order has already been made directing the forfeiture of property, a person who claims an interest in the property may, before the end of the period of twelve months commencing on the day on which the forfeiture order is made, apply under this subsection to the court for an order under subsection (1).

3. A person who—

   a. had knowledge of the application for the forfeiture order before the order was made; or

   b. appeared at the hearing of that application, shall not be permitted to make an application under subsection (2), except with leave of the court.

4. A person who makes an application under subsection (1) or (2) shall give not less than fourteen days written notice of the making of the application to the Agency Director who shall be a party to any proceedings in the application.

5. An applicant or the Agency Director may in accordance with the High Court rules, appeal to the Court of Appeal against an order made under subsection (1).

6. A person appointed by the court under this Act as a receiver or trustee shall, on application by any person who has obtained an order under subsection (1), and where the period allowed by the rules of court with respect to the making of appeals has expired and any appeal against that order has been determined—

    a. direct that the property or Part thereof to which the interest of the applicant relates, be returned to the applicant; or

    b. direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

7. The Court may —

    a. before making a confiscation order, or

    b. in the case of property in respect of which a restraining order was made, where that order was served in accordance with section 68, or in the case of property in respect of which a court order has been made authorizing the seizure of the property,set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the restraining order, unless the conveyance or transfer was made for value to a person acting in good faith and without notice."

7. In setting up the exclusion proceedings, Mozzartbet invoked the ancillary provisions of section 94 :

" 94. Exclusion of interests in property

1. The High Court may, on application—

    a. under section 90(3); or

    b. by a person referred to in section 91(1), and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

2. The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of crime if it finds, on a balance of probabilities, that the applicant for the order—

a. has acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

b. where the applicant had acquired the interest concerned after the commencement of this Act, that such person neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of crime.

3. The High Court may make an order under subsection (1), in relation to the forfeiture of property which has been used or is intended for use in the commission of an offence, if it finds, on a balance of probabilities, that the applicant for the order had acquired the interest concerned legally and—

a. neither knew nor had reasonable grounds to suspect that the property in which the interest is held has been used or is intended for use in the commission of an offence; or

b. where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned in connection with the commission of an offence

4. If an applicant for an order under subsection (1) adduces evidence to show that he did not know or did not have reasonable grounds to suspect that the property in which the interest is held is tainted property, the Agency Director may submit a return of the service on the applicant of a notice issued under section 90(3) in rebuttal of that evidence in respect of the period since the date of such service.

5. Where the Agency Director submits a return of the service on the applicant under subsection (4), the applicant shall, in addition to the facts referred to in subsections (2)(a) and (b), also prove on a balance of probabilities that, since such service, he has taken all reasonable steps to prevent the further use of the property concerned in the commission of an offence.

6. The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the

interest of the administration of justice or in the public interest, make that order upon the conditions that the High Court deems appropriate, including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the High Court may determine, to prevent the future

use of the property in connection with the commission of an offence."

8. Mozzartbet raises the argument that although the forfeiture application was made under sections 81, 90 and 92 of POCAMLA, from the grounds upon which that application was made, reliance was placed on section 92(1)(b) and apart from that assertion, the application did not show on a balance of probabilities that the claimed sums were proceeds of crime. It is further argued that while ARA asserted that all the funds held in the impugned accounts were proceeds of crime in respect to the claimed sums, it did not explain how it was derived directly or indirectly from an offence. As for the ground raised by ARA that Mozzartbet was involved in money laundering, it is submitted that there was no allegation raised in the application whether under sections 3,4 or 7 and since none of these sections were engaged in relation to the claimed sums, ARA's charge of money laundering falls flat. In addition, there had been independent investigations done by the DCI which resulted in the full vindication of Mozzartbet.

9. Mozzartbet further submits that ARA failed to bring the claimed sums within the meaning of POCAMLA to begin with and thus issues of burden of proof, whether on a balance of probabilities as statutorily provided or otherwise or on evidence, did not arise. It is contended that had the learned judge conducted an independent analysis as to whether the claimed sums were proceeds of crime, it would have shown that the claimed sums were not proceeds of crime as statutorily defined. Cited is the English High Court decision in Director of Assets Recovery Agency & others, R (on the application of) vs Jeffrey David Green & others [2005] EWHC 3168 where Sullivan J stated that whether a claim for civil recovery can be determined on the basis of conduct in relation to property without identification of any particular unlawful conduct, must include the question whether the claimant can sustain a case for civil recovery in circumstances where a respondent has no identifiable lawful income to warrant the lifestyle and purchases of that respondent. Mozzartbet argues that this applies to a case on a third party like itself, and thus it is important to understand that third parties occupy a separate distinct and protected role under the asset forfeiture regime under POCAMLA. Emphasizing further on this issue at plenary, learned counsel Mr Amoko appearing for Mozzartbet referred this court to the UK Supreme Court decision in Crown Protection Services [2021] UKSC 49 and particularly the decision by Lord Stevens. Counsel observed that the working principle of POCA, which is the English equivalent of our POCAMLA, is that neither Confiscation Order under Part 2 or Civil Recovery under Part 3 or the money laundering position in Part 7 interfere with existing third party property rights. Counsel further contended that as explained in paragraph 33 of the decision, the scheme of POCA is not to interfere with any property rights except tainted gifts. POCA protects the property rights of others, regardless of how the right arise and the third party occupies a distinct and separate position from that of the respondent in respect to whom forfeiture orders are sought and who is alleged either to have been holding money which are the proceeds of a crime or is the result of money laundering.

10. Belaboring the issue of burden of proof, counsel argues that the ARA is duty bound to show that the money concerned has been used or intended to be used in the commission of an offence or the profit of a crime as statutorily defined and in relation to third parties, has to go further than that and show that the money is implicated in such either commission of crime or unlawful conduct. Counsel thus submits that there was no such identification of particulars of the conduct which brought it within POCAMLA in order for civil forfeiture jurisdiction to be invoked and on that ground alone, the judgment must fall.

11. Counsel's argument, further, is that the money was as a result of two contracts for the development, installation and commissioning of specialized customized betting software and the basis upon which these contracts were called into doubt were either factually mistaken or legally inappropriate. Counsel emphasizes that the contracts were signed prior to the money being paid and in any event, prepayment

is a standard feature of commercial practice and thus prepayment in and of itself cannot be a basis for questioning the bona fides of the contracts. Counsel further argues that whereas the software was not delivered, the mere fact that there is a breach of contract does not mean that the contracts are not legitimate.

12. Lastly, on the question of common directorship, counsel submits that there was no such evidence, and regardless, common directorship does not necessarily mean that there was an impropriety within the corruption protection of POCAMLA and thus does not implicate the bona fides of the contracts. Therefore, the allegation that some money was paid by Kimaco to Mozzartbet directors after money had left Mozzartbet to Kimaco merely means that those directors were guilty of their fiduciary and statutory obligations to Mozzartbet and their actions should not be attributed to Mozzartbet. Cited is the UK Supreme Court case in Jetivia SA and another (Appellants) v Bilta (UK) Limited (in liquidation) and others (Respondents) [2015] UKSC 23 where Lord Neuberger was of the opinion that where a company has been the victim of wrong-doing by its directors, then the wrong-doing cannot be attributed to the company as a defence to a claim brought against the directors.

13. Learned counsel Mr Lutta appearing for Kimaco and Pescom supported the submissions of Mr Amoko. In their joint submissions, they backed Mozzartbet's argument that the source of funds in issue was from Mozzartbet's betting business and that the investigations by the DCI established that Mozzartbet made Kshs.17,057,136,032 from sale of bets and gave a clean bill of health regarding any alleged criminal implication. They further reiterate that ARA made no attempt whatsoever to determine any criminal origin of the amounts sought to be declared proceeds of crime in line with the holding in Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party) [2018] KEHC 1845 (KLR). It is argued that while Mozzartbet was the best person to respond to questions on the legality or otherwise of the source of the funds, ARA failed to enjoin Mozzartbet as a party to the proceedings and the only plausible reasons for this failure was that it was convinced that the sums were from a legitimate source and not proceeds of crime. They contend that Kimaco furnished evidence of a contract dated 20th February, 2020 with Mozzartbet for the supply of software system solutions but which was disregarded by the trial court whose finding also disregarded the fact that the software was not supplied by reason of frustration of contract by the preservation orders obtained by ARA against Kimaco.

14. During plenary, Mr Lutta noted that while the law is that parties are bound by their pleadings, ARA in the affidavit dated 12th March, 2021, prayed for a totally different offence of alleged money laundering than what was deposed in the prayers sought under the application and thus led to the trial court erroneously finding in favour of ARA for the offence of money laundering. He cites the Nigerian Case of Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc SC 91/2002 which was cited with approval in Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR). Counsel thus argues that the learned trial judge erred in deviating from those prayers sought by ARA by declaring the sums to be proceeds of crime and then entered judgment on account of money laundering. He adds that as long as that issue of whether the funds were proceeds of crime was not determined, it did not lie properly for the trial judge to enter judgment in favor of ARA and these funds were therefore not declared proceeds of crime. In conclusion, he argues that it was clear that Mozzartbet is engaged in lawful business and it has licenses from the relevant regulatory authorities, and has not been shut down and therefore, to say that funds from Mozzartbet are a proceeds of crime, the learned trial judge was trying to lay a case where there was none.

15. Learned counsel Mr Githinji appearing for ARA concedes that while section 93 of the POCAMLA provides for the protection of innocent third parties, Mozzartbet were not an innocent third party for the reason that the directors associated with Mozzartbet received funds from Kimaco's and Pescom's

bank account. It is submitted that Kimaco was a shell company that was incorporated as an SPV for purposes of laundering funds under the guise that it was engaged in the business for the supply of software systems and solutions and ICT products and lacked the human resource, the speciality of technical capacity to deliver on the purported contract for the supply of software solutions and ICT products. In addition, that despite being paid an advance sum of Kshs.256,051,910.00 Mozzartbet confirmed that Kimaco had not delivered as per the purported contract milestones.

16. To buttress this position, Counsel gave an example of a transaction wherein, there was an M-pesa transaction that showed that Kimaco received funds from Mozzartbet which was linked to Kimaco's bank account at DTB and a bank account held at Co-operative Bank. He contends that once the sums were received, Pescom, who was a signatory of Kimaco's bank accounts, authorized and transferred part of the funds from Kimaco's bank account at DTB and Co-operative Bank to Pescom's bank account, wherein Mr Makau was the sole signatory, held at NCBA bank. The funds were further transferred from Pescom's bank account to individuals associated to Mozzartbet as directors namely, Emmanuel Charumbira, Musa Cherutich Sirma and Melentijevic Branimir. Counsel contended that Pescom was not or did not have a contract with either Mozzartbet or Kimaco and therefore submitted that Kimaco was involved in money laundering and at the very least, they committed the offence of obtaining by false pretences contrary to sections 312 as read together with section 313 of the *Penal Code* and thus constituted proceeds of crime.

17. ARA further submits that for a party to invoke third party protection under section 93 of the POCAMLA, they need to satisfy the grounds set out in section 93(1)(a) and (b) and a party seeking to exclude an interest in property from a forfeiture order under section 94 has to establish the test set out in section 94(2)(a) and (b). ARA poses the argument that both tests are arguably similar and thus a party seeking to invoke the provisions has to establish the following twin limbs:The interest acquired was acquired without knowledge and in circumstances such as not to arouse reasonable suspicion, that the property was, at the time he acquired it, tainted property or proceeds of crime.The interest acquired was acquired for sufficient consideration and or acquired legally for a consideration, the value of which is not significantly less than the value of that interest.

18. ARA therefore submits that the evidence established that, Emmanuel Charumbira and Musa Cherutich Sirma were declared in the bank account opening form for Mozzartbet as the directors of Mozzartbet, with respect to bank accounts held in UBA Bank. Emmanuel Charumbira was similarly a shareholder in Mozzartbet Africa incorporated in Mauritius in which Mozzartbet Africa was also the majority shareholder of Mozzarbet with Musa Cherutich Sirma. In addition, Melentijevic Branimir and Musa Sirma witnessed the shareholder agreement executed by Mozzartbet, Mozzartbet Africa and Mid Logistics Limited dated 29th August, 2016 and thus ARA submits that this association of the three individuals with Mozzartbet gave rise to reasonable suspicion that Mozzartbet had knowledge that the funds sent to Kimaco was intended to be laundered and they benefitted as a result.

19. Counsel concludes by stating that on the issue of the DCI investigations, section 92(4) of the POCAMLA provides that the validity of a forfeiture order is not affected by any outcome of either a criminal proceeding or criminal investigation.

20. Our remit as a first appellate Court is to re-evaluate the evidence before the trial court with a view to drawing our own inferences and conclusions. On this occasion we are at par with the trial court as trial before that court was on the basis of affidavit evidence which has been placed before us.

21. Although counsel for Mozzartbet has made lengthy arguments regarding the philosophy and purpose of third party protection within the scheme of POCAMLA we perceive it to be rather straightforward.

In Aquila Advisory Ltd (Supra) cited to us by counsel, Lord Stephens delivering a judgment of the court says this of third party protection under The English Proceeds of Crime Act 2002 (POCA);

> "The overarching principle of POCA is that neither a confiscation order under Part 2, nor a civil recovery order under Part 5, nor the money laundering provisions in Part 7 interfere with existing third-party property rights. For example, section 69(3)(a) (under Part 2) which provides that the powers of a receiver in respect of realisable property to which a confiscation order (or a restraint order) applies "must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him." Similarly, section 281 (under Part 5) provides that in proceedings for a recovery order, a person who claims that any property alleged to be recoverable property belongs to him may apply for a declaration in specified circumstances, and property to which a section 281 declaration applies is not recoverable property. In this respect, POCA reflects the approach of the Drug Trafficking Offences Act 1986 which preceded it, and of which Lord Hobhouse said, in setting out the scheme of that Act in In re Norris [2001] 1 WLR 1388 at paras 12-17, that confiscation orders should not interfere with the property rights of innocent third-parties."

22. The underlying principle is that forfeiture, or confiscation orders as is known under English Law, should not interfere with the property rights of innocent third-parties. Third party innocence is at the heart of the provisions of section 93 which affords protection to a third party who satisfies court, on a balance of probabilities that; the person was not in any way involved in the commission of the offence, or where interest is acquired during or after the commission of the offence, it is acquired for sufficient consideration and without knowing, and in circumstances such as not to arouse reasonable suspension, that the property was, at the time accrued, tainted property.

23. There is proposition made by Mozzartbet, quoting a passage in Jeffrey David Green (supra), that "a claim for civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle". We have no quarrel with this proposition as long as the third party establishes innocence in line with the provisions of section 93(1) of POCAMLA yet we think that they will be instances when lack of identifiable lawful income to warrant a lifestyle may well be, albeit not solely, indicative of lack of innocence of a third party.

24. We also need to make a preface observation regarding a submission made by Mr Lutta, learned counsel appearing for the Kimaco and Pescom, that while ARA, in its originating motion of 12th March 2021, sought a declaration that funds were proceeds of crime, Senior Sergeant Fredrick Musyoki in the affidavit in support goes on a tangent on alleged money laundering. Counsel laments that while his client prepared to answer a case as to whether the funds were proceeds of crime, the learned judge proceeded to hold that the funds were laundered funds. Counsel posits that ARA could not proceed on one ground and then succeed on another.

25. It is true that in paragraph 13 of his affidavit Snr. Sgt Musyoki depones as follows:

> " That investigations have established that the legal entities associated with Peter Kiilu Makau and Consolata Mwende Kiilu namely Kimaco Connections Limited, Pescom Kenya and Power Energy International Limited executed a complex scheme of money laundering designed to conceal, disguise the nature, source, disposition and movement of illicit funds, suspected to constitute proceeds of crime and which are the subject matter of this forfeiture application."

26. He reiterates this in paragraph *29*:

> "That an analysis of the bank statement in respect to account number 8443240011 held at NCBA Bank in the name of Pescom Kenya and account number 01148530107300 held at Co-operative Bank Limited in the name of Kimaco Connections Limited which are associated with Peter Kiilu Makau has established the accounts were involved in a complex money laundering scheme with payments being made to Emmanuel Charumbira, Musa Sirma and Melentijevic Branimir, who are associated with and/or are directors of Mozzartbet Kenya Limited."

27. The Act defines money laundering as follows:

> ""money laundering" means an offence under any of the provisions of sections 3, 4 and 7."

28. This invites a consideration of sections 3, 4 and 5 which reads:

> " 3. Money laundering
>
> A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—
>
> a. enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or
>
> b. performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to—
>
> i. conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
>
> ii. enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or
>
> iii. remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.
>
> 4. Acquisition, possession or use of proceeds of crime. A person who—
>
> a. acquires;
>
> b. uses; or
>
> c. has possession of, property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.

4. Failure to report suspicion regarding proceeds of crime A person who wilfully fails to comply with an obligation contemplated in section 44 (2) commits an offence."

29. Then the statute gives this wide definition of proceeds of crime;

> " "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."

30. Once the offence in section 4, which is acquisition, use or possession of proceeds of crime is included as a money laundering offence in the interpretation section of the statute, then there can

be no inconsistence for ARA to seek that the subject funds be declared as proceeds of crime because they are as a result of money laundering. What would be of concern to us is if appellants would be found culpable on an offence not pleaded at all. That would be trial by ambush and inimical to the right to fair hearing. Here, however, it is clear from the lengthy affidavit of Snr. Sgt Musyoki that Kimaco and Mr. Makau were said to be holding funds in a money laundering scheme. The learned trial judge was therefore entitled to consider and find whether the monies were laundered.

31. The next preliminary matter would be whether the finding of the Director Criminal Investigations that he did not find any criminal activities established against Mozzartbet Kenya Limited was in itself sufficient to insulate the appellants, or at least Mozzartbet, from being found to be engaged in a money laundering scheme.

32. We take it that the DCI, after investigations, came to the conclusion that it could not successfully mount a criminal case against Mozzartbet. The threshold for a successful criminal conviction is evidence on beyond reasonable doubt. On the other hand, the proceedings brought by ARA was for civil forfeiture

under Part VIII of The Act. Section 81 clarifies that all proceedings under that part are civil proceedings. Section 81 is as emphatic as can be:

> " 81. Nature of proceedings
>
> 1. All proceedings under this Part shall be civil proceedings.
> 2. The rules of evidence applicable in civil proceedings shall apply to proceedings under this Part."

33. Under section 92, the High Court may make an order for forfeiture if it finds, on a balance of probabilities, that the property concerned has been used or is intended for use in the commission of an offence or is proceeds of crime. The threshold to be achieved is proof on a balance of probabilities. And there is good reason for this low threshold. In its very nature money laundering and disguising proceeds of crime can be a complex and covert scheme. To require civil forfeiture on anything other than proof on a balance of probabilities could make forfeiture a nigh impossible task. This could be

inimical to public interest. The rationale behind the statute was discussed in the opening judgment of Warsame, JA in Pamela Aboo v ARA & Another, Civil Appeal No. 452 of 2018 (unreported);

> "Corruption and economic crimes are frequently motivated by the prospect of financial gain. The battle against corruption is inextricably linked to the fight against money laundering, since stolen assets of a corrupt public official are meaningless unless they are laundered through the financial network in a way that is obscure and does not raise suspicion....
>
> In the war against money laundering, Kenya has signed and ratified all of the United Nations (UN) Conventions on combating Money Laundering and the Financing of Terrorism. Consequently, enactment of the *Proceeds of Crime and Anti-Money Laundering Act*, 2009 (POCAMLA). POCAMLA was a significant step towards domestication and aligning Kenya to the global anti-money laundering (AML) and financial crime standards."

34. Mativo, JA in his judgment in Pamela Aboo (supra) expounded on the nature and purpose of the POCAMLA and asserted thus;

> " At the outset, it is important to underscore the nature, import and purpose of the legislation(s) governing civil asset forfeiture proceedings. For starters, POCAMLA was enacted in pursuit of legitimate and important purpose of combating serious organized crime and preventing criminals from benefiting from the proceeds of their crime. Among the arsenal of tools employed to achieve these objectives is the authorization of seizure of property, restraint orders and forfeiture. The law permits state officials to seize property suspected to be the proceeds of crime or an instrumentality of an offence.
>
> As the preamble to POCAMLA suggests, it is an Act of Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes."
>
> He went on further to state that:
>
> "The thrust of modern day proceeds of crime legislation is to target the unexplained wealth of the criminal and not the criminal himself. Therefore, it is irrelevant that the person found with the assets was not a public officer or was not involved in corruption. The POCAMLA regime in Kenya adopts much of the model proposed in the United Nations Convention against Corruption, in which legislation provides for non-conviction-based confiscation/ forfeiture proceedings that do not require a predicate offence to be established. This is what distinguishes proceeds of crime proceedings from criminal proceedings. Proceedings under POCAMLA are civil in nature although the Act deals with the proceeds of criminal conduct. The objective of POCAMLA is not to indict, prosecute and convict criminals but rather to forfeit the proceeds of crime."

35. The noble intention of the statute would be frustrated if the threshold were to be proof beyond reasonable doubt. The mandate of the ARA and its Director is markedly different from that of the

DCI and the appellants cannot bank on clearance from the DCI to resist the forfeiture proceedings and if need be, section 92(4) puts rest to the appellants contention. It reads;

> "The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated."

36. So now to the substantive issue, was the evidence in support of the forfeiture motion simply recycled adjectives with no probative value as submitted by counsel Amoko? Was that affidavit just of mambo jambo stuff?

37. The evidence was that Kshs.251,154,214.00 was held in account No.0636622001 at Diamond Trust Bank, Nation Centre Branch in the name of Kimaco Connections Limited, Kshs.50,269,766.33 was held in account No.01148530107300 at Co-operative Bank in the name of Kimaco Connections Limited and Kshs.2,496,670.75 in account No. 8443240011 at NCBA Bank in the name of Pescom Kenya. There was evidence that Peter Kiilu Makau and Consolata Mwende Kiilu were directors of Kimaco and signatories to the bank accounts. Pescom is a trade name belonging to Peter Kiilu Makau.

38. Some Kshs.256,725,028 had, in the period July-August 2020, been received into account to 0830622001 via Mpesa transfer from Mozzartbet. Kshs.384,659,591 had been paid in account No.01148530100730 between 4th February 2020 and 1st August 2020 from Kimaco Connections via Paybill 311372. Part of those funds were later transferred to entities associated with Peter Kiilu Makau namely Pescom Kenya and Power Agency International Limited. Kshs.43,134,000 was transferred from the account of Kimaco Connections to account Number 8443240011 in the name of Pescom Kenya.

39. Directors of Mozzartbet are Musa Cherutich Sirma, Mozzarbet Africa and Mid Logistics Limited. Further, Emmanuel Charumbira and Melentijevic Branimir are associated with Mozzartbet. Emmanuel Charumbira received $125,806.48 (approximately Kshs.13,209,680.40) from Kimaco's USD Account 021 205 30107300. Musa Simra received Kshs.17,255,201.00 from Pescom's NCBA account No. 8443240011. Melentijevic received Kshs.14,635,733 from Kimaco's Cooperative Bank account numbers 021 2053017300 and 011 48530107300.

40. The payment on 8th May 2025 to Sirma was allegedly for payment for cereals. In an affidavit sworn in HCACEC Misc. 034 of 2020 Makau explains that this was payment in respect of a contract of cereals to be supplied to Pescom. Further investigations however revealed that it was Kimaco not Pescom that had submitted two bids for supply of green grams, rice and beans to National Cereals and Produce Board (NCPB). Further, that Kimaco did not supply the cereals to NCPB. At any rate, there was no evidence that Sirma supplied the cereals either to Pescom or Kimaco.

41. Regarding the payment to Mr. Charumbira, it was supposedly in regard to a subcontract while the payment to Melentijevic was alleged in payment of two invoices dated 10th August 2020 and 1st July 2020 to Pescom relating to software tracking module but there was no evidence such contract between Pescom and Melentijevic. Further, other than the invoices there is no evidence from either Melentijevic or Pescom that the software was supplied.

42. Let us turn our attention to the more substantial funds. These involve payment of some Kshs.256,930,343.52 by Mozzartbet to Kimaco. It was explained by both Mozzartbet and Kimaco that the payment was made pursuant to two contracts both of 20th February 2020. From those monies, substantial sums have been paid to an entity called Open Skies Management Services. Mr. Makau, both in his affidavit before court and statement made on 1st October 2020 before the ARA, stated that

Kimaco and Open Skies had entered into a contract for the latter to supply software products to the former. The impression given, without doubt, was that the contract with Open Skies was to mainly enable Kimaco meet its obligations with Mozzartbet.

43. In a further affidavit sworn on 2nd December 2021, Snr. Sgt Musyoki points out the following curious issues about this three- way arrangement:

    i. The contract between Open skies and Kimaco which was intended to service that between Kimaco and Mozzartbet was entered earlier. The former was entered on 11th December 2019 and the latter on 20th February 2020. This predating was not explained away by Kimaco.

    ii. The contracts between Mozzartbet and Kimaco provided that the supplier shall be independent and not deemed to be an employee or agent of the Mozzartbet and would not be assign or subcontract the contract without a written consent of the other party.

44. It turns out however that Emmanuel Charumbira is a director of both Mozzartbet and Open Skies. And while strictly speaking, under company law, the two are separate entities, it does not answer why there is no evidence that the subcontract to Open Skies was ever consented to in writing by Mozzartbet. Neither does it explain why the contract between Open Skies and Kimaco predates that between Kimaco and Mozzartbet.

45. The trial judge cannot be faulted for finding as follows:

> " I am satisfied that the Applicant has proved its case against the Respondents on a balance of probabilities. In my mind the letter concerning Mozzarbet from the Directorate of Criminal Investigations and the Civil case filed by Mozzarbet against the 2nd Respondents in the Commercial & Tax Division are all but decoys. The 2nd Respondent has not demonstrated that it had any past experience in software business when it was allegedly contracted by Mozzarbet Kenya Limited. It is instructive that prior to entering into the alleged contract with Mozzarbet the 2nd Respondent had entered into a contract with Open Skies Management Services for supply of software. What is telling is that it is Mozzarbet which prepaid the 1st Respondent in order for it to be supplied with the software if the contracts annexed as exhibits are to be believed. As I have also stated it is telling that the money paid by Mozzarbet was to be paid to Open Skies a company it shared directorship with meaning that Mozzarbet did not need a middleman to procure software from a company which so to speak was its sister company as they shared Directorship. The money paid by Mozzarbet to the 1st Respondent also ended up with one Hon. Musa Sirma a director of Mozzarbet ostensibly to execute a contract that the 1st and 2nd Respondents had with the National Cereals & Produce Board and the Pescom Kenya but which contract was never performed. It is my finding that Kimaco was just a shell company which could not even pay its rent as evidenced by a letter exhibited as 000625 at Page 87 of the Applicant's supporting affidavit. As for the issue of the payment to the Kenya Revenue Authority it is evident that the tax was paid in the course of the investigations by the Applicant. Proof of this is that the letter from the Kenya Revenue Authority is dated 28th October 2020 and it makes reference to a Notice of Investigations dated 5th October, 2020 and another dated 28th September, 2020 which is around the time the investigations commenced (See paragraph 2 and 3 of SSgt Fredrick Musyoka Musyoki's affidavit dated 12th March, 2021. It is my finding that the depositions the Respondents were involved in a money laundering scheme have not been rebutted."

46. Another layer of suspicion was the status of Kimaco at the time it was entering the multi-million contract. There was evidence that notwithstanding that it alleged to have five (5) employees, Kimaco did not make any 'Pay as you Earn' and there was no evidence that any of the 5 named employees received salary from Kimaco. In addition, Kimaco filed nil returns with KRA in the period it received a whopping sum of Kshs.641,763,956.05 and when it was trading and had entered into two multi-million contracts.

47. In his response Mr. Makau, while contending that Kimaco had overpaid taxes, the evidence it produced was of payment made after ARA had commenced investigations into its affairs. Further, no evidence was produced to counter the allegations made in respect to non-existing staff. Simply stated, there was ample evidence from which the learned trial judge could draw the conclusion that Kimaco was a shell company.

48. Although a proposition was made that civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant its lifestyle, the evidence led against Kimaco is not simply a gap between identifiable lawful income and lifestyle. The evidence revealed that Kimaco received payment under suspicious circumstances, made out payments in similar circumstances and concealed its business from the Tax authority. Is it not said that "if it walks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck"?

49. We turn our attention to Mozzartbet. This is the entity which paid a substantial sum (Kshs.256,851,910) to Kimaco for monies on account of two contracts. Is Mozzartbet without blemish in the matter? To start with account opening documents for its accounts in UBA Kenya Bank, names the following to be its directors: Loncar Koviljke (Serbian national), Emmanuel Charumbira (Zimbabwean national) and Musa Cherutich Sirma (Kenyan national). There is evidence of payment made by Kimaco or Pescom or Mr Makua himself to two of those Directors under suspicious circumstances that have not been adequately explained.

50. Further, Branimir Melentijevic is a shareholder of Mozzartbet Africa which is the majority shareholder of Mozzartbet Kenya Limited. There was evidence that some funds initially paid by Kimaco to Pescom Kenya made its way to Melentijevic. These were made in payment of two invoices, for USD 69,964.30 and USD 34,599.00 allegedly for software business. What Kimaco does not controvert is the allegation by Snr. Sgt Musyoki that these payments bespeak of the alleged software agreement between Open Skies and Kimaco which was to service Kimaco's contract with Mozzarbet.

51. The totality of the evidence puts persons holding directorships or connected with Mozzartbet as beneficiaries of funds from Kimaco which received substantial payment from Mozzartbet. Neither the individuals nor Mozzartbet had satisfactorily explained their intimate connections with an entity that was conducting its affairs in a questionable manner. Mozzartbet did not even contend that it was a victim of its director's wrong doing so as to come within the circumstances discussed by Lord Neuberger in Jetivia SA (supra). We hold that there was sufficient evidence, on the statutory threshold of balance of probabilities set by section 92 of the Act, to implicate Mozzartbet as well and it cannot benefit from protection of a third party.

52. Ultimately, we reach the conclusion that the two appeals are without merit and are hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

F. TUIYOTT

JUDGE OF APPEAL

…………………………….

F. OCHIENG

JUDGE OF APPEAL

…………………………….

A. O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.