Mangira & another v Assets Recovery Agency; Ali Cars Limited (Interested Party) (Civil Appeal E132 of 2023) [2024] KECA 1488 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1488 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E132 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

STEPHEN VICKER MANGIRA ..... 1ST APPELLANT

NABIL LOO MOHAMED ..... 2ND APPELLANT

AND

ASSETS RECOVERY AGENCY ..... RESPONDENT

AND

ALI CARS LIMITED ..... INTERESTED PARTY

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 20th January 2023 in HCCC No. 269 of 2017)

JUDGMENT

1. This is an appeal from the ruling and orders of the High Court of Kenya at Mombasa (M. N. Mwangi, J.) dated 20th January 2023 in Mombasa HC Civil Application No. 269 of 2017.

2. The precis of the appeal is that the Assets Recovery Agency (the respondent), filed an application dated 12th July 2017 in Mombasa HC Misc. Application No. 195 of 2017 under sections 81 and 82 of the Proceeds of Crime & Anti-Money Laundering Act (POCAMLA) as read with Order 51 of the *Civil Procedure Act*, seeking a preservation order against Stephen Vicker Mangira (the 1st appellant), (Nabil Loo Mohamed (the 2nd appellant) and one Bakari Kila Bakari, prohibiting the sale, transfer, disposal off or other dealings with the following motor vehicles:

    i. KCJ xxxH Toyota Vellfire registered in the name of the 1st appellant;

    ii. KCK xxxA Toyota Prado registered in the name of the 1st appellant;

iii. KBV xxxK, Toyota Station Wagon registered in the name of the 1st appellant;

iv. KBP xxxQ BMW registered in the name of the 1st appellant;

v. KCK xxxQ BMW registered in the name of Ali Cars Limited (the affected party herein), but the 1st appellant as the beneficial owner;

vi. KCH xxxZ Toyota Alphard registered in the name of the 1st appellant;

vii. KCK xxxB Toyota Landcruiser registered in the name of the interested party, but the 1st appellant as the beneficial owner; and

viii. KCH xxxR Toyota Vitz registered in the name of the 2nd appellant.

3. In addition to the orders aforesaid, the respondent also sought:

i. a preservation order prohibiting the 1st appellant and the said Bakari Kila Bakari from dealing with Kshs. 18,500,000 seized from the 1st appellant as well as Kshs 348,000 and USD 1,500 seized from Bakari Kila Bakari and held by the Director of Criminal Investigations; and (ii) prohibiting the 1st appellant from accessing, transacting in and/or dealing with Kshs. 2,640,339.60 held at the Standard Charted Bank Kericho Bank Account No. 0100309xxxx.

4. The respondent obtained the preservation orders as prayed vide an order of the High Court issued on 14th July 2017 and gazetted on 1st August 2017 vide Gazette Notice No. 7407 in Vol. CXIX – No. 107 of the Kenya Gazette.

5. Having obtained the preservation orders aforesaid, the respondent filed an Originating Motion dated 31st October 2017 in Mombasa HC Civil Application No. 269 of 2017 under Section 91 of POCAMLA as read with Order 51 of the *Civil Procedure Act* against the appellants and Bakari Kila Bakari seeking: (i) orders declaring that the aforementioned assets subject of the preservation orders aforesaid were proceeds of crime and, therefore, liable to forfeiture to the Government; (ii) orders for forfeiture of the said assets and for their transfer to the respondent; and (iii) costs of the application.

6. The grounds on which the respondent's application was anchored were: that, following the reports of the arrest of the appellants and Bakari Kila Bakari on suspected drug related offences, a team of investigators comprising the Anti-Narcotic Unit, the Financial Investigations Unit and the respondent embarked on investigations under POCAMLA in respect of financial crimes and identification of proceeds of crime; that the investigations established commission of drug related offences resulting in the prosecution of the appellants and Bakari Kila Bakari in Shanzu Criminal Case No. 257 of 2017; that police investigations identified and traced assets belonging to the appellants and Bakari Kila Bakari reasonably suspected to be proceeds of crime under POCAMLA, or intended to be used for criminal activities; that further financial investigations did not establish any justifiable reasons for the source of the assets; that the respondent obtained preservation orders prohibiting the appellants and Bakari Kila Bakari and their representatives from dealing in any manner with the said assets; that the order was gazetted by the respondent; that section 90 of POCAMLA provides that, where a preservation order is in force, the respondent may apply to the High Court for an order of forfeiture to the Government of all or any of the property that is subject to the preservation order; and that it was in the interests of justice that the court grants the orders as prayed.

7. The application was supported by the affidavit of Muthoni Kimani, the then Director of the respondent, sworn on 31st October 2017 essentially deposing to the grounds set out on the face of the application. In addition, Chief Inspector Mike King'oo Muia (Muia) of the Directorate of Criminal Investigations (DCI) Nairobi Headquarters Serious Crimes Unit also swore an affidavit on

31st October 2017 deposing that he was part of a team who undertook investigations on the appellants and Bakari Kila Bakari relating to offences under the *Narcotic Drugs and Psychotropic Substances (Control) Act*, POCAMLA and the *Prevention of Organised Crimes Act*; and that, on 11th February 2017, a team of officers from the DCI were in an operation in Mombasa and arrested several individuals suspected to be dealing in illicit trafficking of narcotic drugs, and involved in money laundering activities.

8. Muia deponed further that the 1st appellant was arrested on 11th February 2017 at Reef Hotel and, upon search of his motor vehicle, he was found to have cash amounting to Kshs. 18,500,000 stacked in two suitcases; that, in his statement, the 1st appellant averred that he sold land in Kericho and received payment in cash to the tune of Kshs. 20.5 million in part payment, but did not give the particulars of the land, details of the purchaser or any documentary proof of a legitimate transaction in that regard; that, upon further investigation, they found that that the 1st appellant did not own any land, and that there was no advocate by the name Momanyi whose offices were allegedly situate at Mwalimu House in Kericho; that the 1st appellant stated that the reason why he was carrying such huge sums in cash was for the purchase of an apartment and two hearses, but could not identify the apartment or the vehicles he intended to purchase, or produce any evidence relating to the alleged transactions, raising doubt on his source of the money; that further investigations revealed that three vehicles were purchased by the 1st appellant at a price of Kshs. 16,976,000 in cash and a trade-in with another vehicle valued at Kshs. 900,000; and that the 1st appellant did not give any reasonable explanation for the large deposits to his Standard Chartered Bank account.

9. Muia deponed further that the 2nd appellant was the registered owner of motor vehicle registration number KCH XXXX which, upon seizure and search on 11th February 2017 at Reef Hotel, was found with narcotic drugs; that the 2nd appellant had used the said vehicle to pick Bakari Kila Bakari, a Tanzanian citizen, and his girlfriend, Lillian Bernard Martin Kanje, from Moi International Airport Mombasa on 10th February 2017; that, the following day, the three drove around town all day until they were arrested; that Bakari Kila Bakari was arrested in the company of the 1st and 2nd appellants and, upon search in his Room No. 104, Kshs. 348,000 and USD 1,500 was recovered along with 8 active phones, an iPod and a MacBook laptop; that the devices were being analysed, but that the sheer number of phones on the individual led to the reasonable belief that he used them for criminal activities; and that Bakari Kila Bakari claimed to have withdrawn USD 4,000 from a KCB ATM, and yet the maximum daily limit for ATM withdrawals was USD 1,000, which made his explanation untrue.

10. In addition to the foregoing, Muia deponed that the 1st appellant's passport indicated that he was a frequent traveler to Tanzania for unknown purposes; that there was a peculiar link between the three suspects, and that there was reasonable cause to believe that they were part of an organised criminal enterprise; that it was not a coincidence that the appellants and Bakari Kila Bakari were found and arrested at the same time and place; and that there was therefore reasonable cause to believe that they had a common object to engage in unlawful activities for gain.

11. Finally, Muia deponed that, in the course of investigations, they were able to trace the said motor vehicles which were reasonably believed to have been acquired by the appellants using proceeds of crime; and that the properties and monies in the possession of the appellants and Bakari Kila Bakari were reasonably believed to be proceeds of crime or intended to be used for criminal activities, and were therefore liable for recovery under POCAMLA.

12. The 2nd appellant filed a replying affidavit sworn on 5th February 2019 in opposition to the application. He deponed, inter alia, that there was nothing in the *Civil Procedure Act* and the Rules providing for an "Originating Motion," and that the court had no jurisdiction to hear and determine proceedings

commenced outside the provisions of the law; that the application was in violation of *the Constitution* in so far as it was filed and prosecuted before Shanzu SPM Criminal Case No. 257 of 2017 was concerned; that, under Article 50(2) (a) of *the Constitution*, every person is presumed innocent until the contrary is proved; that the appellants and Bakari Kila Bakari had not been proved guilty; and that, for any court to hear the application, it would have to presume that they were guilty.

13. The 2nd appellant deponed further that the respondent was an interested party in Mombasa HC Civil Application No. 49 of 2017 (DPP vs. Swaleh Yusuf Ahmed & 5 Others) where the DPP obtained orders of restraint against the respondents therein on the basis of their being charged in Shanzu SPM Criminal Case No. 209 of 2017 with trafficking in narcotic drugs and money laundering as were the appellants herein; that the respondent had not filed any forfeiture proceedings in that case against the accused persons who were Muslims; that the respondent had not given any explanation why it was targeting the appellants and favouring the accused persons in that case, thereby applying the law selectively; that the accused persons in that case were allegedly found with 15kg of heroin, and yet they were treated as though they were immune from forfeiture while the respondent was vigorously pursuing the 2nd appellant on the allegation that he was found with 540 grams of narcotics; that the respondent was also pursuing the 1st appellant for forfeiture of all of his money and vehicles in the absence of any allegation that he was found in possession of any narcotics; and that there were external forces controlling the respondent.

14. In addition to the foregoing, the 2nd appellant deponed that they had filed Mombasa HC Constitutional Petition No. 4 of 2019, raising questions of law on various issues, including the question as to whether the respondent had any power to represent the Government in any civil proceedings; whether the respondent or the trial court can proceed on a presumption of guilt before criminal proceedings were determined; whether the respondent could discriminate against one group of accused persons while favouring another group; and whether the whole of Part VI to Part XIII of POCAMLA (sections 53 to 134) were inconsistent with *the Constitution* and thereby null and void. According to him, it was necessary to hear the petition first; that that no civil proceedings could be instituted under POCAMLA without prior written authority of the Attorney General; and that no such authority was obtained or proved in the application for preservation orders or in the instant application for forfeiture and that, therefore, the applications were incompetent an ultra vires.

15. The 2nd appellant deponed further that the 1st appellant was away from Mombasa and was struggling financially because his only bank account holding over Kshs. 2.6 million was frozen; that his cash was taken away; that all his vehicles were seized, and that his wife had been threatened with eviction by their landlord; that the 2nd appellant's vehicle was seized; that, in Criminal Application No. 8 of 2017, a different case against the aforementioned other accused persons (Swaleh Yusuf Ahmed & 4 others), a police officer swore an affidavit deponing that the 2nd appellant's vehicle was searched and a substance suspected to be narcotic drugs was found, yet the 2nd appellant's did not know and had never met those accused persons, and yet their charge sheet stated that they were arrested in Kikambala and the said vehicle was not mentioned in the charge sheet; that, although the 1st appellant was charged with unlawfully obtaining property, being the KShs. 18.5 million recovered from him, no policeman or prosecuting counsel had to date come forward with a statement detailing how that money was unlawfully obtained; that there was no warrant of arrest authorising search and seizure; and that the police officers excluded the cash taken from the 1st appellant from the inventory.

16. Subsequently, the 1st appellant filed a further replying affidavit sworn on 19th May 2021 opposing the application. It is noteworthy, though, that there is no replying affidavit on record filed by the 1st appellant prior to the "further replying affidavit". In the further replying affidavit, the 1st appellant deponed that he was charged with specific money laundering offences under POCAMLA with the full

participation of the respondent; that the charges were to the effect that the sum of KShs. 18.5 million and the motor vehicles seized from him were proceeds of crime, namely trafficking in narcotic drugs; that after a full trial which took almost 4 years and 16 prosecution witnesses, the 3 accused persons, including the 1st appellant, were acquitted of all the charges by the Chief Magistrate in Shanzu; that the 1st appellant explained the source of his income in his sworn testimony, which was unchallenged; that the trial court agreed that his line of work as a traditional herbalist did not constitute any crime or offence under the *Witchcraft Act* (Cap. 67); and that, for example, he had been paid Kshs. 55,000,000 by a client for his services prior to his arrest.

17. According to him, the investigations leading to his arrest, the arrest itself and the prosecution was as a result of a multi- agency cooperation and joint effort by officers from the respondent, the DCI, the National Intelligence Service, the Government Chemist and Safaricom; that the evidence of all the prosecution witnesses related to offences under POCAMLA; and that, as a result of the multi-agency cooperation, the civil proceedings by the respondent and Shanzu SPM Criminal Case No. 257 of 2017 were so intertwined, with the same witnesses and the same persons directing the investigation, arrest and prosecution relating to the same persons and property, that an acquittal in the criminal proceedings should have led to an automatic termination of the preservation and forfeiture proceedings; that the respondent was part of the criminal proceedings, and could not maintain civil proceedings under POCAMLA to get what they could not get in criminal proceedings; that the prosecution had already made an application on behalf of the respondent for release of the KShs. 18.5 million to the respondent in the criminal case; that the multi-agency cooperation extended to the manner in which the criminal case was prosecuted; and that, after delivering judgment in the criminal case, and having acquitted him of all charges, the learned Chief Magistrate acknowledged that she had jurisdiction to order restitution of the exhibits to him, but held that the exhibits be dealt with in the ongoing proceedings in the High Court.

18. The 1st appellant deponed further that he registered a business by the name Cerabafide Investments to carry on a car hire business, which could be confirmed by the documents, letterheads and rubber stamps seized by officers from the respondent, DCI and NIS from him; that he purchased the seized vehicles over a period of years by instalments, and by trading in older vehicles; that the use of motor vehicles for car hire business was not a crime; that his motor vehicles and money were not proceeds of crime, that the DPP had failed to prove the same in the Shanzu criminal case; and that the 1st and 2nd appellants filed Mombasa HC Constitutional Petition No. 4 of 2019 where, in his judgment, the learned Judge held that the High Court could not usurp the mandate of the Magistrate's Court. According to the learned Judge, the 1st appellant's interests were best served in defending the prosecution in the criminal case and reiterated the presumption of innocence as an entrenched principle of criminal justice.

19. In addition to the foregoing, the 1st appellant deponed that there was no power or jurisdiction conferred upon the High Court to authorise seizure of any property by the respondent; that, under section 82(3) of POCAMLA, a court making a preservation order shall at the same time make an order authorising seizure of the property by a police officer; that the respondent was not a police officer, and, therefore, the preservation orders granted to it were per incuriam, null and void for all intents and purposes and could not be said to be in force; that no order was sought or granted to appoint a manager to manage the seized vehicles and money under section 86 of POCAMLA; that the making of a forfeiture order under section 92 of POCAMLA did not anticipate that a person could be arrested and charged with money laundering offences under the Act, and subjected to forfeiture proceedings founded on the same allegations; that a judge making forfeiture orders could not rely on affidavit evidence contrary to the findings of the criminal trial court after hearing 16 prosecution witnesses; that section 92(4) of POCAMLA, which provides that the validity of a forfeiture order is not affected by

the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, would only be applicable if the forfeiture order is made before the outcome of criminal proceedings; and that, the appellants having been found innocent of all allegations, the continued effort by the respondent to seize and forfeit his property was a violation of Article 40 and inconsistent with Article 2(4) of *the Constitution*.

20. Finally, the 1st appellant deponed that he had made an application in Mombasa HC Misc. Application No. 195 of 2017 to vary the preservation orders, taking into account his living expenses, legal expenses and the assets which he required to continue carrying on his business; that, out of desperation, his wife took a loan at exorbitant rates of interest; that he owed his landlord Kshs. 1,260,000 as rent for 18 months; that his family had been subjected to hardship and embarrassment; that the seized motor vehicles, if not maintained, would rot away and be of no value to him; and that, if the vehicles were returned to him, he would be able to run his business and support his family.

21. The application was canvassed by way of written submissions and determined vide a ruling of the High Court (Njoki Mwangi, J.) dated 20th January 2023. The heading of the decision was subsequently rectified by a ruling dated 19th April 2024 to read "Judgment" instead of "Ruling" on the respondent's application for rectification of the error as well as the erroneous references to an incorrect bank account number.

22. In the ruling dated 20th January 2023, the High Court held that the nature of the civil action contemplated under section 90 of the POCAMLA was by way of an application, and not a plaint as contended by the appellants; that the application having been brought by way of an Originating Motion was competent and properly before the court; that the failure of the respondent's director to be named as the applicant was not fatal to warrant dismissal of the application, as the court could comprehensively determine the real dispute between the parties; and that the respondent was a body corporate with the capacity to sue and be sued and, therefore, the contention that only the Attorney General could file proceedings was misplaced, and a misinterpretation of section 53 of POCAMLA.

23. Turning to the issue as to whether the appellants' properties sought to be forfeited were proceeds of crime, the High Court held that, in the application, all that the respondent was required to do was to show on a balance of probability that the appellants could not adequately account for their assets and, thereupon, the appellants had the burden of presenting evidence to prove that the monies and properties in question were acquired legitimately; that the appellants had not produced any proof of the sources of the income in issue to warrant the 1st appellant's possession of the money and motor vehicles in question; that the 1st appellant's attempt to prove his source of income was that he had registered a business named Cerabafide Investments, yet the business name was registered on 27th January 2017; that the 2nd appellant offered no proof or explanation of income to purchase the motor vehicle registered in his name; and that the money and motor vehicles in issue were proceeds of crime as defined under section 2 of POCAMLA.

24. In addition to the foregoing, the High Court held that the proceedings before the court were to determine the criminal origins of the property in issue and were not a criminal prosecution against the appellants where the presumption of innocence was applicable; that asset forfeiture was a civil remedy aimed at confiscation of proceeds of crime, which was not affected by the outcome of any related criminal proceedings; that the respondent had the locus standi to institute and proceed with the proceedings notwithstanding the appellants' acquittal in the criminal trial; that, having found that the assets and monies were proceeds of crime, they were therefore liable for forfeiture to the Government; and that the right to property under Article 40 of *the Constitution* did not extend to unlawfully obtained property.

25. In view of the foregoing, the High Court allowed the Originating Motion; declared the money and assets as being proceeds of crime liable for forfeiture; ordered that the money and assets be forfeited to the Government of Kenya and transferred to the respondent; and that a sum of KShs. 1,415,000 unlawfully withdrawn by the respondent out of the KShs. 2,640,339.60 held in his Standard Chartered Bank account, during the pendency of the proceedings be deposited with the respondent for forfeiture.

26. Aggrieved by the learned Judge's decision, the appellants moved to this Court on appeal against the impugned ruling and orders on a whopping 36 grounds set out in their Memorandum of Appeal dated 28th August 2023, which offend the mandatory provision of rule 88 of the Court of Appeal Rules, 2022 but which we need not replicate here. Under rule 88(1) (a) of the Court's Rules, the appellants are enjoined to "concisely set forth" the grounds of objection to the decision appealed against, specifying, inter alia, the points which are alleged to have been wrongly decided. Indeed, their grounds of appeal may be likened to a mammoth haystack from which the Court is invited to grope, sift and search for itself a couple or two of needles with which the juridical expanse may be scratched to reveal what, if anything, the learned Judge may be faulted for.

27. Be that as it may, counsel for the appellant shrewdly elected to deal with all the grounds of appeal collectively, and from which our juristic sieve strains and distils into four substantive issues from the needlessly populous grounds of appeal and submissions, namely: (i) whether the commencement of the forfeiture proceedings by way of an Originating Motion rather than a plaint rendered the application incompetent or fatally defective; (ii) whether the respondent had the capacity to file the application; (iii) whether the appellants' acquittal in the criminal case was consequential to the preservation orders and the application for forfeiture; and (iv) whether the learned Judge shifted the burden of proof to the appellants and, if so, whether the appellants sufficiently proved or explained their source of income to dispel the supposition that they constituted unexplained assets.

28. In support of the appeal, learned counsel for the appellants, M/s. Kinyua Muyaa & Co., filed written submissions and a list & digest of authorities dated 25th May 2024 citing the cases of Speaker of the National Assembly v Karume [1992] KECA 42 (KLR) for the proposition that, where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed, and that the Civil Procedure Rules cannot oust clear constitutional and statutory provisions;

    Warehousing Limited [2015] eKLR for the proposition that section 34 of the *Advocates Act* prohibits unqualified persons from preparing certain documents and that documents prepared by other categories of unqualified persons, such as non- advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes; as well as Assets Recovery Agency v Quodran Limited & 2 others [2018] eKLR; and Kenya Anti-Corruption Commission v Stanley Mombo Amuto [2017] eKLR to demonstrate that the proper manner for instituting forfeiture proceedings is through an Originating Summons.

29. On his part and in opposition to the appeal, Learned Counsel for the respondent, Mr. Samuel Wambua, filed written submissions, a list & digest of authorities dated 30th May 2024. Counsel cited the cases of Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Maina t/a Machira & Co. Advocates [2013] eKLR, setting out the principles guiding a first appellate court; Assets Recovery Agency vs. Timami & another [2024] KEHC 3197, Assets Recovery Agency vs. Charity Wangui Gethi & another [2021] eKLR, and the Namibian case of Martin Shalli vs. The Attorney General and the Prosecutor General (2013) NAHCMD 5 for the proposition that civil forfeiture proceedings are not aimed at the guilt of the owner but, rather, are proceedings in rem against the property and, even where a person is tried for an offence and acquitted, the court would still be required to inquire into the

question as to the source of the property should that issue be before it; Pamela Aboo vs. Assets Recovery Agency and Ethics and Anti-Corruption Commission (Interested Party) Nairobi Civil Appeal No. 452 of 2018 [UR] for the proposition that, in civil forfeiture proceedings, it must be shown that the proceeds were a product of a criminal act, and there must be a causal connection between the proceeds and the offence; and Assets Recovery Agency vs. Samuel Wachenje & 9 others Nairobi [2018] eKLR for the proposition that an applicant seeking stay of preservation orders bears the burden of demonstrating that the preservation orders have deprived them of the means to provide for reasonable living expenses and/or that they have suffered hardship as a result of the order, which hardship outweighs the risks of dissipation of the property concerned.

30. On the 1st issue as to whether commencement of forfeiture proceedings by way of an Originating Motion instead of a plaint renders the application incompetent or fatally defective, learned Counsel for the appellants submitted that there are no competent proceedings in Kenya commenced by Originating Motion, and that proceedings for forfeiture orders must be commenced by Plaint to give all parties a fair hearing, including the opportunity to examine witnesses; that the learned Judge invoked Order 51 rule 1 of the Civil Procedure Rules, which requires all applications to the court to be by Motion; that Order 51 deals with applications filed within substantive suits, and does not provide for filing Motion applications within proceedings commenced by applications; and that the learned Judge disregarded section 19 of the *Civil Procedure Act* by failing to hold that "Originating Motions" are not a prescribed manner for commencing any proceedings in Kenya whether in the *Civil Procedure Act* or POCAMLA.

31. With regard to the related issue as to whether the trial court's decision amounted to a "ruling" or a "judgment," counsel contended that, by seeking to have the title of the impugned ruling reviewed so as to read "Judgment," the respondent conceded that it ought to have filed a Plaint instead of an Originating Motion; that the learned Judge's conversion of the ruling to a judgment implied that there was a trial, and that the review was intended to align the decision with the "unlawful decree" that the respondent had extracted; that there was no error in heading the decision "Ruling" instead of "Judgment" and that the learned Judge should not have relied on Order 45 rule 2 of the Civil Procedure Rules to override section 80 of the parent Act; that the appellants relied on sections 91(2), 94(4) and 95(2) of POCAMLA in their references to judgments and adducing of evidence for their proposition that proceedings for forfeiture orders must be commenced by Plaint; that prayer 1 in the Originating Motion was for a declaration that the concerned assets are proceeds of crime and therefore liable to forfeiture to the government; and that declarations are made in substantive suits after hearing witnesses, but not in proceedings commenced by applications.

32. Notably, learned Counsel for the respondent did not submit on this issue. In the impugned ruling, the learned Judge had this to say on the matter:

> " 58. The 1st and 2nd respondents contend that the pleadings filed should have been by way of a plaint with the plaintiff as the Agency director and the Attorney General as the Advocate representing the Agency director. Order 3 rule 1 of the Civil Procedure Rules, 2010 and Section 19 of the *Civil Procedure Act* provide that suits are instituted by way of a plaint or in such manner as may be prescribed by the rules. The application has been brought under the provisions of sections 90 and 92 of POCAMLA as read with Order 51 of the Civil Procedure Rules.
>
> 59. Section 90 of the POCAMLA provides as follows-

1. If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

2. The Agency Director shall give fourteen days' notice of an application under subsection (1) to every person who served notice in terms of section 83(3) ...."

60. Order 51 of the Civil Procedure Rules on the other hand provides that all applications to the Court shall be by Motion and shall be heard in open Court unless the Court directs the hearing to be conducted in Chambers or unless the rules expressly provide. From the said provisions, it is clear that it is not mandatory for a civil action to be brought by way of a plaint since there are other means by which suits can be filed. It is this Court's view that the nature of civil action contemplated under Section 90 of POCAMLA is by way of application and not a plaint.

61. It is my considered view that a suit and/or application brought as a miscellaneous application is one where the rights of the parties are straightforward and can be determined comprehensively without calling of witnesses.

62. .... I hold that the application herein having been brought by way of an Originating Motion is competent and properly before this Court."

33. We take to mind the provision of section 90 of POCAMLA, which we take the liberty to cite in extenso, and which reads:

90. Application for forfeiture order

1. If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

2. The Agency Director shall give fourteen days' notice of an application under subsection (1) to every person who served notice in terms of section 83(3).

3. A notice under subsection (2) shall be served in accordance with the provisions of the *Civil Procedure Act* (Cap. 21).

4. A person who served notice under section 83(3) may appear at the hearing of the application under subsection (1) to—

a. oppose the making of the order; or

b. apply for an order—

i. excluding his interest in that property from the operation of the order; or

ii. varying the operation of the order in respect of that property,

and may adduce evidence at the hearing of the application.

34. The concluding words in section 90 of POCAMLA clearly demonstrate that the Act does not in any way limit the right of parties to an application for forfeiture of assets to adduce evidence at the hearing of the application. Neither does the Act require proceedings for forfeiture to be instituted by way of a plaint. In the same vein, the Civil Procedure Rules do not limit the form in which civil proceedings may be instituted under any other Rules. In Joseph Kibowen Chemjor v William C Kisera [2013] eKLR, Sila J. correctly observed:

> "Under Section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how proceedings may be commenced."

35. To our mind, reference in section 90(1), (2) and (4) of POCAMLA to the term "application" as a means by which forfeiture proceedings may be instituted includes Originating Motions as was the case in issue. In Saint Benoist Plantations Limited vs. Jean Emile Adrien Felix (1954) Vol. 21 EACA 105, the predecessor to this Court held that:

> "... . in such a case as the present where the act merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the court can be approached. Now there is no question about it that the court can be and frequently is approached by Originating Motion."

36. With reference to the closely related provision of section 56 of the *Anti-Corruption and Economic Crimes Act*, which provides for applications for preservation orders with respect to property suspected to have been acquired as a result of corrupt conduct, Nyamu, J. stated as follows in Kenya Anti-Corruption Commission vs. Lands Limited & 7 others [2008] eKLR:

> "In addition, since ACECA had provided a new remedy without stating the manner of approaching the court, an Originating Notice of Motion or a Notice of Motion would have been the appropriate approach to the court instead of filing a Chamber Summons ...."

37. Section 90 of POCAMLA prescribes the manner of originating forfeiture proceedings as an application, but does not state the form in which the application should take. Accordingly, we form the view that it was not unprocedural or by any means fatal for the respondent to approach the High Court by way of an Originating Motion.

38. Turning to the 2nd issue as to whether the respondent had the legal capacity to institute and prosecute the forfeiture proceedings, learned Counsel for the appellants submitted that, under section 82(1) of POCAMLA, it is the Agency Director who is empowered by Parliament to apply for preservation orders; that, under section 90 of the Act, the Agency Director may apply for forfeiture orders only where valid preservation orders are in force; that the respondent had no power, capacity or jurisdiction to seek preservation or forfeiture orders in any form, or under any procedure; and that the orders obtained by the respondent were ultra vires, null and void.

39. According to counsel, the learned Judge accommodated the respondent by overriding sections 82 and 90 of POCAMLA, and by invoking Order 1 rule 9 of the Civil Procedure Rules on misjoinder and non-joinder of parties even though the issue did not relate to joinder of parties, but to whether proceedings

had been commenced by the person authorized by law to do so. Counsel submitted further that the learned Judge was at fault by invoking Article 159(2) (d) of *the Constitution* in view of the fact that determination of the right person authorized by Parliament to seek preservation and forfeiture orders in exercise of statutory authority was not a procedural technicality curable under Article 159(2) (d) of *the Constitution*.

40. In addition to the foregoing, counsel argued that the learned Judge's conclusion that the respondent had capacity to sue and be sued was a misstatement of the issue; that the Respondent may file suits based on any contract or tort, but cannot exercise statutory authority to file and prosecute proceedings for preservation orders and forfeiture of assets; that its authority to sue is distinguishable from the authority granted to EACC to commence forfeiture proceedings under section 55(2) of the *Anti-Corruption and Economic Crimes Act* as posited in authorities cited by the respondent; that the respondent also filed incompetent documents because it is not a qualified person, and the alleged pleadings were not filed by the Attorney General or any State Counsel; that the Originating Motion and Supporting Affidavit were drawn and filed by the respondent; and that the respondent cannot rely on the allegation that some other documents filed later are expressed to have been drawn and filed by the Agency Director.

41. In rebuttal, learned Counsel for the respondent submitted that the respondent has the statutory authority and capacity to file proceedings seeking preservation and forfeiture orders in view of the fact that, first, the pleadings filed before the Superior Court were signed by the then Agency Director, Ms. Muthoni Kimani, in her official capacity as the Agency Director; secondly, that, even if the respondent could not commence the proceedings, it was the then Agency Director who commenced the preservation and forfeiture proceedings, and that failure to describe the Agency Director as a party before the trial court was not fatal to the suit; that Order 1 Rule 9 of the Civil Procedure Rules, 2010 requires that a suit should not be defeated by reason of misjoinder or non-joinder of parties; that, instead, the provision requires the court to deal with the matter in controversy before it and determine the rights and interests of the parties actually before it; thirdly, that, by dint of sections 61(1), 68(1), 82(1) and 90(1) of POCAMLA, the respondent has the authority to approach the court for confiscation orders, restraint orders, preservation orders and forfeiture orders respectively; and that, therefore, the Agency Director had the right to execute such pleadings as the public officer mandated to administer the respondent's affairs.

42. Counsel submitted further that the POCAMLA does not subject the respondent and the Agency Director to the provisions of the *Advocates Act* and, in particular, section 34 with respect to documents drawn by unqualified persons; that, even if section 34(1) of the *Advocates Act* applied to the respondent, the documents filed before the Superior Court were drawn and executed by the then Agency Director and advocates designated as state counsel under section 21 of the Office of the Attorney General Act; that State Counsel are qualified persons under and by virtue of section 10 of the *Advocates Act*; and that, further, paragraph (i) of the proviso to section 34(1) of the *Advocates Act* exempts the application of the section to public officers who draw documents in the course of their official duties, one of whom is the Agency Director and her staff

43. In addition to the foregoing submissions on the issue of locus standi, we have carefully considered the impugned ruling, part of which is set out at length hereunder, and in which the learned Judge had this to say:

> " 63. The submission by Counsel for the 1st and 2nd respondents was that Sections 53 and 82(1) of POCAMLA provide that the Agency director is the one who should have commenced forfeiture proceedings and is also the one who has

powers to move the Court for forfeiture, as the Assets Recovery Agency has no locus standi to apply for preservation or forfeiture orders. Section 53(1) of POCAMLA provides as hereunder-

> (1) There is established a body to be known as Assets Recovery Agency, which shall be a body corporate with perpetual succession and a common seal, and shall in its corporate name, be capable of—
>
> a. suing and being sued;
>
> b. holding and alienating movable and immovable property;
>
> c. borrowing and lending money;
>
> d. doing and performing all such other acts or things as may be lawfully done by a body corporate."

64. It is evident from the above provisions that the Assets Recovery Agency being a body corporate is capable of suing and being sued in its own name. From the pleadings before this Court, it is evident that the applicant herein is the Assets Recovery Agency however, the said pleadings have been signed by the then director of the Agency Ms. Muthoni Kimani. This in my view is an issue which can be resolved by invocation of the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010 which provides that no suit shall be defeated by reason of the misjoinder or non- joinder of parties, and the Court may in every suit deal with the matter in controversy in so far as regards the rights and interests of the parties actually before it. The provisions of Article 159(2)(d) of *the Constitution* also apply in that justice should be done without undue regard to procedural technicalities ....

66. It is my finding that the failure of the Director Assets Recovery Agency to be named as applicant in the instant application is not fatal to the Originating Motion to warrant the application to be dismissed. This Court can still determine the real dispute between the parties comprehensively ....

67. .... Ms. Gitiri submitted that the Agency Director appears in all the pleadings as the one who signed the same and that Advocates working for the Assets Recovery Agency are designated as State Counsel and they act in that capacity under Section 21 of the Office of the Attorney General *Act, No. 49 of 2012*. Section 10 of the *Advocates Act* recognizes State Counsel to be qualified persons ....

68. Since the Assets Recovery Agency is a body corporate with the powers to sue and be sued, the contention that the said Agency and director cannot file proceedings in the Republic of Kenya as that is the preserve of the Honourable Attorney General is misplaced and a misinterpretation of section 53 of POCAMLA."

44. It is common ground that the Originating Motion was signed by Ms. Muthoni Kimani in her capacity as the then Director of the respondent. It is equally instructive that the Originating Motion was supported by the affidavit of the then Director of the respondent. Accordingly, the apparent formal

infraction in the Originating Motion by naming the respondent as the applicant cannot render the forfeiture proceedings fatally defective. We take this view cognisant of the provisions of section 10 of the *Advocates Act*, which reads:

> 10. Certain officers entitled to act as advocates
>
> Each of the following persons shall, if he holds one of the qualifications specified in paragraphs (a), (b) and (c) of section 13(1) at the time of his appointment to his office, be entitled in connection with the duties of his office to act as an advocate, and shall not to that extent be deemed to be an unqualified person, that is to say—
>
> (a) ... ...;
>
> ... ...; and
>
> d. such other person, being a public officer or an officer in a public corporation, as the Attorney- General may, by notice in the Gazette, specify.

45. On the other hand, section 34 of the *Advocates Act*, which bars unqualified persons from acting as advocates in any legal proceedings, and from preparing certain documents or instruments, provides:

> 34. Unqualified person not to prepare certain documents or instruments
>
> 1. No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—
>
> a. ...;
>
> ...;
>
> (f) relating to any other legal proceedings;
>
> nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:
>
> Provided that this subsection shall not apply to—
>
> i. any public officer drawing or preparing documents or instruments in the course of his duty; or
>
> ii. any person employed by an advocate and acting within the scope of that employment; or
>
> iii. any person employed merely to engross any document or instrument.

46. The plain reading of the foregoing provisions of the *Advocates Act* leads to the inescapable conclusion that the respondent's Agency Director, being a public officer and advocate working for the respondent, and designated as State Counsel, was qualified to draw the documents filed in the forfeiture proceedings. In the circumstances, we find no evidence on record to support the appellants' contention that the documents filed by the respondent was drawn or prepared by an unqualified person in contravention of the *Advocates Act* so as to render the forfeiture proceedings a nullity. In conclusion, the respondent had the requisite legal capacity to commence and prosecute the forfeiture proceedings.

47. Turning to the 3rd issue as to whether the appellants' acquittal in the criminal case was consequential to the preservation orders and the application for forfeiture, learned Counsel for the appellants submitted that section 89(1) (b) of POCAMLA provides that the High Court is required in mandatory terms

to rescind preservation orders when the (criminal) proceedings against the defendant concerned are concluded; that the learned Judge purposely misconstrued section 89(1) (b) of POCAMLA as section 2 of the Act defines "defendant" to mean a person against whom a prosecution for an offence has been instituted irrespective of whether that person has been convicted or not; that the appellants were defendants in the criminal case; and that POCAMLA is largely borrowed from other jurisdictions in which accused persons in criminal cases are referred to as defendants.

48. Counsel argued that the significance of that provision is that an innocent person cannot continue to be encumbered by a preservation order after acquittal; and that there would be no need to maintain preservation orders after conviction because under section 61 of POCAMLA confiscation orders would follow automatically, and that the same property cannot be the subject of preservation and confiscation orders. According to counsel, based on the clear wording of section 90(1) of POCAMLA, the Originating Motion should have collapsed and the assets returned to the appellants; that the respondent had participated in the trial in which its officers had testified that they could not find any evidence linking the appellants to drug trafficking, economic or any crime; that the Originating Motion was supported by an affidavit sworn by Chief Inspector Mike King'oo Muia, who testified in the criminal proceedings for alleged offences under the same statute that he could not find any history of any drug dealing by the 1st appellant; that, under Article 50(2) of *the Constitution*, every person is to be presumed innocent until the contrary is proved; and that the appellants cannot be both innocent of all crimes on money laundering and drug trafficking, and still have their property forfeited to the State in civil proceedings for the same offence brought under the same statute on the basis of affidavit evidence of the same witnesses.

49. Counsel contended that, in her supporting affidavit, the then Agency Director stated that the preservation orders were premised on the findings of the Directorate of Criminal Investigations and the investigators attached to the Asset Recovery Agency; that those alleged findings and the evidence upon which they were based were not part of the record but that, on the contrary, the prosecution witnesses testified that they could not find any evidence of drug trafficking on the part of the appellants; that the prosecution appealed, but that the appeal was dismissed; that, the State having lost its case in the criminal trial and the subsequent appeal, cannot pursue the appellants through incompetent civil proceedings.

50. According to learned counsel, the learned Judge purposely misconstrued section 92(4) of POCAMLA, which provides that the validity of a forfeiture order is not affected by the outcome of criminal proceeds in respect of an offence which the property concerned is in some way associated. Counsel submitted that the criminal proceedings were commenced and concluded before the Originating Motion was heard; and that the forfeiture proceedings ought to have been terminated.

51. On the other hand, learned counsel for the respondent submitted that section 92(1) of POCAMLA empowers the High Court to grant an application for a forfeiture order if it finds on a balance of probabilities that the property concerned has been or is intended for use in the commission of an offence or is a proceed of crime; that courts have on numerous occasions held that the provisions under Part VIII of POCAMLA (Civil Forfeiture) are distinct from the provisions of Part VII on Criminal Forfeiture; and that interpreting section 92(4) of POCAMLA in the manner proposed by the appellants amounts to re-enacting that provision, a power that the Court does not enjoy.

52. According to counsel, section 92(1) and (4) acknowledges that there may be circumstances where no-one is convicted, or where a person may be tried and acquitted, but the High Court would still be required to enquire into the source of the assets in issue. Counsel submitted that civil forfeiture proceedings are civil proceedings that are available whether or not criminal proceedings have been

preferred against an accused; and that such proceedings would not be affected by the outcome of any related criminal proceedings.

53. As the learned Judge correctly observed:

> "94. .... Under Section 92(4) of the POCAMLA, conviction in criminal proceedings is not a condition precedent to civil forfeiture ....
>
> 96. .... the proceedings before this Court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the respondents where the presumption of innocence is applicable ....
>
> 97. ... asset forfeiture is a civil remedy directed at confiscation of the proceeds of crime and is not aimed at punishing the respondents and, even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. This Court finds that as explained hereinabove, the Asset Recovery Agency had the requisite locus standi to institute and continue with the proceedings herein notwithstanding the acquittal of the respondents in the criminal trial."

54. We take to mind the provision of section 92 of POCAMLA, which clearly delinks the outcome of criminal proceedings (if any) from civil proceedings for forfeiture, and which provides:

> 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.
>
> 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.
>
> 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.

55. We share the view expressed in Kenya Anti-Corruption Commission vs. Stanely Mombo Amuti [2017] eKLR where Achode, J. (as she then was) observed as follows with regard to civil forfeiture proceedings

under section 55 of the Anti- Corruption and Economic Crimes Act which is similar to the proceedings under section 92 of POCAMLA:

> " 92. This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168, the court stated that:
>
> > 'In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.'
> >
> > ... .
>
> 94. I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - Kenya Anti- Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR.
>
> 95. Section 55(5) of the *Anti-corruption and Economic Crimes Act* envisages that if the Plaintiff satisfies the court, on a balance of probability, on the evidence adduced, that the Defendant has unexplained assets, the burden shifts so that the court may require the Defendant to satisfy it that the assets were acquired otherwise than as a result of corrupt conduct."

56. In the English case of Serious Organised Crime Agency vs. Gale [2009] EWHC 1015, a decision of the High Court of England and Wales (which was upheld by the Court of Appeal and the Supreme Court), Griffith Williams, J. held that the discontinuance of criminal proceedings against the defendant in Spain and his acquittal in other criminal proceedings in Portugal was not a bar to a subsequent civil recovery application under the UK's Proceeds of Crime Act 2002, observing that:

> "18. What should the court's approach be to the decision of the Portuguese Court to acquit DG? It is not contended that the doctrine of issue estoppel applies and clearly the criminal law principle of Autrefois Acquit has no application in civil proceedings. On behalf of DG, it was submitted that the Portuguese charges cannot be re-litigated without hearing from all the relevant witnesses or considering a full transcript which is not available. However, I do not accept this contention. To consider the evidence adduced in the Portuguese proceedings is not to re-litigate because what is in issue in these proceedings is not the commission of the specific offences alleged against DG in Portugal but whether on the evidence before this court of the material considered by the Portuguese Court, together with the evidence available to the Spanish Courts and other material not considered by the courts in either jurisdiction, the claimant has proved on the balance of probabilities that DG's wealth was

obtained through unlawful conduct of a particular kind or of one of a number of kinds, each of which would have been unlawful conduct."

57. It is noteworthy that the preservation orders in Mombasa HC Misc. Civil Application No. 195 of 2017 were made pursuant to sections 81 and 82 of POCAMLA and Order 51 of the Civil Procedure Rules in civil proceedings that were unrelated to and unaffected by the outcome of the Shanzu criminal case. Likewise, the forfeiture proceedings in issue were brought pursuant to section 91 of POCAMLA (which fall under Part VIII of the Act – Civil Forfeiture) as read with Order 51 of the Civil Procedure Rules. They were civil forfeiture proceedings with different evidentiary requirements and standards of proof from the evidentiary requirements and burden of proof in the Shanzu criminal case. In conclusion, the forfeiture proceedings were civil in nature and not founded on criminal proceedings or dependent on the appellants' conviction and, therefore, the appellants' acquittal in the Shanzu criminal case did not automatically extinguish the preservation orders and the forfeiture proceedings.

58. With regard to the 4th and final issue as to whether the learned Judge shifted the burden of proof to the appellants and, if so, whether the appellants sufficiently proved or explained their source of income to dispel the supposition that they constituted unexplained assets, learned Counsel for the appellants submitted that, in her ruling, the learned Judge "falsely" stated that the 1st appellant filed a further replying affidavit so that his evidence would be in consonance with the Defence which he gave in the Criminal Case No. 209 of 2017 following his acquittal; that the 1st appellant was not accused in Criminal Case No. 209 of 2017, which featured nowhere in the proceedings before the Judge, and that he could not have testified after his acquittal; and that it seems that the learned Judge carried out private investigations of her own and obtained "false documents," which influenced her decision, and which "borders on misconduct".

59. We find it necessary at this point to pause and pronounce ourselves on the learned counsel's strong words that border on sheer disrespect for the learned Judge's reasoning in the impugned decision. To our mind, it is one thing to disagree with a judicial officer; it is another to discredit their decision in such derogatory words as "falsely" or insinuation that the learned Judge carried out her own "private investigations" that turned into "false documents" which she relied on. With due respect, counsel should be mindful that sharp ethical practice calls for courtesy, decorum and unqualified respect to all, including judicial officers whose decisions are open to appeal as of right, and who have no stake in the outcome of the proceedings before them.

60. Back to the learned counsel's submissions, we take note of their spirited contention that the learned Judge applied the wrong reasoning in holding that it was not sufficient for the appellants to simply allege, without any proof, that the assets in issue were not proceeds of crime; and that the appellants had been cleared of all wrong doing in the criminal proceedings by the same person who swore the Supporting Affidavit in the Originating Motion and had no obligation to offer additional proof.

61. On their part, learned Counsel for the respondent submitted that the respondent produced sufficient evidence before the learned Judge to prove, on a balance of probabilities, that the properties, subject of the preservation order were proceeds of crime; that the appellants and Bakari Kila Bakari were arrested together at Reef Hotel on 11th February 2017, and that upon search of the 2nd appellant's vehicle, narcotic drugs were found therein; that upon search of the 1st appellant's vehicle, KShs. 18.5 million was found therein; that upon search of Mr. Bakari's room, police found 8 active mobile phones which, after analysis, raised suspicion of his involvement in criminal activities.

62. Counsel contended that the 1st appellant was not candid when he recorded his statement with the respondent; that the 1st appellant only disclosed 3 properties, yet the respondent's investigations

revealed that he had 7; and that the 1st appellant stated that he was a businessman, and had recently incorporated Cerabafide Investment while the business name was incorporated on 27th January 2017.

63. Counsel submitted further that the 1st appellant stated that he had sold a parcel of land in Kericho for KShs. 38,000,000, and that his advocate had given him only KShs. 20,500,000; and that he had carried the sum with the intention of buying 2 hearse vehicles and an apartment. According to counsel, neither the parcel of land that was sold nor the advocate, one Mr. Momanyi, could be found, and the 1st appellant could not give details of the motor vehicles or the apartment that he allegedly wanted to purchase. Counsel submitted further that the 1st appellant could not explain where he had obtained the KShs. 2,640,339.30 found in his Standard Chartered Bank account; that the 1st appellant used orders issued on 13th October 2017, which discharged the orders issued in Mombasa HC Misc. Civil Application No. 50 of 2017 to withdraw KShs. 1,415,000 while the preservation order freezing the sum of money was still in force; and that a search with the Kenya Revenue Authority established that the appellants did not file any tax returns. In conclusion, counsel submitted that the evidence adduced by the respondent was sufficient to discharge the burden of proof and shift the evidential burden to the appellants; and that the appellants did not discharge the evidential burden of proof on a balance of probabilities to satisfy the trial court that the moneys and properties in issue were not unexplained assets or proceeds of crime liable to forfeiture under the Act.

64. We take to mind the following passages in the impugned ruling albeit at length, and in which the learned Judge observed:

> " 82. It is also my considered view that in the present application, all that the applicant [the respondent herein] has to show on a balance of probability is that the respondents [the appellants herein] cannot adequately account for their assets and monies and the inference to be drawn is that they were not generated from a legitimate source of income.
>
> 83. The respondents on the other hand have a duty to present evidence as to their source of income to support and/or warrant acquisition of the assets and/or cash in question. From the 1st and 2nd respondents' affidavits, it is evident that there is no proof of sources of income to warrant the 1st respondent to be in possession of the money and vehicles in question. The 1st respondent did not produce title documents and/or land sale agreement in respect to the property he allegedly sold in Kericho, tax compliance certificates and/or acknowledgment receipts for filing tax returns to prove that he is indeed a successful witchdoctor/herbalist. The 1st respondent also failed to provide sale agreements for the apartments and hearses he was to purchase in Mombasa.
>
> 84. This Court cannot overlook the fact that at the outset, when questioned by the police, the 1st respondent stated that he had sold a piece of land at Kericho, which sale was ostensibly the source of the cash that he was found in possession of. Later after being acquitted in the criminal case, he filed a further replying affidavit. In the said affidavit, he averred that the amount of Kshs. 18,500,000/= was allegedly given to him by an Indian arising from the 1st respondent's work as a witchdoctor and he was paid Kshs. 55,000,000/=. The inconsistency in the explanation given by the 1st respondent as to his source of his income validates the assertion by the applicant as to the illegitimacy of the money and the assets that are under preservation by virtue of Court orders. Such a variance in evidence cannot be reconciled. It is also worth noting that the said averment

in the further replying affidavit filed on 20th May, 2021 was made so as to (sic) in consonance with the defence he gave in the Criminal Case at the Shanzu Senior Principal Magistrate's Court Criminal Case No. 209 of 2017 following his acquittal on 12th May, 2021.

85. The 1st respondent's attempt at proving his source of income was that he had registered a business by the name Cerabafide Investments which he was using to run a successful car hire business. Annexure F.M 23 shows that the said business name was registered on 27th January, 2017.

86. The 2nd respondent on the other hand neither offered any explanation nor proof of his source of income to support the purchase of motor vehicle registration No. KCH XXXX Vitz. The respondents did not produce and/ or annex to their affidavits any form of documentation to support the allegations and/or averments therein.

87. Account No. 0100309XXXX held at Standard Chartered Bank, Kericho branch is in the name of the 1st respondent. It had a balance of Kshs. 2,640,339.69 as at 13th July, 2017. The 1st respondent failed and/or ignored to offer any explanation as to the source of the funds therein...

88. It is my finding that the respondents have failed to demonstrate how they obtained the assets and money in question. They had the onus of discharging the burden of proof of facts within their knowledge ....

89. Having failed to discharge the burden of proof on a balance of probabilities, this Court draws the conclusion that the motor vehicles and the monies in issue are proceeds of crime as defined under section 2 of POCAMLA."

65. Our careful examination of the record as put to us does not point to anything for which the learned Judge could be faulted for reaching the conclusion that the motor vehicles and moneys in issue were proceeds of crime. We form this view mindful of this Court's decision in Stanley Mombo Amuti vs. Kenya Anti- Corruption Commission [2019] eKLR where the Court had this to say about the evidentiary burden on a defendant in civil forfeiture proceedings brought under section 55 of the Anti-Corruption and Economic Crimes Act, which is similar to forfeiture proceedings under section 92 of POCAMLA:

"78. The concept of "unexplained assets" and its forfeiture under Sections 26 and 55 (2) of ACECA is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 of ACECA are non-conviction based civil forfeiture provisions. The Sections are activated as an action in rem against the property itself. The Sections require the Anti-Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. Section 55 (2) of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. Section 55 (2) of ACECA is in sync with Section 112 of the *Evidence Act*, Cap 80 of the Laws of Kenya...

79. Under Section 55 (2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired."

66. In our view, the respondent had laid a proper basis for applying for the forfeiture order by establishing, on a balance of probabilities, that the monies and assets seized from the appellants were not obtained using legitimate sources of income. We find, as did the learned Judge, that the appellants did not adequately explain their sources of income in their replying affidavits, but mostly pointed to their acquittal in the Shanzu criminal case as the only justification for disturbing the forfeiture orders; that the 2nd appellant did not lay any basis for his acquisition of the motor vehicle registered in his name; that the 1st appellant did not sufficiently demonstrate the source of the money seized from him, except to aver albeit without any evidence, that the money in question was paid on account of a land transaction for a consideration of Kshs 38 million; and that the moneys seized in cash were the proceeds of his line of work as a traditional healer/witchdoctor and car hire business.

67. In conclusion, we find nothing to suggest that the learned Judge shifted the burden of proof to the appellants. To the contrary, the appellants failed to discharge their statutory obligation to sufficiently explained their source of income to dispel the supposition that they constituted unexplained assets and proceeds of crime. In the circumstances, we find nothing to fault the learned Judge for the impugned decision.

68. Having carefully examined the record of appeal as put to us, the plethora of grounds on which it was anchored, the comprehensive rival submissions of learned counsel, the cited judicial authorities and statute law, we find that the appeal fails and is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR