Aboo v Assets Recovery Agency; Ethics and Anti-Corruption Commission (Interested Party) (Civil Appeal 452 of 2018) [2023] KECA 1658 (KLR) (15 December 2023) (Judgment) (with dissent - JM Mativo, JA)

Neutral citation: [2023] KECA 1658 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 452 OF 2018

HM OKWENGU, MA WARSAME & JM MATIVO, JJA

DECEMBER 15, 2023

BETWEEN

PAMELA ABOO ..... APPELLANT

AND

ASSETS RECOVERY AGENCY ..... RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

(Being an appeal against the Judgment and Order of the Anti-corruption and Economics Crimes Division at Nairobi High Court (Hedwig Ong'udi, J.) dated 13th November 2018) in ACEC Misc No. 73 of 2017)

JUDGMENT

Judgment of Warsame, J.A.

1. 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.

2. The United Nations Vienna Convention of 1988 under Article 3.1 has described money laundering as:

> " The conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions".

3. Money laundering therefore involves the process of converting income from illegal activities into funds that originate from seemingly legal sources without revealing their true source, nature or ownership.

4. 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.

5. The crux of this appeal revolves around one main issue, to wit, where the burden of proof lies when determining whether the origins of funds are proceeds of crime when seeking forfeiture orders under the POCAMLA. This issue becomes much clearer after a recapitulation of the background facts, even if cursory, of the events that provoked the proceedings in the High Court.

6. On 7th March 2017, the respondent, Assets Recovery Agency (ARA) received information that there were funds in three accounts at Equity Bank Donholm Branch Nairobi, in the name of the appellant, Pamela Aboo holding a total of Kshs.19,688,152.35/- suspected to be proceeds of crime. Upon receipt of this information the respondent sought court orders authorizing it to investigate the said accounts.

7. Subsequently, on 9th March 2017, the respondent obtained a warrant to investigate and preserve the Kshs.19,688.152.35/- held in two accounts being Account Numbers 0820165xxxxxx holding Kshs.10,214,762.35/- and 0820167xxxxxx, holding Kshs.9,473,390/- as well as an order freezing Account No. 0820372xxxxxx for a period of 60 days pending completion of investigations.

8. The investigations by the respondent confirmed that the three accounts belonged to the appellant having been opened between 17th November, 2015 and 24th February, 2017 holding a total of Kshs.19,688,152.35/-. It was established that the funds in the said accounts were mainly through cash deposits at Equity Bank, Kenya Ports Authority (KPA) Branch, Mombasa Supreme Centre Branch near KPA and through Mombasa based Equity Bank Agents. Further, it was established that the cash deposits were made in tranches of between Kshs.30,000/- and Kshs.400,000/- and that there were no withdrawals from the said accounts.

9. The respondent alleged that the funds in the three accounts were acquired illegally and deposited into the appellant's accounts on behalf of her husband, Alex Mukhwana Khisa, who was an officer at Kenya Revenue Authority, Customs Department based at Times Tower.

10. During investigations, on 21st March, 2017, the appellant was invited to the respondent's offices to explain the source of the funds. Proffering her explanation, she gave four sources of business. First, she stated that the cash deposits were from one Samson Waweru, a business man from Mombasa, whom she conducted transport business with after he told her he owned lorries for hire. She asserted that she had invested Kshs.1,000,000/- in his business after a one-time meeting and it had been agreed that he would be depositing the profits in her accounts.

11. The second source of business, she explained, was from dealing in bananas and sugarcane with her business partner Jonathan Kimindu which were sold in Mombasa. The third source was through her trade in cereals. She claimed grew maize and sold them in various markets in Busia and deposited the proceeds in banks in Nairobi. Lastly, she maintained that she also received revenue from the sale of perfumes. She affirmed that except the withdrawal of Kshs.2 million to buy a plot, no withdrawal had been made from the accounts because she was saving the funds to purchase a lorry for her own transport business.

12. Following the investigations, the respondent was not satisfied with the appellant's explanation of the source of her funds. The respondent concluded that the appellant could not confirm the amount of funds in the accounts, could not produce any business license, permits or compliance documents to prove the existence of any legal business, could not show the flow of her business operations in terms of loss and profit and gave no indication of what she injects into the business as expenses. In essence, her explanations raised more questions than answers.

13. Consequently, the respondent moved the High Court under Sections 81, 82, 90 and 92 of POCAMLA and filed ACEC Miscellaneous No.73 of 2017 seeking inter alia: a declaration that the funds were proceeds of crime and therefore liable for forfeiture to the Government; that the court issues orders of forfeiture of the said funds; and lastly, that the said funds be forfeited to the Government and transferred to the respondent.

14. In the meantime, on 17th July, 2017 the respondent obtained preservation orders in respect of the appellant's three accounts; being Account Numbers 0820165xxxxxx holding Kshs.10,214,762.35/-, 0820167xxxxxx holding Kshs.7,473,390/- and 0820372xxxxxx holding Kshs.2,000,000/- for a period on 90 days from 1st August 2017 which was the date of gazettement.

15. Coincidentally, the interested party, Ethics and Anti- Corruption Commission (EACC) was also running parallel investigations on allegations of corruption and abuse of office against the appellant's husband, Alex Muhkwana Khisa after receiving reports that he had solicited and received bribes from clearing and forwarding agents to undervalue tax payable on imports.

16. In the end, their investigations on Alex Khisa established that the appellant's accounts at Equity bank, being accounts number 082016xxxxxxx and 0820167xxxxxx holding an aggregate of Kshs.17,843,009.35/-, were being used by her husband as a conduit to deposit and transfer money acquired corruptly from bribes. Consequently, the EACC obtained preservation orders in ACEC Misc. Application No. 40 of 2017. This file was later marked as closed by a court order issued on 24th January, 2018.

17. It is pertinent to note that the interested party also filed ACEC Miscellaneous Application No. 41 of 2017 under section 56 of the Anti-Corruption & Economic Crimes Act (ACECA) against the appellant's husband seeking to freeze his Account- No. 0630193397326 at Equity Bank Kawangware holding Kshs.467,566.71 suspected to have been received from the proceeds of corruption.

18. The said application was dismissed. In a ruling dated 14th June 2017, the court found that the deposits in the subject account came from his employer Kenya Revenue Authority on a monthly basis and were assumed to be his salary and that all the deposits were from known sources. The court therefore held that the EACC had not tabled any evidence before the court to show that proceeds of crime had been deposited or transferred though the account.

19. In the spirit of multi-agency team framework and efficiency, the two law enforcement agencies agreed that the ARA would proceed to recover the funds. Consequently, EACC filed a supporting affidavit deposed by Lamek Okun, a forensic investigator in support of the respondent's case in the High Court confirming that they also had conducted investigations on the appellant's accounts and found that she had amassed wealth that was not proportionate to her legitimate sources of income. It was EACC's conclusion that the appellant's accounts were being used as a conduit for depositing and transferring proceeds of crime, being money acquired corruptly in the form of bribes by her husband Alex Khisa.

20. In opposition to the respondent's case, the appellant maintained that the respondent's application was malicious and that no iota of evidence had been offered by the respondent or the interested party to

show that the funds in question originated from corrupt dealings by her or her husband Alex Khisa. She maintained that there was no probable cause to justify forfeiture orders of her funds.

21. Faced with the divergent positions taken, the learned Judge (Ong'udi, J.) framed one issue for determination, to wit, whether the respondent and the interested party have proved a case for forfeiture of the stated funds under POCAMLA and/or ACECA. In a judgment dated 13th November, 2018 the learned Judge allowed the respondents' application and in her own words expressed:

> " 57. I have done an analysis of the deposits above and shown how much was being deposited in a day or so for the Respondent. Even with all this, the Respondent has not attempted to explain the source of this money either through the replying or supplementary affidavit. It could be true that she does business with Samson Waweru, Jonathan Kimindu and her own business but where is the evidence?
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> ...
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> Where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means what has been presented is not challenged. In this case there is no explanation of the source of the huge deposits into the Respondent's accounts. Even a glance at the cash deposits made at Donholm branch of Equity Bank would call for an explanation by the Respondent as to who was making the deposits and for what purpose."

22. Naturally, aggrieved by this finding the appellant proffered an appeal. It is this decision that is the subject of the appeal before us which is premised on 5 grounds of appeal. In a nutshell, the appellant takes issue with the finding that the sum of Kshs.19,688,152.35 held in her accounts were proceeds of crime despite the lack of evidence provided by the respondents; that the respondent failed to discharge the burden of proof; and that the learned Judge misdirected herself by shifting the burden of proof to the appellant.

23. When the matter came up for hearing before us, the parties indicated that they would rely on their written submissions with no need for oral highlights.

24. It was the thrust of the appellant's case that the burden of proof set under Section 2 of POCAMLA lay with the Asset Recovery Agency to prove two elements: that the funds in her accounts were proximately and substantially connected to criminal activity; and that the value of the assets exceeds the legitimate source(s) of income that she could afford at the material time. In this regard, she maintained that the respondent had failed to prove either of the two elements.

25. Moreover, the appellant pointed out that her husband Alex Khisa was not a party to the proceedings before the High Court despite the suspicion that he was illegally siphoning huge amounts of money to her. In her opinion, the respondent having failed to establish illegal activity against her husband mutated the case from investigating him and commended investigations against the appellant.

26. It was submitted that the appellant had gone to great lengths to rebut the respondent's assertions by explaining the legitimate businesses she was engaged in and even revealed her business associates, their contacts and physical location.

    However, the ARA and EACC failed to carry out further investigations or provide evidence to prove that the appellant's businesses were non-existent. Consequently, in the appellant's view, the learned

Judge fell in error by shifting the burden of proof and finding that her assets were unexplained and subject to forfeiture.

27. Relying on the case of Ethics and Anti-Corruption Commission v Ministry of Medical Services and Another [2012] eKLR where it was held that a prima facie case must be presented to show that the property in question has been the subject of some corrupt dealings, the appellant submitted that the respondent had not established that the money was proceeds of crime.

28. In view of the foregoing, the appellant urged us to allow the appeal and set aside the judgment of the High Court.

29. Opposing the appeal, the respondent relied on the case of Assets Recovery Agency vs Rohan Anthony Fisher, and & Others, Supreme Court of Jamaica, Claim No 2007 HCV003259 which position was adopted in the case of Assets Recovery Agency v Joseph Wanjohi & 3 Others, ACEC Application No. 7 of 2019, to emphasize that once it had established on a balance of probabilities that the appellant could not show a legitimate source for the funds in her account, it was incumbent on the appellant to demonstrate evidentially how she lawfully came into possession of the funds in question thus shifting the burden of proof.

30. The respondent contended that all it needed to do was make a prima facie case to satisfy the court that there is evidence which establishes its belief within the meaning of POCAMLA that the funds were proceeds of crime or unlawful activities. It maintained that its belief in this instance was not groundless or frivolous as to the contrary, the evidence placed before the learned Judge established the respondent's belief to the satisfaction of the court.

31. It was its position that it was immaterial whether the appellant knew or participated in the acquisition of the illicit funds so long as the respondent proved that the funds were suspected to be from illegitimate sources and the appellant was unable to satisfactorily explain the source of the same. Citing Section 112 of the *Evidence Act*, the respondent contended that it was upon the appellant to provide proof of facts which were especially within her knowledge.

32. Supporting the respondent's position, the interested party submitted substantially on the issue of evidential burden of proof. Citing the case of Stanley Mombo Amuti v Kenya Anti- Corruption Commission [2019] eKLR, it was alleged that evidentiary burden rested on the appellant to offer satisfactory explanation for legitimate acquisition of her funds and satisfactorily explain the disproportionate assets or forfeit such asset. In their view, the respondent had established a prima facie case against the appellant and despite being given the opportunity to explain the disproportion, the appellant had neglected to do so.

33. I have considered the grounds of appeal, submissions by parties and the authorities cited therein. In doing so, I remind myself of the duty of a first appellate court, which is, to re- evaluate the evidence on record and arrive at our own conclusions bearing in mind that I have neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, my responsibility is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.

34. Prior to delving into the appellant's grounds of appeal, it is apposite to set out the law and the provisions of the POCAMLA that are relevant in the instant appeal. The Originating Motion by the respondent dated 31st October 2017 that sought for forfeiture of the appellant's funds as being

proceeds of crime, was filed pursuant to sections 81, 82, 90 and 92 of the POCAMLA. To begin with, the preamble to the POCAMLA provides that 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." (Emphasis mine)

35. Section 2 of the POCALMA goes on to define proceeds of crime as:

> " Any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed." (Emphasis mine)

36. The Originating Motion having been brought pursuant to sections 81, 82, 90 and 92 of the POCAMLA, the nature of these proceedings fall under Part VII of the Act which strictly deals with civil forfeiture. Therefore, the rules of evidence applicable in civil proceedings were applicable in the proceedings before the High Court. What then is the legal and evidential burden in proceedings for civil forfeiture?

37. It is elementary that he who alleges a fact must prove the existence of that fact. To that end, Part 1 of Chapter IV (Sections 107 to 119) of the *Evidence Act* is dedicated to burden of proof. According to Section 107 (2);

> " When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

38. The legal burden lies only on one of the parties and does not shift to the other party throughout the length and breadth of the trial. Section 108 explains that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

39. On the other hand, evidential burden refers to the obligation on a party to adduce sufficient evidence of a particular contested fact in order to justify a decision on that fact in his favour. It is also elementary that in civil cases, the standard of proof required is on a balance of probabilities or on preponderance of evidence. A litigant who fails to discharge the evidential burden in a case carries the risk, he may lose the whole or some part of the case. Furthermore, unlike the legal burden, the evidential burden is not static: it keeps shifting between the parties throughout the course of the trial.

40. In this regard, section 92 of POCAMLA is clear that:

> "The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—
>
> a. has been used or is intended for use in the commission of an offence; or
>
> b. is proceeds of crime." (Emphasis mine)

I shall revert to this disjunctive test later in this judgment.

41. I must underscore that civil forfeiture proceedings may be brought against any person who holds tainted property connected to an offence irrespective of whether or not that person has committed the unlawful conduct or not. The subject of the proceedings is the property or proceeds and how it was derived or realized from illegal conduct.

42. Civil forfeiture is not tied to the identification, charging, prosecution, conviction or punishment of any offender. Civil forfeiture therefore denotes an action in rem, that is as against the property in contrast with in personam actions which are actions against individuals. This position was highlighted by the Supreme Court of India in Biswanath Bhattacharya v Union of India & Ors, AIR 2014 SC 1003, when it cited with approval an Article by Anthony Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds' (2004), Journal of Financial Crime, where he conceptualized the civil forfeiture regime in the following words:

> "Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the 'trophies' of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that 'half a loaf is better than no bread'."

43. From the foregoing, it is evident that ARA, the respondent, had the legal burden to prove a prima facie case on a balance of probability, either of the two elements under Section 92 aforesaid; that, the appellant either had assets that have been used/are intended for use in the commission of an offence, or that the assets were proceeds of crime.

44. I am cognizant, that evidence is the foundation stone upon which a case is built; if it is weak, the case crumbles and falls. Did the respondent discharge this legal burden? Put differently, did the respondent and the interested party tender sufficient evidence to prove a case for forfeiture? The question of the burden of proof is especially critical where a case is determined purely on affidavit evidence as the judge does not have the opportunity to see or hear the witnesses and hence is clearly at a disadvantage. Equally, it is trite that in affidavit evidence, there is no option to test the veracity of the evidence in cross examination or to observe evidence and the demeanor of witnesses. Such is the case before me, like was the case before the High Court. I am therefore duty bound to ensure that justice is done between the parties and ensure that each party has discharged its evidentiary burden.

45. To reiterate, all along it has been the respondent and the interested party's case that the appellant's accounts were being used as a conduit for depositing and transferring proceeds of crime, being money acquired corruptly in the form of bribes by her husband Alex Khisa. Indeed, an integral part of the institution of forfeiture is that a link must establish that certain benefits flowed either directly or directly originating from the offence.

46. To understand the critical function of examining the link to the offence I can gainfully extract from an Article by Mamak, K., Barczak-Oplustil, A., Kwiatkowski, D. et al. 'Should gains from criminal knowledge be forfeited?'. Crime Law Soc Change 77, 305–320 (2022), where it was stated that the connector between the benefit and the crime performs a threefold function:

    a. It allows for the establishment of a causal relationship, the relationship of the "origin" of benefits from a particular act.

b. It enables the recognition of a given benefit as undue, unjust, or unlawfully obtained.

c. It justifies, ethically and legally, the perpetrators' deprivation of specific benefits related to an offence under state criminal law."

47. In discharging its legal burden, it was therefore incumbent upon the respondent to establish the source of benefits, the type of benefit and the beneficiary. The primary issue for determination by the trial court was whether the respondent had discharged its burden by proving that the property to be forfeited is indeed the product of criminal activity. In my considered view, 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.

48. To my mind, the genesis of the source of crime or the alleged offence and the proceeds is the appellant's husband. It is the appellant's husband who was being investigated by the interested party for corruption after receiving reports that he had solicited and received bribes from clearing and forwarding agents to undervalue tax payable on imports. Had the appellant's husband never been investigated, suspicion would never have arisen regarding her accounts. This is the first link in the chain of causation.

49. The evidence adduced by the respondent in the affidavit deposed by Muthoni Kimani, the Director of the respondent stated that investigations by Cpl. Isaac Nakitare, a police investigator attached to the respondent, established that the funds in the appellant's three bank accounts were from illegitimate sources having been deposited into the account's on behalf of her husband Alex Khisa; and that the preservation orders were premised on the finding of investigations conducted by the respondent which established that the funds amounting to Kshs.19,688,152.35 were unlawfully obtained and had no justifiable source. The director also produced a record of the bank deposit slips and the appellant's witness statement regarding the source of funds in her account. Statements by the officials of Equity Bank one Wilson Oduor (who opened the accounts) and one Elizabeth Njoki Ndonga (who was the operations manager at Equity Donholm) were annexed to the director's affidavit.

50. An examination of the affidavit by Cpl. Isaac Nakitare reveals that the appellant and her husband were summoned by the investigating officers. From their investigations it was established that:

a. While the investigations were ongoing, the appellant transferred Kshs.2,000,000/= from account 0820167xxxxxx into a fixed deposit account opened in her name as per the witness statement of Elizabeth Njoki, which in their view was a clear attempt to conceal the funds contrary to the provisions of POCAMLA.

b. The appellant who claimed was engaged in cereal farming and deposited the cash into the three accounts in question, could not produce any documents to prove the alleged deposits.

c. The appellant could not produce any license, permits or compliance documents to prove the existence of any legal business or trade.

d. Her husband, who confirmed that he was an employee of KRA stated that he was aware of the bank accounts, but denied knowing the source.

e. The various deposits were made by her business partner, Samson Waweru as returns for her Kshs.1,000,000/= investment in his transport business though she could not provide any documentary proof.

51. In view of the foregoing, the respondent concluded that the funds in the appellant's accounts were from illegitimate sources having been deposited into the three accounts on behalf of her husband who

was an officer with KRA; that the deposits were mainly cash deposits by third parties, designed to evade the threshold set out in the Central Bank of Kenya Prudential Guidelines 2013 on reporting suspicious transactions.

52. In the same breath, the affidavit deposed by Lamek Okun, a forensic investigator with the interested party, revealed that EACC had received complaints on allegations of corruption and abuse of office against the appellant's husband, an officer with KRA stating that he had solicited and received bribes from clearing and forwarding agents to undervalue tax payments on imports. He averred that following the complaints, they obtained warrants to investigate both his and the appellant's accounts. The investigations revealed huge deposits in the appellant's accounts whereas the appellant lacked any legitimate source of income. As a corollary, it was established that the appellant's accounts were being used as a conduit for depositing and transferring proceeds of crime being money acquired corruptly in the form of bribes by Alex Khisa. This is the totality of the respondent and interested party's evidence.

53. In my humble view a case is won or lost on cogent evidence. I have reviewed the affidavit evidence tendered by the respondent and the interested party. It is common ground that for the period under review, in the appellant's three accounts, only deposits were made and that there were no withdrawals. It is also common ground, as I have observed earlier, that the investigations of Alex Khisa in turn led to the appellant being investigated. The investigations on the appellant disclosed that huge amounts of money were deposited into her account. I note that the High Court in its judgment with great detail analyzed the deposits into the appellant's account concluding that in a single day when there was a deposit, the amount was not less than Kshs.100,000/-. This analysis is uncontroverted. From the record, we note that the investigations on Alex Khisa were carried out in separate proceedings being, ACEC Miscellaneous Application No. 41 of 2017 wherein the application by the interested party herein, seeking to freeze his accounts was dismissed the court establishing that the funds in his account were legitimate and came from his employer KRA. Therefore, form the investigations, no alleged offence was established on his part.

54. Reverting to the link of causation that I had alluded earlier in this judgment, the investigations on Alex Khisa pointed to his wife the appellant. When tasked by the interested party to explain his wife's source of income, he indicated that the appellant was the only one in a position to explain the money in her accounts. The appellant therefore becomes the second link in the chain of causation. At this point the respondent had discharged both its legal and evidentiary burden. The evidentiary burden then shifted to the appellant to explain the source of funds in her accounts.

55. Confronted with the question of explaining her source of income, in a bid to justify that the funds in her three accounts were legitimate, the appellant gave four sources of business as we had stated earlier. First, she stated that the cash deposits were from one Samson Waweru, a business man from Mombasa, whom she conducted transport business with after he told her he owned lorries for hire. She asserted that she had invested Kshs.1,000,000/- in his business after a one-time meeting and it had been agreed that he would be depositing the profits in her accounts.

56. The second source of business, she explained, was from dealing in bananas and sugarcane with her business partner Jonathan Kimindu which were sold in Mombasa. The third source was through her trade in cereals. She claimed grew maize and sold them in various markets in Busia and deposited the proceeds in banks in Nairobi. Lastly, she maintained that she also received revenue from the sale of perfumes. She affirmed that except the withdrawal of Kshs.2,000,000/- to buy a plot, no withdrawal had been made from the accounts because she was saving the funds to purchase a lorry for her own transport business.

57. I note, that to the respondent, the smoking gun was the huge tranches of amounts that were deposited into the appellant's accounts in Mombasa. To them, these were the transactions in the form of bribes from the clearing and forwarding agents to undervalue tax payments on imports that were received on behalf of Alex Khisa. To dislodge this evidence, the appellant did not deny that she had numerous deposits into her accounts from Mombasa rather, she clarified that she had two business partners in Mombasa and went ahead to give their names and mobile phone numbers. In my opinion the explanation given by the appellant not only disclosed who was making the deposits but also for what purpose the deposits were being made. Having done so, in my considered view, the appellant had discharged her evidentiary burden which at this point shifted back to the respondent to prove otherwise that the two were not the appellant's business partners. These two business partners become the third and final link in the chain of causation.

58. At this point, it is pertinent to note that both the respondent and the interested party have sweeping investigative powers and resources regarding the investigation and prosecution of anti-corruption, money laundering and economic crimes. It was well within their means and mandate to further investigate the named business partners to ascertain the veracity of the appellant's statement. The respondent and interested party were under the duty to trace and follow the trail of the funds to its logical end; the back stopped with them. It was the respondent who alleged that the source of the appellant's funds was illegitimate and in terms of section 107 of the *Evidence Act*, in this instance, it was duty bound to prove that the duo were not legitimate business partners in order to justify a decision on that fact in its favour.

59. Again, I do not agree with the respondent's reliance on section 112 of the *Evidence Act* that in the circumstances where the facts in question were especially within the knowledge of the appellant, the burden of proving the legitimacy of the funds rested with her. It was not impossible, for instance, for the respondent to contact the two business partners using the contacts provided by the appellant or to establish even one of the alleged corrupt dealings of the appellant's husband. In saying so, I am guided by the decision in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR where the Supreme Court clarified the invocation of section 112 of the *Evidence Act* as follows:

> "(187) But Section 112 of the *Evidence Act* is not to be invoked without regard to the preceding sections, especially Section 107 (1) and (2) of the same Act which provide as follows:
>
> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of facts it is said that the burden of proof lies on that person"
>
> ...
>
> (189) Section 112 of the *Evidence Act*, on which the learned Judges of Appeal placed reliance, is an exception to the general rule in Section 107 of the same Act. Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof. The Supreme Court of India, in Shanbhu Nath Mehra v. State of Ajmer AIR 1956 SC 404, considered the import of Sections 106 and

101 of the Indian *Evidence Act* (which are in pari materia with Sections 112 and 107 of our *Evidence Act*), as follows:

> "Section 106 is an exception to Section 101 Section 101 lays down the general rule about the burden of proof. 'Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.'...This lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience."

60. As was clearly and correctly held by the Supreme Court, Section 112 of the *Evidence Act* is not a panacea for poor and disjointed investigations on the part of the respondent to just say, we think the money is illegally obtained and the court must give orders without property evidence. It was the duty of the respondent to demonstrate the monies in the account of the appellant was not proportionate to her income, therefore not a legitimate source of income. The connection or conduit must be clearly proved to the satisfaction of the court.

61. Again, the trial fell into error, with respect by saying that the respondent has not attempted to explain the source of money. I don't understand how the trial court arrived at the said conclusion, when the appellant gave the sources of the funds together with all details of the depositors or business partners.

    The moment the appellant gave the details of her business partners and sources of income, the evidential burden shifted to the respondent.

62. Having failed to prove that the two businessmen were illegitimate, the respondent not only failed to discharge its evidentiary burden but also broke the link in the chain of causation. We are inclined to agree with the appellant's argument that it was fatal for the respondent to fail to join her husband to the proceedings before the High Court as he was the genesis of the alleged offence of corruption; the beginning of the link. We emphasize that no allegation of corrupt conduct has been leveled against the appellant hence her husband was a necessary party to these proceedings as he was the link to the alleged corruption.

63. Be that as it may, apart from establishing the illegitimacy of the businessmen, the respondent had a duty to establish a connection between Alex Khisa and the deposits in Mombasa that were made by the two businessmen who were depositing money. Furthermore, the respondent was to prove that the money was deposited in the appellant's three accounts at the behest of her husband Alex Khisa. There must exist a causal nexus between the crime and the benefit where evidence either direct or circumstantial, must be led showing the nexus between the alleged corrupt dealings of Alex Khisa and that he was using the appellant's accounts as a conduit.

64. Moreover, it is not enough to casually allege that the funds were illegitimately acquired because the appellant failed to give a reasonable explanation of her wealth and that her husband worked with KRA. The origin of the wealth cannot be distanced from the alleged offence because it is only the proceeds that can be attributed to the offence that can be attached for forfeiture. We must add that it is rather unusual that the respondent made a blanket claim for forfeiture of the entire amounts in the appellant's three accounts without considering the possibility of intermingling of funds.

65. At this juncture I wish to distinguish the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR from the instant case. The interested party in its submissions emphasized that that the evidentiary burden rested on the appellant to offer satisfactory explanation for legitimate acquisition of her funds and satisfactorily explain the disproportionate assets or forfeit such assets. In its view, the respondent had established a prima facie case against the appellant and despite being given the opportunity to explain the disproportion, the appellant had neglected to do so.

66. First and foremost, in Stanley Mombo (supra) this Court was dealing with the question of the concept of unexplained assets and notice to explain under section 2 as read with section 55(2) of ACECA. The Court explained the evidentiary burden as follows:

> " 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."

This is the standard that the interested party has urged me to apply in the instant case.

67. Secondly, though the forfeiture of unexplained assets under ACECA is still civil in nature and may be comparable to the civil forfeiture under POCAMLA, the instant proceedings before the High Court were brought pursuant to POCAMLA which does not deal with the concept of unexplained assets. It is therefore misguided to urge this Court to apply the same standard in Stanley Mombo (supra) as in the instant proceedings whereas POCAMLA does not deal with the concept of unexplained assets. That evidentiary standard, in the instant circumstances, does not hold any water and I decline the invitation to apply it in the instant case.

68. In the end I find that the High Court focused on the appellant's inability to corroborate her evidence by getting her two business partners to swear affidavits to support her claims instead of shifting the burden back to the respondent to prove its case to the contrary that the two were not the appellant's legitimate business partners. With due respect, the High Court equally failed to consider that the respondent had not demonstrated an intricate scheme of money laundering involving Alex Khisa, the appellant and the two businessmen where investigations have traced a certain amount of money that was the proceeds of corruption to warrant forfeiture. The respondent failed to establish a nexus between the offence and resultant proceeds of crime. I am inclined to agree with the appellant that the respondent did not provide an iota of evidence to prove that the funds in her accounts were from illegitimate activities. The evidence presented was speculative and the superior court had erroneously shifted the burden of proof to the appellant.

69. In conclusion, I reiterate that the learned trial judge, just like me, was not privileged to see or hear the witnesses as the case was purely determined on affidavit evidence. I am cognizant of the difficulty that such a scenario presents when it comes to assessing the veracity or of the evidence tendered by each party. Whereas I acknowledge the right and efforts of the state to recover the proceeds of crime, the court cannot sanction every allegation put forward by the state that is not supported by cogent evidence. The scales of justice in the circumstances tilt heavily in favour of the appellant to ensure that an injustice is not arbitrarily visited upon her to prevent law enforcement agencies and state officials from divesting property owners of their hard-earned wealth through generalized and unsubstantiated claims. The court stands between citizens and the State, in order to do justice. In my view it is a dangerous proposition, to say that the State has arbitrary rights to deprive citizens of their property

and monies without the correct procedure and cogent evidence. The coercive powers of the State must not be allowed to override the rights and interests of innocent citizens. It is the duty of state agencies to demonstrate, that the trophy, is a benefit of undue, unjustly and/or unlawfully obtained by the appellant. That is the missing link in this appeal. I decline the invitation to deprive the appellant of her monies without justification and material that is the basic denominator in standing between the citizens and the State. The respondent and interested party are ordinary litigants who are expected to play within the Rules. In this case, they did not discharge their obligation. Consequently, I am satisfied with the explanation given by the appellant.

70. In conclusion, and as Okwengu, JA concurs, we accordingly set aside the judgment and decree of the learned trial Judge dated November 13, 2018, with costs to the appellant.

It is so ordered.

Dated and delivered at Nairobi this 15th day of December 2023.

Judgment of Okwengu JA

1. I have had the opportunity of reading in draft the judgments of my brother Judges, Warsame JA and Mativo JA. The background and facts leading to this appeal have been well captured in the judgments of my two brother judges.

2. In a nutshell Asset Recovery Agency (ARA), successfully sued and obtained orders of forfeiture in the High Court, under the "Proceeds of Crime and Anti Money Laundering Act" (POCAMLA), in regard to funds held in three accounts at Equity Bank in the name of Pamela Aboo (the appellant).

3. The orders issued by the High Court, included a declaration that a total of Kshs 19,688,152.35 held in Bank accounts numbers 0820165xxxxxx, 0820167xxxxxx and 0820372xxxxxx at Equity Bank, Donholm Branch Nairobi, in the name of the appellant, are proceeds of crime, and the funds therein liable for forfeiture to the Government; and a forfeiture order for all the funds in the three accounts to be forfeited and transferred to ARA, the government agency dealing with asset recovery under POCAMLA.

4. In her memorandum of appeal, the appellant has raised five grounds essentially faulting the learned Judge on four main issues, namely, holding that the funds in issue are proceeds of crime in absence of evidence; failing to find that ARA failed to discharge the burden of proof under sections 107 and 108 of the *Evidence Act*; wrongly shifting the burden of proof to the appellant and thereby arriving at an erroneous conclusion; and occasioning injustice by heavily relying on inapplicable foreign authorities that were cited by ARA.

5. The originating motion dated 31st October, 2017 (ARA's motion) for a forfeiture order, was made under Part VII of POCAMLA, which covers section 81 to 99 that deal with civil forfeiture. Section 81, specifically states that all proceedings under that part shall be civil proceedings and the rules of evidence applicable to civil proceedings shall apply.

6. Section 92 (1) of POCAMLA applies the standard of proof in civil cases by empowering the High Court to make a forfeiture order applied for under section 90(1) of that Act, 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.

7. Prior to the filing of ARA's motion that resulted in the judgment subject of this appeal, ARA had obtained a preservation order under section 82 of POCAMLA, in regard to the funds in the three accounts. That section empowered the Court to make preservation orders "if there are reasonable grounds to believe" either that the property concerned has been used or is intended for use in the commission of an offence; or is proceeds of crime. Of note is the fact that the Proceedings for a preservation order are ex-parte proceedings.

8. Section 90 of POCAMLA, gives the Director ARA powers to apply for forfeiture orders in regard to any property subject of a preservation order. Thus, bringing in section 92(1) of POCAMLA.

9. ARA having obtained a preservation order in regard to the appellant's three accounts, proceeded to the next stage of applying under section 90 (1) of POCAMLA for a forfeiture order. It was not disputed that the funds in the three accounts were in the name of the appellant, and that the appellant was not employed but claimed to be a business woman, while her husband was an employee of Kenya Revenue Authority (KRA).

10. Under section 92 (1) of POCAMLA, the main issue that a trial court has to determine before making a forfeiture order is whether the funds in issue have been used or are intended for use in the commission of an offence, or are proceeds of crime. Section 92 gives clear guidance that the standard of proof is on a balance of probabilities.

11. As to who bears the burden of proof, ARA who in this case was asserting that the funds were intended for use in the commission of an offence or is proceeds of crime, had the responsibility of discharging the burden of proof in regard to that assertion, albeit, the lower standard of a balance of probabilities. That is the essence of sections 107 and 108 of the *Evidence Act*.

12. At paragraphs 13 and 14 of her affidavit sworn in support of ARA's motion Muthoni Kimani, the Director of ARA averred that:

> "13. The preservation orders are premised in the findings of the investigations conducted by the investigators attached to the agency which established that funds amounting to Ksh.19,688,152.35. held in the three accounts Nos. (provided) at Equity Bank Donholm Branch Nairobi were unlawfully obtained by ARA as there is no justifiable reasons for the source of the said funds.
>
> 14. That I verily believe that there is sufficient evidence to prove that the funds amounting to Kshs 19,688,152.35 are proceeds of crime hence liable for recovery under the Proceeds of Crime and Anti Money Laundering Act."

13. These averments were the basis upon which ARA moved the Court, and therefore it was incumbent that ARA avails appropriate evidence in support of the averments by proving on a balance of probability that the funds in the three accounts which were clearly in the appellant's name were unlawfully obtained by the appellant and are proceeds of crime.

14. Section 2 of POCAMLA defines proceeds of crime to mean:

> " 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 successfully 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; (emphasis added).

15. The learned Judge of the High Court in her judgment, properly directed herself in regard to section 92 of POCAMLA. She was satisfied that ARA had established that the appellant had made large deposits into her accounts and that her explanation of the sources of the huge deposits was suspicious. This is how the learned Judge rendered herself:

> " ....Where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means what has been presented is not challenged. In this case there is no explanation of the source of the huge deposits into the respondent's accounts. Even a glance at the cash deposits made at Donholm branch of Equity Bank would call for an explanation by the respondent as to who was making the deposits and for what purpose.
>
> 62. The moment the Applicant established through the bank statements that there were huge cash deposits, the burden shifted to the respondent to explain the source. A lot has been said about respondent's husband by both parties but this court is not using that information against the respondent. The respondent had a clear duty to explain the source or sources of these huge deposits into her account which she has failed to do."

16. With due respect, the learned Judge took a wrong turn when she found that the appellant had the evidential burden to explain the sources of the huge deposits but failed to discharge this evidential burden. The issue before the learned Judge as per section 92 of POCAMLA was not a matter of suspicion, but evidence demonstrating that the funds in issue had been used or were intended for use in the commission of an offence or were proceeds of crime.

17. There was no iota of evidence produced before the High Court to show that the funds in the three accounts had been used or were intended for use in the commission of an offence. As ARA's position was that the funds were proceeds of crime, given the definition of "proceeds of crime" in section 2 of POCAMLA (already adverted to), the issue was whether the funds in the accounts were realized directly or indirectly as a result of or in connection with an offence. This required proof by ARA, and the burden could not be reversed by requiring the appellant to prove that the funds were not proceeds of crime.

18. The appellant had filed a replying affidavit dated 11th July, 2018, in response to ARA's motion wherein she denied being involved in any corrupt or illegal dealings or that the funds in her accounts were connected with Alex Mukhwana Khisa. In her affidavit, the appellant did not offer any information regarding the source of the funds, but claimed to have given details of her business associates to the investigators of ARA and implied that it was ARA's responsibility to disprove her contention that the money was from her business associates.

19. The burden of proof in regard to the unlawfulness of the origin of the funds that were in the appellant's accounts remained with ARA. That burden could not be discharged through evidence of mere suspicion, nor could the evidential burden shift to the appellant merely because she had large deposits in her accounts.

20. A careful perusal of the record of appeal reveals an element of confusion regarding the application that was before the learned Judge. What was before the learned Judge was ARA's motion, brought by ARA under sections 81, 82, 90 and 92 of POCAMLA. The proceedings in the record of appeal show that on 11th July, 2018, Ethics and Anti-Corruption Authority (EACC) was joined to ARA's motion as an interested party, following an application dated 12th April, 2018 that it had filled. EACC was also

granted leave to file a response to ARA's motion, and an affidavit sworn on 18th July, 2018 by Lamek Okun, a forensic investigator with EACC was duly filed.

21. Lamek deposed in his affidavit, inter alia, that investigations by EACC had established that the funds in the three accounts were unexplained assets as they did not have any known legitimate sources of income; that Alex Mukwana Khisa was using two of the respondent's accounts at Equity Bank Donholm Branch to deposit and transfer monies acquired through corruption; and that the amount of Ksh.17,843,009.35 in the respondent's accounts were proceeds of crime acquired through corruptions and therefore subject to recovery and forfeiture. These were substantive allegations that required proof.

22. For some unexplained reasons the application that was filed by EACC to be joined in ARA's motion as an interested party, has not been included in the record of appeal. That notwithstanding it is apparent from the affidavit of Lamek that EACC was supporting ARA's motion for forfeiture under sections 81, 82, 90 and 92 of POCAMLA. That forfeiture process is different from the forfeiture process provided under ACECA. The fact that EACC was joined in ARA's motion as an interested party did not bring in the forfeiture provisions provided under ACECA.

23. The forfeiture process under ACECA includes Section 55 that deals with forfeiture of unexplained assets as follows:

    1. .....

    2. The Commission may commence proceedings under this section against a person if—

        a. after an investigation, the Commission is satisfied that the person has unexplained assets; and

        b. the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given

    3. Proceedings under this section shall be commenced in the High Court by way of originating summons.

    4. In proceedings under this section—

        a. the Commission shall adduce evidence that the person has unexplained assets; and

        b. the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

    5. If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

    6. If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to

the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

24. EACC had earlier successfully initiated different proceedings in the High Court wherein it moved the High Court and obtained a preservatory order under section 56 of ACECA in regard to the three accounts held by the appellant in Equity Bank, on the grounds that the funds therein were unexplained assets. By admission on affidavits sworn by officers of EACC, these proceedings were withdrawn following an agreement between EACC and ARA, leaving ARA to continue with the forfeiture process under POCAMLA. These are the proceedings that EACC sought leave to be joined as an interested party.

25. I appreciate EACC's interest in the forfeiture of the funds in the three accounts. However, EACC had deferred to ARA, and did not invoke section 55 of ACECA, but was supporting the forfeiture process initiated by ARA in regard to the funds in the three accounts. That process remained the forfeiture process provided under POCAMLA.

26. ACECA and POCAMLA provide for forfeiture of illegally acquired property and proceeds of crime respectively. However, there is some distinction in the procedure provided in the two statutes. While in POCAMLA, section 94 as read with section 92 empowers the court to issue an order of forfeiture of proceeds of crime if it is proved on a balance of probability that the property has been used or is intended for use in the commission of an offence or is proceeds of crime, ACECA provides under Article 55 for forfeiture of unexplained assets which is concerned with disproportion between the assets concerned and the known legitimate sources of income of the person found with the assets.

27. "Unexplained asset" is defined under section 2 of ACECA to mean assets of a person –

a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

28. In addition, section 57 of ACECA provides that:

> Unexplained asset may be taken by the court as corroboration that a person accused of corruption or economic crime received a benefit and for the purpose of this section, the assets of an accused person shall be deemed to include any assets of another person that the court finds:
>
> a. Are held in trust for the accused person or otherwise for or on his behalf, or
>
> b. Were acquired from the accused person without adequate consideration.

29. In her judgment the learned Judge expressed concern about the huge amounts in the appellant's account, and shifted the evidential burden to the appellant requiring her to explain the sources of the funds in her accounts. In so doing, the learned Judge conflated the forfeiture process in POCAMLA with that in ACECA, treated the funds in the three accounts as unexplained assets, and proceeded to apply the ACECA standard under section 55(5) & (6) of ACECA in regard to unexplained assets. This was wrong as the two forfeiture processes in the two statutes though leading to the same end, that is forfeiture of property in issue, are distinct and anchored on different premise. The parties having opted for the POCAMLA process, the issue thereby became whether the funds in the appellant's accounts were proceeds of crime and not whether the funds were unexplained assets or monies acquired through corruption.

30. In their submissions before the High Court the learned counsel of the respective parties did not assist the court in drawing a line between the forfeiture process in an application under POCAMLA, and the forfeiture process in an application under ACECA. Counsel referred mainly to authorities regarding the application of the forfeiture process under ACECA, as if the same was applicable in the forfeiture process that was initiated by ARA under POCAMLA.

31. For instance, cited by ARA and EACC was Kenya Anti- Corruption Commission -vs- Stanly Mumbo Amuti, [2015] eKLR, where the court was dealing with the issue of burden and standard of proof under section 2 and section 55 of ACECA; and Kenya Anti- Corruption Commission -vs- James Mwathethe Mulewa & another, [2017] eKLR, in which the court was dealing with an application under section 55 of ACECA. Also cited was Ethic and Anti-Corruption Commission -vs- Ministry of Medical Services and Another, [2012] eKLR, in which the court was dealing with an application under section 56 of ACECA. These authorities were distinguishable and not applicable in the appellant's case where ARA's motion was brought under the POCAMLA provisions.

32. It is for the above reasons, that I find that the learned Judge erred in issuing a forfeiture order under POCAMLA when ARA failed to prove that the funds in the appellant's three accounts were used or intended for use in the commission of an offence or were proceeds of crime.

33. Consequently, I concur with Warsame JA that this appeal is for allowing. Accordingly, the final order shall be that the appeal is allowed and the judgment and order of Ongudi, J. made on November 13, 2018, is set aside, and substituted with an order dismissing ARA's motion.

Those shall be the orders of the Court.

Dated and Delivered at Nairobi this 15th day of December, 2023

Dissenting Judgment of Mativo JA.

1. Corruption and economic crimes have become an albatross around the neck of economic growth and a major hurdle to economic development. Corruption affects us all. It intersects at points of social, political, economic and ethical discourse with no end in sight and thus remains an elusive malignancy slowly eroding our hard- won democracy. The enactment of various statutes including the *Anti-Corruption and Economic Crimes Act* (ACECA), the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) casts a wide net to address many categories of this rampant crime in our country.

2. The respondent is a body corporate established under section 53 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA). Pursuant to section 54 of POCAMLA, the respondent's functions includes implementing the provisions of Parts V11 to X11 of the said Act. The said provisions relate to criminal forfeiture, civil forfeiture, general provisions relating to preservation and forfeiture of property, production orders and other information gathering powers and international assistance in investigations and proceedings.

3. A brief background to the proceedings in the High Court which culminated in the judgment dated 14th November 2018 in ACEC Misc. No. 73 of 2017 the subject of this appeal is necessary to put the parties' diametrically opposed arguments into a proper context. The respondent sued the appellant in High Court Miscellaneous Application Number 73 of 2017 (O.S.) seeking: (a) A declaration that the sum of Kshs.19,688,152.35 held in the appellant's account numbers 0820165xxxxxx, 082016769173 and 0820372xxxxxx at Equity Bank, Donholm Branch were proceeds of crime and therefore liable to forfeiture. (b) the said funds be forfeited to the Government and transferred to the applicant. (c) Any other or further orders the court would consider appropriate to facilitate the transfer of the forfeited property to the government. (d) Costs of the application.

The application was filed under sections 81, 82, 90 and 92 of POCAMLA as read together with Order 51 Civil Procedure Rules.

4. It was common ground that the appellant operated 3 Bank accounts all domiciled at Equity Bank, Donholm Branch Nairobi which accounts held a total sum of Kshs.19,688,152.35/=. Briefly, the respondent's core grounds in support of the said application were:

    a. investigations undertaken pursuant to a Court order revealed that the said funds were suspected to be proceeds of crime. (b) the investigations revealed that a one Alex Mukhwana Khisa, the appellant's husband, an employee of the Kenya Revenue Authority, Customs Department, deposited the said funds in the appellant's accounts, and (c) investigations did not establish any justifiable source of the funds. Consequently, the respondent obtained preservation orders in Miscellaneous Application Number 58 of 2017 against the said sum.

5. In or about March 2017, the Ethics and Anti-Corruption Commission's (EACC) investigations on corruption and abuse of office against the said Alex Mukwana Khisa had established that the said sum of Kshs.19,688,152.35 was unexplained assets in terms of section 55 of ACECA. The two agencies agreed that the respondent proceeds to recover the funds while the EACC remained an interested party in the proceedings. Accordingly, the EACC was by consent of the parties joined as an interested party in the said case.

6. For the sake of clarity, it is important to mention that a preservation order preserves property until a forfeiture order is granted, or a request for forfeiture is refused or the preservation order lapses. The effect of a preservation order is that no one may deal in any manner with property forming the subject matter of the order unless authorized by the court, which issued the order. (See Part VIII of the POCAMLA).

7. Before the High Court, the appellant maintained that the application was malicious and an abuse of court process since there was no justifiable reason whatsoever or probable cause to warrant the respondent's actions nor was there evidence to justify the allegations that the funds were deposited in her bank accounts on behalf of the said Alex Mukhwana Khisa. She maintained that there was no reason to suggest that the funds were from illegitimate sources or money laundering. She contended that she was in business and the sum of Kshs.2,000,000.00 transferred from account number 0820167xxxxxx to account number 0820372xxxxxx, a fixed deposit account was for the purposes of investment. Further, the said sum of Kshs. 2,000,000/= could not have been deposited in a fixed deposits account if it was obtained through corrupt dealings.

8. In the impugned judgment, the High Court (Ongundi, J.) held that the appellant had a clear duty to explain the source or sources of the huge deposits into her accounts which she failed to do, that forfeiture under POCAMLA is not a violation of an individual's right to property once the property is found to have been unlawfully acquired. In a nutshell, the learned judge decreed as follows:

    a. The Kshs.19,688,152/35 held in account Nos. 0820165xxxxxx, 0820167xxxxxx & 082037205163, Equity Branch, Donholm Branch, Nairobi in the respondent's name are proceeds of crime.

    b. Forfeiture orders to issue in terms of all the funds held in the said accounts.

    c. The above funds shall be forfeited to the government and transferred to the applicant.

    d. Costs to the applicant.

9. In her bid to overturn the above verdict, the appellant has proffered the following grounds in this appeal:

   (a) The judge erred in holding that the said sums are proceeds of crime in absence of evidence.

   (b) The respondent failed to discharge the burden of proof under sections 107 and 108 of the *evidence Act*.

   (c) The court erred in shifting the burden of proof to the appellant and in the end; it arrived at an erroneous conclusion.

   (d) The court heavily relied on inapplicable foreign authorities cited by the respondent thus occasioning injustice.

10. Mr. Waswa, the appellant's counsel faulted the learned judge for ignoring the appellant's explanation on the source of the money. He argued that the learned judge dwelt on conjectures and suspicion that the appellant operated her business without withdrawals from her accounts; and that the respondent did not present a prima facie case that the money was proceeds of crime. To support his argument, counsel cited Ethics and Anti-Corruption Commission vs Ministry of Medical Services & Another [2012] eKLR which held:

> "... a prima facie case must be presented before court that the property in question has been the subject of some corrupt dealings. It is not enough for the Commission to simply walk into Court with a request and expect the said orders to be granted. Where the said orders are granted and it turns out that either the Court was misled or no prima facie case existed that the property was acquired as a result of corrupt conduct, the court would be perfectly entitled to vacate the orders."

11. On the burden of prove, Mr. Waswa submitted that the appellant provided the respondent with the nature of business she was engaged in and the details of her associates, but the respondent did not undertake further investigations to rebut the said information. Furthermore, the respondent did not even challenge the authenticity of the tax assessment issued to the appellant on 12thFebruary, 2018. Notwithstanding shifting of the burden of proof, counsel argued that the appellant sufficiently disproved the respondent's allegations and relied on Assets Recovery Agency vs Charity Wangui Gethi [2018] eKLR in which the High Court stated:

> " In this case the applicant had a duty to prove that indeed this vehicle in issue was procured by use of money fraudulently acquired from the NYS. Indeed, it has been shown that if any fraudulent money from NYS... How then can the respondent's money at the Standard chartered bank account be connected to the NYS money? It was the applicant's duty to connect these two different transactions."

12. Mr. Adow, learned counsel for the respondent submitted that the learned judge applied the law and the facts before her correctly as reflected at paragraphs 57-59 of the judgment. Counsel argued that an appellate court does not overturn the decision of a lower court simply because it may have different views about the same. Regarding the burden of proof, counsel argued that under POCAMLA, once the respondent establishes on a balance of probabilities that the appellant had in her accounts funds, which she was not able to show the legitimate source, then the burden shifted to her to explain the source of the funds. He submitted that the respondent accorded the appellant opportunities when the funds were being investigated and throughout the trial before the High Court but her explanation/ defense was unsatisfactory hence, the learned judge arrive at the right conclusion.

13. Mr. Adow relied on the Jamaican Supreme Court decision in Assets Recovery Agency vs Rohan Antony Fisher & Others, Claim No. 2007 HCV 003259 followed by the High Court in ACEC Application Number 7 of 2019, Assets Recovery Agency vs Joseph Wanjohi & 3 Others in which the Jamaican Apex Court stressed the nature of the evidential burden placed on a respondent to demonstrate the lawful source of the funds as follows:

> "…. Even though these proceedings are quasi criminal in nature there is an evidential burden of proof on the defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely say she worked/ works as an higgler but has massed thousands of United States dollars without more. There is no indication of any work place or higgle ring or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence, is that the properties seized are properties obtained through unlawful conduct and are therefore recoverable properties. This court finds the applicant case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 14thAugust 2007. This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The money was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets…"

14. He also argued that the evidence presented by the respondent showed that the appellant benefited from illegitimately sourced funds directly by depositing and keeping the funds in her bank accounts. Therefore, counsel submitted that it is immaterial whether the appellant knew or participated in the acquisition of the illicit funds or that a third party deposited the funds in her accounts. It was his submission that what was required to be proved, (which the respondent did) was that the funds were suspected to be from an illegitimate source(s) and the appellant was not able to satisfactorily explain the source of the same.

    Counsel maintained that since the appellant did not rebut the evidence presented by the respondent before the High Court, and being unable to explain the source of the funds in her accounts, the evidence before the court led to the conclusion that the funds in her accounts were proceeds of crime.

15. Responding to the submission on the right to property under Article 40 of *the Constitution*, Mr. Adow submitted that unlawfully acquired property is not constitutionally protected and cited Article 40(6) of *the Constitution* which provides "…the rights under this article do not extend to any property that has been unlawfully acquired…" He also relied on the Namibian decision in Teckla Nandjila Lameck vs President of Namibia 2012(1) NR 255(HC) which held:

> " The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity, which is defined, to "constitute an offence or which contravenes any law."

16. In conclusion, the respondent's counsel asserted that the respondent proved to the satisfaction of the Court that the funds in issue were proceeds of crime hence the learned judge rightly ordered its forfeiture of the same to the Government.

17. On behalf of the interested party, Mrs. Jemutai argued that the appellant's accounts were used as conduit for depositing and transferring proceeds of crime being money acquired corruptly in the form of bribes by her husband and that a statement obtained from him did not disclose legitimate source of income. She argued that the appellant's statements vaguely described a transport and logistics business

she was engaged in with a one Samson Waweru. Further, though she claimed they had four lorries, she did not disclose the source of the capital or explain the questionable large deposits into her accounts with no noted withdrawals from her accounts. Counsel argued that she failed to call the persons she claimed she was in business with, namely a one Samsom Waweru and a one Johathan Kimindu to support her allegation that she engaged in legitimate business. She cited this Court's decision in Stanely Mombo Amuti vs Kenya Anti-Corruption Commission [2019] eKLR:

> "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."

18. In conclusion, counsel maintained that the respondent established a prima facie case against the appellant and as a result the burden of proof shifted to the appellant. Despite being was accorded a reasonable opportunity to explain her disproportionate assets, she did not demonstrate that she acquired the money legitimately.

19. I have considered the grounds of appeal, submissions by counsel and the authorities cited. This Court in Abok James Odera t/a J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR aptly described its primary role as a first appellate court. It stated that its duty it to re-evaluate, re- assess and re-analyze the evidence on record, and then determine whether the conclusions reached by the learned judge are to stand, or not, and give reasons either way. This mandate is clearly set out in rule 31 (1) (a) of the Court of Appeal Rules, 2022.

20. I have read in detail the leading judgment by Warsame, JA and the concurring judgment by Okwengu, JA. I acknowledge their analysis of the facts and the law. However, the point of divergence in my view is my answer to the following pertinent questions: (a) whether the funds in question were reasonably suspected to be proceeds of crime within the meaning of section 92 (1) (b) of POCAMLA. (b) whether the appellant demonstrated satisfactorily by way of sufficient evidence that she lawfully and legitimately earned the money, and (c) whether the forfeiture order violates the appellant's right to property.

21. 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. T he law permits state officials to seize property suspected to be the proceeds of crime or an instrumentality of an offence.

22. 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.

23. The High Court can make an order of forfeiture under section 90(1) of the Act 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. Before asking what proof on the balance of probabilities means in practice, it is helpful to know what it means in theory. Lord Hoffman in Re B [2008] UKHL 350 answered that question using a mathematical analogy:

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

24. Lord Nicholls in re H (Minors) [1996] AC 563 at 586 described balance of probabilities as a flexible test:

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. ...Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

25. The difference between succeeding on the balance of probabilities and failing on the balance of probabilities was best explained by Lord Denning Miller vs Minister of Pensions [1947] 2 All ER 372 when he said:

> " If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not."

26. Expounding of the standard of proof on a balance of probabilities, the South African Court of Appeal the National Employers' General Insurance vs Jagers 1984 (4) SA 437 (ECD) at 440 D-441 A had the following to say regarding the standard of balance of probabilities:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected.

> In deciding whether that evidence is true or not the court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

27. The question to be decided will always be which of the versions of the particular witnesses is more probable considering all the evidence tendered as well as all the surrounding circumstances of the case. The starting point in properly contextualizing the evidence is to understand the meaning of proceeds of crime. Section 2 of POCAMLA defines "proceeds of crime" as:

> 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

28. The other important point to bear in mind is that civil forfeiture is an action against the property (hence, in rem), not the person. It is a mechanism by which, in the absence of criminal proceedings, the proceeds of criminal activity can be confiscated, so as to deprive a person of illicit gains. In such circumstances, the civil forfeiture of assets becomes a very useful remedial legal tool designed to recover the proceeds of unlawful activity, as well as property used to facilitate unlawful activity. Generally, the state brings a proceeding against property (in rem) rather than against individuals. The court is invited to inquire into the origin of property. If the origin of the title to the ownership lies in suspected unlawful activity, and the state proves this to the court, then the court is empowered to transfer title to the state, unless the person can demonstrate by satisfactory evidence, the lawful source of the asset(s).

29. It is also imperative to understand that there are two underlying policy reasons for civil forfeiture: First, gains from unlawful activity ought not to accrue and accumulate in the hands of those who commit unlawful activity. Such individuals ought not to be accorded the rights and privileges normally attendant to civil property law. Second, the state as a matter of policy wants to suppress the conditions that lead to unlawful activities. Leaving property that facilitates unlawful activity in an individual's hands creates a risk that he or she will continue to use that property to commit unlawful activity.

30. The other key test in civil forfeiture is absence of a satisfactory explanation. The evidentiary burden, cast upon the person under investigation, is to provide a satisfactory explanation demonstrating 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. The person found with the property suspected to be proceeds of crime is required to offer an explanation as to how the property under investigations was acquired. The onus is therefore on the person to clearly explain how he or she acquired the property.

31. It is correct to state that the "burden of proof" in civil asset recovery claims is unique. The asset recovery agency is only required to demonstrate on a balance of probabilities that the property is proceeds of corruption. It is not essential for the Agency to establish the precise form of unlawful conduct as a result of which the property in question was acquired and the court may be asked to draw appropriate

inferences from the unlawful conduct established by the Agency combined with the proved absence of legitimate capital and income.

32. The standard of proof required to determine civil asset recovery proceedings is the standard applicable to civil proceedings. The court does not require proof beyond reasonable doubt of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary would suffice. The onus shifts to the person holding the suspected property to demonstrate that the property is not proceeds of crime as defined in section 2 of POCAMLA. The same act defines property to mean:

> "property" means all monetary instruments and all other real or personal property of every description, including things in action or other incorporeal or heritable property, whether situated in Kenya or elsewhere, whether tangible or intangible, and includes an interest in any such property and any such legal documents or instruments evidencing title to or interest in such property;

33. Once the Asset Recovery Agency satisfies the court on a balance of probabilities that the property is suspected to be proceeds of corruption, the reverse burden of proof applies. The onus of proof shifts to the respondent who must rebut the presumption that the property in question was acquired unlawfully. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Asset Recovery Agency, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. (See the Court of Appeal decision in Mbuthia Macharia vs Annah Mutua Ndwiga & Another Civil Appeal No. 297 of 2015 [2017] eKLR). As was held by the Supreme Court in Raila Amolo Odinga & Another vs IEBC & 2 Others [2017] eKLR the evidential burden of proof may shift to the defendant depending on the nature and effect of evidence adduced by the claimant.

34. 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. This approach was explained by the Constitutional Court of South Africa in Prophet vs National Director of Public Prosecutions [2006] (2) SACR 525 (CC):

> "(58) Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the

property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence." (Emphasis added)

35. The standard of proof required is no more than proof on a balance of a preponderance of probabilities, that is to say, sufficient to show that the case of the party having the legal burden of proof is more likely than not to be true. Sufficiency or insufficiency of evidence and credibility of witnesses are factual issues, which are essentially matters for the trial judge. It is not within this Court's province to substitute its own assessment of the facts for that of the trial courts, which is better placed to assess the evidence before it. An appellate court would also rarely interfere with the findings of a trial judge on factual matters unless they are palpably wrong.

36. All that the appellant was required to do was to show the legitimate source of the funds to discharge the reverse onus burden of prove. In other words, the appellant was required to demonstrate "a real, genuine and bona fide dispute of fact exists." The foregoing position was aptly stated by the Supreme Court of Appeal of South Africa in Wightman t/a J W Construction vs Headfour (Pty) Ltd and Another [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 13 as follows:

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But, even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter." (Emphasis added)

37. To reverse the onus, the appellant was required to adduce credible evidence to support her assertion that she lawfully earned the money. In deciding, whether evidence is true or not, the court is required to weigh and test the party's allegations against the general probabilities. In finding facts or making inferences in a civil case, one may, as Wigmore states in his work on evidence, "...by balancing probabilities select a conclusion which seems to be more natural or plausible conclusion amongst several conceivable ones, even though that conclusion may not be the only reasonable one." (Cited in Govan vs Skidmore, 1952 (1) SA 732 (N)).

38. As the disputing party, the appellant necessarily possessed the knowledge of the source of the funds. She was obligated to provide satisfactory evidence to demonstrate the source of the funds as opposed to unsupported allegations that she was doing transport business. The appellant claimed that she

deposited some of the cash into her accounts while her business associates deposited part of the cash. This sounds attractive. However, nothing could have been easier than submitting evidence of how she earned the money by providing supporting contracts, invoices issued to the clients, evidence of payment of the invoices and receipts or acknowledgements of the payment. Corresponding banking slips should have supported the foregoing. A satisfactorily explanation showing on a balance of probabilities that the funds were lawfully earned could have sufficed to rebut the reverse onus of prove.

39. The appellant claimed she had business partners but none was called as a witness. It would have been prudent to call the alleged business associates as witnesses, at least to support her claims and to demonstrate that they deposited the cash into her accounts. A sworn affidavit from her alleged business associate, in the bare minimum could have assisted. The alleged business associate (s) could have shed light on the key question of the source of the funds, by tendering credible evidence. The failure to call her alleged business associates to support her claims left gaps in her evidence. The alleged business partners were crucial witnesses who would have gone a long way to support her case. She chose not to call them. The shallow explanations proffered by the appellant did not meet the required threshold in civil cases to demonstrate that the funds were earned legitimately. In civil asset recovery cases, once the State demonstrates the existence of property suspected to be proceedings of crime the evidential burden shifts to the owner of the property to disapprove the allegations.

40. Even though a party's failure to call witnesses, who are available, does not necessarily, in itself, warrant a negative inference. However, as was held in Samson vs Pim 1918 AD 675:662, if a witness is able to corroborate the version of a party, and such witness is available, and is not called as witness, the deduction may be made that the evidence of that witness would have been unfavourable to that party. Put differently, had she availed the alleged business partners as her witnesses, they could have offered the required corroboration.

41. Corroboration is, however, to be regarded as nothing but an aid or measure in the process of evaluating evidence in aspects such as credibility, truthfulness and consistency, rather than an additional requisite in bridging the barrier of proof. Corroboration is described by DPP vs Kilbourne 1973 ALL ER 440:447H as follows:

> " The word 'corroboration' is not a technical term of art, but a dictionary word bearing its ordinary meaning... Corroboration is therefore nothing other than evidence which 'confirms' or 'supports' or 'strengthens' other evidence ... It is, in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and, on the other, 'supporting evidence."

42. Two basic principles should be kept in mind whenever evidence is evaluated. Firstly, evidence must be weighed in its totality (and therefore not in a piece-meal fashion) and secondly that 'probabilities' must be distinguished from 'conjecture or speculation.' A very prominent role is therefore attached to the concept of 'probabilities.' In the process of adjudication, two factors are constant, namely what must be proved, and to what degree of persuasion, but there is a third factor, namely the quantum and quality of the probative material required to persuade the court.

43. Unless it is shown to the satisfaction of the court that the property does not constitute, directly or indirectly, proceeds of corruption and it was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of corruption, then a forfeiture order will perfectly be issued. The only qualifications to the issuance of the order is that the court shall give any person with an interest in the property the opportunity to be heard as to why the order should not be made, and that the order should not be made if there is a serious risk of injustice to any person. The onus of establishing the injustice is on the person alleging it. The appellant was accorded an opportunity to

be rebut the "balance of probability" that the money was proceeds of corruption. However, from her evidence, she did not rebut the presumption. Instead, she let the opportunity slip through her fingers.

44. I now turn to the appellant's argument that her constitutionally guaranteed right to property under Article 40 of *the Constitution* was violated. Undeniably, POCAMLA is meant to serve as an effective tool in the fight against crime. However, POCAMLA authorizes a serious erosion of the rights contained in the Bill of Rights, the cornerstone of our democracy because the seizure is done merely on the basis of a reasonable suspicion that the property targeted was involved in the commission of crime or was its proceeds. It was in this context that the South African Constitutional Court in Fraser vs Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) discussing South African Proceeds of Crime Act observed:

> "POCA could however also have potentially far- reaching and abusive effects, if not interpreted and applied in accordance with the rights and values protected in *the Constitution*."

45. In this regard, this Court when interpreting POCAMLA must promote the purposes, values and principles of *the Constitution*; advance the rule of law and human rights and fundamental freedoms in the Bill of Rights; permit the development of the law and contribute to good governance. (See Article 259 of *the Constitution*, which provides mandatory cannon of constitutional interpretation).

46. Article 40 of *the Constitution* guarantees the right to property.

    However, it must be emphasized that only lawfully obtained property enjoys full constitutional protection as clearly provided under Article 40 (6) of *the Constitution*. For this reason, civil forfeiture regime does not violate the right to property because *the Constitution* does not protect the ownership or possession of the proceeds of crime or unexplained wealth. Even if civil forfeiture infringes the right to property, such an infringement would be a proportionate response to the fundamental problem, which it addresses, namely that no one should be allowed to benefit from his or her wrongdoing. A remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess to inhibit crime. It thus serves a legitimate public purpose. Such an infringement no doubt satisfies the limitation clause in Article 24 of *the Constitution*. Therefore, because the proceedings are constitutionally permissible, any indignity from the forfeiture of the instrumentalities or proceeds of crime or unexplained wealth does not violate *the constitution*. It is, for example, akin to the exposure of anyone who is subject to lawful criminal proceedings.

47. Confiscation measures may be applied not only to the direct proceeds of crime but also to property, including any incomes and other indirect benefits, obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets. Confiscation measures may be applied not only to persons directly suspected of criminal offences but also to any third parties who hold ownership rights without the requisite bona fide with a view to disguising their wrongful role in amassing the wealth in question.

48. In conclusion, from the analysis of the issues discussed herein above, and the conclusions arrived at, it is my finding that that this appeal fails. Accordingly, I dismiss this appeal with costs to the respondent and the interested party.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

M. WARSAME

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR