



**Assets Recovery Agency v Mutwiri & another; Situ Investments Limited & another
(Interested Parties) (Civil Application E013 of 2023) [2024] KEHC 3543 (KLR)
(Anti-Corruption and Economic Crimes) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL APPLICATION E013 OF 2023**

EN MAINA, J

MARCH 20, 2024

BETWEEN

THE ASSETS RECOVERY AGENCY APPLICANT

AND

ELOSY KENDI MUTWIRI 1ST RESPONDENT

FELIX MUTWIRI MUTHAMIA 2ND RESPONDENT

AND

SITU INVESTMENTS LIMITED INTERESTED PARTY

NCBA BANK LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. This matter concerns the forfeiture application of motor vehicles KCP 336B Chassis No. ACU30-00113547 and KDC 813M Chassis No. JALFRR90NK7001566 (hereinafter referred to as “the Suit motor vehicles”) suspected to be proceeds of crime: Trafficking in Persons.
2. On 27th February 2023, the Applicant herein obtained preservation orders in regard to the suit motor vehicles registered in the name of the 1st Respondent and the Interested Parties. The order was gazetted on 17th March 2023 through Gazette Notice No. 3606 of CXXV-No. 65.



The Parties

3. The Applicant is the Assets Recovery Agency established under Section 53 of the Proceeds of Crime and Anti Money Laundering Act (hereinafter referred to as POCAMLA) as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. The agency has authority to institute civil proceedings for the recovery of proceeds of crime and seek orders for forfeiture of assets to the government where there are reasonable grounds to believe that such assets are proceeds of crime. The agency also has policing powers under Section 53A of the POCAMLA to enable it investigate, identify, trace, freeze and recover proceeds of crime.
4. The 1st Respondent and the 1st Interested Party are the registered owners of motor vehicle Regn. KCP 336B chassis No. ACU30-00113547.
5. The 2nd Respondent is the spouse and business partner of the 1st Respondent.
6. The 2nd Interested party and the 1st Respondent are the Registered owners of motor vehicle Reg. No. KDC 183M chassis No. JALFRR90NK7001566.
7. The 1st and 2nd Interested parties are both financiers in respect to the purchase of the motor vehicles and are co-registered owners, having extended loans to the 1st Respondent for purchase of the vehicles.
8. The Originating Motion was canvassed by way of affidavits and written submissions.

The Applicant's case

9. The Originating Motion dated 9th June 2023 is brought under Sections 90, 92 & 131 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and Order 51 Rule 1 of the Civil Procedure Rules seeks orders as follows: -
 - a. That this Court be pleased to declare the motor vehicles KCP 336B and KDC 183M proceeds of crime and therefore liable for forfeiture to the Government of Kenya.
 - b. That an order for forfeiture of the motor vehicles do issue.
 - c. That costs be provided for.
10. The application is based on the following grounds that: that the Agency received information from the Directorate of Criminal Investigations of suspected trafficking of persons by the 1st and 2nd Respondents; that pursuant to the information the agency initiated investigations to inquire into the activities of the Respondents with a view of identifying, tracing, freezing and forfeiture of proceeds of crimes under the [Proceeds of Crime and Anti-money Laundering Act](#); that investigations established that the 1st and 2nd Respondents used funds sourced directly or indirectly from trafficking in persons to purchase the suit motor vehicles; that there are reasonable grounds to believe that motor vehicle registration number KCP 336B Chassis number ACU30-00113547 registered in the name of Elosy Kendi Mutwiri And Situ Investments Limited and motor vehicle registration number KDC 813M Chassis Number JALFRR90NK7001566 registered in the name of Elosy Kendi Mutwiri And Ncba Bank PLC are proceeds of crime as they were acquired using illicit funds emanating directly or indirectly from trafficking in persons and as such are liable to forfeiture under the POCAMLA; that it is in the interest of justice that the orders of forfeiture do issue forfeiting the motor vehicles to the Applicant on behalf of the government of Kenya and that there are justifiable reasons and grounds to warrant the issuing of the orders sought.



11. The application is supported by an affidavit sworn on 9th June 2023 by Jillo Rufus, an investigator with the Agency, which reiterates the grounds on the face of the application further deposes that sometimes on 12th July 2021 police officers proceeded to a house in Karura Estate in Ruiru which was alleged to be housing aliens; that the police officers found a group of 106 male aliens aged between 15 years and 40 years; that the said men claimed to be from Ethiopia but they had no identification or travel documents; that the 1st Respondent and one Maureen were also at the scene and claimed to be caretakers of the premises. Further that members of the public also apprehended and handed over six other aliens who had escaped from the house in Karura estate, to Matangi Police Station; that upon being arrested the 1st Respondent recorded a statement to the effect that the house had been rented by the 2nd Respondent who is her husband.
12. The 2nd Respondent was also arrested on 12th July 2021 on the same day in the company of one Mr. Kirimi. Jillo Rufus deposes that investigations revealed that the house was leased by the 2nd Respondent for the period 6th July 2021 and 4th July 2022 via a lease agreement which he executed.
13. Further that the 2nd Respondent recorded a statement on 28th February 2022 where he claimed to have rented the house for a friend but denied that he signed the lease agreement; that one Ms Karwitha also recorded a statement where she stated that the 2nd Respondent is her brother and that he employed her on 5th July 2021 as a cook for people traveling from Ethiopia to South Africa at a salary of Kshs. 10,000 a month; that she had started work on 6th July 2021 and was supposed to cook three meals a day, that the 1st Respondent was the one who did the shopping. Ms Karwitha further stated that the aliens had arrived on different days in groups of 20 or 30 a day and that the 2nd Respondent's work was to provide them with shelter and food. Further that one Mr. Kirimi in whose company the 1st Respondent was arrested on 12th July 2021 recorded a statement in which he stated that that very morning the 2nd Respondent had requested him to find a lorry to ferry Ethiopians as his wife had been arrested.
14. The investigating officer deposed that on 19th July 2022 the 1st and 2nd Respondents were charged in the Chief Magistrate at Kiambu with the offence of Trafficking in Persons in CM Criminal Case No. E1279 of 2021 but by the time this Originating Motion was filed the case was yet to be determined.
15. He further deposed that on 25th December 2021 the 2nd Respondent was intercepted along Nkubu - Chuka Road while ferrying 31 male persons in motor vehicle Regn. No. KDC 183M; that the 2nd Respondent knowingly gave false information regarding the ownership of the motor vehicle saying it had been given to him by one Timothy Kinoti yet it belonged to the 1st Respondent who is his wife; that the 2nd Respondent admitted that he had gone to pick the aliens in a statement he recorded on 26th December 2021 and also to having done it before. That investigations revealed that on 28th December 2021 he was charged with enabling entry of improperly documented persons at the Nkubu Principal Magistrate's Court, vide Criminal Case number E542 of 2021.
16. Jilloh Rufus deposed that investigations into the 1st Respondent's account number 77701xxxxxx at Equity Bank revealed that she received deposits of Kshs. 8,663,580 between 6th May 2020 and 9th June 2021; that an analysis of the 2nd Respondent's account number 07101xxxxxx at Equity Bank showed deposits of large sums of cash via cash deposit and Eazzypay platform. The funds were used to defray loan instalments for loans taken from the bank.
17. He deposed that there are reasonable grounds to believe that the motor vehicle KCP 336B was purchased through funds from trafficking in persons as the 1st Respondent paid a cash deposit of Kshs. 850,000 and thereafter instalments of Kshs. 50,000 and Kshs. 800,000; that in the loan application form submitted to the 1st Interested Party for purchase of the Motor vehicle, the 1st Respondent



declared that she was self-employed and earning a gross income of between Kshs. 251,000 and Kshs. 500,000, yet she had not filed any income tax returns with the Kenya Revenue Authority. However, upon being given an opportunity to explain her source of income by the Applicant, she had stated that the money used to open a grocery had come from her husband. That the 1st Respondent's statements recorded on 18th January 2022 and 8th February 2022 did not yield a plausible explanation as to the source of funds. The 2nd Respondent did not also explain the source of the funds.

18. On the purchase of KDC 183M, Jillo Rufus deposed that in the loan application form with the 2nd Interested Party, the 1st Respondent stated that she was earning an income of below Kshs. 150,000. That the loan was offset through instalments via M-pesa number 0723xxxxx.
19. Jilloh Rufus deposed that the vehicles were financed using proceeds of human trafficking; that the Applicant obtained preservation orders in respect of the suit motor vehicles which prohibited the Respondents and Interested Parties from dealing in or disposing the vehicles and the orders were duly gazetted on 17th March 2023 vide Gazette Notice No. 3606. He deposed that Section 90 of the POCAMLA empowers the Applicant to apply for forfeiture orders where a preservation order is in force.

The Respondents' case

20. The Respondents did not file a response to the application despite attending Court in person and asking for and being granted time to instruct legal Counsel.

The 1st Interested Party's case

21. The 1st Interested Party opposed the Originating Motion through a Replying Affidavit sworn on 17th July 2023 by Salome Karanja, its Credit Manager. She deposes that the 1st Interested Party is engaged in the business of offering asset finance to clients; that on 15th December 2020, it advanced a loan of Kshs. 1,060, 729 to the 1st Respondent to purchase motor vehicle Regn. No. KCP 336B which the 1st Respondent in turn offered as security for the loan. Consequently, the motor vehicle was registered in the names of the 1st Respondent and the 1st Interested Party.
22. Salome Karanja further deposes that from June 2021 the 1st Respondent defaulted and the outstanding balance is therefore Kshs. 1,889,964.23 and the 1st Interested Party is desirous of exercising its legal rights under the agreement; that however the motor vehicle has been in the custody of the Directorate of Criminal Investigations, and the 1st Interested Party has been unable to recover its outlay and further that the vehicle has also depreciated due to lack of maintenance and service and vagaries of the weather which further prejudices its ability to recover its loan. She further deposes that the 1st Interested party filed an application for release of the vehicle through Kiambu Criminal Case Number E1279 of 2023, which application had to be withdrawn in light of the preservation orders, issued by this court; that the 1st Interested Party is greatly prejudiced by the circumstances of this case as it is unable to recover its outlay yet the vehicle is not a proceed of crime.
23. She also deposes that the Applicant and Respondents face less prejudice if the vehicle is not forfeited as compared to the prejudice that the 1st Interested Party will suffer if the vehicle is forfeited and has thus urged this court to dismiss the application. (The 1st Interested Party produced the loan facility between it and the 1st Respondent and marked it Exhibit A).



The 2nd Interested Party's case

24. The 2nd Interested Party opposed the application in its replying affidavit, sworn on 17th July 2023 by Jackson King'ori, its Legal Counsel. The deponent begun by stating that bringing the current application through an "Originating Motion" offends Section 19 of the Civil Proceedings Act Cap 21(sic), hence the same are fatally defective and should be struck out in limine.
25. He further deposes that the crimes alleged to have been committed by the 1st and 2nd Respondents are neither corruption nor economic crimes and are thus before the wrong court; that motor vehicle Regn. No. KCD 183M cannot be divested without the 2nd Interested Party being made a substantive party to the suit, as no substantive relief can be sought by or granted to an Interested Party. He further deposes that the 2nd Interested Party was not served with the preservation orders and was thus unable to give proper notice as required by Section 83 (3) of the POCAMLA but that nevertheless it filed and served a Notice of Intention to Oppose which it prays will be deemed to have been served within time.
26. He further deposed that the motor vehicle Regn. No. KDC 183M cannot reasonably be said to be proceeds of crime as defined under Section 2 of the POCAMLA, as the funds used to purchase it were obtained from the 2nd Interested Party who could not have reasonably suspected that the 1st Respondent was involved in crime which alleged crimes were committed long after the loan was advanced. He contends that repayment of a loan using proceeds of crime would not make the asset acquired through a lawful process, a proceed of crime, and even the alleged repayment by proceeds of crime was not substantiated by the Applicant.
27. On the allegation that the 1st Respondent did not file income returns with the Kenya Revenue Authority (KRA), he deposes that false or incorrect tax declaration by an individual does not convert that individual's finances into proceeds of crime.
28. He further deposed that the loan advanced to the 1st Respondent remains outstanding to the tune of Kshs. 3,553,296.56 as at 4th July 2023; that the account fell into arrears in May 2023 and demand notices were issued to the 1st Respondent and under Clause 7 of the Letter of Offer, the 1st Respondent's ownership terminated and the 2nd Interested party is the exclusive owner, and the vehicle cannot therefore be forfeited to the Government. He urged this Court to declare that the preservation order issued had lapsed as against motor vehicle Regn. No. KDC 183M.

The Applicant's submissions

29. Mr. Adow, Learned Counsel for the Applicant, submitted that the Respondents engaged in the illegitimate business of trafficking in persons, acquired the assets in issue and used the same vehicles to perpetrate the offenses; that the Respondents had not rebutted the Applicant's evidence as they had not provided a logical explanation of the source of the funds used to acquire the impugned motor vehicles; that Counsel contended that the criminal activities of the Respondents are a threat to national security, good order, public interest and leads to erosion of societal good values by commercializing human beings hence leading humanity to be susceptible to vulnerability; that depriving the Respondents of the benefits of crime shall thus act as deterrence and maintain national security. On the issue of the motor vehicles being collateral, Counsel submitted that offering the vehicles as security was meant to conceal and disguise the source of the funds used to acquire them and to make it difficult to trace the source of their funds. Counsel asserted that this is a classical scheme of money laundering as criminals usually create sophisticated complex schemes to camouflage the assets and benefits derived from criminal activities.



30. Counsel further submitted that the Applicant only needs to make a prima facie case which satisfies the court that there is evidence which establishes the Agency's belief within the meaning of POCAMLA that the assets sought to be forfeited are proceeds of unlawful activities. He asserted that the evidence that was placed before this court satisfies that the vehicles are proceeds of unlawful activities. Counsel contended that the Applicant had presented evidence that the Respondents benefitted from illegitimately sourced funds which they deposited in their accounts and hereafter used to acquire assets; Counsel submitted that whether the Respondents participated in the acquisition of the illegal funds and assets or whether a third party deposited the funds is immaterial. Counsel argued that all that is required is for the Applicant to prove that the assets are from illegitimate sources, which the Applicant has done in this case and which has not been controverted by the Respondents.
31. In regard to the Interested Parties, Counsel submitted that the vehicles were acquired from illegitimate sources but were then laundered by offering them as collateral with the sole intention of concealing, hiding and disguising the source of their illegitimate income contrary to Sections 3, 4 and 7 of the POCAMLA. Counsel contended that this is a classical scheme of money laundering; that the Respondents were using decoy loans to depict that the source of funds used to acquire the vehicles was legitimate; that the Interested Parties cannot have an interest in assets which are established to be proceeds of crime and moreover even if they did it the same is a commercial relationship which they can pursue in a commercial forum. Further that the Interested Parties have not established any identifiable and reasonable interests in the vehicles.
32. Learned Counsel for the Applicant relied on the following cases to support his submissions: ACEC Application Number 7 of 2019; ARA V Joseph Wanjohi & Others ARA V Pamela Aboo, EACC (Interested Party) (2018) eKLR. KACC V James Mwathethe Mulewa & Anor (2017) eKLR Nguku V Republic (1985) KLR 412 Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7 Prosecutor General V New Africa Dimensions & Others, HC Namibia Case No. POCA 10/2012 ARA V Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No. 2007 HCV003259

The 1st Interested Party's submissions

33. Miss Kimiti, Learned Counsel for the 1st Interested Party, submitted that the 1st Interested party's interest in motor vehicle Regn. No. KCP 336B is that it advanced a loan facility to the 1st Respondent which she used to acquire the vehicle and which she then used as collateral for the loan. That no evidence has been adduced to prove that the motor vehicle was acquired through illegitimate funds obtained from criminal activities; that no evidence has been tendered to rebut that of the Interested Party that it financed the purchase through clean and ethical dealing and not through money laundering.
34. Counsel submitted that the Applicant must establish a nexus between the source of funds, being the unlawful activities, and the purchase of the subject motor vehicle which the Applicant had failed to do and hence the prayers with respect of the motor vehicle should fail.
35. Counsel further contended that the definition of proceeds of crime under Section 2 of the POCAMLA did not extend to include legitimate business occurring on a day-to-day basis. Further, that the 1st Interested Party advanced the facility in the legitimate and normal course of business and that it has displaced the contention by the Applicant that the vehicle is a proceed of crime. Counsel contended that it is not sufficient for the Applicant to merely state that part of the funds used to acquire the vehicle are suspected to be proceeds of crime. Counsel having contended that the 1st Interested Party having advanced a financial facility it has an interest distinguishable from any alleged proceed of crime as alleged by the Applicant.



36. Counsel submitted that the 1st Interested Party would suffer a higher risk than the Applicant and Respondents should the orders sought be granted. She reiterated that the 1st Respondent had already defaulted in servicing the facility, triggering a recovery action before her arrest. Counsel urged this court not to grant the prayers in the Originating Motion.
37. In support of her submissions Counsel relied on the following cases: -Assets Recovery Agency V Rose Monyani Musanda, Sidian Bank Limited (Interested Party) [2020] eKLR Assets Recovery Agency V Charity Wangui Gethi [2018] eKLR

The 2nd Interested Party's submissions

38. Mr. Kongere, Learned Counsel for the 2nd Interested Party reiterated that the current proceedings being civil in nature, the same ought not to have been instituted by way of originating motion. Counsel stated that the procedure for instituting an action is not a mere technicality as it has the potential of curtailing the right to fair hearing.
39. He further submitted that being an Interested Party disadvantaged it as it could not frame its own issues or introduce new issues. For the 2nd Interested party to apply for any substantive orders, it would have to apply to be made a substantive party. Having had the suit commenced by way of originating motion, it was beyond the contemplation of Order 1 Rule 10 of the Civil Procedure Rules, to have the interested party apply to be admitted as a substantive party in the suit. The proceedings are thus incompetent and for striking out.
40. He further submitted that the vehicle financed by the 2nd Interested party, could not under the definition of “proceeds of crime” as defined under Section 2 of the POCAMLA just because of it being repaid through allegedly illegitimately acquired funds.
41. The 1st Interested part relied on the following cases in its submissions: Assets Recovery Agency V Muthama (2023) KEHC 1787 KLREzekiel Muriithi Nephath v Kenya Bus Services Limited & Anor (2002) eKLR. Lydia Nyanchana Ottara V Alex M. G. (2018) eKLR. Francis Kariuki Muruatetu & Anor V Republic & 5 Others (2016) eKLR. Assets Recovery Agency V Rose Monyani Musanda, Sidian Bank Limited (Interested Party) (2020) eKLR. Assets Recovery Agency V KKS (2022) KEHC 10024 (KLR)

Issues for determination

- i. Whether the present application is fatally defective and hence incompetent and whether they are properly before this court;
- ii. Whether the motor vehicles are proceeds of crime and whether the same should be forfeited to the government;
- iii. Whether the suit motor vehicles should be forfeited; and
- iv. Who should bear the costs of the suit.

Issue (i) Whether the present application offends proper procedure;

42. The 2nd Interested party in its Replying Affidavit, deposed that the instant Originating Motion offends Section 19 of the *Civil Procedure Act*. In its submission, it contended that the application is fatally defective and incompetent as the commencement of civil proceedings are governed by Order 3 Rule 1 of the Civil Procedure Rules. Counsel submitted that the phrase “Application for Forfeiture Order” as provided under Section 90 of the POCAMLA is not to be taken literally. That the procedure for



bringing an action is not a mere technicality as it has the potential of curtailing the right to fair hearing. Section 19 of the *Civil Procedure Act* provides that:

“Every suit shall be instituted in such manner as may be prescribed by rules.”

43. Order 3 Rule 1 of the Civil Procedure Rules provides as follows:

“3(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”

44. Much as the proceedings under the POCAMLA are civil in nature the manner of instituting the proceedings and of hearing the same is provided in Section 90(1) of the POCAMLA which states that “The Agency Director may apply to the High Court for an order...”. This to me implies that the manner of approaching the court by way of an application. Indeed Section 90(2) states that the Agency Director shall give 14 days notice of the application under Subsection (1) hence laying aside any doubt as to the procedure to be used. It is also instructive that Section 90(4) does not require the filing of a defence and all that a person who is interested in property the subject of the application, is required to do is to file a Notice under Section 83 for him/her to take part in the proceedings hence making a distinction between suits brought by way of plaint and these proceedings under the POCAMLA which are brought by way of Originating Motion. In my view instituting the proceedings under the POCAMLA by way of Originating Motion is not fatal given that Order 51 Rule 1 also requires that all applications shall be by motion. The term Originating is then added to distinguish the applications from interlocutory applications which are brought by way of a Notice of Motion.

45. Moreover, Order 3 Rule 1 anticipates the commencement of suits in ways other than by Plaint and indeed some proceedings are instituted by way of Originating Summons (see Order 37 of the Civil Procedure Rules). An Originating Summons is then canvassed through affidavit evidence (Rule 18) and the court is granted power under Rule 19 to where necessary continue with the proceedings as if they were filed by way of a Plaint.

46. I agree with the finding in the matter of *Asset Recovery Agency V Muthama (2023) KEHC 1787 KLR* where the court held that: -

“It is my finding that the procedure for Instituting suits envisaged under Section 90 of POCAMLA is by way of application.”

47. The 2nd Interested Party further submitted that the manner of instituting these proceedings prejudiced it as it could not apply to be a substantive party in the suit, introduce issues or pray for substantive orders. I do not agree with this submission. In my view the POCAMLA has very extensive provisions which guarantee the protection of third parties and their rights. The 2nd Interested Party is also a substantive party to these proceedings as it was enjoined by the Applicant at the institution of the suit and did not have to apply to be enjoined and it has also been granted an opportunity to ventilate its interest in the application and hence its right to a hearing has not been violated. No prejudice has been occasioned to the Interested Parties at all by the manner of bringing these proceedings and none has been pleaded or alluded to. It is therefore my finding that the application is properly instituted.

Issue (ii) Whether the impugned motor vehicles are proceeds of crime and whether they should be forfeited to the government.

48. The Respondent did not file any responses to the Originating Motion and so to speak the Originating Motion was not defended. This despite this court making efforts to ensure that the Respondents were served with all notices pertaining to the mentions and hearings. The record will show that they



even attended the virtual sessions and requested for time to get a lawyer to represent them. The Applicant's evidence that they engaged in human trafficking was therefore neither controverted nor rebutted. Human trafficking is an offence under Section 3(5) of the Counter Trafficking in Persons Act. Trafficking includes knowingly leasing a house, building or other premises for the purpose of trafficking in persons. In this case there is evidence that the 2nd Respondent leased a house for purposes of holding aliens and that in fact a group of forty (40) aliens of Ethiopian descent were found in that house. Other than leasing the house, there is evidence that the 2nd Respondent was responsible for hiring a truck for transportation of the trafficked persons and that the 1st Respondent who is his spouse was engaged in ensuring that the trafficked persons were taken care of and that she was arrested in the premises where the victims were housed. As I have stated the evidence adduced by the Applicant has not been rebutted.

49. A perusal of the statements of account exhibited by the Applicant reveal that the Respondents received monies from that illegitimate trade. Although they were duly served with the statements the Respondents did not make any effort to explain the source of their funds. This court was also told that they were not filing any taxes. Contrary to the submission of Counsel for the 2nd Interested Party it is my finding that failure to file tax returns can also be testimony that one has no legal source of income but is merely not evidence of tax evasion. It follows therefore that since the Respondents had no legal source of income the monies they were receiving into their accounts was from this offence of trafficking in persons. It also follows that whatever property they acquired from that income was proceeds of crime; is tainted and hence realizable property. See Section 2 of the POCAMLA which 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 derived or realized from such property from the time the offence was committed.”

50. Tainted and realizable property are on their part are defined as:-

“‘tainted property’ in relation to an offence means—

- (a) any property used in, or in connection with, the commission of the offence;
- (b) any proceeds of the offence; or
- (c) any property in Kenya which is the proceeds of a foreign offence in respect of which an order may be registered, and when used without reference to a particular offence means tainted property in relation to an arrestable offence.”

51. Section 17(1) of the Counter Trafficking in Persons Act prescribes the confiscation and forfeiture of the proceeds of the crime under that Act while the POCAMLA creates the Assets Recovery Agency as an entity with authority to as an entity with authority to trace identity and also institute proceedings for the recovery of proceeds of crime. Section 90(1) gives power to the Agency Director to apply to bring applications for forfeiture of such property to this court. In the premises it is my finding that the submissions by Counsel for the 2nd Respondent that these proceedings are not properly before this court must also fail.



52. The upshot is that in view of the cogent evidence adduced by the Applicant through the supporting affidavit of its investigations officer and the lack of a rebuttal thereto, the Applicant has proved on a balance of probabilities that the Respondent's properties were acquired from the commission of an offence and are therefore proceeds of crime and that to me included the impugned motor vehicles.
53. On the second limb of this issue Sections 93, 94, 95(3) and 96 of the POCAMLA obligates this court to take into account the interest of third parties such as the Interested Parties in this case.
54. The 1st Interested Party contends that it is currently the owner of motor vehicle KCP 336B the 1st Respondent having defaulted in repaying its loan and that it shall suffer greater prejudice if the security it holds is forfeited as it will be left financially exposed, as compared to the prejudice that is likely to be suffered by the Applicant if the vehicle is not forfeited. On its part, the 2nd Interested Party contends that the motor vehicle registration No. KDC 183M was purchased by the 1st Respondent through a loan it advanced to her and that it is a joint owner of the vehicle by virtue of the loan agreement. Further that the motor vehicle was to revert to itself absolutely in the event there was default and as such the vehicle was no longer the property of the 1st Respondent but its property and should be excluded from these proceedings. The Applicant's position however is that these loans were just decoys intended to disguise the real source of the funds used to acquire the vehicles.
55. I have considered the evidence by the Applicant and the Interested Parties carefully and I am persuaded that the loans borrowed from the Interested Parties by the Respondents were just decoys intended to conceal and disguise the source of the funds used to acquire the two motor vehicles. It is evident that after taking the loans and acquiring the cars which they then used as collateral they used monies which they acquired through the illegal trade to service those loans. That clearly explains why they after they were arrested they could no longer service the loans. In effect the vehicles were acquired through the proceeds of the illegal trade or business and the loans were used to launder the property to make it look like it was from a legitimate course. For all intents and purposes the vehicles are proceeds of crime as defined in Section 2 of the POCAMLA. The claim to the same by the Interested Parties cannot therefore stand. Public interest and indeed civil forfeiture dictates that a person (s) ought not to be allowed to continue to enjoy illicit wealth; that such wealth must be forfeited so as to act as a deterrent. Learners must take cognizance of this and take precautions to cushion themselves from customers such as the Respondents who use their facilities to launder their ill-gotten property.
56. Accordingly, I find that the two vehicles are liable for forfeiture to the government of Kenya and I do so hold.
57. On who should bear the costs of these proceedings I find that the costs of the Applicant and Interested Parties shall be borne by the Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MARCH, 2024.

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E. N. MAINA

JUDGE

