



**Assets Recovery Agency v Shande & 2 others (Civil Application E008 of 2023)
[2024] KEHC 3542 (KLR) (Anti-Corruption and Economic Crimes) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL APPLICATION E008 OF 2023**

EN MAINA, J

MARCH 20, 2024

BETWEEN

THE ASSETS RECOVERY AGENCY APPLICANT

AND

ABDINASIR HIRBO SHANDE 1ST RESPONDENT

FIRST COMMUNITY BANK LIMITED 2ND RESPONDENT

GALGALO MOHAMED LIBAN 3RD RESPONDENT

JUDGMENT

1. This matter concerns the forfeiture application over motor vehicles Registration number KCR 003A Mitsubishi Fuso and motor vehicle number KCZ 056L Mitsubishi Fuso that are suspected to be proceeds of crime.
2. On 22nd August 2019, the Applicant herein obtained preservation orders over the subject motor vehicles; KCR 003A Mitsubishi Fuso chassis number BAVFN627RISY00820 registered in the name of the 3rd Respondent and KCZ 056L Mitsubishi Fuso Chassis Number BAVFN627RLSY00977, registered in the names of the 1st and 2nd Respondents. The order was gazetted on 2nd December 2022 vide Gazette Notice No. 14880.

The Parties

3. The Applicant is the Assets Recovery Agency established under Section 53 of the Proceeds of Crime and Anti Money Laundering Act (herein after referred to as the 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 POCAMLA to enable it investigate, identify, trace, freeze and recover proceeds crime.

4. The 1st Respondent is the beneficial owner of impugned motor vehicle registration number KCZ 056L Mitsubishi Fuso Chassis Number BAVFN627RLSY00977.
5. The 2nd Respondent is a financier in respect of motor vehicle registration number KCZ 056L Mitsubishi Fuso Chassis Number BAVFN627RLSY00977.
6. The 3rd Respondent is the registered owner of motor vehicle Registration number KCR 003A Mitsubishi Fuso chassis number BAVFN627RISY00820.

The Applicant's case

7. The application coming for consideration in this Judgement is the Originating Motion dated 2nd March 2023 brought under Sections 81, 82, 90, 92 & 131 of the Proceeds of Crime and Anti-Money Laundering Act and Order 51 Rule 1 of the Civil Procedure Rules, seeking the following orders;
 - a. That this Honourable Court be pleased to issue an order declaring that motor vehicle registration numbers KCR 003A registered in the name of Galgalo Mohamed Liban, is a proceed of crime and therefore liable for forfeiture to the Government.
 - b. That this Honourable Court be pleased to issue an order declaring that motor vehicle registration numbers KCZ 056L registered in the name of Abdinasir Hirbo Shande and First Community Bank Limited, is a proceed of crime and therefore liable for forfeiture to the Government.
 - c. That this Honourable Court be pleased to issue an order declaring that motor vehicle KCR 003A be forfeited to the Government of Kenya.
 - d. That this Honourable Court be pleased to issue an order declaring that motor vehicle KCZ 056L be forfeited to the Government of Kenya.
 - e. That costs be provided for.
8. The application is based on the following grounds:
 - a. That Investigations established that on 21st July 2022, Police Officers from Sololo Police Station intercepted motor vehicle Regn. No. KCR 003A at Dambala Fachana Area while joining Moyale-Marsabit Highway at the Kenya-Ethiopia Border, carrying 64 bags of dry green plant materials suspected to be narcotic drugs.
 - b. That the 1st Respondent was arrested and charged with the offense of trafficking narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act as well as Conspiracy to Commit a felony contrary to Section 393 of the Penal Code vide Principal Magistrate's Court at Moyale Criminal Case No. E066 OF 2022 which was pending at the time of filing the current application.
 - c. That the 1st Respondent provided the 2nd Respondent with the Logbook of motor vehicle Registration. No. KCZ 056L as an alternative security to release KCR 003A.
 - d. That there are reasonable grounds to believe that motor vehicle Registration. No KCR 003A is a proceed of crime purchased by funds from the narcotics trade and issuing of the orders sought.



9. The application is supported by the affidavit sworn on 2nd March 2023 by CPL Frederick Muriuki, an investigator attached to the Applicant, which basically reiterates the grounds upon which the application is brought and deposes further that samples of the 64 sacks of dry green plant were subjected to tests and found to be cannabis sativa; that at the time of the request to substitute the security with the 2nd Respondent, the motor vehicle Registration No. KCR 003A had been impounded and was at Sololo Police Station in Moyale; that whereas the 3rd Respondent, was invited to record a statement with the Applicant, he refused to honor the summons; that in his statement with the Applicant, the 1st Respondent stated that he sold the motor vehicle KCR 003A to the 3rd Respondent, at Kshs. 7,800,000, on 11th January 2022 and handed over possession; that Kshs. 7,500,000 was paid on the same day and Kshs. 300,000 was to be settled in three months and that once the vehicle was impounded the 1st Respondent demanded settlement of the balance and also made a request to the 2nd Respondent for release of the vehicle and transfer to the 3rd Respondent.
10. Fredrick Muriuki also deposed that the 1st Respondent's father, Hirbo Shande Wache's statement with the Applicant stated that the 3rd Respondent paid them Kshs. 7,500,000 in cash to boost their business. That there are reasonable grounds to believe that the motor vehicle KCR 003A is an instrumentality of crime and/or was purchased using proceeds of crime, as the source of funds used to purchase it are unknown; that investigations revealed that the 3rd Respondent lives in Ethiopia where the 64 bags of Cannabis is suspected to have been sourced and that the Applicant obtained a preservation order in respect of the subject motor vehicle and the same was gazetted on 2nd December 2022 vide Kenya Gazette Vol. CXXIV No. 257, Notice No. 14880.
11. In his Supplementary Affidavit sworn on 9th August 2023 Frederick Muriuki further deposed that the Respondent was charged alongside one Ali Adan Ali and that the Respondents stated contradicting facts as to who was in actual possession of the impugned vehicle. In regard to the issue of competency of these forfeiture proceedings Fredrick Muriuki deposed that on 6th March 2023 the Court ordered that the 90-day period had lapsed and directed parties to proceed in the forfeiture suit if it had been filed, by which time the forfeiture application had indeed been filed.

The 1st Respondent's case

12. The 1st Respondent opposed the application through a replying affidavit sworn by himself on 9th June 2023 where deposed that the witness statements recorded by the Applicant were obtained under duress and he denied them in totality; that the subject motor vehicle KCR 003A was bought for him by his father to facilitate transport of cattle for sale between Kenya and Ethiopia; that he and his father took a facility from the 2nd Respondent and used the said motor vehicle as security for a loan to purchase motor vehicle KCZ 056L; that he applied and was granted the loan; that he serviced the loan and repaid it but the 2nd Respondent retained the motor vehicle as security for a further advance in respect to a third motor vehicle; that he sold the motor vehicle KCR 003A to the 3rd Respondent who lives in Ethiopia, for Kshs. 7.9 million and was paid 7.6 million leaving a balance of Kshs. 300,000; that the motor vehicle was transferred to the 3rd Respondent while its possession remained with the 1st Respondent.
13. He further deposed that the subject motor vehicle was impounded while in the possession of one Ibrahim Adan Ali who had leased the motor vehicle and chose to use his own driver. The police released Ibrahim and the driver and chose to charge him which he considered malicious; that he sought to substitute the collateral held by the 2nd Respondent from KCR 003A to KCZ 056L; that the motor vehicle KCZ 056L was not found with any narcotic drugs and the application to have it forfeited for being a proceed of crime was unfounded. He further deposed that the motor vehicles are from



legitimate businesses in cattle, water, milk and other goods, run by him and his father, with monthly profits of approximately Kshs. 2 million; and that the 2nd Respondent advanced him the loan only upon ascertaining that he was in a financial position to repay it.

The 2nd Respondent's case

14. The 2nd Respondent opposed the application through its Notice of Objection to an Order of forfeiture and the replying affidavit of Amran Abdikadir dated 7th July 2023 where he deposed that as at the time of filing this application there were no preservation orders over the impugned motor vehicles as the same had lapsed on 6th March 2023.
15. He further deposed that the 1st Respondent is a long-standing customer of the 2nd Respondent with several active facilities; that the 2nd Respondent advanced a facility of Kshs. 5,000,000 to the 1st Respondent which he secured through motor vehicle KCR 003A/Mitsubishi FN 627 which vehicle was registered in their joint names.
16. Further that the 2nd Respondent also advanced the 1st Respondent a facility of Kshs. 15.5 million which he also secured with KCR 003A and another motor vehicle. The 1st Respondent then requested that KCR 003A be released, which request was allowed subject to replacement of the security. The 1st Respondent thus provided the Log Book for KCZ 056L and the Logbook for KCR 003A released with instructions to transfer it to his name within 14 days.
17. The 2nd Respondent contended that it was served with an order to release information regarding the motor vehicles and the 1st Respondent's accounts, to which it had complied.
18. He further deposed that the 2nd Respondent was served with orders dated 22nd November 2022 prohibiting it from dealing with motor vehicles Registration. numbers KCR 003A and KCZ 056L. The orders were however vacated on 6th March 2023 at which time the Applicant was yet to file the forfeiture application, making the current application a contravention to Section 90 of the POCAMLA.
19. He further deposed that the 2nd Respondent is not involved in any money laundering activities and its only relationship with the 1st Respondent is as its customer. The 2nd Respondent was not involved in the process of acquisition of KCZ 056L, it is thus only registered in the names of the 1st and 2nd Respondents as it is a security for a loan, its interest only accruing through securitization. The loan to the 1st Respondent remains outstanding to the tune of Kshs. 671,776 as at July 2023, thus any orders against the security leaves it exposed and without collateral.
20. He contended that there was no evidence to demonstrate that the motor vehicle KCZ 056L was used in any money laundering activities or is a proceed of crime and it is in the interest of justice that it be excluded from forfeiture.
21. The 3rd Respondent did not enter appearance in the proceedings albeit being served by way of email.
22. The Originating Motion was canvassed by way of written submissions.

The Applicant's submissions

23. Learned Counsel for the Applicant, Mr. Muchui, submitted that the instant application, filed on 7th March 2022 was within the 90-day period provided by law after gazettelement of the preservation orders as 90 days from 2nd December 2022 should have lapsed on 25th March 2023. He explained that as per



- Order 50 Rule 4 of the Civil Procedure Rules as the period between 21st December and 13th January are omitted from the computation of time.
24. On the question of forfeiture of the motor vehicles, Counsel submitted that the transfer of KCR 003A from the 1st Respondent to the 3rd Respondent was done while the vehicle was under Police Custody. The 3rd Respondent had neglected to answer the Applicant's summons to record a statement or participate in the current proceedings. He had gone into Ethiopia during the proceedings and had not provided a legitimate source of his funds.
 25. He further submitted that under Section 2 of the POCAMLA, "realizable property" includes proceeds from instrumentalities, used or intended to be used in money laundering or predicate offenses as well as property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offense. The motor vehicle KCR 003A is thus realizable property as it was used in the ferrying of narcotic drugs. Further, he submitted that there are reasonable grounds to believe that the vehicle is a proceed of crime as the 3rd Respondent has not given any reasonable explanation to rebut the position. Applicant contended that he had proved on a balance of probabilities that the motor vehicle KCR 003A is a proceed of crime as defined in the POCAMLA and thus it ought to be forfeited to the State.
 26. Counsel further submitted that forfeiture proceedings are instituted under the Civil Procedure Rules and are proceedings in rem (against property) but are not intended to determine criminal liability of the Respondent hence they are independent of the outcome of any criminal proceedings instituted on the same facts.
 27. On forfeiture of motor vehicle KCZ 056L, Counsel submitted that the substitution of the security was meant to conceal the actual ownership of both motor vehicles and misrepresent the sources of funds in repayment of the loan facility. He submits that the vehicle is also a proceed of crime and should be forfeited to the state.
 28. Counsel submitted that the Originating Motion dated 2nd March 2023 is merited and the prayers sought should be allowed as prayed.
 29. The Applicant relied on the following cases in their submissions: Kenya Anti-Corruption Commission -v- Stanley Mombo Amuti (2017) eKLR Teckla Nandjila Lameck v President of Namibia 2012(1) NR 255 (HC)S

The 1st Respondent's submissions

30. Learned Counsel for the 1st Respondent, Mr. Oyaro submitted that the Applicant has not been able to put the 1st and 3rd Respondents at the scene of the crime as the motor vehicle KCR 003A had been leased to 3rd parties and the Respondents were unaware of their trade.
31. He further contended that the Respondent had furnished the court with all relevant documents to prove how the motor vehicle KCR 003A was acquired and sold as well as tendered evidence to show his sources of income
32. Counsel further submitted that the Applicant had not demonstrated how he obtained the 3rd Respondent's email address, on which he claimed to have effected service through.
33. He contended that the impoundment of motor vehicle KCR 003A due to the discovery of cannabis sativa does not automatically infer that the vehicle was a proceed of trafficking of narcotics and consequently a proceed of crime. That the Applicant has not demonstrated any other illegality outside of the singular incident.



34. On forfeiture of motor vehicle KCZ 056L, he submitted that it had not been proven to be a proceed of crime. The sale of KCR 003A necessitated the substitution of security with the Bank and the allegations of concealment are baseless. The 1st Respondent was in a financial position to afford the purchase of the motor vehicle and the Applicant had proved that the purchase was from proceeds of crime.
35. Counsel for the 1st Respondent contended that the Applicant had not discharged its burden of proof, linking the motor vehicles to illegal conduct and hence proceeds of crime within the meaning of POCAMLA. The 1st Respondent had on the other hand demonstrated how he lawfully came into possession of the motor vehicles in issue and sufficiently discharged his evidential burden.
36. He further submitted that forfeiture of the current motor vehicles is a violation of the 1st Respondent's right to property as guaranteed under Article 40 of the Constitution of Kenya.
37. The 1st Respondent relied on the following cases in their submissions: ARA V Pamela Aboo (2018) eKLRARA V Lilian Wanja Muthoni T/A Sahara Consultants & 5 Others (2020) eKLRARA V Charity Wangui Gethi (2018) eKLREACC V Jimmy Mutuku Kiamba Misc/Civil Application No. 804 of 2014 Abdulrahman Mahmoud Sheikh & 6 Others v Republic Emmanuel Suipenu Siyanga v Republic Cr. Appeal 209 (2013) eKLRARA V Fisher Rohan and Miller Delores, Supreme Court of Jamaica, Claim No. 2007 HCV 003259

The 2nd Respondent's submissions

38. Learned Counsel for the 2nd Respondent, submitted that preservation orders were gazetted on 2nd December 2022 and they lapsed on 2nd March 2023 yet the current application was filed on 6th March 2023. There was thus no preservation order in place when the present application was made.
39. He further submitted that the 2nd Respondent was only a registered owner of the subject motor vehicles by virtue of being a financier of the 1st Respondent. It could not have reasonably known of the narcotic trade charges as such information was not in the public domain.
40. He contended that it stood to suffer substantial loss if the motor vehicle KCZ 056L was forfeited as it was the sole security for a facility given to the 1st Respondent, and should a forfeiture order be made, there should be corresponding orders declaring its interest.
41. The 2nd Respondent thus submitted that it has proved on a balance of probabilities that it acquired an interest in the two vehicles unaware that they were tainted property. It had equally demonstrated its extent of interest in the property, which is capable of protection by the court. It contended that it exercised reasonable due diligence and should not be punished for offenses allegedly committed by the Respondents.
42. Counsel for the 2nd Respondent also submitted that it had made an application for exclusion under Section 93 of POCAMLA, which has been unopposed. He urged the court to be guided by the finding on Nandwa v Kenya Kazi Limited (1988) KLR 488 on the effect of failure to controvert facts and evidence tendered by the opposing party, and its facts and evidence stand unchallenged.
43. He further submitted that under Section 15 of the Moveable Property Security Act, 2017, its interest in the motor vehicle is effective against 3rd parties, including the Government.
44. He thus urged the court to exclude from forfeiture, Motor vehicle KCZ 056L.
45. The Respondent relied on the following cases in their submissions: ARA V Rose Momanyi Msanda; Sidin Bank Limited (Interested Party) (2020) eKLRARA V Phyllis Njeri Ngirita & 2 Others, Platinum



The Issues for determination

- i. Whether the preservation orders of 22nd November 2022 were in place at the time of filing the present application and whether the absence of a preservation order vitiates an application for forfeiture.
- ii. Whether the impugned motor vehicles are proceeds of crime;
- iii. Whether the motor vehicles should be forfeited to the government; and
- iv. Who should bear the Cost of the suit.

Analysis and Determination

Issue (i) - Whether the preservation orders of 22nd November 2022 were in place at the time of filing the present application and whether that vitiates this application.

46. Counsel for the 2nd Respondent submitted that the current proceedings are incompetent as the preservation orders had already lapsed by the time the current application was filed. However, Counsel for the Applicant contended that the Civil Procedure Rules provide for a period between when time ceases to count and hence the Applicant had until 25th March 2023 to file the instant application, and thus it was filed on time.

47. Section 84 of the POCAMLA states that:

“A preservation order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette, unless—

- a. there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order;
- b. there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or the order is rescinded before the expiry of that period.”

48. The POCAMLA anticipates a sequence within which property that is proceeds of crime can be preserved and then forfeited. My reading of Section 84 (a) of the POCAMLA is that a preservation order lapses if ninety days upon gazettelement of the order elapse before an application for forfeiture is filed. In my view Section 84(a) merely prescribes the duration of a preservation order but is not to be interpreted to prescribe the conditions for filing a forfeiture application. However, Section 90 (1) of the POCAMLA is emphatic that an application for forfeiture can only be filed where there is in place an order of preservation. The same states:

“90. Application for forfeiture order

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



49. Be that as it may, the Originating Motion herein is saved by the provisions of Order 50 Rule 4 of the Civil Procedure Rules that provides:-

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act.”

50. The preservation order having been gazetted on 22nd March 2022 and if the period between 21st December and 13th January is excluded then the application filed on the 7th March was within time.

Issue (ii) - Whether the impugned motor vehicles are proceeds of crime.

51. The Applicant contends that it has discharged its burden of proof by demonstrating that the Respondent, whose vehicle was impounded for ferrying narcotic drugs and who had no other declared source of legitimate income, was able to purchase the subject motor vehicles.
52. The 1st Respondent conceded that both motor vehicles that are subject of the current proceedings were indeed his property at some point, but that he sold motor vehicle KCR 003A to the 3rd Respondent for Kshs. 7.9 million and received a deposit of Kshs. 7.6 million with the balance of Kshs.300,000 being settled later. He explained that the funds used to purchase the motor vehicles were from legitimate cross-border businesses which he runs with his father. He named those businesses as the sale of cattle, milk, water and other items, and stated that the same fetch him an approximate profit of Kshs. 2 million per month. The 2nd Respondent also deposed that the 1st Respondent is a long-standing customer of the Bank, having several active facilities.
53. The 2nd Respondent also contended that he had presented sufficient evidence of his sources of income. In his Replying Affidavit, he attached an invoice of Kshs 61,200 for a dispatch of 13th July 2020, an invoice of Kshs. 104,040 for a dispatch of 14th August 2020, an invoice of Kshs, 39,168 for a dispatch of 31st July 2020, an invoice of Kshs. 91,800 for a dispatch of 29th June 2020, an invoice of Kshs. 135,450 for a dispatch of 27th April 2020, an invoice of Kshs. 59,400 for a dispatch of 11th February 2020, an invoice of Kshs. 147,735 for a dispatch of 20th April 2020, an invoice of Kshs. 122,400 for a dispatch of 14th April 2022, an invoice of Kshs. 106,470 for a dispatch of 16th April 2020 and an invoice of Kshs. 110,250 for a dispatch of 4th May 2020, all by Canaan Factories Limited Dairy Division. He also presented a memorandum of understanding between himself and Canaan Factories Limited where he was appointed as a Distributor and the proceeds of the sales would be deposited into Canaan Factories account.

Issue iii: Whether the motor vehicles should be forfeited to the government

54. The Applicant submitted that the impugned motor vehicles are proceeds of crime based on the fact that KCR 003A was impounded ferrying narcotic drugs, that it was sold after impoundment, and replaced as a security with KCZ 056L, to allow for its transfer to the 3rd Respondent. The Applicant also submitted that the motor vehicles also fell under the meaning of “realizable” security under Section 2 of the POCAMLA.
55. The Applicant further contends that the 1st Respondent has been unable to explain the source of the income used to purchase the subject motor vehicles.



56. The 1st Respondent, though conceding that the motor vehicle KCR 003A was impounded with Narcotic drugs, explained that at the material time, the vehicle was leased to third party who had insisted on using his own driver, and that he had no notice of the kind of trade the lessee engaged in. He also conceded that despite selling the vehicle to the 3rd Respondent, he had possession of it. He did not controvert the allegation that the vehicle was released from the 2nd Respondent and transferred to the 3rd Respondent after impoundment. He however denied the allegation by the Applicant that the transfer was meant to conceal the ownership of the vehicle as well as the mode of acquisition.
57. Section 2 of the POCAMLA which provides:
- “realizable property” means-
- a. property laundered;
 - b. proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences;
 - c. property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and
 - d. property of corresponding value;
58. Section 2 of the POCAMLA defines further 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.”
59. The threshold for assets to be found to be proceeds of crime was explained in the case of Director of Assets Recovery Agency & others -v- Green & Others [2005] EWHC 3168 where it was stated:-
- “In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”
60. In a forfeiture application, the burden of proof first lies with the Applicant to demonstrate that indeed the Respondents hold assets that are not supported by their known sources of income and/or may be reasonably presumed to be proceeds of crime. Once the Court is satisfied of this position, the burden of proof then shifts to the Respondents to adequately demonstrate that the source of the assets is legitimate.
61. In the matter of ARA V Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica Claim No. 2007 HCV003259 held that:-
- “Even though these proceedings are Quasi- Criminal in nature, there is an evidential burden of proof on the Defendant. It is incumbent to then to demonstrate evidentially how they lawfully came into possession of the assets seized. . . There is no indication of any work place or higglering or any enterprise on her part, The only reasonable and inescapable inference



is that the property seized are obtained through unlawful conduct and are therefore recoverable properties.”

62. The Applicant has discharged its burden of proof in regard to the motor vehicle KCR 003A being involved in unlawful conduct, and that its source has not been adequately explained. The evidential burden then shifted to the Respondents to explain the legitimacy of the property sought to be forfeited.
63. The 1st Respondent has not provided a reasonable explanation as to why he sold the motor vehicle to the 3rd Respondent yet the motor vehicle had already been impounded. He has also not provided a sale agreement or any other document to prove that the alleged consideration moved from the 3rd Respondent to himself. It is also interesting that he has opposed the application for its forfeiture though the vehicle no longer belongs to him. It is instructive that the National Transport and Safety Authority motor vehicle copy of Records indicate that as at 29th July 2022 the motor vehicle was still in the names of the 1st and 2nd Respondents. It is also instructive that the 1st Respondent’s replying affidavit is silent as to the date he sold the vehicle to the 3rd Respondent. No sale agreement, as I have stated, was annexed. Any alleged sale would in my view be but an attempt at concealing the asset which is also a pointer to its illegitimate source. He also conceded that the vehicle KCZ 056L was only given as a security to the 2nd Respondent as a pre-condition to secure the release of the motor vehicle KCR 003A.
64. I have found elsewhere in this judgement that indeed the 1st Respondent has failed to discharge its evidential burden of explaining the source of his funds used to purchase the subject motor vehicle.
65. In his statement recorded with Assets Recovery Agency, the 1st Respondent conceded that the vehicle KCR 003A was impounded while ferrying narcotic drugs and that conclusively that the vehicle is an instrumentality of crime and as such it falls within the purview of realizable property as defined in Section 2 of the POCAMLA as submitted by Counsel for the Applicant. However, there being no evidence on a balance of probabilities that the substitute vehicle was either a proceed of crime or an instrumentality of crime removes it from the purview of realizable property. Although he alleges that the statement was obtained through coercion I do not believe him as the statement is so detailed as to rule out coercion. Moreover, he has not given this court any reason that the officer who investigated this matter had any reason to coerce him or indeed any other witness to record a statement.
66. Section 20 of the Narcotic Drugs and Psychotropic Substances (Control) Act states that:
“
“(1) Any machinery, equipment, implement, pipe, utensil, or other article used for the commission of any offence under this Act shall be forfeited to the Government.

(2) Every conveyance used for the commission of any offence under this Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under this Act, or any narcotic drug or psychotropic substance, shall be forfeited to the Government:
Provided that where, on application made by the person who was the owner of the conveyance to the court in which any prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under Part IV is pending, the court is satisfied beyond reasonable doubt that—
 - a. the person who was the owner of the conveyance, and



- b. in the case of an aircraft or ship, every person who was a responsible officer thereof.

when it was made use of for such conveyance, was not concerned in or privy to such use, the conveyance shall be restored to the owner by the court.”

67. There being no question as to whether the vehicle KCR 003A was used to ferry narcotic drugs and the owner, who is alleged to be the 3rd Respondent having not made any application to this court to bar such forfeiture this court proceeds to make the declaration sought in respect to the said vehicle and to order its forfeiture to the Government.

68. This brings us to the question of the 2nd Respondent’s interest in motor vehicle KCZ 056C. The 2nd Respondent claims that it is the only security it holds for a facility given to the 1st Respondent and a forfeiture would expose it to the tune of Kshs. 671,776 as at July 2023. It further contends that its application for exclusion of the motor vehicle from these proceedings is uncontroverted and thus unchallenged. It also avers that its interest in the motor vehicle, being registered, supersedes all other third parties as per Section 15 of the Movable Property Security Rights Act.

69. Section 93(1) of POCAMLA under which the application for exclusion was made states:-

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

- a. that the person was not in any way involved in the commission of the offence; and
- b. where the person acquired the interest during or after the commission of the offence, that he acquired the interest—
 - i. for sufficient consideration; and
 - ii. without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property.”

70. It is my finding that the 2nd Respondent cannot rely on the provisions of Section 15 of the Movable Property Security Rights Act as it is superseded by Section 131 of the POCAMLA which states: -

“ 131. Supersession

Where there is a conflict between the provisions of this Act and the provisions of any written law with regard to any matter, the provisions of this Act shall prevail.”

71. Be that as it may, it is not in doubt that the 2nd Respondent acquired an interest in motor vehicle KCZ 056L when the 1st Respondent substituted it as a collateral in place of motor vehicle KCR 003A after it was impounded by the police. I have carefully considered the evidence placed before me by the Applicant and I am not persuaded that there is proof on a balance of probabilities that this particular vehicle KCZ 056L is either a proceed of crime or an instrumentality of crime as would warrant this court to order it forfeited. In my view the mere fact that it was charged on the bank in place of the other vehicle does not of itself make it tainted. In the premises there shall be no declaration in respect thereto.



72. However, having found that motor vehicle KCR 003A is a proceed of crime, I allow Prayers 1 and 3 of the Originating Motion dated 2nd March 2023 and order that the motor vehicle shall be forfeited to the state.

73. The costs of the proceedings shall be borne by the 1st and the 3rd Respondents jointly and severally.

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

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E. N. MAINA

JUDGE

