



Assets Recovery Agency v Timami & another (Anti-Corruption and Economic Crimes Civil Suit E015 & E019 of 2023 (Consolidated)) [2024] KEHC 3197 (KLR) (Anti-Corruption and Economic Crimes) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3197 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL SUIT E015 & E019 OF 2023 (CONSOLIDATED)

EN MAINA, J
MARCH 20, 2024

BETWEEN

THE ASSETS RECOVERY AGENCY APPLICANT

AND

ABDULMAJID MSALLAM TIMAMI 1ST RESPONDENT

SAID MSELEM ABDALLAH 2ND RESPONDENT

JUDGMENT

1. The consolidated Originating Motions herein, dated 12th June 2023 and 7th August 2023, are brought under Sections 81, 82, 90, and 92 of the [Proceeds of Crime and Anti-Money Laundering Act](#) (the POCAMLA) and Order 51 Rule 1 of the Civil Procedure Rules.
2. By the motions, the Applicant seeks a declaration that the below listed properties, which belong to the Respondents, are proceeds of crime and consequently an order of forfeiture of the properties to the government of Kenya:
 - * Motor Vehicles: KAZ 161M, KCC 232R, KCT 180M, KAE 005A, ZF 6293, ZF 8270, KCQ 854X, KCV 459T, KCP 632F, KCL 444U, KBQ 410Y;
 - * Immovable Property:
 - * LR NO MOMBASA/ MWENBELEGEZA/1385,
 - * LR NO C.R 66464 MOMBASA MUNICIPALITY SUB DIV NO. 14173(ORIGINAL NO. 14152/22) SECTION 11 MAINLAND NORTH, SURVEY PLAN NO. 2371828;



* LR NO. C.R 65470 MOMBASA MUNICIPALITY SUB DIV NO. 14171 (ORIG SUB DIV NO. 14152/20) SECTION 11 MAINLAND NORTH, SURVEY PLAN NO. 371826,

* LR NO. C.R 66469 MOMBASA MUNICIPALITY SUB DIV NO. 14170 (ORIG NO.14152/19) SECTION 11 MAINLAND NORTH, SURVEY PLAN 371825,

* ALL RENTAL INCOME ACCRUING FROM THE DEVELOPMENTS ON THE ABOVE LAND PARCELS.

3. Additionally, the Applicant seeks;
 - a. An order directing the Director of NTSA to effect transfer of the impugned motor vehicles to the Applicant.
 - b. A vesting order directing the Chief Land Registrar (Mombasa) to effect transfer of the impugned land parcels to the Applicant.
 - c. THAT the Court makes any other ancillary order it considers appropriate to facilitate the transfer of the forfeited property to the Government of Kenya.
4. The impugned properties are the subject of a preservation order granted by this court on 28th July 2023 and gazetted by the Applicant vide Gazette Notice No. 7185 of CXXV-No. 170.

The Parties

5. The Applicant, which is a State Agency, is a body corporate established under Section 53 of the POCAMLA with the mandate of identifying, tracing, freezing and instituting proceedings for the forfeiture of property to the government where such property is proceeds of or is an instrumentality of crime. Section 53A of the POCAMLA also cloths the Agency with police powers to carry out investigations.
6. The 1st Respondent is described as a resident of Mombasa County and the registered owner of the impugned land parcels (save for Land Parcel L.R NO. MOMBASA/MWEMBELEGEZA/1385) and the beneficial owner of the motor vehicles.
7. The 2nd Respondent is described as a Tanzanian national and the registered proprietor of Land Parcel L.R NO. MOMBASA/MWEMBELEGEZA/1385.
8. The applications were canvassed by way of affidavit evidence and written submissions. The Applicant was represented by Miss Ngelechei while the firm of Mwadumbo & Company Advocates appeared for the Respondents.

The Applicant's case

9. The genesis of these applications is the arrest, trial and subsequent conviction of the 1st Respondent for the offence of trafficking in narcotic drugs. The Applicant alleges that sometimes in the year 2019 it received information that the Directorate of Criminal Investigations was investigating the 1st Respondent for suspected drug trafficking; that thereafter the 1st Respondent was arrested and arraigned in the Mombasa Chief Magistrate's CRC NO. 532/2019 for trafficking 1015.8 grams of heroin worth Kshs.3,047,400. The charge stated that the heroin was being conveyed in motor vehicle Regn. No. KCT 180M Honda CRV.
10. The Applicant contends that following the arrest and arraignment of the 1st Respondent it instituted its own investigations into his financial affairs; that it obtained warrants to investigate the 1st Respondent's



bank and M-pesa accounts, vide Misc. Criminal Application No. E2655 of 2021 and Misc. Criminal Application No. 2656 of 2021.

11. According to Corporal Isaac Nakitare, an investigator with the Agency and the deponent of the affidavit in support of the Motions, the 1st Respondent had accounts in Gulf Africa Bank Limited, ABSA and NCBA Banks; that upon obtaining the warrants he obtained statements of the 1st Respondent's said bank and M-pesa accounts; that an analysis of the statements revealed that the 1st Respondent had transacted a lot of money through those accounts during the period it was suspected he was carrying on the illegal trade.
12. Isaac Nakitare deposed that he established that the 1st Respondent's bank Account number 010309930501 at Gulf African Bank Limited was credited with Kshs.75,896,816.75 and debited Kshs.75,795,967.89 between October 2017 and August 2019. Out of this, a sum of Kshs. 33,783,466.00 was from different individuals through deposits, transfers and cheques of between Kshs.5000 and Kshs.10 million; Kshs.35,650,000 was from a fixed deposit which yielded a profit of Kshs.527,965.75 in period of three months; that Kshs.32,602,798.89 was withdrawn from the account in tranches of between Kshs.7,400 and Kshs.10,000,000. Corporal Nakitare deposed that the analysis also revealed that there were also ATM withdrawals of Kshs.61,604,000 from that account and that on 25th April 2018 a sum of Kshs.1,835,400 from that account was expended to purchase of a truck.
13. Corporal Nakitare deposed that between 3rd January 2014 and 16th September 2020 the 1st Respondent's NCBA Account No. 1000263539 received Kshs.155,061,904.56 and debits of Kshs. 154,532,486.40. The money came from different sources with the 1st Respondent being the biggest depositor through tranches ranging between Kshs.10,000 and Kshs.2,100,000 daily; that from the year Kshs.8,684,500 was transacted via M-pesa; that the cash, cheque and transfer withdrawals lacked clear narration of the beneficiaries; that on select dates, deposits into the account were made in tranches of between Kshs.900 and Kshs.950 to avoid the reporting threshold; that between 2014 and 2017, about ten deposits were utilized towards the purchase of various motor vehicles.
14. Further that between 21st March 2012 and 2nd April 2020 the 1st Respondent's Account No. 2024901761 at Absa Bank received suspicious deposits of Kshs.6,955,000 which had no narrations and debits of Kshs.6,250,014 in cash and outward remittances; that between 18th September 2020 and 31st August 2021 the 1st Respondent's Account No. 1454710067-1300015298 at NCBA, had suspicious credits of Kshs.6,760,300 and debits of Kshs.5,272,554 withdrawn via over the counter, at the ATM and through cheques.
15. Further, that an analysis of the 1st Respondent's NCBA USD Account No. 1004510743 for the period between 6th January 2018 and 31st May 2021 revealed suspicious credits of USD 669,252 and debit of USD 642,160 which included a cash withdrawal of USD 562,650; that the 1st Respondent's USD Account at NCBA number 1454710051-1004510743 analyzed for the period between 18th September 2020 and 31st May 2021 revealed suspicious credits of USD 155,192.36 and debits of USD 155,192. Deposits were in tranches below Kshs.1 million to avoid the reporting threshold.
16. It is further averred that the 1st Respondent used the money in the accounts to acquire the landed properties, the subject of the applications herein so as to launder the money; that he caused LR NO Mombasa/Mwembelegeza/1385 to be registered in the name of the 2nd Respondent so as to disguise and conceal its true ownership and source; that he is the owner of this property arises from the fact that he is the one who has signed the Lease, lodged the requisite application for approval to develop the property to the National Construction Authority, that the person who manages the property recorded a statement to the effect that she was his agent and that as a matter of fact the said agent remitted the



rental income from the property to the 1st Respondent and other persons associated with him through M-pesa but not to the 2nd Respondent.

17. It is also the Applicant's case that the Respondents have not proffered any explanation as to the source of the properties or demonstrate a legitimate source of income; that the 2nd Respondent had also not shown justification for exclusion of the property registered in his name from the proceedings; that the signature on the Lease pertaining to that property was found to resemble that of the 1st Respondent by the document examiner; that as the 2nd Respondent had declined the Applicant's invitation to explain the source of the property he had not demonstrated a legitimate source of income and hence the only logical conclusion was that the 1st Respondent acquired that property using proceeds of crime and registered it in the name of the 2nd Respondent so as to disguise its source.
18. The Applicant avers that on 19th January 2023 the 1st Respondent was found guilty and convicted for the offence of trafficking in narcotics contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* and the pending appeal has no bearing on these proceedings as civil forfeiture is not dependent on the outcome of criminal proceedings.

The 1st Respondent's case

19. The 1st Respondent opposed the application through his replying affidavit, dated 18th February 2023 where he deposes that the source of the monies in his bank accounts were from legitimate businesses; that he is not the owner of property LR Number MOMBASA/MWEMBELEGEZA/1385; that he did not contract the agent who manages that property; that the impugned properties are not proceeds of crime and that the allegations had not been substantiated by evidence.
20. He averred that he had appealed against the conviction and contended that the appeal had a high probability of success and hence these applications should be dismissed.

The 2nd Respondent's case

21. On his part the 2nd Respondent filed a Replying Affidavit, dated 18th July 2023 and a Further Affidavit dated 14th September 2023. He deposes that he is the registered owner of LR N0 MOMBASA/MWEMBELEGEZA/1385; that he purchased that property from one Hadija Bakari through an agreement for sale dated 16th January 2017 which he annexed to the replying affidavit. He vehemently denied that the property was a proceed of crime and contended that the applications herein are vexatious, frivolous and a gross abuse of court process.
22. He stated that the Applicant had not presented a single transaction between the 1st Respondent and himself and had thus failed to demonstrate that the property is a proceed of crime; that contrary to the Applicant's allegation, Yusra Swaleh Badru is his agent and manager through his wife but not the agent of the 1st Respondent; that a one off payment of Kshs.250,000 was paid by the agent to the 1st Respondent, who is his brother, on 1st May 2021 upon his instructions as the 1st Respondent was experiencing financial difficulties and he needed money to settle a medical bill. He contended that at no other time did he cause money to be sent to the 1st Respondent and that the sum paid was not so significant as to amount to proceeds of crime. He explained that the other monies sent by the agent were to cater for the service charge of the flats and that the Applicant had failed to establish any link between the parties paid and the 1st Respondent.
23. He contended that he has never been charged with any anti-corruption offence; that he was not party to the criminal proceedings involving the 1st Respondent and that there had been no transactions between the two. He stated that the preservation orders granted by this court have occasioned a loss of income



to him yet he is ailing and has no other source of income and it is therefore in the interest of justice that the property be exempted from forfeiture.

24. In the further affidavit sworn on 14th September 2023, he deposes that the signature appearing on the Lease for LR NO Mombasa/Mwembelegeza/1385 is his own signature though he acknowledged that it does resemble that of the 1st Respondent. He urged this court to exempt the property from these proceedings.

The Applicant's submissions

25. Miss Ngelechei, Learned Counsel for the Applicant, submitted that these proceedings are premised on facts established following investigations into the Respondent's illegal trafficking of narcotics, for which crime the 1st Respondent was convicted and jailed for 15 years; that investigations of the 1st Respondent's accounts uncovered huge suspicious deposits; that the said deposits had no clear narrations and were made just below the reporting threshold, indicating activities of money laundering; that ten transactions had narrations which pointed to the purchase of different motor vehicles and further that the money would be withdrawn as soon as it was deposited either at the ATM, by cheque or in cash. Counsel stated that the 1st Respondent's bank and M-pesa accounts were used as conduits to receive, transfer, disguise and conceal the origin of funds acquired through proceeds of the trade in narcotic drugs. The asset properties were then acquired using those proceeds.
26. Counsel submitted that the 2nd Respondent is a proxy intended to conceal and disguise the real ownership of property LR Number MOMBASA/MWEMBELEGEZA/1385 which was acquired by the 1st Respondent through proceeds of crime and registered in the name of the 2nd Respondent. Counsel contended that the document examiner confirmed that the signatures on the certificate of Lease and the application for approval for construction belong to the 1st Respondent; that the Manager of the property remits the rent collected partly to the 1st Respondent and partly to the associates of the 1st Respondent. Counsel submitted that, in her statement the said Manager admitted that on 21st May 2023 she sent money to different people, among them, the 1st Respondent; that the Manager alleged that she would send the rent to the 2nd Respondent but did not provide details of the remittance. Counsel submitted that it is therefore evident that the property was acquired by the 1st Respondent through the 2nd Respondent so as to conceal the real ownership. Counsel asserted that the 2nd Respondent did not demonstrate why that property should be excluded from forfeiture.
27. Counsel further stated that the Respondents did not demonstrate how the subject assets were acquired or establish any legitimate sources of income.
28. She asserted that these proceedings are not affected by the outcome of the criminal proceedings as alleged by the Respondents; that the Applicant has proved on a balance of probabilities that the suit properties are proceeds of the crime committed by the 1st Respondent and therefore liable to forfeiture under Section 92(1) of the POCAMLA and that the Respondents had not adduced evidence to rebut that of the Applicant.
29. Counsel submitted that the right to property does not extend to property that is unlawfully acquired. She urged this court to allow the applications as declining the same would allow the Respondents to draw economic advantage from commission of crime to the disadvantage of the general public.
30. Counsel placed reliance on the following cases:
- * Director of Assets Recovery & Others, Republic v Green (2005) EWHC 3168
 - * Abdulrahman Mahmud Sheikh & 6 others v Republic & Others [2016] eKLR



- * Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7
- * ARA V Quorum Limited & 2 others [2018] eKLR
- * Miller v Minister of Pensions (1947) 2 ALL ER 372
- * ARA V Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No. 2007 HCV003259
- * KACC V Stanley Mombo Amuti [2017] eKLR
- * Teckla Nandjila Lameck V President of Namibia 2012(1) NR 255(HC)
- * Martin Shalli V Attorney General of Namibia & amp, Others High Court of Namibia Case No. POCA 9/2011
- * Philip V The United Kingdom (2001) ECHR 437
- * KACC V James Mwachethe Mulewa and another [2017] eKLR

The 1st Respondent's submissions

31. The Respondents filed separate submissions although they were represented by the same firm of Advocates. For the 1st Respondent it was submitted that these applications are premature as the appeal challenging his conviction is yet to be heard; that suspicion is not a basis for condemnation; that the Applicant has not proved that the properties are proceeds of crime; that a person only becomes a criminal upon conviction, before which he is a suspect and that the property can only be forfeited in a criminal court and further that the Applicant had not discharged the onus placed upon it by Section 92 of the POCAMLA. Counsel argued that moreover, the section contravenes the right to fair trial guaranteed under Article 50 of *the Constitution* of Kenya 2010, and a forfeiture application ought only to be entertained after a conviction and after avenues for appeal have been exhausted.
32. Counsel stated that under Section 65 of the POCAMLA, an Applicant must demonstrate that an offense was committed and as the Appeal is pending this court cannot grant forfeiture orders. Counsel contended that all the Applicant did was make allegations and placed the burden on the Respondents to explain the source of the assets. Counsel submitted that under Sections 107,108 and 109 of the *Evidence Act* the burden of proof remains with the Applicant.
33. Counsel asserted that the Applicant had not met the required standard of proof; that the standard applicable in the current proceedings is an intermediate standard of proof which is higher than a balance of probabilities but less than the criminal standard of “beyond reasonable doubt”; that the Applicant had also not met the threshold set out in Order 2 Rule 1 of the Civil Procedure Rules that information on the circumstances in which it is alleged that liability has arisen be set out in every pleading, and further that the facts presented by the Applicant do not meet those requirements.
34. Counsel stated that the 1st Respondent explained that his funds are from a legitimate source as required by Section 65 of the POCAMLA whereas the Applicant had not established a prima facie case. Counsel averred that the 1st Respondent did not breach banking procedures; that the 1st Respondent has a right to property guaranteed under Article 40 of *the Constitution* and the applications herein should be dismissed with costs.
35. Counsel relied on the following cases:
 - * Stanley Mombo Amuti V Kenya Anti-Corruption [2019] eKLR
 - * Eastern Produce (K) Ltd – Chemomi Tea Estate V Bonfas Shoya [2018] eKLR
 - * Mbutia Macharia V Annah Mutua Ndwiga & Anor [2017] eKLR



* Evans Kidero V Speaker of the Nairobi City County Assembly & Anor [2018] eKLR

The 2nd Respondent's submissions.

36. Learned Counsel for the 2nd Respondent, submitted that the property LR NO MOMBASA/MWEMBELEGEZA/1385 and the developments thereon are not proceeds of crime. Counsel contended that the 1st Respondent's dealings should not be used to paint the 2nd Respondent, who has never been charged with any offense, as a criminal. Counsel stated that the sources of the 2nd Respondent's funds are separate, legitimate and verifiable and are not in any way connected to those of the 1st Respondent.
37. Counsel submitted that the property does not fit the definition of proceeds of crime as provided in Section 2 of the POCAMLA. Further, that the 2nd Respondent's right to property is guaranteed under Article 40 of *the Constitution* and that Section 2 of the POCAMLA requires that the applicant discloses an offense yet none had been disclosed on the part of the 2nd Respondent.
38. Counsel submitted that the 2nd Respondent's property is not liable to forfeiture; that the 2nd Respondent had demonstrated how he had acquired it; that the property was acquired way before 2019 when the 1st Respondent was arrested and charged and that property cannot be forfeited on mere suspicion. For this submission Counsel relied on the case of Ethics and Anti-Corruption Commission V Jimmy Mutuku Kiamba & Others [2019] eKLR where the Court excluded properties acquired before the period of interest.
39. Counsel further submitted that the burden of proof rests and remains with the Applicant to establish a causal link between the property and the suspicious criminal activity yet it had not even established a prima facie case.
40. Counsel argued that in this case, the standard of proof was intermediate and above the balance of probabilities.
41. On the question of ownership of LR NO MOMBASA/MWEMBELEGEZA/1385, Counsel contended that the title and transfer documents presented by the 2nd Respondent were not controverted and should be accepted as genuine and legitimate. He urged this court to find that the property belongs to the 2nd Respondent and hence dismiss the application for its forfeiture with costs.
42. Counsel relied on the following cases to support his submissions:
 - * Ethics and Anti-Corruption Commission V Jimmy Mutuku Kiamba & Others [2019] eKLR
 - * Ethics and Anti-Corruption Commission V Ministry of Medical Services & Anor [2012] eKLR
 - * Eastern Produce (K) Ltd – Chemomi Tea Estate V Bonfas Shoya [2018] eKLR
 - * Mbuthia Macharia V Annah Mutua Ndwiga & Anor [2017] eKLR
 - * State of New Jersey V 4194.00 In US Currency
 - * Honeycutt V United States 581 (2017)
 - * Evans Kidero V Speaker of the Nairobi City County Assembly & Anor (2018) eKLR
 - * Philip Muiruri Ndaruga V Republic (2016) eKLR



The Issues for determination

- i. Whether Section 92 of the POCAMLA violates the right to fair trial guaranteed under Article 50 of *the Constitution*.
- ii. What is the standard of proof applicable to proceedings for civil forfeiture and whether in this case the Applicant has discharged that standard.
- iii. Whether the suit properties ought to be forfeited; and
- iv. Who should bear the costs of this case.

Issue No. (i): Whether Section 92 of the POCAMLA violates the right to fair trial.

43. Learned Counsel for the 1st Respondent submitted that to the extent that Section 92 of the POCAMLA permits forfeiture of property before the right of appeal is extinguished then it is unconstitutional. Counsel also argued that the section is also unconstitutional to the extent that it permits forfeiture before one's guilt is adjudged. Both arguments were however discounted by Counsel for the Applicant.
44. Among the rights guaranteed under Article 50 of *the Constitution* are the right to have any dispute heard and decided in a fair and public hearing before a court of law; the right to be presumed innocent until proved guilty and if convicted to appeal to, or apply for review by, a higher court as prescribed by law. On the other hand, Section 92(1&4) of the POCAMLA provide as follows:

“92(1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—

 - a. has been used or is intended for use in the commission of an offence; or...

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated....”
45. It is now settled that civil forfeiture proceedings are not aimed at the guilt of the owner but, rather they are proceedings in rem, against the property. The law recognizes that in some instances there may not even be anyone to convict and for that reason provides that the absence of a person whose interest may be affected by a forfeiture order does not prevent the court from making the order. Even where a person is tried for an offence and is acquitted the court would still be required to inquire into the question of the source of the property should that issue be before it. It is instructive that these proceedings which are prescribed under PART VIII of the POCAMLA are distinct from Criminal Forfeiture which is prescribed under PART VII of the Act. Section 65 of the POCAMLA applies to the latter but not the former. There is no allegation that this court shall not afford the Respondents a fair hearing merely because one has appealed and the other has not been convicted. Their right to fair trial in this court remains intact and I am not persuaded therefore that Section 92 of the POCAMLA is unconstitutional.



46. My so saying finds support in the case of Audrene Samantha Rowe & Others Civil of Division Claim No. 2012 HCV 02120 the Court held that:

“ . . . Civil recovery proceedings are directed at the seizure of property found, on a balance of probabilities, to be proceeds of crime, and not the conviction of any individual.” And in the case of Director of Assets Recovery Agency & others -v- Green & Others [2005] EWHC 3168 where the court 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.”

47. Moreover, in this case there is no dispute that the 1st Respondent was charged, tried, convicted and jailed for the offence of trafficking in narcotics. In the circumstances he no longer enjoys the presumption of innocence and as civil forfeiture is not dependent on the outcome of criminal proceedings the appeal cannot prevent this court from granting the order.

48. It has also been argued that these proceedings ought to have been instituted before the criminal court. However, as I have already stated this is an application for civil forfeiture and Section 90(1) of the POCAMLA expressly provides that the same should be instituted in the High Court. Section 81 of the Act is also clear that the proceedings shall be civil proceedings. The argument does not therefore have any basis. Indeed, even under the Narcotic Drugs and Psychotropic Substances Control Act the only forfeiture order that is entertained by the trial court is that of the conveyances of the drugs but not the proceeds thereof (see Section 20 of the *Narcotic Drugs and Psychotropic Substances (Control) Act*).

Issue No. (ii): What is the standard of proof applicable to proceedings for civil forfeiture and whether in this case the Applicant has discharged that standard.

49. There is no dispute that the burden of proof in this case lies on the Applicant. However, learned Counsel for the Respondents contends that the standard of proof applicable to the proceedings is an intermediate standard that is above a “balance of probabilities” but below “beyond reasonable doubt”. He relied on the case of Evans Kidero v Speaker of the Nairobi City County Assembly and another [2018] eKLR. My finding however, is that that case is distinguishable from this case because unlike in that case here there is no allegation of fraud. It is my finding that the standard of proof having been prescribed in Section 92 (1) of the POCAMLA as being on a balance of probabilities this court has no alternative but to ascribe to the same. The section states:

“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—... ” (emphasis mine).

50. The next issue for determination is whether the Applicant has discharged its burden of proof or in other words whether the Applicant has proved that the suit properties are proceeds of crime. The Applicant argues that it has discharged the onus and the standard of proof by proving that the 1st Respondent was convicted for the offence of trafficking in narcotic drugs by a competent court; that it has also adduced evidence that during the period the properties were acquired the 1st Respondent’s bank and M-pesa accounts received huge suspicious deposits which could only have come from the illegal trade; that it has also demonstrated that the property registered in the 2nd Respondent’ name belongs to the 1st Respondent but was so registered to conceal the source of funds and further that the Respondents have not rebutted the Applicant’ case. On their part the Respondents contend that the



Applicant has not adduced cogent evidence that the properties are proceeds of crime but, is instead relying on generalization and mere suspicion; that the Applicant has not established a prima facie case and that they have proved that they acquired the properties lawfully and hence the same are not liable for forfeiture. The 1st Respondent also argued that he has demonstrated that the monies transacted through his accounts were from legitimate business and that the property in the name of the 2nd Respondent belongs to the 2nd Respondent but not him and as the 2nd Respondent has not been charged with any anti-corruption offence his property should be excluded from these proceedings.

51. I have carefully considered the evidence by both sides, the rival submissions, the cases cited and the law. As stated earlier, to succeed, the Applicant must prove on a balance of probabilities that the impugned properties are proceeds of crime. It is also trite that whereas the Respondents also bear an evidentiary burden, the Applicant must discharge its legal burden before the evidentiary burden can shift. It is also trite that the evidentiary burden is not static but oscillates between the parties depending on the circumstances. Further, whereas the Applicant need not prove a specific offence, it must establish not only some unlawful conduct but must also prove a causal link between the offence or unlawful conduct and the property (see the case of Pamela Aboo V Assets Recovery Agency and the Ethics and Anti-Corruption Commission, Civil Appeal No. 452 of 2018 (unreported). In the case of Director of Assets Recovery Agency & others V GREEN & others [2005] EWHC 3168 the court 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.”

52. It is my finding that in this case, the Applicant has adduced cogent evidence to prove that the 1st Respondent was involved in the trafficking of narcotics which is a criminal offence in this jurisdiction. The Applicant need not prove any other offence or unlawful conduct. As for causal link between the criminal offence and the properties it is my finding that there is evidence that proves that the suit properties registered in the 1st Respondent’s name were acquired during the period he was under investigation. I have also perused the documents evidencing the movement of the monies in his M-pesa and bank accounts and I am persuaded that indeed those accounts received unusually large amounts of cash. It is instructive that the monies would more often than not be withdrawn in tranches intended to circumvent the reporting threshold hence making the source of the funds suspicious. That the withdrawals do not have the requisite narrations as to the source does not help matters. In my view the evidence placed before this court surpasses mere generalization and suspicion. I am satisfied therefore that the Applicant has discharged its legal burden of proof sufficiently as to warrant the evidentiary burden to shift to the 1st Respondent.
53. Other than asserting that the source of the money in his accounts was from legitimate business the 1st Respondent did not adduce proof of such business. The Applicant’s evidence has therefore not been rebutted. In the premises it is my finding that the monies could not have been from any source other than the illegal trade. Clearly therefore the suit motor vehicles and landed properties in the 1st Respondent’s name are proceeds of crime.
54. As for the property LR NO MOMBASA/MWEMBELEGEZA/1385 I find it a fact from the evidence that the same legally belongs to the 1st Respondent and is only registered in the name of the 2nd Respondent to conceal and disguise its source. Why do I say so? I say so because whereas it is the 2nd Respondent who executed the sale agreement, the Lease which is the document which evidences ownership is signed by the 1st Respondent. It is also the 1st Respondent, not the 2nd Respondent, who sought the approval for development of that property which goes further to prove that the



property belongs to the 1st Respondent. Whereas there is evidence that demonstrates that the 1st Respondent received money from the agent of that property, such as the Kshs.250,000 admitted by the Respondents, there is no evidence that the 2nd Respondent received any financial benefit from the property as would be the case if it was his. I do not find the explanation that the payment made to the 1st Respondent was a one off payment. The explanation that the 1st Respondent was financially hard pressed is also not convincing given that his accounts still had a lot of money. It is my finding that the payments sent to him and his associates in the form of rent were paid to him as the owner of the property. Its registration in the name of the 2nd Respondent was merely intended to launder the dirty money. I find therefore that this property is also tainted and hence realizable.

Issue No. (iv): Whether the properties should be forfeited to the State:

55. Having come to the conclusion that the motor vehicles and landed properties are proceeds of crime I have no alternative but to declare them forfeited to the Government of Kenya and I do so order. However, I take note of the trial magistrate's judgment delivered on 5th January 2023 which forfeited motor vehicle KCT 180M CRV Honda and accordingly remove the motor vehicle KCT 180M CRV Honda from the list of the motor vehicles to be forfeited in this case.

Issue No. (v): *Who shall bear the costs of this case:* _____

56. As a general rule costs follow the event and as there is nothing exceptional about this the costs shall be borne by the Respondents.
57. Accordingly I enter judgement in favour of the Applicant against the 1st and 2nd Respondent as follows:-
- a. THAT a declaration be and is hereby issued that the following motor vehicles are proceeds of crime: KAZ 161M, KCC 232R, KCT180M, KAE 005A, ZF 6293, ZF 8270, KCQ 854X, KCV459T, KCP632F, KCL 444U, KBQ 410Y.
 - b. THAT the aforestated vehicles be and are hereby forfeited to the government of Kenya.
 - c. THAT an order be and is hereby issued directing the Director of the NTSA to effect transfer of the vehicles to the Applicant.
 - d. THAT a declaration be and is hereby issued that the following immovable properties are proceeds of crime and the same are hereby forfeited to the government of Kenya: LR NO MOMBASA/MWEMBELEGEZA/1385 and all income accruing therefrom, LR NO C.R 66464 MOMBASA MUNICIPALITY SUB DIV NO 14173 (ORIG NO 14152/22) SECTION II MAINLAND NORTH, SURVEY PLAN 371828, LR NO C.R 65470 MOMBASA MUNICIPALITY SUB DIV 14171(ORIG NO 14152/20) SECTION II MAINLAND NORTH, SURVEY PLAN NO 371826, LR NO C.R 66469 MOMBASA MUNICIPALITY SUB DIV NO 14170(ORIG NO 14152/19) SECTION II MAINLAND NORTH, SURVEY PLAN NO 371825 and all rental income accruing therefrom.
 - e. THAT a vesting order be and is hereby issued directing the Chief Land Registrar Mombasa to effect transfer of the above immovable properties to the Applicant.
 - f. THAT the costs of the suit shall be borne by the Respondents.

Signed, dated and delivered virtually in Nairobi on this 20th day of **March 2024**.

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E N MAINA



JUDGE

acec civil suit e015 of 2023 (consolidated with acec civil suit no. 19 of 2023	0
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