Assets Recovery Agency v Kigunzi (Civil Suit E034 of 2023) [2024] KEHC 4044 (KLR) (Anti-Corruption and Economic Crimes) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4044 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

CIVIL SUIT E034 OF 2023

EN MAINA, J

APRIL 25, 2024

BETWEEN

THE ASSETS RECOVERY AGENCY ..... APPLICANT

AND

NANCY INDOVERIA KIGUNZI ..... RESPONDENT

JUDGMENT

1. By the Originating Motion dated 23rd November 2023, filed herein on 27th November 2023, which is brought under Sections 81, 90 and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* (the POCAMLA) and Orders 51 of the Civil Procedure Rules the Assets Recovery Agency/Applicant seeks; firstly a declaration that a sum of Kshs.13,474,520/= recovered from the Respondent's residence but now being held at the Central Bank of Kenya, is proceeds of crime liable for forfeiture to the State. Secondly an order forfeiting the said sum of Kshs. 13,474,520/= to the Government of Kenya and; thirdly an order that the said sum of Kshs.13,474,520 be transferred to the Applicant's account No.xxxx at the Kenya Commercial Bank Limited, KICC Branch.

2. The Originating Motion is supported by the affidavit of Fredrick Muriuki sworn on 23rd November 2023. The said Fredrick Muriuki deposes that he is an investigator attached to the Applicant and part of a team that was investigating the legitimacy, origin, destination and purposes of the impugned sum of money. That the said money, the Respondent's identity card and huduma number were, together with plant material suspected to be cannabis sativa and other items suspected to be used in the trade, recovered from the Respondent's residence when officers from the Directorate of Criminal Investigations (DCI) raided the home on 15th August 2023.

3. Fredrick Muriuki also deposes that during the raid the DCI officers arrested three persons believed to be mules, associates and close relatives of the deceased in the residence; that the money was kept in sacks and was reasonably suspected to have been acquired through the sale of cannabis (bhang);

that the green material recovered from the house weighed 610 kilograms and was upon analysis by the government chemist confirmed to be cannabis which is a narcotic drug under the *Narcotic Drugs and Psychotropic Substances (Control) Act*. Fredrick Muriuki further deposes that on 28th August 2023 the Respondent was arraigned at the JKIA Senior Principal Magistrate Court and charged with the offence of Trafficking narcotic drugs contrary to Section 4(a) (ii) of the Narcotic Drugs and Psychotropic Substances Control Act, possession of proceeds of crime contrary to Section 4(c) as read with Section 16(1) (a) of the POCAMLA and conspiracy to commit an offence contrary to Section 4B(4) as read with Section 4B(5) of the Narcotic and Psychotropic Drugs (Control) Act.

4. Further, that the sum of Kshs.13,474,520 was kept at the Central Bank of Kenya for safe custody awaiting a preservation order which this court subsequently granted on 25th August, 2023 vide HCACEC MISC Application No. E028 of 2023 and that there are reasonable grounds to believe that the money is a direct or indirect benefit, profits or proceeds of crime obtained from a complex laundering scheme and hence should be forfeited to the State.

The Respondent's case

5. The proceedings are vehemently opposed by the Respondent by way of the Grounds of Opposition dated 18th December 2023. The gist of the Respondent's case is that these proceedings are premature as the criminal case against the Respondent is yet to be heard and determined; that this application is intended to defeat the Respondent's right to fair hearing as it seeks to dispose/destroy the exhibits in the criminal case; that the Originating Motion amounts to an interference with the jurisdiction of the court handling the criminal case. It is contended that if it is allowed the Originating Motion will amount to condemning the accused unheard. Further that the application is intended to review the preservation order(s) issued by this court and to defeat the process of the proper administration of the administration of justice in the court below and as such it should await the determination of the criminal case. This court is urged to dismiss the Originating Motion.

Submissions

6. Learned Counsel for the parties canvassed the Originating Motion through written submissions. The Agency/Applicant was represented by Mr. Mohamed Adow and the Respondent by the firm of Danstan Omari & Advocates Associates.

The Applicant's submissions

7. Learned Counsel for the Applicant, submitted that Sections 81, 82, 86 & 87 of the POCAMLA authorizes the Applicant to institute forfeiture proceedings of property where there are reasonable grounds to believe that the property sought to be forfeited has been used or is intended to be used in the commission of an offense or is a proceed of crime; that the Applicant obtained preservation orders over the suit money on 25th August 2023; that the order was gazetted on 1st September 2023 and the current application seeks forfeiture of the preserved funds under Section 90(1) of the POCAMLA.

8. Counsel submitted that the investigations by the Applicant established reasonable grounds to believe that the funds were obtained through the illegal trade in narcotic substances, hence proceeds of crime. Counsel contended that the Respondent did not rebut or disprove the evidence tendered by the

Applicant, which should lead to the presumption that the evidence presented is unchallenged. Counsel placed reliance on the case of Nguku v Republic (1985) KLR 412 where the Court held that: -

> " Where a party fails to produce certain evidence, a presumption arises that the evidence produced would be unfavourable to that party."

9. The Applicant also relied on Section 112 of the *Evidence Act* which provides:

> " In any Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

10. Counsel stated that in money laundering, criminals create sophisticated and complex schemes to camouflage and conceal the property and benefits derived from criminal activities; that in this case, the Respondent has created a complex web of money laundering to conceal and disguise the illegitimate trade of narcotics.

11. Counsel argued that the Agency need only establish a prima facie case to satisfy the court that there is evidence to support the belief that the property sought to be forfeited is proceeds of crime or unlawful activities. Counsel submitted that the evidence presented before this court establishes that the funds in issue are proceeds of crime.

12. Counsel further submitted that this Court has power under Section 92(1) of the POCAMLA to issue forfeiture orders if it finds on a balance of probabilities that the suit property is proceeds of crime. Section 92(1) of the POCAMLA 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
>
> (a) Has been used or is intended for use in the commission of an offense or;
>
> (b) Is proceeds of crime.

13. Counsel for the Applicant also submitted that in money laundering schemes, ownership of the proceeds of crime may be direct or indirect.

14. Counsel asserted that in exercising the powers under Section 92 of the POCAMLA and by allowing this application, this Court will be depriving criminals of their ill-gotten gains and deter and prevent crimes; that declining the forfeiture orders shall amount to granting permission to a party to benefit from proceeds of crime which is contrary to the import and purpose of the POCAMLA. Counsel further submitted that Article 40(6) of *the Constitution* of Kenya excludes unlawfully acquired property from that which is protected under *the Constitution* as it states:- ' . . . the Rights under this article do not extend to any property that has been unlawfully acquired." That therefore the forfeiture order does not violate the Respondent's right to property as the suit money was unlawfully acquired.

15. On the Respondent's claim that the current application is premature as the criminal proceedings in the lower court are yet to be concluded, Counsel for the Applicant submitted that the current proceedings are "in rem" (against property) and civil in nature; that this court thus only needs to determine whether on a balance of probabilities, the suit money is proceeds of crime and a conviction is not a pre-condition so long as there is no reasonable explanation disclosing a legitimate source of the money. Counsel relied

on the case of Assets Recovery Agency V Lilian Wanja Muthoni T/A Sahara Consultants & 5 Others where the court stated: -

> " I agree with and I am duly guided by the holdings in the above matters. It is my finding and so I hold, that a criminal conviction is not a condition precedent to the making of an order for Civil Forfeiture under Part VIII of POCAMLA."

16. Counsel stated that the offense of money laundering is a "stand alone" offense and one need not prove any prior charges. Counsel also relied on Section 92(4) of the POCAMLA which states: -

> " . . . The validity of an order under section (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 offense with which the property concerned is in some way associated."

17. The Applicant also relied on the following other cases:-ARA V Pamela Aboo, EACC (Interested Party) (2018) eKLRSchabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7Prosecutor General V New Africa Dimensions & Others, HC Namibia Case No. POCA 10/2012ARA V Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No. 2007 HCV003259Teckla Nandjila V President of Namibia 2012(1) NR 255(HC)Martin Shalli V Attorney General of Namibia & Others, High Court of Namibia, Case No: POCA 9/2011ARA V Joseph Wanjohi & OthersRepublic V Director of Public Prosecution & Others J.R. Civil App No. 102 of 2016Serious Organized Crime Agency Gale [2009] EWHC 1015; [2010] Lloyd's Rep FC 39ARA V Audrene Samantha Rowe & Others, Civil Division claim No. 2012 HCV 02120

The Respondent's submissions

18. Learned Counsel for the Respondent, submitted that the current application is ill founded, misconceived and premature as the suit funds are exhibits in a criminal matter where the trial is yet to begin and to be concluded; that there being no conviction or acquittal, it is uncertain whether the suit funds are proceeds of crime; that an order for forfeiture of the suit funds would be prejudicial to the Respondent and would amount to interference in the ongoing criminal case; that the Applicant has not established that the suit money is proceeds of crime as it has not brought before this court any evidence to that effect. Further, that the question of whether the Respondent committed a crime is to be determined by the trial court yet the Applicant is asking this court to declare the suit funds as proceeds of a crime that has not been proved and that the application is based on mere suspicion which cannot be a basis for condemning a person.

19. Counsel for the Respondent asserted that Article 50 of *the Constitution* of Kenya guarantees the right to fair trial and that Article 50(2) guarantees every accused person the right to be presumed innocent until the contrary is proved. Counsel contended that should this application be allowed, the Respondent will be prejudged as guilty without being heard, which offends the presumption of innocence and which shall render the trial in the court below moot.

20. Counsel stated that the ex-parte orders issued in regard to the money denied the Respondent the right to be heard and to present her side of the story; that the orders already issued and those being sought in the current application more so the order to have the suit funds transferred to the Applicant's account, are in contravention with laid out laws and binding precedent; that the funds should be deposited directly into the Consolidated fund through the National Treasury. Counsel invited this court to weigh the prejudice that is likely to be suffered by the Respondent, an innocent party against the prejudice to be suffered by the Applicant. Counsel urged this court to reject the application and to vacate any

ex-parte orders granted; that this court is vested with powers to do so and hence it should dismiss the application with costs to the Respondent.

21. Counsel placed reliance on the following cases: -Asset Recovery Agency V Charity Wangui Gethi (2018) eKLR

Issues for determination

22. Having considered the Originating Motion, the grounds thereof, the supporting affidavit, the Grounds of opposition, the rival submissions of learned Counsel for the parties and the law the issues that arise for determination are:-

    i. whether the Originating Motion is premature and a violation of the Respondent's right to fair hearing and whether the same should await the determination and outcome of the criminal case at the JKIA Senior Principal Magistrate's Court.

    ii. Depending on the answer to Issue (i) above whether the monies found in the residence of the Respondent and which are the subject of a preservation order issued by this court on 25th August, 2023, are proceeds of crime.

    iii. If the answer to issue (ii) above is in the affirmative whether the funds should be forfeited to the State.

    iv. If so forfeited, whether the funds ought to be transferred to the Agency/Applicant account

    v. The issue of costs.

    Analysis and Determination

    > Issue (i): - Whether the Originating Motion is premature; and a violation of the Respondent's right to fair hearing and whether the same should await the determination and outcome of the criminal case at the JKIA Senior Principal Magistrate's Court.

23. The jurisdiction of this court to hear this application is derived from Sections 90(1) and 92(1) of the POCAMLA which states: -

    > " 90(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."
    >
    > "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
    >
    > (b) is proceeds of crime."

24. It is instructive that unlike a preservation order which is granted ex parte under Section 83 of the POCAMLA forfeiture proceedings are heard inter partes as it is only once a preservation order has been granted that the Applicant is required to serve the Respondent.

25. The issue raised by the Respondent that these proceedings are premature; that they should await the outcome of the criminal case, is moot. Firstly, because Section 92(4) of the POCAMLA provides that the validity of a forfeiture (civil) order is not affected by the outcome of criminal proceedings which in my view would imply that the civil proceedings for recovery and the criminal trial of the person of

interest can be heard concurrently. Indeed, Section 193A of the Criminal Procedure Code provides that the existence of criminal proceedings does not affect civil proceedings and vice versa.

26. Secondly, the issue raised, has been the subject of several cases and it is now trite that a conviction for an offence is not a pre-requisite to an order for civil forfeiture. In the case of The Assets Recovery Agency and Audrene Samantha Rowe and three others SC Judicature Jamaica Civil Division Claim No. 2012 HCV 02120 the court stated: -

> " .... There is no need for Assets Recovery Agency to prove the particulars as would be required in a criminal prosecution. It was held by Sullivan J in Director of the Assets Recovery Agency Vs Green [2005] EWHC 3168 (ADMIN), under similar legislation in England, that the director need not prove or allege the commission of any specific criminal offence. This position applies equally to the legislation in Jamaica. In addition, there is the case of Serious Organized Crime Agency Gale [2009] EWHC 1015; [2010] Lloyd's Rep FC 39 where Griffith Williams J held that notwithstanding the discontinuance of criminal proceedings in Spain and the defendant's acquittal in Portugal, it was permissible to proceed with the civil recovery application in the United Kingdom. Griffith Williams J granted the order. It was upheld by the Court of Appeal [2010] 1WLR 2881 and the House of Lords [2011] 1 WLR 2760; [2012] 2 ALL ERI. The Court of Appeal expressly stated that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability.
>
> .....It was also pointed out that the civil recovery proceeding is directed at the seizure of property and not the conviction of any individual and thus there was no reason to apply the criminal standard of proof.....Assets Recovery Agency need not prove a criminal conviction of anyone. All Assets Recovery Agency has to do is to establish on a balance of probabilities that unlawful conduct occurred and that the property targeted was property obtained through unlawful conduct." (underlining mine)

27. Similarly in the case of Prophet v National Director of Public Prosecutions [2006] [2] SACR 525 it was held:-

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

28. Closer home in the case of Pamela Aboo v Assets Recovery Agency and the Ethics and Anti-Corruption Commission Civil Appeal No. 452 of 2018 (unreported) the Court of Appeal (Warsame JA) stated:-

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

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

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

29. The principle was also upheld in a recent ruling of the Court of Appeal in the case of Kidero v Ethics & Anti-Corruption Commission & 13 others (Civil Application E003 of 2022) [2023] KECA 62 (KLR) (3 February 2023) (Ruling) where the Court stated:-

" 28. In short, courts will not ordinarily grant a stay of civil proceedings simply by virtue of the existence of parallel criminal proceedings arising out of the same events or subject matter. This is the import of section 193A of the Criminal Procedure Code which expressly permits parallel criminal and civil proceedings. The above being the general proposition of the law, to surmount the arguability threshold, an applicant bears the burden of showing how the continuance of the civil action will lead to a "real danger of prejudice" against him in the concurrent criminal and civil proceedings. As was held by a Constitutional Bench of the Supreme Court of India in M. S. Sheriffv The State of Madras and others (AIR 1954 SC 379):

"No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment. ....."

30. It is therefore clear to this court that the Originating Motion herein is not premature. It is also my finding that the Applicant need not have awaited the outcome of the criminal trial so as to bring the application.

31. As to the submission that these proceedings are a usurpation of the jurisdiction of the court below, I find that that too has no basis as Section 90(1) and 92(1) of the POCAMLA vest the jurisdiction to hear applications for forfeiture upon the High Court and not the court below. A closer reading of the Narcotic Drugs and Psychotropic Substances Control Act will also show that the jurisdiction given to the court below is to forfeit the conveyances of the narcotic drugs but not the proceeds of crime (see Section 20(2) of the Act). This court is therefore properly seized of jurisdiction to hear

the Originating Motion and as I have already stated nothing stops the criminal proceedings and this Originating Motion from being heard concurrently.

32. An issue was also raised that the Originating Motion is a violation of the Respondent's right to fair trial in the criminal case. On this issue, it is my finding that that is not the case because as was held in the cases cited above these proceedings are completely distinct from the criminal case. As held in the case of Pamela Aboo v Assets Recovery Agency and the Ethics and Anti-Corruption Commission Civil Appeal No. 452 of 2018 (unreported) (supra) the proceedings herein are in rem while those in the criminal case are in personam. Indeed, different rules such as the procedure and the standard of proof apply to the proceedings. The Respondent's right to fair trial as an accused person are non derogable and there are sufficient safeguards in *the constitution* and in the law to ensure that the court trying her safeguards those rights.

33. Moreover, the Respondent has not demonstrated how the right to fair trial will be prejudiced. In the case of Kidero v Ethics and Anti-Corruption Commissions & 13 Others (supra) the Court of Appeal applied its mind to the relevant factors in determining whether the Applicant (in this case the Respondent) would suffer a "real danger" of injustice as a result of the concurrent civil and criminal proceedings and stated:-

> " 32. In relation to the factors relevant in determining whether the applicant would suffer a "real danger" of injustice or prejudice as a result of the concurrent civil and criminal proceedings, the following factors adopted in the English and Australian decision in Jefferson Ltd v Bhetcha [1979] 1 WLR 898 and McMahon v Gould (1982) 7 ACLR 202: are useful:

a. the possibility that the civil action might obtain such publicity as to influence criminal trial and deprive the accused a fair trial;

b. the proximity in time of the trial of the criminal proceedings to the trial of the civil action;

c. where the disclosure of the defence in the civil action by an accused enables the fabrication of evidence by Prosecution witnesses or interference with defence witnesses, resulting in a miscarriage of justice in the criminal proceedings;

d. the burden on the accused of preparing for both sets of proceedings concurrently;

e. whether the accused has already disclosed his defence to the allegations; and

f. the conduct of the accused, such as his own prior invocation of the civil process when it had suited him."

33. It remains necessary for the applicant to demonstrate that the precise steps which he is required to take in the civil action will have the effect of undermining the protections to which he is entitled to as an accused person in the criminal trial or in the Petition. For example, there is no suggestion that the applicant's rights to a fair trial either in the criminal trial or the civil suit will be compromised. To us this would have been a formidable arguable ground. There is no suggestion that requiring him to plead a defence in the civil action would have the effect of undermining his privilege against self-incrimination or prejudice his presumption of innocence in the criminal trial or his prosecution of the petition. Again, this could have been an arguable ground, though not conclusive because when filing his defence in the civil action, a defendant is free to plead whatever facts he deems fit and considers relevant, for example, by denying the plaintiffs allegations and putting forward a different version of events (the intended effect of which would be exculpatory rather than incriminating)."

34. The Respondent has not placed anything before this court as would bring her case within the principles set out by the Court of Appeal and in the premises I am not persuaded that these proceedings are prejudicial to her in so far as the criminal trial is concerned. The argument that the application is an affront to her right to be presumed innocent has no basis either as in this case she is not on trial. Here the concern of the court is to establish the legitimacy of the source of the money found in her possession but not her culpability which is left to the magistrate trying her to determine.

35. The upshot therefore is that the answer to the Issue No. (i) is in the negative.

> Issue No. (ii): - Whether the monies found in the residence of the Respondent and which are the subject of a preservation order issued by this court on 25th August, 2023, are proceeds of crime.

36. It is instructive that in these proceedings it is not disputed that the sum of Kshs.13,474,520 was in fact found in the Respondent's residence kept in sacks. The Respondent filed Grounds of Opposition but did not file a replying affidavit and hence the facts set out in the supporting affidavit are not controverted.

37. It is the Applicant's case that the DCI officers who searched the Respondent's house found her personal documents to wit, her identity card and Huduma number hence leaving no doubt that that was her residence. That fact was also not controverted. Since therefore, there is no doubt that the money was found in her house the question that is left to be determined by this court, is whether that money is proceeds of crime. This is a question of fact and law which must be proved on a balance of probabilities. (See Section 92(1) of the POCAMLA). Whereas the Applicant is not required to prove the commission of a specific offence it is nevertheless required to prove a causal link between the property and some unlawful conduct or criminal activity. (see cases cited above).

38. According to the Applicant the money must be proceeds of crime because there was found in the same place plant material, which when analyzed by the Government Chemist, was established to be cannabis which is a narcotic substance whose possession, use and trafficking is outlawed by the Narcotic Drugs and Psychotropic Substances Control Act. To prove this the Applicant annexed a report by the Government Analyst and it indeed proves on a balance of probabilities that the substance is bhang. The court shall deem that to be the position as there is no other report in rebuttal.

39. I have carefully considered the evidence placed before this court by the Applicant and I am satisfied that it has on a balance of probabilities proved a causal connection between the impugned money and the commission of an offence. Firstly, as I have stated it is not in dispute that this money which was all in cash was found kept in sacks in the residence of the Respondent. Secondly there is proof on a balance of probabilities that in the same residence there was found some substance which when analysed by the government chemist turned out to be cannabis sativa, a narcotic substance whose possession, use and trafficking is an offence. It is also not disputed that the police found three persons in the residence in circumstances that suggest that they were mules used in trafficking the illegal substance. The Respondent has not proferred any explanation as to the source of the money and neither has she given any explanation at all as to why she had kept such a big amount of money in her residence in sacks rather than taking it to a bank where it would have been earning her interest. The only reasonable conclusion that this court can draw is that the money was kept in that manner so as to avoid detection by the authorities. In the absence of proof that the money was from a legitimate source, I find and I do so declare, that the money was proceeds of crime. I am therefore satisfied that there is proof on a balance of probabilities that the cash was directly connected to criminal activity even though the commission or otherwise of that offence is yet to be determined. The money falls within the definition of proceeds

of crime as it is "property derived or realized, directly or indirectly, as a result of or in connection with an offence."

Issue No. (iii) Whether the money should be forfeited to the State:

40. Having found that the money is proceeds of crime I have no alternative but to forfeit it to the State (The Government of Kenya) as per the law provided. I am not persuaded that to do so will be tantamount to destroying exhibits as I believe the Applicant will keep a record of the same which it shall also avail to the Respondent, if need be, for use in the criminal proceedings. I am also not persuaded that these proceedings amount to a review of the preservation order. These proceedings are a final determination of the status of the money/property found in the Respondent's possession unlike the preservation order which is an interlocutory or interim order granted to preserve the subject matter. The preservation order is granted for 90 days whereupon the application is spent and the file is closed. The filing of an application for forfeiture, if one is filed, is in no way a review or revision of the preservation order.

> Issue No. (iv):- Whether the funds ought to be transferred to the Agency/Applicant's account at the Kenya Commercial Bank.

41. On this issue it was submitted, by learned Counsel for the Respondent, that the money ought not to be transferred to the Applicant's account as that would be a contravention of the law and binding precedents. Counsel placed reliance on the decision of Prof. Sifuna J, in HCACEC Suit No. E002 of 2022 (citation and names of parties not indicated). Counsel submitted that in that case, the court held that the monies were to be deposited into the Consolidated Fund through the Treasury but not the Applicant's account. Two things are instructive – firstly, that the opinion of the learned Judge being a decision of a court of concurrent jurisdiction is not binding on this court; only persuasive. Secondly, it is not lost to this court that all the monies that are subject of forfeiture orders granted under the POCAMALA are deposited in the account of the Applicant pending the operalisation of the Fund prescribed in Section 100 of the POCAMLA. This case is not an exception and it is therefore hereby ordered that the sum of Kshs.13,474,520 currently held at the Central Bank shall be transferred to the Applicant's account as prayed.

Issue No. (v):- Costs

42. Costs generally follow the event and as such the costs of these proceedings shall be borne by the Respondent.

Final disposition

43. Accordingly, I enter judgment for the Applicant against the Respondent as follows: -

    1. That an order be and is hereby issued declaring that the sum of Kenya Shillings 13, 474, 520 found in the Respondent's residence but held at the Central Bank of Kenya is proceeds of crime and therefore liable for forfeiture to the Government of Kenya.

    2. That that the sum of Kenya Shilling 13, 474, 520 be and is hereby forfeited to the Government of Kenya.

    3. That an order is hereby issued that the sum of Kshs.13,474,520/= be transferred to the Applicant's account number xxxx at Kenya Commercial Bank Limited, KICC Branch.

    4. That the costs of this case shall be borne by the Respondent.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF APRIL 2024.

.....

E N MAINA

JUDGE