REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI -CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC CIVIL SUIT NO 1 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

PHYLIS NJERI NGIRITA.....1ST RESPONDENT

LUCY WAMBUI NGIRITA.....2ND RESPONDENT

JEREMIAH GICHINA NGIRITA.....3RD RESPONDENT

AND

PLATNUM CREDIT LIMITED.....1ST INTERESTED PARTY

OPPORTUNITY INTERNATIONAL WEDCO LTD.....2ND INTERESTED PARTY

JUDGMENT

1. This judgment addresses an application for forfeiture to the State of certain vehicles and real properties registered in the name of the respondents or in which they have a beneficial interest. It also addresses two applications brought by the Interested Parties claiming an interest in the motor vehicles the subject of the forfeiture application.

2. The forfeiture application is brought by way of an Originating Motion dated 12th March 2019. In the application, the Assets Recovery Agency (hereafter **'the Agency'**) seeks to recover motor vehicles and real property from the respondents believed to be proceeds of crime.

3. At prayer 1 of the application brought under the provisions of sections 81, 82, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Order 51 rule 1 of the Civil Procedure Rules, the Agency seeks the following order:

1. THAT this Honourable Court issue orders declaring that the following motor vehicles and properties held by the respondents are proceeds of crime and therefore liable for forfeiture to the Government

i. KCH 753U Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and Opportunity

International WEDCO Limited;

ii. KCH 600H Toyota Station Wagon, 2016 blue in colour registered in the name of the 2nd respondent and Platinum Credit Limited;

iii. KCH 889M, Toyota Pickup, 2016 silver in colour registered in the name of the 3rd respondent and Platinum Credit Limited.

iv. Title No. Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated 2nd June 2016 situated within Trans Nzoia County.

v. Title No. Naivasha/Municipality Block 2/884 measuring o.2305HA, being leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014, sold by the vendor New Hope for all Nations Church to the 2nd respondent vide sale agreement dated 8th July 2016.

vi. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated 25th April 2017.

vii. Title No. Njoro/Ngata Block 1/7436, approximate area 0.0840ha. Subdivision of P/NO. 3283 registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated 28th October, 2016 situated in Kiamunyi, Nakuru County.

viii. Title No Naivasha/Mwichiringiri Block 4/22367 approximate area 0.0450, subdivision of P/NO. 17217 registered in the name of the 3rd respondent registered on 1st July 2016.

4. At prayer 2, the Agency asks the court to issue orders of forfeiture to the State in respect of the properties set out in prayer 1 of its application. Prayer 3 asks that the court issues an order that the assets be forfeited to the government and transferred to the Agency. The Agency also asks the court to make any other ancillary orders that it may deem fit for the proper, fair, effective execution of its orders, and to provide for the costs of the application.

5. Arising out of the main application are the applications by the Interested Parties. The Interested Parties respectively ask the court to make orders in respect of their interests in the motor vehicles the subject of the forfeiture application prior to making orders for forfeiture of the vehicles to the State. In its application dated 12th July 2019, the 1st Interested Party, Platinum Credit Limited seeks the following orders:

1. THAT a declaration be and is hereby made that Platinum Credit Ltd has an interest in motor vehicle registration number KCH 600H as a secured creditor to the extent and value of Kshs 3,756,943.97/=.

2. THAT a declaration be and is hereby made that Platinum Credit Ltd, has an interest in motor vehicle registration number KCH 889M as a secured creditor to the extent and value of Kshs 386,823.78/=.

3. THAT the Honourable Court be and is hereby pleased to direct that a sum of Kshs 3,756,943.97/= being the value of the interest of Platinum Credit Ltd in motor vehicle registration number KCH 600H, be paid to Platinum Credit Ltd before the said vehicle is forfeited to the Government.

4. THAT the Honourable Court be and is hereby pleased to direct that a sum of Kshs 386,823.78/= being the value of the interest of Platinum Credit Ltd in motor vehicle registration number KCH 889M, be paid to Platinum Credit Ltd before the said vehicle is forfeited to the Government.

5. THAT the 1st Interested Party be and is hereby awarded costs of this application.

6. The 2nd Interested Party's claim also arises in relation to the orders sought against the respondents by the Agency. In the application dated 28th June 2019 brought under the provisions of sections 81 and 83 (3)(4)(5), of POCAMLA and Order 51 Rule 1 of the Civil Procedure Rules, the Interested Party seeks the following orders:

1. (Spent)

2. THAT this Honourable Court be pleased to admit this notice out of time having been brought to Court after the expiration of the 14 days upon the Notice by the Asset Recovery Agency being Published in the Kenya Gazette under Section 83 (1) of the Proceeds of Crime and Anti-Money Laundering Act.

3. THAT this Honourable Court do issue an Exclusion Order against the Applicant/ Respondent (Asset Recovery Agency) or its employees, agents, servants or any other persons acting on their behalf prohibiting the transfer or disposal of or other dealings with the motor vehicle KCH 753U Toyota Station Wagon, 2009 green in colour pending hearing and final determination of this Application.

4. THAT a Declaration that the Motor Vehicle Registration Number KCH 753U is validly held by the 2nd Interested Party/Applicant as security for a loan advanced to the 1st Respondent and in this regard, should not be forfeited to the state.

5. THAT in the alternative to prayer 2 an order do issue prohibiting the 1st Respondent and or her employees, agents, servants or any other persons acting on their behalf from accessing the proceeds in Kenya Commercial Bank, Account Number […] pending hearing and determination of this Application.

6. THAT in the alternative to prayer 2 an order do issue prohibiting the 1st Respondent and or her employees, agents, servants or any other persons acting on their behalf from accessing the proceeds in Kenya Commercial Bank, Account Number […].

7. THAT in the alternative to Prayer 3, an Order do issue directing Kenya Commercial Bank to release the proceeds in Kenya Commercial Bank, Account Number […] to the 2nd Interested Party/Applicant to the extent of the amount owed by the 1st Respondent to 2nd Interested Party/Applicant.

8. THAT the Honourable Court makes any other ancillary orders that it may deem fit for the proper, fair effective execution of its orders.

9. THAT costs be provided for.

7. A determination of the issues raised in the applications by the Interested Parties will be dependent on the court's determination of the main issues raised in the Agency's application for forfeiture: whether the properties the subject of the application are proceeds of crime and whether they are liable to forfeiture to the State. Upon determination of these issues, the issue relating to the interests of the 1st Interested Party in the motor vehicles registered in its name and that of the 2nd and 3rd respondents, and whether the interest of the 2nd Interested Party in the funds deposited in the 1st respondent's account or in the vehicle used as security therefor, should be protected, will be considered. I will accordingly commence by a consideration of the respective cases of the parties on the main application and the issues that arise before entering into a consideration of the issues raised by the Interested Parties.

The Application for Forfeiture

8. The Agency's application for forfeiture is supported by an affidavit sworn on 12th March 2019 by S/Sgt Fredrick Musyoki, an investigating officer with the applicant, and on grounds set out on the face of the application. The Agency also filed a further affidavit sworn on 8th June 2019 by S/Sgt Musyoki, and a supplementary affidavit sworn on 15th October 2019 by S/Sgt. Musyoki. It also filed a further three affidavits by the same deponent, all sworn on 20th May 2020, in response to the affidavits sworn by Phyllis Njeri Ngirita on 11th April 2019; another affidavit sworn by Phyllis Njeri Ngirita on 19th July 2019; an affidavit sworn on 29th July 2019 by Lucy Wambui Ngirita; and three affidavits sworn on 4th November 2019 and filed in court on 18th November 2019 by each of the respondents respectively.

9. The basis of the Agency's application is set out in its affidavits and the grounds in support. The applicant states that it is established under section 53 of POCAMLA as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. Pursuant to Part VIII of POCAMLA, it is authorized to institute civil forfeiture proceedings and to seek orders prohibiting any person, subject to such conditions as the court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime. It also has policing powers, under section 53A (5) of POCAMLA, to enable it identify, trace, seize and recover proceeds of crime.

10. According to the Agency, on or about 26th April, 2018, it had received information on ongoing criminal investigations involving fraud and economic crimes at the National Youth Service (NYS) which were being conducted by the Directorate of Criminal Investigations (DCI). On 29th May, 2018, several suspects and entities, including the 1st, 2nd and 3rd respondents, were charged with criminal offences in Criminal Case No. ACC 13, 15 and 17 of 2018 with offences including conspiracy to commit an offence of economic crime contrary to sections 47(a)(3) and 48(1) of the Anti-Corruption and Economic Crimes Act (ACECA) and fraudulent acquisition of public property contrary to sections 45(1)(a) and 48(1) of ACECA.

11. Its preliminary investigations established that the three respondents, who are members of one family known as the Ngiritas, received huge amounts of money through their respective business entities and personal accounts held at KCB Limited. Upon investigating the bank statements and documents concerning the said accounts, the Agency established that the respondents and their business entities and associates received funds fraudulently from NYS split in several transactions. The money received from NYS through their business entities and personal accounts was further intra-transferred within the same bank into accounts owned by their family members and associates held at the same bank.

12. It is the Agency's case that in the course of its investigations, it established that the respondents acquired the properties the subject of the application using proceeds of crime fraudulently obtained from the NYS. The Agency asserts that it is in the interests of justice that the court should issue the orders of forfeiture that it seeks. If the orders are not granted, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of the general public interest.

13. The factual basis for the application is set out in the affidavits sworn by S/Sgt. Musyoki referred to earlier in this judgment. The narrative that emerges from these affidavits is as follows.

14. S.Sgt Musyoki, a Police officer attached to the Agency as an investigator, was part of the team responsible for the investigation of the matters leading to the present application. Investigations had been carried out by the DCI into the loss of funds from the NYS and charges had been preferred against the respondents and their co-accused. S/Sgt Musyoki had traced accounts belonging to the respondents, their business entities or their associates held at Kenya Commercial Bank. The accounts are suspected to have been used for money laundering purposes. The Agency sets out these accounts as being the following:

i. KCB Account No. **[…]** in the name of **Phylis Njeri Ngirita;**

ii. KCB Account No. **[…]** held in the name of **Ngiwaco Enterprises;**

iii. KCB Account No. **[…]** in the name of **Waluco Investments;**

iv. KCB Account Nos. **[…],[…]** and No. **[…]** held in the name of **Ngirita Wambui Lucy;**

v. KCB Account No. **[…]** held in the name of **Jerrycathy Enterprises.**

15. The Agency had also established that Lucy Wambui Ngirita, the 2nd respondent, is the proprietor of Ngiwaco Enterprises, which has the business registration number BN/2010/78014. She was also the proprietor of Waluco Investments, business registration number BN/2010/78029. Jeremiah Gichini Ngirita, the 3rd respondent, is the proprietor of the third business entity, Jerrycathy Enterprises, BN: 4420282.

16. The respondents had received huge amounts of money fraudulently from NYS, split in several transactions, through their respective business entities and personal accounts held at KCB Limited. In order to ensure clarity in the amounts and periods within which the funds were transferred to the respondents and their associates, I set out hereunder the respective accounts and the transactions therein as set out in the affidavit sworn on behalf of the Agency.

17. The 1st respondent, Phyllis Njeri Ngirita, received in her personal KCB account number **[…]** funds from NYS as follows:

PHYLIS NJERI NGIRITA KCB A/C No. **[…]**	**DATE**	**MONEY RECEIVED FROM**	**AMOUNT (KSH)**

	24/11/2015	NYS	3,000,000.00
	2/12/2015	NYS	1,539,150.00
	29/6/2016	Waluco Investment	220,000.00
	20/9/2016	NYS	364,050.00
	17/10/2016	NYS	197,400.00
	17/10/2016	NYS	100,150.00
	18/10/2016	NYS	385,550.00
	18/10/2016	NYS	391,590.00
	18/10/2016	NYS	7,500,862.05
	18/10/2016	NYS	8,577,866.40
	18/10/2016	NYS	7,154,030.15
	3/1/2017	NYS	189,000.00
	9/1/2017	NYS	189,000.00
	16/2/2017	NYS	301,330.00
	21/4/2017	NYS	4,580,172.40
	21/4/2017	NYS	5,708,620.70
	21/4/2017	NYS	5,177,586.20
	21/4/2017	NYS	4,895,474.15
	21/4/2017	NYS	4,739,482.75
	10/5/2017	NYS	1,800,000.00
	12/6/2017	NYS	208,800.00
		TOTAL	**57,220,114.80**

18. The 1st respondent had been paid by NYS directly into her personal account, which is contrary to procedure. The Agency asserts that this is a clear case of fraud as there is no evidence of goods or services procured by NYS directly from the 1st respondent.

19. It also emerged from the Agency's investigations that Ngiwaco Enterprises, owned by the 2nd respondent, had received funds from NYS in its KCB account number 1125544910 as follows:

NGIWACO ENTERPRISES **KCB A/C No.** **[…]**	**DATE**	**MONEY RECEIVED FROM**	**AMOUNT** **(KSH)**
	10/4/2015	NYS	3,785,600.00
	22/5/2015	NYS	53,200.00
	2/12/2015	NYS	1,638,000.00
	12/2/2016	NYS	9,656,890.00
	15/2/2016	NYS	3,705,420.00
	20/6/2016	NYS	1,500,000.00
	29/6/2016	NYS	2,000,000.00
	5/7/2016	NYS	5,468,955.00
	17/10/2016	NYS	5,744,690.25
	18/10/2016	NYS	6,410,596.10
	18/10/2016	NYS	8,582,844.85
	18/10/2016	NYS	6,128,522.00
	18/10/2016	NYS	8,155,172.40
	18/10/2016	NYS	8,562,931.05
	18/10/2016	NYS	9,482,699.85

	18/10/2016	NYS	8,174,137.95
	14/11/2016	NYS	2,888,400.00
	14/11/2016	NYS	2,000,000.00
	31/1/2017	NYS	4,485,344.85
	22/3/2017	NYS	2,880,000.00
	26/4/2017	Phyllis Njeri Ngirita	3,700,000.00
	15/9/2017	NYS	2,597,900.00
	6/2/2018	NYS	1,422,414.00
	TOTAL		**109,023,718.30**

20. The 2nd respondent's other business entity, Waluco Investments, received funds from NYS in its KCB account number **[…]** as follows:

WALUCO INVESTMENTS **KCB A/C No.** **[…]**	**DATE**	**MONEY RECEIVED FROM**	**AMOUNT** **(KSH)**
	24/2/2016	NYS	750,000.00
	26/5/2016	NYS	14,816,810.35
	3/6/2016	NYS	5,690,982.75
	6/6/2016	NYS	7,017,241.40
	9/6/2016	NYS	7,168,965.50
	29/6/2016	NYS	4,117,500.00
	29/6/2016	NYS	7,455,724.15
	29/6/2016	NYS	3,345,517.25
	29/6/2016	NYS	16,476,293.10
	29/6/2016	NYS	4,000,140.00
	29/6/2016	NYS	7,586,358.60
	29/6/2016	NYS	1,500,000.00
	29/6/2016	NYS	4,500,000.00
	8/7/2016	NYS	6,648,836.20
	8/7/2016	NYS	5,964,655.15
	18/10/2016	Lucy Wambui Ngirita	41,000,000.00
	29/10/2016	Lucy Wambui Ngirita	8,000,000.00
	31/10/2016	Lucy Wambui Ngirita	1,400,000
	31/1/2018	NYS	2,527,590.00
	6/2/2018	Ngiwaco Enterprises	1,050,000.00
	TOTAL		**154,362,131.7**

21. The 2nd respondent had also received in her personal account number **[…]** held in KCB Bank funds from Ngiwaco Enterprises and Waluco Investment-essentially a transfer from her business entities to her personal account. She had also received funds from Kunjiwa Enterprises, a business entity associated with the theft of NYS funds, as follows:

NGIRITA WAMBUI LUCY KCB Account Number **[…]**	**DATE**	**MONEY RECEIVED FROM NYS**	**AMOUNT (KSH)**
	12/2/2016	Ngiwaco Enterprises	5,000,000.00
	15/2/2016	Ngiwaco Enterprises	3,000,000.00
	24/2/2016	Waluco Investment	750,000.00

	26/5/2016	Waluco Investment	14,300,000.00
	3/6/2016	Waluco Investment	5,477,000.00
	6/6/2016	Waluco Investment	6,000,000.00
	24/10/2016	Ngiwaco Enterprises	10,000,000.00
	24/10/2016	Waluco Investment	10,000.00
	24/10/2016	Waluco Investment	10,000,000.00
	27/10/2016	Kunjiwa Enterprises	4,000,000.00
		TOTAL	

22. The 3rd respondent's business, Jerrycathy Enterprises, had received in its KCB account number **[…]** funds from NYS as follows:

JERRYCATHY ENTERPRISES **[…]**	**DATE**	**MONEY RECEIVED FROM**	**AMOUNT** **(KSH)**
	10/12/2015	NYS	1,830,000.00
	14/12/2015	NYS	124,860.00
	12/2/2016	NYS	1,966,930.00
	18/2/2016	NYS	128,780.00
	26/4/2016	NYS	1,752,850.00
	22/6/2016	NYS	631,490.00
	29/6/2016	NYS	1,000,000.00
	30/6/2016	NYS	9,120,517.25
	5/7/2016	NYS	495,000.00
	11/7/2016	NYS	864,827.60
	17/10/2016	NYS	9,281,420.70
	18/10/2016	NYS	7,580,782.75
	18/10/2016	NYS	13,844,865.50
	18/10/2016	NYS	7,434,482.75
	18/10/2016	NYS	5,585,344.85
	18/10/2016	NYS	4,646,551.70
	9/12/2016	NYS	6,505,172.40
	22/3/2017	NYS	3,060,000.00
	18/1/2018	NYS	4,693,965.50
	4/4/2018	NYS	4,480,603.45
	4/4/2018	NYS	4,480,603.45
	TOTAL		**87,931,482.65**

23. An analysis of the accounts held by the 1st respondent, Phyllis Njeri Ngirita, Ngiwaco Enterprises owned by the 2nd respondent and JerryCathy Enterprises owned by the 3rd respondent showed that the three accounts received a total of Kshs 133,922,491.30 in a two day period, between 17th and 18th October, 2016. The money received from NYS was further intra-transferred within the same bank into accounts owned by the respondents, their family members and associates held at the same bank. These intra-account transactions can be discerned from the copies of statements of account of Phyllis Njeri Ngirita, Ngiwaco Enterprises, JerryCathy Enterprises, Waluco Investment and Lucy Wambui Ngirita (annexures 'FM5' – 'FM9') annexed to the affidavit of S/Sgt Musyoki.

24. It is the Agency's contention that the funds from NYS to the respondents' personal or business name accounts were moved or withdrawn in cash and utilised in an intricate series of transactions illustrated by the Agency in S/Sgt Musyoki's affidavit.

25. What can be garnered from this illustration is that from the amount received by JerryCathy enterprises from NYS, approximately

Kshs 28 million had been withdrawn in cash; Kshs 7 million had been transferred to Kunjiwa Enterprises, an entity in the name of Catherine Wanjiku Mwai, A/C No. 1142293416 KCB. Property number Njoro/Ngata Block 1/7436 and Naivasha/Mwichiringiri Block 4/2267 at the price of Kshs 2,500,000 and Waitaluk/Mabonde Block12/ Sirende/140 at the price of Kshs 20,000,000 had been purchased by the respondents. Some of the funds for the purchase of the latter property had been transferred from account number 1154300986 held in the name of Waluco Enterprises, a business name owned by Lucy Wambui Ngirita, the 2nd respondent.

26. The Agency's narrative also shows that account number **[…]** held at the KCB Bank in the name of Annway Investment, whose registered proprietor was one Ann Wambere Ngirita, received Kshs 72,051,077 from NYS. Out of this amount, approximately Kshs 23 million was withdrawn in cash. Further, funds transferred from the Annway Investment account to the accounts of Lucy Wambui Ngirita at A/C numbers 1178695024, 1103229869 and 1104227606 held at the KCB Bank were part of the funds used to purchase land parcel numbers Naivasha/Municipality Block 2/884 at Kshs 46,000,000 and LR No. 8208/4 Nakuru East at Kshs 7,000,000.

27. With regard to the motor vehicles the subject of this application, the Agency's case is that investigators had also detained the three motor vehicles at the Naivasha Police Station as they were suspected to be proceeds of crime. A search conducted on 13th September 2018 at the offices of the National Transport and Safety Authority (NTSA) established that motor vehicle registration number KCH 600H Toyota station wagon blue in colour manufactured in 2016 was registered in the name of Lucy Wambui Ngirita and Platinum Credit Limited, the 1st Interested Party. KCH 753U, a Toyota station wagon green in colour manufactured in 2009 was registered in the name of Phylis Njeri Ngirita and Opportunity International WEDCO Limited, the 2nd Interested Party.

28. The third vehicle, registration number KCH 889M Toyota pick-up silver in colour manufactured in 2016 was registered in the name of Jeremiah Gichini Ngirita and Platinum Credit Limited. The Agency's investigations had established that on 19th July 2017, the 2nd respondent, Lucy Wambui Ngirita, had taken a chattel's mortgage for Kshs. 2,000,000/= from Platinum Credit Limited with an interest of 6% per month. The mortgage agreement between the 2nd respondent and the 1st Interested Party did not state the purpose of the loan. A valuation report by Regent Automobile Valuers and Assessors dated 18th July 2017 provided to the Agency by the 1st Interested Party showed that the motor vehicle Toyota Land Cruiser V8 registration number KCH 600H had a market value of Kshs. 14,400,000.

29. On 6th June 2017, the 3rd respondent, Jeremiah Gichini Ngirita had taken a chattel's mortgage for Kshs.1,295,000/= from the 1st Interested Party at an interest rate of 6% per month on the security of motor vehicle registration number KCH 889M Toyota Hilux. As with the 2nd respondent, the agreement with the 3rd respondent did not state the purpose of the money. However, a valuation report dated 5th June 2017 by the same valuation company provided to the investigators by the 1st Interested Party indicated the value of the motor vehicle at Kshs. 2,720,000.

30. Like the 2nd and 3rd respondents, the 1st respondent had, on 20th July 2017, taken out a chattel's mortgage for Kshs.900,000/= from the 1st Interested Party at the same interest rate as the other respondents. Similar circumstances as with respect to the other respondents obtained, with no indication of what the money was for. The motor vehicle Toyota Land Cruiser V8 registration number KCH 753U was however valued at Kshs. 1,950,000 in a valuation report dated 18th July 2020 by Regent Automobile Valuers and Assessors. The Agency's case was that after it served the 1st Interested Party with the orders to investigate the three respondents' accounts, the 1st Interested Party denied financing the asset and stated that it had only advanced a credit facility against the motor vehicle registration number KCH 600H, and that the security is jointly registered under its name and that of the 2nd respondent.

31. According to the Agency, motor vehicles registration No KCH 600H , KCH 753 U and KCH 889M were not financed by the 1st Interested Party as it only advanced a credit facility to the respondents. It had, on 20th July 2017, advanced Kshs 900,000 to Phyllis Njeri Ngirita, Kshs. 2,000,000 to Lucy Wambui Ngirita on 19th July 2017 and Kshs 1,295,000 to Jeremiah Gichini Ngirita on 6th June 2017. The chattels mortgage agreements between the respondents and the 1st Interested Party did not also state the purpose of the money and the difference between the values of the motor vehicles and what was advanced. In the view of the Agency, this clearly shows that the transaction between the respondents and the 1st Interested Party was a money laundering scheme and the motor vehicles are therefore proceeds of crime.

32. The respondents had acquired several properties which the Agency contends there is reasonable cause to believe were procured using proceeds of crime fraudulently obtained from the NYS. The first is title number Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA. The Agency avers that this property, which is situated in Trans Nzoia County, is registered in the name of Sylvia Ajiambo Ongoro but was sold to the 2nd respondent pursuant to a sale agreement dated 2nd June 2016.

33. The second property is title No. Naivasha/Municipality Block 2/884 measuring 0.2305HA. It is a leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014. It was sold by New Hope for all Nations Church to the 2nd respondent pursuant to a sale agreement dated 8th July 2016. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre, which is still registered in the name of John Wachira Wahome, was sold to the 2nd respondent pursuant to a sale agreement dated 25th April 2017. The fourth property is Title No. Njoro/Ngata Block 1/7436 measuring approximately 0.0840 Ha. It is situated in Kiamunyi, Nakuru County and is a subdivision of P/NO. 3283 registered in the name of Robin M. Aondo. It was sold to the 3rd respondent pursuant to a sale agreement dated 28th October, 2016. Title No Naivasha/Mwichiringiri Block 4/22367 with an approximate area of 0.0450, being a subdivision of P/NO. 17217 was registered in the name of the 3rd respondent on 1st July 2016. Copies of the sale agreements are annexed as 'FM 21', 'FM 22', 'FM 23', 'FM 24' and 'FM 25').

34. Accordingly, the Agency had, on 3rd December 2018, obtained preservation orders against the respondents' pursuant to sections 81 and 82 of POCAMLA in Nairobi High Court Civil Application No 55 of 2018, Assets Recovery Agency –vs- Phyllis Njeri Ngirita & Others. The orders were gazetted on 14th December 2018 in Kenya Gazette Notice No. 12833 Vol CXX – No. 152.

35. It is the Agency's case that it is empowered under section 90 of POCAMLA to apply for an order of forfeiture to the government of all or any of the property that is subject to the preservation order. Its case is that it is in the interests of justice that the court issues the orders that the assets belonging to the respondents, which are reasonably believed to be proceeds of crime, should be forfeited to the government and transferred to the Agency. Should the court not grant the said orders, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of the general public interest.

36. The Agency has addressed the respondents' explanation with respect to the acquisition of the subject properties in six affidavits filed in response to the respondents' affidavits. In his further affidavit, **S/Sgt Musyoki** responds to the averments set out in the affidavit sworn on 12th April, 2019 by the 1st respondent. He addresses first an allegation that the court had released the motor vehicles the subject of this application.

37. He deposes that by its order dated 19th December 2018, the court had ordered that the motor vehicles shall be detained by the OCS Naivasha Police Station or any other police officer or station only if there is a court order directing their detention or preservation. The Agency's case is that it had obtained preservation orders in Nairobi High Court Anti-Corruption & Economic Crimes Division Misc. Application No 55 of 2018 on 3rd December, 2018, before the ruling of 19th December, 2018, which were gazetted, pursuant to section 83(1) of the POCAMLA, on 14th December, 2018.

38. The Agency notes that the respondents had produced as annexure **PNN-3** thirteen (13) payment vouchers dated between 14th October, 2016 and 1st February, 2017 for the total sum of Kshs 98,076,970 as follows:

No.	**Vch No.**	**Date**	**Description**	**Amount (Kshs)**	**Replying Affidavit at Page No.**
i.	078	14/10/2016	Supply of workshop and drilling equipment and accessories	8,620,000.	011
ii.	062	14/10/2016	Supply of workshop and drilling equipment and accessories	9,030,000.	029
iii.	073	14/10/2016	Supply of workshop and drilling equipment and accessories	9,051,000.	047
iv.	079	14/10/2016	Supply of workshop and drilling equipment and accessories	8,600,000	086
v.	128	14/10/2016	Supply of foodstuff (Tin Beans)	6,058,037.	098
vi.	083	14/10/2016	Supply of workshop and drilling equipment and accessories	5,890,000.	134
vii.	081	14/10/2016	Supply of workshop and drilling equipment and accessories	7,840,000.	172
viii.	085	14/10/2016	Supply of workshop and drilling equipment and accessories	4,900,000.	192
ix.	118	14/10/2016	Supply of workshop and drilling equipment and	9,787,680.	215

			accessories		
x.	098	14/10/2016	Supply of foodstuff (Tinned Beans)	9,999,938.	108
xi.	205	17/10/2016	Supply of foodstuff (Tinned Beans)	6,760,265.	131
xii.	383	9/12/2016	Supply of workshop and drilling equipment and accessories	6,860,000.	150
xiii.	604	1/2/2017	Supply of workshop and drilling equipment and accessories	4,730,000.	063

39. The Agency notes that 10 payment vouchers worth Kshs 79,726,705 for supply of workshop and drilling equipment and accessories were prepared on the same day, 14th October, 2016, in favour of the respondents and their entities. In the Agency's view, this raises the question why different vouchers were prepared rather than the payment being done by a single voucher. In its view, this was a clear indication of a money laundering schemes. It further raised the question how the respondents managed to obtain the 10 contracts for supply of workshop and drilling equipment accessories and foodstuff and all payment vouchers were prepared in one day.

40. The Agency further notes that the respondents have not shown any source of funding for the financing of the supplies to the NYS. They have also not annexed any evidence showing how the contracts were awarded, or any trading licences and payment of any taxes on income earned from businesses and trade to the Kenya Revenue Authority to prove that they were undertaking legitimate business.

41. The Agency disputes the respondents' allegation that they had supplied various government agencies for over 20 years. It notes that all the documents produced in support of this averment are between 14th October 2016 and 1st February 2017, a period of 4 months. It further observes that the respondents received funds in their bank accounts, as evidenced in their bank statements, only during the period that fraud and economic crimes were committed at the NYS.

42. According to the Agency, the properties the subject of this application were all purchased between 2016 and 2017, the period during which the fraud and economic crimes were committed at the NYS. It reiterates its case that there are reasonable grounds to believe that the properties held in the name of the respondents are therefore proceeds of crime. They were obtained directly or indirectly as a result of money laundering and other predicate offences.

43. The Agency disputes the contention by the respondents that they were targeted by the investigative agencies. It argues that they were charged based on the evidence before the criminal court. It asserts that the allegations made against one Chief Inspector Mike Muya cannot be used to immunize the respondents against recovery proceedings. It notes that the present application and the criminal proceedings against the respondents are separate and distinct, with the Agency pursuing the assets reasonably believed to be proceeds of crime in accordance with its mandate under POCAMLA.

44. In responding to the respondents' affidavits sworn on 30th July 2019, S/Sgt Musyoki avers that he had obtained orders pursuant to section 118 and 121 of the Criminal Procedure Code in Miscellaneous Criminal Application Nos 1837, 1998, 2107, 2251 and 3450 of 2018 before the Chief Magistrate's Court, Milimani, Nairobi. He had also obtained orders in Nairobi High Court Anti-Corruption & Economic Crimes Division Misc Application No 39 of 2018 for warrants to investigate and freeze, and for the inspection and production of documents related to accounts held by the respondents and their associates.

45. With regard to the averments by the 1st respondent that they have been discriminated against, S/Sgt Musyoki avers that the respondents have been charged with other suspects, including officers in the employment of the NYS with criminal offences in Criminal Cases No ACC 13, 15 and 17 of 2018. He had demonstrated in his affidavit in support of the application the complex money laundering schemes that the respondents and their associates actively engaged in.

46. The Agency notes that the 1st respondent has failed to produce any tangible evidence of the purported legitimate agricultural activities or business of supplies of tangible goods and livestock and dairy production or loans from various banks to explain her broad sources of income and wealth. She had also not produced any proof of the existence of farm business such as trade permits, tax returns, tax compliance certificates, schedule of payments of labourers, schedule of cash deposits or any relevant document to support existence of the said business.

47. According to S/Sgt Musyki, he had analysed the documents relied on by the respondents and noted that the four LPOs produced

by the 1st respondent trading as Njewanga Enterprises namely 2554124, 2141333, 2474625, and 2172521 dated 19th June 2015, 30th January 2014, 13th May 2015 and 25th March 2014 respectively that the total amount supported by the 1st respondent's documents in annexure PNN 1 is Kshs 5,824,210. It is not the Kshs 38,698,970 that the 1st respondent alleged she had undertaken.

48. The LPOs are in respect of the supply of watermelon and cabbages worth Kshs 1,539,150; English potatoes, watermelon and cabbages worth Kshs 1,210,000; watermelon worth Kshs 3,000,000; and cabbages, onions and greengrams worth Kshs 785,060, making a total of Kshs 5,824,210. It was the Agency's averment that the 1st respondent had not explained or supported with documents the difference of Kshs 32,874,760 received. Further, contrary to procedure, the 1st respondent had been paid by NYS directly to her personal account.

49. Regarding the 1st respondent's contention that she had worked in Germany and saved 120,000 Euros from her employment, the Agency noted that she had not produced evidence of a visa, work permit, copy of passport and bank account statements in support.

50. In response to the affidavit sworn by the 2nd respondent which is in material respects the same as that of the 1st respondent, S/Sgt Musyoki deposes in essentially the same terms as with respect to the contentions by the 1st respondent. He reiterates his averments that the respondents have engaged in a complex money laundering schemes detailed in his affidavit in support of the forfeiture application; the failure by the respondents to produce evidence showing how the contracts they rely on were awarded, trading licences and payment of any taxes on income earned in support of their alleged legitimate businesses. He also reiterates that the respondents had not produced evidence of goods or services delivered, or evidence of any legitimate agricultural or other business activities to explain the alleged broad sources of income and wealth.

51. In explaining her broad source of income, the 2nd respondent had alleged that she obtained a loan on the security of L.R. No. 1144/263, which she alleged was transferred to her in 2013. S/Sgt Musyoki observes that contrary to this allegation, the property was actually transferred on 18th August 2010, and there is no entry in the title to the property or any evidence to show that the 2nd respondent obtained a mortgage of Kshs 28 million in 2014. According to the Agency, the 2nd respondent was advanced a mortgage of Kshs 9,750,000, not Kshs 28,000,000, on 29th May, 2013, a period which is outside the period of investigation in this matter. The loan was for the purpose of completing construction on LR. No 1144/263.

52. Further, contrary to the allegation by the 2nd respondent in reliance on an affidavit purported to have been sworn on 26th July, 2019 by one Jane Wangari Theile, there is no evidence that the 2nd respondent received a sum of Kshs 10,708,400 in 2006 from the said Jane Wangari Theile. From his analysis of the payments set out in the 2nd respondent's affidavit, being monies sent by way of Western Union to the 2nd respondent intermittently between 8th April, 2006 and 10th March 2011 by the said Jane Wangari Theile, the total amount sent was 9,050 Euro, the equivalent of Kshs 1,037,452.18 using the Central Bank of Kenya Foreign Exchange Rate of Kshs 114.6356 as at 14th October, 2019.

53. S/Sgt Musyoki observes that the 2nd respondent has not explained the difference of Kshs 9,670,947.82 between the alleged soft loan extended to her and the amount of Kshs 1,037,452.18 which the Agency's tabulation indicates the 2nd respondent received. In any event, according to the Agency, the affidavit of Jane Wangari Theile is an afterthought, having been sworn four (4) months after the application for forfeiture was filed on 12th March, 2019 and three (3) months after the respondents filed their joint replying affidavit on 12th April, 2019. The Agency also questions the validity and authenticity of the inventory of payments, which it notes is handwritten and cannot be verified.

54. According to the Agency, the documents annexed to the 2nd respondent's affidavit in opposition to the application do not explain the funds that she received through Waluco Investments and Ngiwaco Enterprises during the period under investigations, 2015 to 2018. The Agency further notes that the loan from Equity Bank referred to by the 2nd respondent was for Kshs 150,000, which was advanced on 29th December 2005 and is therefore not relevant to the instant forfeiture proceedings.

55. It is the Agency's deposition that the 2nd respondent has not adduced any evidence to support the award, supply and delivery of goods for the stated amount of Kshs 67,548,650 that was paid by the NYS. It notes that the documents that she seeks to rely on comprise unsigned delivery notes that do not bear any receiving stamp or date of receipt of the goods purportedly delivered to the NYS.

56. In response to the affidavit sworn by the 3rd respondent which is again essentially the same as that of the other respondents, the Agency reiterates in large part the averments by S/Sgt. Musyoki in response to the affidavits by the other respondents with respect to the lack of any documentation to support the award of contracts to him, the delivery of any goods to the NYS. or the existence of

his alleged legitimate businesses. It is also its averment that the 3rd respondent has not produced any evidence to support the payment of Kshs 87,931,482.65 to him by the NYS between 2015 and 2018.

57. In a further affidavit in response to the respondents' affidavits sworn on 18th November 2019, the Agency makes averments mostly on question of law relating to the provisions of POCAMLA on civil forfeiture and the burden of proof on the Agency in such matters.

58. It is the Agency's averment that the assets sought to be forfeited were bought within the period under investigations. It avers in this regard that motor vehicle registration number KCH 600H Toyota station wagon manufactured in 2016 was registered on 15th July 2016 in favour of the 3rd respondent and the 1st Interested Party. Motor vehicle registration number KCH 753U Toyota wagon was registered on 22nd July 2016 in favour of the 1st respondent and Opportunity International WEDCO. The third motor vehicle, KCH 889M Toyota pick-up silver was registered on 12th July 2016 in favour of the 3rd respondent. It also reiterates its previous averments with respect to the purchase of the real property.

59. Regarding the 2nd respondent's supplementary affidavit sworn on 18th November 2019, the Agency reiterates in large part its averments in response to the 1st respondent's affidavit, including the averments relating to the properties the subject of this application and their acquisition by the respondents within the period of investigation. It notes that the 2nd respondent had also failed to demonstrate with particularity and documentary evidence that the payments made to her were pursuant to tenders that had been awarded to her. There was no evidence of goods or services procured by NYS directly from the 2nd respondent and this was therefore a clear case of fraud. It had also been established that the award of tenders to the respondents was irregular and did not conform to the procurement procedures provided for under the Public Procurement and Asset Disposal Act.

60. The Agency terms the documents annexed to the 2nd respondent's affidavit, including the purported invoices and delivery notes, as an afterthought. It notes that they do not bear the name of the officer receiving, date, time and acknowledgement stamps from the NYS and are of no evidential value.

61. With respect to the tax clearance certificates relied on by the respondents. it is the Agency's case that they can be withdrawn once new information comes to the knowledge of KRA. As for the purported LSO documents attached to the 3rd respondent's affidavit, they relate to the period between 2007 and 2013, which is outside the period of investigation by the Agency. Like the other respondents, the 3rd respondent had failed to demonstrate with particularity and documentary evidence that the payments made to him were pursuant to tenders that had been awarded to him.

62. S/Sgt Musyoki avers that he conducted comprehensive investigations together with investigators attached to the Financial Investigation Unit of the DCI, including one No. 67343 PC Bernard Gikandi. Gikandi had prepared a covering report that was forwarded to the DPP to support the criminal charges against the respondents. The investigators had set out in detail in the report the criminal enterprise and the money laundering schemes executed by the respondents.

63. Regarding the chattel mortgages obtained by the respondents from the Interested Parties, the Agency argues that they were an attempt to conceal and disguise the source of funds with the aim of laundering proceeds of crime. S/Sgt Musyoki avers that the subject vehicles were bought during the period under investigation, and whether or not the respondents are indebted to the 1st Interested Party is solely between the two parties.

The Response

64. The respondents filed 9 affidavits in opposition to the application for forfeiture. Aside from the first affidavit filed, sworn on 11th April 2019 by the 1st respondent on behalf of all the respondents and with their authority, the other affidavits, though sworn individually by the three respondents, are essentially in the same terms, with the averments by the 2nd and 3rd respondents, who are a daughter and son of the 1st respondent, substantially mirror those of the 1st respondent. The only differences are a few averments of fact that are peculiar to the respective respondents. The 2nd and 3rd respondents' affidavits were filed in court on 12th April 2019, 27th July 2019, and 18th November 2019. I will accordingly summarise the averments by the respondents without attribution to the individual respondent except where the averments are specific to a respondent.

65. The respondents term the application for forfeiture an abuse of the court process, which aims to circumvent the orders of the court issued on 19th December 2019 for the release of their motor vehicles. They deny that the properties the subject of the

application are proceeds of crime and assert that they are hardworking Kenyans who have supplied various government agencies with goods and services for over 20 years. The supplies have been made faithfully and diligently after successful application for government tenders. They therefore have a legitimate source of income, and they rely on bundles of documents annexed to their affidavits. They further assert that they supplied goods to the NYS in the period they were paid the money the subject of this application.

66. The respondents aver that on 23rd May and 4th June 2018, police officers raided their homes and carried with them vital documents that the respondents had used to buy the goods they supplied to the NYS, actions they term to be in violation of their constitutional rights. These documents included payment vouchers, delivery receipts and purchase documents. They contend that the seizure of the goods was done in an effort to defeat their defence in subsequent proceedings. The only documents that they were able to get were the LPO's evidencing the supply of goods which were with their accountant, a Mr. Lukas Kamau, for purposes of filing returns at the KRA on the supply of the goods and tax due from such supplies.

67. The respondents assert that the investigations were conducted in bad faith and are malicious as they were premised on a family dispute between the respondents' family and the chief investigating officer, one Mr. Mike Julius Kingoo Muia, who was the lead investigator before being replaced at the respondents' behest by a Mr. Waweru from the DCI. The respondents rely in support of this averment on an affidavit sworn by the said Muia in opposition to their application in the Magistrate's Court to be released on bail.

68. It is their case that the said Muia was a business partner of the 3rd respondent who owed him Kshs 3,000,000. They rely in support on an affidavit sworn by the said Muia in which they aver that he admits to knowing and doing business with the respondents. Reliance is also placed on a photograph said to be of the said Muia and the 3rd respondent. The respondents contend that it is as a result of the debt owed to the said Muia by the 3rd respondent that Muia vowed to teach the respondents' family a lesson by maliciously instituting the investigations that led to their arrest and preferment of charges against them in Criminal Case No ACC 13, 15 and 17 of 2018.

69. According to the respondents, the said Muia was a family friend of the family with whom they had shared many issues, including partnering in supplying various goods and services, in which the said Muia had acted though proxies. Their partnership had, however, soured following a disagreement on distribution of payments and the said Muia had vowed to make the respondents pay. They allege that the proceedings against them are a result of the bad blood between them and the said Muia. Though the officer had been removed from being the lead investigator in the case, he had continued to harass the respondents to clear the debt that is owed to him by the 3rd respondent.

70. The respondents allege that the said Muia had unduly influenced the 3rd respondent to sign an affidavit, whose content the 3rd respondent did not understand, falsely stating that he was depositing funds into an account towards repayment of a loan between the 3rd respondent and Muia's late father.

71. With regard to the substance of the application, the respondents aver that it is maliciously instituted with the aim of defeating their right to property, is premature, prejudicial and an affront to justice. This is because they have not been convicted of any criminal offence yet. It is their case that their right to being presumed innocent until proven guilty is threatened by the application which seeks to arbitrary deprive them of their property. They further aver that no nexus has been established between the funds used to purchase the properties the subject of the application and the funds that the Agency claims was obtained from NYS through corrupt means.

72. With respect to the properties in issue, the respondents aver that they bear the name of parties who have not been joined to the proceedings, despite orders adverse to them being sought. The respondents contend that this is in violation of these parties rights to fair hearing, right to property and equal benefit of the law contrary to Article 40, 47 and 50 of the Constitution.

73. The respondents challenge the application further on the basis that they have not been convicted of any offence. They argue that the motor vehicles at issue were acquired legitimately as they had procured chattel mortgages for their purchase. The purchase of the vehicles was therefore not part of a money laundering scheme. It is their averment that the purpose of the money advanced to them by the Interested Parties was for an identifiable purpose that was actualized upon registration of the motor vehicles in both the name of the respondents and the Interested Party. They aver that the vehicles did not have a previous registration in the name of any of the respondents exclusive of the Interested Party

74. The respondents further assert that the contention by the Agency that the balance of the purchase price (for the vehicles) was paid through proceeds of crime is unfounded. It is their case that it was to be paid from proceeds emanating from a legitimate business venture that the respondents are engaged in. The Agency has failed to show the nexus between the property alleged to be the proceeds of crime and the respondent's property acquired through legitimate business enterprise and financing by the Interested Parties.

75. In their affidavits sworn on 27th July 2019, the respondents assert that contrary to the averments by the Agency, they have never participated in any criminal activity or money laundering, nor have they engaged in fraud, economic crimes or any illegal activity. Rather, they have always engaged in legitimate business in supplies, farming, livestock and horticulture. With specific reference to the funds set out in the Agency's affidavit as having been deposited in the respondents' respective business entities' and personal accounts held at KCB Limited, the respondents aver that the funds were acquired and accumulated legitimately, and had also been positively and accurately posted by the NYS.

76. The respondents also aver that they have engaged in legitimate business with several 'stakeholders', including NYS, and there is nothing illegal in receiving payments for business already done. They contend that public payments are subjected to due diligence, checks and balances, and the payments to them were subjected to audit, examination and verification. Further, all the monies paid into their accounts were paid in exchange for valid supplies to the NYS, and that rigorous scrutiny and prudence were applied when making such public payments.

77. The respondents allege bad faith and double standards, questioning why the Agency has focused on them, to the exclusion of other suspects. They contend that no other case has been pursued with the viciousness that has been demonstrated against them They also allege discrimination against them and a vendetta on the part of the Agency's deponent, S/Sgt Musyoki, whom they allege is acting under the direct control of Muia Mike Kingoo.

78. The respondents deny ever having engaged in corruption. They also assert that the rights and property of the 1st and 2nd respondents, as widows, are protected under Articles 23, 24, 25 and 26 of the Women's Protocol to the African Charter on Human and People's Rights as read with Article 2(5) (6) of the Constitution.

79. In explaining the sources of their funds, all the respondents aver that they started their small supply businesses in various years- in 2002, 1966 and 2003 in the case of the 1st, 2nd and 3rd respondents respectively. They aver that they have grown their respective businesses into huge enterprises with several divisions and compartments. They therefore respectively have broad sources of income that cumulatively explain the sources of their wealth. They have engaged in legitimate agricultural activities that earn reasonable amounts of money. Such agricultural activity includes cultivation of maize, cabbages, onions and tomatoes, water melons, oranges, passion, guavas and bananas. They have also engaged in legitimate business of supplies of tangible goods to the NYS, including uniforms, firewood, vegetables, bread, mandazi and mahamri, meat, potatoes and tomatoes. They all assert that without their efforts and supplies to the NYS, sometimes done in difficult circumstances, the over 10,000 NYS youths would have starved.

80. The respondents further aver that they engage in legitimate livestock and dairy production that has smart returns. Each names the number of animals kept, 30, and 60 respectively, for meat and meat products as well as dairy cows and 200, 100 and 300 goats and sheep respectively that bring good economic returns. In order to sustain their businesses, the respondents aver that they have borrowed funds from Cooperative, KCB and Equity Banks.

81. In their last affidavits sworn in opposition to the application pursuant to leave granted on 16th October 2019, the respondents question the basis on which the Agency received information from the DCI in respect to the present matter. They note that the DCI is a different law enforcement body whose legal mandate is different from that of the Agency. They also assert that it is not clear whether the Agency opened an inquiry file upon receipt of the information from the DCI.

82. The respondents contend that the Agency is legally obligated to ensure that any information or evidence that it may obtain from other law enforcement bodies meets the standards required for a prosecution that is intended to achieve the objects of POCAMLA. Further, that the Agency has a specific legal mandate under POCAMLA that is separate and distinct from the legal mandate of the DCI. Such policing powers as have been vested in the Agency under POCAMLA have to be exercised in accordance with the Constitution and the law. They further make various averments with respect to the powers of the Agency under POCAMLA and assert that an application for asset forfeiture pre-supposes the existence of victims and payment of restitution to victims of crime, but there are no known victims in this case.

83. The respondents further argue that the monetary value of the claim against them in this application exceeds the value of the sums which they are respectively alleged to have fraudulently acquired as charged in Nairobi Anti-Corruption Court Criminal Case No.10 of 2018. It is unconscionable, in their view, for the value of the asset forfeiture claim against them to exceed the value of the alleged proceeds of crime that they are alleged to have acquired through their purported crimes as alleged in the criminal case. They allege that where a court of law orders a confiscation of proceeds of crime after a conviction as provided for under section 61 (1) of POCAMLA, it is provided that the amount that the court may order a defendant to pay to the government shall not exceed the value of the defendant's proceeds of the offences or related criminal activities as determined by the court. They accordingly aver that the present application against them is intended to oppress or punish them and not to recover any purported proceeds of crime.

84. The respondents further contend that the Agency is using what it is attempting to pass off as a civil claim to achieve the objects of criminal law. Further, that the asset forfeiture claim is so grossly disproportionate to the offence that it is designed to punish that it amounts to cruel punishment within the meaning of Article 29 (f) of the Constitution of Kenya. It is also their contention that the evidence that the State intends to rely on in the criminal charges against them has not been placed before this court to enable it to make its own determination, on a balance of probabilities, whether the sums which are alleged to have been unlawfully paid to them by the NYS constitute proceeds of crime.

85. The respondents further contend, on the basis of advice from their Counsel, that there is reason to believe that the Agency did not carry out any investigations in respect of the matters which fall within its legal mandate under POCAMLA/ They were never informed by the Agency about the accusations which had been levelled against them by the DCI in the information that was purportedly given by the said DCI to the Agency. They were also completely unaware of the purported offence or offences that they were alleged to have committed in the said complaints which supposedly form the basis of the present claim to recover the alleged proceeds of crime.

86. The respondents further aver that they have never been questioned by the Agency about the allegations made against them nor provided with an opportunity to correct, contradict or comment on the allegations contained in the purported complaint before this forfeiture application was filed.

87. The respondents further aver that they are entitled under the provisions of Article 47 of the Constitution as read with section 4 (1) and (3) (b) of the Fair Administrative Action Act, 2015 to be given a fair and reasonable opportunity to defend themselves before the Agency made the decision to file the present application. They were not summoned by the Agency to respond to the allegations of their involvement in corrupt activities at the NYS before the adverse decisions to seek orders to investigate and freeze and or preserve the funds in their bank account were sought from the Chief Magistrate's Court at Milimani through Miscellaneous Criminal Application Nos.1837 of 2018, 1998 of 2018, 2107 of 2018, 2251 of 2018 and High Court at Nairobi's Anti-Corruption and Economic Crimes Division Miscellaneous Application No.39 of 2018 as contemplated under Article 47 (1) of the Constitution.

88. They were also not summoned and given an opportunity by the Chief Magistrate's Court or the High Court in the matters aforesaid to respond to the allegations of their involvement in corrupt activities at the NYS before the said orders were made. This, they allege, is a violation of their constitutional rights under Article 50 (1) of the Constitution to a fair and public hearing.

89. It is the respondents' deposition further that no investigation into the purported fraud committed at the NYS, which is a public body, can be carried out by any competent investigator without questioning relevant persons at the said body and obtaining relevant documents and information on the suspected payments and the tenders pursuant to which the payments were made.

90. While citing the provisions of section 121 and 122 of POCAMLA, the respondents contend that the fact that the Agency failed to exercise the powers under these sections and chose to file a forfeiture claim which is not supported by any witness statements, documents or information from NYS gives rise to reasonable doubt as to whether the Assets Recovery Agency conducted any investigations into a legitimate complaint or whether it ever had any intentions of doing so. They further aver that the Agency has failed to produce sufficient circumstantial evidence from which an inference can be drawn to the required criminal standard that the property in the said bank accounts has a criminal origin.

91. The respondents further argue that the Agency has not demonstrated that it made any effort to obtain information from the NYS on how the respondents were awarded the relevant tenders and contracts. It has also not demonstrated that it made any effort to obtain information from KRA with respect to the respondents' tax payments. It is their contention that they were barred by the trial court from accessing the NYS offices during the pendency of the trial and they cannot therefore reasonably be expected to obtain information from there. The further charge the Agency with a failure to produce any records from the NYS stores to demonstrate

that the respondents had not delivered any goods to the NYS.

92. With regard to the motor vehicles the subject of this application, the respondents aver that the Agency has not given any reason why it believes that the motor vehicles are proceeds of crime. It is their case that the mortgage agreements did not require that they should state the purpose for which they needed the loan. Further, that they had not claimed that they had obtained the vehicle from financing from the 1st Interested Party. In any event, there is nothing illegal in obtaining a loan of a lesser amount than the value of the security offered.

93. The respondents also make various averments specific to their individual circumstances. The 1st respondent avers that she has engaged in livestock farming in Gulgil and traded in cereals such as beans, maize and green grams from Busia to Naivasha. She also used to trade in cabbages and green vegetables in whole sale using a lorry registration number KCA 548T and made large amounts of money from the business. She has engaged in legitimate business in Kenya between 2003-2016 as shown in a bundle of documents (annexure "PNN 1") worth Kshs. 38,698,970/=. On or about 12th July 2004, she had supplied the Prisons Service with potatoes worth Kshs. 59,800/=.

94. On 16th February 2005, she supplied the Naivasha G. K. Prison with oranges worth Kshs. 60,000/=. On 30th May 2005, she supplied English potatoes worth Kshs. 88,460/=, though she does not indicate to what institution. The 1st respondent avers that she made supplies of various items in the years 2005, 2007, the amounts thereof being Kshs. 219,497/=; Kshs. 171,558/=; Kshs.14,608/=; Kshs. 33,120/=; Kshs. 27,045/= and Kshs. 42,992/= (annexure "PNN 2".) She further avers that she worked in Germany in 2006 and 2007 and saved 120,000 Euros which she invested in the family business, but the documents in respect of the savings were confiscated by CID detectives.

95. The 1st respondent further alleges that she had started a business known as Njewanga Enterprises on or about 20th June 2013. She relies on a bundle (exhibit 4) which she states demonstrates that she was actively engaged in legitimate business for more than fifteen years. Within the said period, she supplied goods and services to various public bodies, and she had also obtained a loan from Equity Bank Ltd of Kshs 150,000.

96. On her part, the 2nd respondent states that she is a business woman in Naivasha. She denies having ever engaged in criminal activity or in money laundering. She has always engaged in legitimate business in supplies, farming, livestock and horticulture. She echoes the averments by the 1st respondent that the funds in their business entities and personal accounts held at KCB Limited have been acquired and accumulated legitimately, and have been positively and accurately posted by the NYS in these accounts. She also alleges double standards and discrimination against the respondents.

97. Like the 1st respondent, she avers that she started her small business of supply, but in 1966. She has grown it into a huge enterprise with several divisions and compartments. She also engages in farming of maize, and vegetables, cabbages, onions and tomatoes, and water melons. She too engaged in supply of goods to the NYS, without which the youth in the institution would have starved.

98. The 2nd respondent avers that in 2013, using savings earned from agriculture and from a posho mill, she purchased L.R. No. 1144/263 (FR. 16237) Naivasha in her name. She had taken a mortgage of Kshs. 28,000,000/= to improve the property. In 2006, her daughter, Jane Wangari Theile and her husband gave her a loan of Kshs. 10,708,400 to assist in expanding and improving her business. She supplied, on diverse dates between 2002 and 2015, firewood, meat, powder milk, biscuits, and fruits to the Prison Department, Naivasha District Hospital, Naivasha TTI and NYS for a global sum of about Kshs. 41,876,527, which was legitimate business and has nothing to do with proceeds of crime and or unexplained wealth.

99. On 19th May 2002, she bought L.R. No. 27 High Density Lake View at Naivasha for Kshs. 1,400,000/=. On 29th December 2005 she obtained a loan of Kshs. 150,000/= from Equity Bank. She avers that on 31st December 2013 Mahaver Stores Ltd would allow her to take goods worth more than Kshs 2, 671,220, relying on a letter from the said store to this effect (exhibit "LWN 7"). On 14th January 2017 she was able to purchase a Toyota Hilux for Kenya Shillings One Million Nine Hundred and Twenty Three Thousand (Kshs. 1,923,000/=.

100. The 2nd respondent avers that she enjoyed overdraft facilities of Kenya Shillings Three Million (Kshs. 3,000,000/=) at KCB Bank Gilgil Branch to service her contracts with the NYS, relying in support on exhibit "LWN 11". She had bought, on or about 14th May 2010, L.R. No. 1144/263 at Naivasha town measuring 0.1148 acre for Kshs. 1,950,000/=. She had also bought, on or about 27th September 2010, a shop known as Ikumbi General Stores for Kshs. 150,000/=. She was also the owner of Ngiwaco Company

Enterprises; she also traded as Ngirispa Enterprises, Annway Investment and Waluco Investments for a total amount of ksh.67,548,650/= , though she does not indicate with what or with whom she traded in these entities..

101. According to the 2nd respondent, she received assistance in the sum of Ksh.10,800,000/= from her daughter, Ann Wambere Wanjiru Ngirita who was working in Germany, reliance for this averment being placed on exhibit "LWN 15". The 2nd respondent also produces a bundle of documents containing copies of the certificates of registration of Ngiwaco Enterprises, Waluco Investments, several single business permits and Tax Compliance Certificates which she avers demonstrate that she has been engaged in legitimate business.

102. It is the 2nd respondent further averment that on or about 24th October 2018, she requested the Ministry of Public Service, Youth and Gender Affairs to provide her with copies of documents pertaining to LPOs, invoices paid and unpaid at the NYS. She was provided with the documents which she exhibits as annexure LWN 5 in the affidavit filed on 18th November 2019. She also annexes documents which she avers demonstrate that she has been engaged in legitimate business for more than fifteen years during which period she supplied various public bodies. She states that on or about June 2018, the respondents engaged a professional accountant/auditor to analyze the books of accounts, invoices and financial statements of the companies for the financial year 2015/2016 and he prepared a report which she exhibits as annexure LWN 7. She had also secured a credit mortgage from KCB of Kshs. 9,750,000/= payable in ten years in respect of L.R. 1114/263, an overdraft facility with KCB and substantial savings with the Kenya Women Finance Trust.

103. For his part, while echoing the averments of the 1st and 2nd respondents, the 3rd respondent describes himself as a business man in Naivasha who never participated in any criminal activity or money laundering. He has always engaged in legitimate business in supplies, farming, livestock and horticulture. Like the other respondents, he asserts that he engaged in legitimate business with several stakeholders, including NYS, and there is nothing illegal in receiving payments for business already done. The funds deposited in their accounts were for valid supplies procured by the NYS and rigorous scrutiny and exercise of prudence was applied when the payments were made.

104. The 3rd respondent avers that he started his small business of supplies in 2003. He too, has grown it into a huge enterprise with several divisions and compartments, has a broad source of income that cumulatively explains the sources of his wealth, and engages in legitimate agricultural involving the cultivation and supply of the same vegetables as the other respondents. He has also engaged in legitimate business with various government agencies between 2004 to 2015 to the tune of Kshs 20,273,858.

105. He registered JerryCathy Enterprises on 27th May 2006 and carried out various businesses between 2006 and 2016 which was legitimate as shown by the bundle of exhibits ("JGN2") which showed that he transacted business worth more than Kshs.14,207,910. The 3rd respondent also deposes that he has a shop where he sells water melons on retail and wholesale basis. His shop was doing very well until the investigations by the Agency which had a malicious intention to revenge on his family. He had, on 4th July 2014, purchased motor vehicle registration number KCA 548T at Kshs. 3,600,000/= (exhibit "JGN 4").

106. In support of his averment that he has engaged in legitimate business, the 3rd respondent relies on the certificate of registration of JerryCathy Enterprises and copies of tax compliance certificates (exhibit JGN 4). He avers that all his documents relating to the transactions which gave rise to the criminal case were confiscated by DCI officers in searches done at his home and business premises at the time of his arrest in May 2018. He however relies on a bundle (exhibit JGN5) which he avers demonstrates that he has been actively engaged in legitimate business for more than fifteen years, and that he has supplied goods and services to various public bodies.

107. The 3rd respondent asserts that he had requested the Ministry of Youth and Gender Affairs, State Department of Public Service and Youth for all the relevant LPOs and invoices paid or unpaid in respect of Jerrycathy Enterprises. On 30th October 2018, he had been provided by the Principal Secretary of the Ministry with the documents (exhibit JGN 6), which demonstrate that he has been engaging in legitimate business with the NYS.

The Submissions

108. The Agency filed written submissions dated 26th June 2019 and Further Written Submissions which are undated but were filed in court on 18th May 2020. The Agency identifies four issues as arising for determination. These are, first, whether the properties sought to be forfeited are proceeds of crime and second, whether they are liable to forfeiture to the government. The third issue is whether the present application is in violation of the respondents' right to property, fair administrative action and fair hearing. The

final issue identified is whether the forfeiture proceedings are dependent on the outcome of the criminal proceedings against the respondents.

109. In addressing itself to the first issue, the Agency submits that the application is brought under POCAMLA which provides for the offence of money laundering and introduces measures for combating the offence. It further provides for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime. The Agency relies on the decision in **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR** in which the court stated that:

"The letter, spirit purpose, and gravamen of the Proceeds of Crime and Anti-Money Laundering Act is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited, after due process, to the state, on behalf of the public which is deemed to have suffered some injury by the criminal conduct."

110. The Agency further relies on the decision in **Mohunram and Another v National Director of Public Prosecutions and Another (CCT19/06) [2007] ZACC 4** in which the court commented on the objects and rationale for the measures adopted in the Prevention of Organized Crime Act as considered in **National Director of Public Prosecutions v Mohamed N.O. [2002] ZACC 9**. Further reliance is placed on the case of **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** in which it was held that the primary object of a confiscation order is not to enrich the State but, among other secondary purposes, to deprive the convicted person of ill-gotten gains.

111. The Agency cites the definition of *'proceeds of crime'* in POCAMLA to submit that the funds from which the properties the subject of this application were purchased are proceeds of crime. It had received information from the DCI regarding on-going investigations involving fraud and economic crimes at the NYS, and the respondents have been charged with various criminal offences in Criminal Case Nos. ACC 13, 15 and 17 of 2018.

112. The Agency reiterates the factual foundation for the present application, including its investigations and findings on the respondent's bank accounts which it suspects have been used for money laundering purposes. The 1st respondent had been paid in her personal account number 1109800584, which is contrary to procedure, Kshs 57,000,114.80. The 2nd respondent had, through Ngiwaco Enterprises and Waluco Enterprises, received a total of Kshs 263,385,849 on diverse dates between 2015 and 2018 from the NYS and associates.

113. Through his business Jerrycathy Enterprises, the 3rd respondent had received Kshs 87,931,482 on diverse dates between 2015 and 2018 from the NYS. The respondents had then intra-transferred the funds within the same bank into accounts that they own or that are owned by their family members or associates. According to the Agency, the respondents had received in their accounts a total of Kshs 133,922,491.30 in two consecutive days, the 17th and 18th October, 2016.

114. The Agency submits that these funds were thereafter used to purchase the properties the subject of this application. It notes that all the properties were acquired during the period the fraud and economic crimes were committed at the NYS, and that the funds were notably all from the NYS.

115. The Agency again cites the decision in **Schabir Shaik & Others –vs- State** (supra) in which the court observed as follows with respect to the definition of proceeds of crime:

"…One of the reasons for the wide ambit of the definition of "proceeds of crime" is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of "camouflage".

The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime."

116. While relying on section 112 of the Evidence Act, the Agency submits that the respondents have failed to demonstrate with particularity how they obtained the properties. Instead, they have indicated that the assets were obtained through legitimate sources of income and that they have supplied various government agencies with goods and services for over 20 years. These assertions, according to the Agency, are not supported by any documentary evidence.

117. The Agency relies on the case of **Assets Recovery Agency –vs- Fisher, Rohan and Miller, Delores, Supreme Court of**

Jamaica, Claim No 2007 HCV003259 with regard to the evidential burden placed on the respondent to demonstrate how they lawfully came into possession of the assets at issue. The Agency submits, in relation to the motor vehicles, that their value compared to what was advanced to the respondents by the Interested Parties clearly demonstrates that the respondents were engaged in a money laundering scheme. Its submission is that the allegation by the respondents that the motor vehicles were purchased through a chattels mortgage scheme is false, its contention being that the vehicles were used as security for a credit facility in an effort to conceal and disguise the source of funds for the purchase of the motor vehicles.

118. According to the Agency, the motor vehicles were purchased at different times between 2016 and 2017, the period of the investigations. Motor vehicle registration number KCH 600H Toyota station wagon was manufactured in 2016 and registered to the 1st respondent on 15th July 2016. The second vehicle, registration number KCH 753U Toyota station wagon was manufactured in 2009 and registered on 22nd July 2016. The final vehicle, registration number KCH 889M Toyota pick-up was manufactured in 2009 and registered on 12th July 2016.

119. The Agency further submits that the real properties the subject of this application were all purchased in the period under investigation, pursuant to sale agreements dated 2nd June 2016, 8th July 2016, 25th April 2017, 28th October, 2016 and 1st July 2016. None of the real properties, however, has yet been registered in the name of the respondents but remain in the previous owner's names, which the Agency submits is a ploy to disguise ownership of the properties. It is its submission further that though the respondents are not the registered owners, they are the beneficial owners having signed sale agreements and provided the funds for the purchase of the properties.

120. With regard to the argument by the respondents that the registered owners of the properties are not parties to this matter and that therefore their right to a hearing has been violated, the Agency cites section 92(3) of POCAMLA which provides that the court may make a forfeiture order even in the absence of a party whose interest may be affected by such an order.

121. The Agency discounts the evidential value of the copies of documents annexed to the respondents' affidavits as evidence of their legitimate businesses. It observes that most of them are not clear, do not have stamps signifying receipt of goods by the NYS, and their authenticity cannot be verified. The other documents relied on by the respondents largely do not link to the period under investigation or have been rebutted by its evidence. It is its case that the respondents have not been able to respond to the specific transactions that it has pinpointed with particulars on how they received the funds from the NYS. The Agency relies on the case of **Assets Recovery Agency vs Lillian Wanja Muthoni Mbogo & others, ACEC MISC APPL No 58 of 2018** for the proposition that there should be a clear source of funds and a document trail in the form of, *inter alia*, books of accounts, stock registers or LPOS to account for funds.

122. The Agency submits further that the actions of the respondents of intra- transferring among themselves the amounts they received from NYS was a money laundering scheme to camouflage the proceeds of crime and disguise the economic benefit derived as legitimate. It is its submission therefore that the respondents are beneficiaries of proceeds of crime, and the properties the subject of this application are proceeds of crime as they were obtained directly as a result of money laundering and other predicate offences.

123. The Agency asks the court to determine the second issue- whether the properties at issue are liable to forfeiture to the government-in the affirmative. It submits that it has demonstrated that the properties are proceeds of crime as defined in POCAMLA, and the court is empowered under section 92(1) thereof to make an order for forfeiture if it finds, on a balance of probabilities, that the properties have been used or are intended for use in the commission of an offence or is proceeds of crime.

124. The Agency relies on the case of **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372** with respect to the burden of proof in civil cases, which is on a balance of probabilities. It is its submission that the present proceedings are civil in nature and the standard of proof is on a balance of probabilities. Reliance is also placed on **Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168** in which it was held that the commission of a specific criminal offence need not be alleged in civil forfeiture proceedings. It also cites the case of **Muneka v Commissioner of Customs and Excise [2005] EWHC 495** for a similar holding.

125. The Agency further seeks support in the case of **National Director of Public Prosecutions (NDPP) –v- R O Cook Properties (Pty) Ltd 2004 ZASCA 36**. It submits that in this case, the Supreme Court of Appeal in South Africa found that Chapter 6 of the South African Prevention of Organised Crime Act No 121 of 1998, provides expressly at section 36 that all proceedings under that chapter are civil in nature. It also provides for forfeiture where it is established, on a balance of probabilities, that property has been used to commit an offence or is the proceeds of unlawful activities, even when no criminal proceedings are pending. The Agency

notes that Chapter 6 of POCA contains similar provisions on civil recovery as are found in Part VIII of POCAMLA.

126. It is the Agency's case that the respondents in this matter benefitted from the crimes committed at the NYS. That it has demonstrated on a balance of probabilities that the properties sought to be forfeited are proceeds of crime as they were purchased directly as a result of the offences committed at the NYS.

127. The Agency further relies on **Republic v Director of Public Prosecutions & another *ex parte* Patrick Ogola Onyango & 8 others [2016] eKLR** and **Serious Organized Crime Agency vs Gale** quoted in **Assets recovery Agency & Others –vs- Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120** in which it was 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. The Agency's submission is that the property in this matter are proceeds of crime and liable to forfeiture to the State under section 92(1) of POCAMLA.

128. The Agency's submission on the third issue is that the court should find the present application is not a violation of the respondents' right to property, fair administrative action and fair hearing. It observes that Article 40 of the Constitution guarantees to everyone the right to acquire and own property of any description in any part of Kenya. As provided under Article 40(6), however, this right does not extend to property which has been unlawfully acquired. The Agency relies for this submission on **Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eKLR** and the Namibian case of **Teckla Nandjila Lameck-Vs- President of Namibia 2012(1) NR 255(HC)** as well as **Martin Shalli -vs-Attorney General of Namibia & Others High Court of Namibia Case No:POCA9/2011**.

129. Regarding the respondents' contention that their right to fair administrative action and fair hearing under Article 40 and 50 respectively have been violated, the Agency relies on the words of the Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** and the High Court's decision in **Dry Associates Limited v Capital Markets Authority & Another [2012] eKLR** with regard to the distinction between the two constitutional rights. It is its submission that the respondents have been accorded the right to a fair hearing by participating in the instant proceedings. Further, that Article 47 does not apply in this case as it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies.

130. The final issue addressed by the Agency is whether the present proceedings should have awaited the outcome of the criminal proceedings against the respondents. It observes that the respondents have been charged in Criminal Case Nos. ACC 13, 15 and 17 of 2018 with, amongst others, conspiracy to commit an offence of economic crime contrary to sections 47(a)(3) and 48(1) of ACECA and fraudulent acquisition of public property contrary to sections 45(1)(a) and 48(1) of ACECA. It submits, however, that civil forfeiture entails an *in rem* action, that is, an action against the asset itself and not against the individual.

131. It relies on the decision in **Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR** in which the court stated that civil forfeiture proceedings are proceedings *in rem* (against the property) and involve a civil suit being brought against the property which is reasonably believed to be a proceed of crime. It further relies on section 92 (4) of POCAMLA which provides that the validity of a forfeiture order is not affected by the outcome of criminal proceedings or investigations in respect of an offence with which the property concerned is in some way associated.

132. The Agency further seeks reliance for this submission on **Phillips v The United Kingdom [2001] ECHR 437** quoted in **Martin Shalli -v-Attorney General of Namibia & Others** (supra); **Teckla Nandjila Lameck-vs- President of Namibia** (supra); **Assets Recovery Agency vs James Thuita Nderitu & others** (supra) **National Director of Public Prosecutions v Mohamed N.O**.(supra); **National Director of Public Prosecutions v Prophet (5926/01) [2003] ZAWCHC 16**; **National Director of Public Prosecutions v Van der Merwe and Another (A338/2010) [2011] ZAWCHC 8**; and **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR**. The Agency also relies on the **Stolen Asset Recovery initiative** publication: **Few and FAR: The Hard Facts on Stolen Asset Recovery, (2014)** on the damage wrought to a society, its economy and the rule of law, and the important role played by the seizure and recovery of the proceeds of economic crimes. It urges the court to find that the application for forfeiture is merited, and to grant the orders as prayed.

Submissions in Reply

133. The respondents filed two sets of submissions. The first set was filed on 23rd August 2019 by the firm of Ondieki & Co Advocates. Thereafter, the firm of Waudo & Co. Advocates filed submissions dated 21st May 2020 and filed in court on 26th May 2020 in which they indicated that the respondents wished to abandon the earlier submissions and rely entirely on the new

submissions.

134. In these latter submissions, the respondents' first argument relates to the burden of proof in matters such as this which are lodged under the provisions of the POCAMLA. They submit that the Agency has proceeded on the assumption that the burden of proof lies on them, and that all it needs to do in an application for civil forfeiture is level accusations against them and then the burden shifts to them to justify how they acquired the purported proceeds of crime. Should they fail to do so, their preserved assets are liable for forfeiture.

135. In the respondents' view, however, the legal burden of proof lies and remains with the Agency. Reliance is placed on section 107 of the Evidence Act for the proposition that he who alleges must prove. The respondents further rely on section 108 and 109 of the Evidence Act with regard to the burden of proof, It is their submission that the onus is on the Agency to prove that the subject properties are proceeds of crime as defined under section 2 of POCAMLA.

136. The respondents rely on the decision in **Eastern Produce (K) Ltd-Chemomi Tea Estate v. Bonfas Shoya (2018) eKLR** in which the court held that the burden was always on a plaintiff to prove his case on a balance of probabilities, a burden that was not lessened even when the case proceeded on formal proof. It is their contention that the reliance by the Agency on section 112 of the Evidence Act to shift the burden of proof onto the respondents is misguided and is based on a misreading of the law.

137. It is their submission further that the facts of this case are not such as are contemplated under section 112 as being facts especially within the knowledge of a particular party. They contend that they are alleged to have traded with a public entity, the NYS, and it is their submission therefore that relevant information with regard to the present matter is not therefore exclusively within their knowledge but is shared with the procuring entity, the NYS.

138. The respondents submit that the Accounting Officer of a public procurement entity has a statutory duty under section 68 of the Public Procurement and Asset Disposal Act, 2015 to keep the records for each procurement for at least six years after the resulting contract has been completed. If no contract resulted, for at least six years after the procurement proceedings were terminated. They further submit that the Agency has very wide investigating powers under sections 121 and 122 of POCAMLA, but that it has simply refused to exercise these powers in this case.

139. According to the respondents, under section 121 of POCAMLA, the Attorney General is empowered to request any person employed in or associated with a government department or statutory body to furnish him with all information that may reasonably be required for any investigation under the Act. Further, that section 122 of POCAMLA empowers the Attorney General to direct, under written authority, a specific investigation where he has reason to believe that any person may be in possession of information relevant to commission or intended commission of an alleged offence under the Act, or that any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offence.

140. It is only where records cannot be found by the Agency at the NYS, its parent Ministry, and the government financial system, that the Agency would be justified in invoking the provisions of section 112 of the Evidence Act. The respondents submit that the Agency has not produced any evidence before this court to prove that the said records are untraceable. In their view, indolence on the part of the Agency does not justify the application of section 112 of the Evidence Act.

141. The respondents further submit, in reliance on the case of **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR**, that the legal burden of proof in this case rests on the Agency. It is only the evidential burden of proof which may shift to the respondents depending on the nature and effect of the evidence adduced by the Agency. The respondents further submit, in reliance on **Ethics and Anti-Corruption Commission vs. Stanley Mombo Amuti v. Kenya Anti-Corruption Commission** (supra), that the burden of proof lies with the Agency and it is for the court to determine that it was discharged on a balance of probabilities, at which stage it would shift to the respondents. They further cite the case of **Peter Wafula Juma & 2 Others vs. Republic (2014) eKLR** for a similar proposition.

142. The second argument advanced by the respondents relates to the standard of proof in matters such as this. They rely on the definition of *'standard of proof'* in **Black's Law Dictionary, (9th Edition, 2009)** at page 1535. They submit that there are three main categories of the standard of proof -the criminal standard of proof of beyond reasonable doubt; the application of civil case standard of 'balance of probabilities'; and the application of an intermediate standard of proof.

143. While noting the reliance by the applicant on the case of **Miller vs. Minister of Pensions (1947) 2ALL ER 372** with respect to the burden of proof in civil cases, it is their submission that the cases of **Enfil Ltd vs. Registrar of Titles Mombasa and 2 Others (2014) eKLR**; **Mpungu & Sons Transporters Ltd –v- Attorney General & another, Civil Appeal No.17 of 2001**; **Evans Kidero v Speaker of the Nairobi City County Assembly & Another (2018) eKL**R; and **Kibiro Wagoro Makumi vs. Francis Nduati Macharia & Another (2018) eKLR** are more applicable as they bring out what courts have held to be the burden of proof in civil cases where there is an allegation of fraud. Their submission is that the holding in these cases is that allegations of fraud are required to be proved on a higher standard than the ordinary balance of probabilities. In their view, this is the standard that is applicable in the present case, a standard that is higher than a balance of probabilities but less than the criminal standard of beyond reasonable doubt.

144. To the question whether the subject property is liable to forfeiture, the respondents take the position that the Agency has not presented sufficient evidence to justify the forfeiture. It is their submission that the Agency has selectively relied on the decision in **Director of Assets Recovery and Others, Republic vs. Green & Others (2005) EWHC 3168** and **Assets Recovery Agency vs. Fisher, Rohan and Millier, Delores, Supreme Court of Jamaica, Claim Nio. 2007 HCV003259** to support its position.

145. The respondents further rely on Order 2 Rule 1 of the Civil Procedure Rules which they submit requires that information on the circumstances in which it is alleged that liability has arisen be set out in every pleading. Further reliance is placed on Order 2 Rule 4 of the Civil Procedure Rules which sets out the matters which must be specifically pleaded in every pleading, which includes fraud. It is the respondents case that the facts presented to this court by the Agency do not meet these requirements.

146. The respondents further argue that while the Agency can collaborate with other law enforcement organs in the discharge of its statutory mandate, it has lost sight of the fact that it is a separate and distinct legal entity from the DCI. It has its own legal mandate under POCAMLA to ensure that any information and or evidence that it may obtain from other law enforcement bodies meets the standards required for a prosecution that is intended to achieve the objects of POCAMLA

147. The respondents submit that the Agency had belatedly filed a further affidavit of S/Sgt Fredrick Musyoki sworn on 14th May 2020 in response to their averments in their affidavits sworn on 18th November 2019 that the purported report and evidence allegedly obtained by the Agency from the DCI had not been placed before this court. They submit that he had annexed to the said affidavi a statement purportedly written by an officer from the DCI, one Bernard Gikandi. While observing that the Agency did not have a right of reply, the respondents submit that the said Gikandi is not a witness in this case, and the evidence in his statement cannot therefore be tested in the usual manner through cross-examination.

148. Further, that the documents that the said officer claimed to have collected, inspected and analyzed have not been placed before this court, and it cannot be assumed that such evidence as is contained in the said documents would be admissible. It is their submission further that no evidence that is being relied on by the prosecution in the criminal cases has been placed before this court for it to make its determination thereon on the civil standard of proof.

149. The respondents further submit that the fact that they have been charged with a criminal offence cannot be adequate to establish a *prima facie* case against them in forfeiture proceedings. They submit that relevant evidence being relied on by the prosecution in support of the criminal charges must be placed before this court for it to make its own determination on whether a *prima facie* case has been established against them on a balance of probabilities.

150. The respondents further submit that the Agency did not examine the bank records of the NYS, the payment vouchers and supporting documents at NYS, nor did he record any evidence from any official of the NYS, or examine any of the counter receipt voucher, requisition and issue voucher, inspection and acceptance report and signed and stamped delivery note. It is also their submission that there is no evidence that the Agency sought information from the Ministry of Youth and Public Service, or from the Director of IFMIS at the Treasury.

151. With respect to the source of funds for the purchase of the subject property, the respondents argue that the Agency has not produced evidence to support its allegation that the funds were solely from the NYS. They submit that no attempt was made to establish whether they have legitimate sources of income. In their view, what the Agency has done is to dismiss their evidence that they have other sources of income on the basis that it cannot be verified, even where it included business dealings with public bodies.

152. It is their submission that the Agency's case is based on suspicion, which is inadequate to found a claim of this nature. Further,

that such suspicion is not reasonable. The respondents cite the definition of reasonable suspicion in **Black's Law Dictionary 9th Edition at page 1585** as ***"A particularized or objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity"*** and the case of Emmanuel **Suipanu Siyanga v Republic (2013) eKLR** to support their position that the suspicion in this matter is not reasonable.

153. The respondents reiterate that the Agency has not established a *prima facie* case (through evidence placed before this Court to justify the shifting of the evidential burden of proof to them. They rely in support on **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR; Ethics and Anti-Corruption Commission vs. Stanley Mombo Amuti v. Kenya Anti-Corruption Commission (2015) eKLR**, **Peter Wafula Juma & 2 Others vs. Republic (2014) eKLR** and **Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) eKLR** with regard to the burden of proof.

154. The respondents submit that they Agency has violated their right to fair administrative action guaranteed under Article 47 and sections 3 and 4 of the Fair Administrative Action Act, 2015. It is their contention that they have both a constitutional and statutory right to have this right protected. In support of their arguments that this right has been violated, the respondents submit that search warrants in respect of their premises were obtained *ex- parte* by the DCI, and the Agency is relying on information gathered by the DCI.

155. It is also their contention that preservation orders were obtained *ex parte* by the Agency, and it did not give them an opportunity to respond to the allegations made against them before it made the decision to obtain the preservation orders. They were also not given an opportunity to respond to the allegations against them before the Agency made the decision to seek and obtain warrants to investigate their bank accounts as the warrants were obtained *ex parte*. The respondents submit that the decision to obtain the search warrants is an administrative action within the meaning of section 2 of the Fair Administrative Action Act. The same submission is advanced in respect to the issuance by the court of the warrants to investigate their accounts. They rely on the decision in **Sanjay Shah Arunjain vs. Republic (2002) eKLR** to submit that the law at the time the warrants were issued did not provide for the issuance of warrants to investigate accounts *ex parte*. Also cited in support of the same argument is the case of **Aurelian Ajiambo Akwaro v Republic (2009) eKLR**.

156. The respondents further submit that Hon. Ong;udi had ordered that they should be served with the aforesaid application, but the order had been violated. They were also not given a chance to respond to the allegations made against them before the decision to file the present application was made. They rely on the case of **Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others (2006) eKLR** with respect to the right to be heard and the duty of a decision maker to hear all parties. It is their submission that the right not to be condemned unheard is based on the rules of natural justice which are not donated by statute or by a court of law and such rules cannot therefore be curtailed on the basis of the stay granted by the Supreme Court of the decision in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae).**

157. It is their argument that the evidence in the bank statements was not in their control, and there was no risk that it would disappear. However, even in cases where there is a risk of evidence being moved or destroyed, the Court of Appeal had, in **Samuel Watatua and Another vs Republic Court of Appeal Nai. Criminal Appeal No.2 of 2013** (Unreported) held that *ex parte* orders may be granted only for a short period, and no final orders should be granted until all parties likely to be affected by the orders have been given a chance to be heard.

158. The respondents allege violation of their right to fair hearing guaranteed under Article 50 (1). They submit that the present proceedings are purported civil proceeding where information and evidence are not obtained and exchanged through discovery as provided for under the Civil Procedure Rules. Instead, one of the parties has employed criminal law practices and procedures, such as the use of search warrants and warrants to investigate accounts and gather evidence while the affected parties are denied the constitutional and statutory protections that are available to them under criminal law.

159. The respondents submit that there cannot be a fair hearing within the meaning of Article 50 where they are expected to produce in their defence evidence in the form of documentation touching on the relevant tenders and contracts with the NYS when all the documents in their possession relating to their dealings with the NYS were seized by the DCI pursuant to search warrants issued by a court of law in the course of the criminal investigations. They ask the court to take judicial notice of the fact that it is a normal practice in our criminal justice system for accused persons to be barred from visiting the scene of crime or contacting possible witnesses. They submit that it is therefore illogical to imagine that they would be in a position to visit the NYS to gather evidence to use in their defence in this matter or in the criminal cases.

160. To the question whether the property the subject of this matter should be forfeited to the State, the respondents argue that the decision of **Schabir Shaik & Others vs. State Case CCT 86/06 (2008) ZACC** relied on by the Agency in support of its application for forfeiture is only persuasive in nature and is inapplicable to the facts of this case. They point out that the case concerned an application for criminal forfeiture after a conviction. In this case, the application is for civil forfeiture proceedings provided for under Part VIII of POCAMLA while criminal forfeiture is provided for under Part VII. The respondents cite the case of **Republic v. Kenya Revenue Authority *ex parte* Stanley Mombo Amuti (2018) eKLR** for the proposition that a case is only an authority for what it actually decides.+

161. With regard to the reliance by the Agency on the case of **Assets Recovery Agency vs Lilian Wanja Muthoni t/a Sahara Consultants & 5 Others (2019) eKLR**, the respondents argue that, unlike in the above case, they have, through their affidavits, produced evidence to prove that they have been engaged in business activities and can therefore justify their lifestyle. They further argue that the decision in the above matter was *per incurium*, their submission being that judgments are not entered in either civil or criminal cases because a defendant or accused person has failed to adduce evidence but because the plaintiff has proved its case to the required standard.

162. Reliance for this submission is placed on the decision in **Peter Wafula Juma & 2 Others vs. Republic (2014) eKLR** , **Central Kenya Ltd v Trust Bank Limited & 4 Others (1996) eKLR** and **Silvia Wanjiku Kimani & Another v Kimani Muiruri Machugu & 2 Others (2020) eKLR** in which the court addressed itself to the standard of proof where fraud is alleged which is, as in cases cited earlier by the respondents, beyond a balance of probabilities and slightly below the standard required in criminal cases.

163. It is their submission therefore that the forfeiture orders cannot be granted against them as the evidence adduced in support of the Agency's case falls below the required standard. They ask the court to find that the Agency has failed to establish a *prima facie* case against them to justify the shifting of the evidential burden of proof to them, and that it has also failed to discharge its legal and evidential burden of proof as contemplated under section 92 of POCAMLA.

164. I now turn to consider the respective arguments advanced by the Interested Parties in support of their respective cases for protection of their interests in the motor vehicles the subject of this application for forfeiture.

The Case of the 1st Interested Party

165. The 1st Interested Party's case is that in or around July, 2017, it had advanced a loan of Kshs 2 million to the 2nd respondent on the security of motor vehicle registration number KCH 600H under its logbook financing scheme. It had also, in or around June, 2017, advanced a loan of Kshs 1,295,000/= to the 3rd respondent on the security of motor vehicle registration number KCH 889M under the same scheme. It had made these advances after satisfying itself that the 2nd and 3rd respondents respectively were the legitimate and registered owners of the respective vehicles and upon confirming suitability of the vehicles as securities for the loans. All the documents necessary for securing the loans had been executed to ensure that the parties were bound by the terms thereof. The 1st Interested Party had, in accordance with the terms of the loan agreements, procured transfer of the motor vehicles into the joint names of itself and the 2nd and 3rd respondents.

166. It had further complied with all statutory and contractual requirements including having its security rights in the two vehicles registered under the Movable Property Security Rights Act, 2017. The 2nd and 3rd respondents had, however, defaulted in the repayment of the loans leading to accrual of penalties and other contemplated charges. Their financial obligations to the 1st Interested Party stood at Kshs 3,756,943.97/= and Kshs 386,823.78/= respectively at the time of the application.

167. It is the 1st Interested Party's case that it has not been involved in any manner whatsoever in the commission of any of the offences alleged to have been committed by the 2nd and 3rd respondents. It contends that it acquired interests in the two motor vehicles for sufficient consideration as they were used as security for loans of Kshs 2 Million and Kshs 1,295,000/=, respectively. Further, that it was not aware at the time it acquired the interest that the two motor vehicles were tainted property nor did it have any suspicion that they were proceeds of crime as alleged.

168. It is its case that the discovery of loss of funds at the NYS had not been made, nor had it been made public, at the time it entered into the transactions with the 2nd and 3rd respondents. It also had no suspicion that the 2nd and 3rd respondents were suspected of economic crimes or that either or both vehicles were potentially proceeds of crime. It had therefore treated the two transactions in the same manner as any other in the course of its money-lending business.

169. It urges the court to uphold its constitutional right to property by declaring and protecting its interest in the two vehicles. Should a forfeiture order be made in respect of the two vehicles without a corresponding order declaring its interests in the two vehicle and an order for the realization of its interest, the 1st Interested Party will suffer the injustice of having its legally-secured interest extinguished arbitrarily in addition to suffering a loss of over Kshs 4,143,767.75/=, the aggregate loan repayment amount due from the 2nd and 3rd respondents.

170. In its submissions, the 1st Interested Party argues that the question whether the two motor vehicles are proceeds of crime can only be answered by a consideration of the evidence presented before the court by the Agency and the 2nd and 3rd respondents. As to whether the vehicles should be forfeited to the State will be determined by a consideration of the provisions of section 92 of POCAMLA. It is its contention, however, that a forfeiture order will render its suit against the 2nd respondent, Naivasha CMCC No. 28 of 2018, moot.

171. The 1st Interested Party argues, however, that it has proved on a balance of probabilities that it acquired an interest in the two vehicles for sufficient consideration and without knowing and/or reasonably suspecting that they were tainted property. It relies on section *93 of the POCAMLA*, under which it has lodged its application.

172. It submits that it has made its application as contemplated under the section during the pendency of an application for forfeiture and before a forfeiture order is made. There is no imputation that it was in any way involved in the commission of the alleged offences, by the 2nd and 3rd respondents, and it has proved that it was not and could not have been involved in commission of the offences in any manner whatsoever.

173. It is its case that it has sufficiently established that it acquired an interest in the two vehicles for sufficient consideration as collateral for loans. It had no suspicion that the two vehicles were tainted property. It submits in this regard that the loan agreements for the two vehicles were entered into in June and July, 2017, while the discovery of the loss of funds from the NYS was made in May, 2018. The results of the investigations were made public thereafter. It submits therefore that no-one could have known or reasonably suspected, a year earlier in 2017, that the two vehicles were likely to be proceeds of crime as at that time investigations had not commenced and the public was not aware of the loss of funds or of the perpetrators.

174. *The* 1st Interested Party submits that it has ably shown the existence, extent and value of its interest in the two vehicles. It is its case that its interest is capable of protection by the court. It cites the decision in **Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR** in which the Court relied on the holding in **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** to the effect that:

"….the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains."

175. The 1st Interested Party further reiterates that it acquired interests in the two vehicles innocently and after placing reliance on the documents provided by the 2nd and 3rd respondents, as well as information obtained from its exercise of due diligence. It should therefore not be punished for offences allegedly committed by the respondents.

176. The 1st Interested Party notes that neither the Agency nor the 2nd and 3rd respondents filed responses to its application and so it is uncontroverted. It urges the court to be guided by the case of **Nandwa-vs-Kenya Kazi Limited (1988) KLR 488** on the effect of failure to controvert facts and evidence tendered by the opposing party, and its submission is that its facts and evidence stand unchallenged.

177. It is also its case that having registered its interest through registration of the two vehicles in its name and that of the 2nd and 3rd respondent respectively, it also registered notice of its security right therein. It is its case therefore that under section 15 of the Movable Property Security Rights Act, 2017, its interest in the two vehicles is effective as against third parties, including the government.

Application by the 2nd Interested Party

178. The 2nd Interested Party filed an application supported by an affidavit sworn by Wycliffe Kiprono, its Collection Manager and is based on the grounds set out on the face of the application. Its case is that it had advanced to the 1st respondent a loan of Kshs.

800,000.00 on the security of motor vehicle registration number KCH 753U Toyota Station Wagon. It is still holding the original log book of the motor vehicle. It had deposited the approved loan amount in the 1st respondent's account number **[…]** at KCB Bank.

179. The 2nd Interested Party argues that it was reasonably believed and misconstrued by the Agency that the proceeds in the 1st respondent's account were fraudulently acquired from the NYS. The 2nd Interested Party had only recently come to be aware of the Gazette Notice by the Agency under section 83(1) of POCAMLA. It alleged that at the time of its application, there was no order preserving the funds in the said account as an order to that effect issued on 6th June 2018 in Milimani Chief Magistrates Court Misc. Criminal Application Number 1998 of 2018 had lapsed.

180. The Agency had also, according to the 2nd Interested Party, intimated to the Chief Magistrate's Court that it did not wish to pursue the reinstatement of the preservation order in respect of the amount as it had confirmed that the money in the 1st respondent's bank account was not proceeds of crime but a loan advanced by the 2nd Interested Party. The Agency had also intimated that its only interest is in the forfeiture of motor vehicle registration number KCH 753U that had been used as security for the loan. The 2nd Interested Party contended that there was imminent danger that the Agency shall dispose, transfer and dissipate the said motor vehicle or the 1st respondent shall proceed to withdraw and utilize the funds in the said account unless preservation orders were issued.

181. The 2nd Interested Party submits that it has an interest in the said motor vehicle and, in the alternative, in the monies preserved by the Agency pursuant to an order issued in Milimani Chief Magistrates Court Misc. Criminal Application Number 1998 of 2018 in which the court preserved the funds held in the 1st respondent's account Number **[…]**. It is its case that the 1st respondent had acquired from it a loan facility of Kshs. 800,000.00 by offering a security in the form of the said motor vehicle. It had approved the loan amount and deposited it in the 1st respondent's KCB bank.

182. The 2nd Interested Party submits that it was unaware of the allegation that the 1st respondent had acquired the motor vehicle illegally when it approved the motor vehicle as security for the loan. It contends that the Agency had, in the application before the Chief Magistrate's Court, intimated that it did not wish to pursue preservation of the monies in the account as it had duly confirmed that the monies in the 1st respondent's bank account are not proceeds of crime but a loan advanced by the 2nd Interested Party. It had also stated that it is only interested in the forfeiture of the motor vehicle.

183. The 2nd Interested Party submits that it should be allowed to serve a notice on the Agency under section 83 of POCAMLA out of time. It did not do so as required since it only recently came to be aware of the Gazette Notice by the Agency under section 83(1) of the Act. It had not been served by the Agency with the court documents even though it had been included in the Agency's application for preservation orders in respect of the motor vehicle and the bank account. It had made the present application in line with section 91 (1) of POCAMLA seeking leave to serve the Agency with the notice provided in section 83 (3) out of time. It is its case that as no party is opposed to such leave being granted, the court should grant it in the interests of equity and justice.

184. The 2nd Interested Party further submits that section 94 (1) (b) of POCAMLA gives the court powers to make an order excluding certain interest in property, such as the motor vehicle in this matter, from operation of the order of forfeiture. It submits that this means that an exclusion order is made only after the court has determined the merit of an application for forfeiture, and indeed granted such forfeiture order. It contends, however, that under section 93 (1) any person who claims an interest in property the subject matter of forfeiture proceedings may make an application, before the forfeiture order is made, for exclusion of the property. It is its case therefore that its present application, contrary to the assertions by the Agency, has been made at the appropriate time.

185. The 2nd Interested Party further submits that it has properly sought an order for the preservation of the funds held in Kenya Commercial Bank, Account Number **[…]** within this suit. It submits that while the Agency has argued in its grounds of opposition that the bank account is not subject to the forfeiture application and can only be canvassed between the 2nd Interested Party and the 1st respondent, the funds in the bank account are squarely connected to the motor vehicle in this matter as the vehicle was used as security by the 1st respondent to obtain the loan. It is its case therefore that there is a direct nexus between the vehicle and the monies in the bank account, and the monies therefore fall within the jurisdiction of this Court.

186. The 2nd Interested Party submits that the purpose of forfeiture proceedings is to ensure that offenders do not benefit from the proceeds of crime and to deter would be offenders. It also asks the court to be guided by the decision of Ong'udi J in **Assets Recovery Agency v Quorandum Limited & 2 others** (supra) with respect to the purpose of forfeiture orders.

187. It is its submission that if this court were to allow forfeiture of the motor vehicle and allow the 1st respondent to access and enjoy funds in the bank account which were directly obtained by the 1st respondent using the tainted motor vehicle as security, then the purpose of the enactment of POCAMLA and the central function of the Agency will not have been achieved. It would also suffer irreparable harm if the court were to decline to preserve the funds as it would not be able to recover the funds from the 1st respondent. Its submission is therefore that this is the proper forum for seeking to preserve the funds in the bank account.

188. The 2nd Interested Party asks the court, should it make a forfeiture order, to issue an exclusion order on the motor vehicle the subject matter of its application. In the alternative, it asks the court to issue an order directing that the funds in the 1st respondent's bank account be returned to the 2nd Interested Party.

189. The Agency filed grounds of opposition to the 2nd Interested Party's application. These grounds, already alluded to above, were first, that the application for exclusion of interest in property can only be made after the court has made an order for forfeiture pursuant to section 94 of POCAMLA. Its second ground is that the funds in the KCB account are not the subject of the forfeiture proceedings and can only be canvassed between the 2nd Interested Party and the 1st respondent.

190. No submissions were filed by the Agency or the respondents in response to the Interested Party's applications, nor did the respondents file any response to the applications.

Analysis and Determination

191. I have read and considered the pleadings of the Agency and the respondents in this matter. I have also considered the pleadings and submissions of the Interested Parties in support of their respective applications, as well as the responses thereto. In my view, the following issues arise for determination:

i. Whether the present proceedings are premature and should await the outcome of criminal prosecution of the respondents;

ii. Whether the present application is in violation of the respondents' constitutional rights to property, fair administrative action and fair hearing under Articles 40, 47 and 50 respectively;

iii. Whether the properties the subject of the application are proceeds of crime and liable to forfeiture to the State;

iv. If the answer to issue iii) above is in the affirmative, whether the motor vehicles in which the Interested Parties claim an interest should be excluded from the forfeiture orders.

Preliminary Issues

192. Before entering into an analysis of the substantive issues set out above however, I wish to dispense with a couple of collateral issues raised by the respondents.

193. The first is an argument by the respondents that the application for forfeiture is an abuse of the court process aimed at circumventing an order issued on 19th December 2018 for the release of the motor vehicles the subject of this application. The Agency responds that the order of the court was that the motor vehicles shall be detained by the OCS, Naivasha Police Station or any other police officer or station only if there is a court order directing such detention or preservation. It is its case that it had obtained preservation orders in **Nairobi High Court Anti-Corruption & Economic Crimes Division Misc. Application No 55 of 2018** on 3rd December, 2018, before the ruling of 19th December, 2018. The said orders were gazetted, pursuant to section 83(1) of the POCAMLA, on 14th December, 2018.

194. I have considered the ruling of Ong'udi J on this point made on 19th December 2018. Indeed, her order with respect to the detention of the motor vehicles was conditional on there being an order authorizing such detention. At paragraph 24 of the ruling in **Phylis Njeri Ngirita & 2 others v Director of Public Prosecutions & 2 others; Asset Recovery Agency (Interested Party) [2018] eKLR** the court observed and directed as follows:

24. For the above reasons stated, it is my finding that the 2nd and 3rd respondent have no good reason to continue detaining the

applicants' motor vehicles unless otherwise served with a lawful order preserving them. Accordingly, the application herein is hereby allowed with orders that:

i. The OCS Naivasha Police station be and is hereby directed to release motor vehicles KCH 753U, KCH 600H and KCA 889M to the applicants or if in custody to the close relatives as they may authorize with immediate effect.

ii. That the said motor vehicles shall be detained by the OCS Naivasha Police Station or any other police officer or station only if there is a court order directing detention or preservation of the same. (Emphasis added)

195. The argument by the Agency that by the time the court issued the ruling of 19th December 2018 an order had been issued and gazetted for the preservation of the motor vehicles in question is not controverted. Accordingly, the application for forfeiture cannot be challenged on the basis that it was brought in disobedience of an order of the court.

196. A second minor issue relates to the allegation that the affidavit sworn on behalf of the Agency and filed in court on 20th May was filed without leave. In the ruling dated 27th February 2020, I dismissed an application by the Agency seeking to strike out the three affidavits filed by the respondents on 18th November 2019. The basis of the application was that the respondents had gone beyond the scope of the leave granted to them to file a further affidavit. In allowing the three affidavits to be deemed as being properly on record, I also granted the Agency leave to file a further affidavit in response to any new issues raised by the respondents in the affidavits of 18th November 2019. I believe, therefore, that all the pleadings on record are there with the leave of the court.

197. A third issue relates to the allegation that the Agency should have carried out its own investigations and that it failed to use its powers under sections 121 and 122 of POCAMLA. These sections relate to the powers of the Attorney General to request any person employed in or associated with a government department or statutory body to furnish him with all information that may reasonably be required for any investigation, and to order specific investigations.

198. I am not persuaded that there was a failure on the part of the Agency to carry out investigations in this matter. I observe that it has been deposed expressly for the Agency that it had carried out investigations into the acquisition of properties by the respondents. It has placed before the court its findings in that regard in the affidavit of S/Sgt Musyoki, who deposes that he was one of the officers in the team from the Agency investigating the matter.

199. The preliminary issues raised by the respondents in this matter therefore have no merit, in my view, and I accordingly turn to consider the main issues identified above on the basis of the affidavits and submissions on record.

Whether the Present Proceedings are Premature

200. The first issue to consider is whether the present proceedings should await the outcome of the criminal proceedings against the respondents. The respondents have argued that this application is premature, prejudicial and an affront to justice as they have not been convicted of any criminal offence yet. It is further their case that it is a violation of their right to be presumed innocent until proven guilty, and no nexus has been established between the funds used to purchase the properties the subject of the application and the funds allegedly obtained from the NYS through corrupt means.

201. The application before me is brought under Part VIII of the POCAMLA. Section 92 thereof provides as follows:

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.

(2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.

(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.

(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. (Emphasis added)

202. At section 2 of POCAMLA, "proceeds of crime is defined as follows:

"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;"

203. My reading of these two sections is that a conviction is not necessary, for the purposes of Part VIII of POCAMLA, in order for the Court to make an order of forfeiture with respect to property shown to be proceeds of crime. Once it is established, on a balance of probabilities, that the property in question has been obtained from proceeds of crime, then an order for forfeiture may be made. It does not matter, to my understanding, in whose hands the property in question is found. Nor does it matter that no one is ever convicted in respect of any crime in connection with the property.

204. I am guided in reaching this conclusion by the sentiments expressed by courts dealing with matters similar to the one before me in this and other jurisdictions whose jurisprudence is persuasive in nature.

205. In the Namibian case of **Teckla Nandjila Lameck-vs- President of Namibia** (supra), the court stated that:

"…Asset forfeiture is, as is stated in section 50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution.…even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above."

206. In **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7**, the Court held that:

"…. the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order…"

207. The respondents have submitted, correctly, that the case of **Schabir Shaik & Others** related to criminal forfeiture under the South African Prevention of Organized Crime Act (POCA). Part VII of the POCAMLA in Kenya have similar provisions. The definition of proceeds of crime in POCAMLA and POCA in Kenya and South Africa respectively, however, as well as the intent behind the proceedings, whether the process before the court is under the civil and criminal forfeiture procedure, is the same: it is to deny a perpetrator or beneficiary of criminal conduct from enjoying such proceeds of crime. While a forfeiture order will be made in cases of criminal forfeiture after a conviction, as was the case in **Schabir Shaik**, in cases of civil forfeiture, a prior conviction is not necessary.

208. The sentiments expressed in the above cases are in any event echoed in jurisprudence from our courts. In the case of **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR** it was held that:

"The letter, spirit purpose, and gravamen of the Proceeds of Crime and Anti-Money Laundering Act is to ensure that one doesn't benefit from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited,

after due process, to the state, on behalf of the public which is deemed to have suffered some injury by the criminal conduct."

209. In its decision in **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR** the court stated that:

"This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168, the court stated that: "In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any 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." I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR." (Emphasis added).

210. In **Assets Recovery Agency vs Pamela Aboo [2018] eKLR**, the court considered the issue in relation to the civil proceedings for forfeiture before it and observed as follows:

"63. Forfeiture proceedings are Civil in nature and that is why the standard of proof is on a balance of probabilities. See section 92(1) of POCAMLA. In the case of Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168 the court stated as follows:

"In civil proceedings for recovery under part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained."

64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 the Court of Appeal 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. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof..."

211. Finally, in his decision in **Republic v Director of Public Prosecutions & another e*x parte* Patrick Ogola Onyango & 8 others [2016] eKLR** which related to a challenge to the prosecution of the applicants for the offence of money laundering under POCAMLA, Onguto J observed as follows:

"150. It would appear to me therefore, and I so hold, that the prosecution need not prove, prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court of law that there was theft or forgery or fraud that led to the acquisition of the proceeds or property the subject of the money laundering proceedings.

There is in my view no need to await any prior convictions of other offences before launching the prosecution of alleged money launderers. It is thus of little wonder that 'proceeds of crime' as defined under POCAMLA 2009 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 successfully converted transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed" (emphasis)

152. I have added the emphasis to illustrate that even the legislators appreciated instances when there may be no one to

prosecute hence there may be no conviction for a predicate offence or crime. The need to prove a predicate offence before laying a charge of money laundering was effectively dispensed with.

153. The principal offender who committed the predicate offence may never be there to be prosecuted, yet access to the proceeds of crime would have been achieved." (Emphasis added)

212. I agree fully with the views expressed by the courts in the above matters. The purpose and legislative intent behind POCAMLA is to ensure that those who profit from proceeds of crime do not enjoy such benefits. It is recognized, as observed by Onguto J, that the perpetrator of an offence may never be identified, or convicted. This, however, does not prevent the court from making an order of forfeiture to the State of such property as may have been found, on a balance of probabilities, to be a proceed of crime.

213. It is my finding therefore, and I so hold, that the present application is not premature, and it need not wait for completion of the criminal cases against the respondents.

Violation of Constitutional rights

214. The respondents have argued that the present application is in violation of their right to property, fair administrative action and fair hearing under Articles 40, 47 and 50 respectively.

215. Article 40 of the Constitution protects the right of every person to own property in any part of Kenya. However, as provided under Article 40(6), the protection of this right does not extend to property found to have been unlawfully acquired. Should the court find that the properties the subject of this application are proceeds of crime, then it will not be a violation of the right to property for the Agency to apply for, and for the court to issue, an order of forfeiture.

216. The respondents further allege violation of the right to fair administrative action by the Agency in the actions it took in relation to the subject properties. Article 47 provides that every person has the right to ***"administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

217. The respondents argue that they are entitled, under Article 47 of the Constitution as read with section 4 (1) and (3) (b) of the Fair Administrative Action Act, 2015 to a fair and reasonable opportunity to defend themselves before the Agency made the decision to file the present application. They were also entitled to an opportunity to respond to the allegations of their involvement in corrupt activities at the NYS before orders to investigate and freeze or preserve the funds in their bank account were sought from the Chief Magistrate's Court at Milimani through the miscellaneous criminal applications on the basis of which the orders were issued. Similar arguments are made with regard to the issuance of the orders by the Chief Magistrate's Court, as well as the orders issued by the High Court for the preservation of the properties the subject of this application.

218. I will deal first with the argument that the respondents' right to fair administrative action was violated. In its decision in **Judicial Service Comission v Mbalu Mutava & another [2015] eKLR** the Court of Appeal observed as follows with respect to the right to fair administrative action vis a vis the right to fair hearing:

"Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. "Fair hearing" in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise."

219. It seems to me that the complaint with regard to the violation of the right to fair administrative action and fair hearing are

unmerited, for two reasons. First, as is apparent from the respondent's affidavits dated 18th November 2019, they appear as something of an afterthought, the respondents seeming to have determined, at a late stage in the proceedings, to approach their response to the forfeiture application by an assault on the preliminary applications made by the Agency in obtaining orders to investigate their accounts. This, in my view, cannot properly be done in this matter. But even if it could, it is my view that it is an assault that is not sustainable. Section 118 and 121 of the Criminal Procedure Code under whose provisions the authority to search the respondents' accounts was obtained do not provide for notice to be issued to the parties concerned.

220. The respondents have made passing reference to the ruling of the Supreme Court delivered on 7th February 2020 in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae).** The effect of this ruling was to restore the position obtaining before the Court of Appeal decision in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR**. The effect of this latter decision had been to require investigative agencies to give notice under section 26 of the Anti-corruption and Economic Crimes Act to any person whose bank accounts were intended to be the subject of investigation. In my view, this decision is of no assistance to the respondents in the present matter.

221. The respondents also allege violation of the right to a fair hearing guaranteed under Article 50(1) which states that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

222. The present proceedings, in my view, present the opportunity for the respondents to be heard with respect to the properties the subject of the application. The Agency is given the power, under Part VIII of POCAMLA, to lodge a civil claim for forfeiture of properties believed to be proceeds of crime. The respondents are given the right to respond to the claim before a court of law and present their position with regard to the lawfulness of their acquisition of the properties in question. It is my view, therefore, that there has been no violation of the respondents' rights under the cited provisions of the Constitution.

Whether the properties the subject of the application are proceeds of crime and liable to forfeiture to the State

223. The Agency asserts that the properties the subject of this application are proceeds of crime and liable to forfeiture to the State. It demonstrates this by showing that in a two-year period, the respondents received in their personal accounts vast sums of money fraudulently transferred from the NYS, which they then used to buy the properties the subject of the application.

224. The respondents have taken two, somewhat divergent, approaches in their response to the forfeiture application. In the affidavits filed earlier in response to the application, their position was that the funds deposited in their accounts were rightfully deposited by the NYS as they have been dealing in supplies with various government entities, including the NYS, for a period in excess of twenty years. They have also had access to funds from other sources with which they could meet their obligations to supply the NYS, such as loans from commercial banks.

225. In the affidavits filed on 18th November 2020 and their later submissions, they take the position that the Agency has not met its obligation under POCAMLA, and the burden of proof cannot therefore shift to them to show that the properties the subject of this application are not proceeds of crime.

226. I will address myself to these two positions separately. I deal, first, with the evidence presented by the Agency in support of the application for forfeiture and its contention that the properties the subject of this application are proceeds of crime.

227. The evidence from the Agency in respect of the funds received from the NYS can be summarised from the copies of the respondents' bank statements exhibited in the affidavit of S/Sgt Musyoki in support of the forfeiture application as annexures 'FM5' – 'FM9' and the analysis of these statements by the Agency which I have set out earlier in this judgment. What emerges from these statements is that between November 2015 and June 2017, Phyllis Njeri Ngirita, the 1st respondent, received from NYS in her personal KCB account number 1109800584 Kshs 57,220,114.80. In a 24- hour period, between 17th and 18th October 2016, she received in that bank account Kshs 197,400.00; Kshs 100,150.00; Kshs 385,550.00; Kshs 391,590.00; Kshs 7,500,862.05; Kshs 8,577,866.40, and Kshs 7,154,030.15

228. Ngiwaco Enterprises, a business entity owned by the 2nd respondent, had received Kshs 109,023,718.30 from NYS in its KCB

account number 1125544910- between April 2015 and February 2018. In the same single day period as in the case of the 1st respondent, between 17th October 2016 and 18th October 2016, the 2nd respondent received Kshs 6,410,596.10; Kshs 8,582,844.85; Kshs 6,128,522.00; Kshs 8,155,172.40; Kshs 8,562,931.05; Kshs 9,482,699.85; and Kshs 8,174,137.95. Waluco Investments, also a business entity owned by the 2nd respondent, received from NYS in its KCB account number 1154300986 between February 2016 –February 2018 Kshs 154,362,131.70.

229. On a single day, the 29th of June 2016, this account received from the NYS Kshs 4,117,500.00; Kshs 7,455,724.15; Kshs 3,345,517.25; Kshs 16,476,293.10; Kshs 4,000,140.00; Kshs 7,586,358.60; Kshs 1,500,000.00 and Kshs 4,500,000.00.

230. JerryCathy Enterprises, the 3rd respondent's business, had received in its KCB account number 1104186225 Kshs 87,931,482.65 from NYS. On the same single day period as in the case of the 1st and 2nd respondents- 17th and 18th October 2016- it had received Kshs 9,281,420.70; Kshs7,580,782.75; Kshs 13,844,865.50; Kshs 7,434,482.75 Kshs 5,585,344.85 and Kshs4,646,551.70. The evidence before the court therefore is that in that two-day period, the accounts held by the respondents had received a total of Kshs 133,922,491.30. An account number 1181363756 held at the KCB Bank in the name of Annway Investment, whose registered proprietor is one Ann Wambere Wanjiku Ngirita, had received Kshs 72,051,077 from NYS. There had also been intra-account transfers between the 2nd respondent's accounts and one other account belonging to Kunjiwa Enterprises, a business entity in the name of Catherine Wanjiku Mwai, which had also received funds from the NYS.

231. The Agency contends that these funds were then moved or withdrawn in cash and utilised in an intricate, and I must observe somewhat dizzying, web of transactions illustrated by the Agency in S/Sgt Musyoki's affidavit. What can be garnered from this illustration is that from the amount received by JerryCathy enterprises from NYS, approximately Kshs 28 million had been withdrawn in cash; Kshs 7 million had been transferred to Kunjiwa Enterprises, an entity in the name of Catherine Wanjiku Mwai, A/C No. 1142293416 KCB.

232. Some of the funds were then used to buy the property the subject of this application. Property number Njoro/Ngata Block 1/7436 and Naivasha/Mwichiringiri Block 4/2267 were purchased at the price of Kshs 2,500,000 and Waitaluk/Mabonde Block12/ Sirende/140 at the price of Kshs 20,000,000. Part of the purchase price for Waitaluk/Mabonde Block12/ Sirende/140 had been transferred from account number 1154300986 held in the name of Waluco Enterprises, the 2nd respondent's business name.

233. Out of the Kshs 72,051,077 transferred from NYS to account number 1181363756 held at the KCB Bank in the name of Annway Investment, approximately Kshs 23 million was withdrawn in cash. Other funds were transferred from the Annway Investment account to the accounts of Lucy Wambui Ngirita at A/C numbers **[…],[…]** and **[…]** held at the KCB Bank, and were part of the funds used to purchase land parcel numbers Naivasha/Municipality Block 2/884 at Kshs 46,000,000 and LR No. 8208/4 Nakuru East at Kshs 7,000,000.

234. The contention of the Agency and the evidence placed before the court with regard to the motor vehicles is that they were also purchased from the NYS funds and were suspected to be proceeds of crime. The chattels mortgages for these vehicles were taken long after their purchase.

235. A search conducted on 13th September 2018 at the NTSA offices established that motor vehicle registration number KCH 600H Toyota station wagon blue in colour manufactured in 2016 was registered in the name of Lucy Wambui Ngirita and Platinum Credit Limited, the 1st Interested Party. On 19th July 2017, the 2nd respondent had taken a chattel's mortgage for Kshs. 2,000,000/= from the 1st Interested Party. A valuation of the vehicle by Regent Automobile Valuers and Assessors dated 18th July 2017 provided to the Agency by the 1st Interested Party showed that the motor vehicle, a Toyota Land Cruiser V8, had a market value of Kshs. 14,400,000.

236. KCH 753U, a Toyota station wagon green in colour was registered in the name of the 1st respondent and the 2nd Interested Party. KCH 889M Toyota pick-up was registered in the name of the 3rd respondent and the 1st Interested Party. The 3rd respondent had, on 6th June 2017, taken a chattel's mortgage for Kshs.1,295,000/= from the 1st Interested Party at an interest rate of 6% per month on the security of motor vehicle registration number KCH 889M Toyota Hilux. A valuation report dated 5th June 2017 by Regent Automobile Valuers and Assessors indicated the value of the motor vehicle at Kshs. 2,720,000.

237. The 1st respondent had also taken a chattels mortgage on 20th July 2017 for Kshs.900,000/= from the 1st Interested Party at the same interest rate as the other respondents. The motor vehicle, Toyota Land Cruiser V8 registration number KCH 753U was valued at Kshs. 1,950,000. It is the Agency's contention that these vehicles were not financed by the 1st Interested Party. It only advanced

a credit facility of Kshs 900,000, Kshs. 2,000,000 and Kshs 1,295,000 to the 1st, 2nd and 3rd respondents respectively. The chattels mortgages between the respondents and the 1st Interested Party did not state the purpose of the money, and the difference between the values of the motor vehicles and what was advanced, in the view of the Agency, clearly shows that the transactions between the respondents and the 1st Interested Party was a money laundering scheme and the motor vehicles are therefore proceeds of crime.

238. I observe here that the Agency's case with respect to the loan to the 1st respondent is not quite accurate. The case presented by the 1st Interested Party is that it only had chattels mortgages with the 2nd and 3rd respondents. The 2nd Interested Party had advanced a loan of Kshs 800,000 to the 1st respondent on the security of motor vehicle registration number KCH 753U. The funds advanced are still in the 1st respondent's account and are the subject of the application for exclusion by the 2nd Interested Party.

239. I have considered the evidence presented by the Agency and its submissions on the issue. Under POCAMLA, the Agency is required to show, on a balance of probabilities, that the assets at issue are proceeds of crime. What we have in this case is a family of three, mother, daughter and son. The 1st respondent received from NYS Kshs 57,000,000 in her personal account; the 2nd respondent, as Ngiwaco and Waluco Enterprises, Kshs 263, 385, 849; the 3rd respondent, Kshs 87, 931,482. Between them, they received approximately Kshs 400 million on from the NYS, a public entity, in a period of two years or so. If the Kshs 72 million deposited in the account of Ann Wambere Wanjiku Ngirita is added, the total comes close to 500 million. In one day, the 17th -18th of October 2016, they received over Kshs 133 million, deposited in their respective accounts in different tranches.

240. The evidence further indicates that in the period during which the respondents received the funds from the NYS, they went on something of a spending spree. They not only purchased the three motor vehicles, but they also purchased the real properties which are also the subject of this application. These properties- title number Waitaluk/Mabonde Block 12/Sirende/410; title No. Naivasha/Municipality Block 2/884, title No. L.R 8208/4 Nakuru East, title No. Njoro/Ngata Block 1/7436 and title number Naivasha/Mwichiringiri Block 4/22367 were purchased by the 2nd and 3rd respondent pursuant to sale agreements dated 2nd June 2016, 8th July 2016, 25th April 2017; and 28th October, 2016 respectively. The last property, Naivasha/Mwichiringiri Block 4/22367, was registered in the name of the 3rd respondent on 1st July 2016. The Agency has placed copies of the sale agreements in evidence.

241. The respondents have not denied the averments that they purchased these properties at the time alleged by the Agency by way of the sale agreements placed before the court. Their response to these contentions is that the Agency is violating the rights of the registered owners by applying for the forfeiture of the properties without the registered owners being heard. I observe here that the registered owners had a right to approach the court for exclusion orders under section 93 of POCAMLA.

242. What we have then, is a family, operating in their business names, into which a State entity deposits public funds in excess of Kshs 400 million.

243. Perhaps there are gifted families in Kenya who are entrepreneurs extraordinaire, who can, in their individual capacities, with their business names creatively named Waluco, Njewanga Ngiwaco, and JerryCathy, transact business with State entities in a brief two years' period worth Kshs 400 million, out of which Kshs133 million is paid in a single day. But that is a big perhaps. From the material placed before me by the Agency, one is constrained to draw the inference that the transactions which resulted in these deposits were of a criminal nature. It beggars belief that it is possible for public funds to be legitimately transmitted to individual accounts in such a manner.

244. The Agency has therefore, in my view, placed before the court material on the basis of which it can validly be questioned whether the properties that were purchased in the period during which the funds were deposited in the respondents' accounts were proceeds of crime. Which then shifts the burden of proof to the respondents to show that the properties were acquired from legitimate sources and were not proceeds of crime.

245. The respondents have argued at length about the burden of proof placed on the Agency in this case. They contend that the burden is below the standard in criminal cases, beyond reasonable doubt, but above a balance of probabilities, because there is an allegation of fraud made. I observe, first, that given the legislative intent of POCAMLA, this is a misreading of the law. The Act provides for civil forfeiture, and there is no requirement that anyone should be proved to have committed any offence, including fraud.

246. More importantly, the legislation in question is specific on the burden placed on the Agency in matters such as this. Section 92 (1) empowers the court to make a forfeiture order if it is satisfied, on a balance of probabilities, that the properties in question are proceeds of crime.

247. In **Miller v. Minister of Pensions [1947] 2 All ER 372**, Denning, MR, in discussing the burden of proof in civil cases, stated as follows:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

248. From the evidence presented above, I am satisfied that the Agency has placed sufficient material before the court to require the respondents to explain the basis of the massive deposits that they received from the NYS, and the source of the funds from which they purchased the properties the subject of this application. I say this bearing in mind the observations of courts with respect to the failure or inability of a party to explain the sources of its funds. In **Assets Recovery Agency –vs- Fisher, Rohan and Miller (supra)** the court observed that:

"……Even though these proceedings are quasi Criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousand of United States dollars without more."

There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence. is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.

This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 14th August, 2007.

This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The money was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets…"

249. See also my decisions in **Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eK**LR and **Assets Recovery Agency vs Lillian Wanja Muthoni Mbogo & others, ACEC MISC APPL No 58 of 2018**.

250. It was thus incumbent on the respondents to demonstrate that the properties in this case were not purchased from proceeds of crime; that the millions deposited in their accounts from the NYS were properly proceeds from legitimate business conducted with the NYS.

251. This is what I have gathered as the respondents' explanation for the millions of funds deposited in their accounts from the NYS. The respondents had started their small supply businesses in 2002, 1966 and 2003 respectively. They have grown these businesses into huge enterprises with several divisions and compartments. They have broad sources of income that together explain the sources of their wealth. They have cultivated and supplied vegetables and fruits, including maize, cabbages, onions and tomatoes, water melons, oranges, passion, guavas and bananas to the NYS and other entities. They have also supplied uniforms, firewood, bread, mandazi and mahamri to the NYS, and without their efforts and supplies to the NYS, sometimes done in difficult circumstances, the over 10,000 NYS youths would have starved.

252. The respondents have placed before the court copies of documents which they allege are evidence of the tenders and supplies of goods to the NYS and other government agencies. What is notable about these documents is that for the most part, they date back to 2004-2005. In the case of those which are within the period within which they allegedly supplied goods to the NYS and the funds at issue were deposited into their accounts, there is none that approaches the value of the monies paid into their accounts. In the case of the 1st respondent, for instance, she alleges that she had supplied goods worth Kshs Kshs 38,698,970 to the NYS.

253. An analysis of the four LPOs that the 1st respondent trading as Njewanga Enterprises relies on namely 2554124, 2141333, 2474625, and 2172521 dated 19th June 2015, 30th January 2014, 13th May 2015 and 25th March 2014 (annexure PNN) respectively shows that the total amount that is supported by evidence is Kshs 5,824,210. It is not the Kshs 38,698,970 that the 1st respondent alleged she had undertaken. The LPOs are for the supply of watermelon and cabbages worth Kshs 1,539,150; English potatoes, watermelon and cabbages worth Kshs 1,210,000; watermelon worth Kshs 3,000,000; and cabbages, onions and greengrams worth Kshs 785,060, making a total of Kshs 5,824,210.

254. The 1st respondent alleged that she had worked in Germany in 2006 and 2007 and saved 120,000 Euros which she had invested in the family business. She had started a business known as Njewanga Enterprises on or about 20th June 2013.

255. The 2nd respondent had also engaged in vegetable business and a posho mill from which she earned enough to buy a property. She had borrowed Kshs 28,000,000/= to improve her property, and she had, in 2006, received a loan from her daughter, Jane Wangari Theile and her husband of Kshs. 10,708,400 to assist in expanding and improving her business. She had supplied, on diverse dates between 2002 and 2015, firewood, meat, powder milk, biscuits, and fruits to the Prison Department, Naivasha District Hospital, Naivasha TTI and NYS for a global sum of about Kshs. 41,876,527.

256. The 2nd respondent also alleged that she enjoyed overdraft facilities of Kenya Shillings three Million (Kshs. 3,000,000/=) at KCB Bank Gilgil Branch to service her contracts with the NYS She was also the owner of Ngiwaco Company Enterprises, traded as Ngirispa Enterprises, Annway Investment and Waluco Investments for a total amount of ksh.67,548,650/=. She also had been allowed, on 31st December 2013, to take goods on credit from Mahaver Stores Ltd worth more than Kshs 2, 671,220. The 3rd respondent's explanation is that he ran a shop in which he sold water melons.

257. The response from the Agency is that the allegations by the respondents are not borne out by the documents they have placed before the court. In the case of the 1st respondent, there is no evidence of a bank account into which the earnings from Germany were directed, or a visa or work permit to support her contention.

258. The contentions of the 2nd respondent are also not borne out by the documents she has supplied. Contrary to her assertions, she had not obtained a loan of Kshs. 28,000,000/= to improve her property, but Kshs 9, 750,000. As for the money allegedly advanced to her by her daughter in 2006, while there were no bank records to indicate receipt of the money, the affidavit sworn by her daughter annexed to her affidavit only shows that she intermittently sent, through Western Union, between 8th April, 2006 and 10th March 2011, a total of 9,050 Euro, the equivalent of Kshs 1,037,452.18.

259. With respect to the business enterprises of the respondents, the copies of documents placed before the court indicate that the 1st respondent registered her business name, Njewanga Enterprises, on 20th June 2013. The 2nd respondent registered Ngiwaco Enterprises on 18th June 2010. Jerrycathy Enterprises was registered as a business name on 27th May 2006, and was also registered under the 'Youth Access to Government Procurement Opportunities (YAGPO) on 14th October 2014.

260. I have considered the averments of the respondents with respect to their sources of funds and the documents that they have placed before the court. The bulk of the documents annexed to the respondents' affidavits go back some fifteen years or so, to 2005-2006, prior to the period within which they received the funds and purchased the assets the subject of this application. They comprise copies of mostly unsigned delivery notes for items such as firewood, cabbages, sukuma wiki, baked beans and oranges to the Naivasha District Hospital, 'the Commandant,' of the NYS, and the Ministry of Interior and Co-ordination of National Government.

261. There are also copies of *'letters of acceptance'* of tenders going back several years prior to 2013. Also included in their bundles are copies of letters purportedly from the *'Commandant'* of the NYS. The letters, such as two dated 11th February 2010 and 9th July 2013, require the respondents to *'supply cabbages on credit'* and to *"Treat this letter as an order since currently I do not have sufficient funds in my Vote Book to commit an L.P.O equivalent to this letter."*

262. Though the respondents have placed all these copies of documents before the court, some of which raise serious concerns about the way State entities deal with public funds and public procurement, none of them explains the vast sums of money deposited in their accounts in the 2015-2018 period. The respondents averred that they have grown their entities into *'huge enterprises with several divisions and compartments.'* I have not seen any evidence of these enterprises or the supplies business that they engage in, to support the large payments into the respondents' accounts. 'Huge enterprises' with divisions and compartments have books of accounts, stock registers, audited accounts and tax returns. To be able to supply goods worth in excess of Kshs 400 million, one

would expect to have warehouses where the stock is kept.

263. The respondents allege that the documents that could have explained the basis for the payments were with the NYS or were taken by the DCI. I note, however, that they all aver that they communicated with the NYS and were supplied with various documents. In any event, I have not heard them to say that their business documents such as stock registers, tax returns and audited accounts were also taken with the documents connected with the NYS transactions.

264. Taking all the facts of this case and the evidence placed before me by the Agency and the respondents, I am not satisfied that the evidence placed before me by the respondents demonstrates that they had the capacity to supply goods of the value of the money deposited in their accounts in the 2015-2018 period. In my view, the funds deposited in their account were therefore deposited there fraudulently, and the properties that they purchased in the period that they obtained the funds from NYS are therefore proceeds of crime.

265. The respondents have complained that they have been pursued aggressively and that there are double standards in pursuing them to the exclusion of others. They also allege that they were pursued because they fell out with a previous investigating officer from the DCI, whom they suggest that they were involved in the business of supplies with.

266. I make two observations on these contentions. First, it is probable, as they allege, indeed one could say that it is certain, that there are others involved in the siphoning of funds from the NYS who have not been pursued, or who have not been pursued with as much vigour as they have been. It is difficult not to draw this inference given the large amount of funds deposited by the NYS into the respondents' accounts. For that large amount of money to be deposited in their accounts in a short space of time, in some cases in a matter of days, would require a person within the NYS or the parent Ministry, with sufficient authority, to place his or her imprimatur on the transactions. The respondents are, in my view, mere minnows in the entire scheme to rob the public.

267. That, however, does not mean that the respondents should not be pursued, through proceedings for the forfeiture of the properties purchased from the said funds, for recovery of the public funds that went into their accounts. What is expected of the Agency and the other State agencies charged with investigation and prosecution of corruption offences, as well as with recovery of ill-gotten wealth, is that they will pursue the other beneficiaries with the same vigour and subject them to similar proceedings to recover the public funds lost in nefarious schemes such as were perpetrated at the NYS.

268. It is my finding, therefore, and I so hold, that the motor vehicles and real properties the subject of this application are proceeds of crime, and should be forfeited to the state.

269. Which brings me to a consideration of the last issue in this matter which arises out of the two applications by the Interested Parties.

Whether the Motor Vehicles in which the Interested Parties claim an interest should be excluded from the forfeiture orders

270. The 1st Interested Party's interest is in the two motor vehicles registered in the name of the 2nd and 3rd respondents. The 2nd Interested Party claims an interest in motor vehicle registration number KCH 735u or the funds deposited in the 1st respondent's account.

271. The Interested Parties' contentions that they advanced funds to the respondents on the security of the vehicles the subject of the forfeiture application have not been challenged. The Agency argues only that the interest of the 2nd Interested Party can only be considered after an order for forfeiture is made, and in respect of the funds in the 1st respondent's account, that it is not within the jurisdiction of this court to make an order with respect thereto. The Agency does not appear to have filed any documents in response to the claim by the 1st Interested Party.

272. Reliance has been placed by the Interested Parties on section 93 of POCAMLA, while the Agency relies on section 94 thereof. The 2nd Interested Party has also cited section 83 of POCAMLA, but at this stage in the proceedings, I believe the more apposite provision is section 93, which provides as follows:

1. 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, the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

(Emphasis added)

273. Section 94 relied on by the Agency provides that:

(1) The High Court may, on application—

(a) under section 90(3);

(b) by a person referred to in section 91(1), and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

274. The Interested Parties have demonstrated that they acquired interests in the motor vehicles the subject of the application for forfeiture. In the case of the 1st Interested Party, it had advanced loans to the 2nd and 3rd respondents on the security of motor vehicles KCH 600H Toyota Station Wagon and KCH 889M, Toyota Pickup. In the case of the 2nd Interested Party, it advanced a loan to the 1st respondent on the security of motor vehicle registration number KCH 753U Toyota Station Wagon. The funds advanced are, however, still in the 1st respondent's account at KCB.

275. Section 93 of POCAMLA is intended to protect third parties in the circumstances set out under its provisions. The Agency did not place any material before the court on the basis of which the court could conclude that the Interested Parties were involved in the offences out of which the property the subject of forfeiture was acquired, or that they knew that the motor vehicles were tainted properties at the time they acquired such interests. There is a danger that a party who acquires property in circumstances similar to what is presently before me may obtain financing on the security of such properties with a view to concealing the source of the properties or defeating forfeiture proceedings, and those who acquire such interests may be complicit. However, no such evidence in this case has been placed before me by the Agency. That being the case, the interests of the Interested Parties merit the protection of the court under section 93 of POCAMLA.

276. In the case of the motor vehicles registered in the name of the 2nd and 3rd respondents and the 1st Interested Party, being motor vehicles KCH 600H Toyota Station Wagon and KCH 889M, Toyota Pickup, it is my finding and I so direct that though, from the Agency's evidence, they are proceeds of crime, they shall be excluded from the properties the subject of forfeiture to protect the interests of the 2nd Interested Party, Platinum Credit Limited.

277. With regard to motor vehicle registration number KCH 753U Toyota Station Wagon, I note that though it was used as security for a loan of Kshs 800,000 to the 1st respondent, the said amount is still held in the 1st respondent's account. The said amount is not subject to forfeiture and is properly due for refund to the 2nd Interested Party, Opportunity International WEDCO Limited. The said motor vehicle is accordingly liable to forfeiture to the State. The funds in the 1st respondent's account shall be released to the 2nd Interested Party.

278. I accordingly issue the following declarations and orders:

1. It is hereby declared that the following properties are proceeds of crime:

i. Motor vehicle registration number KCH 753U Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and Opportunity International WEDCO Limited;

ii. Motor vehicle registration number KCH 600H Toyota Station Wagon, 2016 blue in colour registered in the name of the 2nd respondent and Platinum Credit Limited;

iii. Motor vehicle registration number KCH 889M, Toyota Pickup, 2016 silver in colour registered in the name of the 3rd respondent and Platinum Credit Limited;

iv. Title No. Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA situated within Trans Nzoia county registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated 2nd June 2016;

v. Title No. Naivasha/Municipality Block 2/884 measuring o.2305HA, being leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014, sold by New Hope for all Nations Church to the 2nd respondent vide sale agreement dated 8th July 2016;

vi. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated 25th April 2017;

vii. Title No. Njoro/Ngata Block 1/7436, approximate area 0.0840ha. Subdivision of P/NO. 3283 sitated in Kiamunyi, Nakuru County registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated 28th October, 2016;

viii. Title No Naivasha/Mwichiringiri Block 4/22367 approximate area 0.0450, subdivision of P/NO. 17217 registered in the name of the 3rd respondent on 1st July 2016.

2. It is hereby declared that the following properties shall be forfeited to the State and transferred to the Agency:

i. Motor vehicle registration number KCH 753U Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and Opportunity International WEDCO Limited;

ii. Title No. Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA situated within Trans Nzoia County registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated 2nd June 2016;

iii. Title No. Naivasha/Municipality Block 2/884 measuring o.2305HA, being leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014, sold by New Hope for all Nations Church to the 2nd respondent vide sale agreement dated 8th July 2016;

v. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated 25th April 2017;

v. Title No. Njoro/Ngata Block 1/7436, approximate area 0.0840ha. subdivision of P/NO. 3283 situate in Kiamunyi, Nakuru County registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated 28th October, 2016;

vi. Title No Naivasha/Mwichiringiri Block 4/22367 approximate area 0.0450, subdivision of P/NO. 17217 registered in the name of the 3rd respondent on 1st July 2016.

3.It is hereby ordered that the amount of Kshs 800,000 held in the 1st respondent's account in Kenya Commercial Bank, Account Number […] shall be released to the 2nd Interested Party.

280. The law is that costs follow the event. The respondents shall meet the costs of the Agency and the Interested Parties.

Dated Delivered and Signed at Nairobi this 26th day of August 2020.

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this Judgment has been delivered to the parties online with their consent, the parties having waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE