



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBLINGUGLI

MISCELLANEOUS APPLICATION NO 13 OF 2016

THE ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

SAMUEL WACHENJE alias

SAM MWANDIME.....1ST RESPONDENT

SUSAN MKIWA MNDANYI.....2ND RESPONDENT

VANDAME JOHN.....3RD RESPONDENT

ANTHONY KIHARA GETHI.....4TH RESPONDENT

CHARITY WANGUI GETHI.....5TH RESPONDENT

NDUNGU JOHN.....6TH RESPONDENT

GACHOKA PAUL.....7TH RESPONDENT

JAMES KISINGO.....8TH RESPONDENT

JUDGMENT

1. The applicant, the Assets Recovery Agency, filed the present application dated 20th April 2016 seeking the following orders against the respondents:

1. (spent)

2. THAT this Honourable Court be pleased to issue orders of forfeiture against the following assets;

i. Maisonette House at Kasarani-LR. No. 20857/190.

ii. Plot L.R. No. Ruiru, Juja East Block 2/360

iii. Motor Vehicle Registration Number KCE 852T Toyota Prado

iv. Motor Vehicle Registration Number KCE 874R Toyota Prado

v. Motor Vehicle Registration Number KCD 536P Toyota Prado

vi. Motor Vehicle Registration Number KCB 715E S. Wagon Toyota Prado

3. THAT the Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.

4. THAT the costs be provided for.

2. The application is premised on the provisions of sections 81, 90, 92 and 100 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) as read with Order 51 of the Civil Procedure Rules. It is supported by affidavits sworn on 20th April 2016 by Ms. Muthoni Kimani and CPL Sautet Jeremiah Matipei and is based on the grounds set out on the face of the application.

3. The application is unopposed, though the court record indicates that the respondents were duly served. The 1st respondent entered appearance through the law firm of Wagara, Koyoko & Co. Advocates. Mr. Wagara from the said firm appeared before the court on 11th July 2017, but did not file any response or appear further on behalf of the 1st respondent thereafter. The 2nd -8th respondent were served by way of substituted service on 4th July 2017 through the *Daily Nation* and *The Standard* newspapers following an application for such orders dated 20th June 2016. The respondents did not file any response to the application, nor did they participate in any way in the proceedings.

4. On 3rd March 2020, this court again directed that the applicant should serve the respondents with the hearing notice for 17th June 2020. The applicant served the hearing notice by way of substituted service through the *Standard* newspaper of March 10, 2020, the *Daily Nation* newspaper on March 11th 2020 and the *People Daily* on March 13, 2020. The respondents still did not appear or file any response to the application or participate in any manner in the proceedings.

The Case of the Applicant

5. The applicant's case for forfeiture of the assets the subject of this matter is set out in the grounds and affidavits in support of the application. In the said grounds, the applicant states that it is established as a semi-autonomous body in the Office of the Attorney General under sections 53 and 54 of the POCAMLA. Under section 54 of POCAMLA, it has the mandate to implement the provisions of Parts VII to XII of POCAMLA and to exercise the powers set out therein. Part VIII of POCAMLA sets out the procedure for civil forfeiture. Under section 90 of POCAMLA, where a preservation order is in place, the applicant has power to apply to the High Court for an order of forfeiture to the government of all or any of the property that is subject to the preservation order.

6. The application in this matter is based on the investigations carried out by the Directorate of Criminal Investigations (DCI) into allegations of theft and fraud of funds amounting to Kshs. 791,385,000.00 from the State Department of Planning in the Ministry of Devolution. According to the applicant, the investigations had revealed massive fraud and embezzlement of public funds perpetrated by public officials and private persons, some of whom have been charged for various offences in Nairobi Chief Magistrates' Court (Milimani) Criminal Case No. 1905 of 2015 and Nairobi Chief Magistrates' Court (Milimani) Criminal Case No. 301 of 2016. The criminal investigations had also established that the funds were stolen and/or fraudulently transferred from the National Youth Service (NYS) to various bank accounts and used to procure the properties the subject of this application.

7. It is also the applicant's case that financial investigations conducted by the DCI revealed massive schemes of fraud and money laundering, thus rendering the above properties proceeds of crime liable for seizure and forfeiture under POCAMLA. On 31st December 2015, it had obtained preservation, seizure and surrender orders against the subject properties. The preservation orders were, pursuant to section 83 (1) of POCAMLA, gazetted on 22nd January 2016 vide Gazette Notice No. 325.

8. The affidavit sworn by Ms. Kimani is essentially a recapitulation of the grounds in support of the application. In the affidavit sworn by Cpl. Sautet Jeremiah Matipei, however, the applicant sets out in detail the factual basis in support of the application for

forfeiture. Cpl. Matipei was an investigator attached to the Banking Fraud Unit in the DCI and a member of the team that was investigating the allegations of theft and fraudulent transactions with approximately Kshs. 800,000,000, part of the funds allocated to the NYS in the 2014/2015 financial year. The following factual narrative emerges from Cpl. Matipei's affidavit and the extensive witness statements, bank statements and searches from the Companies Registry and the Registrar of Persons, amongst others, annexed thereto with respect to the properties the subject of this matter.

9. The DCI had received a complaint dated 5th June 2015 from the then Cabinet Secretary, Ministry of Devolution and Planning, Ms. Anne Waiguru, concerning fraudulent commitments exceeding Kshs 800,000,000 in the NYS IFMIS System. A team had then been constituted by the DCI to carry out the investigations. The team had obtained documents and recorded statements from over 25 members of staff within the various departments at the NYS, including administration, accountants, and procurement (AIE holders) for the votes under investigations. The investigations had revealed that a sum of Kshs 695,000,000 was committed in the NYS IFMIS system due for payments to the business entities known as Form Home Builders, Roof and All Trading, Reinforced Concrete Technologies, Tegmen Trading, Grumium Engineering and Draco Capital. The funds had not, however, been released from the National Treasury.

10. A search at the companies Registry, Sheria House, Nairobi established that three entities- Form Home Builders, Roof and All Trading and Reinforced Concrete Technology belonged to one individual, one Josephine Kabura Irungu. The other three entities- Tegmen Trading, Grumium Engineering and Draco Capital belonged to one Peter Omari Otuoma and Caroline Njambi Kinuthia. These individuals were summoned by the DCI and they recorded statements stating that they had supplies contracts with the NYS. They stated that they had supplied hard and soft stones for the upgrading of roads at the Kibera and Mukuru slums, but had not been paid for the services rendered.

11. The investigations also established that some Kshs 791,385,000 had been paid by the NYS to various companies. Form Home Builders had received Kshs 218,925, 000 on diverse dates between 22nd December, 2014 and 21st January, 2015 in A/C No. 065000007849 held at Family Bank, KTDA Plaza, Nairobi. Roof and All Trading had received Kshs 252,300,000 on diverse dates between 5th February, 2015 and 27th March 2015 in A/C No. 065000007848 also held at Family Bank, KTDA Plaza, Nairobi, The third company, Reinforced Concrete Trading, had received Kshs 320,160,000 on diverse dates between 5th February 2015 and 31st March, 2015 in its A/C No. 065000007847 held in the same bank as the other two accounts, the Family Bank, KTDA Plaza, Nairobi.

12. Upon following the above payments through the banking system in which the payments were made through the three bank accounts held at Family Bank, KTDA Plaza, Nairobi, the DCI found that the three accounts, No. 065000007847 for Reinforced Concrete Trading, No. 065000007848 for Roof and All Trading and No. 065000007849 for Form Home Builders all the accounts belonged to one Josephine Kabura Irungu. They further found that all the three accounts had been opened during the month of November, 2014.

13. The DCI further found that upon receipt of the funds into the above accounts, a sum of Kshs, 381,000,000 was internally transferred, through account to account transfers, by Josephine Kabura Irungu from her bank accounts to the accounts of one John Kago Ndungu at the Family Bank, Cargen Branch, on diverse dates between 20th January and 9th June 2015. Kshs 273,000,000 was deposited in A/C No. 014000020946 in the name of John Kago Ndungu while Kshs 108,000, 000 was deposited by Josephine Kabura Irungu in A/C No. 014000044055 in the name of Good Luck Twenty Eleven Enterprises, a business entity owned by the said John Kago Ndungu.

14. The transfers by Josephine Kabura Irungu of the funds fraudulently obtained from NYS from her three business entities bank accounts Nos. 065000007849, 065000007848 and 065000007847 at Family Bank to two account numbers Nos. 014000020946 and 014000044055 belonging to John Kago Ndungu, according to the applicant, were done with the intention of covering the trail of stolen money. The said transfers were effected by Josphine Kabura Irungu in collusion with John Kago, Ben Gethi and staff of Family Bank, KTDA Plaza Branch.

15. It is its case further that the transfer of the funds fraudulently obtained from NYS, from one bank account to another account at the same bank was done in a deceptive manner as was evidenced by tellers' transaction details and the cash deposit slips. Further, the money which was deposited at the bank accounts of John Kago Ndungu and Good Luck Twenty Eleven Enterprises was internal cash transfers and not cash deposits as indicated in the cash deposit slips. Cpl. Matipei notes in his affidavit that the deposit slips do not indicate the name of the person who deposited the cash.

16. The applicant asserts that the DCI investigations and analysis of various documents and witness statements revealed that the payments were irregular, fraudulent and were not supported by any of the requisite documents for government procurement and supplies. This was demonstrated by the statements from officials of the Public Works Supplies Branch, Wesley Mokuia Nyaririki and Ministry of Devolution and Planning which confirmed that there were no valid supplies contracts or tender documents to support the payments. The DCI investigations had confirmed that the funds were fraudulently paid by NYS to the said business entities. This conclusion was reached as the figures in the payments vouchers, LPOs, delivery notes and counter receipt vouchers did not tally. Further, the documents used by the business entities were confirmed to be forgeries by the Document Examiner attached to the DCI.

17. According to the applicant, an inspection on 13th August 2015 by a team of public works officials to Kibera to establish the supplies and quantities of the works executed by the three business entities in the Kibera slum upgrading project showed that the cost of the executed works as established in a quantity surveyors report was Kshs 78, 857, 835, a small fraction of the payment made by the NYS.

18. The DCI had also carried out financial investigation for money laundering offences under POCAMLA to trace the Kshs 791,385,000 fraudulently obtained from the NYS. It established that the funds were wired through G-Pay system to accounts belonging to Josephine Kabura Irungu at Family Bank, KTDA Plaza. Kshs 218, 925, 000 was transferred to Form Home Builders A/C No. 065000007849 between December 2014- 21st January 2015; Kshs 252,300,000 to Roof and All Trading A/C No. 065000007848 between 5th February 2015 and 27th March 2015; and Kshs 320, 160, 000 was transferred to Reinforced Concrete Builders A/C No. 065000007847 between 5th February 2015 and 31st March, 2015. As noted, earlier, a total of Kshs 381,000,000 out of the above amounts was subsequently transferred to A/C No. 014000020946 belonging to John Kago Ndungu and A/C No. 014000044055 in the name of Good Luck Twenty Eleven Enterprises, a business entity owned by the said John Kago Ndungu held at Family Bank, Cargen Branch.

19. The bank statement of the above accounts revealed very many suspicious transactions involving the funds. Huge amounts were deposited and moved or removed from the two bank accounts of John Kago Ndungu. They established that the said John Kago Ndungu entered into several transactions to purchase or invest in several properties and assets for and on behalf of other persons using the said funds. These are the assets the subject of this application which are currently preserved pursuant to orders issued in Nairobi High Court Miscellaneous Application No 601 of 2015. The applicant sets out specifically the process and the trail of funds leading to the purchase of each of the properties by the respondents, their relatives, agents, associates and/or beneficiaries using the funds stolen from the NYS.

20. The first of these assets is the maisonette at Kasarani-LR. No. 20857/190. The applicant deposes that on 31st March 2015, Josephine Kabura Irungu deposited cash, Kshs 40,000,000, to bank account number 049000023194 in the name of Sam M. Mwadime held at Family Bank, Kagwe Branch. The evidence in support of this is annexure 'SJM-14', which comprises copies of the Family Bank account statements of Sam Mwadime, Big Kent Company and Reinforced Concrete Technologies Family Bank account 049000023194, as well as a teller's transaction detail of 31/03/2015 from Family Bank KTDA Branch of Lilian Wangui, a teller in the said Branch.

21. The applicant established that Sam M. Mwadime is the same as Samuel Mdanyi Wachenje, the 1st respondent, a Finance Director and alternate AIE holder at the NYS. It also established that the said Samuel Mdanyi Wachenje had used a forged national identification card to open account number 049000023194 at the Family Bank. The applicant demonstrates this by way of annexure 'SJM-15, copies of the print outs from the National Registration Bureau of the forged identity card of Sam Mwadime and the copies of the genuine identity card of Samuel Mdanyi Wachenje. According to the applicant, Samuel Mdanyi Wachenje had acquired a fake identification card using the serial identification number of one Fatuma Osman Abdi, identification card number 2159580193. He had also used the identification number of one Samuel Karongoi Kihara of identification card number 2310935.

22. The applicant further established that Samuel Mdanyi Wachenje alias Sam Mwadime had approached one Tirus Kamau Mutoru and his wife, Esther Nthenya Nzioki to buy from them a house on L. R. No. 20857/190 registered in the name of Esther Nthenya Nzioki situated in Kasarani. The house was valued at approximately Kshs 21,000,000/=, and they had agreed on the purchase price. The applicant relied in this regard on annexure 'SJM-16', copies of the statements of Tirus Mutoru and Esther Nthenya Nzioki, as well as the bank statement of Tirus Mutoru, DTB Bank account number 5108531001 and the Family Bank account of Sam M Mwadime.

23. A sale agreement dated 11th July 2015 in respect of the property was signed between Susan Mkiwa Mdanyi and Esther Nthenya Nzioki, which agreement was witnessed by Tirus Kamau Mutoru and Samuel Mdanyi Wachenje.

24. The investigations established that on 9th July 2015, Samuel Mdanyi Wachenje alias Sam M. Wachenje Mwadime remitted Kshs 10, 500,000/= twice from his family Bank Account Number 049000023194 to Tirus Mutoru's DTB bank account number 5108531001 through RTGS, being payment for the purchase of the said house. On 29th September 2015, Samuel Mdanyi Wachenje alias Sam M. Wachenje Mwadime remitted Kshs 850, 000/= from his family bank account number 049000023194 to Tirus Mutoru's DTB Bank account number 5108531001 through RTGS, again being payment for the purchase of the said house. Annexures 'SJM-17' "a" "b" & "c", being copies of the RTGS, were presented to the court in evidence. It is the applicant's case that Samuel Mdanyi Wachenje alias Sam Mwadime registered the said parcel of land in his wife's name, one Susan Mkiwa Mndanyi, the 2nd respondent in this matter. Records from the office of the Registrar of Lands confirm that the title was registered in the name of Susan Mkiwa Mndanyi (annexure 'SJM-18' "b"). The original title, according to the applicant, is in the custody of the 2nd respondent.

25. The applicant's evidence in relation to the second property the subject of this matter, L.R. No. Ruiru, Juja East Block 2/360 is similar to that in respect of the first. Like the first property, it is the applicant's case that it was purchased from the Kshs 40,000,000 deposited in cash on 31st March 2015 by Josephine Kabura Irungu in bank account number 049000023194 held by the 1st respondent in Family Bank, Kagwe Branch. The 1st respondent thereafter approached Cyrus Ngugi Mugonya with the intention of buying from him a parcel of land on L.R. No. Ruiru Juja East Block 2/360 (Ballot Number 30) registered in the name of Agnes Wambui Ngigi valued at approximately Kshs 3, 875,000/= which he had identified and agreed on the purchase price.

26. The applicant relies in this regard on the statements made by Cyrus Ngugi Mugonya, the sale agreement in respect of the property, as well as the Plot Ownership Certificate No. 30 (annexure "SJM-20"). A sale agreement was entered into between the 1st respondent and Cyrus Ngugi Mugonya on 8th October 2015. The agreement was witnessed by Geoffrey Orina, an Advocate of the High Court of Kenya. Following the signing of the sale agreement, the 1st respondent on 8th October 2015 transferred from his bank account number 049000023194 at Family Bank Kshs 3, 575,000/= into account number 04900002273 held by Cyrus Ngugi Mugonya as part payment for the said piece of land. This transfer is evidenced by annexure "SJM-21", a copy of the account transfer voucher dated 8th October 2015 for Kshs. 3, 575, 000. Thereafter, the 1st respondent paid Kshs 300,000/= to the vendor, being the balance of the purchase price.

27. It is the applicant's case that motor vehicle registration number KCE 874R Toyota Prado, like the other two properties the subject of this forfeiture application, was purchased from funds fraudulently obtained from NYS. It is deposed on the applicant's behalf that the 1st respondent, through one Anthony Waga Apondo, traded in his motor vehicle Toyota Harrier registration number KCB 715E for a motor vehicle registration number KCE 874R Toyota Prado which was valued at Kshs 5, 200,000/= from Signature Cars Limited owned by TOT Company Limited.

28. It is its case further that the 1st respondent registered the said motor vehicle KCE 874R in the name of one James Kisingo, the 8th respondent, so as to disguise the source of funds and assets procured using the stolen funds. According to the applicant, the 1st respondent paid for the motor vehicle, first, by an RTGS transfer on 4th September 2015 of Kshs 3,000,000/= from his Family Bank account number 049000023194 to Signature Cars Limited bank account held at Development Bank of Kenya in part payment for the said vehicle. The applicant relies in support on annexure "SJM-22", a copy of an RTGS transaction dated 4th September 2015 for Kshs. 3,000,000/=.

29. On the same date, the 1st respondent paid, through one Anthony Waga Apondo, Kshs. 200,000/= in cash to Signature Cars Limited in part payment for the said motor vehicle. Annexure "SJM-23", which is a copy of a cash receipt dated 4th September 2015 for Kshs. 200,000, is produced before the court in evidence. It is the applicant's case that the said vehicle was then registered in the name of James Kisingo to disguise the proceeds of crime. The applicant has placed before the court annexure "SJM-24" "a" and "b" which are copies of motor vehicle delivery note, motor vehicle sale agreement, log book for the two motor vehicles and the statement made by Mr. Wilfred Kipkorir Sang, the proprietor of Signature Cars Limited.

30. With regard to motor vehicle registration number KCE 852T Toyota Prado, the applicant's evidence is that on 8th July 2015, Anthony Kihara Gethi, the 4th respondent, received via RTGS Kshs 3,189,000/= in his bank account number 2024959018 held at the Barclays Bank Moi Avenue Branch from John Kago Ndung'u, the 6th respondent, for the purchase of motor vehicle registration number KCE 852T valued at Kshs 5, 250,000/=. It is the applicant's case that financial investigations revealed that Anthony Kihara Gethi purchased the said motor vehicle for himself and registered it in the name of John Kago Ndung'u. In the course of the investigations, John Kago Ndungu transferred the vehicle to Paul Gachoka, the 7th respondent, in order to disguise the fact that the source of funds for its purchase was the funds stolen from NYS. The applicant relies on annexure "SJM-25" "a" "b" "c" and "d" which are copies of the RTGS dated 8th July 2015 and bank account statement of John Kago and Anthony Kihara Gethi.

31. The applicant notes that the 7th respondent, Paul Gachoka, did not pay any money for the said motor vehicle either to Anthony Kihara Gethi or to John Kago Ndungu. The transfers between these respondents, according to the applicant, were intended to conceal and hide the said motor vehicle and make its seizure and recovery hard.

32. According to the applicant, a similar pattern was followed by the 4th and 6th respondents with respect to motor vehicle registration number KCD 536P Toyota Prado. Its case is that on 14th May 2015, Anthony Kihara Gethi received, via RTGS, Kshs 3,050,000/= in his bank account number 2024959018 held at Barclays Bank Moi Avenue Branch, from John Kago Ndungu. This amount was for the purchase of motor vehicle registration number KCD 536P which was valued at Kshs. 5,200,000/=. The applicant's financial investigations revealed that Anthony Kihara Gethi purchased the said motor vehicle for himself, but registered it in the name of John Kago Ndungu. While investigations were ongoing, John Kago Ndungu transferred it to John Vandame, the 3rd respondent, in order to disguise the fact that the source of the fund for its purchase were the funds stolen from NYS. According to the applicant, the 3rd respondent did not pay a single cent for the said motor vehicle, which was valued at Kshs 5, 200,000/= either to Anthony Kihara Gethi or to John Kago Ndungu. In the applicant's view, this was in order to conceal and hide the said motor vehicle and make its seizure and forfeiture to the state harder.

33. The applicant therefore avers that it is fair and just that the above assets, which are proceeds of crime, should be forfeited to the government and applied for the public good on behalf of the citizens of Kenya who are the victims of the crime committed by the respondents.

Analysis and Determination

34. I have considered the pleadings and submissions of the applicant in this matter, as well as the authorities the applicant has relied on. The factual basis for the application for forfeiture presented by the applicant which I have set out above is unchallenged, the respondents having filed no response to the application despite service. Accordingly, this judgment is rendered on the basis of the applicant's pleadings and submissions

35. What is before the court is an application by the Assets Recovery Agency established under section 53(1) of the POCAMLA to recover assets believed to have been acquired by the respondents from proceeds of crime. As required under Part VIII of POCAMLA, the applicant instituted proceedings under sections 81, 82, 86 and 87 for the preservation of the assets in question. It was granted a preservation order against the assets on 31st December 2015. The orders were gazetted on 22nd January 2016 vide Gazette Notice Number 325 pursuant to section 83 (1) of the POCAMLA.

36. By the application brought pursuant to the provisions of sections 90 and 91 of POCAMLA dated 20th April 2016, the applicant seeks orders of forfeiture of Maisonette House (sic) at Kasarani L.R. Number 20857/190, Plot number L.R. Number Ruiru, Juja East Block 2/360, and motor vehicles registration numbers KCE 852T, KCD 536P, KCB 715E and KCE 874R, all Toyota Prados.

37. The issues that the applicant identifies as arising for determination are:

i. Whether the properties the subject of the forfeiture application owned directly or indirectly by the respondents are proceeds of crime;

ii. If the answer to issue i) above is in the affirmative, whether they should be forfeited to the state;

iii. Whether the application for civil forfeiture is in violation of the respondents' rights to property under Article 40 of the Constitution;

iv. Whether conviction is a precondition for civil proceedings under part VIII of POCAMLA

38. I will begin by considering the last two issues identified by the applicant- whether the application for forfeiture violates the respondents' right to property, and whether a conviction is a condition precedent to the issuance of a forfeiture order. Though the respondents have not thought it fit to challenge the present proceedings despite full knowledge thereof, it is important to consider these issues given the constitutional obligation on the court to do justice and safeguard the rights of all parties before it.

39. It is correct that the right to property is guaranteed to all under Article 40 of the Constitution. However, under Article 40(6), such protection does not extend to property that is unlawfully acquired. Should this court find that the property the subject of this application was acquired from proceeds of crime, then an order for its forfeiture does not violate the respondents' right to property.

40. The second issue is whether a conviction pursuant to a criminal trial is a condition precedent to an order for forfeiture. The proceedings in this matter have been brought under Part VIII of POCAMLA. This part contains provisions for civil forfeiture of assets believed to be proceeds of crime. Section 92(4) therein provides that:

(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."

41. In the case of **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." (Emphasis added).

42. The law, therefore, is clear that for purposes of civil forfeiture, a conviction is not a necessary pre-condition for such orders.

Whether the properties the subject of the forfeiture application owned directly or indirectly by the respondents are proceeds of crime

43. The factual basis for the application that informs the present application is based on the investigations carried out by the DCI into the theft of **Kshs 791, 3850,000/=** from the NYS, which falls under the State Department of Planning in the Ministry of Devolution. The theft was perpetrated by public officials within the department and private persons. Some of these persons, including some of the respondents in this matter, have been charged with various offences in **Nairobi Chief Magistrates Court (Milimani) Criminal Case Number 1905 of 2015 and Nairobi Chief Magistrates' Court (Milimani) Criminal Case Number 301 of 2016**.

44. From the facts presented by the applicant which have not been controverted by the respondents, the assets in issue in this matter were purchased using funds stolen from the NYS. The assets were then registered in the names of the respondents or their associates. The manner of dealing with the funds from the NYS, from the account held by one Josephine Kabura Irungu to the account of the 1st respondent; the purchase of the assets by the 1st respondent and registration in the name of the 2nd respondent, who is his wife; the purchase of motor vehicles by the 4th respondent, registration in the name of the 6th respondent, and the transfer to the 3rd, 7th and 8th respondents, all show a complex scheme of money laundering contrary to section 3, 4, and 7 of POCAMLA. From the averments of Cpl. Matipei sworn on 20th April 2016, the evidence before the court is that the funds used to purchase the assets at issue are proceeds of crime.

45. It is noteworthy that in a matter of days between 22nd December 2014 and 21st January 2015, and then between 5th February 2015 and 31st March 2015, Kshs 791,385,000 had been paid from the NYS to accounts opened by one individual, Josephine Kabura Irungu, in one bank. It is also noteworthy that the entities into whose accounts the funds from NYS were paid were registered under the Registration of Business Names Act in the months of November, 2014, the same month the accounts into which the funds were paid were opened. Kshs 40,000,000 of the amount paid into these accounts had then been transferred in one day to the 1st respondent, then used to buy the properties the subject of this application. None of the respondents ventured to explain the source of the funds for the purchase of these assets, or to counter in any way the version of events offered by the applicant.

46. The applicant has relied on the case of **Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission**

(Interested Party) [2018] eKLR in which the court held that:

“Where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means what has been presented is not challenged. In this case there is no explanation of the source of the huge deposits into the Respondent’s accounts. Even a glance at the cash deposits made at Donholm branch of Equity Bank would call for an explanation by the Respondent as to who was making the deposits and for what purpose. The moment the Applicant established through the bank statements that there were huge cash deposits, the burden shifted to the Respondent to explain the source. A lot has been said about the Respondent’s husband by both parties but this court is not using that information against the Respondent. The Respondent had a clear duty to explain the source or sources of these huge deposits into her account which she has failed to do”.

47. In the absence of a response from the respondents who have had every opportunity, since 2016, to present their version of events, this court is constrained to find that the averments by the applicant establish, on a balance of probabilities, that the assets at issue in this matter are proceeds of crime as defined in section 2 of POCAMLA which defines “Proceeds of Crime” as:

“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;

48. Further, in the case of **Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7** relied on by the applicant, the court, in defining proceeds of crime, stated:

“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”.

Similarly, the definition makes clear that proceeds of crime will constitute proceeds even if “indirectly obtained”. 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.”

49. It is my finding, therefore, and I so hold that the assets the subject of this matter owned directly or indirectly by the respondents are proceeds of crime.

Whether the properties the subject of this application should be forfeited to the State

50. Having found that the assets in this matter are proceeds of crime, the next issue to consider is whether they should be forfeited to the state. The response to this issue follows naturally from the findings of the court on the previous issue. Section 92(1) of POCAMLA provides that:

“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”.

51. The applicant has, in my view, established on a balance of probabilities, that the property the subject of this application was acquired using funds obtained fraudulently from the NYS. Its very detailed averments on the movements of funds from the NYS to the accounts of one Josephine Kabura Irungu to the accounts of the 1st and 6th respondents have not been controverted. Its averments with regard to the purchase of the assets by the respondents and the transfers amongst themselves have also not been controverted. The respondents had an obligation, once the applicant established, on a balance of probabilities, that the assets were proceeds of crime, to controvert this evidence. As was held in the case of **Assets Recovery Agency vs Rohan Anthony Fisher, and & Others, Supreme Court of Jamaica, Claim No 2007 HCV003259**:

“...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 thousands 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...” (Emphasis added)

52. In the circumstances, the respondents having elected not to present their case and the applicant having established, on a balance of probabilities, that the assets at issue are proceeds of crime, this court is satisfied that an order of forfeiture is merited. I accordingly grant the following orders:

1. That the following properties which are proceeds of crime be forfeited to the applicant on behalf of the State:

i. Maisonette House at Kasarani-LR. No. 20857/190;

ii. Plot L.R. No. Ruiru, Juja East Block 2/360;

iii. Motor Vehicle Registration Number KCE 852T Toyota Prado;

iv. Motor Vehicle Registration Number KCE 874R Toyota Prado;

v. Motor Vehicle Registration Number KCD 536P Toyota Prado;

vi. Motor Vehicle Registration Number KCB 715E S. Wagon Toyota Prado.

2. That the respondents shall bear the costs of this application.

53. Orders accordingly.

Dated Delivered and Signed at Nairobi this 23rd day of July 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 ruling 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



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