



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC NO. E020 OF 2020**

**ASSET RECOVERY AGENCY.....APPLICANT**

**VERSUS**

**HON. RIGATHI GACHAGUA.....1<sup>ST</sup> RESPONDENT**

**ANNE KIMEMIA T/A JENNE ENTERPRISES LIMITED.....2<sup>ND</sup> RESPONDENT**

**AND**

**RAFIKI MICROFINANCE BANK LIMITED.....INTENDED INTERESTED PARTY**

**RULING**

**Introduction**

1. The 3<sup>rd</sup> interested party/ applicant has moved this court through a Notice of Motion application dated 15<sup>th</sup> February 2022 expressed to be made under **Sections 81, 82, 83, 89, 91 and 93** of the **Proceeds of Crime and Anti-Money Laundering Act (2009)**, **Order 51 Rule 1** of the **Civil Procedure Rules**, **Articles 40, 48 and 50** of the **Constitution** and all other enabling provisions of the law. The Applicant seeks the following orders:

1. ***THAT the instant Notice of Motion be certified urgent and heard ex-parte and service thereof on the Respondents be dispensed with in the first instance owing to its extreme urgency.***

2. ***THAT This Court be pleased to enjoin Rafiki Micro-Finance Bank Limited forthwith in these proceedings as an interested party.***

3. ***THAT the Court be pleased to grant leave to Rafiki Micro-Finance Bank Limited to effect a Notice of its intention to object to the issuance of forfeiture orders out of time upon the 1<sup>st</sup> Respondent within the meaning of section 83(3) as read together with section 91(1) of the Proceeds of Crime & Anti-Money Laundering Act 2009***

4. ***THAT the Court be pleased to stay all proceedings in ACEC Civil Application No. E020 of 2020 – Assets Recovery Agency vs Hon. Rigathi Gachagua & Jenne Enterprises pending the hearing and determination of this Application.***

**5. THAT the Honourable Court do grant any other or further orders that may favour the cause of justice**

**6. THAT the Costs of this application be in the cause”**

2. The application is based inter alia on grounds that:

*i. That vide ACEC Miscellaneous Civil Application No. 17 of 2020 – Assets Recovery Agency vs Hon. Rigathi Gachagua & Jenne Enterprises Limited the 1<sup>st</sup> Respondent filed an application seeking preservation orders in respect of funds held in various accounts by the applicant for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on suspicion that the same are proceeds of crime*

*ii. The said application was allowed and preservation orders granted for 90 days pursuant to section 82 of POCAMLA*

*iii. It came to the applicant’s attention that vide ACEC Misc Appl. No E020 of 2020; Assets Recovery Agency vs Hon Rigathi Gachagua & Jenne Enterprises Ltd the 1<sup>st</sup> Respondent filed an application dated 7<sup>th</sup> October 2020 seeking to have the funds held by the applicant and belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents declared as proceeds of crime and therefore liable for forfeiture*

*iv. The funds held in the subject accounts by the applicant and belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are security for various credit facilities advanced to various 3<sup>rd</sup> parties to wit, Encartar Diagnostics Limited and Rapid Medical Supplies Limited*

*v. The applicant is reasonably apprehensive that the court will issue an Order of forfeiture of funds held with the applicant and for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents which funds are subject of preservation orders issued on 25<sup>th</sup> June 2020 to its detriment as it holds an identifiable stake in the subject funds.*

*vi. It is in the interests of justice that the court be pleased to grant leave to the applicant to issue a Notice of its intention to oppose the issuance of a forfeiture order pursuant to the provisions of section 91(1) as read together with section 83 of POCAMLA*

*vii. The joinder is significant in assisting the court in the just and fair resolution of issues raised, for effectual and complete adjudication of all questions involved and will provide protection and security for the rights and interests of the applicant/intended interested party who will otherwise be adversely affected by the eventual issuance of forfeiture orders against the funds belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and held by the applicant.*

*viii. Section 91 of POCAMLA confers upon this court discretionary powers to grant leave to an interested party to issue a notice of intention to object the issuance of a forfeiture order and it is therefore necessary that it be granted to enable determination of disputed issues on merit”*

3. The application is supported by the affidavit of Richard Murage, the applicant’s Head of Special Assets & Debt Recovery Unit, sworn on 10<sup>th</sup> November 2021 his further affidavit sworn on 16<sup>th</sup> February 2022. The gist of the application is that preservation were issued in **ACEC Misc. Civil Application No. 17 of 2020 Assets Recovery Agency vs Hon Rigathi Gachagua & Jenne Enterprises Limited** in respect of funds belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent which were suspected to be proceeds of crime Further, that 1<sup>st</sup> Respondent filed an application dated 7<sup>th</sup> October 2020 seeking to have the funds held by the Applicant and belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents declared as proceeds of crime hence liable to forfeiture. That **ACEC Misc Civil Application No. E020 of 2020 Assets Recovery Agency vs Hon Rigathi Gachagua & Jenne Enterprises Limite.**

4. However it is the Applicant’s contentious that the aforementioned funds are security for various credit facilities advanced to 3<sup>rd</sup> parties and that on diverse dates between August 2014 and June 2019, the Applicant advanced Kshs. 295,000,000 to Encartar Diagnostics Limited and Rapid Medical Supplies Limited as working capital and the facilities were secured on the strength of:

*i. Fixed Deposit sum of Kenya Shillings One Hundred and Sixty Five Million Only (Kshs. 165,000,000) of Rigathi Gachagua in Account Number (Particulars withheld)*

*ii. Original Fixed Deposit Certificate of Account Number (particulars withheld)*

iii. *Letter of lien and set off of Kenya Shillings One Hundred and Sixty-Five Million Only (Kshs. 165,000,000) for cash collateral executed by Rigathi Gachagua*

iv. *Personal guarantee and undertaking from Rigathi Gachagua of ID No. (Particulars withheld)*

v. *Directors Guarantee and indemnity; and*

vi. *Board resolutions to borrow from Rafiki Microfinance Bank Limited by Encartar Diagnostics Limited and Rapid Medical Supplies Limited.*

5. The Applicant avers that the third parties have since defaulted in the repayment of the facilities advanced to them were as at 31<sup>st</sup> January, 2022 in arrears to the cumulative total of Kshs. 169,931,392.25/- which amount continues to accrue interest to date. The Applicant avers that the applicant is apprehensive that the court will order forfeiture of the funds it holds to its detriment as it stands to lose the only security or collateral in its possession in so far as the outstanding credit facilities advanced to the third parties are concerned. That if the court does not grant leave for it to be enjoined to the proceedings and also allow it to issue a notice of its intention to object to the issuance of forfeiture orders out of time the applicant stands to suffer adversely. Further that the joinder will prevent a likely course of proliferated litigation over matters concerning the issuance of forfeiture orders and none of the parties will be prejudiced in any way should the orders sought be granted.

## **SUBMISSIONS**

6. Parties elected to dispose the application by way of written submissions. The applicant's submissions were filed on 22<sup>nd</sup> March 2022. Relying on the affidavits of Richard Murage, learned counsel for the Applicant rehashed its version of events emphasizing on the advancement of the funds in issue to the named third parties. Counsel for the applicant asserted that at the time of filing the applicant's earlier replying affidavit deposed by Benjamin Kuria Wangai on 26<sup>th</sup> July 2021, the applicant had not been served with the forfeiture application and it only became aware of that Application upon when it was by served by ARA with the order of preservation order on 7<sup>th</sup> July 2021. Counsel stated that by then the loan amounts disbursed to Encartar and Rapid Medical Supplies had already become due despite their restructure on 11<sup>th</sup> June 2020 and 23<sup>rd</sup> November 2019 respectively and that the 2<sup>nd</sup> respondent had always been a guarantor to the third parties for over 9 years and the loans disbursed on the strength of the guarantee have always been serviced and settled in full.

7. The applicant framed its issues for determination as follows:

i. *Whether the court has discretion to grant leave under Section 91(3) of POCAMLA*

ii. *Whether the applicant has sufficient cause to warrant the grant of orders sought*

8. It is the applicant's submission that this court has discretion to grant leave to an applicant to serve a notice under section 83 [3] of POCAMLA and that provisions of section 91 are provide that a person who for any reason does not serve a notice within fourteen days of becoming aware of the existence of a preservation order can apply to the court for leave to serve the notice out of time. Counsel for the applicant also cited Section 93(1) of the **Proceeds of Crime and Anti-Money Laundering Act** that provides for protection of third parties whose properties may be subject to preservation orders. Counsel reiterated that the applicant only became aware of the forfeiture proceedings on 7<sup>th</sup> July 2021 and cited the following cases to support his submissions: -

· *Assets Recovery Agency vs Samuel Wachenje & 6 Others and Grace Akinyi (2020) eKLR where the court stated;*

*"15. In this case, it is apparent that the Aggrieved Party was not aware of the forfeiture proceedings, nor did she participate in the proceedings. She had also acquired the motor vehicle in contention prior to the commencement of the forfeiture proceedings.*

*16. The Agency's response to the application is essentially a concession that the information on the basis of which it applied for forfeiture of the motor vehicle the subject of this application was incorrect, and that it may not have carried out its investigations sufficiently prior to filing the application for preservation and forfeiture. I am accordingly satisfied that the application for variation of the forfeiture orders issued on 23<sup>rd</sup> July 2020 to exclude vehicle registration number KCB 715E is merited."*

*Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. NAI 255 of 1997 (Unreported) where it was held:-*

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.*

Counsel for the 3<sup>rd</sup> interested party/Applicant submitted that in **Order 50 Rule 6 of the Civil Procedure Rules**, courts with power to enlarge time required for performance of any act notwithstanding that such time has expired and extension of time is therefore a matter of judicial discretion.

9. It is the applicant’s case that it has demonstrated sufficient cause and reasons for grant of the prayers sought in the present application. It is its case that a bank has no money of its own and it use funds from other customers to trade with that in this case, the applicant being a financial institution has a duty under its contract with its customers to exercise reasonable care and skill in the performance of its contractual operations. Counsel submitted that the applicant’s interest in the funds advanced to the third parties is only limited to the exposure it stands to suffer in the event that the court allows ARA’s application to forfeiture the funds without allowing the Applicant to be heard on merit. The Counsel asserts that the agency will suffer no prejudice if the orders sought are granted; that the Applicant only seeks to establish that the transactions of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents at the bank were not in any way suspicious as to amount of money laundering or make the funds proceeds of crime within the meaning of **Section 44 of the Proceeds of Crime and Anti-Money Laundering Act**. Counsels submitted that moreover, the Applicant has all alone cooperated with the Agency to the extent of availing all the documents it required in regard to these proceedings and at availing its officials for interviews so as to aid in the conduct of the investigations.

10. Learned counsel for the respondent Mr. Mohamed Adow, relied on the Asset Recovery Agency’s submission dated 25<sup>th</sup> March, 2022. Mr. Adow underscored the legislative framework within which the forfeiture application is brought, namely the preamble and **Section 2 of the Proceeds of Crime and Anti-Money Laundering Act** which defines proceeds of crime to be:

*“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 property was later successfully converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from that property from the time the offence was committed”*

11. While Relying on the agency’s replying affidavit sworn by Isaac Nakitare sworn on 7<sup>th</sup> March 2022, Mr. Adow framed the issues for determination: as follows:

- i. What recourse is available for an interested party after a preservation order is gazetted or before a forfeiture order is made*
- ii. Whether the applicant’s application meets the threshold of section 91(1) of POCAMLA and if the prayers sought are merited.*
- iii.*

12. On the 1<sup>st</sup> issue Mr Adow submitted that **Part VIII of the Proceeds of Crime and Anti-Money Laundering Act** provides for civil forfeiture. That **Sections 81, 82, 86 and 87** authorize the agency to institute preservation proceedings where there are reasonable grounds to believe that the asset sought to be preserved has been used, is intended to be used in the commission of an offence or is a proceed of crime. Counsel submitted that on 30<sup>th</sup> March 2020 the agency received information on a suspected case of money laundering involving public funds from different National Government Ministries including the Ministry of Land (Kenya Informal Settlements Programme), State Department for Special Planning, Ministry of Health, the National Irrigation Board, Mathira Constituency Development Fund, and several county governments including the county governments of Bungoma, Nyeri and Kwale. Mr. Adow submitted that an enquiry file no. 14 of 2020 was opened to investigate the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ bank accounts to identify and trace any assets acquired from proceeds of crime or which were proceeds or benefits of crime owned by the respondents. That Search and seizure warrants were obtained in Misc. Cr. APP No.215 of 2020 under **Sections 118, 118A, 119 and 121(1) of the Civil Procedure Code** and **Section 180 of the Evidence Act** pursuant to powers granted to the Assets Recovery Agency under **Section 53A (5)** and the orders which were granted on 26<sup>th</sup> May, 2020 were served upon the 3<sup>rd</sup> interested party/applicant.

That subsequently, preservation orders were obtained in Misc. APP No. 17 of 2020 in relation to Kshs. 201,911,371.28 held in four bank accounts at the Rafiki Micro-Finance Bank in the names of Rigathi Gachagua and Jenne Enterprises (ACC Nos particulars withheld). Counsel submitted that the orders were served upon the applicant on 26<sup>th</sup> June 2020 and subsequently gazetted on 10<sup>th</sup> July 2020 as required in **Section 83(1)** of the **Proceeds of Crime and Anti-Money Laundering Act**. Counsel contended that the applicant had recourse in **Section 83(3)** which permits any person who has interest in the property the subject of a preservation order to apply for an order exclude his interest in the property. Counsel stated that such notice was required to be served on the Agency Director of ARA in accordance with **Section 83(4) (a) and (b)**. Counsel averred that the agency did not receive any notice yet the applicant was well aware of the preservation orders.

13. Mr. Adow also submitted that case that the applicant had a second avenue under **Section 91(1)** of the **Proceeds of Crime and Anti-Money Laundering Act** to apply for service of notice out of time within 14 days of becoming aware of the existence of the preservation order the applicant ought to. Counsel submitted that such an application can be made before or after the date on which a forfeiture application was made but be made before the judgment is delivered. Counsel submits that the applicant has been participating in the forfeiture application, [Misc. App. No. E020 of 2020 as is evident from the Replying Affidavit of Benjamin Kuria Wangai, Senior Manager Legal dated 26<sup>th</sup> January 2021 counsel stated that in that affidavit of Kuria Wangai did not raise any issues as to the bank's perceived interests in the subject funds. Further that through a letter dated 7<sup>th</sup> July 2021 the Agency notified the applicant that it has filed the forfeiture application and drew it's the Applicant's to the provisions of **Section 84(a)** of the **Proceeds of Crime and Anti-Money Laundering Act**. Mr. Adow submitted that this reason, the applicant's assertion that it became aware of the existence of the forfeiture application on 7<sup>th</sup> July 2021 is not true and is meant to mislead this court. Counsel asserted that the Applicant was well aware of the investigations, the existence of the preservation order, gazetting of the preservation and forfeiture orders because on 26<sup>th</sup> May and 26<sup>th</sup> June 2020 the agency served the applicant with warrants to investigate the accounts of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the preservation order. Counsel stated that the Agency gazetted the preservation orders On 10<sup>th</sup> June, 2020 and on 26<sup>th</sup> July 2021, the Applicant filed a Replying Affidavit. Counsel stated that on 7<sup>th</sup> July 2022, the Agency notified the Applicant of the filing and existence of the forfeiture application dated 7<sup>th</sup> October 2020. Counsel submitted that in light of the foregoing chronology of events, the Applicant's delay in bringing this application cannot be cured by **Section 91(1)** of the **Proceeds of Crime and Anti-Money Laundering Act** Counsel relied on the case of *Assets Recovery Agency vs Rose Monyani Musanda & 2 Others and the case Wilma & Sons Company Limited (Interested Party)(2021)eKLR* in which the court held as follows:

*"43. A second, related, question is whether the Interested Party had a claim to the vehicle, as it alleges, and should therefore have been notified of the proceedings. In the ruling of Onyiego J dated 15<sup>th</sup> January 2020, the court noted that the 1<sup>st</sup> respondent had alleged that she had sold the vehicle to "Wallmas and Sons Co. Ltd as the current owners."*

*44. It seems to me that while the respondent was in violation of the orders of Onyiego J in failing to release the subject vehicle, the Interested Party is not entitled to the orders that it seeks in this matter. I say this for two reasons. First, should it be the party known as "Wallmas and Sons Co. Ltd" identified in the ruling of Onyiego J as the registered owner of the subject vehicle, then it was and still is entitled to pursue obedience of the court orders issued in the ruling for the release of the motor vehicle. Secondly, if it is the party referred to as Wallmas and Sons Co. Ltd, then it cannot truthfully claim not to have known of the proceedings before this court involving the subject vehicle until after the judgment of the court.*

*45. In the result, I decline to issue orders re-opening the present proceedings to enable the Interested Party participate in the proceedings. I am also not satisfied that the Interested Party is entitled to the orders sought in the present proceedings for the release of the subject motor vehicle to it."*

14. Learned Counsel for the respondent also faulted prayer 4 of the application which seeks suspension of the forfeiture proceedings. Counsel described that prayers as disingenuous of the applicant in that it was not made out of a genuine interest but to sabotage the forfeiture application. Counsel submitted that the purported third parties to whom the Applicant has loaned money are not parties in this case hence any contractual relationship is between them and the Applicant and it should not affect this case. Counsel concluded by stating that the funds in issue are proceeds of crime and cannot be used to form security for a loan. He contended that such guarantee fictional and a decoy for money laundering. That the provisions of **Proceeds of Crime and Anti-Money Laundering Act**, particularly **Section 83 and 91** are not mere technicalities that this court can cure by discretion. Counsel implored this court to dismiss the application for being devoid of merit.

#### Analysis and determination

19. I have considered the pleadings, oral submissions of counsel for the parties, the cases cited and the applicable law. The issues for determination are:

*i. whether the applicant is entitled to be enjoined as an interested party so as to ventilate its case pertaining to its interests in the subject funds*

*ii. whether the applicant ought to be allowed to effect service of a Notice of its intention to object to the issuance of Forfeiture Orders out of time in accordance with Sections 83(3) as read with Section 91(1) of POCAMLA.”*

15. The operative sections on which this application is anchored prostrate as follows

**83. Notice of preservation orders**

*(1) If a court makes a preservation order, the Agency Director shall, within twenty-one days after the making of the order, give notice of the order to all persons known to the Agency Director to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette.*

*(2) A notice under subsection (1) shall be served in accordance with the provisions of the Civil Procedure Act (Cap. 21).*

*(3) A person who has an interest in the property which is subject to a preservation order may give notice of his intention to oppose the making of a forfeiture order, or to apply for an order excluding his interest in the property concerned from the operation thereof.*

*(4) A notice under subsection (3) shall be served upon the Agency Director, in the case of—*

*(a) a person upon whom a notice has been served under subsection (1), within fourteen days after service; or*

*(b) any other person, within fourteen days after the date upon which a notice under subsection (1) is published in the Gazette.*

*(5) A notice served under subsections (3) or (4) shall contain full particulars of the address for the delivery of documents concerning further proceedings under this Part and shall be accompanied by an affidavit stating—*

*(a) full particulars of the identity of the person entering the appearance;*

*(b) the nature and extent of his interest in the property concerned; and*

*(c) the reasons which the person intends to rely on in opposing a forfeiture order or applying for the exclusion of his interest from the operation thereof.”*

16. As stated in **Section 83 (4)** above the Notice of Intention to oppose a forfeiture order shall be issued to the Agency within 14 days of the service or gazettelement of the preservation order. The Applicant submitted herein that it had all along cooperated with the Agency during investigations and that it assisted the Agency with documents and information. I am in agreement with the agency that the applicant was well aware of the preservation orders and the funds to which it pertained but did not take advantage of its remedy under **Section 83(3)**. **Section 91** however provides for late service of a notice and states:-

**“91. Late service of notice**

*(1) A person who, for any reason, does not serve notice in terms of section 83(3) may, within fourteen days of his becoming aware of the existence of a preservation order, apply to the court for leave to serve that notice out of time.*

*(2) An application under subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 90(1), but shall be made before judgment is given in respect of such an application for a forfeiture order.*

*(3) The court may grant an applicant referred to in subsection (1) leave to serve notice in terms of section 83(3) within the period which the court deems appropriate, if the court is satisfied on good cause shown that such applicant—*

*a) has for sufficient reason failed to serve notice in terms of section 83(3); and*

*b) has an interest in the property which is subject to the preservation order.”*

17. By its own admission, the applicant participated in this process from the investigative stages. From its own pleadings it was well aware of the preservation orders but it did not file a notice of intention to oppose the forfeiture orders or to apply for an order to exclude its interest in the property as provided in **Section 83(3)** of the **Proceeds of Crime and Anti-Money Laundering Act**. Nevertheless **Section 91(a)** of **Proceeds of Crime and Anti-Money Laundering Act** provides that even then such a party can seek to file such a notice out of time. I am persuaded that the Applicant has given a plausible explanation for the delay and omission to file the notice and given the constitutional right of access to justice I shall grant the application.

18. On the issue of joinder I am guided by the decision of the Supreme Court in the cases of:-

*Francis Kariuki Muruatetu & Another vs. Republic & 5 Others [2016] eKLR:*

*“[33] These legal provisions have been considered by the Court in Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2014] eKLR (an application by the Law Society of Kenya). In this case, the Law Society of Kenya (LSK) sought to be enjoined in the proceedings as an interested party, but leave was denied. The Court observed that [paragraphs 13-15]:*

*“[13] While the Rules have a definition of who an amicus is, there is no definition attributed to ‘Intervener’ or ‘Interested Party’. However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.*

*“[14] Black’s Law Dictionary, 9<sup>th</sup> Edition, defines “intervener” (at page 897) thus:*

*“One who voluntarily enters a pending lawsuit because of a personal stake in it” and defines ‘Interested Party’ (at p.1232) thus:*

*“A party who has a recognizable stake (and therefore standing) in a matter”.*

*“[15] On the other hand, an amicus is defined in Black’s Law Dictionary thus:*

*‘A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter’.”*

*[34] With that definition of “interested party,” the Court proceeded to hold further [paragraphs 17-18]:*

*“[17] Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.*

*“[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”*

*[35] This Supreme Court decision was cited by the High Court in Judicial Service Commission v. Speaker of The National Assembly & 8 Others, [2014]eKLR. The High Court also cited the definition of ‘interested party’ in: The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the “Mutunga Rules”) thus:*

*“Rule 2 of the Mutunga Rules defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation.”*

*[36] Once again in the said High Court matter, the LSK was denied admission as an interested party because, in the perception of the Court, it could not show an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if not enjoined as a party.*

*[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:*

*One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:*

*i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*

*ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.*

*iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court. (Emphasis mine)*

It is my finding that the applicant has met the criteria for joinder enumerated above.

19. In the circumstances the Notice of Motion dated 15<sup>th</sup> February, 2022 is hereby granted and orders are granted as follows:

*i. The applicant, Rafiki Micro-Finance Bank Limited be and is hereby enjoined to the forfeiture proceedings as an Interested Party*

*ii. That the applicant shall have leave to file a notice of its intention to oppose the making of the forfeiture order or to apply for an order excluding its interest in the property concerned within 14 days of the date of this ruling.*

*iii. That the applicant/interested party shall bear the costs of this application.*

Signed, dated and delivered virtually this 31<sup>st</sup> day of March, 2022

**E.N. MAINA**

**JUDGE**

*In the presence of:-*

*Mr. Mohamed Adow for ARA/Respondent*

*Ms Mwanzia holding brief for Mr. Kilukumi [Sc] for the 1<sup>st</sup> Respondent*

*No Appearance for the 2<sup>nd</sup> Respondent*

*Mr. Machria for the Interested party/applicant*

*Potishoi Sharon Court Assistant*





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