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Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Esther Nyambura Maina
Citation:	Assets Recovery Agency v Ali Adbi Ibrahim [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application ordered
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC CIVIL SUIT NO. E019 OF 2020**

**ASSETS RECOVERY AGENCY.....APPLICANT**

**VERSUS**

**ALI ADBI IBRAHIM.....RESPONDENT**

**JUDGMENT**

1. The Assets Recovery Agency, the Applicant, brought the Originating Summons dated 23<sup>rd</sup> July 2020 against the Respondent seeking orders as follows:-

*“1. THAT this Honourable Court do issue orders declaring that the funds held in the following bank accounts are proceeds of crime and liable for forfeiture to the Government:*

- i. Ksh. 39,647,426.00 held at Equity Bank, Mandera Branch Account number 1000176315716 in the name of Ali Abdi Ibrahim.*
- ii. Ksh. 3,857,943.02 held at Equity Bank, Mandera Branch Account number 100019392183 in the name of Ali Abdi Ibrahim.*

*2. That this Honourable Court do issue forfeiture orders forfeiting the said funds to the government and transfer to the Applicant.*

*3. THAT this Court do make any other ancillary orders it may deem appropriate for the proper, fair and effective execution of the forfeiture order.*

*4. THAT costs be in the cause.”*

2. The application which is brought under **Sections 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act and order 51 Rule 1 of the Civil Procedure Rules** is supported by the affidavit sworn by S/Sgt Fredrick Musyoki, on 23<sup>rd</sup> July, 2020 and his Supplementary Affidavit sworn on 7<sup>th</sup> May, 2021. Senior Sergeant Fredrick Musyoki deposes that he is a police officer attached to the Assets Recovery Agency which is a body corporate established under **Section 53 of the Proceeds of Crime and Anti-money Laundering Act (POCAML A )** and which has the mandate to identify, trace, freeze and recover proceeds of crime; that pursuant to Part VIII of the **Proceeds of Crime and Anti-Money Laundering Act**, the Assets Recovery Agency is authorized to institute civil proceedings and seek orders forfeiting the to the Government where there are reasonable grounds to believe that the said funds are proceeds of crime.

3. Senior Sergeant Fredrick Musyoki continues that in regard to this case the Assets Recovery Agency received information that the Respondent’s accounts No. **1000176315716** and No. **1000193921283** at **Equity Bank, Mandera Branch** were suspected to hold monies which were proceeds of crime; that the Assets Recovery Agency conducted investigations and established that the accounts had received huge cash deposits totalling to Ksh.43,505,369.02/- which the Assets Recovery Agency has reasonable grounds to believe were stolen and/or fraudulently acquired by the Respondent, his agents or representatives from the County Government of Mandera; that there are reasonable grounds to believe that the two accounts belonging to the Respondent were used as conduits for money laundering contrary to **Sections 3, 4 and 7** as read with **Section 16** of the **Proceeds of Crime and Anti-Money Laundering**

**Act;** That the funds are proceeds of crime which ought to be forfeited to the state and to that end on 3<sup>rd</sup> April 2020 the Assets Recovery Agency obtained a preservation order in regard to those funds and the order was gazetted on 24<sup>th</sup> April 2020 through Gazette Notice No. 3265 as provided in **Section 83 of the Proceeds of Crime and Anti-Money Laundering Act**. S/SGT Fredrick Musyoki, deposes that prior to that he had opened an inquiry file No. 13 of 2020 to investigate and inquire into activities in the accounts for purposes of ascertaining whether the accounts indeed held funds that are proceeds of crime. He deposes that on 20<sup>th</sup> March, 2020 he obtained court orders under **Sections 118, 118A, 119 and 121 of the Criminal Procedure Code, Section 180 of the Evidence Act and Section 53 of the Proceeds of Crime and Anti-Money Laundering Act** vide Chief Magistrate **Miscellaneous Application No. 990 of 2020 to freeze the accounts**. He deposes that the orders were duly served upon Equity Bank and that he obtained the bank statements and account opening documents and upon analysing the same he established that both accounts received suspicious cash deposits indicative of schemes of money laundering to hide and conceal proceeds of crime, from several companies which had received funds from the County Government of Mandera. S/Sgt Musyoki deposes that he summoned the respondent to record a statement ('FM 4') and the respondent confirmed that his accounts indeed received money from Bami Investment Ltd, Kurte Suppliers & General Construction Company Ltd, Risala General Contractors Ltd, Frontier Engineering Ltd, Bluesky General Construction Ltd and Green County Construction Ltd. S/Sgt Musyoki deposes that being satisfied that there are reasonable grounds to believe the funds in the said accounts were proceeds of crime, the Assets Recovery Agency approached this court and obtained preservation orders in Miscellaneous Application No. 12 of 2020 referred to above.

4. S/Sgt Musyoki further deposes that in the statement recorded at the Agency the Respondent alleged that Bami Investment Ltd was awarded a contract for the construction of Mandera County Headquarters at a cost of Ksh.455,354,521.00/- and subcontracted 80% of the work valued at Kshs. 364,283,617/- to Risala General Contractors Ltd in which he and one Mohammed Yakub Issak are directors which subcontract was to commence on 16<sup>th</sup> April 2018 and be completed on 16<sup>th</sup> April 2020. That the invoices were however raised by and paid in the name of the Respondent but not in the name of Risala General Contractors Ltd. Senior Sergeant Musyoki deposes that the raising of the invoices by the Respondent but not by Risala raises suspicion. He deposes further that suspicious funds amounting to Ksh.134,940,000/- and Ksh.75,461,000/- were made to the respondent's bank account No.1000176315716 and No.1000193921283 held at Equity Bank Mandera Branch, respectively, by Bami Investment Ltd but the latter account was not provided for in the alleged subcontract. S/Sgt Musyoki asserted that an analysis of the bank statements of Risala General Contractors Ltd's account No. 0300112301 held at Gulf Bank and both the respondent's accounts held at Equity Bank Mandera Branch and the activities thereat did not reflect a company undertaking works of a construction nature to a tune of Ksh.364,283.617/-. S/Sgt Musyoki deposes that investigations at the National Construction Authority (NCA) also revealed that Risala General Contractors Ltd could not have undertaken the subcontract as it had not renewed its registration; That Risala was in any event in 2017 registered under category NCA4 whose maximum limit is Ksh.200,000,000/- for building contractors, Ksh.100,000,000/- for specialist contractors and Ksh.300,000,000/- for Roads and other civil works yet the alleged subcontract was for construction of the Mandera County Headquarters at a cost of Kshs.455,354,510/=. S/Sgt Musyoki deposes that further investigations established that the respondent did not in that year file tax returns with the Kenya Revenue Authority (KRA) and that Risala General Contractors Ltd only declared income of Ksh.34,987,067/- and net assets of Ksh.16,168,770/- as their net for the year 2018 and nothing for the year 2019.

5. According to S/Sgt Musyoki, investigations also revealed that the respondent received a suspicious deposit of Ksh.23,980,000/- from Kurte Suppliers & General Construction Company Ltd in which the respondent is one of the directors (FM-11) and which company is under investigation for receiving fraudulent payment from the County Government of Mandera in a scheme of money laundering to conceal and disguise the source and movement of funds. S/Sgt Musyoki deposed that his investigations revealed that Kurte Suppliers & General Contractors would transfer the funds to the Respondent immediately upon receiving the same from the County Government and that contrary to the Respondent's contention the company has four directors but not two.

6. S/Sgt Musyoki avers that investigations also established that between September 2016 and March 2019 the respondent received suspicious funds in the sum of Ksh.11,000,000/- in his Equity Bank Account No. 1000193921283 Mandera Branch from Frontier Engineering Ltd, a company under investigation for receiving fraudulent payments from Mandera County Government; That in his statement the Respondent alleged that in 2014 he loaned Ksh.15.4 million to Abdi Kadiri Khalif and Hassim Khalif who were directors of Frontier Engineering Ltd but investigations revealed that the directors of that Company were **Mohamed Adan Khalif, Abdikhathar Mohamed Haji and Ismail Adan Khalif** but not **Abdi Kadiri Khalif and Hassan Khalif** as alleged by the Respondent.

7. S/Sgt Musyoki further deposes that on 12<sup>th</sup> and 27<sup>th</sup> February 2020 the respondent received Ksh.459,000/- and Ksh.6,200,000/- respectively from Bluesky General Construction Ltd and that the respondent in his statement alleged that on 4<sup>th</sup> March 2019 he had advanced a loan of Ksh.6,000,000/- to Ali Ibrahim Guracha who worked with Bluesky General Construction Ltd and who paid back the money using a Bluesky's General Construction Ltd's account. S/Sgt Musyoki deposes that however investigations established

that Ali Ibrahim Guracha was not a director of Bluesky Construction Ltd and was not an employee of the company and he could not have paid a personal debt through a company's account for which he is not a director or employee.

8. It is also S/Sgt Musyoki's averment that the respondent received suspicious funds amounting to Ksh. 5,000,000/- from Green County Construction Co. Ltd a company under investigation for receiving fraudulent payments from the County Government of Mandera and that the Respondent in his statement indicated that he had loaned Ksh.11.8 million to Mr. Kullow Mohammed Sheikh a Director of that company when he was carrying out some works in Kwale in 2014 but that investigations established that Kullow Mohammed Sheikh was not a director of Green County Construction Co. Ltd; that investigations also revealed that the Directors of Green County Construction Ltd were Said Hassan Hussein and Outpost Farm Limited and Henry Bob Mosi. S/Sgt Musyoki deposed further that the Respondent received Ksh.3,000,000/- from Abdi Maalim but in his statement he stated he could not remember the reason the money was sent to him.

9. S/Sgt Musyoki avers that investigations also established that the respondent received suspicious deposits in his account number 1000193921283 at Equity Bank Mandera Branch amounting to Ksh. 59,171,100 and that withdrawals were made in tranches of below Ksh.1,000,000/= to evade the reporting threshold set out in **Section 44** and the **4<sup>th</sup> Schedule** of the **Proceeds of Crime and Anti-Money Laundering Act** and the **Central Bank of Kenya Prudential Guidelines** which require the account holder to declare the source of the money; that investigations also revealed that neither the respondent nor his companies filed tax returns or declared income and assets with the Kenya Revenue Authority as genuine businesses would.

10. S/Sgt Musyoki further deposes that investigations revealed that between 3<sup>rd</sup> April 2018 and 6<sup>th</sup> March 2020 the respondent cumulatively received suspicious deposits amounting to Ksh. 168,508,300/- and Ksh. 216,560,574/- in his account Nos. 1000176315716 and 1000193921283 respectively held at Equity Bank Mandera Branch and that the Risala Contractors Account received Kshs. 82,905,296/= but by the time the Agency was preserving the funds, the bank balances in the two accounts were only Ksh.39,647,426/- and Ksh.3,857,943/- respectively.

11. S/SGT Musyoki asserts therefore that given the foregoing there are reasonable grounds to believe that the funds in the respondents' accounts were proceeds of crime and that the accounts were used as conduits for money laundering contrary to **Sections 3, 4** and **7** as read together with **Section 16 of the Proceeds of Crime and Anti-Money Laundering Act** and it is in the greater public interest that this court issues the forfeiture orders sought by Assets Recovery Agency.

12. In his supplementary affidavit, sworn on 7<sup>th</sup> May 2021 in answer to the Respondent's replying affidavit, S/Sgt Musyoki deposes that the contract between Bami Investment Ltd and the Mandera County Government produced by the respondent when he gave a statement to the Agency was not dated and that the term of that alleged contract is 2<sup>nd</sup> April 2018 to 30<sup>th</sup> April 2020 which is different from the contract annexed to the Respondent's Replying Affidavit as that agreement is dated 23<sup>rd</sup> April 2018 and the term is stated to be from 2<sup>nd</sup> April 2018 to 30<sup>th</sup> April 2019. S/Sgt Musyoki deposed that the respondent had failed to provide a certificate of completion, lease or purchase of equipment used and, invoices or receipts of building materials purchased by Risala General Constructors Ltd in the construction of the Mandera County Headquarters as proof of the subcontract. S/Sgt Musyoki further deposes that in **ACEC Application No. 12 of 2019 ARA v Ali Abdi Ibrahim** filed by the Respondent for variation of the preservation orders the Respondent did not exhibit the loan agreements for the loans allegedly advanced to the director of Frontier Engineering Ltd and Ali Ibrahim Gurachi yet he has attached loan agreements in his replying affidavit in this case. Further, that the respondent gave contradictory evidence on the alleged loan to the directors of Frontier Engineering Ltd in that in his statement to the Agency he claimed to have loaned them Ksh. 15.4 million while, in his replying affidavit he claimed to have loaned them Ksh. 10,000,000/- and the annexures in his replying affidavit were for USD 30,000 and 40,000. At paragraph 25 of the affidavit Ssgt Musyoki reiterates that there are reasonable grounds to believe that the funds in issue are proceeds of crime obtained from illegitimate sources by the Respondent and the same should be forfeited to the government.

### The Response

13. In opposition to the application the Respondent relied on his replying affidavit sworn on 16<sup>th</sup> March 2021 in which he deposes that he is a businessman involved in legitimate business and that the monies in the impugned accounts were obtained from legitimate businesses and can accurately be accounted for by regular deposits from business and contract works he is involved in. He deposes that the money received from different companies was money that was legally owed to him and is not proceeds of crime.

14. The Respondent deposes that Risala General Contractors Ltd was subcontracted by Bami Investment Ltd at a price of Ksh. 364,283,617/- vide a subcontract he has exhibited as (AA 1-03) whose commencement date was on 16<sup>th</sup> April 2018 and completion date 16<sup>th</sup> April 2020; that as per clause 3(i) of that sub-contract Bami Investment Ltd could either deposit money into Risala's account or into his personal account; That Risala General Contractors Ltd has an account with Gulf Bank in Nairobi but the project was in Mandera where Gulf Bank does not have a branch and that therefore money was paid into his personal accounts for convenience. The Respondent deposes that the project the subject of the subcontract entailed several aspects of building, waterworks, pavements, road works, landscaping, electrical installation and many others that were divided into the different limits provided for by the National Construction Authority meaning that Risala General Contractors Limited would be within the limits set by the National Construction Authority. He contends that the works undertaken by the company are lawful and legitimate. He states that after the notification on 5<sup>th</sup> March 2018 Bami and Risala held several discussions before entering into the subcontract. He asserts that the Respondent was and remains the main actor and controller of Risala General Contractors Ltd with full mandate to act for and on behalf of the company and this has not been disputed by its other director.

15. In regard to Kurte Suppliers and General Construction Company Ltd the Respondent deposes that the Agency has not produced evidence to show that Kurte Suppliers and General Construction Company Ltd was or is under investigations for receiving fraudulent payments from the County Government of Mandera in a scheme of money laundering and that there is no evidence linking the Applicant with the assertions of money laundering. At paragraph 39 he deposes that he is one of the Directors of Kurte and all payments received from Kurte were for money owed to him. He deposes that the payments by the County Government to Kurte was for construction of Kululo road whose construction was to commence from 15<sup>th</sup> September, 2014 to 30<sup>th</sup> August, 2015.

16. The Respondent asserted that he filed returns with KRA and the same are up to date and are in full compliance. It is his contention that all the funds received in his accounts have been accounted for and that there is nothing suspicious in the deposits or withdrawals made by him. He states that the continued preservation of that money has affected and continues to stall the completion of the project works.

17. The Respondent contends further that he indeed loaned a sum of Kshs. 6,000,000/- to Ali Ibrahim Guracha t/a Bluesky General Construction Ltd as per a loan agreement marked AA1-07 which was paid back by Ali Ibrahim Guracha through Bluesky General Construction Ltd and further that he also loaned money to Kullow Mohammed Sheikh of Green County Construction Co. Ltd as per the loan agreement marked AA1-08. He contends that the assertions by the Agency that the moneys paid to him by the two companies are proceeds of crime unfounded and are not supported by evidence.

18. The respondent further states that the standard of proof in cases such as this one is on a balance of probabilities and not beyond reasonable doubt and that the conclusions drawn by the Agency and the legal evaluation thereat cannot be sustained from both an objective and factual basis and therefore the application dated 23<sup>rd</sup> July 2020 ought to be dismissed with costs. The Respondent describes the depositions of the applicant as whimsical, unfounded, misinformed and only intended to mislead this court.

### **The applicant's submissions**

19. Learned Counsel for the Applicant first reiterated the mandate and powers of the Assets Recovery Agency then proceeded to frame the issues for determination as being:-

- a. *Whether the funds the subject of the forfeiture application are proceeds of crime;*
- b. *If the answer to (a) above is in the affirmative, whether the funds should be forfeited to the State;*

20. On whether the funds in issue are proceeds of crime, Ms. Gitiri cited **Section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** and the case of **Schabir Shaik & Others-Vs- State Case CCT 86/06(2008) ZACC 7** where the court 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.”*

*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.”*

21. Counsel submitted that the Respondent's bank account Numbers 1000193921283 and 1000176315716 both held at Equity Bank, Manderu Branch received suspicious deposits of a total of Ksh.216,560,574.00 and Ksh.168,508,300 respectively from various suspicious sources including cash deposits whose source the Respondent could not justify. Counsel reiterated the averments in the supporting and further affidavit of S/Sgt Musyoki and contended that the respondent received a total of Ksh.210,401,000/- from Bami Investment Ltd in his personal accounts despite the alleged subcontract being between BAMI Investment Ltd and Risala General contractors and not himself. Further, that the respondent received suspicious deposits of Ksh. 23,980,000/- from Kurte Suppliers & General Construction Company, which company would transfer the funds to the respondent immediately upon receiving funds from Manderu County Government creating suspicion of a money laundering scheme. Counsel submitted that investigations revealed that between September 2016 and March 2019 the respondent received Ksh. 11,000,000/- from Frontier Engineering Ltd and he had failed to prove a loan agreement between him and the directors of that company; that, investigations also revealed that on 12<sup>th</sup> and 27<sup>th</sup> February, 2020, the respondent received Ksh. 459,000/- and Ksh. 6,200,000/- respectively from Bluesky General Construction Ltd which he claimed to be repayment of a loan advanced to one Ali Ibrahim Guracha a Director thereof but it was established that Mr. Ali Ibrahim Guracha is not a director of Bluesky General Construction Ltd hence there was no justification for the payment. Counsel reiterated that the respondent also received Ksh. 1,200,000/- on 22<sup>nd</sup> January, 2016 and Ksh. 5,000,000/- on 17<sup>th</sup> October, 2016 from Green County Construction Co. Ltd yet he did not produce any evidence to substantiate the claim that the money was repayment of a loan. Counsel submitted that moreover the respondent's tax records filed with the Kenya Revenue Authority showed that he did not declare the income in his bank accounts.

22. In regard to the monies received from Bami Counsel quoted a portion of the subcontract where it is stated that the money was to be paid to ACC No. 100176315716 Account Name Ali Abdi Ibrahim and posed the question why money owed to a company would be paid to an individual's personal account. Counsel further stated that the Respondent also received Kshs.75,461,000/- from Bami in his account No. 10019392183 but the account was not included in Clause 3 of the subcontract. Counsel contended that the subcontract is shrouded in mystery because firstly, the contract initially provided by the Respondent to the Agency was not dated and the contract term was between 2<sup>nd</sup> April, 2018 to 30<sup>th</sup> April, 2020 while the subcontract produced in this court is dated 28<sup>th</sup> April, 2018 and is indicated as running between 2<sup>nd</sup> April, 2018 to 30<sup>th</sup> April, 2019 and secondly because in the Respondent's statement to the Agency the contract was to run from 16<sup>th</sup> April 2020. Counsel pointed out that the above contradictions were noted by the court in a ruling delivered on 7<sup>th</sup> April, 2020 in ACEC Application No. 12 of 2020 **Assets Recovery Agency v Ali Abdi Ibrahim**. Counsel also queried why the invoices to Bami were raised by the Respondent in his personal capacity rather than by Risala General Contractors Ltd and submitted that this issue was also raised by the court in **ACEC Application No. 12 of 2020 Assets Recovery Agency v Ali Ibrahim**.

23. Counsel further submitted that while the Respondent claimed to hold 75% shares in Risala General Contractors Ltd records at the Business Registration Services indicate that the two directors in Risala General Contractors Ltd hold 500 ordinary shares each. Counsel asserted that evidence from the National Construction also discounted that Risala General Contractors Ltd could have been subcontracted to undertake the project as it had not renewed its registration and secondly because its limit for such services was lower than the contract sum for the project.

24. Counsel further submitted that the respondent's evidence in regard to the directorship/ownership of Kurte Supplies & General Construction Company Ltd was also contradictory because contrary to his contention that he holds 60% shareholding records from the Business Registration Service indicates the company has four directors with 300 ordinary shares each.

25. In regard to the monies paid by Frontier Engineering Ltd Miss Gitiri submitted that the loan agreement annexed to the replying affidavit was suspicious as the respondent had not produced it when he went to the Assets Recovery Agency to make a statement. She also submitted that the persons referred to at page 44 of the Respondent's statement and in paragraph 44 of the replying affidavit are not even directors of Frontier Engineering Ltd. She submitted that investigations revealed its directors were Mohamed Adan Khalid, Abdikhathar Mohammed Haji and Ismail Adana Khalif. She submitted that apart from the purported loan agreement which she described as an afterthought no evidence was produced to justify the funds from Frontier Engineering Ltd.

26. Counsel reiterated that the same position also prevailed in regard to Bluesky General Construction Ltd where the respondent alleged to have loaned money to one Ali Ibrahim Guracha a director of Bluesky General Construction Ltd yet there was no evidence that the said Ali Ibrahim Guracha was a Director of Bluesky General Construction Ltd. Counsel also took issue with the fact that the Respondent had not produced a loan agreement when he first recorded a statement with the Assets Recovery Agency or when he made the application for variation of the preservation orders but he purported to produce one in this case. She contended that contrary to the assertion by the Respondent that Ali Ibrahim Guracha was a director of Bluesky General Construction Ltd investigations revealed its directors were Entalo Ibrahim Alio and Abdi Ali Alio. Counsel submitted that the same applied to the loan allegedly advanced to Green County Construction. Counsel poked holes into the loan agreement and stated that it was an

afterthought given that Kullow Mohammed Sheikh to who the loan was allegedly advanced is not a director of Green Construction Company; that the sum allegedly advanced was Kshs.11.8 million yet the monies paid into the Respondents account were Kshs.1,200,000 on 22<sup>nd</sup> January, 2016 ad Kshs.5,000,000 paid on 17<sup>th</sup> October 2016. Counsel submitted that moreover the purported loan agreement is dated 12<sup>th</sup> March, 2014 and the period of the loan was 12 months. Counsel cited a passage in the ruling in **ACEC application No. 12 of 2020 ARA v Ali Abdi Ibrahim** where the court held that the respondent had not explained why he was receiving money from Frontier Engineering Ltd, Bluesky General Construction Limited and Green Construction Company and that the allegation that the payment was from informal loan facilities was not enough.

27. In regard to monies received from Gabrar Construction, Counsel submitted that it was the Respondent's own evidence that he could not remember why Kshs.850,000/- was paid into his account by the company.

28. Miss Gitiri submitted further that the Respondent also received suspicious cash deposits amounting to Kshs.62,062,500 in his Mandera Branch Equity Account which he could not explain; that the same account received suspicious deposits amounting to Kshs.216,560,574/= from various suspicious sources and withdrawals were made in tranches of below Kshs. 1 million to evade the reporting threshold and that Acc. No.100176315716 received a total of Kshs.168,508,300 whose sources the Respondent could not explain. Counsel submitted that without evidence to substantiate the source of the funds mere assertions are of no probative value and they should be dismissed.

29. Learned Counsel Ms. Gitiri contended that the respondent failed to substantiate the source of the suspicious funds and cash deposits into his accounts as required by law. She cited **Sections 109 and 112 of the Evidence Act** and **ACEC Civil Suit No. 2 of 2019 Assets Recovery Agency vs James Thuita Nderitu [2020] eKLR** where the court stated that:-

*"71. ....Since the respondents have failed to provide even an iota of evidence to show how the suspect funds from NYS were received in their accounts and for what particular purpose, the respondents are beneficiaries of proceeds of crime and the funds in the said accounts are proceeds of crime as they were obtained directly as a result of money laundering and other predicate offences."*

#### **Issue No. 2.**

30. On this issue Ms. Gitiri submits that the Agency/Applicant has demonstrated on a balance of probabilities that the funds are proceeds of crime and subject to forfeiture to the State. She relies on the case of **William Kabogo Gitau vs George Thuo & 2 others [2010] 1 KLR 526** to support her contention and it is her submission that the respondent did not prove why and how the suspicious cash transactions were deposited into his account as the explanations given were unfounded and without evidence. She cited **Assets Recovery Agency v Pamela Aboo [2018] eKLR** for the proposition that lack of documentary proof of transactions was reasonable ground to believe that monies may have been proceeds of crime. She also placed reliance on the case of **Mombasa High Court Petition No. 4 of 2019 Stephen Vicker Mangira & Ano v Assets Recovery Agency & others (unreported)** where the court stated that the doctrine of strict liability applied and the evidentiary burden was on the accused person. She also referred this court to the case of **Abdurahman Mahmaoud 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"*

31. Ms. Gitiri submitted that civil forfeiture proceedings pursuant to **Part VIII of the Proceeds of Crime and Anti-Money Laundering Act** involves a civil suit being brought in court against the property or funds or any other benefit where there are reasonable grounds to believe that it is proceeds of crime irrespective of whether or not criminal proceeding have been instituted. She cited the case of **Gale vs Serious Organized Crime Agency** cited in the case of **Assets Recovery Agency & Others -Vs- Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120** and the case **Assets Recovery Agency v Pamela Aboo [2018] eKLR** and the case of **Ethics & Anti-Corruption Commission (Interested Party) [2018] eKLR**. Counsel further made reference to **Section 92(4) of the Proceeds of Crime and Anti-Money Laundering Act** and referred to **Misc. App. No. 46 of 2018 Assets Recovery Agency vs Felix Obonsi Onganga & 3 others** and **Stephen v Mangira & Ano vs Senior Principal Magistrate, Shanzu & 9 others [2020] eKLR**. Counsel contended that by the time the Agency was preserving the funds, the bank account balances were only Ksh. 39,647,426/- in Equity account number 1000176315716 and Ksh. 3,857,943/- in Equity Account Number 1000193921283 and stated that the movement of funds in the accounts disclose a pattern of money laundering and that the

funds amount to proceeds of crime and the same should be forfeited to the Agency on behalf of the State.

#### **The respondent's submissions**

32. Mr. Ahmednasir Learned Senior Counsel for the respondent framed four issues for determination: -

*a. What constitutes proceeds of crime;*

*b. Whether the funds in issue are proceeds of crime;*

*c. Who should bears the burden of proof*

*d. Whether the applicant is entitled to the orders sought*

33. With respect to the first issue, counsel cited **Section 2 of Proceeds of Crime and Anti-Money Laundering Act** which defines "**proceeds of crime**". He further cited the definition of proceeds of crime from the statutes of India, Namibia and South Africa and submitted that the said definitions expressly allude to the commission of a crime or an unlawful activity as a pre-requisite to classifying property obtained therefrom as proceeds of crime. He referred to the case of **Assets Recovery Agency vs. Pamela Aboo [2018] eKLR** where the court adopted the definition of **Section 2 of Proceeds of Crime and Anti-Money Laundering Act**.

34. On whether the funds in issue are proceeds of crime, Learned Senior Counsel Ahmednasir submitted that this application is based on the personal suspicion of an investigating officer who has no iota of evidence that the funds in the respondent's accounts are proceeds of crime and who has not even tried to discharge the burden of proof required by the law. Learned Senior Counsel submitted that the respondent provided a reasonable explanation of the sources of the disputed funds as regular deposits from businesses and contracted works, which are lawful and legitimate. Mr. Ahmednasir SC further submitted that the issue of dates raised by the applicant in relation to the contract between Risala General Contractors Ltd and Bami Investment Ltd is a mere technicality. He cited **Article 159(2)(d) of the Constitution** and further submitted that the main contention of the court in **ACEC App No. 12 of 2020 Assets Recovery Agency Vs. Ali Abdi Ibrahim** was lack of proper documentation that could account for the monies received and why the monies were received. Learned Senior Counsel for the Respondent submitted that the applicant has not linked the respondent with any illegal activities as alleged and was relying on suspicion and conjectures; That the Agency has a duty under **Section 92(1) of the Proceeds of Crime and Anti-Money Laundering Act** to satisfy the court that the funds in the subject bank accounts have either been used or are intended for use in the commission of an offence, or is proceeds of crime. Learned Senior Counsel relied on the case of **Director of Assets Recovery and others vs Green & others [2005] EWHC 3168** where it was held that whereas in a claim for civil recovery the applicant need not give or prove particulars of any specific crime it must prove criminal activity which means conduct which constitutes an offence and such proof must be on a balance of probabilities. Senior Counsel also cited the case of **Assets Recovery Agency Vs. Pamela Aboo (supra)** in support of his proposition. He contended that in this case the applicant is forcefully trying to acquire legally acquired property belonging to the Respondent which amounts to a violation of the Respondent's right to property under **Article 40 of the Constitution**.

35. On who bears the burden of proof, Mr. Ahmednasir SC cited **Section 81 of the Proceeds of Crime and Anti-Money Laundering Act** and submitted that the burden of proof is on a balance of probabilities as was held in the case of **Kanyungu Njogu Vs Daniel Kimani Maingi [2000] eKLR** and **Miller v. Minister of Pensions [1947] 2 All ER 372** where he quotes Denning as stating:-

"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."

36. Senior Counsel Mr. Ahmednasir argued that the onus in this case falls on the Agency to prove its allegations on a balance of probabilities. He contended that as provided in **Section 107 of the Evidence Act** it is a principle of law that he who alleges must prove. In support of his contention Senior Counsel also cited Section 94 of the Proceeds of Crime and Anti-Money Laundering Act and the case of **ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120**; the case



of **National Director of Public Prosecutions (NDPP) vs RO Cook Properties (Pty) Ltd 2004 ZASCA 36** and the case **Assets Recovery Agency vs Fisher, Rohan and Miller, Delores Supreme Court of Jamaica, Claim No 2007 HCV003259**.

37. Counsel submitted that the money in this case is not proceeds of crime: that the Respondent has demonstrated how he lawfully came into possession of the funds in his accounts thereby discharging his evidential burden.

38. On whether the Agency is entitled to the orders sought, Mr. Ahmednasir SC submitted that the respondent has been operating a lawful business and the monies contained in the bank accounts were obtained from legitimate business/trading as has been proved by the Respondent. Mr. Ahmednasir SC stated that excessive use of governmental power is “a colourable attempt to impose sanctions on innocent persons without protecting their rights” and the same should be discouraged. He cited the case of **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others** where the court identified the legislative intent of the **Proceeds of Crime and Anti-Money Laundering Act** as follows: -

*“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.”*

39. Mr. Ahmednasir SC concluded by urging this court to find that the applicant did not establish a link between the funds in the Respondent’s accounts to illegal conduct and hence proceeds of crime within the meaning in the **Proceeds of Crime and Anti-Money Laundering Act**. Senior Counsel contended that the Applicant did not therefore discharge the burden of proof. He urged this court to dismiss this forfeiture application with costs and issue an order lifting all the freezing, preservation and or any other orders placed over the Respondent’s bank accounts.

#### **Analysis and Determination**

40. I have carefully considered the pleadings, the rival submissions of Counsel for the parties, the cases cited thereat and the law. From the pleadings and submissions of the parties four issues arise for determination: -

- a. *What constitutes proceeds of crime.*
- b. *Who bears the burden of proof”*
- c. *Whether the funds in the Respondents accounts which are sought to be forfeited are proceeds of crime and*
- d. *Whether the Applicant is entitled to the reliefs sought.*

#### **Issue (a): What constitutes proceeds of crime.**

41. Section 2 of the **Proceeds of Crime and Anti-Money Laundering Act** defines ‘proceeds of crime’ 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”*

42. In the case of **Schabir Shaik & others v State case CCT 86/06 (2008) ZACC 7** the court 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”*

*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.”*

43. The ambit of what constitutes proceeds of crime is therefore indeed wide and as both Section 2 of the Proceeds of Crime and Anti-Money Laundering Act and the courts have given a straight forward definition of what constitutes proceeds of crimes I need not say more.

Issue (b) Who bears the burden of proof.

44. Learned Senior Counsel Mr. Ahmednassir cited several cases which have laid down the principle that once the applicant has discharged the burden of proof placed upon it by **Section 92** of the **Proceeds of Crime and Anti-Money Laundering Act** the evidential burden shifts to the respondent to prove that the assets were lawfully obtained or are not proceeds of crime.

45. In the case of **Assets Recovery Agency vs Pamela Aboo: EACC Interested party [2018] eKLR** the court stated:-

*“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 Proceeds of Crime and Anti-Money Laundering Act. 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....” (Emphasis mine)*

While in the case of **Assets Recovery Agency v Fisher Rohan and Miller Delores**, Supreme Court of Jamaica, Claim No. 2007 HCV 003259 it was held:-

*“.....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.”*

46. In the case of **Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR** the Court of Appeal explained it as follows in regard to the **Anti-Corruption & Economic Crimes Act** which has more or less similar provisions: -

*“79. Under Section 55(2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. in other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. the cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate course of income. tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired”*

47. Likewise, in this case the burden of proof lies upon the Applicant to prove that the funds in the Respondent’s accounts are proceeds of crime as alleged but should that burden be discharged the evidential burden shifts to the Respondent to explain the source of the funds given that such evidence is within his special knowledge. (See **Sections 109 and 112 of the Evidence Act**.)

48. What constitutes proof on a balance of probabilities was discussed in the case of **Kanyungu Njogu vs Daniel Kimani Maingi [200] eKLR** and in the case of **Miller vs Minister of Pensions [1947] 2 ALL ER 372** cited by Senior Counsel where Denning MR stated:-

*“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 lost, because the requisite standard will not have been attained.”*

49. It is also trite that in order for the court to make orders of forfeiture under **Sections 90 & 91** of the **Proceeds of Crime and Anti-Money Laundering Act**, the applicant need not establish the specific crime committed in relation to the property in issue. Contrary to the respondent’s assertion, the Agency does not have to prove the actual crime committed. All it is required to prove is that there was unlawful conduct. Once the Applicant establishes, on a balance of probabilities as provided in **Section 92(1)(b)** of the **Proceeds of Crime and Anti-Money Laundering Act** that the assets in question are proceeds of crime, a duty is cast on the respondent to prove that he obtained the funds lawfully. The respondent is required to give a satisfactory explanation that he legitimately acquired the assets in question failing which the said assets shall be declared to have been illegally acquired. I find support in the case of **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR** where the court held: -

*“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).*

Similarly in the case of **The Assets Recovery Agency vs Quorum Limited & 2 others [2018] eKLR** the court held that:-

*“Further the application for forfeiture is not made on behalf of the prosecution, but on behalf of ARA as held in **Serious Organized Crime Agency vs Gale** quoted in the case of **Assets recovery Agency & Others –vs- Audrene Samantha Rowe & Others Civil division claim No 2012 HCV 02120** where 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 conviction of any individual and thus there was no reason to apply the criminal standard of proof...”*

*See also **Phillips v The United Kingdom [2001] ECHR437** quoted in **Martin shalir A.G. of Namibia (supra)**; **Techla Nadjila Lameck vs President of Namibia (supra)***

106. *Simply put civil forfeiture proceedings are not subject to presumption of innocence which is a criminal law phenomenon.”*

**Issue(c): whether the funds in the Respondents accounts are proceed of crime:**

50. Applying the above principles to this case and starting with the Respondents claim that the monies paid into his accounts by Bluesky General Contractors Ltd, Green County Construction Co. Ltd and by Freight Engineering Ltd were repayments for loans advanced, I have carefully considered all the evidence placed before this court by the parties. The Agency presented evidence by way of the chart ‘FMI’ annexed to S/Sgt Musyoki’s supplementary affidavit that the funds in the Respondent’s accounts were received from the County Government of Mandera by different companies which in turn deposited the funds in the Respondent’s accounts. It is alleged that the Respondent would then withdraw the monies in tranches of less than Kshs. 1 million so as to evade the banking regulations. The Respondent on his part gave various explanations as to the circumstances by which he received the monies in his accounts. The Respondent contends that the money received from **Bluesky General Contractors Ltd** was for repayment of a loan advanced to one **Ali Ibrahim Guracha** for machine hiring. He attached a copy of the alleged loan agreement and an **APPLICATION FOR FUNDS TRANSFER** form marked (AA1-7). However, there is evidence that upon carrying out a search at the Company Registry the Agency established that the said **Ali Ibrahim Guracha** was not a director of **Bluesky General**

**Construction Ltd.** I have also closely examined the alleged **Application for Funds Transfer form (AA 1-7)**. Whereas the transfer is alleged to have been for a loan for machine hiring pursuant to the agreement dated 6<sup>th</sup> March 2019 it is curiously dated 4<sup>th</sup> March 2019 two days prior to the agreement. It is also dated two days before Kshs. 6,000,000/- was transferred to Ali Ibrahim Guracha as per the Respondent's statement of account No. 000033 annexed to S/Sgt Musyoki's supporting affidavit which indicates that the sum of Kshs. 6,000,000/- was transferred on 4/3/2019. There is therefore no evidence that the Kshs 6,000,000/- transferred to Ali Guracha on 4/3/2019 was the subject of the loan agreement. Moreover there is evidence which this court finds cogent and reliable that Ali Guracha was not a director of Bluesky General Construction Ltd as alleged in the loan agreement. The evidential burden lay with the respondent to prove that he indeed loaned the money and that the loanee was associated with the company that sent him the money on 12<sup>th</sup> and 27<sup>th</sup> February, 2020. Upon an analysis of the evidence before me, I find that no logical explanation has been offered as to why the respondent received payment from Bluesky General Construction Ltd. I find that on this payment the Respondent has not discharged the evidential burden that is placed upon him by operation of the law.

**51.** On the issue of funds received from Green County Construction Co. Ltd, the respondent claimed that in 2014 he loaned money to Mr. Kullow Mohammed Sheikh, the owner of Green County Construction Company Ltd. Assets Recovery Agency however carried out investigations at the companies registry and found the owners of the company were Said Hassan Hussein, Outpost Farm Ltd and Harry Bob Masi but not Kullow Mohammed Sheikh. The respondent's assertion that Mr. Kullow must have relinquished the ownership of the company when he became a Member of Parliament is not borne by evidence. He who alleges must prove and it was therefore incumbent upon the respondent to prove that Kullow Mohammed Sheikh was at the time material to this case a Director of Green County Construction Co. Ltd and that he relinquished that Directorship upon joining politics. Moreover the agreement (**AA1-08**) produced by the Respondent as evidence of the loan is not dated and is therefore not a sufficient rebuttal of the Applicant's evidence. As correctly submitted by the learned Counsel for the Applicant while the legal burden lies upon the applicant the evidential burden shifted to the respondent once the applicant discharged the burden. The purported loan is a fact which is fact in the special knowledge of the respondent and it is also he who would be prejudiced most were this court to believe otherwise. As the Respondent has not demonstrated that the money received from Green County Construction Ltd was in repayment of a loan and evidence was led that the source of the money deposited in his account was from the County Government of Mandera this court is entitled to believe that it was proceeds of unlawful conduct because a County Government cannot pay money otherwise than for goods supplied or services rendered and the Respondent has not demonstrated either of the two.

**52.** On the issue of funds received from Frontier Engineering Company, the Respondent's explanation is that the monies were in repayment of a loan advanced to Abdi Kadiri Khalif and Hassim Khalif who are directors of Frontier Engineering company. However, the Applicant's evidence is that the Directors of that company were **Mohamed Adan Khalif, Abdikhathar Mohammed Haji and Ismail Adana Khalif** but not **Abdikadir Khalif and Hassim Khallif**. The Respondent did not rebut that evidence and this court is not persuaded therefore that the company could have repaid loans that any of its directors took out on behalf of the company. It is my finding that the Respondent's evidence does not prove any loan was advanced to Abdikadir Khalif and that therefore the money deposited in his account by Frontier Engineering Company must be proceeds of crime.

**53.** In regard to the money deposited by Kurte Suppliers & General Construction Co. Ltd it was the Respondent's evidence that he is one of the directors in that company and that the money deposited was his share for the construction of Kululo-Elram Road. He produced a contract between the company and the County Government of Mandera as proof that the company had been awarded a contract to construct the Road. However the contract is undated and curiously so for a contract of such a huge sum of money. Secondly there is no evidence that the Company in fact executed the project. In my view a certificate of completion and an affidavit from his partner would have been more credible and reliable than an undated agreement. I find therefore that there is no evidence on a balance of probabilities that there was a contract which could justify the deposit.

**54.** In summary the respondent's explanation that the money he received from the various companies was in repayment of loans he had advanced to the Directors of the companies which deposited monies in his accounts is not borne by evidence because firstly none of the documents he has annexed show that the persons he allegedly lent the money are Directors of those companies. Indeed, there is no rebuttal of the investigations carried out by Assets Recovery Agency that prove on a balance of probabilities that the persons named by the Respondent as the loanees were never directors of the companies. Secondly, it is also not convincing and this court is not persuaded that a company would repay money borrowed by a person (s) it is not associated with. It is my finding that the monies received from the companies were not repayments for a loan and in the absence of any other credible explanation from the Respondent my finding is that they were proceeds of crime. As stated by the court in **ACEC application No. 12 of 2020 Assets Recovery Agency vs Abdi Ibrahim:-**

***"63. He has not explained why he was receiving money from Frontier Engineering, Bluesky General Construction and Green Construction Company. He has only given a general statement that he was trading with this (sic) companies. He does not***

*specifically state the nature of the business or trade he was conducting or carrying out etching how much.(sic)*

**65. The allegation that some money in terms of millions was from informal loan facilities without any evidence backing that allegation is not enough. That is a mere statement which requires validation by way of cogent evidence. In the absence of any proof that such monies were obtained from legitimate sources of income which is a matter of fact, the same shall be deemed to be money obtained through illegitimate means which could be a crime by way of money laundering or fraud.”**

55. Even here the Respondent did not tender cogent evidence that these were loan repayments and I am unable to so find. It is also instructive that he could not remember why he received Kshs. 3,000,000/- from one Abdi Maalim. Since the evidential burden fell on him it would have been helpful if he had obtained affidavits from the Directors of the Companies showing that they were indeed repaying money he had advanced them.

56. Turning to the issue of money received by the respondent from Bami Investment Ltd, his contention is that Risala General Constructors Ltd was subcontracted by Bami Investments Ltd and that Risala only had an account in Gulf Bank in Nairobi but did not have an account in Mandera and the contract money was therefore deposited into his account for convenience and as provided in Clause 3(i) of the agreement between the companies. The Respondent did not offer any explanation for the sum of Kshs.75,461,000/- deposited by BAMI Investment Ltd in his account No. 1000193921283 which account was not mentioned in the subcontract as one of the accounts which would receive money from BAMI. Moreover, as proved by the Agency the Respondent was not the only Director/Shareholder in Risala General contractors and so his explanation is not convincing: Why him and not the other Director. It is not sufficient to assert that his co-director did not object to the funds being sent to his personal account. He should have placed evidence before the court to prove the assertion.

57. In addition, the respondent did not discount evidence that Risala General Contractors Ltd had not renewed its licence with the National Construction Authority at the time it allegedly undertook the project meaning that it could not have in fact been subcontracted to carry out the project as that would have been unlawful. There is also evidence that it did not meet the criteria to carry out such a project a fact which the Respondent did not convincingly respond to other than alleging that the works were divided into different portions for which Risala qualified.

58. It is my finding that all the evidence tendered by the respondent concerning BAMI does not in fact add up. **Section 97 of the Evidence Act** provides that where a contract is reduced into writing parole evidence cannot be called to prove its contents. The Respondent's evidence concerning the contracts awarded to BAMI which it alleges to have subcontracted Risala General Constructors Ltd to implement was contradictory in material particulars in regard to the dates. While the Respondent swore that BAMI's contract was to commence on 2<sup>nd</sup> April 2018 and was to expire on 30<sup>th</sup> April 2019 the contract itself is dated 23<sup>rd</sup> April 2018 almost three weeks after the contract would have started. Further, the subcontract to Risala which is dated 26<sup>th</sup> April, 2018 is said to have commenced on 16<sup>th</sup> April, 2018 with a completion date of 16<sup>th</sup> April, 2020. If the Respondent is to be believed by 16<sup>th</sup> April, 2020 Bami's contract would have expired. There is no evidence that the term of BAMI's contract was extended. How then would a subcontractor complete a contract when the main contractor's completion date/term had lapsed" This court is not convinced that there existed a subcontract between Bami & Risala. I do not agree with Mr. Ahmednasir SC's submission that this court ought, **under Article 159 (2)(d) of the Constitution**, to ignore the dates of the contract as mere procedural irregularities. This is because the inconsistency and contradiction in those dates are at the root of the credibility of the evidence adduced by the Respondent. It could be, as Senior Counsel contends, that there is a beautiful building that was constructed in Mandera town but there is certainly no credible evidence that the same was built by Risala General Constructors Ltd upon being subcontracted by BAMI Investments Ltd. Moreover, it is unlikely that Risala General Constructors Ltd would have undertaken a huge project of such magnitude when it had no licence from the National Construction Authority and when it did not meet the limits set for such works. I find that the Respondent's evidence in regard to the subcontract was not only inconsistent but contradictory and for that reason it is not reliable or trustworthy and it does not offer any credible explanation for why the Respondent benefited from money obtained by BAMI Investments Ltd from the County Government of Mandera.

59. There is indeed evidence that he received much more money than in the two accounts, whose source was the County Government of Mandera for which he has not given any explanation. He has not given an iota of evidence to prove that either himself, his companies or the companies that paid money into his account did legitimate business with the County Government of Mandera which paid them the money as demonstrated in the Chart (Exhibit "FM1") annexed to the supplementary affidavit of S/Sgt Musyoki.

60. In the upshot having considered all the evidence and submissions before me, I am satisfied that the applicant has proved on a

balance of probabilities that the money in the Respondent's accounts No. 1000176315716 and No. 1000193921283 held at Equity Bank Mandera Branch are proceeds of crime as defined in **Section 2** of the **Proceeds of Crime and Anti-Money Laundering Act**.

**Issue(d): Whether the applicant is entitled to the orders sought.**

**61.** The uncontested facts in this case is that the respondent is the holder of Bank Accounts number 1000176315716 and 1000193921283 at Equity Bank Mandera Branch and that he indeed received the monies in the said accounts from various companies. As I held above there is evidence that the source of the monies paid into the two accounts is the County Government of Mandera. I have also found that there is no iota of evidence that the said companies were engaged in any legitimate business either with the Respondent or with the County Government of Mandera. I have also discounted the Respondent's assertion that Risala General Contractors was subcontracted by Bami Construction Ltd and that there were any loan agreements between the Respondent and the Directors of the companies that paid money into his accounts and I have come to the conclusion that the monies were proceeds of crime.

**62.** In the case of **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others** (supra) the court highlighted the legislative intent behind the **Proceeds of Crime and Anti-Money Laundering Act** as follows:

*“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.”*

**63.** Further, in the case of **Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7** it was held:

*“... 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...”*

The respondent did not discharge the evidential burden placed upon him by **Sections 109** and **112** of the **Evidence Act**. The evidence tendered by the Applicant was therefore not rebutted and accordingly I find the case against the Respondent was proved on a balance of probabilities.

**64.** **Section 92(1)** of **Proceeds of Crime and Anti-Money Laundering Act** provides as follows: -

**“92 Making of a forfeiture order**

**(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.**

**65.** Once this court makes a finding that the assets or property of the Respondent are proceeds of crime (subject to **Section 94** of the **Proceeds of Crime and Anti-Money Laundering Act**) it is left with no alternative but to make an order for forfeiture. That is my reading of **Section 92(1)** of the **Proceeds of Crime and Anti-Money Laundering Act**. I find that the provisions of **Section 94** are not relevant to this case. I am also not persuaded that an order of forfeiture is a violation of the Respondent's right to property guaranteed in **Article 40** of the Constitution. That the investigations were carried out by a police officer is also in my view immaterial.

**66.** Accordingly, the application dated 23<sup>rd</sup> July 2020 succeeds, and I enter judgment for the applicant against the Respondent as

follows:-

*i) That the sum of Kshs. 39, 647,426/- held in Equity Bank Manderu Branch Account No. 1000176315716 in the name of Ali Abdi Ibrahim is proceeds of crime and is hereby forfeited to the State.*

*ii) That the sum of Kshs.3,857,943.02 in Equity Bank Manderu Branch Account No. 1000193921283 in the name of Ali Abdi Ibrahim is proceeds of crim and is hereby forfeited to the State*

*iii) That it is hereby ordered that the funds in the said accounts shall be transferred to the applicant*

*iv) That the Respondent shall bear the costs of this Originating Motion.*

*Orders accordingly.*

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY, 2022.**

**E. N. MAINA**

**JUDGE**



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