



Case Number:	ACEC Suit 09 of 2020
Date Delivered:	31 Mar 2022
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Esther Nyambura Maina
Citation:	Assets Recovery Agency v Evans Wafula Kundu & 3 others (Interested Parties) [2022] eKLR
Advocates:	Miss Gitiri for the Applicant Mr. Adano for the Respondent
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**ACEC SUIT NO. 09 OF 2020**

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

**VERSUS**

**EVANS WAFULA KUNDU.....1<sup>ST</sup> INTERESTED PARTY**

**ANCILLARH KEMUNTO MONARI....2<sup>ND</sup> INTERESTED PARTY**

**SYLVIA AJIAMBO ONGURU.....3<sup>RD</sup> INTERESTED PARTY**

**DENNIS MBURU NYAMBURA.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Applicant, the Assets Recovery Agency is established under Section 53 of the Proceeds of Crime and Anti- Money Laundering Act, 2009, as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime under Sections 81 to 92 of the Proceeds of Crime and Anti Money Laundering Act.

2. By an Originating Motion dated 24<sup>th</sup> March, 2020 brought under Sections 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act,2009 and Order 51 of the Civil Procedure Rules the Agency seeks orders that:

“1. **THAT** this Honourable Court do issue orders declaring the following assets held by the Respondent and Interested Parties are proceeds of crime and liable for forfeiture to the Government.

i) LR NO. xxxx/xx situate in KASARANI, NAIROBI registered in the name of the Respondent vide Sale Agreement dated 1st April 2014.

ii) LR NO. xxxx/xxx situate in NAIROBI registered in the name of the Respondent on 15th August 2011. Developed flats in the year 2015 – 2017

iii) LR NO. KITALE MUNICIPALITY BLOCK (GATUA) xx/x registered in the name of Samuel Akuma Monari but sold to the Respondent vide Sale Agreement dated 12th December 2013.

iv) LR No. xxxx/xx (PLOT NUMBER 21) TRANS NZOIA DISTRICT transferred to the Respondent and his wife one Sylvia Ajiambo Onguru by Amagoro Park Limited vide Sale Agreement dated 17th March 2014.

v) LR NO. xxx/x AND LR NOxxx/xx TRANS NZOIA DISTRICT registered in the name of the Respondent and his wife one Sylvia Ajiambo Onguru developed between the year 2017 – 2018.

vi) LR NO. xxx/xx and LR NO xxx/xxx TRANS NZOIA DISTRICT transferred to the Respondent and his wife one Sylvia Ajiambo Onguru by Amagoro Park Limited vide Sale Agreement dated 10th January 2015.

vii) LR NO xxx/xxx situate in RUNDA ESTATE, NAIROBI registered on 19th January 2017 in the name of MOJISOLA LIMITED whose sole Director is one Millicent Matingi Kundu, daughter of the Respondent vide Sale Agreement dated 28th November 2016.

viii) LR NO. xxx situate in EAST OF NAKURU MUNICIPALITY in the Nakuru District registered in the name of one Millicent Matingi Kundu, daughter of the Respondent vide Sale Agreement dated 29th November 2016

ix) LR NO. NJORO/NGATA BLOCK x/xxx (KIAMUNYI) registered on 10th March, 2014 in the name of the Respondent and one Ancillarh Kemunto Monari a wife to the Respondent.

x) LR NO. KITALE MUNICIPALITY BLOCK xx/ GATUA/xxx registered on 10th August 2015 in the name of the Respondent and one Ancillarh Kemunto Monari a wife to the Respondent.

xi) Motor vehicle registration number KCF xxxT HINO LORRY/TRUCK, CHASSIS NUMBER JHE FY1EUKxxx white in color registered in the name of one Dennis Mburu Nyambura.

2. **THAT** this Honourable Court do issue forfeiture orders forfeiting the assets in paragraph (1) above to the Government and transferred to the Applicant.

3. **THAT** the Honourable Court makes any other ancillary orders that it may deem fit and just for proper and effective execution of its orders.

4. **THAT** costs be provided for.”

3. The Respondent and the 1<sup>st</sup> to 5<sup>th</sup> Interested parties have vehemently opposed the Originating Motion through the following affidavits; a replying affidavit sworn by the Respondent on 1<sup>st</sup> October 2020, replying affidavit sworn by Millicent Matingi Kundu on behalf of the 1<sup>st</sup> Interested Party, a replying affidavit sworn by the 2<sup>nd</sup> Interested Party, a replying affidavit sworn by the 3<sup>rd</sup> Interested Party and a replying affidavit sworn by the 4<sup>th</sup> Interested Party. All the affidavits are dated 27<sup>th</sup> October 2020.

4. In response to those replying affidavits, the Applicant filed 5 further affidavits on 11<sup>th</sup> January, 2021 all sworn by S/Sgt Fredrick Musyoki.

#### **The Applicant' s case**

5. The Application is based on grounds that on 26<sup>th</sup> April 2018, the Applicant received information on ongoing criminal investigations involving fraud and economic crimes at the National Youth Service (hereinafter “NYS”) which were conducted by the Directorate of Criminal Investigations; that, on 29<sup>th</sup> May 2018, the Respondents together with other suspects were charged in Criminal Cases Nos. ACC 8, 9, 10, 11, 13, 15 and 17 of 2018 for offences which included Conspiracy to commit an offence of economic crime contrary to Section 47(3) and 48(1) of the Anticorruption and Economic Crimes Act in regard to the loss of funds at the NYS between the period 2013 to 2018.

6. The Applicant avers that during the period of interest, the Respondent was in charge of the Mechanical and Transport Branch at the NYS Headquarters, Ruaraka and his net salary was between **9,564/=** in January 2016 and **Kshs. 26,300/=** in December 2017 but investigations revealed that his bank account numbers 0671062221 and 0274537256 held at Barclays Bank Ruaraka and Nakuru Branch received large cash deposits of Kshs. 197,391,968/= which were illicit funds and proceeds of crime.

7. The Applicant avers further that the Respondent partook in the fraudulent NYS transactions by signing most of the fraudulent local purchase orders, payment vouchers and that he procured goods not used or required by the Mechanical and Transport Branch. The Agency states that he also engaged NYS supplier such as James Thuita, Yvonne Wanjiku Ngugi and Lucy Wambui Ngirita as proxies and that they purchased several properties on his behalf in order to conceal or disguise the source of the illicit funds.

8. The Applicant avers that the Agency established that the Respondent is the beneficial owner of the assets the subject of these forfeiture proceedings but that he has disguised the ownership by registering the assets either as jointly owned by himself, his wives, children, associates or by companies owned by his daughter. Through the annexures to the supporting and further affidavits of S/Sgt Musyoki the Agency/Applicant traced the alleged illicit sources of the assets as follows:

**i. That** LR NO. xxx/xx situate in Kasarani, Nairobi was purchased vide an Agreement for Sale dated 1<sup>st</sup> April 2014 from Charles Muchina Kanyi and Jane Muthoni Muchina for Kshs. 15,000,000, which amount was paid in 5 installments.

**ii. That** LR NO. Kitale Municipality (Gatua) Block xx/x was bought from Samuel Akuma Monari vide a sale agreement dated 12<sup>th</sup> December 2013 at a purchase price of Kshs. 2,000,000.

**iii. That** LR NO. xxx/xxx (Plot number xx) Trans Nzoia District is registered in the names of the Respondent and his wife Sylvia Ajiambo Onguru, the 3<sup>rd</sup> Interested Party herein and that the property was developed between 2017 and 2018 and a maisonette built thereon by the Respondent.

**i. That** LR No. xxx/x, LR No. xxx/xx, L.R No. xxx/xxx, LR No. xxx/xxx Trans Nzoia District measuring 40 acres were purchased from Jackson Ekimu Omaidio vide Sale Agreements dated 26<sup>th</sup> March 2008 and 10<sup>th</sup> January 2015 in the names of the Respondent and his wife Sylvia Ajiambo Onguru, the 3<sup>rd</sup> Interested Party. The Respondent constructed his palatial home on LR No. 8699/17 between 2015 and 2018.

**v. That** LR No. xxx/xxx situate in Runda Estate Nairobi was purchased from Sidney James Nesbitt and Asifa Lalji Nurani through a Sale Agreement in the name of Millicent Matingi Kundu who is the Respondent's daughter and the 4<sup>th</sup> Interested Party in this case, at a purchase price of Kshs. 73,000,000. That with the intent of concealing the property, it was registered in the name of Mojisola Limited, the 1<sup>st</sup> Interested Party whose sole director is the 4<sup>th</sup> Interested Party and that the payments for this asset were traced to the Respondent, Interscope Technologies, Flagstone Merchants and Kidiavai Advocates. The Directors of Interscope Technologies were suppliers of the NYS and have been charged in *Anti-Corruption Criminal Case No. ACC 12 of 2018*.

**vi. That** LR NO. 8208 situate in East of Nakuru Municipality was bought from John Wachira by the 4<sup>th</sup> Interested Party through a Sale Agreement dated 29<sup>th</sup> November, 2016 in the sum of Kshs. 25,000,000. That out of this sum, Kshs 11,000,000 was paid directly by NYS suppliers namely Lucy Wambui Ngirita and Ark Road Holdings Limited, who have been charged in *Anticorruption Criminal Case No. ACC 14 of 2018* but a balance of Kshs. 1,700,000 remains outstanding and due to the Vendor.

**vii. That** LR NO. NJORO/NGATA BLOCK x/xxx (KIAMUNYI) was registered in the name of the Respondent Ancillarh Kemunto Monari a wife to the Respondent (the 2<sup>nd</sup> Interested Party herein). On 10<sup>th</sup> March, 2014 and was developed into a four storey 2 bedroom residential flat.

**viii. That** LR NO. KITALE MUNICIPALITY BLOCK xx/GATUA/xxx was registered in the name of the Respondent and the 2<sup>nd</sup> Interested Party on 10<sup>th</sup> August, 2015 and that investigations revealed that there are reasonable grounds to believe that the assets are proceeds of crime.

**ix. That** LR NO. xxx/xxx situate in NAIROBI was registered in the name of the Respondent on 15<sup>th</sup> August 2011 and that he developed flats in the year 2015 – 2017, during the period of investigation of the NYS theft.

**x. That** Motor vehicle registration number KCF xxxT HINO LORRY/TRUCK, CHASSIS NUMBER JHE FY1EUKxxxx white in color was registered in the name of one Dennis Mburu Nyambura, the Respondent's son, but it belongs to the Respondent and that initially the vehicle was registered in the name of Alex Mambo Mutisya but upon questioning by the Applicant he denied owning the vehicle.

**xi. That** Amagoro Traders whose sole director is one Bonventure Waswa Kundu who is believed to be a brother to the Respondent

is a company which traded with NYS in 2013 to 2014 and that between 25<sup>th</sup> April 2013 and 19<sup>th</sup> April 2014, the company received a total sum of Kshs. 17,238,550 from the NYS and transferred Kshs. 9,715,000 to the Respondent.

**xii. That** the Respondent Kevas Investments was one of the companies trading with the NYS in 2013 and whose sole director is the said Bonventure Waswa Kundu and that between 10<sup>th</sup> December 2013 and 26<sup>th</sup> April 2013, the entity received Kshs. 6,991,000 and transferred to the Respondent 3, 984,000.

9. Lastly that investigations revealed that the companies associated with the Respondent did not file tax returns and that the payments to the vendors were an elaborate scheme to launder money stolen from the NYS. Further that the Applicant obtained preservation orders in respect of the assets the subject of this suit under Sections 53A and 54 of POCAMLA vide *ACEC Misc Civil Application No. 48 of 2019* on 13<sup>th</sup> December 2019 and gazetted the same in *Gazette Notice Vol CXXII No. 1 published on 3<sup>rd</sup> January 2020*. The Applicant states that it is in the interests of justice that the orders of forfeiture do issue against the Respondent.

### **The Respondent's case**

10. In his replying affidavit sworn on 1<sup>st</sup> October 2020 the Respondent states that he was employed as a service man in the National Youth Service in 1980 and rose through the ranks to his current position of Ag- Deputy Director and officer in charge of the Mechanical and Transport Branch and that his monthly salary as at January 2016 was Kshs. 78,164.

11. He avers that his troubles began in April 2017 when he raised issues of procurement irregularities within the NYS with his seniors. He states that he was transferred to NYS Vocational Training Institute as a way of punishing him. He explained that all his assets are legitimate, having been acquired from the proceeds of his family business beginning from 1992 to date. He states that he operated a posho mill business since 1992 and that he obtained a loan facility from Harambee Sacco to build 12 rental units on a property he acquired in Gilgil in 1995. He states that the property is still registered in the previous owners' name but he was in possession of the transfer forms showing that the property was transferred to his daughter, the 4<sup>th</sup> Interested Party.

12. He averred further that he subsequently invested in farming businesses including large scale and commercial maize farming, dairy farming, horticultural business, poultry farming, rearing sheep and goats for sale and contract seed farming for East Africa Seeds Limited. He avers that these businesses were financed by two loan facilities taken in 1996 one of Kshs. 1,250,000 and the other of Kshs. 300,000. He referred to a total of 19 assets acquired between the period 1995 to 2014 and stated that from 2008 he operated a lucrative bar and restaurant in Kitale as well as a transport business through which he acquired 6 matatus through SMP Capital but which he sold in 2015. He avers that over the years he owned several lorries which he used to service transport contracts.

13. The Respondent also avers that his most lucrative business was commercial maize business. He states that maize business was the source of his hundreds of millions which he used to buy the assets. He made reference to various agreements for lease of land in respect of the maize farming and attached affidavits sworn by the lessors on various dates in January 2020. He stated that he supplied the maize in large scale to the National Cereals and Produce Board, Kitale Industries Limited, Unga Limited, Eldoret grain Millers, Mama Millers Ltd, Kitale Main Millers, Solomon Wainaina and Manasseh Nyagah Njenga, who collectively paid approximately Kshs. 65,000,000 to Kshs. 175,000,000 annually for the maize; that his other businesses earned approximately Kshs. 200,000,000 to Kshs. 350,000,000 in cash or cheques. He avers that he also operated bank accounts at KCB, Barclays, I&M Bank, Eco Bank, Harambee Cooperative Sacco and Transnational Bank. Further that in respect of the HINO truck, he purchased it from an Asian man who transferred it to his son, the 5<sup>th</sup> Interested Party herein. He avers that he was within his rights to register his properties in the names of his children and that he did not do so to conceal the properties as alleged. He states that all his properties were acquired before the NYS 1 and NYS 2 scandals and urged this court to dismiss this suit.

### **The Interested Parties' case.**

14. The 1<sup>st</sup> to 5<sup>th</sup> Interested Parties filed individual affidavits in opposition to the Originating Motion. The 1<sup>st</sup> Interested Party, a company solely owned by the Respondent's daughter laid claim over LR NO 7785/822 situate in RUNDA ESTATE, NAIROBI registered on 19<sup>th</sup> January 2017 in the name of MOJISOLA LIMITED.

15. The 2<sup>nd</sup> Interested Party, averred in her affidavit that she was the 3<sup>rd</sup> wife to the Respondent and laid claim over LR NO.

NJORO/NGATA BLOCK x/xxx (KIAMUNYI) registered on 10th March, 2014 jointly in her name and that of the Respondent.

16. The 3<sup>rd</sup> Interested Party, a wife to the Respondent laid claim over LR No. xxx/xx (PLOT NUMBER xx) TRANS NZOIA DISTRICT, LR NO. xxx/xx, LR NO. xxx/x, LR NO xxx/xxx TRANS NZOIA DISTRICT and LR NO xxx/xxx TRANS NZOIA DISTRICT which were transferred jointly to herself and the Respondent.

17. The 4<sup>th</sup> Interested Party, the Respondent's daughter, laid claim over LR NO. xxx Situate in East of Nakuru Municipality and LR NO xxx/xxx situate in Runda Estate. It is noteworthy that the 1<sup>st</sup> Interested Party in its affidavit also claims ownership of the same Runda property.

18. The 5<sup>th</sup> Interested Party, the Respondent's son, lays a claim over Motor vehicle registration number KCF xxxT HINO LORRY/TRUCK, CHASSIS NUMBER JHE FY1EUKxxx white in color registered in his name. In summary, the Interested Parties aver that the properties which are the subject of this suit belong to them and were acquired from a loan of 25,000,000 (sic) obtained by the Respondent from Afya Sacco in 2013, proceeds of farming and transport businesses by the Respondent, the sale of the Respondent's Greenspan maisonette at a consideration of Kshs. 15,000,000 and sale of his matatus in 2016 and 2017.

#### **Submissions of the Applicant.**

19. Learned counsel for the Applicant framed two issues for determination: Firstly, whether the assets the subject of the forfeiture application are proceeds of crime and secondly, whether the assets should be forfeited to the State.

20. Counsel submitted that Applicant has demonstrated that the assets the subject of the suit are proceeds of crime within the meaning of Section 2 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). Counsel cited the South African case of **Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC7** and submitted that between the years 2013 and the year 2017, the Respondent received several suspicious cash deposits amounting to Kshs. 197,391,968 in his bank account numbers 0671062221 held at Barclays Bank Ruaraka and 0274537256 held at Barclays Nakuru branches and that the funds are reasonably believed to be proceeds of crime as no evidence has been adduced to show the legitimate sources. Counsel submitted that the funds were remitted through 95 suspicious cash deposits in the Ruaraka branch and 38 suspicious cash deposits in the Nakuru branch. Counsel contended that this was against the Respondent's total earnings of Kshs. 73,757 for the period and his net pay of Kshs. 9,564 in January 2016 and net pay of Kshs. 26,300.85 in December 2017.

21. Counsel stated that contrary to the Respondent's averments that his family business earns approximately Kshs. 200,000,000 to Kshs. 350,000,000, the highest gross income declared by the Respondent to the Kenya Revenue Authority was Kshs. 1,344,600 and a profit of Ksh. 102,680/= in the year 2015.

22. Counsel stated that the Respondent has not produced evidence to substantiate the alleged sources of funds and how the property was acquired; that instead he has made mere assertions which have no probative value and accordingly failed to discharge his burden of proof under Sections 109 and 112 of the Evidence Act. Counsel cited the case of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334** to support that submission. Counsel submitted through the affidavits of S/Sgt Fredrick Musyoki the Applicant proved that the assets subject of this forfeiture application were acquired through proceeds of crime; That some of the assets were paid for through Interscope Technologies, Flagstone merchants whose directors are James Thuita and Yvonne Wanjiku, Lucy Wambui Ngirita and Ark Road Holdings Ltd all of who were suppliers of goods/services to NYS and who were charged in court and their assets forfeited to the State vide **Assets Recovery Agency v James Thuita Nderitu & 6 others [2020] eKLR** and **Assets Recovery Agency v Phylis Njeri Ngirita & 2 others; Platinum Credit Limited (Interested Party) & another [2020] eKLR**

23. Counsel stated the evidence filed, in court by the Respondent proves that he purchased the properties in cash installments delivered in different locations including Nevada Hotel Nairobi, Kasarani Sports View Hotel, Ridgeways Mall Kiambu Road amongst others. Counsel stated that there was no proof of the source of the funds, hence the conclusion that the cash was proceeds of crime. Counsel stated that the Respondent further admitted that he acted in conflict of interest by loaning money to one Mr. Waswa, a supplier to the NYS contrary to Section 12 of the Public Officers Ethics Act. Counsel pointed out that the affidavits annexed in the Respondent's bundle of documents were all sworn on January 2020 ostensibly to prove he was engaged in maize farming a demonstration that they were an afterthought.

24. Counsel for the applicant further submitted that the claim that the Respondent's family engages in farming business was false as no evidence of the existence of a farm, licenses, permits, tax returns et al was tendered as proof. To support this submission counsel cited the case of **Assets Recovery Agency v Lillian Wanja Muthoni Mbogo & others [2018] eKLR** and the case of **Assets Recovery Agency v Pamela Aboo [2018] eKLR**. Counsel argued that the Respondents did not demonstrate why the cash deposits amounting to Kshs. 197,391,968 were made into his account and where they were made. Counsel contended that the Interested Parties did not prove how they acquired the assets the subject of this suit and were therefore presumed to be beneficiaries of proceeds of crime. Counsel relied on the case of **Assets Recovery Agency v James Thuita Nderitu Supra** and **Assets Recovery Agency v Rohan Anthony Fisher and others Supreme court of Jamaica Claim No 2007 HCV003259**.

25. Counsel asserted that having demonstrated on a balance of probabilities that the assets are proceeds of crime, the subject assets should be forfeited to the state. Counsel stated that the right to property under article 40 of the Constitution does not extend to property that has been illegally acquired; That the Respondent, being a public servant entrusted with public resources at the NYS went on a frolic to enrich himself, his relatives, associates and companies using public funds thereby killing the Kenyan dream. Citing the case of **Abdulrahman Mahmoud Sheik and 6 others v Republic and others [2016] eKLR** Counsel for the Applicant urges this court to allow the application and to forfeit the assets to the state.

### Submissions of the Respondent

26. Counsel for the Respondent relied on the Respondent's replying affidavit sworn on 1<sup>st</sup> October 2020, the bundle of documents dated 1<sup>st</sup> October 2020, and the written submissions dated 6<sup>th</sup> January 2022.

27. Counsel started by invoking the law on the protection of third-party interest and stated that Section 93 and Section 94 of POCAMLA cloth this court with power to make an order excluding the property of third parties from the forfeiture order. Counsel submitted that the Respondent is a family man married to two industrious wives who have worked together to build their current vast estate in farming, transport and real estate. Counsel stated that the Respondent was not involved in the NYS Scandals 1 and 2 which begun in 2013 as he was not in an accounting or procurement position as his work involved dealing with NYS training services and as such he was not in a position to authorize or influence any tender.

28. Counsel reiterated the averments in the Respondent's affidavit on the source of funds and submitted that the Respondent legitimately acquired the assets during the course of his employment with the NYS from 1980 to-date. Counsel stated that the Respondent's explanation on the acquisition of the assets and the source of funds was as follows:

29. He explained the source of funds for the acquisition of the respective assets as follows:

i. That LR NO.xxx/xx situated in Kasarani was acquired on or about 2014, from the proceeds of maize farming and family business. The said house has been leased out with a monthly rent income of Ksh 715,000.

ii. LR NO. xxxx/xxx situate in Mwiki, was acquired in 2011 (vacant land) 2 years before the alleged scandals and cannot therefore be regarded as proceed of crime. That the Respondent pointed out that the only reason given by the applicant as to why the said property should be forfeited is for the reason that it was developed in 2015-2017 and this court is being invited to punish the Respondent for dealing with his property as he wishes, an invitation which the court should reject.

iii. LR NO. KITALE MUNICIPALITY BLOCK (GATUA) xx/x was acquired in 2013 at a consideration of Ksh 2,000,000, after leasing the said land from 2008 from Samuel Monari. The Respondent operated bars and two shops on the land as a tenant until the year 2018. The Respondent allegedly used the income from the bar and restaurant to invest elsewhere including purchasing the said property. The bars and restaurant and shops continued operating until 2018 when KENHA interfered with the acreage and the Respondent awaits compensation to-date.

iv. LR NO xxx/x and LR NO xxx/xxTRANS NZOIA DISTRICT was acquired from Jackson Ekimu Omaidu over a period of time running from 2008 following a lease turned into a purchase. It was financed from the proceeds of sale of maize at every harvest season. The said land was purchased way back in 2008 which is 5 years before the alleged NYS Scandal which is said to have taken place in the years starting 2013 as evidenced by the agreement for sale dated 26th March 2008. Payments for the land was done in installments from 27/02/2008 to date. These properties are undergoing subdivision and they do not have a title deed. The land has in

it a farm house, poultry house, dairy cow sheds that the Respondent started building in 2010- 2014 and the Respondent moved there in August 2014.

v. LR NO xxx/xx and LR NO. xxx/xxx TRANS NZOIA COUNTY LR NO. xxxx/xx was acquired in 2008 from Jackson Ekim Omaido following a lease that turned into a purchase paid for from the proceeds of sale of maize at every harvest season. The Respondent paid for it in installments in cash and kind from 27/02/2007 and is still paying. LR NO. xxx/xxx. These properties are undergoing subdivision and the Respondents do not have title deeds yet.

vi. LR NO. xxx situate in East of Nakuru Municipality was acquired from the proceeds of sale of maize and sale of the Respondents Greenspan maisonette Nairobi /Block xx/xxx Maisonette No.213 for ksh 10,250,000. The entire purchase price was paid directly to the vendor in installments from November 2016 to November 2017 and the property was registered in the name of the 4th Interested Party.

vii. LR NO. NJORO/NGATA BLOCK x/xxx (KIAMUNYI)- was acquired through a loan facility from Afya Sacco of Kshs. 2,500,000/- (sic) in 2013 and topped up with more loans from the same institution.

30. Counsel submitted that the Respondent explained his other sources of income to include maize farming both for commercial purposes and seed production on properties that his 2nd wife inherited from her family and from various agricultural leases he was able to secure over the years using overdraft secured from Barclays bank. Counsel submitted that the proceeds from maize farming amounting to Kshs. 65,000,000 to 175,000,000 annually were ploughed back through purchase of other assets and business ventures and that currently, the family business earns approximately 200,000,000 to Kshs. 350,000,000.

31. Counsel further submitted that the Respondent's transport business has been lucrative and that it had serviced contracts with Rift Valley Bottlers Company Ltd between 2013 and 2014, Kenya Seed Limited between 2000 and 2005 and Ponty Pridd Holdings in 2014 and the Respondent had used the proceeds of those contracts to buy assets. Counsel stated that the Originating Summons is defective for failing to include parties to the proceedings or to call them as witnesses; that the Applicant relies heavily on evidence whose accuracy and/ or truthfulness cannot be properly substantiated and has failed to respond to the detailed source of the Defendant's assets. Further that the businesses of the Respondent were demonstrated through receipts and documents filed in court and that the Plaintiff places heavy reliance on an ongoing case notwithstanding that the culpability of the accused persons in the criminal case is yet to be determined. Counsel stated that the allegations by the Applicant have no probative value and are speculative and the court should consider the Respondent's factual evidence on each asset individually and not be swayed by the Applicants speculations. Counsel urged this court to dismiss the Originating Summons with costs.

#### **Issues for determination**

32. From the facts of this suit, the submissions and cases cited the following issues arise for determination:

- i. Whether the Respondents' properties sought to be forfeited are proceeds of crime; and
- ii. whether an order for forfeiture can be made in the absence of a criminal conviction.
- iii. Whether the respondents' properties are liable to forfeiture to the Government of Kenya.

#### **Analysis and determination.**

33. From a reading of the evidence laid before this court it is clear that the period of interest is between 2013 and 2018 when the Respondent was working at the National Youth Service as the officer in charge of the Mechanical and Transport Branch. The Proceedings are anchored on the proceeds of crime and Anti Money Laundering Act (POCAMLA). It is alleged that the properties which are sought to be forfeited to the state belong to the Respondent and are proceeds of crime. Section 2 of POCAMLA 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.**”[Emphasis mine]

34. Civil forfeiture proceedings are governed by Part VIII of POCAMLA and more especially by Section 90 of the Act provides:

**90. Application for forfeiture order**

**(1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.**

**(2) The Agency Director shall give fourteen days’ notice of an application under subsection (1) to every person who served notice in terms of section 83(3).**

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

**(4) A person who served notice under section 83(3) may appear at the hearing of the application under subsection (1) to—**

**(a) oppose the making of the order; or**

**(b) apply for an order—**

**(i) excluding his interest in that property from the operation of the order; or**

**(ii) varying the operation of the order in respect of that property, and may adduce evidence at the hearing of the application.**

35. Before bringing this application the Applicant had obtained a preservation order in relation to the subject property in H.C ACEC Misc. App. No. 48 of 2019 and it cannot therefore be said that the application is defective. Further the law is that civil proceedings for recovery are not dependent on the outcome of criminal proceedings. This is provided in section 92 (4) of POCAMLA which states: -

**92. Making of 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.....

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

**(3) “The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.....”**

It is my finding therefore that the submission of counsel for the Respondent that this application before the culpability of the accused persons is determined has no basis. So too is the submission that the Applicant did not enjoin the persons in whose names the properties are registered or call them as witnesses.

36. The letter, the spirit and purpose of the Proceeds of Crime and Anti –Money Laundering Act is to ensure that no person benefits from criminal conduct and that should any proceeds of criminal conduct be traced, then it ought to be forfeited. This position was

confirmed in the case of **Assets Recovery Agency V Pamela Aboo [2018] eKLR** where the Court held:

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

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

**“64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120 the Court of Appeal stated:**

**“..... that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof.”**

**see also Phillips v The United Kingdom [2001] ECHR 437; Techla Nandjila Lameck v President of Namibia 2012 (1) NR 255 (HC)”**

37. The Respondent in this suit has been charged with several counts of corruption offences in 7 different cases pending before the Magistrates Anti-Corruption Magistrates Court (Criminal Case No. ACC 8,9,10,11,13,15 and 17 of 2018,) all relating to alleged theft and corruption arising from the NYS Scandal 1 and 2 which occurred between the years 2013 and 2018. The Applicant has firmly refuted the claims and interests of the Interested Parties through the further affidavits filed on 11<sup>th</sup> January 2021. The Applicant has particularly drawn a flow chart on the trail of the source of the funds used to purchase LR NO. xxx situate in East of Nakuru Municipality, which include deposits by the Respondent and some of the NYS suppliers namely Lucy Wambui Ngirita, James Thuita and companies associated with them, who are all his co-accused with the Respondents in the pending corruption cases. The Applicant has contrasted these payments with the Respondents pays lips, with his highest net pay during the period of interest being **Kshs. 26,300.85** in December 2017 and his declared earnings on the farming business being Ksh. 1,244,600/=.

38. In respect of the income of the Respondent’s farming business, the Applicant produced a tabulation of the earnings received from the maize farming amounting to Kshs. 259,550 earned between 2013 and 2014. They have also produced the Respondent’s Afya Sacco account statements which do not reflect the loans alleged to have been borrowed by the Respondent. They have also produced a statement by the Kenya Revenue Authority which indicates that the Respondents’ businesses did not file tax returns during the period of interest. It is my finding that this evidence does not account for the Kshs. 200,000,000 the Respondent alleges to have earned annually from farming and other businesses. It is instructive that for period of interest the Respondent did not file wealth declaration forms as required of civil servants. It is also instructive that the audited report and bank records do not reflect the alleged Kshs. 65,000,000 to Kshs. 175,000,000 incomes from the sale of maize. Moreover, no annual returns were proved to have been filed at the companies registry and no tax returns were filed with the KRA as would be expected from such big business. Indeed, KRA through its letter dated 18<sup>th</sup> March 2020 confirmed that for the period in issue the companies and firms that paid for the assets namely Mojisola Limited, Interscope Tech Services, Flagstone Merchants, Arkroad Holdings Limited, Amagoro Traders Limited, Kevas Investment and Amagoro Park Limited, Kiadiavai and Company Advocates and Kimani & Associates filed nil returns. The Respondent has not addressed the contested large cash deposits amounting to Kshs. 197,000,000 transacted on various dates through his accounts during the period 8<sup>th</sup> January 2013 to 25<sup>th</sup> September 2017, the highlight of the alleged NYS 1 and NYS 2 theft. This silence begs many questions: What were the sources of these funds transacted which were paid into his account" What is the nexus between the funds and the assets acquired by the Respondent during the period of interest" Are the funds not proceeds of the offences that the accused has been charged with in Criminal Case No. ACC 8, 9, 10, 11, 13, 15 and 17 of 2018" In two related suits arising from the charges in Criminal Case No. ACC 8, 9, 10, 11, 13, 15 and 17 of 2018 this court forfeited assets acquired by the accused persons during the period of interest. The two decisions are *Assets Recovery Agency v James Thuita Nderitu* (supra) and *Assets Recovery Agency v Phylis Njeri Ngirita* (supra). It is my finding that the evidence tendered by the Respondent as an explanation for the sources of the money with which he acquired the assets during the period in issue was not convincing and it did not rebut the evidence tender by the Applicant.

39. Whereas Section 93 of POCAMLA is intended to protect third parties in the circumstances set out under its provisions in this case the Interested Parties have not demonstrated that they in fact acquired the land and motor vehicle the subject of the application for forfeiture. It is clear that they were merely beneficiaries of the assets by virtue of being the Respondents children.

40. Through its further affidavits the Agency explained the linkage between the unexplained large cash deposits in the Respondent's accounts and the purchase of the assets and it was apparent that the properties were registered in the names of the Interested Parties or jointly with the Respondent as a way to conceal and disguise the source of the illicit funds. None of the Interested Parties claim to have paid for the assets. Indeed, it was their case that their father (the Respondent) had worked hard to acquire the assets.

41. The 1<sup>st</sup> Interested Party and the 4<sup>th</sup> Interested party both claimed ownership of LR NO xx/xxx situate in RUNDA ESTATE, NAIROBI and LR NO. xxx Situate in East of Nakuru Municipality which properties have been proven to have been purchased by NYS suppliers namely Ark Road Holdings, Lucy Wambui Ngirita, Interscope Technologies and Flagstone Merchants, whose directors are jointly charged with the Respondent in the pending anticorruption cases listed hereinabove. The properties having been purchased by those other parties there is no evidence upon which this court can make a finding that they belong to the Interested Parties. If anything the manner of their acquisition only goes to confirm that the properties are proceeds of crime.

42. The 2<sup>nd</sup> Interested Party, after denying owning any properties in her initial statement made a U-turn and changed her position and claimed ownership of LR NO. NJORO/NGATA BLOCK 1/868 (KIAMUNYI) and LR NO. KITALE MUNICIPALITY BLOCK 13/GATUA/393. (See Annexure FM 30 in the Applicant's bundle of documents). It is not clear what informed her to change her mind. It is however clear that the two statements are completely at cross-purposes and cannot convincingly explain her interest as alleged. It is also instructive that in her statement to the Applicant she categorically denied she was the Respondent's wife and claimed to be a widow. How then can this court rely on her evidence to make a finding that she was the owner of the properties. My finding is that she cannot be relied upon as she is untrustworthy. I therefore find that the two properties are also unexplained assets and are proceeds of crime liable to forfeiture.

43. The 5<sup>th</sup> Interested Party only averred that the KCF xxxT HINO LORRY/TRUCK, CHASSIS NUMBER JHE FY1EUKxxx was registered in his name on the instructions of his father, the Respondent herein. There is no explanation whatsoever on the source of funds. Immediately after the Respondent was arrested the truck was hidden and eventually traced to the home of Respondent's brother in Trans Nzoia County which raises even more suspicion on the legitimacy of the ownership. It is my finding that the source of funds that went into its acquisition was also unexplained.

**Issue No. (ii)**

44. I have already dealt with this issue and held that this suit is not dependent on a criminal conviction.

**Issue No. (iii)**

45. It is my finding that the Respondent and the Interested Parties did not adduce evidence to prove the sources of the cash used to acquire the properties during the period of interest that is 2013 to 2018. To the contrary the Applicant has demonstrated that the Respondent could not have acquired the assets legitimately given his income at the time. I am therefore satisfied that the properties acquired **during the period of interest** are proceeds of crime and hence liable to be forfeited to the Government. For the avoidance of doubt, the specific properties acquired during the period of interest (2013 to 2018) and which are liable to be forfeited are: -

- i. LR NO. xxx/xx situate in KASARANI, purchased on 1<sup>st</sup> April 2014;
- ii. LR NO. KITALE MUNICIPALITY BLOCK (GATUA) xx/x purchased on 12th December 2013;
- iii. LR NO. xxx/xx LOT NUMBER xx) TRANS NZOIA DISTRICT purchased on 17th March 2014;
- iv. LR NO xxx/xxx TRANS NZOIA DISTRICT purchased on 10<sup>th</sup> January 2015;
- v. LR NO 7785/xxx situate in RUNDA ESTATE, purchased on 28th November 2016;

vi. LR NO. xxx situate in EAST OF NAKURU purchased on 29th November 2016;

vii. LR NO. NJORO/NGATA BLOCK 1/xxx (KIAMUNYI) registered on 10th March, 2014 in the name of the Respondent and the 2<sup>nd</sup> Interested Party;

viii. LR NO. KITALE MUNICIPALITY BLOCK xx GATUA/xxx registered on 10th August 2015 in the name of the Respondent and the 2<sup>nd</sup> Interested Party; and

ix. Motor vehicle registration number KCF xxxT HINO LORRY/TRUCK, CHASSIS NUMBER JHE FY1EUKxxxxxxxxxxx white in color registered on 11<sup>th</sup> December 2015 and transferred to the 5<sup>th</sup> Interested Party.

46. The remaining properties LR NO. xxx/xxx situate in Nairobi registered in the name of the Respondent on 15th August 2011, LR NO. xxx/x and LR NO xxx/xx Trans Nzoia District registered in the name of the Respondent and his wife the 3<sup>rd</sup> Interested Party acquired vide the Agreement dated 26<sup>th</sup> March 2008 and LR NO. xxx/xx Trans Nzoia District in the name of the Respondent and his wife the 3<sup>rd</sup> Interested Party acquired in 2008 fall outside the period of interest and are accordingly not proceeds of crime within the meaning of Section 2 of the POCAMLA. These specific properties cannot be said to have been acquired directly from the offence income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed as the Applicant did not prove that they were developed or acquired with comingled funds. Accordingly, the above properties shall be excluded from the forfeiture order. Judgement is therefore entered for the Applicant as follows: -

i. LR NO. 2085/xx situate in KASARANI, purchased on 1<sup>st</sup> April 2014;

ii. LR NO. KITALE MUNICIPALITY BLOCK (GATUA) 13/x purchased on 12th December 2013;

iii. LR NO. xxx/xx PLOT NUMBER xxTRANS NZOIA DISTRICT purchased on 17th March 2014;

iv. LR NO xx/xxx TRANS NZOIA DISTRICT purchased on 10<sup>th</sup> January 2015;

v. LR NO xxx/xxx situate in RUNDA ESTATE, purchased on 28th November 2016;

vi. LR NO. xxxx situate in EAST OF NAKURU purchased on 29th November 2016;

vii. LR NO. NJORO/NGATA BLOCK 1/xxx(KIAMUNYI) registered on 10th March, 2014 in the name of the Respondent and the 2<sup>nd</sup> Interested Party;

viii. LR NO. KITALE MUNICIPALITY BLOCK 13/GATUA/xxx registered on 10th August 2015 in the name of the Respondent and the 2<sup>nd</sup> Interested Party; and

ix. Motor vehicle registration number KCF xxxT HINO LORRY/TRUCK, CHASSIS NUMBER JHE FY1EUK xxxx white in color registered on 11<sup>th</sup> December 2015 and transferred to the 5<sup>th</sup> Interested Party.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

**E.N. MAINA**

**JUDGE**

**In the Presence of:-**

**Miss Gitiri for the Applicant**

**Mr. Adano for the Respondent**

**Sharon Potishoi – Court Assistant**

**N/A for the Interested Parties.**



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