



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC MISCELLANEOUS NO. 73 OF 2017**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS UNDER SECTION 81 AND 82 OF THE PROCEEDS OF CRIME AND ANTI MONEY LAUNDERING ACT (POCAMLA) AS READ TOGETHER WITH ORDER 51 OF THE CIVIC PROCEDURE RULES**

**IN THE MATTER OF: PRESERVATION ORDERS FOR KSHS 19,688,152.35**

**HELD IN BANK ACCOUNT NUMBERS 0820165680743, 0820167691973 AND 0820372051630 IN THE NAME OF PAMELA ABOO AT EQUITY BANK LIMITED, DONHOLM BRANCH NAIROBI**

**BETWEEN**

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

**VS**

**PAMELA ABOO.....RESPONDENT**

**AND**

**ETHICS & ANTI CORRUPTION COMMISSION....INTERESTED PARTY**

**JUDGMENT**

1. The Asset Recovery Agency (ARA) which is the Applicant herein filed the originating Motion dated 31<sup>st</sup> October 2017. It is supported by the affidavits of Muthoni Kimani & Cpl Isaac Nakitare plus the thirteen (13) grounds on its face. The application seeks the following orders:

(i) That this Honourable court be pleased to issue an order declaring that Kshs 19,688,152.35 held in three Bank accounts numbers 0820165680743, 0820167691973 and 0820372051630 at Equity Branch Donholm Branch Nairobi in the name of the Respondent are proceeds of crime and therefore liable for forfeiture to the Government.

(ii) That this honourable court be pleased to issue orders of forfeiture of the following funds:

*(a) Kshs 10,214,762.35 in Account number 0820165680743 in the name of Pamela Aboo, held at Equity Bank Limited, Donholm Branch.*

(b) Kshs 7,473,390.00 in Account number 0820167691973.

(c) Kshs.2,000,000 in account number 0820372051630 in the name of Pamela Aboo, held at Equity Bank Limited, Donholm Branch.

(iii) That this Honourable court be pleased to issue an order that the above funds be forfeited to the Government and transferred to the Applicant

(iv) That this Honourable Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.

(v) That costs be provided for.

2. The Ethics and Anti corruption Commission (EACC) applied to be enjoined as an interested party vide its application dated 12<sup>th</sup> April 2018. A consent allowing the application was entered into on 11<sup>th</sup> July 2018. The interested party filed a supporting affidavit by Mr. Lamek Okun.

3. The application was opposed by the Respondent who filed a replying affidavit and a supplementary affidavit.

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

4. This application was filed under sections 81, 82, 90 and 92 of the Proceeds of Crime and Anti Money Laundering Act (POCAMLA) as read together with Order 51 Civil Procedure Rules (CPR). It is the Applicant's case that the Respondent operates three(3) accounts namely:

- A/C No [...]
- A/C NO [...]
- A/C NO [...]

All are domiciled at Equity Bank, Donholm Branch Nairobi. The said accounts hold a total of Kshs 19,688,152.35/-.

5. The Applicant's case is that upon receipt of an order (MKI) from the court to investigate and freeze the Respondent's accounts, the Applicant carried out investigations and found that the three accounts were holding a total of Kshs 19,688,152.35 suspected to be proceeds of crime.

6. It was further established that the Respondent's husband one **Alex Mukhwana Khisa** is an employee of Kenya Revenue Authority (KRA). It was suspected that it was the said Alex Mukhwana who was making the said deposits. The Respondent on 21<sup>st</sup> March 2017 at 3.05 p.m recorded as statement explaining the source of the money (MK2b).

7. **Cpl Isaac Nakitare No 62652** a Police investigator attached to ARA explained the amounts in each of the three (3) accounts to be as follows:

A/C No [...] Kshs 10,214,762.35/-

A/C No [...] Kshs 9,473,390/-

A/C No [...] Kshs 2,000,000/-

He said the said Accounts were opened between 20<sup>th</sup> April 2014-March 2017 while the funds were deposited between 2015-2017.

8. The deposits were done mainly at Equity Bank, Mombasa Branch and Equity Bank Agents in Mombasa. Further that there were no withdrawals made from the said accounts from the time the accounts were opened (Annexure I.N.2 1-c).

9. The deponent further stated that he was not satisfied with the explanation given by the Respondent on the source of the huge sums of money in her accounts. The statements by **Wilson Oduor Wameyo** (who opened the accounts) and **Elizabeth Njoki Ndonga** (Operations Manager Equity Bank Donholm) were marked as Annexures I.N. 3 & 4 respectively.

10. **Lamek Okun** a forensic investigator in his supporting affidavit on behalf of the interested party confirmed that the EACC had carried out investigations in respect to the Respondent's accounts. Preservation orders were obtained by the Commission when it was discovered that the deposits in the said accounts were very suspect.

11. He otherwise reiterated what M/s Muthoni Kimani & CP Isaac Nakitare had deposed in their affidavits.

12. **Mr Mohammed Adow** in his submissions raised four (4) issues namely:

*(a) Whether Kenya shillings 19,688,152.35 held in three bank accounts numbers [...], [...] and [...] at Equity Bank, Donholm Branch Nairobi in the name of the Respondent are proceeds of crime.*

*(b) If issue(a) above is in the affirmative, whether Kenya shillings 19,688,152.35 held in three bank account numbers [...], [...] and [...] at Equity Bank Donholm Branch Nairobi in the name of the Respondent should be forfeited to the Government.*

*(c) Whether the Application for civil forfeiture is in violation of Respondent's rights to property under Article 40 of the Constitution"*

*(d) Whether the identification of nay criminal offence is a precondition for civil proceedings under part VIII of Proceeds of Crime and Anti Money Laundering Act.*

13. On issue (a) counsel submitted that the Respondent had not been able to explain the source of the millions of shillings in the three (3) accounts in issue. That she did not even know the amount of money in her accounts. She failed to produce any business license, permits or compliance documents like KRA to confirm the existence of any legal business or trade. He referred to the following cases:

14. **-ARA vs Pamela Aboo [2018] eKLR Macfoy v United Africa Co Ltd [1961] 3 ALL EL.R. 1172 and -Nguku v Republic [1985] KLR 412.** Where the court stated as follows:

**"that where a party fails to produce certain evidence a presumption arises that the evidence produced would be unfavourable to that party."**

15. He submitted that the material before the court showed that the funds in issue are proceeds of crime within the meaning of section 2 of POCAMLA which defines "proceeds of crime" as:

**"proceeds of crime" means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later 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;**

He supported this with the cases of **Col Dr. Besigye Kiiza v Museveni Yoweri Kaguta** Election Petition No 1 of 2001; (ii) **Schabir Shaik & Others vs State case CCT 86/06 92008) ZACC 7.**

16. On issue No (b) Counsel submitted that the Applicant had proved its case for forfeiture. That in money laundering schemes ownership of the proceeds of crime may be direct or indirect., he referred the court to the following cases:

**-Prosecutor General vs New Africa Dimensions & Others High Court of Namibia** Case on POCA 10/2012 -**ARA vs Rohan Anthony Fisher, & Others** Supreme Court of Jamaica, claim No 2007 HCV003259 -**NDPP vs Rebuzzi** quoted in the case of **Schabir Shaik & Others vs State** case (supra)

17. On issue No(c) he referred to Article 40(6) of the Constitution which provides:

**“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

This he said was applied in the cases of:

- **Teckla Nandjila Lameck vs President of Namibia 2012 (1) NR 255 (HC)**
- **Martin Shalli vs Attorney General of Namibia No POCA 9/2011**

He therefore submitted that the funds in issue having been obtained illegally are proceeds of crime and are not protected by Article 40 of the Constitution of Kenya.

18. Finally on issue No (d) he submitted that a civil suit under part VIII POCAMLA is an action in rem (against property) and all that is supposed to be shown is whether the funds sought to be forfeited are proceeds of crime (either direct asset benefit or profit). On this he cited section 92(4) POCAMLA which provides:

**“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”**

19. He also referred to the case of **Republic vs Department of Public Prosecution & Others J.R. Civil Application No 102 of 2016** where the court held:

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

**The criminal origins of the proceeds may be proved in the same way as any other elements of an offence can be proved. The offence of money laundering must be deemed as ‘stand alone’ offence. In proving that the proceeds or property are proceeds of crime even circumstantial evidence will be crucial. There is in my view no need to await any prior convictions of other offences or before launching the prosecution of alleged money launderers. It is thus of little wonder that ‘proceeds of crime’ as defined under POCAMLA 2009.....**

I have added the emphasis to illustrate that even the legislators appreciated instances where there may be no one to prosecute hence there may be no conviction for a predicate offence or crime. The need to prove predicate offence before laying a charge of money laundering was effectively dispensed with. The principal offender who committed the predicate offence may never be there to be prosecuted, yet access to the proceeds of crime would have been achieved. He may have left jurisdiction with assistance of others. He may be a fugitive. He may have passed on. Behind him though, he would have left money launderers. If the principal offender may not be indicted, would it then mean that the money launderers would never be prosecuted" In my view, that certainly cannot be what the legislators intended. They, in my view intended to ensure that in a money laundering offence both the *actus reus* and the *mens rea* of the principal offences were strictly proven by the prosecution and not by mere reliance on previously held proceedings.”

20. He further referred to **Kenya Anti -Corruption Commission v Stanley Mombo Amuti [2017] eKLR**; serious organized Crime Agency vs Gale quoted in the case of **Assets Recovery Agency & Others vs Andrene Samantha Rowe & Others civil Division Claim No 2012 HCV 02120**

21. Finally he cited the case of **Kenya Anti Corruption Commission vs Stanely Mombo Amuti** (supra) where Justice Achode stated at paragraphs 95

*“95 Section 55(5) of the Anti corruption and economic Crimes Act envisages that if the Plaintiff satisfies the court, on a balance of probability, on the evidence adduced, that the Defendant has unexplained assets, the burden shifts so that the court may require the Defendant to satisfy it that the assets were acquired otherwise than as a result of corrupt conduct. See the case of Ethics and Anti-Corruption Commission (The Legal Successor of Kenya Anti-Corruption commission) versus Stanley Mombo Amuti [2015] eKLR, where he Court of Appeal held that: “Anti corruption and Economic Crimes Act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage the burden would shift to the Respondent if the court so ordered. In our view, this is not an alien process in civil litigation. It also happens in defamation cases where there is a defense of justification.” Applying the ratio decidendi of the Dr Besigye Kiza case above, the amount of proof that produces the court’s satisfaction must be that which leaves the court without reasonable doubt.*

*96 In the present case I have considered the property acquired at or around the time the defendant was reasonably suspected of corruption or economic crime; and whose value is disproportionate to his known sources of income at or around that time, and for which I consider that there is no satisfactory explanation. I am satisfied that the Plaintiff proved on a balance of probability that the property listed below fits into the definition of the term unexplained assets as defined under section 2 of ACECA and should be forfeited to the State”*

#### **The interested party’s case**

22. The Interested Party supports the Originating motion by the Applicant. **Lamek Okun** who swore the supporting affidavit is an investigator with EACC and was part of the team that investigated this matter. The complaint was against one **Alex Mukhwana Khisa** an employee of KRA but above all a husband to the Respondent.

23. The Respondent’s accounts at Equity Bank Donholm Namely: Accounts No 082016580743 and 0820167691973 were investigated after warrants of search were issued to the Investigator. The search revealed huge deposits running into millions of shillings, yet the Respondent does not have any known legitimate sources of income. It was suspected that these accounts of the Respondent were being used as a conduit for depositing and transferring proceeds of crime being money acquired corruptly.

24. The Commission therefore sought preservation orders in respect of the funds in the said accounts and the court granted an order to last 3 months. (EACC4).

25. M/s Jemutai for the Interested party submitted highlighting the Commission’s mandate, which she said compliments that of the ARA on forfeiture. She submitted that the Respondent had not explained the legitimacy of her sources of income. She referred the court to the case of **Kenya Anti Corruption Commission vs Stanley Mombo Amuti [2017] eKLR** and section 2 of ACECA which defines what unexplained assets means.

26. Counsel further referred to section 55(2) of ACECA which is reinforced by section 11(1) (j) of the EACC Act. She said the section makes provision pertaining to compensation and recovery of improper benefits. She relied heavily on the commission’s investigations of Alex Mukhasa Khisa who is the Respondent’s husband. In reference to section 55(2)-(6) ACECA she submitted that it was not necessary for the Interested party to prove that the Respondent actually committed an act of corruption in order for the provisions of section 55 ACECA to be invoked.

27. She cited the case of **Kenya Anti-Corruption Commission vs James Mwathethe Mulwa & Anor [2017] eKLR** where in spite of the acquittal by the lower court Justice Ogolla declared that the assets the subject matter in the above case were unexplained assets and ordered Mr. Mulewa to pay the Government the value of the assets. Counsel therefore prayed for forfeiture of the said funds.

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

28. The Respondent in her replying and supplementary affidavits deponed that the ARA had failed to connect her bank accounts to illegitimate sources or that the deposits were made on behalf of Alex Mukhwana Khisa. That she was issued with a Tax assessment order dated 26<sup>th</sup> February 2018 which confirmed that the money held in her accounts was genuine money.

29. It was her averment that the preservation orders were obtained ex parte without any material information being placed before the court. She refuted any claim of her money being proceeds of crime as stated in the supporting affidavits. She says that indeed a copy of the agreement for sale was duly sent to Equity Bank Donholm branch from Bungoma branch. That it was Elizabeth Njoki Ndonga who had advised her to transfer Kshs 2Million to a fixed deposit account for purposes of investment.

30. She deponed that the mere fact that Alex Mukhwana Khisa is her husband is no proof that the funds held in her accounts were deposited on his behalf. Further that she had given details of her business associates and nothing stopped the Applicant from getting any information from them. She accuses the Applicant of acting maliciously against her yet there was no evidence linking her to any corrupt deals. She has explained how the EACC officers summoned her to Integrity Centre and recorded a statement from her.

31. She averred that after enjoying preservation orders granted vide **Nrb ACEC Misc Application No 40 of 2017** the Interested Party applied to close the file after failing to gather any evidence to support its claims. She states that neither the Applicant nor Interested party has shown any wrong doing on her part, to warrant her being kept away from the funds in her accounts. She referred to several applications filed by the Applicant and interested party.

32. Mr. Odoyo for the Respondent opposed the application saying there was nothing to show that the funds in the Respondent's accounts were proceeds of crime.

33. Counsel submitted that the Applicant has a duty under section 92(1) of the Proceeds of Crime and Anti- Money Laundering Act, NO 9 of 2009 (POCAMLA) to satisfy the court that the funds in the subject bank accounts has either been used or is intended for use in the commission of an offence, or is proceeds of crime. He referred to section 2 of POCAMLA which defines "proceeds of crime" and "offence" and the Black's Law dictionary 9<sup>th</sup> edition pg 1186 definition of "offence"

34. He contends that it had not been shown what law the Respondent had violated by depositing money and failing to withdraw it. That the 3<sup>rd</sup> party depositors were never questioned to discredit the Respondents position. It was his submission that proper investigations were not carried out by the Applicant and who had a fixed mind of depriving the Respondent of the funds in the subject bank accounts.

35. Counsel argued that Alex Mukhawana Khisa who had been linked to the said funds was not a party to these proceedings. Secondly no evidence had been led to link the said Alex Mukhwana Khisa to the said funds. He relied on section 81 of POCAMLA, sections 107 and 108 of the Evidence to support this position.

36. He also referred the court to the cases of :

**(i) EACC vs Ministry of Medical Services and Anor [2012] eKLR Nairobi High Court Misc. Civil Application no 174 of 2012;**

**(ii) KRA vs Jimmy Mutuku Kiamba [2015] eKLR Nairobi High Court Misc. Application no 285 of 2015**

**(iii) EACC vs Equity Bank (Kenya) Ltd & Anor Nairobi High Court Misc. Application No 41 of 2017.**

37. Finally he submitted that the Applicant having failed to demonstrate that the Respondent committed an offence under section 2 of POCAMLA or that the funds in the subject bank accounts are proceeds of crime under the said provision of the law, it does not deserve to be granted the forfeiture orders.

### **Determination**

38. The application before this court seeks the forfeiture of a total of Kshs **19,688,152/35** domiciled in accounts Nos [...], [...] and [...] at Equity Bank Ltd Donholm branch. The said accounts belong to the Respondent.

39. I have considered the application, all affidavits, annextures, all submissions and authorities cited. The main issue I find falling for determination is whether the Applicant and the Interested party have proved a case for forfeiture of the stated funds under POCAMLA and/or ACECA.

40. Preservation orders in respect of the funds in this matter were issued vide ACECA Misc Application no 58 of 2017 on 14<sup>th</sup> July 2017. An application by the Respondent to have them rescinded/set aside was disallowed by the court vide its Ruling dated 13<sup>th</sup> March 2018. This originating Motion dated 31<sup>st</sup> October 2017 was filed on the same day. It was filed under sections 81, 82, 90 and 92 of POCAMLA as read together with Order 51 of the Civil Procedure Rules.

41. The undisputed facts are as follows:

- The three named bank accounts belong to the Respondent
- The said accounts are holding funds to the tune of Kshs 19,688,152/35.
- The statements on the 3 accounts show the credits, debits and balances, on each account.
- This matter has been investigated by both the EACC and ARA

42. For any forfeiture to be made the court must be satisfied that property or asset is a proceed of crime or is to be used to perpetuate a crime. Section 92 of POCAMLA provides:

**(1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—**

**(a) has been used or is intended for use in the commission of an offence;**

**or**

**(b) is proceeds of crime.**

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

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

43. Upon investigations being carried out by the Applicant and the Interested party each appears to have arrived at a conclusion that the cash deposits into these accounts raised suspicion. Cpl Isaac Nakirari deponed that after making this conclusion the Respondent and her husband (Alex Mukhwana Khisa) were summoned and they recorded statements (IN5 and another). The said **Alex Mukhwana** is an employee of KRA.

44. In his statement Mr. Mukhwana clearly stated that he was aware that the Respondent had a lot of money in her account at Equity Bank but he could not explain the source. That she was the only one in a position to explain the money in her account.

45. The Applicant filed this suit seeking a forfeiture order because the investigators were not satisfied with the explanation the Respondent gave them.

Account no [...] has Kshs debits of Kshs 2,205,803/- credits Kshs 9,664,050/- and a balance of Kshs 7,458,247/-.

Period = 20<sup>th</sup> April 2016 to 10<sup>th</sup> March 2017.

- An analysis of this account shows only one cheque deposit of Kshs 13,250/- by C.I.C. General Insurance.
- The rest are cash deposits by common depositors namely
- SCOLAH WANJIKU T- 57 cash deposits totaling Kshs 2,120,000/-
- EAZZY AGENT – 104 cash deposits totalling Kshs 5,209,800/-
- MAGSONTWO INVESTMENTS- 6 cash deposits totaling Kshs 340,000/-
- FESCO AGENCIES- 34 cash deposits totaling Kshs 225,000/-
- ESTHER SARANGE -7 cash deposits totaling Kshs 261,000/-
- ANGELA KATINA- 5 cash deposits totaling Kshs 185,000/-
- JOHNSON MUOKA- 4 cash deposits totaling Kshs 60,000/-
- CASH DEPOSIT AT DONHOLM -4 deposits totaling Kshs 800,000/-
- CASH DEPOSIT DIGO ROAD Mombasa -2 deposits totaling Kshs 630,000/-

46. Account No [...] has debits of Kshs 763/90, Kshs 10,215,526.25; balance Kshs 10,214,762.35. Period =17<sup>th</sup> November 2015-10<sup>th</sup> March 2017. The cash depositors in this account were as follows:

- SCOLAH WANJIKU T -13 cash deposits totaling Kshs 396,000/-
- MAGSONTWO INVES- 13 cash deposits totaling Kshs 700,000/-
- CASH DEPOSITS DONHOLM - 5 deposits totaling Kshs 1,550,000/-
- CASH DEPOSITS MOMBASA (VARIOUS POINTS)-28 DEPOSITS TOTALING Kshs 6,214,000/-
- FESCO AGENCIES – 4 deposits totaling Kshs 135,000/-
- SARAH WAMBUA- one deposit of Kshs 400,000/-
- DASON one deposit of Kshs 220,000/-
- JAMES MATHENGE- one deposit of Kshs 250,000/-



· Esther Sarange, Johnson Muoka, Dymake Enterprise, Transwide Pharmt, Leoart trading T, Goshen Monsa Ent, Nicaja Enterprise, Angela Kathina T all deposited a total of Kshs 159,000/-

47. Account No [...] – has a credit of Kshs 2,000,000/- with a balance of same amount. It is noted that these funds were transferred from Account no [...], belonging to the Respondent.

48. A random perusal of these accounts reveals that on average there is no single day the said accounts received less than Kshs 100,000/- in deposits. For example:

**Account no 0820167691973**

On 8 <sup>th</sup> August 2016	270,000/-
On 11 <sup>th</sup> August 2016	240,000/-
On 30 <sup>th</sup> August 2016	360,000/-
On 21 <sup>st</sup> September 2016	300,000/-
On 28 <sup>th</sup> September 2016	365,000/-
On 4 <sup>th</sup> October 2016	250,000/-
On 5 <sup>th</sup> October 2016	370,000/-
On 15 <sup>th</sup> October 2016	170,000/-
On 8 <sup>th</sup> November 2016	170,000/-
12 <sup>th</sup> November 2016	170,000/-
On 18 <sup>th</sup> November 2016	470,000/-
On 21 <sup>st</sup> November 2016	270,000/-
On 30 <sup>th</sup> November 2016	185,000/-
On 5 <sup>th</sup> December 2016	140,000/-
On 28 <sup>th</sup> December 2016	110,000/-
On 4 <sup>th</sup> Janay 2017	100,000/-
On 12 <sup>th</sup> January 2017	100,000/-
On 23 <sup>rd</sup> January 2017	120,000/-
On 24 <sup>th</sup> February 2017	100,000/-
On 25 <sup>th</sup> February 2017	100,000/-
On 3 <sup>rd</sup> March 2017	120,000/-

**Account no 0820165680743**

On 11 <sup>th</sup> February, 2016	450,000/-
On 25 <sup>th</sup> February 2016	562,000/-
On 11 <sup>th</sup> March 2016	500,000/-
On 1 <sup>st</sup> September 2016	216,000/-
On 4 <sup>th</sup> November 2016	700,000/-
On 25 <sup>th</sup> November 2016	375,000/-
On 23 <sup>rd</sup> December 2016	380,000/-
On 23 <sup>rd</sup> February 2017	600,000/-

49. The above huge cash deposits is part of what the Respondent was asked by the Applicant and Interested Party to explain its source. She gave an explanation vide her statement (MK2b & IN 5). She explained that she does transport business with a Mr Samson Waweru of Tel 0723 301930 with whom she invested Kshs 1 million. That the said Samson Waweru was depositing cash

into her account though they had not agreed on any given amount.

50. He would deposit Kshs 150,000/- to Kshs 300,000/- from Mombasa. She had invested Kshs 600,000/- with Samson Waweru in the presence of Mungai tel No 0710 637582 who had introduced the two of them. She later had Kshs 400,000/- deposited into Samson Waweru's account by her cousin Okware of Tel 0719[...]. She also explained that she does banana and sugarcane business with Jonathan Kimindu of Tel 0723 [...] who is also based in Mombasa. He too deposited money into her account.

51. She added that she also deals in cereals which she purchases from Busia and sells in various markets; she transports her products by motorbike she said. She said she does not deposit any cash in Busia and so carries it to Nairobi where she deposits it in bits. She confirmed that she had never made any withdrawals save for a request to transfer Kshs 2.1 million to a person who was selling her land. The request was declined by the bank.

52. The Applicant and Interested party were not satisfied with this explanation. The Interested party filed an application against the Respondent's husband **ACEC Misc Application No 41 of 2017 EACC vs Equity Bank Ltd & Alex Mukhwana Khisa**. The same was dismissed for the reason that the only deposits in that account were in respect to Mr. Mukhwana's salary. So his account with Equity Bank was a salary account, hence the disconnect.

53. The allegations here are that the Respondent's accounts have been used as a conduit for corrupt moneys in other words moneys that have not been lawfully acquired, or proceeds of crime.

54. 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"**

55. The Applicant and interested party have explained their reasons for believing that the cash deposits into the Respondent's accounts were proceeds of crime. In response to this claim the Respondent in her replying and supplementary affidavits and submissions has dwelt on the issue that the Applicant and Interested party have not discharged their burden of proving her connection with corrupt dealings.

56. Counsel for the Respondent cited sections 107 (1) and 108 of the Evidence saying no evidence had been presented before the court to show that the funds in the accounts were unlawfully acquired. There is no dispute that the cash deposits in the Respondents accounts involved huge sums of money from various quarters.

57. I have done an analysis of the deposits above and shown how much was being deposited in a day or so for the Respondent. Even with all this, the Respondent has not attempted to explain the source of this money either through the replying or supplementary affidavit. It could be true that she does business with Samson Waweru, Jonathan Kimindu and her own business but where is the evidence"

58. There is nothing that stopped Samson Waweru and other business partners from swearing affidavits to support her claims. If indeed Samson Waweru and Jonathan Kimindu were among the cash depositors based in Mombasa, could they not have come out to specifically state on oath when and how much they deposited" The Respondent did not support the claim that she gave Kshs 1 million to Samson Waweru. That sum of money must have come from somewhere if the allegation is anything to go by.

59. Mr. Odoyo in his submissions has asked what law prohibits one from depositing money and if there is any offence in not withdrawing the same. My quick answer to that is that there is no law that prohibits one from depositing money and there is also no offence committed if one fails to withdraw their money. How was she running her business without making any withdrawals" Even as one fails to withdraw it must be shown how they are surviving. One is at liberty to deposit even a billion shillings but the person must be ready to share the source of such huge deposits with the relevant authorities. When no satisfactory explanation is forthcoming the court will take it that the same was not lawfully acquired.

60. In the case of KACC vs James Mwathethe Mulewa & Anor [2017] eKLR Justice Ogola E.K had this to say

**59- “On the issue of cash deposits, the Plaintiff alleged that the 1<sup>st</sup> Defendant was receiving various deposits including a sum of Kshs 100,000/- during the period under investigations. The explanation offered by the 1<sup>st</sup> defendant was that the income was generated from the sale of nearly 300 cattle. As the 1<sup>st</sup> defendant did not respond to the second statutory notice received by him on 1<sup>st</sup> February 2011, court has no option but to believe the evidence tendered by the Plaintiff in of numerous bank statements attached to the affidavit of Josphat Kariuki Ndwigah sworn on 8<sup>th</sup> April 2011”**

I agree with the Judge on this.

61. Where the person against whom allegations have been made does not give a satisfactory explanation to rebut the allegations, it means what has been presented is not challenged. In this case there is no explanation of the source of the huge deposits into the Respondent’s accounts. Even a glance at the cash deposits made at Donholm branch of Equity Bank would call for an explanation by the Respondent as to who was making the deposits and for what purpose.

62. The moment the Applicant established through the bank statements that there were huge cash deposits, the burden shifted to the Respondent to explain the source. A lot has been said about the Respondent’s husband by both parties but this court is not using that information against the Respondent. The Respondent had a clear duty to explain the source or sources of these huge deposits into her account which she has failed to do.

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)

65. Forfeiture under POCAMLA is not a violation of an individuals’s right to property. Article 40(6) of the Constitution is clear that rights acquired under article 40 do not extend to any property that is found to have been unlawfully acquired.

66. Having considered all the material before this court, I find that the originating Motion dated 31<sup>st</sup> October 2017 has merit and I allow it and enter judgment with costs in favour of the Applicant in the following terms:

1. The Kshs 19,688,152/35 held in Account Nos. 0820165680743, 0820167691973, & 082037205163 Equity Branch Donholm Branch Nairobi in the name of the Respondent are proceeds of crime.
2. Forfeiture orders to issue in terms of all the funds held in said Accounts.
3. The above funds shall be forfeited to the Government and transferred to the Applicant.

4. Costs to the Applicant.

**Signed, dated and delivered this 13<sup>th</sup> day of November 2018 in open court at Nairobi.**

.....

**Hedwig I. Ong'udi**

**Judge**



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)