REPUBLIC OF KENYA

THE SENATE
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TWELFTH PARLIAMENT (SIXTH SESSION)

THE SENATE

Rt. Hon. Speaker
You may approve for tabling.
31/03/22

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

Approved
31/03/2022

.....

REPORT ON THE LIFESTYLE AUDIT BILL (SENATE BILLS NO. 36 OF 2021)

.....

PAPERS LAID	
DATE	05/04/2022
TABLED BY	DLM
COMMITTEE	—
CLERK AT THE TABLE	MR. AMOLO

Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

March, 2022

DC-EG
Recommended & Forwarded
31/03/22

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PREFACE

Mr. Speaker,

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to standing order 218(3) of the Senate Standing Orders. According to the said standing order and the Second Schedule to the Senate Standing Orders, the Committee has a mandate to—

Consider all matters related to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.

The Committee is comprised of the following members: -

1) Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
2) Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
3) Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
4) Sen. James Orengo, EGH, SC, MP - Member
5) Sen. Fatuma Dullo, CBS, MP - Member
6) Sen. Mutula Kilonzo Junior, CBS, MP - Member
7) Sen. (Dr) Irungu Kang'ata, CBS, MP - Member
8) Sen. Johnson Sakaja, CBS, MP - Member
9) Sen. Isaac Ngugi Githua, MP - Member

Mr. Speaker,

The Lifestyle Audit Bill (Senate Bills No. 36 of 2021) seeks to put in place a legal framework for undertaking lifestyle audits on public officers. In creating this framework, the Bill seeks to incorporate the values and principles of governance under Article 10 and Chapter Six of the Constitution into the public service.

The Committee considered the Bill at length, conducted public participation, and deliberated on the submissions received. A call for submission of memoranda was placed in the local dailies on Friday 16th July, 2021. The Committee received submissions from the Ethics and Anti-Corruption Commission and Mr. Eric Munyao Ngumbi.

CHAPTER ONE: INTRODUCTION

1.0 Background on the Lifestyle Audit Bill (Senate Bills No. 36 of 2021

The Lifestyle Audit Bill (Senate Bills No. 36 of 2021) is sponsored by Sen. (CPA) Farhiya Ali Haji, MP. A copy of the Bill is attached to this Report as ***Annex 2***.

The Bill was published on 27th May, 2021 and was read a First Time on 14th July, 2021. Following the First Reading in the Senate, it stood committed, pursuant to Standing Order 140 (1), to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration and public participation.

The Committee considered the Bill at length, conducted public participation, and deliberated on the submissions received. A call for submission of memoranda was placed in the local dailies on Friday 16th July, 2021. The Committee received submissions from the Ethics and Anti-Corruption Commission and Mr. Eric Munyao Ngumbi.

Based on the deliberations and public participation, the Committee has made various observations and recommendations on the Bill set out in Chapter Three of this Report.

1.1. Justification for the Bill

Corruption is endemic in Kenya and efforts to address it have time and again failed to bear fruits. This is the situation despite empirical evidence showing public officers living beyond their means.

Article 10 (2) (c) of the Constitution states that *the national values and principles of governance includes good governance, integrity, transparency and accountability*. Indeed, Chapter Six of the Constitution makes further and detailed provision for the responsibilities of leadership, guiding principles on leadership and integrity and conduct of public officers.

The following statutes have been enacted to, among others, make further provision for leadership and integrity and to deter corruption and other economic crimes with respect to public officers—

(a) the Anti-Corruption and Economic Crimes Act;
(b) the Public Officer Ethics Act;
(c) the Leadership and Integrity Act;
(d) the Public Service (Values and Principles) Act;

(e) the Bribery Act;
(f) the Proceeds of Crime and Anti-Money Laundering Act;
(g) the Public Finance Management Act; and
(h) the Public Procurement and Asset Disposal Act.

There is therefore plenty of laws that make provision for leadership and integrity and criminalise corruption and other economic crimes. Corruption is however still prevalent and tackling it continues to be a challenge. Investigative agencies still face an uphill task in investigating and establishing corruption and corrupt practices.

Noting that some public officers seem to be living large, one of the ways of identifying and rooting out corruption may be by undertaking lifestyle audits on public officers suspected to be living beyond their means. There is however no legal framework for carrying out a lifestyle audit. The Bill therefore cures this lacuna by making provision for—

(a) the lifestyle audit process;
(b) the standards of professional conduct when carrying out a lifestyle audit;
(c) bodies to be involved in carrying out a lifestyle audit;
(d) reporting and investigation of unexplained wealth;
(e) the making public the declarations of the income, assets and liabilities;
(f) referral of matters to the Director of Public Prosecutions after conclusion of a lifestyle audit; and
(g) procedures for carrying out a lifestyle audit on public officers.

1.2. Objective of the Bill

The principal object of the Lifestyle Audit Bill (Senate Bills No. 36 of 2021) is to put in place a legal framework for undertaking lifestyle audits on public officers. In creating this framework, the Bill seeks to incorporate the values and principles of governance under Article 10 and Chapter Six of the Constitution into the public service.

1.3. Overview of the Bill

The Bill empowers the Ethics and Anti-Corruption Commission to undertake a lifestyle audit on a public officers where—

a) there are reasons to believe that the officer is living beyond her or his lawfully obtained and reported income;
b) the officer is unable to account for their source of income; or
c) the officer has misappropriated funds under that officer's care and trust.

The Bill stipulates that in carrying out the lifestyle audit, the Commission would be required to—

a) inform the officer of the requirement to carry out the audit;
b) submit to the officer information regarding the intended audit and the reasons for the audit; and
c) accord the officer a right to be heard on the audit.

Where there are reasonable grounds to suspect that a public officer's lawfully obtained income would be insufficient to allow the officer to obtain property held by such officer, the Bill empowers the Ethics and Anti-Corruption Commission to apply to the High Court for search warrant to be issued against the officer—

a) to explain the nature and extent of their interest in a particular property; and
b) the manner in which the property was acquired

The Bill however allows the Commission to carry out a search without a warrant in exceptional cases where there are reasonable grounds to believe that evidence may be removed or destroyed and in accordance with the Evidence Act, Cap. 75.

The Bill makes it an offence for a person, during the conduct of a lifestyle audit, to knowingly make a statement that is false or misleading whose penalty is imprisonment for a term not exceeding two years or a fine not exceeding five million shillings or both. The Bill also allows statements made by a person during a lifestyle audit to be used in the conduct of negotiations for a deferred prosecution agreement.

The Bill further allows the Ethics and Anti-Corruption Commission to apply to the High Court for an interim freezing order with respect to a property that is subject to a lifestyle audit. Where the High Court issues an interim freezing order, it would be required to specify the specify the period for which the order shall be valid, which period shall not exceed three months.

The Bill empowers the High Court to vary or discharge an interim freezing order on application made by the Commission or a person affected by the order. After such a discharge, the Bill allows the owner of the property subject to the order to apply to the High Court for compensation within three months from the date of discharge. The High Court may make an order for compensation only if satisfied that—

a) the applicant has suffered loss as a result of the making of the interim freezing order;

b) there has been a serious default on the part of the Commission; and
c) the order would not have been made had the default not occurred.

The Bill further provides that where an officer of the Commission, without reasonable cause, applies for or knowingly relies on false information to obtain an interim freezing order and the order is subsequently discharged and compensation awarded, the officer of shall be personally liable to pay the compensation and disciplinary action may be undertaken against that officer.

The Bill further allows the Ethics and Anti-Corruption Commission to apply to the High Court for an account freezing order with respect to an account that is subject to a lifestyle audit. The Bill allows such an application to be made *ex parte* if the circumstances of the case are such that notice of the application would prejudice the effect of the order sought. Where the High Court issues an account freezing order, it would be required to specify the specify the period for which the order shall be valid, which period shall not exceed three months. Similarly to the provisions on interim freezing orders, the Bill allows the High Court to vary or set aside an account freezing order and determine compensation for a person affected by the order.

The Bill allows the Commission to, with due notice and after considering any objections raises, issue an account forfeiture notice to an the holder of a frozen account for the purpose of forfeiting money held in the account. The Bill allows persons aggrieved by the decision of the Commission to appeal to the High Court.

The Bill also allows members lodge a complaint to the Commission where they believe that a person holds unexplained wealth of a public officer. The Commission will be at liberty to determine whether to investigate any such complaint in accordance with the provisions of the Bill and inform the complainant of its decision within fifteen days of the Decision.

The Bill allows the Ethics and Anti-Corruption Commission to apply *ex parte* to the High Court for an order requiring an associate of a public officer subject to a lifestyle audit to provide, within a reasonable time specified in the order, a written statement stating whether a property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property. The Bill defined the term "associate" to mean a person whom the Commission reasonably believes has had dealings with a public officer who is the subject of a lifestyle audit and in relation to property reasonably believed to have been acquired by use of unlawfully obtained income. The Bill makes it an offence

for person to fail to comply to the order above, with such failure attracting a penalty of a fine not exceeding one million shillings or imprisonment for a term not exceeding three years, or both.

The Bill further allows a lifestyle audit may be carried out on an immediate family member of a public officer if it is established that a property which is a subject of a lifestyle audit is owned by the immediate family member, including joint ownership.

The Bill mandates that the Commission to refer a matter to the Director of Public Prosecutions where, as a result of a lifestyle audit, the Commission is of the view that criminal proceedings should be instituted against a public officer. The Bill further allows a person who is the subject of a lifestyle audit to enter into a deferred prosecution agreement with the Director of Public Prosecutions.

The Bill also allows the High Court to defer the publication of information under the Bill once enacted for such a time as the Court considers necessary if the postponement is necessary to avoid substantial risk of prejudice to the administration of justice.

The Bill allows the Ethics and Anti-Corruption Commission to make regulations for the operationalisation of its provision once enacted. It also allows the Director of Public Prosecutions to, in consultation with the Commission, issue guidelines on cooperation and collaboration in the investigation of crimes it once enacted.

The Bill finally amends the Public Officer Ethics Act to allow the information contained in a declaration or clarification made under it to be accessible to the public. This includes the wealth declarations periodically made by state officers and public officers.

CHAPTER TWO: PUBLIC PARTICIPATION

2.0 Stakeholder Invitation and Submission

The Committee, pursuant to Article 118 of the Constitution and Standing Order 140, invited submissions from members of the public on the Bill via an advertisement for submission of memoranda placed in the local dailies on Friday 16th July, 2021. A copy of the advertisement is attached to this Report as ***Annex 3***.

The Committee received submissions from the Ethics and Anti-Corruption Commission and Mr. Eric Munyao Ngumbi. Copies of the submissions are attached as ***Annex 4***.

A matrix of with a summary of submissions from various stakeholders and Committee observations is attached at ***Annex 5.***

CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

3.0 The Committee made the following observations—

(a) Both stakeholders who responded to the call for submissions on the Bill proposed that the Bill be stood down and in its place amendments are made to existing laws that make provision for lifestyle audits. These include—

i. Anti-Corruption and Economic Crimes Act;
ii. Ethics and Anti-Corruption Commission Act; and
iii. Proceeds of Crime and Anti-Money Laundering Act.

(b) Section 2 of the Anti-Corruption and Economic Crimes Act defines unexplained assets as assets of a person—

i) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and
ii) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

(c) Section 26 of the Anti-Corruption and Economic Crimes Act makes provisions for the Ethics and Anti-Corruption Commission to require a person to provide a statement explaining their source of income for the assets they own whereas section 55 thereafter provides for forfeiture of unexplained assets. These provisions can be utilized to carry out lifestyle audits as envisaged under the Bill.

(d) Indeed, section 11(1)(j) Ethics and Anti-Corruption Commission Act empowers the Ethics and Anti-Corruption Commission to "*institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures*".

(e) PART VIII of the Proceeds of Crime and Anti-Money Laundering Act also makes elaborate provision for the Asset recovery Agency to carry out forfeiture of assets from persons suspected to have acquired them illegally.

(f) Courts of law have time and again utilized provisions in the above existing legislation to certify lifestyle audits of various public officers. In ***Christopher Ndarathi Murungaru V Kenya Anti-Corruption Commission & Another [2006] eKLR***, a three

Judge High Court Bench determined that an investigation by the then Kenya Anti-Corruption Commission under, among others, section 26 of the Anti-Corruption and Economic Crimes Act is constitutionally permissible under the previous Constitution. The Court in this matter directed that the law, including the aforesaid section 26, take its course. The Court finalized by dismissing the application that challenged the utilization of, among others, the said section 26 of the Anti-Corruption and Economic Crimes Act (***Annex 6a***).

(g) In ***Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR***, the Court of Appeal reiterated the constitutionality of the said section 26 of the Anti-Corruption and Economic Crimes Act under the current Constitution. The Court of Appeal stated that it was "*satisfied that the provisions of Sections 26 and 55 (2) of the ACECA do not violate the right to property as enshrined in Article 40 of the Constitution*" (***Annex 6b***). The Court of Appeal therefore dismissed the appeal which was challenging the decision of the High Court (Justice L.A. Achode) that had applied sections 2 and 55 of the Anti-Corruption and Economic Crimes Act in declaring that the defendant had unexplained assets of Kshs.41,208,000/- and that the assets had to be surrendered to the government (***Annex 6c***).

(h) In a more recent determination, on 10th March 2021, Justice Mumbi Ngugi applied, among others, section 2, 26 and 55 of the Anti-Corruption and Economic Crimes Act in ***Ethics And Anti-Corruption Commission v Patrick Ochieno Abachi & 6 others [2021] eKLR*** and determined that the defendants had various unexplained assets which she directed be forfeited to the government (***Annex 6d***).

(i) In **Assets Recovery Agency v Mike Sonko Mbuvi Gideon Kioko [2020] eKLR**, the High Court (Justice J. Lesiit) determined that the provisions of Part VIII of the Proceeds of Crime and Anti-Money Laundering Act had been properly applied in issuing preservation orders against the property of the Respondent (***Annex 6e***). Similarly, in ***Assets Recovery Agency v Phylis Njeri Ngirita & 2 oters (sic); Platnum Credit Limited (Interested Party) & another [2020] eKLR***, the High Court (Justice Mumbi Ngugi) applied Part VIII, to wit sections 81, 82, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act in declaring various assets of the respondents as proceeds of crime and directing that they be forfeited to the state and transferred to the Asset Recovery Agency (***Annex 6f***).

(j) In ***Assets Recovery Agency v Charity Wangui Gethi & another [2021] eKLR***, the High Court (Justice Mumbi Ngugi) once again applied the provisions of Part VIII of

the Proceeds of Crime and Anti-Money Laundering Act and ordered that the "funds amounting to Kshs 97,682,424 held in the names of the 1st and 2nd Respondents ... are proceeds of crime and liable for forfeiture to the Government" (***Annex 6g***).

(k) The Committee therefore agrees with the stakeholders that current legislation allows for lifestyle audits to be carried out and unexplained assets to be surrendered to the government. It is therefore not necessary or ideal for another law to be added to the jurisprudence. It may be prudent for gaps in the current law to be filled through amendments to the respective statutes as opposed to a new statute that reiterates what is currently available in law and has continually been exercised by the courts to recover corruptly acquired assets.

3.1 The Committee makes the following recommendations—

(a) The Committee recommends that the Bill be stood down and in its place the sponsor introduces amendments to the Anti-Corruption and Economic Crimes Act and the Proceeds of Crime and Anti-Money Laundering Act to capture any gaps under them with respect to the carrying out of lifestyle audits.

(b) In the event that the above recommendation is not carried, the Committee recommends the following amendments to the Bill—

i) The definition of the term "Ethics and Anti-Corruption Commission" in clause 2 be amended to remove a typographical error and make proper reference to "the Ethics and Anti-Corruption Commission Act".

ii) Clause 4 be amended to properly number sub-clause (1).

iii) Clause 4 be amended to insert a new sub-clause immediately after sub-clause (3) to state—

(3A) An accounting officer who fails to comply with the requirement to co-operate with the Ethics and Anti-Corruption Commission under sub-section (3) commits an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both.

iv) Clause 5(1) be amended to incorporate paragraphs (a) and (b) into one paragraph (a).

v) Clause 6 be amended to delete reference to "search warrant" and replace it with the term "notice to explain".

vi) Clause 7 be amended to include the following among the objects and procedures for procuring a search warrant—

i. application for the warrant be made to the Magistrates' Court and be subject for review (whether before or after execution) to the High Court;
ii. application to court to indicate and substantiate that the evidence sought could not be obtained anywhere else;
iii. application to court to list all the information, documents and evidence being sought through the search warrant; and
iv. documents and evidence obtained during the search be deposited in court.

vii) Clause 7 be amended to provide that application for search warrant be made *ex parte*.

viii) Clause 11 be amended to increase the duration of an interim freezing order to six months.

ix) Clause 14(4) be amended to extend the period that an account freezing order can be made from a period 'not exceeding 3 months' to a period 'not exceeding 6 months'.

x) Clause 14 be amended to insert a stipulation that an application for an account freezing order be made *ex parte*.

xi) The Bill be amended to delete clause 21 as there is no law on deferred prosecution agreements thus making the clause redundant.

xii) Clause 23(3) be amended to replace the Director of Public Prosecutions with the Ethics and Anti-Corruption Commission as the Director of Public Prosecutions has no role in the lifestyle audit process and the function to make cooperation guidelines ought to reside with the Ethics and Anti-Corruption Commission.

xiii) The Bill be amended to delete clause 25. The publication of declarations will not aid in the undertaking of lifestyle audits as the Ethics and Anti-Corruption Commission can always access the declarations when conducting investigations, including when conducting a lifestyle audit.

xiv) The Bill be amended to provide that a lifestyle audit may be undertaken on a person who was a public officer at least 10 years before the commencement of the audit and not be restricted to serving public officers.

(c) The text of the proposed amendments is annexed to this Report as ***Annex 7***.

ANNEXES

Annex 1:	Minutes of the Committee in considering the Bill
Annex 2:	The Lifestyle Audit Bill (Senate Bills No. 36 of 2021)
Annex 3:	Newspaper advertisement
Annex 4:	Copies of submissions received from the Ethics and Anti-Corruption Commission and Mr. Eric Ngumbi
Annex 5:	Matrix on Stakeholder Submissions on the Bill, and Committee Determinations thereon
Annexes 6a – 6g:	Case law on provisions in existing legislation utilized by Courts to certify lifestyle audits of various public officers
Annex 7:	Committee amendments to the Lifestyle Audit Bill (Senate Bills No. 36 of 2021)

TWELFTH PARLIAMENT | SIXTH SESSION

MINUTES OF THE THIRTY FIFTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON WEDNESDAY, 23RD MARCH, 2022, AT 8:00 AM.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson **(Chairing)**
2. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
3. Sen. Fatuma Dullo, CBS, MP - Member
4. Sen. Mutula Kilonzo Junior, CBS, MP - Member
5. Sen. Johnson Sakaja, CBS, MP - Member
6. Sen. Isaac Ngugi Githua, MP - Member

ABSENT WITH APOLOGY

1. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. (Dr.) Irungu Kang'ata, CBS, MP - Member

IN ATTENDANCE

1. Sen. Samson Cherargei, MP - Senator, Nandi County

a) Office of the Attorney General

1. Ms. Christine Agimba - Deputy Solicitor General
2. Ms. Caroline Saroni - Chairperson, Advocates Complaints Commission
3. Mr. George Nyakundi - Secretary, Advocate Complaints Commission
4. Mr. Anthony Mbua - Legal Counsel

b) Law Society of Kenya

1. Mr. Collins Odhiambo - Deputy Secretary, Parliamentary Affairs and Legislation

c) G.M Muchoki & Co. Advocates

1. Mr. Mbugua Anthony - Legal Counsel representing Leo Investments/ Chatur Group of Companies

SECRETARIAT

1. Mr. Charles Munyua	- Clerk Assistant
2. Mr. Moses Kenyanchui	- Legal Counsel
3. Mr. Mitchell Otoro	- Legal Counsel
4. Mr. Said Osman	- Research Officer
5. Ms. Lucianne Limo	- Media Relations Officer
6. Ms. Purity Orutwa	- Clerk Assistant *(Taking minutes)*
7. Ms. Hawa Abdi	- Serjeant at Arms
8. Mr. James Kimiti	- Hansard/Audio Officer
9. Mr. Kennedy Owuoth	- Fiscal Analyst
10.Ms. Sandra Alusa	- Intern
11.Mr. Daniel Ominde	- Pupil

MIN. NO. 189/2022 PRAYER

The sitting commenced with a word of prayer by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 190/2022 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Isaac Ngugi Githua, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 191/2022 STATEMENT SOUGHT BY SEN. SAMSON CHERARKEY, MP REGARDING UNQUALIFIED PERSONS PRACTICING AS ADVOCATES IN VARIOUS PRIVATE COMPANIES

The Committee met with Sen. Samson Cherarkey, MP and invited stakeholders to consider the request for Statement sought from the Committee on unqualified persons practicing as Advocates in various private companies.

Thereupon, the Committee proceeded to receive submissions from –

a) *The Advocates representing Leo Investments/ Chatur Group of Companies*

Informed the Committee that the firms had employed three Advocates as in-house counsel, all of whom were dully admitted and licensed to practice as Advocates. Further, that the firms did not offer legal services to members of the public but only undertook duties falling within the functions and mandates of the respective firms, including the preparation of internal documents, tenancies and lease agreements.

b) *The Office of the Attorney General and Department of Justice*

Submitted on the registration status and ownership of the firms in issue, as well as the businesses they were licensed to operate.

c) *The Law Society of Kenya*

Submitted that the Roll of Advocates is duly updated on the LSK Website under the Advocates Search Engine where any member of the public can search for an advocate to confirm whether they are registered and are in active practice.

d) *Senator Samson Cherarkey, MP*

Indicated that he would obtain and share with the Committee further information on the alleged dealings by the said firms which would amount to provision of legal services to members of the public.

Thereupon, the Committee noted that while the allegations made against the said firms were serious, it would not be possible to proceed with the inquiry in the absence of specific allegations and evidence to support the same. Consequently, Sen. Cherarkey, MP was tasked to furnish the Committee with any additional information or documents in support of the request for Statement.

MIN. NO. 192/2022 THE LIFESTYLE AUDIT BILL (SENATE BILLS NO. 36 OF 2021)

The Committee considered and adopted the Report on the Lifestyle Audit Bill (Senate Bills No. 36 of 2021), having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

MIN. NO. 193/2022 ADJOURNMENT

There being no other business, the meeting was adjourned at 9:30 am. The next meeting was scheduled for Thursday, 24th March at 11:00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: 30/03/2022

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE NINETY-SIXTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD AT WHITESANDS BEACH RESORT, IN MOMBASA COUNTY, ON FRIDAY, 26TH NOVEMBER, 2021 AT 10.00 A.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson **(Chairing)**
2. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
3. Sen. Fatuma Dullo, CBS, MP - Member (V)
4. Sen. (Dr.) Irungu Kang'ata, CBS, MP - Member
5. Sen. Isaac Ngugi Githua, MP - Member (V)

ABSENT WITH APOLOGY

1. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Mutula Kilonzo Junior, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

SECRETARIAT

1. Dr. Johnson Okello - Director, Legal Services
2. Ms. Mercy Thanji - Legal Counsel
3. Mr. Charles Munyua - Clerk Assistant
4. Mr. Said Osman - Research Officer
5. Mr. Moses Kenyanchui - Legal Counsel
6. Ms. Lucianne Limo - Media Relations Officer
7. Mr. Javan Nang'eyo - Sergeant at Arms
8. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
9. Ms. Hawa Abdi - Sergeant at Arms
10. Mr. James Kimiti - Hansard Officer

MIN. NO. 462/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Fatuma Dullo, CBS, MP.

MIN. NO. 463/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. (Dr.) Irungu Kang'ata, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

MIN. NO. 464/2021 JUDGMENT BY THE COURT OF APPEAL IN CIVIL APPEAL NO. E084 OF 2021 - *SPEAKER OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA & ANOTHER Vs SENATE OF THE REPUBLIC OF KENYA & 12 OTHERS*

The Committee was taken through a brief on the Judgment delivered by the Court of Appeal on 19th November, 2021 in Civil Appeal No. E084 of 2021 - *Speaker of the National Assembly of the Republic of Kenya & Another Vs Senate of the Republic of Kenya & 12 Others.*

It was noted that the Judgment had greatly eroded the gains made in the Judgment delivered by the High Court on 29th October 2020 in HC Petition No. 284 of 2019. Consequently, it was resolved that an appeal be preferred to the Supreme Court on the aspects of the Court of Appeal Judgment that the Senate was dissatisfied with.

In this regard, the Committee directed the legal team to file the Notice of Appeal within the required timelines. The Committee would convene at a later date to consider the draft Petition and Record of Appeal to be filed at the Supreme Court.

MIN. NO. 465/2021 THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)

The Committee noted that, due to the extensive public and stakeholder submissions received on the Bill, it was important that the matrix be considered at a physical sitting during which at least five Members were present, to enable decisions to be made on the respective clauses of the Bill.

Consequently, further consideration of the Bill was deferred.

MIN. NO. 466/2021 THE LIFESTYLE AUDIT BILL, (SENATE BILL NO. 36 OF 2021)

The Committee noted that, due to the extensive public and stakeholder submissions received on the Bill, it was important that the matrix be considered at a physical sitting during which at least five Members were present, to enable decisions to be made on the respective clauses of the Bill.

Consequently, further consideration of the Bill was deferred.

MIN. NO. 467/2021 **I) THE ELECTION (AMENDMENT) BILL (SENATE BILLS NO. 42 OF 2021);**
II) THE ELECTION (AMENDMENT) (NO. 2) BILL (SENATE BILLS NO. 43 OF 2021); AND
III)THE ELECTION (AMENDMENT) (NO 3) BILL (SENATE BILLS NO. 48 OF 2021).

The Committee noted that a public hearing on the three Bills was scheduled to be held in Nairobi on 3rd December, 2021. The Committee further resolved to explore the possibility of undertaking public hearings on the Bills, at selected regions outside Nairobi, in January, 2022.

MIN. NO. 468/2021 **THE CONSTITUTION OF KENYA (AMENDMENT) BILL (SENATE BILLS NO. 46 OF 2021).**

The Committee resolved to explore the possibility of undertaking public hearings on the Bills, in Kitui County and other selected regions, in January, 2022.

MIN. NO. 469/2021 **ADJOURNMENT**

There being no other business, the meeting was adjourned at 12.45 pm. The next sitting will be held on Friday, 26th November, 2021 at 2.00 pm, in Mombasa County.

SIGNED: .....
(CHAIRPERSON)

DATE: 30/03/2022

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE NINETY-SECOND SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON TUESDAY, 9TH NOVEMBER, 2021 AT 8.15 A.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
2. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson **(Chairing)**
3. Sen. Fatuma Dullo, CBS, MP - Member
4. Sen. Mutula Kilonzo Junior, CBS, MP - Member
5. Sen. Johnson Sakaja, CBS, MP - Member
6. Sen. Isaac Ngugi Githua, MP - Member

ABSENT WITH APOLOGY

1. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. (Dr.) Irungu Kang'ata, CBS, MP - Member

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant
2. Mr. Said Osman - Research Officer
3. Mr. Moses Kenyanchui - Legal Counsel
4. Mr. Mitchel Otoro - Legal Counsel
5. Mr. Javan Nang'eyo - Sergeant at Arms
6. Ms. Lucianne Limo - Media Relations Officer
7. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
8. Ms. Hawa Abdi - Sergeant at Arms
9. Mr. James Kimiti - Hansard Officer
10. Ms. Cynthia Wanjiku - Pupil

MIN. NO. 442/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 443/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Johnson Sakaja, CBS, MP.

MIN. NO. 444/2021 THE LIFESTYLE AUDIT BILL, (SENATE BILL NO. 36 OF 2021)

Consideration of the Bill was deferred to a later date.

MIN. NO. 445/2021 THE ELECTION (AMENDMENT) (NO 3) BILL (SENATE BILLS NO. 48 OF 2021)

The Committee commenced consideration of the Bill and was taken through an overview of the Bill and the submissions received thereon.

Thereupon, the Committee made the following observations –

a) The Bill, as drafted, conferred on the National Assembly the power to power to consider draft regulations on the use of popular names. There was need to find whether it was possible to grant an entry point to the Senate.
b) The Independent Electoral and Boundaries Commission (IEBC) had, in its submissions, raised concerns regarding how popular names could be ascertained, and on resolution of disputes relating to use of popular names, particularly where the same name was claimed by more than one candidate. The Committee noted that the said concerns could be addressed by way of regulations formulated under the Bill.

Thereupon, the Committee resolved to consider the matrix on the Bill at a subsequent sitting.

MIN. NO. 446/2021 ANY OTHER BUSINESS

a) The Committee considered various options available for capacity building of Members, and resolved to have the same undertaken in Dubai, UAE, in December, 2021.

b) The Committee further resolved to hold a working retreat, in Kilifi County, to conclude on various legislative business pending before the Committee.

c) Members were reminded that two Reports by the Committee, that is on extrajudicial killings and on the delay in appointment of Judges, were scheduled for consideration in plenary that afternoon. Members were therefore urged to be present for the debate.

MIN. NO. 447/2021 ADJOURNMENT

There being no other business, the meeting was adjourned at 9.00 am. The next sitting will be held on Wednesday, 10th November, 2021 at 8.00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: .....30/03/2022.....

TWELFTH PARLIAMENT |FIFTH SESSION

MINUTES OF THE EIGHTY-NINTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON TUESDAY, 2ND NOVEMBER, 2021 AT 8.25 A.M.

PRESENT

1. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson **(Chairing)**
2. Sen. Fatuma Dullo, CBS, MP - Member
3. Sen. Johnson Sakaja, CBS, MP - Member

ABSENT WITH APOLOGY

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
2. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
3. Sen. James Orengo, EGH, SC, MP - Member
4. Sen. Mutula Kilonzo Junior, CBS, MP - Member
5. Sen. (Dr.) Irungu Kang'ata, CBS, MP - Member

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant
2. Mr. Said Osman - Research Officer
3. Mr. Moses Kenyanchui - Legal Counsel
4. Mr. Mitchel Otoro - Legal Counsel
5. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
6. Ms. Hawa Abdi - Sergeant at Arms
7. Mr. James Kimiti - Hansard Officer
8. Ms. Cynthia Wanjiku - Intern

MIN. NO. 429/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Johnson Sakaja, CBS, MP.

MIN. NO. 430/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Johnson Sakaja, CBS, MP and seconded by Sen. Fatuma Dullo, CBS, MP.

MIN. NO. 431/2021 **THE LIFESTYLE AUDIT BILL (SENATE BILLS NO. 36 OF 2021)**

The Committee resumed consideration of the Lifestyle Audit Bill (Senate Bills No. 36 Of 2021) and was taken through the first part of the matrix on the Bill. The Committee was further taken through a brief on judicial decisions relating to the carrying out of lifestyle audits in Kenya.

The following observations were made –

a) There was need to have robust provisions in place to ensure that lifestyle audits were conducted objectively and that the process was not abused;
b) There were provisions in existing laws that would need to be aligned with the provisions of the Bill if it was passed into law. These could be done as consequential amendments;
c) Warrants to undertake lifestyle audits should not be open-ended. The Committee proposed a timeline of 60 days.

Thereupon, the Committee resolved to resume consideration of the matrix, from clause 14 onwards, at a later date.

MIN. NO. 432/2021 **ADJOURNMENT**

There being no other business, the meeting was adjourned at 9.55 am. The next sitting will be held on Wednesday, 3rd November, 2021 at 8.00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: .....30/03/2022.....

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE FIFTY-FIFTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON WEDNESDAY, 18TH AUGUST, 2021 AT 8.20 A.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (**Chairing**)
2. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
3. Sen. Mutula Kilonzo Junior, CBS, MP - Member

ABSENT WITH APOLOGY

1. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Fatuma Dullo, CBS, MP - Member
4. Sen. Irungu Kang'ata, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant
2. Mr. Said Osman - Research Officer
3. Mr. Mitchell Otoro - Legal Counsel
4. Mr. Moses Kenyanchui - Legal Counsel
5. Ms. Sylvia Nasambu - Clerk Assistant
6. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
7. Mr. James Ngusya - Serjeant at Arms
8. Mr. James Kimiti - Hansard Officer

MIN. NO. 280/2021 PRAYER

The sitting commenced with a word of prayer by the Vice Chairperson.

MIN. NO. 281/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. (Canon) Naomi Jillo Waqo, MP.

MIN. NO. 282/2021 **THE LIFESTYLE AUDIT BILL (SENATE BILL NO. 36 OF 2021)**

The Committee resumed consideration of the Bill, whereupon it considered the matrix of stakeholder submissions on the Bill.

Thereupon, the Committee resolved that an analysis of the caselaw relating to lifestyle audits be undertaken and presented to the Committee, to align the consideration of the Bill with judicial decisions on the subject.

MIN. NO. 283/2021 **ADJOURNMENT**

There being no other business, the meeting was adjourned at 8.40 am. The next meeting will be held on Thursday, 19th August, 2021 at 8.00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: .....30/03/2022.....

TWELFTH PARLIAMENT |FIFTH SESSION

MINUTES OF THE FIFTY-FOURTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON TUESDAY, 17TH AUGUST, 2021 AT 8.20 A.M.

PRESENT

1. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson (**Chairing**)
2. Sen. Fatuma Dullo, CBS, MP - Member
3. Sen. Mutula Kilonzo Junior, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

ABSENT WITH APOLOGY

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
2. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
3. Sen. James Orengo, EGH, SC, MP - Member
4. Sen. Irungu Kang'ata, CBS, MP - Member

IN ATTENDANCE

1. Sen. Farhiya Ali Haji, CBS, MP - Nominated Senator

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant
2. Mr. Said Osman - Research Officer
3. Mr. Mitchell Otoro - Legal Counsel
4. Mr. Moses Kenyanchui - Legal Counsel
5. Ms. Sylvia Nasambu - Clerk Assistant
6. Ms. Lucianne Limo - Media Relations Officer
7. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
8. Mr. James Kimiti - Hansard Officer

MIN. NO. 274/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Fatuma Dullo, CBS, MP.

MIN. NO. 275/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Fatuma Dullo, CBS, MP.

MIN. NO. 276/2021 THE LIFESTYLE AUDIT BILL (SENATE BILL NO. 36 OF 2021)

The Committee commenced consideration of the Bill, whereupon it was informed that –

a) The previous version of the Bill contained provisions both on lifestyle audits and deferred prosecution agreements. In the current version, the Bill only dealt with lifestyle audits, while deferred prosecution agreements were now substantively dealt with in a separate Bill, namely the Anti-Corruption and Economic Crimes (Amendment) Bill, 2021; and
b) The previous version of the Bill had given powers to many bodies to undertake lifestyle audits while, in the present case, this function was restricted to the Ethics and Anti-Corruption Commission, with other public entities offering support.

Thereupon, the Committee resolved to fast-track consideration of the Bill to have it considered by the Senate and referred to the National Assembly.

MIN. NO. 277/2021 BRIEF ON THE SEVENTH ANNUAL DEVOLUTION CONFERENCE

The Committee was taken through a brief on preparations for the 7th Annual Devolution Conference, scheduled to be held in Wote, Makueni County, on 23rd to 26th August, 2022.

MIN. NO. 278/2021 ANY OTHER BUSINESS

The Committee noted the demise of the late Senator Victor Prengei, following a road accident the previous night, and eulogized him as a hardworking, determined, and passionate colleague who represented the youth and marginalized groups in the senate.

MIN. NO. 279/2021 ADJOURNMENT

There being no other business, the meeting was adjourned at 8.50 am. The next meeting will be held on Wednesday, 18th August, 2021 at 8.00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: 30/03/2022

SPECIAL ISSUE

Kenya Gazette Supplement No. 109 (Senate Bills No. 36)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

SENATE BILLS, 2021

NAIROBI, 27th May, 2021

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PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

THE LIFESTYLE AUDIT BILL, 2021

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4 — Authority to conduct a lifestyle audit.

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THE LIFESTYLE AUDIT BILL, 2021

A Bill for

AN ACT of Parliament to give effect to Article 10 and Chapter 6 of the Constitution; to provide for the procedure for undertaking lifestyle audit; and for connected purposes

ENACTED by the Parliament of Kenya, as follows —

PART I- GENERAL PROVISIONS

Short title.

1. This Act may be cited as the Lifestyle Audit Act, 2021.

Interpretation.

2. In this Act—

"account freezing order" means an order that prohibits a person by or for whom the account to which the order applies is operated from making withdrawals or payments from the account;

"Commission" means the Ethics and Anti-Corruption Commission established under section 3 of the Ethics and Anti-Corruption Act; No. 22 of 2011.

"interim freezing order" means an order that prohibits a person from dealing with property that is subject to a lifestyle audit exercise;

"Kenya Revenue Authority "means the Kenya Revenue Authority established under section 3 of the Kenya Revenue Authority Act; No. 2 of 1995.

"lawfully obtained income" means an income obtained lawfully under the laws of the country from where the income arises;

"lifestyle audit" means an investigative audit of a person's living standards to ascertain consistency with a person's lawfully obtained and reported income; and

"public officer" has the meaning assigned to it under Article 260 of the Constitution.

PART II—CONDUCT OF A LIFESTYLE AUDIT

Standards of professional conduct when carrying out a lifestyle audit.

3. The following standards of professional conduct shall apply when a lifestyle audit is carried out with respect to a public officer—

(a) due care and professionalism;

(b) objectivity;

(c) confidentiality; and

(d) existing standards under any other written law.

Authority to conduct a lifestyle audit.

4. The Commission may undertake a lifestyle audit under this Act.

No. 4 of 2003.

(2) The Commission may collaborate with the Kenya Revenue Authority, a responsible Commission under section 3 of the Public Officer Ethics Act or any other entity it may consider necessary for the effective conduct of a lifestyle audit.

(3) All public bodies shall co-operate with the Ethics and Anti-Corruption Commission whenever the Commission is conducting a lifestyle audit.

(4) Without prejudice to subsection (3), any public body that has information leading it to suspect that a public officer's lawfully obtained income is insufficient to allow the officer to obtain property held by such officer shall provide that information to the Ethics and Anti-Corruption Commission.

Lifestyle audit process.

5. (1) A lifestyle audit may be carried out if—

(a) there are reasons to believe that a public officer is living beyond the officer's lawfully obtained and reported income;

(b) a public officer is unable to account for their source of income; or

(c) a public officer has misappropriated funds under that officer's care and trust.

(2) The Commission shall, where grounds exist for the conduct of a lifestyle audit under subsection (1) —

(a) inform the officer of the requirement to carry out the audit;

(b) submit to the officer, information regarding the intended audit and the reasons for the audit; and

(c) accord the officer a right to be heard on the audit in accordance with subsection (3).

(3) Before conducting a lifestyle audit, the Commission shall give the officer—

(a) a seven day's notice of the nature and reasons for the proposed lifestyle audit;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of the right to legal representation, where applicable;

(d) notice of the right to cross-examine, where applicable; and

(e) information and evidence relied upon to make the decision to conduct the lifestyle audit.

Unexplained wealth.

6. The Commission may, where there are reasonable grounds to suspect that a public officer's lawfully obtained income would be insufficient to allow the officer to obtain property held by such officer, apply for a search warrant to be issued against the officer—

(a) to explain the nature and extent of their interest in a particular property; and

(b) the manner in which the property was acquired.

Search warrants.

7. (1) Where the Commission intends to conduct a lifestyle audit, it may apply for a search warrant against the public officer from the High Court.

(2) When making an application under subsection (1), the Commission shall specify the grounds on which the application is made and if material relevant to the lifestyle audit is likely to be found on the premises specified in the application.

(3) Where a search warrant is issued, it shall contain—

(a) the address of the premises to be searched;

(b) grounds for the conduct of a lifestyle audit;

(c) the name of the public officer; and

(d) an explanation that material relevant to concluding the lifestyle audit is likely to be found on the premises.

(4) A search warrant shall be executed within thirty business days or such period as may, upon application to the Court, be extended.

Search without warrant.

8. (1) A search may be conducted without a warrant in exceptional cases where there are reasonable grounds to believe that evidence may be removed or destroyed.

Cap. 75

(2) Sections 119, 120 and 121 of the Criminal Procedure Code as to the execution of a search warrant shall apply to a search without a warrant under subsection (1).

Misleading statements.

9. (1) A person commits an offence if, during the conduct of a lifestyle audit, that person knowingly makes a statement that is false or misleading.

(2) A person who commits an offence under this section is liable, on conviction, to imprisonment for a term not exceeding two years or to a fine not exceeding five million shillings or to both.

Statements in general.

10. A statement made by a person during the conduct of a lifestyle audit may be used in the conduct of negotiations for a deferred prosecution agreement in accordance with the law on deferred prosecution agreements.

Application for an interim freezing order.

11. (1) The Commission may, where it considers necessary, make an application to the High Court for an interim freezing order with respect to a property that is subject to a lifestyle audit.

(2) Where the Court issues an interim freezing order, it shall specify the period for which the order shall be valid.

(3) The period specified by a Court under subsection (2) shall not exceed three months from the date that interim freezing order is made.

Discharge of an interim freezing order.

12. The High Court may at any time vary or discharge an interim freezing order on application made by the Commission or a person affected by the order.

Compensation.

13. (1) Where an interim freezing order in respect of any property is discharged, the person to whom the property belongs may make an application to the High Court for compensation.

(2) An application under subsection (1) shall be made within three months from the date of discharge of the interim freezing order.

(3) The Court may make an order for compensation only if satisfied that—

(a) the applicant has suffered loss as a result of the making of the interim freezing order;

(b) there has been a serious default on the part of the Commission; and

(c) the order would not have been made had the default not occurred.

(4) Where an officer, acting on behalf of the Commission and who without reasonable cause applies for or knowingly relies on false information to apply for and obtains an interim freezing order and the interim freezing order is subsequently discharged and compensation awarded pursuant to subsection (3)—

(a) the officer of the Commission shall be personally liable to pay the compensation; and

(b) disciplinary action may be undertaken against that officer.

Application for an account freezing order.

14. (1) The Commission may apply to the High Court for an account freezing order in relation to an account which is the subject of a lifestyle audit.

(2) An application for an account freezing order may be made without notice if the circumstances of the case are such that notice of the application would prejudice the taking of any steps under this Act to freeze the account.

(3) An account freezing order ceases to have effect at the end of the period specified in the order.

(4) The period specified by the Court under subsection (3) shall not exceed three months from the date the account freezing order is made.

(5) An account freezing order shall provide for notice to be given to persons affected by the order.

Setting aside of an account freezing order.

15. (1) The High Court may at any time vary or set aside an account freezing order on an application made by—

(a) the Commission; or

(b) a person affected by the order.

(2) The Court shall, before it varies or sets aside an account freezing order, give an opportunity to be heard to a person who may be affected by its decision.

(3) A person against whom an account freezing order is issued may, subject to subsection (4), make an application for compensation.

(4) The Court may make an order for compensation where satisfied that—

(a) the person against whom an account freezing order was made has suffered loss as a result of the making of the interim freezing order;

(b) there has been a serious default on the part of the Commission; and

(c) the order would not have been made had the default not occurred.

(5) Where an officer, acting on behalf of the Commission and who without reasonable cause applies for or knowingly relies on false information to apply for and obtains an interim freezing order and the account freezing order is subsequently discharged and compensation awarded pursuant to subsection (4)—

(a) the officer of the Commission shall be personally liable to pay the compensation; and

(b) disciplinary action may be undertaken against that officer.

Account forfeiture notice.

16. (1) The Commission shall give notice to an account holder for the purpose of forfeiting money held in the frozen account.

(2) The Commission shall, in issuing an account forfeiture notice under subsection (1),—

(a) state the amount of money held in the frozen account which it is proposed be forfeited;

(b) specify the period within which the account holder may raise an objection to the proposed forfeiture and the address to which any objections should be submitted; and

(c) specify that the money will be forfeited unless an objection is received at that address within the period for raising an objection.

(3) A person who intends to raise an objection to an account forfeiture notice under subsection (1) shall submit an objection, in writing, to the address specified in the order within thirty days of receipt of the notice.

(4) Where an account holder fails to raise an objection and the period specified under subsection (3) has lapsed—

(a) the amount of money stated in the notice shall be forfeited;

(b) the bank in which the frozen account is maintained shall transfer that amount of money into an interest-earning account nominated by, and in the name of, the Commission; and

(c) the account freezing order made in relation to the frozen account ceases to have effect upon the transfer of the funds.

(5) A person aggrieved by the determination made by the Commission on the objection may appeal to the High Court within thirty days after the date of such a determination.

(6) An appeal shall not automatically operate as stay of forfeiture of the money held in the frozen account under subsection (1).

(7) Where an appeal has been instituted, the High Court may on an application, order a stay of forfeiture on terms the Court considers just.

Complaints by members of the public.

17. (1) A member of the public may lodge a complaint to the Commission where such person has reason to believe that a person holds unexplained wealth of a public officer.

Cap. 15.

(2) A person who intends to lodge a complaint under subsection (1) shall submit the complaint in the prescribed form together with a statutory declaration made in accordance with the Oaths and Statutory Declarations Act.

(3) Upon receipt of a complaint under subsection (1), the Commission may—

(a) call for information or a report regarding such complaint from any person within such reasonable time as it may specify; and

(b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(4) The Commission may decline to investigate a complaint if it considers that the complaint is trivial, frivolous, vexatious or is not made in good faith.

(5) If the information or report called for under subsection (3)(a) is not received within the time stipulated, the Commission may proceed to inquire into the complaint without such information or report in accordance with this Act.

(6) The Commission shall, within fifteen days of its decision, notify the complainant of the decision and the reasons for its decision in writing.

Obligation to provide information.

18. (1) The Commission may apply *ex parte* to the High Court for an order requiring an associate of a public officer subject to a lifestyle audit to provide, within a reasonable time specified in the order, a written statement stating, in relation to a property specified in the order, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) In subsection (1), "associate" means a person whom the Commission reasonably believes has had dealings with a public officer who is the subject of a lifestyle audit and in relation to property reasonably believed to have been acquired by use of unlawfully obtained income.

(3) The Commission may by notice in writing require a person to provide, within a reasonable time specified in the notice, information or documents in the person's possession that relate to a public officer subject to a lifestyle audit exercise.

(4) A person who fails to comply with a requirement under this section commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or

Cap. 80.

to imprisonment for a term not exceeding three years, or to both.

(5) A requirement under this section shall not require anything to be disclosed that is protected under the advocate-client privilege including anything protected by section 134 or 137 of the Evidence Act.

Immediate family.

19. A lifestyle audit may be carried out on an immediate family member of a public officer if it is established that a property which is a subject of a lifestyle audit is owned by the immediate family member, including joint ownership.

Referral of matters to the Director of Public Prosecutions.

20. Where, as a result of a lifestyle audit under this Act, the Commission is of the view that criminal proceedings should be instituted against a public officer, it shall refer the matter to the Director of Public Prosecutions.

Entering into a deferred prosecution agreement.

21. A person who is the subject of a lifestyle audit may enter into a deferred prosecution agreement with the Director of Public Prosecutions in accordance with the law on deferred prosecution agreements.

PART III— MISCELLANEOUS PROVISIONS

Publication of information.

22. (1) The High Court may defer the publication of information under this Act for such a time as it considers necessary, if it appears to the Court that the postponement is necessary to avoid substantial risk of prejudice to the administration of justice in—

(a) legal proceedings;

(b) an investigation under this Act; or

(c) a criminal investigation under any other written law.

(2) In proceedings under this Part, the High Court may, in the interests of justice, public safety, public security or propriety or for any other sufficient reason, make an order requiring —

(a) any information which is contained in a Court document intended to be produced before the Court, be removed or be sufficiently redacted; or

(b) a person not to publish such information, or do an act that is likely to lead to the publication of such information.

(3) A person who contravenes subsection (2) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

Regulations.

23. (1) The Commission may make Regulations generally for the better carrying out into effect of this Act.

(2) Without prejudice to the generality of subsection (1), the Commission may make regulations providing for—

(a) the procedure for cooperation between the Commission and other relevant bodies under section 4(2); and

(b) guidance and regulation in the submission of information and carrying out of investigations under this Act.

(3) The Director of Public Prosecutions may, in consultation with the Commission, issue guidelines on cooperation and collaboration in the investigation of crimes under this Act.

Amendment of section 26 of No. 4 of 2003.

24. Section 26 of the Public Officer Ethics Act is amended in subsection (1) by inserting the words "and the Ethics and Anti-Corruption Commission" immediately after the words "public officer".

Amendment of section 30 of No. 4 of 2003.

25. The Public Officer Ethics Act is amended by deleting section 30 and substituting therefor the following new section—

Access to declarations.

30. The information contained in a declaration or clariication made under this Act shall be accessible to the public.

MEMORANDUM OF OBJECTS AND REASONS

The principal purpose of the Bill is to provide a legal framework for the carrying out of a lifestyle audit on public officers. The Bill seeks to incorporate the values and principles of governance under Article 10 of the Constitution into the public or state officers' public work.

There is no legal framework presently as to how a lifestyle audit is to be carried out on a public or a state officer who is suspected to be living beyond that person's lawful income. The Bill cures this lacuna in the law.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative powers to the Ethics and Anti-corruption Commission to make regulations for the better carrying into effect of the provisions of the Bill once enacted.

This Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

The Bill concerns county governments in terms of Articles 110(1) (a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution. The obligations proposed to be imposed by the Bill will have a direct impact on the means through which State and public officers serving in county governments discharge their functions under Part 2 of the Fourth Schedule to the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 21st April, 2021

FARHIYA ALI HAJI,
Senator.

Section 26 of No. 4 of 2003, which it is proposed to amend—

26. Declaration required

(1) Every public officer shall, once every two years as prescribed by section 27, submit to the responsible Commission for the public officer a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years.

(2) The declaration shall be in the form set out in the Schedule and shall include the information required by the form.

Section 30 of No. 4 of 2003, which it is proposed to amend—

30. Access to declarations

(1) The contents of a declaration or clarification under this Act shall be accessible to any person upon application to the responsible Commission in the prescribed manner if the applicant shows to the satisfaction of the responsible Commission that he or she has a legitimate interest and good cause in furtherance of the objectives of this Act, in such declaration or clarification:

Provided that prior to the responsible Commission making an affirmative decision under this section, it shall grant the opportunity to the affected party to make representations on the matter.

(2) No information obtained pursuant to subsection (1) shall be published or in any way made public except with prior written authority of the responsible Commission.

(3) Any person who—

(a) publishes or in any way makes public any information obtained under the foregoing sections without prior permission of the responsible Commission;

(b) knowingly republishes or otherwise disseminates or discloses to another person information to which this section relates where—

(i) such information was disclosed to himself or to some other person; or

(ii) such information was obtained in contravention of this Act,

shall be guilty of an offence and liable on conviction to imprisonment for five years or to a fine not exceeding five hundred thousand shillings, or to both.

REPUBLIC OF KENYA

TWELFTH PARLIAMENT | FIFTH SESSION

THE SENATE

INVITATION FOR PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA

At the sitting of the Senate held on Wednesday 14th July, 2021, the Bills listed at the second column below were introduced in the Senate by way of First Reading and thereafter stood committed to the respective Standing Committees indicated at the third column.

Pursuant to the provisions of Article 118 of the Constitution and Standing Order 140 (5) of the Senate Standing Orders, the Committees now invite interested members of the public to submit any representations that they may have on the Bills by way of written memoranda.

The Memoranda may be sent **by email** on the address: csenate@parliament.go.ke and copied to the respective Committee email addresses indicated at the fourth column below, to be received on or before **Friday, 6th August , 2021 at 5.00 p.m.**

	Bill	Committee Referred To	Email Address
a)	The Lifestyle Audit Bill (Senate Bills No. 36 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	senatejlahrc@parliament.go.ke
b)	The Intergovernmental Relations (Amendment) Bill (Senate Bills No. 37 of 2021)	Standing Committee on Devolution and Intergovernmental Relations	senatedevolution@gmail.com
c)	The County Governments (Amendment) Bill (Senate Bills No. 38 of 2021)	Standing Committee on Devolution and Intergovernmental Relations	senatedevolution@gmail.com

The Bills may be found on the Parliament website at http://www.parliament.go.ke/the-senate/senate-bills.

J.M. NYEGENYE, CBS,
CLERK OF THE SENATE.

06 AUG 2021

ETHICS AND ANTI-CORRUPTION COMMISSION
INTEGRITY CENTRE (Jakaya Kikwete/Valley Road Junction) P.O. Box 61130 – 00200, NAIROBI, Kenya
TEL.: 254 (020) 4997000, MOBILE: 0709 781000; 0730 997000
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When replying please quote:

EACC. 8/6

5th August, 2021

Jeremiah M. Nyengenye, CBS
Clerk of the Senate/ Secretary
Parliamentary Service Commission
Clerk's Chambers, the Senate
Parliament Buildings
NAIROBI

THE SENATE
RECEIVED
06 AUG 2021
REGISTRY

RE: SUBMISSION OF A STAKEHOLDER MEMORANDUM ON THE LIFESTYLE AUDIT BILL, 2021

Kindly refer to your Call for Public Participation on the Lifestyle Audit Bill, 2021 vide a Newspaper Advert dated **16th July, 2021.**

The Ethics and Anti-Corruption Commission (EACC) has scrutinized the Bill, as re-published on 27th May 2021, and noted that the Bill contains some proposals that could monumentally impact on the existing legal and institutional frameworks for the fight against corruption. Notably, some of the clauses in the Bill, if enacted in their current form, would negate the gains made in the fight against corruption so far, under the existing laws.

Accordingly, the Commission hereby submits a Memorandum of reform proposals towards addressing the identified issues of concern in the Bill.

The Commission will be pleased to provide any clarifications and/or additional information that may be required in relation to the Memorandum.

Your continued support in the integrity and anti-corruption reform process is highly appreciated.

TWALIB MBARAK, CBS

DCOM/DLS
Please deal
Deputy Clerk, Senate
Date 06/08/2021

Clerk Assistant
Legal Affairs Committee
Kindly deal
06/08/2021

ETHICS AND ANTI-CORRUPTION COMMISSION

MEMORANDUM BY THE ETHICS AND ANTI-CORRPTION COMMISSION TO THE SENATE COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE LIFESTYLE AUDIT BILL, 2021, (SENATE BILLS NO. 36 OF 2021)

MEMORANDUM BY THE ETHICS AND ANTI-CORRPTION COMMISSION TO THE SENATE COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE LIFESTYLE AUDIT BILL, 2021, (SENATE BILLS NO. 36 OF 2021)

A. INTRODUCTORY BACKGROUND

The Lifestyle Audit Bill, (Senate Bills No. 36 of 2021) is a private members Bill sponsored by Hon. Farhiya Ali Haji. It seeks to provide a legal framework for conducting lifestyle audits, primarily on public and state officers; and to their family members and associates. During the sitting of the Senate held on 14th July, 2021, the Bill was introduced into the Senate by way of First Reading, and stood committed to the Senate Committee on Justice, Legal Affairs and Human Rights. By a notice in the daily newspapers, the Clerk of the Senate invited submission of any representations from interested parties on the Bill, pursuant to Article 118 of the Constitution.

The Commission has scrutinized the Bill, *vis-à-vis* the legislative intention and objective of the proposals, and has prepared this Memorandum in response thereto. The Commission also recalls that it made elaborate submissions on the Bill as originally drafted in 2019 (The Lifestyle Audit (No. 2) Bill, (Senate Bills No. 21 of 2019)) and appreciates that some of the representations made were taken into account and incorporated in the current Bill.

B. MANDATE OF THE ETHICS AND ANTI-CORRUPTION COMMISSION (EACC)

The Commission is established under section 3 of the Ethics and Anti-Corruption Commission Act, 2011 as read with Article 79 of the Constitution, as the Constitutional body mandated to combat and prevent corruption, and promote best practice and standards in ethics and integrity.

The mandate of the Commission is stipulated under Articles 79 and 252 of the Constitution, and further amplified under various statutes that operationalize Chapter Six of the Constitution. These are the statutes that provide the legal framework for the fight against corruption including the Ethics and Anti-Corruption Commission Act, 2011 (EACC Act), Leadership and Integrity Act, 2012 (LIA), Public Officer Ethics Act, 2003 (POEA), Anti-Corruption and Economic Crimes Ac, 2003 (ACECA), and the Bribery Act, 2016.

The specific functions of the Commission as ensuing from the above Constitutional and statutory frameworks include:

i. Investigations into corruption and economic crimes, and violations of codes of conduct, and making of recommendations to the Director of Public Prosecutions pursuant to section 11 of the EACC Act as read with section 35 of ACECA.

ii. Recovery of corruptly acquired assets through investigations or Alternative Dispute Resolution under section 13(d) of the EACC Act as read with section 25A of ACECA, or civil proceedings for forfeiture of unexplained wealth in possession of state and public officers pursuant to section 55 of ACECA.

iii. Oversight over responsible Commissions as they implement Kenya's wealth declaration system under part IV the Public Officer Ethics Act, 2003, pursuant to sections 4(2-5), 6(3) and 52(2) of LIA read together.

iv. Enforcement of Chapter Six of the Constitution and other integrity provisions under POEA and LIA, pursuant to section 4(2) as read with Article 79 of the Constitution.

v. Corruption prevention through systems reviews targeting public entities, public training, education and awareness, and promotion of ethics pursuant to section 11 of the EACC Act.

Significantly, lifestyle audits are an integral part of the investigations undertaken by EACC in the enforcement of the above laws. It is noteworthy that Part VI of the ACECA, specifically section 55 on unexplained wealth, Part IV of POEA and section 19 of LIA contain lifestyle audit frameworks to the extent that their implementation entails inquiry into the lifestyles and material possessions of individuals.

The EACC therefore submits this Memorandum to the Senate Standing Committee of the Senate on Justice, Legal Affairs and Human Rights as a key stakeholder in anti-corruption, and in light of its mandate as set out above. Part I of the Memorandum contains general comments, while Part II contains observations and recommendations relating to the particular provisions in the Bill, in a clause by clause approach, while Part III contains the general recommendation.

C. COMMENTS/OBSERVATIONS BY EACC ON THE LIFESTYLE AUDIT BILL, 2021

PART I: General Observations

1. Relationship with the Constitution and Other Statutes: Articles 10, Chapter 6, Article 201 and Article 232 of the Constitution of Kenya envisage transparency in the continuous vertical and horizontal accountability in all public office and state offices in Kenya. In its earlier Memorandum on the 2019 Bill, the Commission had raised a concern on the statement in the Memorandum of Objects and Reasons that the primary purpose of the Bill is to provide procedures for conducting lifestyle audits on the ground that Kenya does not currently have in place such framework. This concern is still valid in respect of the 2021 Bill.

   It is also observed that there are fragmented provisions in various statutes addressing the same question of lifestyle audit in varying degree and from diverse approaches. These include the Public Officer Ethics Act- Sec. 30; the Leadership and Integrity Act- Sec. 19 and 49; the Public Service (Values and Principles) Act; ACECA, 2003 – (Sec. 26, 27, 28 and 55); the Proceeds of Crime and Anti-Money Laundering Act, 2009. The Bill fails to either augment or consolidate these lifestyle audit provisions into one coherent, consistent and progressive legislation.

   The Commission still proposes that the Memorandum of Objects be expanded to cover the following salient requirements-

i) Need for harmonization, and where appropriate consolidation, of the lifestyle audits provisions fragmented in various statutes;

ii) Need to address the gaps in existing provisions that relate to lifestyle audits;

iii) Responding to contemporary corruption trends and challenges in the fight against corruption. The emerging public interest in the fight against corruption is disgorgement of gains emanating from corruption and economic crimes and adoption of effective and deterrent measures that would make corruption a high risk low gain venture.

2. Observations on Conceptual and Structural Consistency

The Lifestyle Audit Bill, 2021 as designed, would make it practically impossible to achieve the very purpose for which lifestyle audits are undertaken universally, namely: to ascertain consistency between a person's living standards with their lawfully obtained and reported income and recover any unexplained wealth. Notably, the Bill adopts the commonly accepted definition for lifestyle audit to be *"an investigative audit of a person's living standards to ascertain consistency with a person's lawfully obtained and reported income."* However, the Bill establishes pre-audit thresholds and processes that are self-sabotaging and go well beyond the concerns of human rights to defeat or substantially constrain the commencement of a lifestyle audit irrespective of the outcome. In particular, section 5 provides for contradictory procedures and requirements that raise a permanent block in the way of lifestyle audit. No attempt has been made at reconciling the pre-audit procedures to make them work in practice.

The Bill is conceptualized for recovery of assets in cash only. For example, the Bill addresses and provides procedures for freezing and forfeiture related to cash, specifically cash in bank accounts. It fails to address all other asset types and asset classes that would ordinarily comprise a person's wealth. This is a major gap that calls for structural changes in the Bill.

PART II: COMMENTS/OBSERVATIONS ON THE VARIOUS PROVISIONS

1. Section 2 - Definitions and interpretation of various terms and concepts: In the definition of "Commission" the EACC Act is wrongly indicated as Ethics and Anti-Corruption Act. This should be corrected to "Ethics and Anti-Corruption Commission Act".

2. Section 3: Standards of professional conduct when carrying out a lifestyle audit- Subsection 3(c) provides for "confidentiality" as a standard for lifestyle audit. However, confidentiality is only applicable when lifestyle audit is integrated in programmes for continuous enhancement of integrity in the public service. These would include pre-recruitment assessment of suitability and assessment of predisposition to fraud in deployment to corruption prone areas. If it is used as an investigation tool, as consistently adopted in the Bill, confidentiality would not apply. Professionalism and

objectivity would be the applicable standards. Secondly, when lifestyle audit is triggered by evidence uncovered in the course of a forensic audit or traditional criminal investigations, it may not be possible to treat the criminal aspect with confidentiality.

3. Section 4 - Authority to conduct a lifestyle audit:
    a. The use of the word "authority" in the marginal note is inconsistent with the provisions of the section. It is proposed that the marginal note reads "*Enforcement of the Act*".
    b. There is no subsection (1) in this section. The subsections should be renumbered accordingly.
    c. Subsection (3) mandates all public bodies to cooperate with the Commission whenever the Commission is conducting a lifestyle audit. It is proposed that this should extend to public officers and any other person as well.
4. Section 5 - Lifestyle Audit Process:
    a. The observations herein are in addition to the observations on Conceptual and Structural Consistency in Part 1.
    b. There is need to insert the conjunction "*or*" in subsection 5(1)(a) so that the three conditions precedent are disjunctive and independent.
    c. Subsection 5(1)(b) does not state when or how, or to whom, the public officer was unable to account for their source of income.
    d. In respect of the guarantees provided for in subsection 5(3), various concerns arise. It envisages that a proceeding in the nature of a hearing will take place, yet the audit has not started at this point. There are no set standards on what will be the threshold for a lifestyle audit. Granted that no audit has taken place, what will be the support evidence to satisfy the requirement in 5(3)(e)? Effectively, this subsection places insurmountable pre-conditions for lifestyle audit which would render the law moribund.
    e. The Commission proposes that it should just be sufficient that the professional standards in section 3 have been observed.
5. Section 6 - Unexplained Wealth:
    a. The provisions in this section have conflated a search warrant with a notice to explain. A search warrant cannot be used to explain income or asset.
    b. The provision is confusing as to what would come first, between the application for a warrant and the explanation by the affected officer.
6. Section 7 – Search Warrants: This section fails to address the traditional purpose for a search warrant in lifestyle audits, namely: to search for evidence wherever it could be whether in premises, vehicles aircraft or even on the person, as opposed to persons. It

is recommended that the objects of search warrant listed in the Criminal Procedure Code be maintained. On execution of a warrant, thirty (30) days period is deemed too short. The Commission proposes that the time to execute should be open ended, granted that the officer subject of the warrant has commensurate rights to set aside or review the warrant order within the said period. On the procedure for application for search warrants, it should be made *ex-parte* without notice to the affected person, and the law should be clear on this aspect. This is derived from experience of investigating agencies. The Commission recommends that the current application procedure in the Criminal Procedure Code be applicable in respect of search warrants.

7. Section 11 – Application for an interim freezing order: The duration for an interim freezing order at three months is too short to undertake an objective audit. It is proposed that this be set at six months, granted that there is a procedure to vary, review or discharge the order at any time.

8. Section 13 – Compensation:

    a. The provisions/requirements for compensation are potentially self-defeating on the objectives of the Bill, by placing an onerous responsibility on the investigative agencies as well as making the officers personally liable.

    b. The words "serious default" as used in subsection 13((3)(b) are ambiguous and capable of multiple interpretations.

    c. The provisions will potentially intimidate officers hence detrimental to the objectives of the Bill.

9. Section 14 – Application for an account freezing order:

    a. The Bill only makes provision for freezing of cash accounts in financial institutions. It is silent on the procedure for other types of assets which would ordinarily be unearthed by lifestyle audits or other investigations. The Bill also fails to address advances in technology such as cryptocurrencies.

    b. It should be clarified that freezing orders can also issue, not just in respect to moneys held in bank accounts, but also against other financial institutions such as SACCOs, Insurance Policies, Equities and Voluntary Contribution Pension Schemes, etc. which also hold substantial funds.

    c. The period specified by the court for a freezing order to remain in place at three months is too short to undertake an objective audit. It is proposed that this be set at six months, granted that there is a procedure to vary or set aside the order at any time.

d. The procedure for application of account freezing orders should, just like the proposal on application for search warrants, be made *ex-parte* without notice to the affected person.

10. Section 15 – Setting aside of an account freezing order: The provisions on compensation against the Commission or an officer of the Commission being held personally liable for compensation are onerous, and against the objects of the Bill.

11. Section 16 – Account forfeiture notice: The provisions herein only relate to forfeiture of cash held in an account. It is silent on the procedure for other assets, including cash not held in an account. In addition, the Bill does not address properties or assets held outside the country, and the procedure for their confiscation.

12. Section 17 – Complaints by members of the public: The requirement to submit a complaint with a statutory declaration will potentially discourage reporting, and goes against established corruption reporting standards and good practice worldwide. The provision does not state what would be the effect of an anonymous report, or a report not accompanied by a statutory declaration yet which is proved to be credible.

13. Section 19 – Immediate family: The word "immediate" as used in this section is vague. A definition of the scope of immediate family of a person should be provided.

14. Section 23 – Regulations: This section combines development of Regulations and Guidelines. The two are distinct and separate. The role of the DPP in issuing guidelines on cooperation and collaboration in investigations is misplaced. This role should be reserved for the Commission as the body enforcing the Act.

PART III: GENERAL RECOMMENDATION

In light of the above observations, the Ethics and Anti-Corruption Commission proposes and recommends THAT taking into account that lifestyle audits is conceptualised more of an investigative tool, the Senate may consider anchoring the proposed provisions on lifestyle audits into the existing legal framework for investigation of corruption, economic crimes and related offences. In the event of the Bill proceeding to enactment, the above observations should be factored and incorporated in the Bill.

========== END ==========

Eric Munyao Ngumbi
P.O. Box 104299-0010
NAIROBI.
Email address: engumbi2019@gmail.com
Mobile Phone No. 0721-505299

16th August, 2021

Jeremiah M. Nyegenye, CBS
Clerk of the Senate
Clerk's Chambers, The Senate
Parliament Buildings
NAIROBI

THE SENATE
RECEIVED
24 AUG 2021
DEPUTY CLERK

24 AUG 2021

RE: EXPERT OPINION ON THE LIFESTYLE AUDIT BILL, 2021

I refer to the above matter and your communication dated **16th July, 2021** inviting comments on the Lifestyle Audit Bill, 2021.

This submission stems from my Master of Laws (LL.M) Thesis on Lifestyle Audits in Kenya, which the Senate discussed during the Second Reading of the Lifestyle Audit Bill, 2019, **on 11th March, 2020**. The research work was entitled "Viability of Lifestyle Audits as an Anti-Corruption Strategy in Kenya: A Critical Assessment of the Policy, Legal and Administrative Framework."

Notably, vide a letter dated **22nd April, 2020**, I submitted comments on the initial Lifestyle Audit Bill, 2019. It is appreciated that most of these comments were addressed in the current Bill as republished on **27th May, 2021.**

I have scrutinized the Lifestyle Audit Bill, 2021 and made the following two (2) broad observations:

i) The Bill fails to respond to some of the major challenges impeding effective application of lifestyle audits under the existing anti-corruption frameworks. One such framework is the wealth declaration system, which is inextricably intertwined with lifestyle audits that support effective detection, tracing and recovery of unexplained assets.

24 AUG 2021

ii) The Bill contains some clauses that, if enacted into law as proposed, would not only constrain implementation of lifestyle audits but may also reverse the gains made in the fight against corruption, so far.

To this end, the undersigned submits the attached Memorandum detailing his research-based opinion for consideration by the Committee.

Your kind consideration to formally acknowledge receipt of this contribution will be highly appreciated.

NGUMBI E.M.
Encl.

Copy to: **Sen. Erick Okong'o OMogeni, MP, SC**
Chairperson
Senate Standing Committee on Justice, Legal Affairs,
and Human Rights
Parliament Buildings
NAIROBI.

EXPERT OPINION ON THE LIFESTYLE AUDIT BILL, 2021

(SENATE BILLS NO. 36 OF 2021)

SUBMITTED TO

THE SENATE COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

BY

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Researcher, Constitutionalism and Public Accountability in Africa
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MEMORANDUM TO THE SENATE COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE LIFESTYLE AUDIT BILL, 2021, (SENATE BILLS NO. 36 OF 2021)

1.0 Introduction

1.1 What is a Lifestyle Audit?

A lifestyle audit is an investigative, law enforcement and corruption prevention tool, whose primary objective is to determine whether a person's living standards correspond to their known legitimate sources of income. The lifestyle audit is a fact-finding phase in an investigation process. It entails an in-depth examination of a person's sources of income against expenditure to gather evidence that could potentially be used in administrative interventions or proceedings for breaches of code of conduct, criminal offences, tax liability, confiscation of proceeds and instrumentalities of crime or forfeiture of unexplained assets.

In essence, lifestyle audits are conducted for the purposes of compliance and enforcement of laws, regulations and codes of conduct. Specifically, lifestyle audits have been used to unearth undisclosed or undeclared income or assets and for recovery of illicit or unexplained wealth, among others.

1.2 What Triggers a Lifestyle Audit?

A lifestyle audit is undertaken in circumstances where there is reasonable cause to believe that a person's living standards and/or material wealth cannot be sustained by the known or reported sources of income.

The rationale is to establish whether or not the lifestyle or assets of an individual that are disproportionate to the individual's lawful income may be as a result of corrupt conduct. If the findings of the lifestyle audit are in the affirmative, various legal processes can ensue. First, the unexplained assets can be forfeited back to the state. Second, the suspect may be recommended for prosecution, if the evidence gathered from the lifestyle audit can sustain a conviction.

1.3 What Outcomes Does a Lifestyle Audit Yield?

A lifestyle audit yields various crucial outcomes including the following:

i) Generation of the lifestyle profile of the subject to enable evidence gathering in preparation for subsequent investigation stages;
ii) Identification of any misappropriated or hidden assets for recovery;
iii) Disruption of potential loss of property or continuation of crime;
iv) Identification of any collateral crimes that may have been committed, such as money laundering;

v) Identification of other players linked to the criminal enterprise;
vi) Provision of business intelligence for institutional integrity management;
vii) Exposure of systemic weaknesses to inform operational reforms within an organization or sector.
viii) Enhanced compliance with tax and wealth declaration laws;

1.4 What is the Global Practice?

The potential of lifestyle audits to tame corruption is evident in countries that have intensified its application especially among its public officials. Practitioners have identified Ukraine, Philippines, India, Hong Kong, United Kingdom, India and Rwanda as among the leading jurisdictions that have successfully implemented lifestyle audits through, among others, confiscation of unexplained wealth and intensive verification of assets and liabilities declared by public officials. On its part, South Africa has entrenched the use of Lifestyle Questionnaires in its revenue administration to bolster full disclosure of payable tax by citizens.

Research on international best practice demonstrates that effective application of lifestyle audits requires a multi-pronged strategy that focuses on, among others-

i) Adoption of laws that require compulsory disclosure of conflict of interest and financial information by public officials;
ii) Effective wealth declaration systems;
iii) Legal regimes for disclosure of beneficial ownership of incorporated entities;
iv) Development and maintenance of databases with relevant personal information;
v) Legal regimes for monitoring of financial transactions of individuals both locally and in foreign jurisdictions;
vi) Clear behavioural standards outlined in written codes of conduct for all public officials;
vii) Protection and provision of incentives to whistle blowers and informers.

Notably, there is currently no known country with a dedicated legislation on lifestyle audits. Rather, lifestyle audits across the globe are embedded in the general frameworks for confiscation of unexplained wealth, anti-money laundering, financial and other disclosures, monitoring and reporting of suspicious transactions, revenue collection and management, and regulation of bank accounts held by public officials in foreign jurisdictions. However, Kenya and

South Africa have in the last two years been involved in enacting legislation specifically dedicated to lifestyle audits.

1.5 Does Kenya Currently Have a Lifestyle Audits Framework?

Yes. Kenya has a legal framework for lifestyle audits. Even though the phrase "lifestyle audit" has not been used anywhere in the existing laws, that does not waive the existing legal provisions with lifestyle audit aspects, to the extent that implementation of those provisions entails inquiries or audits into the lifestyles and assets of individuals.

1.5.1 Existing Frameworks on Lifestyle Audits

Among the existing legal frameworks that provide for lifestyle audits, *albeit*, in varying degrees include the following:

i) Sections 26, 27, 28 and 55 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) on the procedures for recovery of unexplained wealth;
ii) Part IV of the Public Officer Ethics Act, 2003 on wealth declarations in the public sector;
iii) Section 19 of the Leadership and Integrity Act, 2012 on the regulation of bank accounts outside Kenya;
iv) Proceeds of Crime and Anti-Money Laundering Act, 2009 as relates to financial reporting.
v) Revenue collection and administration laws.

1.5.2 The Problem with the Current Lifestyle Audits Framework

Lifestyle audits under the existing frameworks have been faced by various challenges. Some of them include the following:

i) Lack of legally-backed mechanisms for information sharing through institutional collaboration and cooperation. In particular, there is no law underpinning proactive exchange or unhindered access to information between EACC and agencies that maintain public registries with databases concerning public officers. This gap is a major obstacle to accessing crucial information for lifestyle audits.

ii) Ineffective wealth declaration system that hinders effective detection of illicit enrichment. Some of the shortfalls of Kenya's wealth declaration system include: restricted access to wealth declaration forms, inadequate verification of declared assets, and capacity challenges in the responsible

Commissions designated under Section 3 of POEA to manage wealth declarations.

iii) Lack of a regulatory framework for special investigative techniques such as surveillance, among others which are important in lifestyle monitoring.

iv) Inadequate Constitutionally permissible limitations to the right to privacy and right to private information impedes lifestyle monitoring.

v) Inadequate mechanisms for public engagement in the detection and reporting of suspect lifestyle audits.

2.0 Is the Lifestyle Audit Bill, 2021 Sufficient and If Not, Why?

The Lifestyle Audit Bill, 2021 seeks to give effect to Article 10 and Chapter 6 of the Constitution; and to provide for the procedure for undertaking lifestyle audits. According to the Memorandum of Objects and Reasons, the purpose of the Bill is to cure a lacuna in law by providing for the legal framework for the conduct of lifestyle audits.

The Bill presupposes a complete absence of a lifestyle audits framework in Kenya. However, this is erroneous since as discussed under part 1.5 of this Memorandum, such framework indeed exists.

An analysis of the Bill reveals various shortfalls that need to be addressed in order to ensure enactment of legislation that will meet its intended objectives. Broadly, two major observations are made:

i) The Bill fails to address major challenges that currently impede effective lifestyle audits under the existing anti-corruption frameworks. For instance, Kenya's wealth declaration system under POEA is inextricably intertwined with lifestyle audits, and is foundational to the detection, tracing and recovery of corruptly acquired assets. However, the system has major gaps that need to be addressed for any legal regime for lifestyle audits in Kenya to succeed.

ii) The Bill contains some clauses that, if enacted into law as proposed, would not only constrain the conduct of lifestyle audits but may also reverse the gains that the country has made in the fight against corruption, so far.

3.0 Observations and Recommendations on the Lifestyle Audit Bill, 2021

The following specific observations and recommendations are made.

3.1 Implementation of Lifestyle Audits

Under Clause 4(3) & (4), the Bill imposes an obligation on all public bodies to cooperate with EACC in its conduct of lifestyle audits. However, the Bill does not provide any sanction or enforcement mechanism where a public entity fails to cooperate with EACC, thus making the cooperation obligation self-defeating.

Further, the Bill limits cooperation with EACC only to public entities yet private entities, such as banking institutions, could similarly be key actors in the lifestyle audit process.

It is thus recommended as follows:

i) Enumerate the specific powers and functions of the Commission in relation to a lifestyle audit, including the power to undertake alternative dispute resolution.
ii) Extend the duty to cooperate with the Commission to private organizations, public officers and any other person.
iii) Criminalize the failure to cooperate with the Commission and attach the criminal liability to the Accounting Officers of the public entities.
iv) Incorporate a new Clause to the effect that "the Commission may require any organization, or person to carry out such functions as may be necessary in ensuring the effective implementation of the Act."
v) Incorporate a new Clause to the effect that "the Commission may move the High Court for appropriate orders to compel performance of any action required of a person or organization in the implementation of the Act."

3.6 Regulations

Clause 23(2) prescribes two broad areas that require Regulations. Even though the subsection is not limited, there are other crucial matters warranting Regulations that should be expressly listed. In this regard, it is recommended that the following matters be incorporated under the clause:

i) Information required for a lifestyle audit.
ii) Prescription of any form necessary under the Act, including the form in which any required declaration may be made.
iii) Responsibilities of public registries and institutions managing databases with information relevant to lifestyle audits.

3.7 Development of Guidelines for Investigations under the Act

Clause 23(3) seeks to empower the DPP to make Regulations for Investigations under the Act, a function constitutionally outside the DPP's office.

Accordingly, it is recommended that the responsibility be left to the Commission, being the body charged investigations under Statutes emanating from Chapter 6 of the Constitution.

3.8 Role of the Declaration of Income, Assets and Liabilities in the Lifestyle Audit Process.

Clauses 24 and 25 recognize the centrality of Kenya's wealth declaration system and its inextricable nexus to the lifestyle audit process. The two clauses propose amendments to the wealth declaration system under POEA.

Clause 24 aims at compelling public officers to submit copies of their wealth declarations to the Commission while Clause 26 seeks to allow public access to wealth declarations.

Besides the two aspects sought to be addressed through the proposed amendments to POEA, there are other major weaknesses in Kenya's wealth declaration system which should equally be addressed to guarantee effective lifestyle audits.

Remarkably, the Kenya's wealth declaration system under part IV of POEA is a key component of the lifestyle audit process and as such, it should be strengthened to address its inherent weaknesses which have been a major obstacle to effective lifestyle audits under the existing legal frameworks.

Accordingly, it is recommended that appropriate amendments to Kenya's Wealth Declaration System currently under Part IV of POEA be undertaken towards the following reform measures:

i) Effective inspection and verification of declarations of income, assets and liabilities.
ii) Reduction of the declaration interval in Kenya from 2 years to 1 year for all state officers, with a further provision requiring a public officer to make declarations at any other time, if so required for the purposes of facilitating investigations.
iii) Centralization of the management of wealth declarations for state officers.
iv) Designation of "Responsible Commissions" for the various public offices currently not catered for in section 3 of POEA, which were created subsequent to the promulgation of the Constitution, 2010.
v) Enhanced scope of declarable assets to include assets held outside Kenya and provide for a framework for automatic forfeiture of undeclared assets to the Government.
vi) Setting of a value threshold for declarable assets to enhance efficiency in the management of the declarations.
vii) Establishment of an integrated database system that interlinks the various public databases that contain records and information relevant to lifestyle audits.
viii) Electronic submission, verification, storage, retrieval and management of wealth declarations.

4.0 Conclusion

The enactment of a dedicated lifestyle audits legislation is a progressive move with great potential to strengthen Kenya's anti-corruption regime. However, for this goal to be achieved, there is need to address the gaps identified in the Bill as well as those in the complementary frameworks such as wealth declaration.

5.0 General Recommendation

Guided by the foregoing analysis, it is recommended that the intended lifestyle audits framework be achieved through review and strengthening of the existing lifestyle audit frameworks discussed under Part 1.5 of this Memorandum.

To this end, it is recommended as follows:

i) That in place of the current Bill, a Lifestyle Audit Laws (Amendment) Bill, 2021 be enacted to appropriately amend to strengthen the various statutes containing lifestyle audit provisions. Among these statutes include the Anti-Corruption and Economic Crimes Act, 2003, Public Officer Ethics Act, 2003 (POEA), Proceeds of Crime and Anti-Money Laundering Act, 2009 and the Leadership and Integrity Act, 2012.

ii) That as an alternative to no. (i) above, a distinct substantive part be incorporated under ACECA harmonizing all the relevant provisions relating to lifestyle audits.

However, if the Bill is progressed to enactment, it should be re-conceptualized to consolidate and harmonize all the various lifestyle audit provisions in the existing statutes into one comprehensive framework.

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

STAKEHOLDER VIEWS ON THE LIFESTYLE AUDIT BILL (SENATE BILL NO. 36 OF 2021)

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
General	The Ethics and Anti-Corruption Commission	Reconsider the Bill in its entirety and in its place review the existing legislations touching on lifestyle audits.	Lifestyle audits are conceptualized more as an investigative tool and ought to be anchored in the existing legal framework. The Bill as drafted would make it practically impossible to achieve its intended purpose. The Bill introduces pre-audit procedures and thresholds that are self-sabotaging and go well beyond human rights concerns. The Bill is conceptualised for recovery of assets in cash only as it provides procedures for freezing and forfeiture related to cash, specifically cash in bank accounts. It fails to address all other asset types and classes that ordinarily comprise a person's wealth which is a major gap that calls for structural changes to the Bill.	**<u>Proposal Adopted</u>** It is imperative that legislation on lifestyle audits be domiciled in the relevant legislation. Sections 26, 27, 28, 29 and 55 of the Anti-Corruption and Economic Crimes Act make provision for lifestyle audit whereas PART VIII of the Proceeds of Crime and Anti-Money Laundering Act makes provision for the freezing and forfeiture of illegally acquired assets. **The Bill be stood down and replaced with amendments to the Anti-Corruption and Economic Crimes Act and the Proceeds of Crime and Anti-Money Laundering Act to insert provisions of the Bill that may be missing**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
				from the two legislations on lifestyle audit and the freezing and forfeiture of illegally acquired assets. The Bill however does not introduce self-sabotaging pre-audit procedures and thresholds as alleged by the EACC. The procedures are to protect public officers from arbitrary harassment and investigations as the law may be misused to target some officers.
	Mr. Eric Munyao Ngumbi	Reconsider the Bill in its entirety and in its place review the existing legislations touching on lifestyle audits.	The Bill fails to address major challenges that currently impede effective lifestyle audits under the existing anti-corruption frameworks. For instance, Kenya's wealth declaration system under the Public Officer Ethics Act is inextricably intertwined with lifestyle audits, and is foundational to the detection, tracing and recovery of corruptly acquired assets. However, the system has major gaps that need to be	**Proposal Adopted** It is imperative that legislation on lifestyle audits be domiciled in the relevant legislation. Sections 26, 27, 28, 29 and 55 of the Anti-Corruption and Economic Crimes Act make provision for lifestyle audit whereas PART VIII of the Proceeds of Crime and Anti-Money

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			addressed for any legal regime for lifestyle audits in Kenya to succeed. The Bill contains some clauses that, if enacted into law as proposed, would not only constrain the conduct of lifestyle audits but may also reverse the gains that the country has made in the fight against corruption, so far. In place of the current Bill, a Lifestyle Audit Laws (Amendment) Bill, 2021 be enacted to appropriately amend to strengthen the various statutes containing lifestyle audit provisions. Among these statutes include the Anti-Corruption and Economic Crimes Act, 2003, Public Officer Ethics Act, 2003 (POEA), Proceeds of Crime and Anti-Money Laundering Act, 2009 and the Leadership and Integrity Act, 2012. Alternatively, a distinct substantive part should be incorporated under ACECA harmonizing all the relevant provisions relating to lifestyle audits.	Laundering Act makes provision for the freezing and forfeiture of illegally acquired assets. **The Bill be stood down and replaced with amendments to the Anti-Corruption and Economic Crimes Act and the Proceeds of Crime and Anti-Money Laundering Act to insert provisions of the Bill that may be missing from the two legislations on lifestyle audit and the freezing and forfeiture of illegally acquired assets.** The Bill however does not introduce self-sabotaging pre-audit procedures and thresholds as alleged by the EACC. The procedures are to protect public officers from arbitrary harassment and investigations as the law may be misused to target some officers.

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			If the Bill is progressed to enactment, it should be re-conceptualized to consolidate and harmonize all the various lifestyle audit provisions in the existing statutes into one comprehensive framework.	
		Review the Bill to harmonise it with the related provisions under Anti-Corruption and Economic Crimes Act and any other relevant statute.	Clauses 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15,16, 18 and 19 of the Bill provide procedures to be followed in undertaking a lifestyle audit. The Bill is, however, silent on what happens to the similar or related framework currently provided under sections 26, 27, 28 and 55 of the Anti-Corruption and Economic Crimes Act. Notably, although the phrase "lifestyle audit" is not used in the Anti-Corruption and Economic Crimes Act, the elaborate legal framework for recovery of unexplained wealth therein is basically what entails a lifestyle audit under the Bill. In the circumstances, the absence of any harmonization of the Bill and the existing laws under the Anti-Corruption and Economic Crimes Act is major gap.	**Proposal Adopted** It is imperative that legislation on lifestyle audits be domiciled in the relevant legislation. Sections 26, 27, 28, 29 and 55 of the Anti-Corruption and Economic Crimes Act make provision for lifestyle audit whereas PART VIII of the Proceeds of Crime and Anti-Money Laundering Act makes provision for the freezing and forfeiture of illegally acquired assets. **The Bill be stood down and replaced with amendments to the Anti-Corruption and Economic Crimes Act and**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
				the Proceeds of Crime and Anti-Money Laundering Act to insert provisions of the Bill that may be missing from the two legislations on lifestyle audit and the freezing and forfeiture of illegally acquired assets.
2	The Ethics and Anti-Corruption Commission	Amend the name of the Ethics and Anti-Corruption Commission Act to properly make reference to it under the definition of the term "Ethics and Anti-Corruption Commission".	The name of the Act is wrongly cited as Ethics and Anti-Corruption Act.	**Proposal Adopted** **The Bill be amended to correct the typographical error.**
3	The Ethics and Anti-Corruption Commission	Delete reference to confidentiality under paragraph (c).	Confidentiality cannot be maintained, e.g. during investigations or when the matter proceeds to court.	**Proposal Rejected** It is imperative that confidentiality be maintained in the conduct of lifestyle audits.
4	The Ethics and Anti-Corruption Commission	Review the clause.	1) The use of the term "authority" in the marginal note is inconsistent with the	**Proposal (1) Rejected** 1) The proposed amendment is not necessary. The

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			provision. The marginal note should read "Enforcement of the Act". 2) Subclause (1) is not properly numbered. 3) The obligation to cooperate with the EACC under subclause (3) should extend to every person.	subject of the clause talks to the authority of the EACC to conduct lifestyle audits. **Proposal (2) Adopted** **2) Amend the Clause to properly number sub-clause (1).** **Proposal (3) Rejected** 3) Obligation to to cooperate with the EACC can only be extended to public bodies. Mandating every person to cooperate with EACC in the conduct of lifestyle audits may infringe on a person's fundamental rights and freedoms under the Constitution.
	Mr. Eric Munyao Ngumbi	The clause be reviewed as to— a) enumerate the specific powers and functions of the Commission in relation to a lifestyle audit, including the	The Bill imposes an obligation on all public bodies to cooperate with EACC in its conduct of lifestyle audits. However, the Bill does not provide any sanction or enforcement mechanism where a public	**Proposal Rejected** a) The powers and functions of the EACC with respect to the conduct of lifestyle audits are clearly stipulated

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
		power to undertake alternative dispute resolution; b) extend the duty to cooperate with the Commission to private organizations, public officers and any other person; c) criminalize the failure to cooperate with the Commission and attach the criminal liability to the Accounting Officers of the public entities; d) incorporate a new Clause to the effect that "the Commission may require any organization, or person to carry out such functions as may be necessary in ensuring the effective implementation of the Act"; and e) incorporate a new Clause to the effect that "the Commission may move the High Court for appropriate orders to compel	entity fails to cooperate with EACC, thus making the cooperation obligation self-defeating. Further, the Bill limits cooperation with EACC only to public entities yet private entities, such as banking institutions, could similarly be key actors in the lifestyle audit process.	in the Bill. In fact, that is more or less the subject of the entire Bill. b) Obligation to to cooperate with the EACC can only be extended to public bodies. Mandating private organisations and other persons to cooperate with EACC in the conduct of lifestyle audits may infringe on private persons' fundamental rights and freedoms under the Constitution **c) Insert a new sub-clause immediately after sub-clause (3) to state as follow—** **(3A) An accounting officer who fails to comply with the requirement to co-operate with the Ethics and Anti-Corruption Commission under sub-section (3) commits an offence and is liable, on**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
		performance of any action required of a person or organization in the implementation of the Act".		**conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both.** d) The EACC should not delegate its functions under the Bill. e) It is not necessary to make provision for the EACC to move to court to compel the performance of certain acts by other parties.
5	The Ethics and Anti-Corruption Commission	Review the clause.	1) There is need to insert the conjunction "or" in paragraph (1)(a) so that the three conditions are disjunctive and independent. 2) Paragraph (1)(b) does not state when or how, or to whom, the public officer was unable to account for their source of income. 3) Subclause (3) introduces insurmountable pre-conditions for lifestyle audit which would render the	**<u>Proposal Rejected</u>** 1) Insertion of the conjunction "or" is not necessary. 2) The proposed amendment is not necessary as the amendment is clear. **Sub-clause (1) be amended to incorporate paragraphs (a) and (b) in one paragraph (a).**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			law moribund. The professional standards under clause 3 are sufficient.	3) Sub-clause (3) does not introduce insurmountable pre-conditions which would render the law moribund as alleged by the EACC. The procedures are very important as they protect public officers from arbitrary harassment and investigations as the law may be misused to target some officers.
	Mr. Eric Munyao Ngumbi	The clause be deleted and substituted with the following new Clause— 5. The Commission may, on its own motion or upon receipt of a complaint, conduct a lifestyle audit where it reasonably suspects that a person's living standards or assets cannot be sufficiently supported by the	The primary goal of lifestyle audits is to detect corrupt conduct by ascertaining if the living standard of an individual is commensurate or in tandem with their income stream. It is a fact finding mission. Clause 5 outlines restrictive pre-conditions to the conduct of a lifestyle audit thus making it literally impossible to conduct a lifestyle audit on a suspect. For instance:	**Proposal Rejected** The Bill does not introduce restrictive pre-conditions which would make it impossible to conduct lifestyle audits as alleged by Mr. Eric Munyao Ngumbi. The procedures are very important as they protect public officers from arbitrary harassment and investigations as the

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
		person's known legitimate sources of income.	a) Clause 5(1)(b) &(c) anticipates advance inquiry processes to be carried out in order to satisfy the listed grounds for initiating a lifestyle audit. According to the Bill, one will have to conduct conventional investigations to determine if a person is either unable to account for their source of income, or has misappropriated funds under their care and trust, before a lifestyle audit can ensue. Certainly, this would be illogical because the pre-conditions are indeed the very basis upon which the lifestyle style audits should be conducted. b) Clause 5(2)(3) avails extra-ordinary safeguards to the subject of a lifestyle audit as though the audit was in itself a trial or conclusive determination of wrongdoing. A lifestyle audit merely serves to establish facts which determines whether or not an enforcement action is necessary. Notably, the clauses elevate individual rights way beyond the wider public interest in an effective fight against corruption, which is itself a major hindrance to the realization of the elevated individual rights.	law may be misused to target some officers.

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			Significantly, the fears sought to be addressed by the impugned sub-clauses are already addressed by the professional and accountability standards prescribed under Clause 3 of the Bill for law enforcement officers.	
6	The Ethics and Anti-Corruption Commission	Review the clause.	1) The provision conflates a search warrant with a notice to explain. A search warrant cannot be used to explain income or assets. 2) The provision is confusing as to what would come first between the application for a warrant and the explanation by the affected officer.	**Proposal (1) Adopted** **1) The clause be amended to delete "search warrant" and replace it with "notice to explain".** **Proposal (2) Rejected** 2) The clause is clear that the EACC would be required to apply for a warrant and after procuring one then compel the affected officer to explain their source of income.
7	The Ethics and Anti-Corruption Commission	Review the clause to—	The provision fails to address the traditional purpose for a search warrant in lifestyle audits, i.e. to search for	**Proposal (a) Adopted with Changes**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
		a) maintain the objects of a search warrant listed in the Criminal Procedure Code; b) provide that the execution of a search warrant be open ended; and c) provide that the application for a search warrant be *ex parte*.	evidence wherever it could be, whether in premises, vehicles, aircraft or even on a person. The execution of a search warrant within thirty days is too short. The experience of investigating agencies indicates that applications for a search warrant be *ex parte* without notice to the affected person.	**a) Include the following among the objects and procedures for procuring a search warrant—** **i. application for the warrant be made to the Magistrates' Court and be subject for review (whether before or after execution) to the High Court;** **ii. application to court to indicate and substantiate that the evidence sought could not be obtained anywhere else;** **iii. application to court to list all the information, documents and evidence being sought through the search warrant; and** **iv. documents and evidence obtained during the search be deposited in court.**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
				Proposal (b) Rejected b) The clause provides for search warrants to be executed within 30 business days from their issuance. This is about 43 calendar days and is sufficient for the execution of a search warrant. In any event, sub-clause (4) provides for the extension of the period with leave of court. **Proposal (c) Adopted** **c) Amend the clause to provide that application for search warrant be made *ex parte*.**
11	The Ethics and Anti-Corruption Commission	Review the clause to increase the duration of an interim freezing order to six months and provide a procedure for its review, varying or discharge.	The duration for an interim freezing order at three months is too short to undertake an objective audit.	**Proposal Adopted** **Amend the clause to increase the duration of an interim freezing order to six months.**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
				Clause 12 makes provision for the varying and discharge of interim freezing orders.
13	The Ethics and Anti-Corruption Commission	Review the clause.	The provisions/requirements for compensation are potentially self-defeating on the objectives of the Bill by placing an onerous responsibility on the investigating agencies as well as making the officers personally liable. The words "serious default" as used in paragraph (3)(b) are ambiguous and capable of multiple interpretations. The provision will potentially intimidate officers hence detrimental to the objectives of the Bill.	**Proposal Rejected** It is imperative to ensure that those tasked with facilitating lifestyle audits do not take advantage of their position to the detriment of other public officers. The term "serious default" is not ambiguous and in any event the determination of the same is to be made by court.
14	The Ethics and Anti-Corruption Commission	Review the clause.	1) The Bill only makes provision for freezing of cash accounts in financial institutions and is silent on the procedure for other types of assets which would ordinarily be unearthed by lifestyle audits or other investigations. The Bill also fails to	**Proposal (1) Rejected** 1) Clause 11 and 12 make provision for interim freezing orders which apply to assets other than moneys. On the other hand, sections 55 and 56 of the Anti-Corruption and

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			address advanced technologies such as cryptocurrencies. 2) There is need for clarification that freezing orders can also issue against other financial institutions such as SACCOs, Insurance Policies, Equities, Voluntary Contribution Schemes etc. which hold substantial sums. 3) The duration for a freezing order at three months is too short to undertake an objective audit. The same should be reviewed to increase the duration of an interim freezing order to six months and provide a procedure for its review, varying or discharge. 4) The experience of investigating agencies indicates that applications for account freezing orders be *ex parte* without notice to the affected person.	Economic Crimes Act and PART VIII of the Proceeds of Crime and Anti-Money Laundering Act make substantive provision for freezing and forfeiture of both monetary and non-monetary assets. **Proposal (2) Rejected** 2) The proposed amendment is not necessary. The language of clause 14 (use of the term "account") does not preclude other financial institutions. **Proposal (3) Adopted** **3) Clause 14(4) be amended to extend the period that an account freezing order can be made from a period 'not exceeding 3 months' to a period 'not exceeding 6 months'.** **Proposal (4) Adopted**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
				4) **Clause 14 be amended to insert a stipulation that an application for an account freezing order be made *ex parte*.**
15	The Ethics and Anti-Corruption Commission	Review the clause.	The provision on compensation against the EACC or its officers being held personally liable for compensation are onerous and against the objects of the Bill.	**Proposal Rejected** It is imperative to ensure that those tasked with facilitating lifestyle audits do not take advantage of their position to the detriment of other public officers.
16	The Ethics and Anti-Corruption Commission	Review the clause.	The provision only relates to forfeiture of cash held in an account and is silent on the procedure for other assets, including cash not held in an account. The Bill also fails to address properties and assets held outside the country and the procedure for their confiscation.	**Proposal Rejected** Clause 11 and 12 make provision for interim freezing orders which apply to assets other than moneys. On the other hand, sections 55 and 56 of the Anti-Corruption and Economic Crimes Act and PART VIII of the Proceeds of Crime and Anti-Money Laundering Act make substantive provision for

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
				freezing and forfeiture of both monetary and non-monetary assets.
17	The Ethics and Anti-Corruption Commission	Review the clause.	The requirement to submit a complaint with a statutory declaration will potentially discourage reporting and goes against established corruption reporting standards and good practice worldwide. The provision also fails to address itself to anonymous reporting or the effect of a complaint not being accompanied by a statutory declaration but which complaint is credible.	**Proposal Rejected** It is imperative that frivolous reporting is discouraged. The submission of a statutory declaration will go a long way in ensuring that and avoid disingenuous reporting.
	Mr. Eric Munyao Ngumbi	Delete subclause (2).	Clause 17(2) imposes an onerous requirement of a Statutory Declaration by persons seeking to report suspected possession of unexplained wealth by another person. This would discourage corruption reporting and also expose whistle-blowers to reprisals. The requirement seeks to oust anonymous reporting which is a	**Proposal Rejected** It is imperative that frivolous reporting is discouraged. The submission of a statutory declaration as proposed under clause 17(2) will go a long way in ensuring that and avoid disingenuous reporting.

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			conventional corruption reporting mechanism that guarantees safety of whistle-blowers.	
19	The Ethics and Anti-Corruption Commission	Review the clause to provide a definition of "immediate family".	The word immediate as used in the provision is vague.	**Proposal Rejected** The use of the term "immediate family" is not ambiguous as claimed by the EACC. In any event, the courts will be at liberty to determine who is immediate family and who is not.
21	Mr. Eric Munyao Ngumbi	Delete the clause.	Clause 21 proposes to introduce the Director of Public Prosecutions in the conduct of a lifestyle audit by empowering the DPP to enter into "Deferred Prosecution Agreements" with persons who are subjects of lifestyle audits. Significantly, until a lifestyle audit is complete, referral of matters warranting prosecution to the DPP cannot be contemplated. Further, lifestyle audits are pure investigative tools that do not necessarily lead to prosecution of the subjects. It is	**Proposal Adopted** **The Bill be amended to delete clause 21. Whereas clause 21 makes reference to a law on deferred prosecution agreements, such a law does not exist and the clause is therefore redundant.**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
			noted that Kenya has so far made tremendous milestones in the recovery of proceeds of corruption through the current legal regime that is non-conviction based. Accordingly, clause 21 on Deferred Prosecution Agreements falls outside the legislative focus of the Bill and should be deleted.	
23	The Ethics and Anti-Corruption Commission	Review the clause.	The provision combines the development of regulations and guidelines which are distinct and separate. The role of the Director of Public Prosecutions in issuing guidelines on cooperation and collaboration is misplaced and should be undertaken by the EACC as the body enforcing the Bill once enacted.	**<u>Proposal Adopted</u>** **Clause 23(3) be amended to replace the Director of Public Prosecutions with the Ethics and Anti-Corruption Commission. The Director of Public Prosecutions has no role in the lifestyle audit process and the function to make cooperation guidelines ought to reside with the Ethics and Anti-Corruption Commission.**
	Mr. Eric Munyao Ngumbi		Clause 23(2) prescribes two broad areas that require Regulations. Even though	**<u>Proposal Rejected</u>**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
		Review the clause to include the following paragraphs under subclause (2)— a) Information required for a lifestyle audit. b) Prescription of any form necessary under the Act, including the form in which any required declaration may be made. c) Responsibilities of public registries and institutions managing databases with information relevant to lifestyle audits.	the subsection is not limited, there are other crucial matters warranting Regulations that should be expressly listed. In this regard, it is recommended that the three additional matters be incorporated under the clause.	Clause 23 sufficiently covers all possible regulations that may be made to facilitate the implementation of the Bill. It is not necessary to list specific regulations to be made.
		Review subclause (3) to retain the EACC with the full authority to make regulations under the Bill.	Clause 23(3) seeks to empower the DPP to make Regulations for Investigations under the Act, a function constitutionally outside the DPP's office. Accordingly, it is recommended that the responsibility be left to the EACC, being the body charged with investigations under statutes emanating from Chapter 6 of the Constitution.	**Proposal Adopted** **Clause 23(3) be amended to replace the Director of Public Prosecutions with the Ethics and Anti-Corruption Commission. The Director of Public Prosecutions has no role in the lifestyle audit process and the function to make cooperation guidelines ought to reside with the**

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
				Ethics and Anti-Corruption Commission.
New Clauses	Mr. Eric Munyao Ngumbi	Review the Bill to further amend the Public Officer Ethics Act to include the following reform measures— a) Effective inspection and verification of declarations of income, assets and liabilities. b) Reduction of the declaration interval in Kenya from 2 years to 1 year for all state officers, with a further provision requiring a public officer to make declarations at any other time, if so required for the purposes of facilitating investigations. c) Centralization of the management of wealth declarations for state officers. d) Designation of "Responsible Commissions" for the	Clauses 24 and 25 recognize the centrality of Kenya's wealth declaration system and its inextricable nexus to the lifestyle audit process. The two clauses propose amendments to the wealth declaration system under the Public Officer Ethics Act. Clause 24 aims at compelling public officers to submit copies of their wealth declarations to the Commission while clause 26 seeks to allow public access to wealth declarations. Besides the two aspects sought to be addressed through the proposed amendments to the Public Officer Ethics Act, there are other major weaknesses in Kenya's wealth declaration system which should equally be addressed to guarantee effective lifestyle audits. Remarkably, the Kenya's wealth declaration system under part IV of the Public Officer Ethics Act is a key component of the lifestyle audit process	**<u>Proposals Rejected</u>** The proposed amendments to the Public Officer Ethics Act are too fundamental to be added to the Bill as amendments at the Committee Stage. The same should be considered separately as stand-alone amendments to the Public Officer Ethics Act.

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
		various public offices currently not catered for in section 3 of the Public Officer Ethics Act, which were created subsequent to the promulgation of the Constitution, 2010. e) Enhanced scope of declarable assets to include assets held outside Kenya and provide for a framework for automatic forfeiture of undeclared assets to the Government. f) Setting of a value threshold for declarable assets to enhance efficiency in the management of the declarations. g) Establishment of an integrated database system that interlinks the various public databases that contain records and information relevant to lifestyle audits. h) Electronic submission, verification, storage,	and as such, it should be strengthened to address its inherent weaknesses which have been a major obstacle to effective lifestyle audits under the existing legal frameworks.	

CLAUSE	STAKEHOLDER	PROPOSAL	RATIONALE	COMMITTEE OBSERVATIONS/ COMMENTS AND DETERMINATION
		retrieval and management of wealth declarations.		

Stakeholders

1. The Ethics and Anti-Corruption Commission
2. Mr. Eric Munyao Ngumbi

KENYA LAW
Where Legal Information is Public Knowledge

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 54 of 2006

DR. CHRISTOPHER NDARATHI MURUNGARU ..... PLAINTIFF

AND

KENYA ANTI-CORRUPTION COMMISSION...1ST DEFENDANT/RESPONDENT

HON. ATTORNEY- GENERAL.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

Introduction

The Application

This judgement relates to an application brought by way of an Originating Summons dated and filed in Court on 1st February, 2006. The Application is supported by the Applicant's Supporting Affidavit sworn on 1st February, 2006 and has extensive annextures Newspaper cuttings containing reports on the Applicant in relation to the question of corruption. The Applicant also filed a Further Affidavit with annextures thereto sworn on 1st September 2006. In further support of his case, the Applicant's Counsel filed skeletal submissions together with lists of decided cases from around the Commonwealth and other countries.

The first Respondent that is to say, the Kenya Anti-Corruption Commission, ***"the Commission"*** filed on 8-10-2006 a Replying Affidavit sworn on 7th February, 2006 by its Director, Retired Justice Aaron Gitonga Ringera, together also with written submissions (skeletal arguments) dated and filed on 14th February, 2006. The First Respondent also filed Revised Submissions in the course of the hearing of the Applicant's Originating Summons. There were also filed on behalf of the First Defendant lists of authorities some similar to those of filed by the Applicant's Counsel.

The 2nd Defendant the Honourable Attorney also filed a Replying Affidavit on 14th February, 2006 sworn by one James Mungai Warui, a Senior State Counsel attached to the State Laws Office and having the conduct of this matter. We will in the course of this judgment make reference to the said Affidavits. So at the commencement of the hearing of the Plaintiff's application all necessary documentation was on record, and at all material time, the Plaintiff was represented by Mr. P.K. Muite,

Senior Counsel appearing together with Kioko Kilukumi, while the first and second Defendants were represented by Prof. Githu Muigai and Mr. ***Warui Mungai*** respectively.

THE FACTS

The facts relating to this Application are not in dispute. The trigger thereto was the letter of Notice by the First Defendant's Director dated 9th January, 2006 addressed to the Plaintiff and which because of its centrality to this whole matter, we beg to set out in full – it carries in its letter head the crest oremblem of the first Defendant, with the words, "***Spear of Integrity,"*** and the First Defendant's Reference – KACC/INN6/36/84) and is addressed as follows-

Hon. Dr. Christopher Murungaru,

Member of Parliament,

Continental House,

Nairobi.

NOTICE TO FURNISH A STATEMENT OF PROPERTY PURSUANT TO SECTION 26 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003.

WHEREAS you Hon. DR. **CHRISTOPHER MURUNGARU**

are reasonably suspected of Corruption and Economic Crime, ***NOW THEREFORE*** TAKE **NOTICE** that you are required to furnish to the Director, Kenya Anti-Corruption Commission, within 7 days of this notice, a written statement enumerating all your property.

The Statement should include, but is not limited to, the following details:

(1) list of all property owned, including money, and date of such acquisition;

(2) detailed particulars of the property, location, and with regards to money details of account (s) held;

(3) detailed particulars specifying how the property was acquired, state further whether it was a purchase, a gift or inheritance and at what consideration, if any, was given for the property including source and mode of financing applied;

(4) list of any other property where you have a direct or indirect interest through a spouse, relative, friend, trust or business associate and provide details of the nature of interest held;

(5) particulars of any corporations, partnerships, businesses, or bodies in which you have a direct or indirect interest and the nature of such interest;

(6) particulars of capital or money market investments (e.g. bonds, stocks, T. Bills, shares, fixed deposits etc.);

(7) Details of your current employment and income,

TAKE FURTHER NOTICE that failure to comply with this ***NOTICE*** is an offence punishable by a fine of upto Kenya Shillings three hundred thousand (Kshs.300,000/=) imprisonment for a term of not exceeding three (3) years or both.

Signed

JUSTICE RTD. AARON G. RINGERA

DIRECTOR/THE CHIEF EXECUTIVE

It is clear from the subsequent correspondence between the Plaintiff's Counsel Paul Kibugi Muite, Senior Counsel aforesaid, that the First Defendant's Director's letter above, triggered the discharge of other bullets, namely, a letter dated 16th January, 2006, from the Plaintiff's Counsel in reply to the Director's Notice aforesaid, and a further volley from the Director dated 23rd January, 2006. Again because of the centrality of the issues later emanating from these exchanges, we set out the said replies to, and from the Director.

Firstly, Mr. P.K. Muite, Senior Counsel's letter. It is as follows-

P.K. MUITE, S.C.

ADVOCATE

c/o **Waruhiu,**

K'owade & Nganga

Advocates.

Electricity House, 6th floor,

NAIROBI.

16th January, 2006.

Justice (Rtd.) Aaron G. Ringera,

The Director

Kenya anti-Corruption

Integrity Centre

P. O. Box 61130 – 00200

NAIROBI.

Dear Judge

STATUTORY NOTICE

The Hon. Dr. Christopher Murungaru has consulted me on your letter to him of 9th January, 2006.

As I mentioned to you on telephone, I shall be out of the country this week and request, for that reason, that further action on this matter be stayed to accord me time to raise with you a number of legal issues which arise from your letter. In this connection and to assist me to raise those issues, I shall be grateful if you will let me know the basis for reasonably suspecting Hon. Dr. Murungaru of "**corruption and economic crime**."

I shall also be grateful to know whether besides the Hon. Dr. Murungaru, there are any other Kenyans to whom you have sent similar letters. It is common knowledge that there are many Kenyans who have been publicly spoken of during the former Presidents' Kenyatta and Moi regimes as having acquired well known and identifiable properties, in either unexplained or known circumstances and to the best of my knowledge they have not been obligated to do what you require of my client. NOT to be discriminated against is provided for in Section 82 of the Constitution of the Republic of Kenya.

To the extent also that Section 26 of the Anti-Corruption and Economic Crimes Act seeks implicitly to negate the Constitutional presumption of innocence and seeks to impose an obligation on a citizen to investigate himself/herself and to provide you with evidence of self-investigation and indeed for citizens to potentially incriminate themselves, the section is in my opinion unconstitutional. But be that as it may, my Client would be happy to furnish you with evidence of how he acquired any property or properties which you yourself identify as belonging to him.

I shall raise those and other issues with you upon my return to the country and trust that in the meantime, you will hold this matter in abeyance.

Yours sincerely,

Signed

P.K. Muite

d.d. The Hon. Dr. Murungaru."

And the First Defendant's Director, replied on 23rd January, 2006 as follows-

"Ref. KACC/INV. 6/36 (144)

Hon. Paul K. Muite, S.C.

Advocate,

P. O. Box 47122-00100

NAIROBI

NOTICE UNDER S. 26 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003 ISSUED

TO THE HON. DR. CHRISTOPHER NDARATHI MURUNGARU

We acknowledge receipt of your letter of 16th January, 2006.

We would respond to your concerns as follows:-

(a) ***the basis for reasonably suspecting Hon. Dr. Murungaru of corruption and economic crimes is information in the hands of the Commission relating to his property.***

(b) similar notices have been issued to several other persons;

(c) there is no prohibition by law on the Kenya Anti-Corruption Commission on who may be the subject matter of such notice and the timing of such notices is at the discretion of the Commission;

(c) the Constitutional presumption of innocence comes into play only once a person has been charged in a Court of Law;

(d) the Act places a positive obligation on your Client to furnish the information set out in the notice and failure or refusal to do so, completes an offence the liability for which is stated in section 26 (2) of the Act.

Please be informed that the subject of a notice does not have to appear in person or by Counsel before the Commission. Indeed the Commission does not entertain such appearances and requires only a written answer to the notice As you are now back, we trust you will advice your client accordingly and we expect his compliance **WITHIN TEN (10) DAYS** from the date of your receipt of this letter.

Signed

A.G. RINGERA"

Threatened with a real possibility of being arraigned in Court for disobedience of the notice to account for his assets and property, the Plaintiff moved the Court for urgent intervention by filing 1st February, 2006, Misc. Civil Application No. 54 of 2006, (OS), being the application the subject of this judgement seeking interpretation of the Constitution and awaiting such interpretation, the intervention of the Court by issuance of an appropriate conservatory order to enforce or secure the enforcement of his fundamental rights pending an exhaustive deliberation of the issue.

On 2nd February, 2006, our brother Hon. Mr. Justice Nyamu declined to issue any interim or conservatory orders, leaving to the Defendants the liberty to arraign the Plaintiff before a subordinate court for the offence of non-compliance with the impugned provisions of Section 26 of the Anti-Corruption and Economic Crimes Act ***(the Act).***

Indeed on 17th February, 2006, the Plaintiff was arraigned before the Chief Magistrate's Court in Anti-Corruption Case No. 11 of 2006 charged with one count of non-compliance with the provisions of Section 26 of the aforesaid Act. He pleaded not guilty and was released on a cash bail of Kshs.200,000/=.

Following the release on bail, and pending the hearing and determination of the constitutional questions he had raised before this Court, the Plaintiff moved the Court of Appeal which on 24th March,

2006 delivered itself and issued a stay order in these terms:-

"We think we should stay and we hereby do, the implementation and enforcement of the NOTICE dated 9th January, 2006 issued by the Director of the Commission to the Applicant and since Criminal Case No. ACC 11 of 2006 in the Magistrate's Court was instituted pursuant to the NOTICE, the hearing of that case is also hereby stayed pending the hearing and determination of the appeal brought to this Court or the hearing and determination of the Applicant's Originating Summons in the High Court whichever is the earlier. In other words, this order of stay does not prevent the High Court from hearing and determining the Constitutionality of the sections of the Act challenged by the Applicant. We also wish to make it abundantly clear that this order of stay does not in any way prevent the Commission from independently investigating the Applicant and if necessary, recommending his being charged with an offence of corruption or economic crime based on the evidence which the Commission may obtain by its own investigations. The costs of the motion before us shall be in the appeal already filed. Those shall be our orders."

In compliance with the order of the Court of Appeal, the subordinate court stayed any further proceedings in Criminal Anti-Corruption Case No. 11 of 2006 between ***REPUBLIC –VS- HON. DR. C.N. MURUNGARU.***

In the course of their submission to this Court, as well as in their written submissions, the Plaintiff's Counsel, Hon. P.K. Muite Senior Counsel as well as Kioko Kilukumi were at pains to emphasise that the Plaintiff does not and cannot seek to prevent investigations and/or prosecution for he or any one else cannot succeed in doing so. The Plaintiff's case is that in carrying out any investigations or prosecutions, his fundamental rights to be presumed innocent, right to silence and the privilege not to incriminate himself, be respected and not be violated by the Defendants. The Plaintiff's Counsel also note that the Defendants have not charged the Plaintiff for any offence of corruption or economic crimes arising from the Defendants' own independent investigations of the Plaintiff.

On that background therefore the Plaintiff has come to this Court, and by the Originating Summons dated and filed on 1st February, 2006, and seeks the following reliefs:-

(1) A declaration that the inherent, inalienable, universal, fundamental, legal and constitutional right to be presumed innocent applies at all times, that is to say, before or prior to investigations, prior to being arraigned in Court.

(2) A declaration that it is not constitutionally permissible for the provisions of Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act to reverse the burden of proof in criminal cases which burden is squarely placed on the shoulders of the investigators and the prosecution by virtue of Section 77 (2) of the Constitution.

(3) A declaration that the First Defendant's statutory requirement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition amount to an intrusion into the Plaintiff's privacy which is not reasonably justifiable in a democratic society.

(4) A declaration that the first Defendant's statutory requirement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition is inhumane, demeaning and degrading treatment in contravention of Section 74 (1) of the Constitution of Kenya;

(5) A declaration that the provisions of Sections 26 (1); 27, and 28 of the Anti-Corruption and Economic Crimes Act are inconsistent with the provisions of Section 70(c), 77 (2) (a) and 77 (7) of

the Constitution and therefore void,

(6) A declaration that the inherent, inalienable, fundamental, legal and Constitutional right against self incrimination protected by the Constitution applies at all times prior to investigation, during investigations, prior to arraignment in court and during trial.

(7) A declaration that pre-trial adverse publicity orchestrated by the First Defendant with or without its connivance, both in the electronic and print media is likely to contravene the Plaintiff's right to a fair hearing guaranteed under Section 77 (1) of the Constitution of Kenya,

(8) A declaration that the Defendants are applying the provisions of the Anti-Corruption and Economic Crimes Act selectively and in a discriminatory manner against the Plaintiff in contravention of the provisions of Section 82 (1) and (2) of the Constitution of Kenya;

(9) A declaration that it is not constitutionally permissible and in accordance with the rule of law, public interest, public policy and public decency for the First Defendant to embark on criminal investigations arbitrarily, in a high handed fashion and in a well calculated witch hunt so as to achieve political mileage and for extraneous purposes not intended at all to uphold and enforce the criminal law and such conduct by the First Defendant denies the applicant the protection of law as guaranteed by Section 70 (a) of the Constitution;

(10) an order directing the First Defendant to forthwith stop contravening and/or violating the aforementioned rights of the Plaintiff in the discharge of its statutory mandate and permanently stay and/or quash the operation of the statutory notices dated 9th January, 2006 issued by the First Defendant;

(11) further, or other relief, direction, writ or order that the Court may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of the Constitution that the Plaintiff has identified as having been, are being, or are likely to be contravened by the Defendants.

(12) That provision be made for the costs of the suit.

THE CONSTITUTIONAL QUESTIONS

In seeking this Court's intervention the Plaintiff has inverted the said declarations and turned them into nine (9) constitutional questions which, as Counsel for the Plaintiff stated in at page 4 paragraph 30 of the Plaintiff's written submissions, are interlinked and prays that this Court to breathe some life to words written in our Constitution over forty (40) years ago. These are the questions-

(i) Does the inherent, inalienable, universal, fundamental, legal and Constitutional right to be presumed innocent apply at all time, that is, prior to investigations, during investigations, prior to being arraigned in court or is it a right that arises only when a person has been charged with a Criminal offence.

(ii) Is it constitutionally permissible for the provisions of Sections 26, 27, 28 and 58 of the Anti-Corruption and Economic Crimes Act to reverse the burden of proof in criminal cases which burden is squarely placed on the shoulders of the investigators and the prosecution by virtue of Section 77 (2) (a) of the Constitution"

(iii) Does the First Defendant's statutory requirement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition amount to an intrusion into his privacy which is not reasonably justifiable in a democratic society"

(iv) Is the first Defendant's statutory statement that the Plaintiff furnishes a list of all the Plaintiff's property and mode of acquisition inhumane, demeaning and degrading treatment in contravention of Section 74 (1) of the Constitution of Kenya"

(v) Are the provisions of Sections 26 (1); 27, 28 and 58 of the Anti-Corruption Act inconsistent with the provisions of Section 70 (a), 70 (c),77 (2) (a); 76 (c), 77 (7) and 82 of the Constitution"

(vi) Does the inherent, inalienable, fundamental or legal and constitutional right against self-incrimination protected by the Constitution apply at all times prior to investigations, prior to arraignment in Court or is it a right that only arises at the trial of a criminal offence"

(vii) Is the pre-trial adverse publicity orchestrated by the First Defendant and/or carried out with its connivance, both in the electronic and print media likely to contravene the right to a fair trial and a fair hearing guaranteed under Section 77 (1) and 77 (9) of the Constitution"

(viii) Are the Defendants applying the provisions of the Anti-Corruption and Economic Crimes Act selectively and in a discriminatory manner against the Plaintiff in contravention of the provisions of Section 82 (1) and (2) of the Constitution of Kenya"

(ix) Is it constitutionally permissible and in accordance with the Rule of Law, public interest, public policy and public decency for the First Defendant to embark on criminal investigations arbitrarily in a high-handed fashion and in a well calculated witch hunt so as to achieve political mileage and for extraneous purposes not intended at all to uphold and enforce the criminal law or does such conduct by the First Defendant deny the suspect the protection of law guaranteed by Section 70 (a) of the Constitution"

We accept the opinion expressed by learned Counsel for the Plaintiff in paragraph 3.2 of their written submissions that answers to all these questions are critical in view of the opinion of the first Defendant's Director, who is also a retired Judge of Appeal in his letter of 23rd January, 2006, paragraph (d)-

"(d) *The Constitutional presumption of innocence comes into play only once a person has been charged in a court of law".*

THE DEFENDANTS' REPLIES

The Defendant as noted already, filed two Affidavits. Firstly, there was the Replying Affidavit of Aaron Gitonga Ringera, the First Defendant's Director/Chief Executive Officer sworn on 7th February, 2006. There is also the Replying Affidavit of James Mungai Warui, sworn on 14th February, 2006 on behalf of the Second Defendant, the Hon. the Attorney-General. The position of both Defendants on these questions is crystal clear, that the presumption of innocence, the right to silence and the privilege against self incrimination can only arise at the trial stage, when a suspect has been charged in a court of law, and that those rights have no place until and unless a suspect has been taken to a court of law. These positions are expressed as follows in the Replying Affidavits of respectively, Aaron Gitonga Ringera (paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 inclusive that:-

(a) *the Constitutional right of the Applicant to be presumed innocent until he is proved guilty or has pleaded guilty is only applicable in circumstances of a person already charged with a criminal offence and the same does not prohibit an investigator from reasonably suspecting an individual of having committed an offence during investigations* (paragraph 10),

(b) *reasonably suspecting the Plaintiff of having committed an offence in the course of ..... investigations is not tantamount to presuming the suspect guilty of the offence in question* (*paragraph 11*);

(c) *the Constitutional guarantee of the presumption of innocence prior to proof of quilt does not extend to the evidentiary burden which the Constitution permits may shift to an accused person* (*paragraph 12*)

(d) the requirement of the Plaintiff to give a detailed report of his property does not amount to intrusion into his privacy as the Plaintiff has, on his own admission, filed similar annual declarations with the Clerk of the National Assembly; (*Paragraph 13),*

(e) section 26 of the Act only applies to the investigation stage which is not part of the proceedings, envisaged by Section 77 of the Constitution of the Republic of Kenya *(paragraph 14),*

(f) the statutory notice issued to the Plaintiff pursuant to Section 26 of the Act does not constitute inhuman degrading or other treatment within the meaning of Section 74 of the Constitution of the Republic of Kenya *(paragraph 15)*

(g) to the extent that Sections 26 (1), 27, and 28 of the Act apply to every Kenyan regardless of race, tribe, place of origin or residence or other local connection, political opinions, colour or creed, the same do not *infringe the provisions of Section 82 of the Constitution of the Republic of Kenya (paragraph 16)*

(h) section 70 of the Constitution of the Republic of Kenya makes every right of the individual subject to the public interest and the rights of other people (*page 17),*

(i) to the extent that Section 26, 27, 28 and 58 of the Act are intended to foster the objective of the Act, namely, to provide for the prevention, investigation and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith, the same are in accordance with public interest and the rights of the larger corpus of Kenyans, *(paragraph 17);*

(j) the request to the Plaintiff to provide certain information does not amount to the Plaintiff investigating himself as alleged but rather it constitutes the Plaintiff's performance of a statutory obligation placed upon the Plaintiff by law (paragraph 18),

And Mr. James Mungai Warui's Replying Affidavit is in like vein –

(a) that Sections 26, 27, 28 (and 58) of the Anti-Corruption and Economic Crimes Act does not offend the provisions of Section 82 of the Constitution or any other Section thereof as the said Sections apply to every Kenyan, regardless of race, tribe, and place of origin or residence, (paragraph 14),

(b) **that the statutory notice requiring the Applicant to furnish a list of all his property and mode of acquisition does not amount to inhumane, demeaning and degrading treatment within the meaning of Section 74 (1) of the Constitution** *(paragraph 13),*

(c) **that the Plaintiffs' application is based on a misapprehension of the respective rights of the Republic and the citizen in criminal cases,** *(paragraph 9)*

(d) ***that the Application by KACC of the provisions of Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act, 2003 against the Applicant has given rise to the operation of two fundamental principles which every democratic society is called upon to apply from time to time namely:-***

(i) that the citizen undertakes to live by the laws which protect him and must accept the penalties that may flow from the application of those laws; and

(ii) that when actions of public officers undermine public confidence, the public is entitled, through criminal trials to know what those officers have done in their name; ***(paragraph 10),***

(e) ***that with coming into force of the Anti-Corruption and Economic Crimes Act, 2006 the first Defendant was entrusted with the primary mandate to carry out investigations into matters involving corruption, economic crimes, and related offences and make reports with recommendations to the Attorney-General*** *(paragraph 4),*

(f) ***that the fight against corruption is one of the major policies of the Government and the Kenya Anti-Corruption Commission was set up pursuant to that policy. I believe that filing and prosecution of the Application is designed to undermine that policy*** *(paragraph 3)*

(g) ***that there is nothing illegal, improper or oppressive in efforts to require the Plaintiff to comply with the notice as, the same is based on the KACC reasonably suspecting the Plaintiff of corruption and economic crimes; (paragraph 7).***

The import of the above cited averments by the Defendants' Director and Senior State Counsel respectively is that the principles of the presumption of innocence, the right to silence and the privilege against self-incrimination can only arise at the trial stage, when a suspect has been charged in a court of law, that the Defendants are carrying out a statutory duty, that the Defendants have not breached or threatened to breach any of the Plaintiff's fundamental rights.

THE PLAINTIFF'S SUBMISSIONS

The Plaintiff's case, according to Hon. P.K. Muite, Senior Counsel for the Plaintiff is essentially premised upon the three pillars of fundamental rights set out in Section 77 of the Constitution of Kenya, namely,

(1) ***the presumption of innocence through due process;***

(2) ***the right to silence,***

(3) ***the right not to be compelled to self-incriminate.***

Senior Counsel submitted that if any of those principles are violated there can be no fair trial and the

Constitutional right to a fair trial guaranteed under Section 77 (1) of the Constitution to a fair trial is violated.

Senior Counsel submitted that this Reference is about how the court should proceed to interpret the Constitution vis-à-vis the provisions of Sections 26, 27, and 28 of the Anti-Corruption and Economic Crimes Act, which Counsel said encroach the provisions of the Constitution. The Reference Senior Counsel reiterated is to seek the objective the founding fathers had in employing the language of the Constitution as set out in Chapter V of the Constitution, the Bill of Rights, the values, and spirit of the Constitution, and what value do we as Kenyans give to the words or language of the Constitution, that it is the judges who give life to the spirit of the Constitution, and strike a balance in those values between the desires of the nation as a whole, and the rights of the individual.

Senior Counsel submitted that being reasonably suspected of a corruption or economic crimes is a serious matter. Counsel gave the example of a suspected murderer – that for a fair trial, the Police who carry out their investigations, are required to caution the suspect that whatever you say may be used in evidence against you.

In anti-corruption and economic crimes investigations, there is no similar caution, the Director of the first Defendant ***"demands"*** evidence so as to charge the suspect for the statement of assets is to be so detailed as to include assets held in trust by friend and relatives, information of a most intrusive nature is sought, and in default prosecution may ensue with a likely conviction, and subjection to a fine and imprisonment or both.

Counsel submitted that the information sought is not for statistical purposes, but more likely for institution of a prosecution against the suspect particularly as the nature of the corruption and economic crime is not specified. The First Defendant cannot attack a suspect without a basis for such suspicion. For instance Counsel said, the First Defendant should say that a suspect owns a prominent building in Nairobi, like International Life House, a farm in Australia, or flats in London. This is the kind of investigation the first Defendant should first confront the suspect with and to confront a citizen without such information is unconstitutional.

Senior Counsel submitted that the First Defendant being a creature of statute it has powers to do that which the statute empowers it to do, and the Director of the First Defendant would be acting ***ultra Vires*** the provisions of the Act if he purported to act merely on the basis of "***reasonably suspected"*** or merely "***on intelligence information***" Without such a basis the First Defendant cannot issue a Demand Notice for information on a person suspected of corruption and economic crimes for if the First Defendant had such information against the Plaintiff, it could merely charge him with corruption.

Senior Counsel referred to Gazette Notice No. 8587dated 19th October, 2006 in which there are references to various projects with an estimated cost of Euros 40 billion, and in respect of which there was no budgetary allocation. Counsel submitted that even if there was no budgetary allocation, there was no such offence under the Anti-Corruption and Economic Crimes Act, unlike Section 128 of the Penal Code ***(Cap 63, Laws of Kenya)*** which creates the offence of neglect of duty which offence relates to public officers, for instance failure to confront a criminal when committing an offence. Besides, Counsel contended the First Plaintiff while he was a Minister, was not an accounting officer.

For the First Defendant to seek information from the Plaintiff on corruption or economic crimes, the Director of the First Defendant must confront the Plaintiff with evidence of corruption, and which the Counsel noted, the said Director had failed to do. Whereas therefore the First Defendant's Director may carry on with its investigations against the Plaintiff, and which investigations the Plaintiff cannot prevent

or stop the Director from carrying out, the Plaintiff contends that he is entitled to his Constitutional guarantees of innocence until charged, to silence, and to non-self incrimination.

In support of these contentions the Plaintiff's Counsel cited both Kenyan, regional and foreign decisions in support of the proposition that the Constitution is the supreme law of the country, and should not unlike an ordinary statute, be interpreted in its literal or pedantic manner. Senior Counsel submitted that the Constitution of a country like that of Kenya, should be interpreted '***purposefully***, and robustly, and broadly in order to realize the spirit and values thereof in accordance with the aspiration of the founding fathers of the nation when the provisions of the Bill of Rights (Cap. V of the Constitution) were entrenched into the Constitution.

The local cases cited were:-

(1) ***REPUBLIC -Vs- EL MANN [1969] E.A.* 420 at page 360.**

This case gave birth to what was referred to in the submissions as the ***EL MANN Doctrine,*** and Mr. P.K. Muite_Senior Counsel dared by virtue of later decisions, to sugest that, ***EL MANN*** decision was made ***per incurian*** or wrongly decided.

In the El Mann case the Court expressed itself thus:-

"We do not deny that in certain contexts a literal interpretation may be called for, but in one cardinal respect we are satisfied that a Constitution, is to be construed in the same way as any legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."

The other cases referred to were ***CRISPUS KARANJA –VS- ATTORNEY-GENERAL*** *(unreported)* H.C. Criminal Application No. 39 of 2000, in which a three (3) judge bench of this Court agreed with the sentiments expressed in the ***EL Mann Case*** *(supra)*. At pages 25-28 of their judgment the Judges expressed themselves as follows:-

"We do not accept the proposition that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme. Were an Act of Parliament is in any way inconsequent with the Constitution, that Act of Parliament, to the extent of that inconsistency becomes void. It gives way to the Constitution. It is our considred view, that Constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way i.e. restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document."

In the case of **MWANGI & 7 OTHERS –VS- ATTORNEY-GENERAL [2002]** 2 K.L.R. 709 at pages 715-716, the court restated its purposive approach to the interpretation of the Constitution when it said-

".....the provisions of the Constitution, shall be construed, as per the spirit, purpose and vision of the makers thereof. Where there is any doubt respecting the extent and scope of any power conferred by the Constitution, the object for which such power was bestowed are to be

considered in the interpretation of the Constitution. To achieve this the Constitution must be read as a whole..... this .....has given birth to the doctrine of purposive interpretation. While interpreting a provision of the Constitution, we have to remember that it is a Constitution, a mechanism under which laws are made and not a mere Act which declares what the law is to be. Recognizing the status of the Constitution, there is room for excluding the general rules of interpretation to see that the purport, spirit and vision of the Constitution are kept intact and in harmony."

In the case of **NJOYA & OTHERS -VS- ATTORNEY-GENERAL & OTHERS [2004]** I.EA. 194 Ringera J (as he then was) at page 206 e.g. said-

"I shall accordingly approach Constitutional Interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land. It is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposefully or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution."

To affirm that is not to deny that words in a constitutional text have certain ordinary and natural meaning in the English or other language employed in the Constitution and that it is the duty of the Court to give effect to such meaning. *It is to hold that the court should not be obsessed with the ordinary and natural meaning of words if to do so would lead to absurdity or plainly dilute or vitiate Constitutional values and principles.* ***And what are those values and principles" I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none inferior or supreme; the Constitution is supreme and they all bow to it. I would also include the thread that runs through the Constitution, the separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms . Those to my mind, are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution."***

In the same ***Njoya Case*** Ringera J. (as he then was) also cited with approval the sentiments expressed by Hon. Samatta C.J. (of Tanzania) in the case of ***NYANABO –VS- ATTORNEY GENERAL [2001] I E.A.*** 194 at page 493-

"We propose to allude to general provisions governing Constitutional Interpretation. These principles may in the interest of brevity, be stated as follows, First the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own kind as reflected in the preamble and fundamental objectives and directive principles of state policy. *Courts must therefore endeavour to avoid crippling it* ***by construing it technically or in a narrow spirit. It must be construed in (line) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As it was stated by Hon. Mr. Justice E.O. Ayoola, a former Chief Justice of Gambia....." a timerous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document"***

Secondly, the provisions touching fundamental rights, have to be interpreted in a broader and liberal manner, thereby jealously protecting and developing dimensions of those rights and

ensuring that our people enjoy those rights. Our young democracy not only functions, but grows and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly constrained."

On this theme, P.K. Muite, Senior Counsel, learned Counsel for the Plaintiff also referred us to a series of cases in which the purposive approach in interpreting the Constitution has been applied by the Constitutional Court in relation to-

(1) ***the Challenge to the entry of a Nolle Prosequi in the case of*** *CRISPUS NJOGU –VS-ATTORNEY-GENERAL* ***(unreported) H.C. Criminal Application No. 39 of 2000), the Court said -***

"It is our considered view that the present practice in our criminal justice system that a *Nolle Prosequi* ***cannot be challenged in a court flies on the face of the doctrine of separation of powers. To say that the Attorney-General's exercise of his powers, as a member of the Executive, cannot be questioned in court when entering a Nolle Prosequi, is to say that the Executive arm of Government is accountable to itself. We find such a proposition to be untenable under the Kenya Constitution.... (page 40.)***

.....It becomes the duty of the court to consider the Constitutional principles that are necessarily implied by the entry of a Nolle Prosequi. If the Court finds that *Constitutional Principles and values* ***will be offended by the entry of a Nolle prosequi, then the court is entitled to reject it. In the light of this Mr. Okumu's restrictive and pedantic way of interpreting the constitution is for rejection*** *(page 28).*

(2) ***The right of accused persons to be supplied with copies of statements made by prosecution witnesses and all other exhibits including documentary exhibits. In the case of GEORGE*** NGODHE JUMA & 2 OTHERS -VS- ATTORNEY GENERAL *(unreported)* ***H.C. Misc. Criminal No. 345 of 2001, the Court said:-***

"Therefore in our considered judgment the provision of the Constitution of Kenya under consideration can have *life and practical meaning* ***only if accused persons are provided with copies of statements made to the Police by persons who will or may be called to testify as witnesses for the prosecution as well as copies of the exhibits which are to be offered in evidence for the prosecution..... obviously the Constitutional rights to be represented by a lawyer of one's choice would be meaningless if it did not mean informed representation;***

(4) ***the right to anticipatory bail or bail pending arrest. In*** *SAMUEL MUCIRI W' NJUGUNA –VS- REPUBLIC (unreported)* ***H.C. Criminal Case No. 710 of 2002), using the broad, liberal and purposeful approach in interpretation of Section of the Constitution, the Court at pages 24-25, 29,*** *said-*

" We are further of the humble opinion that the right to anticipatory bail has to be called out where there are circumstances of serious breaches of a citizens rights by an organ of state which is supposed to protect the same."

Counsel for the Plaintiff also relied on the United States case of ***WEEMS –VS- U.S***. [1910] 217 US 349, reproduced from an address by Hon Mr. Justice P.N. Bhagwati, Chief Justice of India in ***Developing Human Rights Jurisprudence Vol. 7, Seventh Judicial Colloquim on the Domestic Application of International Human Rights Norms*** (Legal and Constitutional Affairs Division, Commonwealth Secretariat, where the Supreme Court of the United States said-

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not therefore, be necessarily confined to the form that evil has therefore taken. These works changes, brings into existence new conditions and purposes. Therefore a principle to be vital, must be capable of wider application than the mischief which it gave birth. This is peculiarly of Constitutions. They are to use the words of Chief Justice Marshal, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and the provision of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared might be lost and this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

Learned Counsel for the Plaintiff also referred to decisions on the construction of similar provisions of the Constitution in several other countries, including South Africa.I **(PARK-ROSS & OTHERS –VS- DIRECTOR OF OFFICE OF SERIOUS ECONOMIC OFFENCES, [1995] LRC 178, 189** (e.g Namibia and Canada where Counsel submitted, the courts took a liberal, broad, generous, and purposeful approach to the interpretation of the Constitution.

The question before us is whether the Anti-Corruption and Economic Crimes Act 2003 (No. 3 of 2003) and (hereinafter referred to as ***"the Act"*** or those sections of the Act dealing with inquiries or investigations (S. 26 (1)). ***(Statements of a suspected property***).

(S. 27) requirement to provide (***S.28***) production of records, presumption of corruption if act show and (***S.58***) are in conflict with the Constitution of Kenya.

We have already set out the facts that triggered this Application and hence this judgement. The above provisions of the Act are compelling and inquisitorial in nature. They are by their terms designed to obtain information from persons reasonably suspected of corruption or other economic crimes, without their consent or involuntary written particulars of their assets or properties together with the mode, means and times of acquisition, and the production of records and in relation to such assets and property. In default a person so suspected commits and is guilty of an offence of non-compliance with that requirement to furnish such particulars. The Applicant Dr. Christopher Ndarathi Murungaru an Honourable Member of the 9th Kenyan Parliament contends that these provisions of the Act violate his fundamental rights as guaranteed in the Constitution. The Respondents contend otherwise.

THE APPLICANT'S CASE STATED

We have largely set out the Applicant's case in the foregoing passages of this judgement. The Applicant has however stated his case in the form of nine (9) questions which we have already set out at the beginning of our judgement. All the questions revolve around the Notice dated 9th and 23rd January, 2006 from the Director of the First Defendant addressed to the Plaintiff, and which the Applicant claims is unconstitutional on the grounds that the notice –

(a) ***violates the Plaintiff's right to be presumed innocent;***

(b) ***reverses the burden of proof required in criminal cases;***

(c) ***intrudes into the privacy of the Applicant in a manner unjustified in a***

democratic society;

(d) violates the Plaintiff's right not to self incriminate, and

(e) that the requirement to provide information to the First Defendant is inhuman, demeaning and degrading treatment.

The Plaintiff complains that the provisions of Sections 26 91) & (2) 27, 28 and 58 of the Act are unconstitutional, that the First Defendant has discriminated against the Plaintiff, that he has been subjected to adverse pre-trial publicity and that such publicity has contravened the Plaintiff's right to a fair trial, and that the investigations against the Plaintiff have been arbitrary and high-handed and therefore against public policy, public interest and the rule of law.

THE DEFENDANT'S CASE

The Defendants contend the Plaintiff's contention that Sections 26 (1), 27, 28 and 58 of the Act conflict with the Constitution. Counsel for the Defendants submit that if the provisions ***prima facie*** appear to conflict with any particular right, then such right may be limited in terms of Section 70 (a) & (c) of the Constitution, "***that the provisions of this Chapter shall have effect for the purpose of affording protection*** *subject to such limitations of that* ***protection as are contained in those provisions (Sections 70-83), being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."***

The Defendants also contend that an investigation is not a trial in terms of Section 77 (2) (a) and 77 (7) of the Constitution.

THE TEST FOR CONSTITUTIONAL ISSUE

In their submissions, the First Defendant's Counsel Prof Githu Muigai contended and we agree with his contention, that not every complaint amounts to a Constitutional issue under Section 84 (1) of the Constitution. Section 84 (1) provides:-

"84(1) Subject to subsection (b), if a person alleges that any of the provisions of sections 70 t0 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained if another person alleges a contravention in relation the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

Section 70 (a) and (c) which provide for protection to life, liberty, security of the person and the protection of the law, (70 (a)) and protection for the privacy of his home and other property and from deprivation of property without compensation), (S. 70 (c) together with, Section 74 ***(protection against inhuman or degrading treatment)*** Section 76 protection against arbitrary search or entry), Section 77 (2) (a) (***a right to be presumed innocent***), Section 77 (7) (the right not to self-incriminate whilst in a trial) are part of Chapter V – ***PROTECTION OF FUNDAMENTAL FREEDOMS OF INDIVIDUAL*** of the Constitution of Kenya, and read this:-

"70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, or residence or

other local connexion, political opinions, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:-

(a) *life, liberty, security of the person and the protection of the law,*

(b) .....

(c) *protection of the privacy of his home and other property and from deprivation of property without compensation,*

(d) *the provisions of this Chapter (SS.80-83) shall have effect for the purpose of affording protection to those rights and* ***freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not-prejudice the rights and freedoms of others or the public interest."***

Section 74 deals with protection from inhuman treatment and reads:-

"74. (1) ***No person shall be subject to torture, inhuman or degrading punishment or other treatment;***

(2) ***Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."***

Section 76 as already noted above deals with protection against arbitrary search or entry of any person's premises except with the consent of that person. Again there are exceptions if said search is authorized by law or if such search or entry is required in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilization of any property in such manner as to promote the public benefit (Section 76 (2) (a), the promotion of the rights or freedoms of other persons; (Section 176 (2) (b), or purposes of collection of tax, rates dues or to carry out works if the property belongs to the Government (S. 76 (2) (c) or enforcement or execution of a judgement S. 76(1) (d) or under the "***search or entry is shown not to be ..... reasonably required in a democratic society."***

Section 77 (1) and more so 77 (2) upon which the Plaintiff greatly relied, as we have already mentioned above, read as follows:-

77 (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court and established by law.

(2) ***Every person who is charged with a criminal offence-***

(a) ***shall be presumed innocent until he is proved or has pleaded guilty;***

(b)

(c)

And Section 77 (7) reads-

"(7) **No person who is tried for a criminal offence shall be compelled to give evidence at the trial;**

Section 84 (2) of the Constitution grants the Court original jurisdiction a jurisdiction ***sui generis*** to Chapter V of the Constitution, to hear and determine an application brought by a person in pursuance of subsection (1) – alleging a contravention of that person's fundamental rights and freedoms or the fundamental rights and freedoms of another person who is detained. In exercise of this jurisdiction, the Court may issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Section 70 to 83 inclusive of the Constitution (and in this matter Sections 70 (a) & (c), 74, 76, and 77 (1) (2) (a) and 77 (7) thereof).

The Anti-Corruption and Economic Crimes Act provides in Sections 27-28 and 58 thereof as follows-

"26(1) the Commission may by notice on writing require a person reasonably suspected of corruption, or economic crime to furnish within a reasonable time specified in the notice, a written statement-

(a) enumerating the suspected person's property and the times it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property that was acquired by purchase, gift, inheritance or in some other manner, and what consideration if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(3) The powers of the Commission under this Section may be exercised only by the Director;

And Section 27 requires other persons to provide information in these terms:-

"27 (1) The Commission may by notice in writing require an associate of a suspected person to provide, within a reasonable time specified in the notice, a written statement of the associate's property at the time specified in the notice.

(2) In subsection (1) "associate of a suspected person" means a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.

(3) The Commission may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents in the person's possession that relate to a person suspected of corruption or economic crime.

(4) A person who neglects or fails to comply with a requirement under this section is guilty

of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(4) No requirement under this section requires anything to be disclosed, that is protected by privilege of Advocates including anything protected by section 134 or 137 of the Economic Act.

Section 28 relating to production of records says-

28 (1) The Commission may by notice in writing –

(a) require a person, whether or not suspected of corruption or economic crime to produce specified records in his possession that may be required for an investigation; and

(b) require that person or any other to provide explanations or information within his knowledge with respect to such records whether the records were produced by the person or not.

(2) A requirement under subsection (1) (b) may include a requirement to attend personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

(4) The six month(s) limitation in subsection (3) does not prevent the commission from making further requirements for further periods of time as so long as the period of time in respect of which each requirement is made does not exceed six months.

(5) Without affecting the operation of section 30, the Commission may make copies of or take extracts from any record produced pursuant to a requirement under this section.

(6) A requirement under this section to produce a record stored in electronic form is a requirement-

(a) to reduce the record to hard copy and produce it; and

(b) if specifically required, to produce a copy of the record in electronic form.

(7) In this section "records" includes books, returns, book accounts or other accounts, reports, legal or business documents and correspondence other than correspondence of a strictly personal nature.

(8) The Commission may by notice in writing require a person to produce for inspection, within a reasonable time specified in the notice, any property in the person's possession, being property of a person reasonably suspected of corruption or economic crime.

(9) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(10) No requirement under this section requires anything to be disclosed that is protected by the privilege of Advocates including protected by Section 134 or 137 of the Evidence Act.

And Section 58 which is contained within ***PART VII –EVIDENCE***- (of the Act), relates to presumption of corruption if an act of corruption is shown and says-

"58. If a person is accused of an offence under Part V an element of which is that an act was done corruptly and the accused person is proved to have done that act the person shall be presumed to have done that act corruptly unless the contrary is proved."

Having set out the relevant provisions of the Anti-Corruption and Economic Crimes Act (***'the Act as already referred to above)***, we now consider, as the Petitioner contends, whether Section 26, 27, 28 and 58 of the Act are in conflict with the Constitution and if so, whether those provisions are saved or rescued as the Defendants contend by Section 70 itself of the Constitution.

THE PROPER APPROACH TO CONSTITUTIONAL INTERPRETATION.

Before doing so however, it is necessary, we think, to deal with the approach to which the Court should adopt in consideration of the respective contentions, and with the question of where the onus lies in respect of each contention.

It is really not a show of legal or great learning to say that the Constitution of Kenya, or of any other country is a basic law, upon which all the fundamental organs of an organized modern (or one aspiring to be so organized and modern), is the supreme law of such state or country. In Kenya, this fundamental principle of supremacy of the Constitution is to be found in Section 3 of the Constitution which says-

"3. ***This is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency be void."***

This provision was not made in the ***Constitution of Kenya*** set out in Schedule 2 of ***the Kenya Independence order in Council 1963*** Statutory Instrument 1963 No. 1968 published in the Kenya Gazette as Legal Notice No. 718 of 10th December, 1963 and which came into force **immediately** before 12th **December, 1963** (*midnight of the Kenya Independence day).* This provision was crafted later in the amendments carried in the "***majimbo"*** Regional Independence Constitution from the declaration of the Republic on 12th December, 1964 to consolidation of the Constitutional Provisions Act No. 5 of 1969.

Since therefore the consolidation Constitution of the Republican Constitution, and the declaration of the supremacy of the Constitution, both academic writers and researchers on Constitutional law have expressed their preferences on what the correct way to approach the interpretation of the provisions of this basic or supreme law.

Some, like Hon. P.K. Muite, Senior Counsel, learned Counsel for the Plaintiff have submitted widely on the values and principles and spirit of the Constitution, what Tebutt J. in ***PARK-ROSS –VS-DIRECTOR OF OSEO [1995] ILRL 178*** at 188 said "*with an extravagance of expression*" ***yet others sometimes guarded and at other times not so well guarded in their choice of expression, have fallen into the temptation and trap of resorting to language which helps little in the interpretation process of the Constitution. Tags and labels such as "liberal", broad", "generous", and***

"purposive" ***were generously employed by learned Counsel for the Plaintiff. Said Counsel also drew deeply from both the local and bounteous*** of comparative foreign case law from countries with similar provisions in their Constitutions enshrining fundamental rights and freedoms.

Counsel for both the Plaintiff and the Defendants did not spare us, but provided long lists of cases and materials on the question of the Interpretation of the Constitution liberally, broadly, generously and purposively, from as far afield as the ***U.S. WEEMS –VS- U.S. (supra), Namibia, (FREIMAR SA. –Vs. PROSECUTOR GENERAL OF NAMIBIA & ANOTHER [1994] @ LRC, 251***, at page 257, C & L where the High Court of Namibia interpreting the words "***all persons charged with an offence shall be presumed innocent until proven guilty according to law" extended the ordinary and natural meaning of those words to include not only to those accused persons, but also to other persons whose rights are affected by a forfeiture order made after conviction, South Africa (Z STATE –VS- ZUMA & ANOTHER[1995] ILRC, (45) and India, Developing Human Rights Jurisprudence Vol. 7. (Liberty and Security of the person in India with particular access to Courts by Hon. Mr. Justice Bwagwati*** *(supra).*

Unlike the South African Constitution which in Section 35 (1) provides that in interpreting the provisions of Chapter 3 (which provides for fundamental rights and freedoms), the court "***may have regard to comparable foreign case law"*** our Constitution has no similar provision. Our approach to application of foreign case law must be done with circumspection, firstly because we do not have an express provision to borrow with largesse from foreign case law, but secondly more importantly, because of the different social structures and milieu existing in other countries as compared to us in Kenya, and indeed the different historical backgrounds against which the various constitutions came into being. Our Constitution must in our view be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind not only the particular provisions of the Constitution but also the provisions of the law which is sought to be impugned.

In this regard both Hon. P.K. Muite Senior Counsel and Kioko Kilukumi, told us in their submissions that the choice was that of this court to elect whether or not to uphold constitutional values and principles which underwrite the right to be presumed innocent; the right to silence and the privilege against self incrimination or for this court to engage in "***austerity of tabulated legalism***" which will choke the Constitution; rob off its potency and efficacy; dilute, vitiate, cripple and dismantle the fundamental rights and freedoms; deny suspects real and practical protection offered by the Constitution thereby undermining the integrity of our criminal justice system and ultimately frustrate the aspirations and expectations of the Kenyan people.

Counsel also submitted that the privilege against self-incrimination and the right of silence are the two rights which are internationally recognized as being at the heart of a fair trial, that without the availability of the right to silence and privilege against self-incrimination at the investigation stage, the ensuing trial cannot be fair, as guaranteed under Section 77 (1) and 77 (2) (a) of the Constitution, that rights declared will be the lost in reality.

For these contentions said learned Counsel relied upon academic opinions expressed by such authors as ***Stephen Odgers*** "***Police Interrogation and the Right to Silence***" published in the Australian Law Journal Vol. 59, ***(February 1985)***, where at page 85, after noting that the state, in any contest with an individual citizen possesses considerable resources, enormous power, a huge organization and trained officers means that the imbalance should be overcome not only at the trial but also at the point of criminal investigations for otherwise trial safeguards would be meaningless if the state ensured conviction before trial by compelling a full confession from the accused; that an individual may justifiably refuse to respond to unfounded rumours or "***fishing expeditions.***"

Counsel also relied upon an article by ***D.J. Galligan*** published in ***Current Legal Problems*** 1998 (a publication of the Faculty of Laws, University College London,) entitled "***The Right to Silence***" at page 87 –

*.....**under the present conditions, the right to silence is indispensable to the right to a fair trial, the question remains whether there is a basis for the right to silence in values independent of the trial.... and opines that the right to silence is linked to the general principle that the state must prove its case against the suspect not only at the trial but also in pre-trial matters. The burden of proof lies on the state and the burden is not achieved by requiring the suspect to provide incriminating evidence..... hence the right to silence is closely associated with the application of the right against self-incrimination.***

In his Doctoral thesis – Professor Muigai expressed a similar view – "***as a matter of legal logic the right against self-incrimination can only make sense if all persons who can potentially be prosecuted enjoy the same right. For those already prosecuted, the benefit of the right may be lost.***"

Counsel for the Plaintiff also found succor in the Article "***HUMAN RIGHTS, SERIOUS CRIME AND CRIMINAL PROCEDURE*** by Andrew Ashworth, Q.C. Vinerian Professor of English Law, All Souls College, Oxford (published under the auspices of the (***HAMLYN TRUST***) where at page 18, the author observes:-

"The privilege against self-incrimination is declared in Article 14 (3) (g) of the International Covenant on Civil and Political Rights, the right "not to be compelled to testify against himself or to confess guilt" and it is one of two closely linked rights – the other is the right to silence which the Scrasbourg Court has implied in Article t, on the basis that the two rights are internationally recognized as lying at the heart of the notion of a fair trial. The privilege against self-incrimination runs deeper than the right of silence, that right restricts the extent to which adverse inferences may be drawn from a failure to answer questions or to comment on statements, whereas the privilege restricts the extent to which a citizen can be placed under a duty to answer questions or to supply information."

In Ex-parte ***Y.P. Sennik REPUBLIC –VS- THE SURBODINATE COURT OF THE 1ST CLASS MAGISTRATE*** AT ***CITY HALL, NAIROBI & ATTORNEY GENERAL***, Exparte Youginder Pall Sennik & C.G. ***RETREAT LTD*** H.C. Misc.Application No. 652 of 2005) Nyamu J. considered the International Covenant on Civil and Political Rights, in the context of what constitutes a fair hearing in terms of Section 77 of the Constitution of Kenya and these are-

*(1) **the right to equality before the law;***

(2) **the right to presumption of innocence;**

(3) **the right to be tried by a competent, independent and impartial tribunal established by law;**

(5) **the right to a fair hearing;**

(6) **the right to equality of arms and adversarial proceedings.**

Senior Counsel, Hon. P.K. Muite also treated us to a cross-section of decisions by the United States

Supreme Court, the ***CANADIAN APPROACH, the ENGLISH*** and ***SOUTH AFRICAN*** approaches. We will give a few more examples:-

In ***BROWN –VS- STOTT [2002] 2 LRC 612 at 620 d*** & (e), the House of Lords, Britain's highest court commenting on the European Bill of Rights held that-

"The European Court of Human Rights has recognized a right to silence and a right against self-incrimination at trial, both derived from Article 6 (1) of the Convention. There is no difference in principle between a requirement to admit the driving of a car made out of court before trial, and a similar requirement to testify at trial. To be effective, the right to silence and the right not to incriminate oneself at trial imply recognition of similar rights at the stage when the potential accused is a suspect being questioned in the course of a criminal investigation. To assess whether a person has incriminated himself or herself, the essential consideration is the use to which the evidence obtained under compulsion will be put. The concept is not confined to admissions of wrong or to remarks which are directly incriminating.....

....The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings." (ibid pages 627,i - 628(a), 629, f, g, 634; & 638 h).

The House of Lords (at pages 648 i and 649 a) continued-

"It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the serious fraud office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover, the fact that the statements were made by the Applicant prior to his being charged does not prevent their later use in Criminal proceedings from constituting an infringement of the right.....

It was appreciated from an early stage the accused persons right to silence at trial would be worthless if his right of silence and his right against self-incrimination were not available to him from the outset of the criminal investigation. So rules were developed by the judges to ensure that those rights were respected by the court and the police."

The last example we cite is that of the South African cases of ***STATE –VS- ZUMA & OTHERS*** [1995] ILRC 145 page 162 h, and ***OSMAN & ANOTHER –VS- ATTORNEY GENERAL*** [1999] 2 LRC 612; 225 (b), where the South African Supreme Court Appellate Division found recourse in the 1925 case of ***REPUBLIC –Vs- CAMINE*** [1925] A.D. 570 where Innes C.J. at page 575 said-

"It is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced, to do that either before trial, or during the trial. The principle comes to us through the English law; and its roots go back far in history."

Those are in our view perhaps a sufficient survey of the case law in support of the propositions, that the rights of a suspect and an accused person to silence, and against self-incrimination or testifying against self in comparative jurisdictions, U.S.A. India, South Africa, Canada and the United Kingdom of Great Britain and Northern Ireland. We now turn to the analysis of the Kenya law and situation. We will do so from four approaches-

(1) the history of the rule to silence and against self-incrimination,

(2) the Corruption jurisprudence including international instruments,

(3) the Kenya law and situation,

(4) The issue for determination of the Court.

THE RIGHT TO SILENCE AND NON-SELF INCRIMINATION

(a) The Rule

In the foregoing reference to the case of R –Vs- CAMINE (*supra*), Innes C.J. observed that the principle that no one can be compelled to give evidence incriminating himself has its roots far in history.

According to ***PHIPSON ON EVIDENCE*** 8th Edition by Roland Burrows, K.C. Chapter XV, Facts Excluded by Privilege under the Section **CRIMINATING QUESTIONS** at page 188 says-

"No witness whether party or stranger is, except in specified cases, compellable to answer any question or to produce any document the tendency of which was to expose the witness..... to any criminal charge, penalty or forfeiture, that is in the esoteric *Latin Nemo tenetur prodere seipsum,."*

(b) The basis of principle

The principle is based upon the policy of encouraging persons to come forward with evidence to the courts of justice, by protecting them, as far as possible, from injury, or needless annoyance, in consequence of so doing. A sensible compromise has been adopted in the modern state by compelling disclosure, but indemnifying the witness in various respects from its results. For instance under the Evidence Act (Cap 80 Laws of Kenya), Section ***128 provides-***

"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue or in any civil or criminal proceedings, upon the ground that the answer will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind, *but no such answer which a witness is compelled to* ***give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceedings except a prosecution for giving false evidence by such answer."***

(c) The history

It was not always so for at common law. The accused, enjoyed in general no immunity from answering upon oath as to the charges against him. On the contrary, such answers formed an essential feature of all the older modes of trial, from the Saxon ordeal and Norman Combat to the more popular compurgation or wager of law, which, although obsolete in the 16th century was not finally abolished until 1833. It was the same in the ***State Trials*** held before Parliament or the Council., and also other inquiries where the accused was not only put on oath but rigorously interrogated. However in Jury trials the accused was not put on oath, not because of any tenderness but because a denial on oath which in the earlier forms of trial (very much like our traditional ancestors used to do under a **Mugumo** or other local large shade tree), was conclusive in the defendant's favour and was regarded as too easy and decisive a method of self – exoneration to be permitted. In most traditional societies, if a suspect **swore that if I committed the offence for which I am accused let me be struck down by lightining or**

thunder bolt or be bitten by the most poisonous serpent – and this was sufficient to discharge the suspect. The accused had to be tried by the jury's oath not his own. For instance in 1590 in the case ***R. –Vs. Udal, I HOW St. Tr. 1289;),*** in an exceptional concession in a jury trial, an oath was tendered to the defendant-

"**We offer you that favour which never any indicted felony had before – swear** *that you did not and it shall suffice."*

How and why the modern and opposite doctrine came is to be found in the conflict and struggle for supremacy between the Civil Courts to restrict the usurpation of the spiritual or ecclesiastical courts except in matrimonial and testamentary causes, culminating in the enactment of the Ecclesiassical Jurisdiction Act, 1661 which ousted the jurisdiction of the Ecclesiassical courts from administering any oath whereby an accused would be obliged to accuse himself of any crime, or be exposed to any penalty. It was in resisting such an oath in 1590 that the maxim ***nemo tenetur prodere seipsum*** was in terms first put forward (Cullier –Vs-Cullier, Croz Eliz 201).

Phipson observes that the protection was aimed not against self-incrimination **per se** but against its oppressive exaction by the Church for the presumption was not then, as now, in favour of, but against the innocence of the accused. Later on, in the reaction against the tyranny of the **Star Chamber** and the High Commission Courts (abolished in 1641), the claim is no longer confined to ecclesiastical tribunals, stages of procedure, or, as some held, capital charges, but becomes general that no one should be found to criminate himself in any court or any stage of any trial. That also is the ***fons et origo*** of Section 77(1) (a) of our Constitution and similar Constitutions of the Commonwealth tradition.

THE SITUATION TODAY

Today, the citizenry, and the states into which the citizenry are organized are faced with a tyranny, and terror of another kind, namely, the tyranny and terror of organized commercial or sometimes referred to as "***white "collar***" crime because organized crime knows no borders, and is not confined to any one country or groups of countries or continent. It is exacerbated by the new and fast changing communication information technology so that the information available here today is obliterated and transferred to another facility, in another country in another continent by the push and click of a button. To fight such crime needs immense resources, and collaborative effort of various internal and external agencies. That is the background to the ***United Nations*** **Convention against corruption,** done in Arabic, Chinese, English, French, Russian and Spanish texts, equally authentic was formulated a few years ago and of which Kenya is a signatory, and is domesticated under our municipal law by the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION.

This Convention had its antecedents in the following prior multilateral instruments to combat corruption across the world-

(1) The Inter American Convention against Corruption, adopted by the Organisation of American States on 29th March, 1996,

(2) the Convention to fight Corruption involving officials of the European Communities or Officials of the Member States of the European Union, adopted by the Council of the European Union on 26th May, 1997,

(3) the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation of Economic Cooperation and Development on 21st November, 1997,

(4) the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27th January, 1999,

(5) the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4th November, 1999, and

(6) the African Union Convention on Preventing and Combating Corruption adopted by the Heads of State and Government of the African Union on July, 2003, and

(7) the United Nations Convention against Transnational Organized Crime which entered into force on 29th September, 2003.

These instruments are the standards upon which the Kenya Anti-Corruption and Economic Crimes Act must be measured. This is so because, the greatest threat to the socio-economic and political substratum in the 21st Century are the quadruple evils of corruption, terrorism, drug trafficking and their attendant consequence, money laundering. Consequently all trading nations of the world at various stages of civilization and democratization have initiated and/or have passed similar legislation.

COMPARATIVE LEGISLATION AND THE SOCIAL CONTRACT AND EXPECTATIONS OF SOCIETY

In the back-drop of the above cited cases, and multi-lateral instruments, we refer to some countries which have at various times enacted legislation to combat corruption and economic crimes, terrorism, drug trafficking and money laundering, issues which are closely connected and give rise to and are a consequence of the other. These countries with respective legislation are-

(1) Singapore- Prevention of Corruption Act, Cap. 242 – Laws of Singapore,

(2) Northern Ireland – Proceeds of Crime Act, Northern Ireland Order 1996,

(3) Botswana – Corruption and Economic Crimes

Act, 2002 (No. 01 of 2002),

(4) Brunei – Prevention of Corruption Act, (1982) (Cap. 131, Laws of Brunei)

(5) South Africa – Serious Economic Offences Act, 1991,

(6) United Kingdom – Criminal Justice Act, 1987,

(7) United States – The Patriot Act.

A. THE SOCIAL CONTRACT

Jean Rousseau in his book, *"the Social Contract"* Penguin (Classic, ... at pages 61-62 says-

If then, we eliminate from the social pact everything that is not essential to it, we find it comes down to this – Each one of us puts into community, his person and all his powers under the supreme direction of the general rule, and as a body, we incorporate every member as an indivible part of the whole."

Immediately, in place of the individual person of each contracting party, this act of association creates an artificial and collective body composed of as many members as there are voters in the assembly, and by this same act that body acquires its unity, its common ego, its life and its will. The public person thus formed by the will of all other persons was once called the "city" and area composed of citizens), and is now known as the republic or the body politic. In its passive name is called the state, when it plays an active role it is the sovereign; and when it is compared to others of its own kind, it is a power. Those who are associated in it take collectively the name of a people, and call themselves individually citizens, in so far as they put themselves under the laws of the state....."

(b) **Protection of Expectations under the Social Contract**

Friedrick A. Hayek in his seminal work, ***Law Legislation and Liberty*** Vol. I, ***Rules & Orders***, 1973 Edition at page 102 says-

...The development of new rules of law will evidently involve a continuous interaction between the rules of law and expectations. While new rules will be laid down to protect existing expectations, every new rule will also tend to create new expectations. As some of the prevailing expectations will always conflict with each other, the judge will constantly have to decide which is to be treated as legitimate and in doing so will provide the basis for new expectations. This will in some measure always be an experimental process since the judge *(and the same applies to the law maker)* ***will never be able to foresee all the consequences of the rule he lays down, and will often fail in his endeavour to reduce the sources of conflicts of expectations. Any new rule intended to settle one conflict may well prove to give rise to new conflicts at another point, because the establishment of a new rule always acts on an order of actions that the new law alone does not wholly determine. Yet it is only by their effect, on that order of actions, effects which will be discovered only by trial and error, adequacy of the rules can be judged."***

(C) EXPERIENCE OF ENGLAND

In England, in attempting to reconcile the conflicting expectations of the law abiding citizenry in accordance with their social contract, that their elected government would protect them from the acts of a tiny and infinitesimal minority but whose acts tear directly into the rights and expectations of the vast majority and hence the need to balance the rights of that majority and the principle of the presumption of innocence of an individual. Section 16A of the Terrorism ***(Temporary Provisions)*** Act 1989 provides-

16A (i) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies."

In the case of ***R-Vs. DPP Ex Kebeline [1999] 4 ALL E.R. 801*** in reiterating the needs to uphold the social contract, and the overriding power of the State, England's Highest Court, the House of Lords (***Lord Hope***) while construing Section 16(3) of the Prevention of Terrorism (Temporary Provisions) Act 1989, which confer a statutory defence on accused – that the accused did not know the articles were

in the premises, or had no control over it, and which will deprive the prosecution of the presumption, went to observe at page 850-

"*.....Then there is the nature of threat which terrorism poses to a free and democratic society. It seeks to achieve its ends by violence and intimidation. It is often indiscriminate in its effects, and sophisticated methods are used to avoid detection both before and after the event. Society has a strong interest in preventing acts of terrorism before they are perpetrated – to spare the lives of innocent people and to avoid the massive damage and dislocation to ordinary life which may follow from explosions which destroy or damage property.*"

Corruption is equally a cancer which robs the society in general but more particularly the poor when resources of a country whether public or privately controlled are siphoned into local or foreign accounts for the benefit of a few individuals or groups thereof, when for instance goods supposed to be procured are not in fact procured, but the price or part of it is paid, when goods to be procured do not meet the contractual specification, but the price of the original specifications is paid, when a bridge is certified to be completed, but is in fact incomplete, but the price is paid out when class rooms and dormitories are constructed with shoddy materials, and CDF funds are paid out at inflated rates, it is a cause of great pain and sorrow and lamentation in a country such as Kenya where the vast majority lives on less than Kshs.80/= or a dollar, a day. It is a form of terrorism and tyranny to the poor, the majority of our population.

It is therefore a social and economic imperative for a country like Kenya to enact and implement to the letter an anti-corruption and economic crimes legislation. Corruption as already described in the foregoing passages of this judgement is a complex fraud and the large sums of money embezzled be it through procurement of goods and services or transfer pricing are readily laundered through the purchase of real estate property and stocks, both locally and overseas through chains of trusts and cross-trusts and foundations. Borrowing from various multi-lateral instruments on corruption and economic crimes, the Kenyan Anti-Corruption and Economic Crimes Act had to adopt new and novel modes of investigation and detection of complex webs of local and international corruption. Because much of the information lies within the suspect's knowledge and that of his associates the investigatory power must be all encompassing to include such associates and accomplices in some cases. For instance in the South African case of ***State-Vs-Schabir Shaikh*** reported in the ***Star*** Newspaper of November 7, 2006, the South African Supreme Court of Appeal rejected the appeal by ***Schabir Shaikh*** an associate of the ANC (South Africa's Ruling Party) Deputy Chief, and former Vice President Hon. Zuma, was charged and found guilty of fraud and corruption, meaning that although the individual suspect may escape the noose, his associates in fraud and corruption may not be so lucky. The compelling of suspects to give a list of their properties is a method widely used all over the world in open and democratic societies.

In ***MEME –VS- REPBULIC [2004] I KLR. 640***, the Constitutional Court considered similar anti-corruption forms of legislation from-

(1) ***Botswana*** – Corruption and Economic Crimes Act, 1996, (No. 13 of 1994) Section 39,

(2) ***Singapore*** – Prevention of Corruption Act 1960 (Cap. 241),

(3) ***Malawi*** - Corrupt Practices Act 1999 (Act No. 18 of 1995),

(4) ***Zambia*** – Anti-Corruption Commission Act 1996 ***(No. 42 of 1996)***,

(5) ***Nigeria*** – Corrupt Practices and Related Offences Act, 2000.

(6) ***Lesotho*** – Prevention of Corruption and Economic Offences Act 1999,

(8) ***Ethiopia*** – Federal Ethics, and Anti-Corruption Commission Establishment Proclamation No. 235 of 2001,

(9) United Nations Convention Against Corruption 2003,

(10) African Union Convention on Preventing and Combating Corruption 2003.

We will draw examples from Northern Ireland, Singapore, Botswana, Northern Ireland, the United Kingdom, and finally consider the Kenyan Anti-Corruption and Economic Crimes Legislation, the constitutionality thereof, before drawing our conclusions.

THE UNITED KINGDOM

We have already considered the effect of legislation on the prevention and the curtailment of the right to silence and non-self incrimination under terrorism legislation. We now consider comparative anti-corruption and economic crimes legislation. It is called the ***CRIMINAL JUSTICE ACT***, 1987, which establishes the ***Serious Fraud Office,*** similar to the Kenya Anti-Corruption Commission. The relevant provisions are as follows-

(1) ***A Serious Fraud Office shall be constituted for England and Wales and Northern Ireland.***

(2) ***The Attorney-General shall appoint a person to be the Director of the Serious Fraud Office*** *(referred to in this part of this act as the Director)****, and he shall discharge his functions under the superintendence of the Attorney- General.***

(3) ***The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.***

(4) ***The Director may (a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and (b) take over the conduct of any such proceedings at any stage.***

2. Director's investigation powers (***1) The powers of the Director under this section shall be exercisable, but only for the purposes of an investigation under section 1 above, or, on a request made by the Attorney-General of the Isle of Man, Jersey or Guernsey, under legislation corresponding to that section and having effect in the Island whose Attorney-General makes the request, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.***

(2) ***The Director may by notice in writing require the person whose affairs are to be investigated*** *(the person under investigation)* ***or any other person who he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.***

(3) ***The Director may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which***

appear to him to relate: and (a) if any such documents are produced, the Director may (i) take copies or extracts from them; **(ii)** require the person producing them to provide an explanation of any of them; **(b)** if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

(8) ***A statement by a person in response to a requirement imposed by virtue of this section may only be used in evidence against him (a)*** on a prosecution for an offence under subsection (14) below; **or (b)** on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it.

These provisions were challenged in ***Smith –vs- DIRECTOR OF SERIOUS FRAUD OFFICE [1992] 3 ALL ER. 456.*** In that case, the Applicant, a Chairman and Managing Director of a financial company reported to the Bank of England that the company was in financial difficulty. The Bank suspecting that the company's difficulties were as a result of fraud, called the Police to investigate, and as a result of which the Applicant was arrested and charged. He also attracted the attention of the Director of Serious Fraud Office who after determining that the activities of the Applicant were suitable for investigation, summoned the Applicant for interview in terms of section 1 (3) of the Criminal Justice Act 1987.

Before the interview, the Applicant applied for Judicial Review seeking to quash section 2 of the Criminal Justice Act, on the ground that the 1987 Act did not authorise the Director to serve a Section 2 notice on the Applicant after he had been charged. The Applicant further sought orders that the Director be required to caution the Applicant that he was not obliged to answer any questions concerning the matters with which he had been charged, before requiring him to comply with the requirements of section 2 notice.

In its Judgement, the Court held that the Director of Serious Fraud Office was authorized under section 2 of the1987 Act to question a person under investigation and the powers did not come to an end when the person was charged. The Court found that the clear words of the 1987 Act showed that Parliament had intended to establish an inquisitorial regime in relation to serious or complex fraud in which the Director could obtain by compulsion responses to questions which might be self-incriminatory.

As Lord Mustill succinctly puts it, at page 470-

.....**my Lords, I feel no doubt that the Counsel were right to take this course. Either the Director was empowered not only to pose questions but to compel an answer, or she was not. If she was, then the administration of a caution which presupposed that an answer could not be compelled would be a self contradictory formality which Parliament cannot possibly have intended."**

And at pages 474 -475 after observing that upholding the power of the Director of Serious Fraud Office to summon and question the Applicant, the Court was not re-establishing in relation to a limited classes of offences an inquisitorial method of ascertaining the truth in criminal law cases which the English law had long since repudiated in favour of the adversarial process- but that it was indisputable and undisputed that this is just what Parliament set out to do, and has effectively done. In truth the adverse comments are criticisms, not of the Director's contention that powers created by the Act apply in the situation now under review, but of the policy are scope of the Act itself. These we may not entertain. In the words of Windeyer J. in ***REES -VS- KRATZMAN [1965] 114 C.L.R. 63*** at 80.

"***If the Legislature thinks that in this field the public interest overcomes some of the***

common law's traditional considerations for the individual then effect must be given to the statute which embodies the policy."

The English Courts have thus upheld the provisions of their laws which are similar to ours, as superceding the old common law right against self-incrimination. Lord Mustill references raise the futility of requiring a caution when faced with a compellable law such as ours. This may be equated to the Judges rules which have been in use in all common law jurisdictions.

BRUNEI DARUSSALAM

The **Prevention of Corruption Act**, Chapter 131,

Laws of Brunei (the Brunei Act), enacted to prevent corruption and bribery, establishes the **Brunei Anti Corruption Bureau,** headed by a Director. It has provisions almost similar to the Singapore Act in terms of investigative powers vested upon the Anti-Corruption Bureau.

The relevant provisions material for our present purposes are:

Special powers of investigation

23. (1) The Public Prosecutor or the Director, if satisfied that there are reasonable grounds for suspecting that an offence under this Act has been committed by any person, may, for the purpose of an investigation into such offence, authorise in writing any Officer of the Bureau specified in such authorization, to exercise the following powers on the production by him of the authorization.

(a) ***(not applicable)***

(b) ***to require from any person the production of any accounts, books, documents, safe-deposit box or other article of or relating to any person named or otherwise identified in such authorization which may be required for the purpose of such investigation and the disclosure of all or any information relating thereto, and to take copies of such accounts and books or of any relevant entry therein.***

(2) – 3 (not issue here).

(4) Any person who, having been lawfully required under this section to disclose any information or to produce any accounts, books, documents, safe deposit box or other article to the Director, Deputy Director or an Officer of the Bureau authorized under subsection (1), shall, notwithstanding the provisions of any other law and any oath of secrecy to the contrary, comply with such requirement, and any such person who fails or neglects, without reasonable excuse, so to do, and any person who obstructs the Director, Deputy Director or an Officer of the Bureau authorized under subsection (1), shall be guilty of an offence: Penalty, a fine of 20,000 and imprisonment for one year.

Section 23A which provides for special powers of investigation says-

23A. (1) In the course of any investigation into or proceedings relating to an offence alleged or suspected to have been committed by any person under this Act or under sections 161 to 165 or 213 to 215 of the Penal Code *(Chapter 22)* ***or a conspiracy to commit, or an attempt to commit, or an abetment of any such offence, the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice-***

(a) require any such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing enumerating all movable or immovable property belonging to or possessed by such person and by the spouse, parents, or sons and daughters of such person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;

(b) require any such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing of any money or other property sent out of Brunnei Darussalam by him, his spouse, sons and daughters during such period as may be specified in the notice;

(c) require such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing enumerating all movable or immovable property belonging to or possessed by such person where the Public Prosecutor has reasonable grounds to believe that such information can assist the investigations;

(d) - (e) specific to banks, and Chief Executives of parastatals and heads of other government departments.

(2) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) of this section shall, notwithstanding the provisions of any other law and any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who willfully neglects, or fails so to comply shall be guilty of an offence: Penalty, a fine of $5,000 and imprisonment for one year.

These investigative provisions of the Brunei Act are in material respects similar to the Kenyan provisions under section 26, 27 and 28 of the Act. We have not come across any judicial decision in a matter in which the above provisions have been challenged.

However, the High Court of Brunei Darussalam had occasion to consider a challenge to statutory investigative powers (under the Brunei Investment Agency Act, Chapter 137, Laws of Brunei) based on the right against self-incrimination in **Civil suit No. 31 of 2000 State of Brunei Darussalam & Brunei Investment Agency –Vs- HRH Prince Jefri Bolkiah and 71 others.** The 1st Defendant was the Crown Prince of Brunei Darussalam, and was suspected to have fraudulently caused sums in excess of $14.8 Billion belonging to the State to be paid from the account of the Brunei Investment Agency into bank accounts in his names or under his control. The Brunei Investment Agency and the Brunei Anti-Corruption Bureau commenced investigations against him.

The Defendants were served with notices requiring them to furnish information relevant to the investigations, and had also sought to freeze Defendants assets subject of the investigations. Upon failure to comply, the Court, on an ***ex parte*** application by the Plaintiff, ordered the Defendants to make disclosure. The Defendants took out summons seeking to vary the ***ex parte*** orders, and sought orders, inter alia, that they were entitled to refuse to comply with the notices on the grounds that compliance would incriminate them, and that the Public Prosecutor give an undertaking in writing that, if they complied, any information disclosed would not found any criminal charges against them.

In rejecting the plea of protection against self-incrimination, the Court (Roberts, C.J.) accepted that the privilege against self-incrimination is deeply ingrained in the common law and is a cardinal principle of common law systems of justice, see ***Sorby The Commonwealth*** (1983) 152 CLR. The Court further considered the decided case law in Australia and England, and preferred the English position based on the House of Lords decision in *AT & T Istel Ltd, v Tully* [1993] AC 45 H.I., where the

House of Lords stated that the privilege against self-incrimination substituted, and could be removed by legislation.

We respectfully accept the submission by Counsel for the First Defendant that likewise, in our circumstances, any right against self-incrimination can be removed by statutory provisions. The right cannot be used as a excuse for neglect or failure to comply with sections 26, 27 and 28 of our Act.

BOTSWANA

The ***Botswana Corruption and Economic Crime Act, No. 01 of 2002*** (*the Botswana Act*), inter alia, establishes a Directorate on Corruption and Economic Crime, and confers on the Directorate powers to investigate suspected cases of corruption and economic crime.

The relevant provisions material for our present purpose are:

Power of Director to obtain information

8. (1) If, in the course of any investigation into any offence under Part IV, the Director is satisfied that it would assist or expedite such investigation, he may, by notice in writing, require-

(a) ***any suspected person to furnish a statement in writing-***

(i) enumerating all movable or immovable property belonging to or possessed by him in Botswana or elsewhere or held in trust for him in Botswana or elsewhere, and specifying the date on which every such property was acquired and the consideration paid therefor, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise;

(ii) specifying any moneys of other property acquired in Botswana or elsewhere or sent out of Botswana by him on his behalf during such period as may be specified in such notice;

(b) any other person with whom the Director believes that the suspected person had any financial transactions or other business dealing, relating to an offence under Part IV, to furnish a statement in writing enumerating all movable or immovable property acquired in Botswana and elsewhere or belonging to or possessed by such other person at the material time;

(c) any person to furnish, notwithstanding the provisions of any other enactment to the contrary, all information in his possession relating to the affairs of any suspected person and to produce or furnish any document or a certified true copy of any document relating to such suspected person, which is in the possession or under the control of the person required to furnish the information.

(2)***Every person on whom a notice is served by the Director under subsection (1) shall, notwithstanding any oath of secrecy, comply with the requirements of the notice within such time as may be specified therein, and any person who without reasonable excuse fails to so comply shall be guilty of an offence and shall be liable to the penalty prescribed under section 18(2).***

The penalty under section 18 (2) is imprisonment for a term not exceeding five years, or a fine not exceeding Pula 10,000, or to both.

SINGAPORE

Section 21(1) and (2) of the Corruption Action of Singapore are the equivalents of the Kenya Anti-Corruption and Economic Crimes Act Section 26,27 and 28. They are cited herewith for purposes of clarity.

Public Prosecutor's Powers to obtain information 21.

(1) *In the course of any investigation or proceedings into or relating to an offence by any person in the service of the Government or of any department thereof or of any public conspiracy to commit, or an attempt to commit, or an abetment of any such offence, the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice.*

(a) require that person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by that person and by the spouse, sons and daughters of that person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;

(b) require that person to furnish a sworn statement in writing of any money or other property sent out of Singapore by him, his spouse, sons and daughters during such period as may be specified in the notice;

(c) require any other person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by that person where the Public Prosecutor has reasonable grounds to believe that the information can assist the investigation;

(d) require the Comptroller of Income tax to furnish, as specified in the notice, all information available to the Comptroller relating to the affairs of that person of or the spouse or a son or daughter of that person, and to produce or furnish, as specified in the notice, any document or a certified copy of any document relating to that person, spouse, son or daughter which is in the possession or under the control of the Comptroller;

(e) require the person in charge of any department, office or establishment of the Government, or the President, Chairman, manager or Chief Executive Officer or any public body to produce or furnish, as specified in the notice, any document or a certified copy of any document which is in his possession or under his control;

(f) require the manager of any bank to give copies of the accounts of that person or of the spouse or a son or daughter of that person at the bank.

(2) *Every person to whom a notice is sent by the Public Prosecutor under subsection (1) shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such time as may be specified therein and any person who willfully neglects or fails so to comply shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding one year or to both.*

Section 21(b) goes even further that the Kenya law and requires a person to furnish a sworn statement of any money or other property sent out of Singapore by him, his spouse, sons or daughters

during a specified period.

A point worth mentioning is that the person from whom such information is required from is expected to give a sworn statement to that effect.

The Singapore law goes further and requires a Bank Manager to give copies of the accounts of a person at the bank without a Court Order. Further the Comptroller of Income Tax may also be called upon to furnish all information relating to the tax affairs of a person.

It is clear that Singapore has more compelling and inquisitorial laws than ever envisaged here in Kenya and it is not far fetched to equate this situation to the orderly and developed country Singapore has become over the last 40 years.

NORTHERN IRELAND

Northern Ireland has a legislative instrument with provisions similar to our sections 26, 27 and 28. This is **Proceeds of Crimes (Northern Ireland) Order 1996 (the 1996 Order).** The object of the 1996 Order was to provide means of tracing and confiscating money and property derived from criminal conduct. The Order gives to the Court powers designed to assist in the process of tracing the proceeds of crime.

Article 49 empowers a County Court Judge when satisfied of the matters set out in paragraph (1), to appoint a financial investigator to exercise for the purposes of the investigation the powers conferred by schedule 2. Paragraph 2 and 3 of Schedule 2 confer upon the financial investigator a number of specified powers, the material one being that contained in paragraph 2 (1):-

A Financial Investigator may by notice in writing require any person who he has reason to believe has information which appears to the investigator to relate to any matter relevant to the investigation to attend before the investigator at a specified place either forthwith or at a specified time and answer questions or otherwise furnish information which appears to the investigator to relate to the investigation."

Paragraph 5 makes it an offence to fail to comply with a financial investigator's requirement. Indeed section 2(1), (2), (3) and section 5(1) of the Irish legislation are similar or equivalents to sections 26(1) and (2) of the Kenya legislation.

Paragraph 6 of the Northern Ireland statute contains restrictions on the use which may be made of answers given or information furnished by the person interviewed and paragraph 7 contains restrictions on disclosure of the information so gained. Those provisions of the Northern Ireland statute were put to test in the case of **CLINTON –VS- BRADLEY [2000] NICA 8.**

The Facts

This case went to the Court of Appeal of Northern Ireland by way of a case stated from a decision of a Resident Magistrate whereby the appellant had been convicted of an offence contrary to section 5(1) of Schedule 2 of the Proceeds of Crime (***Northern Ireland***) Order 1996, of failing without reasonable excuse to comply with a requirement imposed upon him to answer questions put to him by a financial investigator. The issue upon which the Appeal turned was whether the appellant had reasonable excuse to refuse to answer if he believed that to do so might tend to incriminate him in respect of another offence with which he was subsequently charged.

In rejecting the Defence's arguments, the Magistrate had ruled that;

"***after examination of the relevant statutes and case law I came to the conclusion, with regret that the Defendant's natural desire not to incriminate himself in the parallel case could not, in the context of this particular statute (the 1996 Order) constitute a reasonable excuse. My reason for this was that to allow such a defence here would have the effect of totally negativing the clear purpose of the legislation, which was to compel answers to questions of an investigative nature to be put to an interviewee in precisely this type of case and not to allow him to use the defence of any right not to incriminate himself."***

The grounds on which Counsel for the appellant contended that he had reasonable excuse for refusing to answer the investigator's questions were:-

(a) ***The legislature could not have intended to make such an in-road into the privilege against self-incrimination without a clear expression of intention, and it was not sufficiently clear that it did so intend;***

(b) ***The ambiguity permits the Court to have regard to Article 6 (1) of the European Convention on Human Rights, of which the requirement was in breach.***

(c) ***In other areas of Irish law the existence of a risk of self-incrimination has been held to constitute a reasonable excuse for refusing to give information.***

Court of Appeal held that:-

(i) The question whether the provision of schedule 2, in conferring a power to ask questions or obtain documents or information, excludes the privilege against self-incrimination is one of construction. The Court did not consider the paragraph 5 (1) as ambiguous. The working of the provision is itself perfectly clear, that the failure to comply with the investigator's requirement to answer question or furnish information is an offence. Parliament can and from time to time does enact provisions which interfere with the right to silence.

(ii) The Court cited with approval the orbiter of ***Hutton J. in R –Vs- Donnely (1986) NI 54,*** that;

However I make it clear that in my opinion the defence of reasonable excuse based upon the principle that a man is not bound to incriminate himself will only be valid where there is a genuine risk that the information would tend to incriminate the person and make him liable to prosecution. A person should not be able to raise the defence of reasonable excuse successfully where the possibility of his being prosecuted by reason of the information he might give is fanciful and artificial.

(iii) It was argued on the appellant's behalf, in reliance upon **Saunders –vs- UK (1996) 23 EHBR 313,** that to require a person to incriminate himself would mean that his trial was unfair, in breach of Article 6(1) of the Convention. That cannot however, be judged at the time when the investigators require the person concerned to answer questions or furnish information, or even at the time when the Magistrate's Court decides on the Commission of an offence under paragraph 5(1). It can only be determined at the time of the trial of the offence in respect of which it is claimed that the person may be incriminated by the answers or information. ***(R vs Director of Public Prosecutions, ex-parte Kebeline (1999) 4 ALLER 801 at page 834 per Lord Steyn.*** As the European Court of Human Rights remarked at paragraph 69 of its judgement in ***Sauders vs UK***, the question must be examined by the Court in the

light of circumstances of the case. These cannot possibly be known at the time when the investigators require answers or information.

(IV) The functions performed by the inspectors were essentially investigative in nature and did not adjudicate either in form or in substance. Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities prosecuting, regulatory, disciplinary or even legislative. A requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities.

Comparing Irish & Kenyan situation

The Northern Ireland experience is particularly relevant to the Kenyan situation. As indicated hereinabove subsections 2(1), (2), (3) and section 5(1) of the Irish legislation are the equivalent to ours. The finding in the ***Bardley case*** *(supra)* is even more relevant and should lay to rest any further challenges to the Kenyan legislation. These findings are that:-

(i) ***Like the Irish legislation, the contents of the Kenyan legislation are clear, explicit and unambiguous. Parliament knowingly enacted the provisions to interfere with the right to silence.***

(ii) ***There is no obvious risk of self incrimination when a person answers questions or furnished information of his property under section 26, 27 and 28 of the Kenyan Act. This information, is demanded on the basis of reasonable suspicion. Any further investigations on the furnished information may lead to:-***

(a) Arraignment in Court over charges of corruption or economic crime.

(b) Preservation and forfeiture of assets suspected of being acquired by corruption.

(c) No action as the Commission may find that the property was lawfully acquired.

(iii) Challenging the operations of section 26, 27 and 28 of the Kenyan legislation is tantamount to jumping the gun. Its validity can only be determined at the time of the trial of the offence in respect of which it is claimed that the person may be incriminated by the answers or information. The questions can only be examined in Court in the light of all the circumstances and cannot possibly be answered at the time when the investigators require the information.

HOW THEN SHOULD THE COURT APPROACH THE INTERPRETATION OF THIS LAW"

The Court of Appeal in ***CHRISTOPHER NDARATHI MURUNGARU -VS- KENYA ANTI-CORRUPTION COMMISSION & HON. THE ATTORNEY-GENERAL*** (Civil Appeal No. 43 of 2003 (***unreported***) commented on the law and the Judges Rules as follows:-

"The Director of the Commission was of the view that the provisions relating to fair trials only apply in courts and not in the process of investigation. Yet Parliament itself by the Criminal Law (Amendment) Act 2003 (Act No. 5 of 2003) took away from the police whose duty like the Commission is to investigate suspected crimes, the power to record confessions from persons suspected of crimes. Even the passing of that Act, the Judges Rules applied to officers who were investigating crimes against suspected person(s). If these provisions applied to the process of

investigations, why should the fair trial provisions of Section 77 of the Constitution apply in the Court"

To this question Professor Muigai, learned Counsel for the First Respondent made answer with which we agree and said that the provisions of the Criminal Law (***Amendment***) Act, 2003 (***No. 5 of 2003***) which took away the power of the Police to take confessions from suspects, and the ***Judges Rules*** (against self incrimination) do not alter the constitutional right to silence and non-self incrimination apply only at or during the trial, because-

(a) ***A Police Officer is required to caution a suspect who the*** *Police officer has decided to charge* .

(b) ***Prior to this, the officer may interview any suspect and is under no obligation to caution them.***

(c) ***Judges rules being rules of practice declared to be so by competent Courts are only applicable until overturned by a higher Court or*** *by statute.*

(d) ***In the Kenyan case, the Anti-Corruption and Economic Crimes Act gives the Commission the power to investigate*** *but* ***not to prosecute.***

(e) ***The Commission does not therefore charge or arraign people in Court but makes recommendations to the Hon. Attorney-General on whether to prosecute or not.***

(f) ***The final decision as to whether to prosecute lies with the Hon. Attorney General.***

(g) ***The Commission may out of the information obtained from the application of section 26, 27 and 28, make recommendations to the Hon. Attorney-General for prosecution (or not); file for preservation and/or forfeiture of property on obtaining (prima facie) evidence sufficient for these causes of action; or simply close the investigations.***

(h) ***Thus purporting to say that answering notices under sections 26, 27 and 28 may lead to self-incrimination is fanciful and far-fetched as the intended use of this information may not be clear at that stage.***

(i) ***Any aggrieved party who is charged using the information obtained vide the notices may challenge the production of that evidence once charged in Court with any offence which may arise out of the investigations.***

(j) ***The Anti-Corruption & Economic Crimes Act, 2003 is superior to the Judges Rules which are merely rules of practice. Any contradiction between the two should be ruled in favour of the Act.***

In accordance with Court of Appeal's own decision in ***SYEDANA M. BURHANNUDIN SAHEB –VS- MOHAMEDALLY HASSANALLY*** (Civil Appeal at Nairobi No. 28 of 1980) (***unreported***), adopting the decision of Lord Esher M.R. in ***R –VS- THE COUNTY COURT JUDGE OF ESSEX AND CLARK*** ***[1887] Vol. XVIII,*** page 704, judgement of Miller J.A. – The Court said –

"The new Act has introduced a new jurisdiction , a new procedure, new forms or new remedies, the procedure forms, or remedies there prescribed, and the new order must be

followed until altered by subsequent legislation."

OF THE REASONABLENESS OF THE DIRECTOR'S SUSPICION

The Kenya Anti-Corruption and Economic Crimes Act is a penal statute. Like all other penal statutes it must be construed strictly. A restatement of Section 26 of the Act is therefore necessary. It reads as follows:

Section 26(1) the Commission may by notice in writing require a person reasonably suspected of corruption or economic crime to furnish, within a time specified in the notice, a written statement:-

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any was given for the property.

The most enigmatic phrase in section 26; and which phrase has raised much controversy, are the two words **reasonably suspected** of corruption or economic crime.

IN THE COURT OF APPEAL, CIVIL APPLICATION NO. NAI 43 OF 2006 (24/2006) DR CHRISTOPHER N. MURUNGARU –VS- KACC & HON. ATTORNEY-GENERAL the Court stated that:-

"We pause here to point out that in order to issue a notice under this section (section 26), the Commission (KACC) and its Director must be in possession of some material from which it is *REASONABLY SUSPECTED* that the person to whom the notice is being issued has been involved in corruption or economic crime. In the absence of reasonable suspicion of involvement in corruption or economic crime, the Commission and its Director would have no power to issue a notice under section 26 of the Act."

What therefore is the meaning of the term **Reasonable suspicion"** Whereas the meaning of the word ***reasonable*** is fairly obvious and non contentious; the meaning of the word ***suspicion*** or "***suspicious***" needs to be determined. None other than judicial precedent would be our destination in this quest.

In the case of ***Hussein -vs- Chong Fook Kam [1969] ALL E.R 1626*** at 1630, the Court was seized of a terrorism matter and the question was whether the articles in the accused's possession raised reasonable suspicion that they were connected to terrorism. The Court took up Lord Devlin's observation that:-

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove. Suspicion arises at or near the starting point of investigation of which obtaining of prima facie proof is the end."

The Court also drew a distinction between reasonable suspicion at the time of the arrest and prima facie proof at the trial as follows:-

"Prima facie (proof) consists of admissible evidence. Suspicion can take into account

matters that could not be put in evidence at all suspicion can take into account also matters which, though admissible could not form part of a prima facie case."

It is clear that reasonable suspicion is merely reasonable conjecture or surmation. There need not be proof but a mere seed which on investigations may lead to prima facie proof.

This provision is not unique to the Kenyan Statute. A few examples will suffice.

Singapore

In Singapore, ***the Prevention of Corruption Act***, 1960 provides the circumstance under which the Director of the Corrupt Practices Investigation Bureau can exercise his powers of arrest. Section 15(1) provides that:-

"The Director or any special investigator may without a warrant arrest any person who has been concerned in any offence under this Act or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned."

It is paramount to note that the circumstances cited above are listed in order of weight of evidence applicable to each circumstance. These are:-

(i) a reasonable complaint

(ii) credible information

(iii) reasonable suspicion

Reasonable suspicion is listed last thus reinforcing the position that it is a conjecture or mere surmation i.e without proof at that point of time.

It should also be noted that the Singapore statute gives their anti-graft agency the powers to arrest a person on reasonable suspicion that he was involved in the commission of an offence under the Act.

Unlike the draconian Singapore provisions, the power donated by section 26(1) 27, & 28 to the Director of the First Defendant is specific – the person suspected of corruption and economic crimes is required by the notice to enumerate his property and the times when it was acquired, and the mode of the suspected corrupt acquisition or economic crime, and whether the property was acquired by purchase, by gift, inheritance or in some other manner, and what consideration if any was given for the property.

The Director's notice of 9th January, 2006 and reiterated in the letter of 23rd January, 2006 refers to any direct or indirect interest the Plaintiff has or may have in any property held by the Plaintiff's associates, and relatives.

Section 26 (1) of the Act is an independent provision from either section 27, which gives the First Defendant (the Commission) power to issue a notice to an associate of a suspected person to provide within a reasonable time specified, a written statement of the associate's property at the time specified in the notice; or Section 28 which, again donates the Commission power by notice in writing to require any person whether or not suspected of corruption or economic crime to produce specified records in his

possession that may be required for an investigation. Any notice under Section 26(1) of the Act to a person reasonably suspected of corruption or economic crime must relate only to the property of that person not of his relatives, including his spouse, for under our law, a spouse is an independent person from either the husband or wife. Each one of them may own his/ her own property. Each one of them would be entitled to a separate notice as a person or persons suspected of corruption or economic crimes.

To the extent therefore that the said notices of 9th January, 2006 purports to call upon the Plaintiff to give particulars of his interest in any property of his relatives we find and hold the same to be incompetent.

It is incompetent because the notice under Section 26 of the Act is specific to the person reasonably suspected of corruption and economic crime. It is incompetent because it is not specific of the time when suspected acts of corruption or economic crimes were committed. It is also incompetent because it is vague. To what property or assets does it refer to" Chickens or Chicken farm", a horse or horse stud" Fundamentally the notice should specify the time frame to which alleged acts of corruption and economic crimes relate. For instance the notice should in the case of this Plaintiff, specify that the information required is for the period he was elected an Hon. Member of Parliament or appointment to Cabinet, and not his private life before he came to power.

Arising from this view of the said notice, we hasten to find and hold that the same cannot therefore be a proper foundation of charges against the Plaintiff under Section 26 (2) of the Corruption and Economic Crimes Act. We therefore further find and hold that Nairobi Chief Magistrate's Court Anti-Corruption Case No 11 of 2006 is incompetent, and direct that the same be terminated forthwith. We further direct that the First Defendant formulate and send proper notices to the Plaintiff and thereafter the matter take course in the manner prescribed under Section 26 of the Act.

OF THE CONSTITUTIONALITY OF SECTIONS 26, 28 & 58 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT.

It was the forte of the submissions of Hon. P.K. Muite, Senior Counsel and Mr. Kilukumi, that the said sections are unconstitutional because they impinge upon the Plaintiff's constitutional rights to be presumed innocent (as guaranteed under Section 77 (2) (a)) and not to self-incriminate (as guaranteed by Section 77 (7)) of the Constitution. For the purpose of the conclusion we will draw on these contentions, we again reproduce here below the provisions of Section 77 (1), 77 (2) of the Constitution. They are as follows:-

77 (1) If a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence-

(a) shall be presumed to be innocent until he is proved or has pleaded guilty.

(3)– (6) inapplicable

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial;

Senior Counsel for the Plaintiff made a great pun of the manner in which this court should give

these provisions, a ***purposive, liberal, and generous interpretation*** in accordance with the values and principles upon which the fathers wrote these words into the Constitution as basic and fundamental. Counsel submitted that such purposive, liberal, generous, living soul of the Constitution should mean that the right to silence and to non-self incrimination should not only include the trial stage, but also all the aspects of investigation; that we would be following the bold spirit of our brothers and sisters in such cases as:-

(1) ***CRISPUS KARANJA –VS- ATTORNEY-GENERAL*** *(supra),*

(2) ***MWANGI & 7 OTHERS –VS- ATTORNEY GENERAL,*** *(supra)*

(3) ***NJOYA & OTHERS –VS- ATTORNEY-GENERAL & OTHERS***

(4) **The Tanzania Case of NDYANABO –VS- ATTORNEY-GENERAL** *(supra)* in all of which the theme was to encourage and exhort us to be bold and imaginative, for ***"a timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document."*** And secondly, the provisions touching upon fundamental rights have to be interpreted in a broader and liberal manner, thereby jealously protecting and developing ***the dimensions of those rights and ensuring that our people enjoy their rights,*** our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.

In this submission Senior Counsel, for the Plaintiff invited us to what he called the "***Elmann doctrine***" it had been discredited by this court in the immediately forementioned cases. But what is the ***"Elmann doctrine,"*** and whence its origins."

THE EL MANN "DOCTRINE & PRESUMPTION OF INNOCENCE AND NON-SELF INCRIMINATION.

What is referred to as the "***Elmann doctrine***" is the literalist interpretation which the court should give a statute where the words of that statute are unambiguous and admit of no other meaning. In **REPUBLIC –VS- ELMANN [1969]** E.A. 357, the issue was whether the Republic might put in evidence against an accused charged with a contravention of the Exchange Control Act answers given by the accused to an investigation officer pursuant to a mandatory questionnaire under powers conferred by paragraph (c) of the General Provisions as to Evidence and Enforcement set out in Part 1 of the Fifth Schedule to the Act which had been amended to expressly to say that any information obtained as a result of the questionnaire should be admissible in evidence in any prosecution for an offence under the Act.

In support of refusing the admission of the information as evidence, Counsel for the accused contended that the fundamental rights under the Constitution of Kenya Sections 21, (7) (now Section 77 (7), namely-

"No person who is tried for a criminal offence shall be compelled to give evidence at his trial." rendered the amended sub-paragraph ***ultra vires*** the Constitution.

The Constitutional Court held that (i) there was no ambiguity in the wording of Section 21 (7) of the Constitution, which should therefore be construed according to the ordinary and natural sense of the words used and did not protect the accused from the giving of evidence by the prosecution of information provided by the accused before the trial began, (ii) paragraph 1 (5) of Part 1 of the Fifth Schedule to the

Exchange Control Act is not ***ultra vires*** the Constitution; and (iii) the information was admissible in evidence against the accused.

The basic issue before Mwendwa C.J. Farrel and Chanan Singh JJ. (who may have been schooled in the colonial days but were by no stretch of the imagination colonial judges) in the **Elmann Case**, and upon which Counsel on both sides of the case are recorded at page 359 letter cd to have been in substantial agreement, and indeed like in this case, was the principles of construction to be applied and each of the Counsel in that case referred that Court to the same passage in ***CRAIES ON STATUTE LAW*** (6th Edition) at page 66, which read:-

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention as expressed in the Acts themselves. The tribunal that was to construe an Act of legislature or indeed any other document has to determine the intention as expressed by the words used and in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view." per Blackburn in the case of *DIRECT UNITED STATES CABLE CO. –VS- THE AGRO-AMERICAN TELEGRAPH CO. [1887] 2 A.C. 394.*

In the same El Mann case, the court referred to **IN BARNESS –VS- JARVIS** [1953] I W.L.R. 649, where Lord Goddard C.J. said-

"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered."

If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

In **WARBURTON –VS- LOVELAND**, (1832) 5 E.R., a case decided in 1832 but whose principles ring true today, TINDAL C.J. said-

"where the language of an Act is clear and explicit, we must give effect to it, whatsoever the consequences, for in that case the words of the statute speak the intention of the legislature."

What Senior Counsel Hon. P.K. Muite and his colleague Mr. Kilukumi, asked us to do, is not very different from the arguments adduced in the El mann case.

Like in the ***El mann case***, Counsel for the Plaintiff here emphasized and argued that the Constitution is no ordinary Act of Parliament. It cannot be construed in accordance with ordinary canons or principles of construction. Professor Muigai, and Mr. James Warui Mungai for the 2nd Defendant argued that regard must be heard to the language used. Like the ***El mann case***, Hon. Muite ***urged us*** and his colleague invited us by the use of such expressions as ***"purposive", "liberal,"*** and generous construction of a Constitution than we would ordinarily adopt in the construction of an ordinary enactment of the legislature as did the courts in the above captioned cases of Crispus ***Karanja -Vs- Attorney-General, Mwangi & 7 others Vs. Attorney General, Njoya & others –Vs- Attorney General and the Dyanabo -Vs- Attorney General*** *(supra)*.

Professor Muigai and his colleagues for the 1st and 2nd Defendants took the opposite view. In his submission Professor Muigai, admitted, that despite the views expressed in his Doctoral thesis on

constitutional law and attitude of the colonial judges, the ***El mann case*** had never been overruled by the Court of Appeal, and was still good and sound law in Kenya. We share this view of the El mann case, and indeed the construction adopted in it in relation to Section 21 (7) now Section 77 (7) of the Constitution. We say so for several reasons.

Firstly all societies are at some stage of development. For instance the doctrine of inalienability of any rights fundamental or otherwise, is inconsistent with the Constitution itself which expressly declares the rights and freedoms of one individual are subject to those of another or others collectively. The Constitution guarantees the right to life, (Section 70 (a)) yet takes it away in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted (Section 71 (1)) Why so" Because society ordained as part of the social contract that if you kill unjustifiably you too may suffer the same fate, after due process. That is a great advance from the laws of the ***Medes*** and ***Persians***, an eye for an eye, a tooth for a tooth, and a death for a death.

Secondly from Hamurabi to ***Moses, Jesus*** and ***Mohammed***, even what we may consider lesser offences as adultery (and bigamy which only exists in the statute books), in today's permissive society, the values and aspirations are not merely those of a person suspected of corruption or economic crime, but of the people or citizenry that there shall be zero tolerance to corruption and economic crimes such as drug trafficking and associated crime of money laundering be it through stock securities or the building of estates at home or overseas or other channels.

Thirdly, when there is any doubt in the interpretation of Statute, what is to be considered the object of which the power was donated or the fundamental right of the individual" In the ***Mwangi Case*** the Court was of the view that recognizing the status of the Constitution, there is room for excluding the general rules of interpretation to see that the purport, spirit and vision of the Constitution are kept intact and in harmony. In the ***Dynabo Case*** – the Constitutions were to be interpreted in accordance with ***the will*** and ***dominant*** aspirations of the people should prevail. And how does a court discover that will and dominant aspiration of the people"

That will and aspiration of the people is not discovered in some wild fantasy and exploration of the liberal, generous, and purpose of the spirit of the Constitution. That will aspiration and spirit will be found only in the language of the Constitution. Das J. in ***KESHAVA MENON –VS- STATE OF BOMBAY [1951] S.C. R. 228***, a Bombay Case, cited in the ***El mann Case*** said-

"An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion, but a Court of Law has to gather the spirit of the Constitution from the language of the Constitution. What we may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view."

Or as Tebbut J. put in Park-Ross & Another –Vs- Director of Office of Serious Economic Offences *(supra)*..... ***to hold that a wide interpretation, for which the applicant contends exists, this Court would have to search for and find it in some general considerations and disregard the specificity of the framers of the Constitution in enacting Section 25 should they have wished to extend the right to remain silent to those, one would have expected provision to that effect instead of every specific reference to such right in Section 25 (02) (a) ."***

In the same way the Court in ***El mann –Vs- Republic*** (supra) adopted this dictum, so do we. In addition we may add that to construe the language of a Constitution in its or their literal or ordinary meaning is not to equate the Constitution with any legislative enactment. It must also be always borne in

mind that the Constitution whether adopted by a Constituent Assembly or by way of a plebiscite is still a legislative enactment, the difference only lies in the special or specific majorities for its enactment to be effective. A Constitution will therefore be construed widely or broadly (we avoid the use of the expression "***liberally***" because it has other connotations – like in same sex unions which to the majority of our people would be an abomination, and not so to others) if there is a reason for so doing, the reason usually being that there is some ambiguity in the language used and to give it a literal meaning would lead to an absurdity.

That is not the case here either in terms of Section 77 (1) of 77 (2) (b) or indeed 77(7). The Plaintiff has not been charged in any Court of law. His right to the presumption of innocence, or to testify against himself has not been called into question. This is an investigation. Indeed as Tebutt J. said in the ***Park Ross*** of section 5 of the South-African Act similar to our Section 26-

"An inquiry under section 5 is not part of any criminal process and cannot be regarded as the investigative stage of criminal process. No one can say that because of such an inquiry takes place, criminal charges are likely to follow therefrom. Nobody is an accused at that stage nor is anyone necessarily likely to be."

In ***R. Vs HERBERT [1990]*** 57 3 d 1 it was stated at page 10 – any constitutional right to remain silent should not be equated with the related privilege against self-incrimination. The latter is the privilege of limited scope of a witness in Court proceedings not to answer a question which may incriminate him.

It is also observed that the right to silence is not an absolute right. Under Section 157 of the Evidence Act, the Court is allowed to draw adverse inference from an answer of a witness.

Statutes presuming guilt or putting the burden upon the suspect are strewn all over the statute books. For instance under the Traffic Act, (***Cap 403***) a Police officer may stop a motorist for his driving licence and a person who fails to produce one is guilty of an offence (Section 36 of that Act). Similar provisions are to be found in the Customs and Excise Act (Cap 472) the Income Tax Act, (Cap. 470).

OF ALLEGED DISCRIMINATION

Senior Counsel Hon. P.K. Muite, contended that the 1st Defendant was applying the provisions of the Anti-Corruption and Economic Crimes Act selectively and in a discriminatory manner against the Plaintiff in contravention of the provisions of Section 82 (1) and (2) of the Constitution of Kenya.

By the very provision that no person shall be discriminated against on account of his race, tribe, place of origin or residence or other local connection political opinion, colour or creed, the Anti-Corruption and Economic Crimes Act applies to every person in Kenya regardless of race, tribe etc and the Act is not therefore contrary to or inconsistent with provisions of Section 82 of the Constitution of the Republic of Kenya.

OF ALLEGED INHUMAN & DEGRADING TREATMENT OF THE PLAINTIFF

The contention here is that the requirement by the First Defendant that the Plaintiff furnishes a list of his assets constitutes torture, inhuman or degrading punishment or other treatment. Frankly we think that this contention would be laughable except for the connotation to treat the court as a theatre of the absurd. The object of the Anti-Corruption and Economic Crimes Act in its entirety is to provide an enforceable legislative or legal framework as its long title clearly states an Act of Parliament to provide

for the prevention, investigation (***or detection***) and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith. Requiring the Plaintiff to declare his earthly possessions in pursuit of this objective may cause a person suspected of corruption or economic crimes, some mental anxiety, but cannot constitute torture, or inhuman or degrading treatment within the meaning contemplated by Section 74 of the Constitution.

Professor Muigai learned Counsel for the 1st Defendant was helpful to us by referring to one case, but the Plaintiff's Counsel did not cite any authority to support the Plaintiff's contention that a demand to furnish particulars of his earthly possessions is torture. In the Ugandan case of ***SUSAN KIGULA & 416 OTHERS -VS- ATTORNEY-GENERAL,*** Kampala , Constitutional Court, Constitutional Petition No. 6 of 2003, Twinomujunu J.A. while determining the question of the Constitutionality of the death sentence in Uganda observed as follows-

"I now turn to the determination of the merits of the questions posed by the first two issues of this petition, namely:-

Is a death sentence prescribed by Ugandan Penal laws, cruel, inhuman or degrading treatment or punishment within the meaning of Article 24 of the Constitution""

The learned Judge of Appeal then continued and said-

" I have read all the Affidavits filed on behalf of both parties to the Petition. They portray the death sentence as a sordid, barbaric and extremely harrowing experience. I have also studied all the authorities, local and foreign, together with the relevant legislative and Constitutional provisions. I have also studied all international conventions on death penalty. I have no hesitation whatsoever that a death sentence is cruel, inhuman and degrading punishment within the meaning attributed to those words in *ATTORNEY-GENERAL –VS- ABUKI, KYAMANYWA –VS- UGANDA REPUBLIC –VS MBUSHUU STATE -VS- MAKWANYANE, KAKU –VS STATE (1998) 13 NWC R, 54,* ***and several others cited from the U.S.A countries, India and Bangladesh. However that is not the issue which fall for determination now. The issue is the death penalty in Uganda, cruel, inhuman degrading punishment or treatment within the meaning of Article 24 of the Constitution of Uganda.....***

In short the right to life is *guaranteed except* ***where deprivation of life is done in execution of a death sentence passed by the court in accordance with the Constitution and the laws of Uganda. My simple understanding of this provision is that though the right to life is guaranteed the right is not absolute because there is one exception where life can be lawfully extinguished. That is when carrying out a death penalty lawfully imposed by courts."***

We have read and considered the Application, the authorities submitted by Counsel for the Plaintiff. In our view the Plaintiff cannot say that his fundamental rights under Section 70(a) & (c), 74, 76, 77 (a) 77 (7), and 84 (1) & (2) of the Constitution have been contravened or are being threatened with contravention. The Plaintiff has not met any of the threshold tests for breach of fundamental rights as laid down in such cases as ***ANARITA KARIMI NJERU –VS- REPUBLIC*** (No. 1) [1979] K.L.R. 154, where Trevelyan and Hancox JJ said:-

"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree or precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged

to be infringed."

This case has been consistently followed in subsequent recent cases including **PATTNI & ANOTHER -Vs- REPUBLIC [2001] K.L.R. 264 and subsequent cases. NJOYA & 6 OTHERS -VS-ATTORNEY-ENERAL & ANOTHER [2004] I.K.L.R. 232; MEME –VS- REPUBLIC & ANOTHER** [2004] I.K.L.R. 637 holding No. 7.

We therefore find and hold that the Plaintiff has not discharged the burden placed upon him as an applicant to show that any of his fundamental rights as to presumption of innocence, and non-self incrimination, or being subjected torture or inhuman or degrading or other treatment have been contravened or are threatened with contravention.

OF PRE-TRIAL PUBLICITY

It is moot argument whether the alleged pre-trial adverse publicity orchestrated by the First Defendant and/or carried with the connivance or both of the electronic and print media is likely to contravene the right to a fair hearing as guaranteed under section 77 (1) and 77 (7) of the Constitution. It is moot because the Plaintiff has not been charged with any offence. There is no promise or assurance from any quarter that the Plaintiff will be charged with any offence. Besides no evidence was adduced or demonstrated to us that the First Defendant has orchestrated any adverse publicity against the Applicant. In any case as it was held in ***KAMLESH PATTNI –VS- ATTORNEY-GENERAI***, media publicity ***per se*** does not constitute a violation of a party's right to a fair hearing.

OF THE PUBLIC INTEREST UNDER SECTION 70 OF THE CONSTITUTION AND SECTIONS 26, 27, & 28 OF THE ACT

In a way we have covered this subject in our discussion on Jean Rousseau and the Social Contract and Fredrick A. Hayek on ***Law and Legislation and Liberty***, (***supra)*** regarding the paramount interest and expectation of the people or citizenry of a country such as Kenya. Section 70 of the Constitution of the Republic of Kenya, makes every right of the individual subject to the public interest and the rights of the people. To that extent therefore Sections 26, 27, and 28 of the Anti-Corruption and Economic Crimes Act, 2003, are intended to foster the objective of the Act, namely, to provide the legal framework for the prevention, investigation (and detection) prosecution through the Attorney-General and punishment of corruption, economic crimes and related offences and for matters incidental and connected therewith. Those provisions are in due accord with the public interest and the rights and interests of the larger body or **corpus** of Kenyans.

OF THE CONSTITUTIONALITY AND CONSTITUTIONAL JUSTIFICATION OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT.

We reiterate what we have said above of the constitutionality and constitutional justification of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3) 2003. It is this. The Act pursues an objective that it is sufficiently important to justify the limiting of individual constitutional rights, for indeed no such rights are absolute as we have demonstrated above. They are subject to the public interest enshrined in the welfare or rights of the community whole. As ***JAMES MUIGAI WARUI*** , Senior State Counsel aptly put it at paragraph (d) of his Replying Affidavit (***supra)***-

"The Application by KACC of the provisions of Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act, 2003, against the Applicant has given rise to the operation of two fundamental principles which every democratic society is called upon to apply from time

to time namely:-

(i) that the citizen undertakes to live by the laws which protect him and must accept the penalties that may flow from the application of those laws.

(ii) that when actions of public officers (and we should add political leaders or Ministers) undermine public confidence, the public is entitled through criminal trials to know what those officers (have done or purported to do) in their name."

As stated above, the massive and debilitating cancerous nature of corruption in Kenya has impoverished and continues to impoverish the great majority of the Kenyan masses, and leads to robbing Kenyans of resources to build, repair and maintain a run-down infrastructure inadequate health services, and mediocre and inadequate educational facilities. It has led to spiral inflation and unemployment. In our humble view, therefore, urgent, swift and proper investigations are justified. Section 26, 27 and 28 saves investigative time. The Kenya Anti-Corruption Commission is spared time to investigate basic issues as to who owns what or when or how it was acquired and for what consideration. The furnishing of such information does not necessarily mean that the suspect will definitely be charged or prosecuted. There are many imponderables before a prosecution is availed as we outlined in the case of ***OTIENO CLIFFORD RICHARD -VS- REPUBLIC (MISC. CIVIL CASE NO. 720 OF 2005 (O.S.)).***

Investigations and particularly those involving modern economic crimes and corruption are complex and require investigative skills and knowledge of a specialized nature. Corruption and related offences of economic crimes require the setting up of a special body or unit to deal with them Parliament in its wisdom indeed realised this, and thus provided for the establishment of the Kenya Anti-Corruption Commission. In the discharge of its mandate, the Commission has among its ranks investigators of diverse knowledge and skills, Engineers, Architects, Quantity Surveyors, Auditors and Lawyers. This is the team charged with the investigation, detection and prevention of corruption and economic crimes.

To enable the Commission to operate effectively, it is the provisions set out in Section 26, 27 and 28 of the Act which are a necessary tool in the discharge of the Commission's mandate.

The late ***RUBERT CROSS*** who did much to revive the discussion of the principles of evidence called the right to silence "***a sacred cow***." More recently the London Metropolitan Commissioner called for its abolition, and wondered how the "***so called***" right to silence ever gained any sort of respectable place in the English tradition." The Commissioner concluded by endorsing the view of one of his predecessors that the ***right to silence "has done more to obscure*** the truth and facilitate crime than anything else in this country."

The said comment might be said of the Criminal Law (Amendment) Act that confessions be made before a magistrate – a court which has absolutely no training or knowledge or the techniques in investigation of crime and detection of evidence let alone a confession from a sophisticated criminal.

FINDINGS AND CONCLUSIONS

Being therefore of the above mind, we now revert to the Plaintiffs' prayers and questions set out at the beginning of this long judgement.

(1) All fundamental rights whether described as inherent, inalienable, universal, fundamental, legal and Constitutional whether to be presumed innocent or to life itself are

subject to that qualification, that such rights are subject to such limitations that are designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

In the case of our Constitution, Section 77(2) (a), (the right to be presumed innocent) and Section 77 (7) (the right not to incriminate or bear testimony against self), the language of the Constitution is clear and unambiguous, admitting only of one meaning, that the right to be presumed innocent and not to bear witness against self arise only upon being charged with a criminal offence, and not before.

(ii) Sections 26, 27 and 28 of the Anti-Corruption and Economic Crimes Act are investigatory provisions and do not change or reverse the burden of proof, in criminal cases. The burden of proof rests on the prosecution always not on the shoulders of the investigators. In any event Section 72 (1) (e) clearly provides that a person may be deprived of his personal liberty upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Kenya.

An investigation by the Director of the Kenya Anti-Corruption or his Commission under Sections 26, 27 and 28 of the Act is constitutionally permissible pursuant to said section 72 (1) (e). Section 77 (2) (a) (h) and indeed 77 (7) of the Constitution are applicable only when a person has been charged with a criminal offence.

(iii) Under the social contract and indeed under the Limitation prescribed under Section 70 of the Constitution that the right not only to the Protection of the Privacy of home and other property and deprivation of property without compensation, but to dear life itself, liberty or security of the person and the protection of the law and freedom of conscience, of expression and of assembly and association, the statutory requirement under section 26 in respect of a person reasonably suspected of corruption under sections 27 and in respect of associates), and section 28 (in respect of records books and documents), are a necessary and constitutionally justifiable intrusion of the privacy of home and the property in the interest of the rights and freedoms of others and the public interest. It is not justifiable in a democratic society that communal wealth should be spirited and starched way through corruption and economic crime.

(iv) The First Defendant's statutory requirement that the Plaintiff do furnish a list of all the Plaintiff's property and mode of acquisition is neither inhumane, demeaning nor degrading treatment nor in contravention of Section 74 (1) of the Constitution of Kenya which provisions prohibit torture degrading or inhuman treatment).

(v) Sections 26 (1), 27 and 28 of the Anti-Corruption and Economic Crimes Act are not inconsistent with the provisions of Section 70 (a), 70 (c) 77(2) (a), 76 (1), 77(7) or 82 of the Constitution of Kenya.

(vi) Clearly under Section 77 (7) of the Constitution the Constitutional right against self-incrimination is only available where a person has been charged with a criminal offence. It is not under the clear language of our Constitution available during investigations or prior to being charged. Besides, if life may be taken away, by order of court as prescribed under section 71 (1) of the Constitution, Why would a right not to self-incriminate not be limited to the time of testimony after being charged" It is the same Constitution and no right is superior or higher than another.

(vii) *The question whether the pre-trial adverse publicity of the Plaintiff, whether orchestrated by the First Defendant and/or with his connivance (and there was no evidence to that affect before us) both in the electronic and print media is likely or at all to affect a fair trial and a fair hearing as guaranteed under Section 77 (1) & 77 (9) of the Constitution is purely speculative for the Plaintiff has not been charged with any anti-corruption offence or economic crime. The current charges against the Plaintiff under Section 26 (2) of the Act are as a result of the failure by the Plaintiff to comply with the notice under Section 26 (1) of the Act.*

(viii) *In matters of investigation each individual case is in our opinion treated in accordance with its peculiarity giving rise to reasonable suspicion on the part of the Director of the Commission, and every Kenyan or resident or other person suspected of corruption and economic crime is subject to investigation without regard to his race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex. The Plaintiff herein did not adduce any evidence or particulars to show that persons of such description (race, tribe, etc)* are subjected to disabilities or restrictions *to which persons of another description are not made subject or accorded privileges or advantages which are not accorded to persons of another description. Gazette Notice No. 8587 of 19th October, 2006 showed no less than fifty cases investigated or under investigation by the Commission for the quarter covering 1st July, 2006 to 30th September, 2006. We find and hold that the Plaintiff has not been discriminated in any manner under Section 82 (1) and (2) of the Constitution of Kenya.*

(ix) *The fundamental right to life, liberty, security of the person and the protection of the law accorded under section 70 (a) of the Constitution is at the same time limited to the extent that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. What the Constitution has itself limited cannot be unconstitutional or be regarded to be contrary to the rule of law the public interest or public policy or public decency.*

We find and hold that investigations by the First Defendant are in accordance with the law, are neither arbitrary, high handed nor a witch hunt or for extraneous purposes and are not to gain political mileage.

On the contrary, we find and hold that the investigations by the First Defendant are in accord with the law, and are intended to uphold and enforce the criminal law in so far as Corruption and economic crime are concerned for these are complex and sophisticated modern crimes and the result of which cause poverty, underdevelopment and misery among our people. Such investigations do not impinge upon the provisions of Section 70 (a) of the Constitution.

The presumption of a corrupt act under Section 58 of the Act is not a shift of the burden of proof. The presumption of a corrupt act is reached upon proof, by the prosecution and again, that presumption applies at the trial, not the investigation. We therefore hold that the said section does not offend either Section 77 (2) (a), or Section 77 (7) of the Constitution.

In the result therefore and save for the limited grant of part only of prayer No. 10 (quashing the notice dated 9th January, 2006, and the prosecution founded on it,) all the Plaintiff's prayers and questions must be answered in the negative, and the Plaintiff's Originating Summons dated and filed on 1st February, 2006 is hereby dismissed with costs to the Defendants.

We further direct that the law should take its course. There shall be orders accordingly.

We thank Hon. Paul K. Muite, Senior Counsel and his team of Mr. Kioko Kilukumi, Professor Muigai for the First

Defendant and Mr. James Mungai Warui learned Counsel for the First and Second Defendants respectively.

Dated and delivered at Nairobi this 1st day of December, 2006.

.....

J.W. Lesiit

Judge

.....

R.P.V. Wendoh

Judge

.....

M.J. Anyara Emukule

Judge.

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KENYA LAW
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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & OTIENO-ODEK JJA)

CIVIL APPEAL No. 184 of 2018

BETWEEN

STANLEY MOMBO AMUTI..... ..... APPELLANT

AND

KENYA ANTI-CORRUPTION COMMISSION..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Achode, J.) delivered on 23rd November 2017

in

Anti-Corruption & Economic Crimes Court Misc. No. 5 of 2016

formerly

HCCC No. 448 of 2008 (OS))

****

JUDGMENT OF THE COURT

UNEXPLAINED ASSETS and NOTICE TO EXPLAIN

1. The scourge of money laundering, economic crimes and corruption is threatening the moral and social fabric of society. In Kenya, one of the legislative instruments designed to deal with the scourge is **Anti-Corruption and Economic Crimes Act of 2003**. In its preamble, the Act seeks to provide for prevention, investigation and punishment of corruption, economic crimes and related offences. The Act establishes the Kenya Anti-Corruption Commission as a body corporate whose Chief Executive Officer is the Secretary/Director to the Commission.

2. Entrenched in the Act is the concept of "unexplained assets" which is a legal innovation to combat the vice of "doubtful

source of wealth, money laundering and suspicious corrupt practices." Underlying the concept is the theme "You fail to satisfactorily explain the lawful source of assets, you forfeit it."

3. *Section 2* of the **Anti-Corruption and Economic Crimes Act (ACECA)** defines "unexplained asset" to mean:

"Assets of a person:

(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation."

4. For purposes of investigating and inquiry into unexplained assets, **Section 26** of the Act provides:

"26(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property:

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b)stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(3) The powers of the Commission under this section may be exercised only by the Secretary."

5. At the outset, it is necessary to describe the nature and character of Notice issued under ***Section 26*** of **ACECA.** A ***Section 26*** Notice is a civil investigatory tool aimed at collecting information and data from a person suspected of corruption or economic crime. By virtue of ***Section 55 (9)*** of the Act, the provisions of ***Section 55 ACECA*** are retroactive and *a* ***Section 26*** Notice may issue regardless of when the property was acquired. The Notice can issue in relation to property acquired before the Act came into force. Evidence recovered pursuant to ***Section 26*** on unexplained assets is for civil recovery only. Pursuant to ***Section 30*** of the Act, the material received pursuant to the Notice cannot be used in criminal proceedings against the respondent (except in certain limited circumstances including prosecution for perjury, or on a prosecution for another offence where the respondent has provided inconsistent evidence).

BACKGROUND FACTS

6. On 9th July 2008, the respondent issued a Notice under ***Section 26*** of the Act requiring the appellant to furnish a statement of his property. In relevant excerpts, the Notice stated:

"…..Your various assets, located in different parts of the country are estimated at tens of millions of Kenya Shillings and are found to be disproportionate to your salary considering that your salary from employment in the Public Service was your only source of income during the period within which you acquired the said assets. You are therefore reasonably suspected of engaging in Corruption and Economic Crimes." *(Emphasis supplied)*

7. The Notice issued to the appellant identified specific properties, motor vehicles and bank accounts including cash and cheque deposits which the appellant was required to explain and furnish the source of monies that led to acquisition or development of the enumerated assets. The appellant was required to explain the source of cash deposits made to his accounts.

8. Of relevance to this appeal, the Notice required the appellant to explain his wealth for 16 years being the period 1992 to 2008. It is contended in this appeal that the respondent unlawfully altered the period of investigation and inquiry to 10-months namely from September 2007 to June 2008.

9. The appellant complied with the Notice and gave explanation for his wealth and assets in a response dated 17th July 2008. Dissatisfied with the explanation, the respondent by way of Originating Summons (OS) moved to the High Court pursuant to ***Section 55*** of the **ACECA** seeking orders for forfeiture of the unexplained assets.

10. The gist of the respondent's application was for the trial court to determine whether the appellant was in possession of unexplained assets; whether a declaratory order should issue declaring various properties of the appellant to constitute unexplained assets liable to forfeiture; whether the appellant should be condemned to pay the Government of Kenya the sum of Ksh. 140,976,020/= being the cumulative bank deposits made by the appellant between September 2007 and 30th June 2008 and whether the appellant should pay the Government Ksh. 32,500,000/= being the value of real land properties constituting unexplained assets or any other amount the court finds to constitute unexplained assets.

11. Upon hearing the Originating Summons, the learned judge (Achode J.) in a judgment delivered on 23rd November 2017 held the appellant was in possession of unexplained assets valued Ksh. 41,208,000/=. A decree was issued that the appellant is liable to pay the Government of Kenya the sum of Ksh. 41,208,000/=. More specifically, the learned judge expressed herself as follows:

"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 balance of probability that the property listed below fits into the definition of the term unexplained assets as defined under Section 2 of the ACECA and should be forfeited to the State:

1. Ksh. 9,500,000/= said to have been advanced by one Samuel Gitonga.

2. Ksh. 15.5 million said to be professional fees from a Sudanese National.

3. Ksh. 10,900,000/= said to be instalments paid by Evelyn Mwaka and Antony Nganga Mwaura for sale of property.

4. Ksh. 1,000,000/= said to be funds for a community project.

5. Ksh. 4,308,000/= cash seized from the Defendants house.

I therefore declare the foregoing sums of monies to be unexplained assets and order that the Defendant do pay the Kenya Government Ksh. 41,208,000/= being the sum total of the monies listed above. There are no orders as to cost."

GROUNDS OF APPEAL

12. Aggrieved by the judgment and decree of the High Court, the appellant has lodged the instant appeal citing the following abridged grounds in his memorandum:

(i) The judge misdirected herself on Articles 40 and 50 of the Constitution and Section 55 of the Anti-Corruption and Economic Crimes Act (ACECA) as to the threshold on forfeiture of property.

(ii) The judge erred in ignoring that the appellant was not issued with a mandatory notice under Section 26 of the ACECA to explain his property acquired within ten (10) months from September 2007 to June 2008 and the judge further erred in failing to find the Originating Summons was defective after the period was unlawfully altered from 16 years to 10 months without the consent or authority of the Director of the Commission.

(iii) The judge erred by ordering forfeiture of the appellant's property amounting to Ksh. 9.5 million said to have been advanced by Samuel Gitonga yet the property was not enumerated and listed in the Notice dated 9th July 2008 and the same was not subject to the proceedings in the Originating Summons.

(iv) The judge erred in making an order for forfeiture of the appellants' property of Ksh. 15.5 million said to be professional fees from a Sudanese National yet the same was not enumerated and listed in the Notice dated 9th July 2008 and the same was not subject to the proceedings in the Originating Summons.

(v) The court erred in making an order for forfeiture of Ksh. 10.9 million said to be instalment by Evelyn Mwaka and Antony Mwaura for sale of property yet the property was not enumerated and listed in the Notice dated 9th July 2008 and thus the appellant was not afforded a reasonable opportunity to explain the property.

(vI The judge erred in making an order for forfeiture of Ksh. 1,000,000/= said to be community project yet the property was not enumerated and listed in the Notice dated 9th July 2008 and thus the appellant was not afforded a reasonable opportunity to explain the property.

(vii) The court erred in making an order for forfeiture of Ksh. 4,308,000/= yet the property was not enumerated and listed in the Notice dated 9th July 2008 and thus the appellant was not afforded a reasonable opportunity to explain the property.

(viii) The judge erred in making an order for forfeiture of the appellant's properties without setting out clearly the matters alleged to constitute the particular kind or kinds of unlawful conduct through which the properties were obtained.

(ix) The judge erred in finding that property can be forfeited without conviction for a criminal offence.

(x) The judge erred and ignored the direction given by the Court of Appeal in ***Stanley Mombo Amuti -v- Kenya Anti-Corruption Commission (2015) eKLR*** *at paragraph 31 thereof.*

13. At the hearing of this appeal, learned counsel ***Mr. Franklin Omino*** appeared for the appellant while learned counsel ***Mr. Phillip Kagucia*** appeared for the respondent. Both parties filed written submissions and list of authorities.

SUBMISSIONS BY APPELLANT

14. Counsel for the appellant rehashed the background facts leading to the judgment of the trial court. Counsel submitted the appellant was handicapped in explanation of his assets because the respondent had seized all documents relevant to answering to the Notice that was issued under *Section 26* of the ACECA; that despite the handicap and lack of documentation, the appellant in his response to the Notice gave explanation to the best of his knowledge and recollection.

15. Counsel for the appellant abridged and categorized the grounds of appeal into three:

(i) Errors of law and fact arising from the hearing and determination of the Originating Summons.

(ii) Errors of law and fact due to ignorance and disrespect of law and facts under Sections 26 and 55 of the ACECA.

(iii) Errors of law and fact arising from finding that certain properties subject of the judge's decision were not explained.

16. Submitting on errors on the Originating Summons (OS), counsel urged that the respondent did not issue a Notice to the appellant to require him to explain the property acquired within the period of 10 months from September 2007 to June 2008; the Notice issued required the appellant to explain his properties over a period of 16 years from 1992 to 2008 and not ten-months; that the respondent had illegally altered the Notice period in the Originating Summons without the consent of the Director and thus the OS was *null* and *void ab initio.*

17. A further ground of appeal is that the judge erred in ordering forfeiture of properties that were not part of the Notice dated 9th July 2008 that had been served upon the appellant pursuant to ***Section 26*** of the ACECA; that as regards properties ordered to be forfeited, the respondent did not issue Notice under ***Section 26*** of the Act requiring the appellant to offer explanation; the forfeited properties were not enumerated in the Notice dated 9th July 2008; in addition, the properties were not listed in the Originating Summons and consequently, the appellant was denied justice and a reasonable opportunity to explain the legitimate source of the properties.

18. Counsel submitted that the record reveals the respondent, through its witnesses, testified that there was neither an allegation of corruption nor abuse of office against the appellant; that all the enumerated properties were private not public properties; the respondent tendered evidence that the appellant's properties were private not public; that the forfeited properties comprised assets that the appellant was never requested to explain and the said properties were not enumerated in the Originating Summons. As a result of the foregoing, it was submitted the proceedings before the learned judge under the OS were illegal and ultra vires.

19. Submitting on alleged errors of law, the appellant contended that the judge erred in appreciating the context in which ***Articles 40*** and ***50*** of the Constitution apply; the court further erred in its interpretation and application of ***Section 55*** as read with **Section 26** of the ACECA. In relation to ***Article 40***, the appellant contended that no person has lodged any complaint regarding his properties and thus the State is obliged to uphold **Article 40** of the Constitution which stipulates that the State shall not deprive a person any property unless it has been unlawfully acquired; that there is no evidence on record to show the appellant's properties were unlawfully acquired; the respondent's witnesses testified there is no complaint of corruption or abuse of office against the appellant and therefore it was not within the jurisdiction of the learned judge to invoke a civil recovery of property without proof of any unlawful act or conduct on the part of the appellant.

20. It was submitted that the judge erred in applying ***Section 55*** of the ACECA because the section only applies to a public officer if his act or conduct constitutes corruption or an economic crime; it was urged **Section 26** of the Act did not apply to the

facts of the instant case because no Notice was given to explain the properties declared to be forfeited; the judge erred in ignoring the fact that the Notice given was defective to the extent the period under investigation was shortened without authorization by the Director of the respondent Commission.

21. The appellant further submitted the judge erred in her evaluation of the evidence by failing to find there was no obligation on the part of the appellant to testify and satisfy the court that his assets were acquired otherwise than as a result of corrupt conduct when the respondent had already testified there were no allegations of corrupt conduct or abuse of office on the part of the appellant. Counsel submitted that the appellant was not given an opportunity to explain how he acquired the assets the subject of forfeiture order by the court; the appellant contends that under ***Section 55*** of ACECA, unexplained assets is not the issue but to have assets acquired as a result of corrupt conduct is the key issue for determination.

22. The appellant submitted that in his response to the Notice dated 9th July 2008, he annexed a loan agreement which showed he had lawfully received cash from one ***Samuel Gitonga*** for construction and development of his plot; that the judge erred in finding the loan agreement between the appellant and Mr. Gitonga was not convincing because the said Mr. Gitonga was not called to testify; to this extent, it was submitted that the judge erred as she was asking the appellant to prove his innocence; and that the probative value of the agreement was not reduced by failure to call Mr. Gitonga to testify.

23. Reiterating submissions on the forfeited property, the appellant urged that there was no Notice issued requiring him to explain the Community Project and source of Ksh. 1,000,0000/= towards the project; that there was no Notice issued under ***Section 26*** of ACECA to explain the Ksh. 15.5 million received as professional fees from a Sudanese National; and that the Constitution does not place the onus on a party to prove that he/she acquired property lawfully.

24. The appellant contend both ***Articles 50*** and ***35*** of the Constitution and the Fair Administrative Actions Act require every person to be informed in advance the evidence the prosecution intends to rely upon and to have reasonable access to that evidence; that to hold the appellant did not explain the properties contravenes his rights under ***Article 50*** because the forfeited properties were not included in the Notice issued pursuant to ***Section 26*** of ACECA. Based on the foregoing submissions, the appellant urged us to set aside the judgment dated 23rd November 2017.

RESPONDENT'S SUBMISSIONS

25. The respondent through learned counsel Mr. Phillip G. Kagucia opposed the appeal by way of written submissions and oral highlights. The respondent urged that the appellant cannot at this appellate stage challenge the validity of the Notice issued under ***Section 26*** of the ACECA; and that any challenge to the Notice should have been done as a preliminary matter as was the case in **Dr. Christopher Ndarathi Murungaru -v- KACC & another - Nairobi HC Misc. Civil Application No. 54 of 2006**

26. The central theme in this appeal is the judge erred in law in failing to identify the period of investigation. The appellant contends that the period of investigation was properly identified by the Director in the Notice dated 9th July 2008 as 16 years and no other Notice was issued varying the period of investigation to 10-months.

27. On the contestation that the Notice cited a period of 16 years whilst the suit vides Originating Summons (OS) was confined to a period of 10-months, the respondent submitted that there was no inconsistency as the 10-month period falls squarely within the Notice period and would not have required a separate Notice. It was further submitted that the appellant's response to the Notice dated 9th July 2008 was unsatisfactory in so far as the period of 10 months between 1st September 2007 and 20th June 2008; and that the OS leaves no doubt regarding the period giving rise to the proceedings; that the period of 10 months between 1st September 2007 and 30th June 2008 is repeatedly mentioned in the OS.

28. The respondent submitted that the Notice dated 9th July 2008 issued under ***Section 26*** of ACECA met the threshold for forfeiture of unexplained assets; that in this matter, upon investigations it was reasonably established that the appellant had unexplained assets disproportionate to his known legitimate source of income ***Section 55 (2) (a)***; that inspite an opportunity being granted as per ***Section 55 (2) (b)***, the appellant failed to give a satisfactory explanation of the disproportionate assets.

29. The appellant contends that the judge erred in ordering forfeiture of cash Ksh. 4,308,000/= recovered at his office and residence; the basis of contestation is that the said sum was not mentioned in the Notice dated 9th July 2008. The respondent submitted that the sum of Ksh. 4,308,000/= was captured at paragraphs 4 and 5 of the Notice dated 9th July 2008 and the appellant was required to explain the source thereof.

30. On the contestation that the learned judge did not properly evaluate the evidence to the requisite threshold, the respondent cited the case of **Ethics and Anti-Corruption Commission -v- Stanley Mombo Amuti (2105) eKLR** where this Court held that under the ACECA, the burden of proof remains with the Commission and it was for the court to determine if the burden was discharged. It was submitted that the respondent called two witnesses who tendered oral and documentary evidence before the judge and established on balance of probability that the appellant had unexplained assets. The respondent urged this Court to re-assess the testimony of ***Enoch Otiko*** (PW2) who established that the cumulative cash deposits in the appellant's accounts totaled Ksh. 140,976,020.55 during the period 1st September 2007 and 30th June 2008; and that these deposits were disproportionate to the appellant's known lawful source of income.

31. On factual basis, counsel for the respondent submitted that the appellant concurred with the Investigating Officer in his response to the Notice that he had cash outflows of Ksh. 43,208,000/= during the 10-month period; this means for the appellant to spend Ksh. 43,208,000/= he must have received it; the question is he was unable to explain where did the cash come from"

32. The respondent submitted extensively on the law on forfeiture of unexplained assets; that ***Article 252*** of the Constitution provides the constitutional underpinning for the powers and functions of the respondent; that **Section 11 (1) (j) ACECA** empowers the respondent to institute and conduct proceedings in court for purposes of confiscation of proceeds of corruption.

33. On the issue of evidential burden of proof, it was submitted the trial court properly exercised its discretion under ***Section 55 (5)*** of the ACECA to decide whether or not the respondent had satisfied the court that the appellant possessed unexplained assets. Citing the case of **Mbogo -v- Shah (1968) EA 93**, the respondent urged this Court not to interfere with exercise of discretion by the judge.

34. Submitting on the contestation that the appellant was not given reasonable opportunity to explain the source of the assets identified for forfeiture, the respondent urged this Court to note that although the suit was initiated the suit by way of OS, by consent of the parties recorded on 10th March 2016, the trial proceeded by way of oral evidence and the appellant had opportunity to satisfy the trial court that his assets were acquired other than by way of corrupt practices; the appellant was given opportunity through cross examination to test the veracity of the respondents evidence; that the learned judge upon evaluating the entire evidence on record arrived at correct conclusions and findings that the appellant had unexplained assets. The respondent submitted it is noteworthy the appellant did not call a single witness in support of his assertion that assets acquired during the period of interest were legitimate.

35. Responding to the contestation that the appellant's property rights under ***Article 40*** of the Constitution were violated as well as the right to fair hearing under ***Article 50***, it was submitted it had not been demonstrated how the rights of the appellant were violated.

36. Counsel cited the comparative experience from Columbia submitting that the remit of civil forfeiture encapsulates more than alleged criminality of the appellant and extends to the regime of proprietorship; that in the instant appeal, the appellant is not entitled to property/assets whose source he cannot adequately explain. The respondent urged us to dismiss the appeal with costs.

ANALYSIS

37. We have considered the grounds of appeal, submission by counsel and the authorities cited. As was stated in **Abok James Odera t/a A. J Odera & Associates -v- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** we remind ourselves of our primary role as a first appellate court namely: to re-evaluate, re-assess and re-analyze the evidence on the record and then determine whether the conclusions reached by the learned judge are to stand or not and give reasons either way.

38. Central to this appeal is the contestation that the Notice issued pursuant to ***Section 26*** of the ACECA indicated the period of investigation and inquiry to be 16 years from 1992 to June 2008; that the Originating Summons (OS) lodged by the respondent illegally reduced the period to 10-months without authorization by the Director of the Anti-Corruption Commission; that due to the alleged illegal and unauthorized reduction of the period of investigation, the OS as filed is fatally defective; to this end, the appellant submitted the judge erred in law in failing to identify the period of investigation and to strike out the defective OS.

39. We have examined and scrutinized both the Originating Summons dated 19th September 2008 and the Notice dated 9th July 2008 requiring the appellant to furnish a statement of property pursuant to ***Section 26*** of the ACECA. The Notice expressly required the appellant to furnish to the Kenya Anti- Corruption Commission, within 14 days of service, a written statement of the properties acquired between 1992 and June 2008. (Emphasis supplied). The Originating Summons at paragraph 4 thereof is a prayer for the trial court to condemn the appellant to pay the Government of Kenya the cumulative sum of Ksh. 140,976,020/= being bank deposits by the appellant between September 2007 and June 2008.

40. It is the appellant's ground of appeal that the Originating Summons is fatally defective as it relates to a period of 10-months and not 16 years.

41. We have considered the appellant's submission on the validity of the Originating Summons and the Notice. The 10-month period from September 2007 to June 2008 is within the 16-year timeline of 1992 to June 2008 stated in the Notice dated 9th July 2008. The Notice required the appellant to furnish details of the enumerated property and cash deposits for the 16-year period. In our view, the greater period includes the lesser period and no fresh or new Notice was required for the 10-months between September 2007 and June 2008. This lesser period is already within the longer 16-year time-frame. Further, the OS at paragraph 4 thereof and at paragraph 10 of its Supporting Affidavit deposed by ***Mr. Anthony Kahiga*** dated 19th September 2008 expressly identified and informed the appellant the period under investigation was September 2007 to June 2008. It is not the duty of the trial court to identify the period of investigation. Under **Section 26** as read with **Section 55** of the ACECA, it is the duty of the respondent Commission to identify the period under investigation. The learned judge correctly found that the evidence on record identified the period of investigation to be September 2007 to June 2008. Accordingly, the ground and submission that the learned judge erred in failing to identify the period of investigation has no merit. Likewise, the contestation that the OS as filed is fatally defective for being grounded on a 10-month period has no merit.

42. The next pivotal ground of appeal is that the judge erred in ordering forfeiture of properties that were not enumerated in the Notice dated 9th July 2008 issued to the appellant pursuant to ***Section 26*** of the ACECA; that in relation to the properties ordered to be forfeited, the respondent did not issue a separate Notice under ***Section 26*** of the Act requiring the appellant to offer explanation; further, the properties were not listed in the Originating Summons and the appellant was denied justice and a reasonable opportunity to explain the source of the properties identified for forfeiture.

43. We have considered the appellant's submission in relation to the properties and assets identified and ordered to be forfeited by the learned judge. The assets to be forfeited are identified by the judge are the following:

i. sh. 9,500,000/= said to have been advanced by one Samuel Gitonga.

ii. Ksh. 15.5 million said to be professional fees from a Sudanese National.

iii. Ksh. 10,900,000/= said to be installments paid by Evelyn Mwaka and Antony Nganga Mwaura for sale of property.

iv. Ksh. 1,000,000/= said to be funds for a community project.

v. Ksh. 4,308,000/= cash seized from the Defendants house

44. We have also analyzed the appellant's response dated 17th July 2008 prepared in response to the Notice dated 9th July 2008. In his response, the appellant conceded that the Notice required him to explain the source of cash recovered from his house and office. He admits that a total of Ksh. 4,308,000/= was recovered from his house and office. He explains the source to be accumulated savings, salary, rent, professional fee and sale of plots. The appellant's response aptly demonstrates that he was given an opportunity to explain the source of cash recovered at his house and office. From the evidence on record, we find the appellant's right to fair hearing under ***Article 50*** of the Constitution as well as his right to be accorded reasonable opportunity to explain the source of the monies recovered as required by **Section 55 (2)** of the ACECA were not violated.

45. In relation to the sum of Ksh. 15,500,000/=, the appellant in his response stated the money was "cash brought in by the late ***Joseph Mabior***, a Sudanese National." In his Notes attached to the response, the appellant states "the letters relating to the particulars of the late Joseph Mabior and the amount of Ksh. 15.5 million was in the personal file taken away by the investigators and he had no access to the file.

46. We have considered the appellant's submission that the sum of Ksh. 15,500,000/= was neither enumerated nor indicated in the Notice dated 9th July 2008. In our view, the appellant was required to explain the source of cash deposits in his various bank accounts for the period under investigation. It is instructive to note the record shows there is no deposit of Ksh. 15,500,000/= as a single deposit transaction that would corroborate receipt of this specific sum from anyone. Rather, the evidence reveals several cash deposits in tranches of Ksh. 100,000/=.

47. On the contention that he was not given an opportunity to explain the source of Ks. 15.5 million, we find that it is the appellant through his response who introduced the sum of Ksh. 15,500,000/= as being cash received from a Sudanese National. The appellant himself admitted and confessed receiving the said sum of Ksh. 15,500,000/=. The appellant not only placed in issue the sum of Ksh. 15,500,000/= but also had a reasonable opportunity to explain the origin and source of the money. The trial court made a finding that the appellant's explanation that the money was professional fees from a South Sudanese National not satisfactory. The judge observed *inter alia* that the nature of the professional services rendered was not explained; and that the duration of the alleged work done was not explained and no fee note was tendered in evidence. We have considered the learned judge reasoning in light of the provisions of **Section 55 (2)** of ACECA and ***Section 112*** of the Evidence Act. The evidentiary burden to tender credible satisfactory explanation of the source of the Ksh. 15.5 million rested with the appellant. We hasten to add that no report of the work or services rendered was put in evidence. The appellant has not demonstrated to our satisfaction that the learned judge erred in her analysis of the evidence on record to arrive at the determination that the source of the admitted sum of Ksh. 15.5 million was not satisfactorily explained.

48. We now consider if the judge erred in ordering forfeiture of Ksh. 9,500,000/= explained by the appellant to have been

advanced by one ***Samuel Gitonga***. The appellant in his response explaining source of cash inflows to his bank account stated that he borrowed the sum of Ksh. 9,500,000/= from friends. In support, he tendered in evidence a loan agreement between himself and one ***Samuel Getonga M'Ringera*** for Ksh. 9,500,000/=; the loan agreement states that the monies was paid in cash. It is instructive to note that the said ***Samuel Getonga M'Ringera*** was not called to testify. The appellant not only placed in issue the sum of Ksh. 9,500,000/= but also had a reasonable opportunity to explain the origin and source of the money. If a relevant issue is placed before the trial court, the court has jurisdiction to pronounce itself on the issue. We find the trial court did not err in considering the question whether the admitted sum of Ksh. 9,500,000/= was part of unexplained assets.

49. The appellant in explaining the source of cash deposits in his bank accounts put in issue and stated that he had received cash deposit for sale of Plot No. 121/186 at Komarock from one ***Evelyn Jennifer Mwaka***. In his response, he stated that he had also received cash installment deposit from ***Mr. Antony Nganga Mwaura*** in relation to Plot No. A. 18. We find the appellant not only placed in issue the sum of Ksh. 10,900,000/= but also had a reasonable opportunity to explain the origin and source of the money. Accordingly, we find that the judge did not err in considering the question whether the admitted sum of Ksh. 10,900,000/= was part of unexplained assets.

50. Concomitantly, the appellant in his response also put in issue the sum of Ksh. 1,000,000/= said to be funds for a community project. Once again, it is the appellant who brought to light and placed in issue the sum of Ksh. 1,000,000/=. He admitted receiving the money as source of his asset. We find that the appellant not only placed in issue the sum of Ksh. 1,000,000/= but also had a reasonable opportunity to explain the origin and source of the money. We find the trial court did not err in considering the question whether the admitted sum of Ksh. 1,000,000/= was part of unexplained assets.

51. The totality of our re-evaluation of the evidence as revealed by the appellant's response dated 17th July 2008 lead us to find that in relation to the properties/assets identified for forfeiture by the learned judge, it is the appellant who identified the assets in explanation of sources of cash flows in his bank accounts. We are satisfied the appellant had an opportunity to explain the source of these cash assets and his right to fair hearing as embodied in ***Article 50*** of the Constitution was not violated.

52. We now turn to consider the issue whether the trial court properly evaluated the evidence on record in arriving at the decision that the total sum of Ksh. 41,208,000/= was unexplained assets that the appellant should forfeit to the Government of Kenya. In this context, the appellant submitted that the learned judge erred in exercise of her discretion under ***Section 55 (2)*** of ACECA in arriving at the decision the respondent had established on balance of probability the appellant had unexplained assets.

53. More specifically, the appellant contends that the judge erred because after the respondent called all its witnesses, the court failed to examine the evidence adduced and make a finding that she was satisfied on a balance of probabilities that the appellant had unexplained assets to trigger her decision to call the appellant to prove by evidence the assets complained of were acquired otherwise than as a result of corrupt conduct; the judge erred as she did not satisfy herself on the need to call the appellant to testify.

54. The gist of the appellants foregoing submission is that the judge erred in exercising her discretion to call the appellant to give evidence without putting on record that the court was satisfied a *prima facie* case on balance of probability had been established by the respondent.

55. We are cognizant of the dicta where the Supreme Court expressed that an appellate court should be very hesitant to assume jurisdiction in cases where a litigant is challenging the exercise of discretion by another Court. In **Teachers Service Commission -v -Kenya National Union of Teachers & 3 Others, SC Application No. 16 of 2015; [2015] eKLR,** the Supreme Court held it has no jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal.

56. The limitation to an appellate court's interference with the exercise of judicial discretion was well expressed in **Daniel Kimani Njihia -v- Francis Mwangi Kimani & Another SC Application No. 3 of 2014; [2015] eKLR** (***Daniel Kimani***) where the Supreme Court stated thus [paragraph 21]:

"Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution."

57. In **Francis Wambugu -v- Babu Owino & others, SC Petition No. 15 of 2018,** on the issue of an appellate court entertaining an appeal founded on exercise of discretion of the trial court, it was stated:

"[76] In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court's decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court's judicial independence and exercise of discretion."

58. In the instant matter, under ***Section 55 (5)*** and ***(6)*** of the ACECA, the trial court has discretion to decide if the Commission has tendered evidence on balance of probability establishing the appellant had unexplained assets. In addition, the court had discretion to let the appellant satisfactorily explain the source of his assets. The Section provide as follows:

"55 (5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct."

59. In **Basil Criticos -v- Independent Electoral and Boundaries Commission & 2 others SC Petition No.22 of 2014; [2015] eKLR**, the Supreme Court held that interfering with an exercise of discretion on the part of the trial court would be tantamount to directing a court on how to exercise its powers, in essence restraining its liberty. In **Musa Cherutich Sirma -v- IEBC & 2 others, SC Petition No. 13 of 2018,** the Supreme Court held that an appellate court can only interfere with exercise of discretion if the appellant can show that in exercise of its discretion:

i. the ...court acted on a whim or that;

ii. its decision is unreasonable and

iii. it is made in violation of any law or the Constitution or that;

iv. it is plainly wrong and has caused undue prejudice to one party.

60. In the instant appeal, the appellant has not demonstrated to our satisfaction that the learned judge in permitting the appellant to testify exercised her discretion under ***Section 55 (5)*** and **(6)** of the Act unreasonably, whimsically or injudiciously or that an injustice has occurred or violation of any law or the Constitution has taken place. (See **Deynes Muriithi & 4 others -v- Law Society of Kenya & another SC Application No 12 of 2015; [2016] eKLR).** Accordingly, we see no reason to interfere with the exercise of the discretion by the learned judge.

61. The appellant further urged that the learned judge erred in failing to find the respondent had not proved the threshold for unexplained assets. The threshold for determining unexplained assets is provided for in ***Sections 2*** and ***55 (2)*** of the **Anti-Corruption and Economic Crimes Act.**

62. ***Section 2*** of Act defines "unexplained asset" to mean:

"assets of a person—

a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation."

63. ***Section 55 (2)*** of the Act stipulates:

"The Commission may commence proceedings under this section against a person if:

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

64. In our considered view, a reading of ***Section 2*** and ***55 (2)*** of the Act establishes the threshold for existence of unexplained assets to be:

i. There must be set time period for the investigation of a person;

ii. The person must be reasonably suspected of corruption or economic crime;

iii. The person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation and

iv. There is no satisfactory explanation for the disproportionate asset.

65. In this appeal, we now re-evaluate the evidence on record to ascertain if the trial court erred in finding that the threshold for

unexplained assets had been attained against the appellant. In evaluating the evidence, in relevant excerpts, the trial court expressed itself as follows:

"77. On the advances from friends and family, the Defendant testified that he received from friends and particularly Ksh. 9,500,000/= from one Samuel Gitonga vide an agreement dated 18th January 2008. This is an averment which was however, not supported by any evidence. The said Samuel Gitonga did not testify nor did the Defendant provide any documentary evidence to support his allegation. The court was not told of any difficulty in securing Mr. Gitonga's attendance in court to testify on behalf of the Defendant if the defendant so wished.

78.....

79. With regard to professional fees, the Defendant testified that some of the deposits into his bank accounts came from payments made to him for professional accounting services he had rendered. In particular, he stated that he earned Ksh. 15.5 million from a Sudanese National. There was however not a shred of evidence to back such an averment. In my view, for the defendant to attract professional fee of the magnitude of Ksh. 15.5 million, he would have to have served a very large corporate body for a considerable amount of time or work to earn such an amount.

80. The Defendant did not provide the name or company of the so called Sudanese National that he served, the period for which services were rendered and the nature of the actual services provided and the fee notes raised. It is not clear why he chose to bank the said fees in tranches of Ksh. 100,000/= via ATM over a period of days. It is doubtful that the Sudanese National would have paid such a large amount of fees in cash and in such small bits over a number of days, instead of making one bank transfer or a few large transfers.

81. On the deposits from Community Funds, the Defendant told the court that he collected Ksh. 1,000,000/= through fund raising for purposes of electricity on behalf of his community back in his village. One would expect there would be some sort of committee to oversee such a noble idea or even the area chief or sub-chief would lend credence to such assertion. I note however, that not a single witness testified in support of the project. The Defendant said the relevant invoice was among documents impounded by the Plaintiff from his house and office. He however, did not supply any copies of documentation from Kenya Power and Lighting Corporation for such a project.

82. On the funds from sale of property, of interest are the deposits made by Jennifer Evelyn Mwaka t/a Evemil Enterprises and Antony Mwaura Nganga t/a Toddy Merchants and Hardy Enterprises into the Defendant's Bank Account No. 8240656. The deposits made in the period under investigation by these two persons amounted to Ksh. 10.9 million.

83. The Defendant admitted that he received money from Jenifer Evelyn Mwaka and Antony Nganga Mwaura amounting to Ksh. 10.9 million. This he explained was because he was in the process of selling a plot of land to Mr. Nganga at a cost of Ksh. 35,000,000/=. The Defendant supplied the Plaintiff with a sale agreement between himself and Antony Nganga as evidence of that sale....

88. The authenticity of the sale agreement which indicated that the Defendant received money from Mr. Nganga in February and March 2008 and the plot alleged to have sold was Plot No. A 18 Umoja Inner core is doubtful. The sale agreement was not part of the documents found and retrieved from the Defendant's house during the search. The alleged sale agreement.....was not signed nor was it witnessed.

90. From the foregoing I make a finding that there was no sale of property between the Defendant and Ms Jenifer Evelyn Mwaka or Mr. Anthony Nganga Mwaura.

91. Then there was also the matter of Ksh. 4,308,000/= cash seized from the Defendant's house.... He did not however tell the source of this money.

66. The appellant faults the learned judge in her evaluation of the evidence on record as reproduced verbatim above. It was submitted that the judge erred in finding the sale agreement with one Samuel Gitonga was not authentic; it was submitted the probative value of the sale agreement was not diminished simply because Mr. Gitonga was not called to testify; that the original sale agreement was produced in court.

67. We have considered the appellant's contention the judge erred in evaluating the evidence relating to the sale agreement with one Samuel Gitonga. We have considered the reasons given by the judge in arriving at the finding that the said agreement was not authentic. For instance, the evidence on record reveals that another offer was made by the appellant to sell the same property which had already been sold to ***Jennifer Evelyn Mwaka***; it is improbable that the appellant would knowingly sell the same property to two different persons. The appellant submitted that the sale did not go through due to the investigations by the respondent. It is trite in contract law, when there is total failure of consideration, refund of any monies paid under the contract is due and owing. Be that as it may, in the instant matter, if at all the sale did not go through, there is no evidence of refund by the appellant of the cash installments paid as deposit. The record shows neither Samuel Gitonga nor Jennifer Evelyn Mwaka were called to testify and throw light on the nature of the cash transactions with the appellant. In his submission before this Court, the appellant neither addressed nor contradicted the specific reasons given by the judge for finding that the sale agreement was suspect and not authentic. We see no reason to interfere with the evaluation of evidence and findings of the learned judge in relation to the sale agreement with Samuel Gitonga and Jenifer Evelyn Mwaka.

68. Apart from the factual contestations in this appeal, the appellant urged the learned judge erred in law in her interpretation and application of ***Sections 26*** and **55** of the ACECA in so far as relates to the concept of "unexplained assets." We now consider this contention.

69. The Kenyan concept of "unexplained assets" is akin to "Unexplained Wealth Order" (UWO) under the **United Kingdom Proceeds of Crime Act 2002 ("POCA"). Section 362A of the UK POCA** defines an unexplained wealth order is an order requiring the respondent to provide a statement—

(a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made;

(b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met);

(c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and

(c) setting out such other information in connection with the property as may be so specified.

70. In the UK case of **National Crime Agency -v- Mrs A [2018] EWHC 2534,**

it was held that for an unexplained wealth order to issue, there must be reasonable grounds for suspecting that the known sources of an individual's lawfully obtained income would have been insufficient for the purpose of enabling the individual to obtain the property. The court observed that one of the critical factors to be taken in account is the "income requirement" and an individual required to explain source of wealth should lead sufficient evidence to defeat any "reasonable grounds for suspicion" under the income requirement.

71. The **UK Section 362A** of POCA is *in pari materia* to ***Section 55 (2)*** of the Kenya ACECA which lay emphasis on assets being disproportionate to an individual's known legitimate sources of income. ***Section 55 (2)*** embodies the concept of "income requirement" whereby an individual's assets should be proportionate to his/her legitimate known source of income.

72. In the instant matter, one of the grounds urged by the appellant is that his right to property as guaranteed by ***Article 40*** of the Constitution as well as the right to fair hearing under ***Article 50*** were violated by the learned judge. The appellant urged his right to be presumed innocent under ***Article 50 (2) (a)*** of the Constitution was violated as the court shifted the burden of proof and required him to prove his innocence. It was submitted that the appellant was not informed in advance of the evidence in possession of the respondent because the forfeited properties were neither listed nor enumerated in the Notice dated 9th July 2008.

73. We have considered the appellant's contention that the requirement to give explanation for unexplained assets interferes with his constitutional right to property. The protection of the right to property has socio-political, moral, ethical, economic and legal underpinning. The right protects the sweat of the brow - it does not protect property acquired through larceny, money laundering or proceeds of crime or any illegal enterprise. When an individual is alleged to have assets disproportionate to his known lawful source of income, is asking such a person to explain and account for the unexplained disproportionate assets a violation of the constitutional protection of the right to property" The answer is in the negative. There is no violation of the right to property if an individual is requested to explain the source of his assets that is disproportionate to his legitimate source of income. Comparatively, while considering a similar contestation, the UK court in **National Crime Agency --v- Mrs. A [2018] EWHC 2534**, rejected submission that requirement to clarify unexplained wealth violates property rights. The court expressed that if there is any interference with property rights, such interference is proportionate and strikes a "fair balance"; that where there are grounds to believe a property has been obtained through unlawful conduct, the requirement to explain is justifiable.

74. In this matter, persuaded by the merits of the UK comparative jurisprudence, we are satisfied that the provisions of ***Sections 26*** and ***55 (2)*** of the ACECA do not violate the right to property as enshrined in ***Article 40*** of the Constitution. In any event, constitutional protection of property does not extend to property that has unlawfully been acquired. If it were to be held that the requirement to explain violates the right to property under ***Article 40*** of the Constitution, enforcement of a Notice issued under ***Section 26*** of ACECA and the requirement to explain the source of disproportionate assets would be rendered nugatory. We decline to so hold.

75. Another ground urged by the appellant is that neither an allegation of corrupt conduct nor abuse of office has been leveled against him; that no criminal charge or conviction has been visited upon him and as such, the trial court erred in making an order for forfeiture without proof of any corrupt conduct or economic crime on the part of the appellant. In rebuttal, the respondent cited the case of **Murphy -v- M (G) [2001] 1ESC 82**, where it was held that *in rem* proceedings for forfeiture of property is civil in character.

76. The trial court in considering this submission at paragraph 92 of its judgment expressed that a claim for civil recovery of unexplained assets can be determined on the basis of conduct in relation to property without identification of any particular unlawful conduct; that in the instant matter, the respondent was not required to prove the appellant actually committed an act of corruption in order to invoke the provisions of ACECA. The learned judge cited dicta from the case of **Director of Assets Recovery Agency & others -v- Green & Others [2005] EWHC 3168** where it was stated:

"In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of 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."

77. We have considered the appellant's contestation that no allegation of corrupt conduct or abuse of office has been leveled against him and that he has never been charged or convicted of an offence under the ACECA.

78. The concept of "unexplained assets" and its forfeiture under ***Sections 26*** and ***55 (2)*** of ACECA is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. ***Sections 26*** and ***55*** of ACECA are non-conviction based civil forfeiture provisions. The Sections are activated as an action *in rem* against the property itself. The Sections require the Anti- Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. ***Section 55 (2)*** of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. ***Section 55 (2)*** of ACECA is in sync with ***Section 112*** of the Evidence Act, Cap 80 of the Laws of Kenya. ***Section 112*** of the **Evidence Act, (Cap 80 of the Laws of Kenya)** provides:

"In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him."

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 source 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.

80. In the instant matter, the appellant was given reasonably opportunity to explain his disproportionate assets. He gave evidence on oath, he tabled documentary evidence, he did not discharge his evidential burden to offer satisfactory explanation as required under ***Section 55 (2)*** of the ACECA. In our considered view, a person with lawful income has no trouble proving the legal origin of his or her assets. The law protects only the rights of those who acquire property by licit means. Those who acquire property unlawfully cannot claim protection provided by the legal system. It is in this context that ***Article 40 (6)*** of the Constitution provides that protection of the right to property does not extend to property that has been unlawfully acquired.

81. Whereas the appellant was under no obligation to call any witnesses to testify on his behalf, there were three crucial individuals that he ought to have called to testify: these were Mr. Samuel Gitonga, Ms Evelyn Mwaka and Mr. Antony Nganga Mwaura. These individuals were crucial to corroborate the appellant's testimony that the named individual lawfully gave him cash in form of friendly loan or installment towards purchase of Plot/Houses.

82. On his part, the appellant contends that it was the respondent that should have called these individuals because statements had been taken from them. Further, the appellant testified and explained corroborative documents relevant to the testimony of these individuals had been seized by the respondent when a search was conducted at his office and residence.

83. In civil as in criminal proceedings, the plaintiff (prosecution) is solely responsible for deciding how to present its case and choosing which witnesses to call. In the instant case, the respondent alone bore the responsibility of deciding whether a person will

be called as a witness in its case. **(See Dabbah -v- Attorney-General for Palestine (1944) AC 156; Whitehorn -v-R (1983) 152 CLR 657).** A court cannot ordinarily direct a party to call any witness. Save in exceptional circumstance, a trial court cannot call any witness. In the instant case, the appellant's contestation that the respondent should have called Mr. Samuel Gitonga, Evelyn Mwaka and Antony Nganga Mwaura as witnesses has no legal foundation. In law, the appellant cannot compel the respondent to call a witness to support or rebut the respondent's case; all that the respondent is obligated to do is call credible and material witnesses to prove its case to the required standard.

84. We note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (See **J. Wigmore, Evidence § 265, at 87 (3d ed. 1940).** In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.

85. Comparatively, in **Bukenya and Others -v- Uganda [1972] EA 549,** it was stated that a court may infer that the evidence of uncalled witnesses would have tended to be adverse. In **Mann Holdings Pte Ltd and another -v- Ung Yoke Hong [2018] SGHC 69,** the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify at trial. In **Elgin Finedays Ltd -v- Webb 1947 AD 744,** it is stated at 745:

"... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...".

86. In the instant appeal, ***Section 55 (4)*** of the ACECA stipulates that the person whose assets are in question shall be afforded the opportunity to cross- examine any witness called and to challenge any evidence adduced by the Commission and, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

87. In this matter, the appellant did have opportunity to cross-examine the respondent's witnesses. Pursuant to ***Section 55 (5)*** of the ACECA, the appellant when he took the witness stand on oath, was given an opportunity to satisfy the learned judge that his assets were acquired otherwise than as the result of corrupt conduct. The judge found he did not offer satisfactory explanation of his disproportionate assets.

88. In our re-evaluation of the evidence on record, we are satisfied that the appellant did not offer satisfactory explanation as to the source of admitted sum of Ksh. 15.5 million from the alleged Sudanese National; the source of Ksh. 1,000,000/= allegedly for community electricity project; the source of Ksh. 10.9 million and the source of Ksh. 9.5 million for sale of properties. We thus find the appellant's contestation that the judge erred in applying and interpreting ***Sections 26*** and ***55*** of ACECA to have no merit. We also find the judge did not err in holding that the admitted cash monies received were part of the appellants "unexplained assets" that should be paid over to the Kenya Government.

89. In the final analysis, our evaluation of the evidence on record and applicable law lead us to find that this appeal has no merit and is hereby dismissed with no order as to costs. We affirm and uphold the judgment and decree of the learned judge dated 23rd November 2017.

Dated and delivered at Nairobi this 10th day of May, 2019

P.N. WAKI

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ANTI-CORRUPTION & ECONOMIC CRIMES COURT MISC. 5 OF 2016

FORMERLY HIGH COURT CIVIL SUIT NO. 448 OF 2008 (OS)

IN THE MATTER OF HOUSE NUMBER A-18 SECTOR III, HOUSE NO. B35 –UMOJA INNERCORE, PLOT NO. C 3, SECTION 1-UMOJA INNECORE, NONG/ NGONG/26632, NONG/ NGONG 38889, NGONG/ NGONG/ 38890

IN THE MATTER OF ACCOUNT NUMBERS [PARTICULARS WITHHELD] BARCLAYS BANK OF KENYA, ENTERPRISE ROAD, ACCOUNT NUMBERS [PARTICULARS WITHHELD] STANDARD CHARTERED BANK, HARAMBEE AVENUE AND ACCOUNT NUMBER [PARTICULARS WITHHELD] ,NWB PLC-60-15

IN THE MATTER OF MOTOR VEHICLE NOS KBB059T, KBB537T, KAR 843M & KAH 233F

AND

IN THE MATTER OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

STANELY MOMBO AMUTI.....DEFENDANT

JUDGMENT

1. The Plaintiff herein is a commission established under Article 248 of the Constitution of Kenya, 2010 as well as Section 3(1) of the Ethics and Anti-Corruption Commission Act No. 22 OF 2011 with the mandate to combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and

anti-corruption.

2. On 12th of July 2008, the Plaintiff acting on information received, wrote to the Defendant informing him that his various assets located in different parts of the country were estimated to be worth millions of shillings and were disproportionate to his salary. Their reasoning was that the defendant in his declaration forms had indicated that salary was his only source of income. The Plaintiff also noted that the Defendant was a long serving civil servant who had worked in various ministries and departments for over 25 years.

3. The Notice required the Defendant to provide a written statement explaining the enumerated properties that he had acquired between 1992 and 2008 which included landed properties, motor vehicles and cash, cheque deposits and bank account balances as enumerated below;

a. Residential houses on L.R No. Nairobi/ Block121/86,

b. Residential house No. 231 on L.R. No. 77/256 Buruburu phase V extension,

c. Residential houses on L.R No A. 18 Umoja innercore,

d. Residential houses on L.R No B. 35 Umoja innercore,

e. Plot NO. C 37 sector 1 Umoja innercore,

f. L.R No. KJD/ Ngong/Ngong/28662,

g. Uholo/ Magoya540,

h. Uholo/Magoya1068,

i. Uholo/Ugunja1327,

j. Uholo/Ugunja1500,

k. Jua Kali plots No.s650,651,652 and 692 Kakamega town,

l. Toyota pickup registration number KBB059T,

m. Toyota land cruiser station wagon registration number KBB537T,

n. Toyota Pickup registration KAR 843M,

o. Peugeot 504 Registration Number KAH 223F,

p. Barclays Bank of Kenya Enterprise Road Branch A/C No.[Particulars withheld],

q. Barclays Bank of Kenya Enterprise Road Branch [Particulars withheld],

r. Barclays Bank of Kenya Rahimtulla Branch A/C No[Particulars withheld],

s. Barclays Bank of Kenya NIC Hse- Masaba Road Branch A/C No [Particulars withheld],

t. Standard Chartered Bank, Harambee Avenue Branch A/C No. [Particulars withheld],

u. Standard Chartered Bank, Yaya Center branch A/C No [Particulars withheld],

v. Standard Chartered Bank, Harambee Avenue Branch A/C No.[Particulars withheld],

w. HFCK Chiromo Branch, A/C No. [Particulars withheld]

x. CFC A/C No. 102191773,

y. Cooperative Bank Of Kenya, Haile-Selassie Branch A/C No. [Particulars withheld]

z. National Westminister Bank PLC- London Branch 60-15-49 A/C [Particulars withheld]

3. The Defendant was also asked to offer an explanation relating to cash **Kshs. 310,000/=** (Three Hundred and Ten thousand shillings), recovered from his office and **Kshs. 3,998,000**/= (Three million, nine hundred Ninety eight thousand) recovered from his house, standard chartered bank bankers Cheque No. 993604 of **Kshs. 4,300,000/=** (Four Million Three Hundred Thousand Shillings) and Barclays Bank of Kenya bankers Cheque no. 564369 worth **Kshs. 13,000,000/=** (Thirteen Million Shillings). He was also required to explain the sources.

4. Finally, the Defendant was required to explain the sources of cash deposits to his various accounts as follows;

a) Standard Chartered Bank, Yaya Branch, Kshs. 100,000/= (One Hundred Thousands only) on 2nd November 2007 and Kshs. 300,000/= (Three Hundred Thousands Only) on 13th February, 2008,

b) Standard chartered bank, Harambee Avenue Branch, account number 0101775027800, Kshs. 1,591,000/= (One Million, Five Hundred and Ninety One Thousands only) on 12th May 2008 and Kshs. 700,000/= Seven Hundred Thousands only) on 13th May 2008,

c) Standard chartered bank, Harambee Avenue Branch, account number 0100275027800 Kshs. 1,000,000/= (one Million Shillings) on 1st February 2008 and kshs.100, 000/= (One Hundred Thousand Only) on 13th February, 2008.

d) Barclays Bank of Kenya Enterprise Road Branch account number 8240656 Kshs. 900,000/=(Nine Hundred Thousands shillings) on 1st February, 2008 and Kshs. 400,000/= (Four Hundred Thousand shillings on 13th February, 2008,

e) The sources of Kshs. 7,295,488/=(Seven Million, four hundred and Eighty Eight Thousands) paid to various merchants and dealers between November 2007 and May 2008,

f) Dates and particulars of acquisition of properties mentioned in paragraph 2 above together with the dates and development costs on any of the aforementioned properties.

5. The defendant replied to the Plaintiffs letter via his dated 17th July, 2008 stating that the Plaintiff's agents had searched his house and taken away his personal files, cheques, cash, and title deeds among other items. He stated that he had worked for and earned a salary for 25 years and made savings thereof. He also clarified that he was the administrator of the estates of his late father and brother which had been sold and he had been entrusted with the proceeds thereof to invest.

6. The Defendant also explained that in 1984, he obtained a World Bank funded scholarship from which he made savings and which he used to offset a HFCK mortgage loan. Further that he was a practicing Certified Public Accountant (CPA) and had worked in the finance sector in various institutions over the period of 25 years and that together with his savings, salaries, professional fees, sale of properties, and rental income, he had obtained loans from various financiers which he used to develop his properties.

7. Dissatisfied with the Defendant's reply, the Plaintiff filed the originating Summons dated 19th September, 2008 seeking to have the properties listed below declared as "unexplained assets" pursuant to section 3 of the Anti- Corruption and Economic Crimes Act, 2003 (herein referred to as ACECA) and be forfeited to the government of Kenya.

1. House number A.18, Umoja Innercore

2. House number b.35- Umoja Innercore

3. Plot number C.37 Sector 1- Umoja Innercore

4. Ngong/Ngong/26632

5. Ngong/Ngong/38889

6. Ngong/Ngong/38890

7. Motor vehicles registration numbers; KBB059T, KBB537T, KAR 843M and KAH 223F.

8. Funds in the following bank accounts;

a. Accounts Number [Particulars withheld] Barclays Bank Of Kenya, Enterprise Road between September 2007 and June 2008.

b. Accounts Number [Particulars withheld]; Standard Chartered Bank, Harambee Avenue between September 2007 and 30th June, 2008

c. Account number [Particulars withheld] national west minister bank PLC-London branch 60-15-49 between September, 2007 and 20th June, 2008.

d. Cash of Kshs. 4,308,000/= (Four Million, Three Hundred and Eight Thousand Shillings) seized by the Plaintiff's agent on 2.7.2008 during execution of search warrants.

9. The defendants be condemned to pay to the government of Kenya a sum of Kshs. 140, 976, 020/- (one hundred and Forty Million, Nine Hundred and Seventy Six Thousand and Twenty Shillings being cumulative deposits made by the Defendant between September 2007 and 30th June, 2008 and **Kshs. 32, 500,000/-** (Thirty Two Million, Five Hundred Thousand Shillings) being the value of the landed properties enumerated above as unexplained assets.

10. In the alternative, the landed properties together with Motor vehicles referred to above be forfeited to the government of Kenya.

11. The sum of Kshs. **4,308,000/=** (Four Million, Three Hundred and Eight Thousand) Shillings seized from the Defendant's House be forfeited to the government of Kenya.

8. Together with the originating summons, the plaintiff filed a chamber summons application dated 19th September, 2008 seeking a temporary injunction to restrain the defendant from alienating, charging, leasing, transferring, wasting, disposing or in any way dealing with the landed properties and motor vehicles pending the hearing and determination of this suit. It also sought a temporary injunction restraining the defendant from withdrawing the funds in the bank accounts or in any manner dealing in the bank accounts pending the disposal of this suit which orders were granted on 22nd September, 2008 and are in existence to date.

9. The Defendant in a replying affidavit dated 2nd July, 2010 and filed on 5th July, 2010 deponed that he was a qualified accountant (CPA.K) and had worked in several public and private institutions in senior capacities for over 25 years. That he had invested in properties which he disposed of from time to time. He was also nominated by his family members to manage the estate of his late father who had worked with the railways corporation for over 30 years and that of his late brother, a teacher. Those estates were sold and he was entrusted with investing the proceeds and providing for his brother's children.

10. The Defendant complained that the Plaintiff had deliberately misrepresented to court that he had deposited **Kshs. 140,976,020.55**/= (One Hundred and Forty Million, Nine Hundred and seventy Six Thousand, and Twenty Shillings and 55 cents) between September 2007 and August 2008 and that he had withdrawn a sum of **Kshs. 86,879,522.11/=** (Eighty Six Million, eight hundred and Seventy Nine Thousand, Five Hundred and Twenty Two Shillings, and Eleven Cents) in his various accounts yet they did not provide any bank deposit or withdrawal slip to prove the allegations.

11. The Defendant averred that following the allegations, he engaged the services of a professional audit firm who audited his accounts and swore an affidavit which confirmed that during the alleged period, he deposited a sum of **Kshs. 39,882,278.60/=** and withdrew a sum of **Kshs. 24,749,823.70/=** and not the amounts alleged by the Plaintiff. He said that during his working time, he had saved, and had some other family wealth which he invested over a period of 40 years and that his investments had grown. He charged that the Plaintiff had manipulated records and figures from his bank accounts and used them to destroy his career and reputation in the name of fighting corruption. He asserted that he was entitled to protection from deprivation of property under the constitution and that the plaintiff was infringing on his rights to property. He prayed that the summons be dismissed with costs.

12. This matter was initially heard by Rawal J (as she then was) by way of submissions. The record indicates that in that trial, the learned judge did not deal with the factual issues raised in the OS but invited counsels for both parties to address her on the issue of the constitutionality of **Section 55 of ACECA** *viz-a viz* the provisions of **Articles 20, 25(c) and 40(3) of the Constitution of Kenya, 2010.** The Judge then found that the provision was inconsistent with the Constitution and dismissed the Plaintiff's suit as null and void. The Plaintiff appealed against the ruling in **Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR.** The court of Appeal allowed the appeal and referred the suit back to the High Court for trial and determination.

13. Parties took directions on 29th June, 2016 for the matter to proceed by way of oral evidence. PW1 Anthony Kahiga an investigator at the Plaintiff Commission, who was part of the investigations team in this suit, testified that the Plaintiff received information that the Defendant had unexplained property and that he was the financial controller of the National Water Conservation and Pipeline Corporation. They sought for and obtained warrants to search the Defendant's home and office.

14. Upon searching the office, they retrieved Kshs. 310, 000/= (Three Hundred and Ten Thousand), electricity bills,, building plans for a house, banker's cheques worth Kshs. 4.3 Million, cash deposit slip

dated 13th May, 2008 for 700,000/= (Seven Hundred Thousand), cash withdrawal slip for Kshs. 1.9 Million, offer for sale of land by the Defendant to Fredrick Obura, copy of sale agreement between the defendant one and Fredrick for a piece of land, Banker's cheque worth Kshs.13 Million in favor of Patrick Njogu Kariuki, bankers' cheque worth Kshs. 4.3 Million in favor of Gilbert Githunguri Mukamba, Log Book for Motor Vehicle Registration Number KBB 259T Toyota pick-up, bank deposit slip for Kshs. 2 million deposited on 13.5.2008.

15. They also recovered a bank draft for Kshs. 5,000,000/= (Five Million Shillings), and a personal spring file containing Barclays bank of Kenya FDR certificate for Kshs. 20,000,000/=. The witness testified that on 13th May, 2008, the Defendant carried out five transactions worth millions of shillings. From the Defendant's home PW1 and his team recovered Kshs. 4,000,000/= (Four Million Shillings) in denominations of Kshs. 1,000 notes, and a spring file containing details related to various parcels of land. They made an inventory of the recovered documents.

16. According to the investigation conducted on the Defendant's bank accounts, the Defendant made deposits amounting to Kshs. 140,097,020.55 within the period of September 2007 to June 2008, and in the same period, he withdrew and made payments totaling Kshs. 85,879,522/11. PW1 pointed out that the Defendant started working at the National Water Conservation and Pipeline Corporation in September 2007 as the financial controller and it was unusual that some of the funds were received from persons trading with the corporation and that the Defendant ought to have known this.

17. PW1 singled out Jennifer Evelyn Mwaka who was a contractor and a supplier at the Corporation, who gave the Defendant a cheque worth Kshs. 5,000,000/= (Five Million only), which was deposited in the Defendant's Barclays Bank account Enterprise Road branch. Another person of interest was Antony Ng'ang'a Mwaura who traded as Toddy Merchants and issued a cheque dated 18th January, 2008 worth Kshs, 3,000,000/= and another dated 5th February, 2008 worth Kshs. 2,000,000/= (Two Million only). The Defendant also received from Hardy Enterprises two cheques worth Kshs. 4,900,000/= (Four million Nine Hundred Thousand) in total, on 3rd April, 2008 and 24th, June 2008 respectively.

18. PW1 referred to various payment vouchers for supplies and in particular Toddy Contractors, worth Kshs. 1,139,873/30 and Hardy Enterprises worth Kshs. 1,309,933/80, and Everno Enterprises dated 8th April, 2008 for Kshs. 6,357,600/. He concluded that money was paid from the corporation, to the suppliers/ contractors and it came to back to the financial controller.

19. PW1 further testified that the investigations team obtained the Defendant's pay slips which showed that his gross salary ranged between 183,580/= to Kshs. 306,000/= between the period under investigations. That in his wealth declaration forms, the defendant declared his income as at 2005 to be salary Kshs. 107,035/= professional audit income per month Kshs. 10,000/= rental income of Kshs. 45,000/= and his assets as three acres of land worth 75,000/=Mortgage house in Commarock worth 750,000/=vehicle registration number KAR 843 M worth Kshs. 800,000/=.

20. In the same declaration his liabilities were indicated to be a loan of Kshs. 1.4 Million from Standard Chartered Bank, a car loan of Kshs. 47,000/= and CFC bank Loan of Kshs. 600,000/=. In 2007, his assets were salary of Kshs. 300,00 per month, and did not include any other income. He indicated his assets as one acre of land in Ngong, a motor vehicle valued at Kshs. 1.2 million, two acres of land in Kisumu, and land worth Kshs. 600,000/= (six hundred thousand shillings.). His liabilities then were a loan of Kshs. 3,500,000/= (Three million, five hundred thousand) from Standard Chartered Bank and Kshs. 1,200,000 (One Million Two Hundred Thousand) from CFC bank.

21. PW1 testified that the defendant was invited to explain the deposits on his account and justify the

anomalies between what he had declared and what he possessed. The defendant's response was found to be unsatisfactory. To date the defendant has Kshs. 55,000,000/= (Fifty Five million) which is considered as unexplained assets. The amount was the difference between the defendant's deposits of kshs. 140,000,000/= (One Hundred and Forty Million) and withdrawals of Kshs. 85,000,000/= (Eighty Five Thousand). He prayed that the Defendant be compelled to pay to the government Kshs. 55,000,000/=.

22. In cross examination, PW1 stated that the deposit of Kshs. 140,000,000/= was an analysis of all the Defendant's bank accounts carried out by Enoch Otiko (PW2). It was not a single bank statement showing that he had made deposits of Kshs. 140,000,000/= but an accumulation of all the deposits made to the defendant's various accounts during the period of investigations. He said that the bank statements did not have bank authentication because they did not come from the bank but from EACC and that his assertion of deposits of Kshs. 140,000,000 was informed by the calculations done by PW2. Upon comparing what the Defendant earned from his known sources of wealth, and what he actually held, the commission concluded that the Defendant had unexplained assets and the fact that he received money from suppliers was a good inference to bribery.

23. PW1 stated that the corporation's offices were burnt as investigations were ongoing but further investigations, established that Mwaka and Mwaura who were the corporation's contractors had paid some money to the Defendant. He attached sale agreements for property said to have been sold to Mwaka and Mwaura by the Defendant to his affidavit in support of the OS. He however impugned the sale agreements on grounds that the consideration was not disclosed.

24. He confirmed that they recovered money from both the defendant's house and office and kept it in an account in the joint names of the EACC and the Defendant. Further that nobody had complained nor that the Defendant had demanded money from them, nor had the Defendant been charged for any corruption related offences.

25. PW1 asked the court to order the forfeiture of Kshs. 55,000,000/= (Fifty Five Million) which the Defendant could not explain its legitimate source. This amount was however not in the Defendant's bank account and the court should therefore order attachment of his assets for its recovery. He asserted that it was not necessary that the Defendant be charged with a criminal offence since there was evidence that money was being paid by the corporation suppliers into the Defendant's account. He discounted the Defendant's assertion that he sold some property to the suppliers, saying that the agreements and particularly that of Jennifer Evelyn Mwaka was not signed and the one for Anthony Ng'ang'a was not genuine.

26. PW2 Enoch Otiko a forensic investigator at the Commission swore an affidavit in relation to this matter on 18th October, 2008 having done the bulk of the analysis of the various documents recovered from the Defendant. He enumerated the documents recovered as bank records, transaction receipts, sale agreements, banker's cheques, bank statements, cash (both in the house and office) and folders containing documents relating to his properties. He prepared an inventory of the documents and obtained a warrant to investigate the Defendant's bank accounts.

27. PW2 also established that the Defendant operated bank accounts in Standard Chartered Bank being accounts No. [Particulars withheld] all of Harambee Avenue branch. The others were Barclays bank of Kenya account numbers [Particulars withheld], both of Enterprise road branch and National Westminister Bank PLC- London Branch.

28. The statements concerning the Standard Chartered Bank accounts were annexed to the affidavit of

PW2. He analysed the deposits and withdrawals columns of the bank statements excluding salary of Kshs.306,000/= as it was a known source of income. The analysis showed that he Defendant made deposits in 2007 as follows:

(i) September 2007 Kshs. 131,400/=

(ii) October 2007, Kshs. 207,900/=

(iii) November 2007, Kshs. 255,400/=

(iv) December 2007, Kshs.173,900/=

The deposits made in 2008 were, as set out below:

- January Kshs. 253,400/=
- February Kshs. 489, 900/=
- March Kshs. 186,400/=
- April Kshs. 237,900/=
- May Kshs. 1,918,213/=
- June Kshs. 148,900/=

The total deposits in the months of interests made to the Defendant's Standard chartered bank account No. [Particulars withheld] amounted to **Kshs. 4,003,331/=**

29. In the 2nd Standard chartered bank account number [Particulars withheld], the defendant made deposits in **April 2008**, Kshs. 1,752,759/50/=, Kshs. 4,191,000/= on 12th and 13th may, 2008. The total deposits in this account amounted to Kshs/-. **5,943,759/50.**

30. The third account analyzed was the defendant's salary account No. [Particulars withheld]/= in Standard Chartered Bank. In the months of May and June, a total of Kshs. 440,000/= was made into this account.

31. The defendant's Barclays Bank of Kenya account number [Particulars withheld] showed that in January 2008, the defendant deposited a banker's cheque worth **Kshs. 3,000,000/=** issued by Antony Ng'ang'a Mwaura T/a Toddy Merchants and Hardy Enterprises. In February, a total deposit of Kshs. **8,300,000/=, (**Of which, 2, 900,000/= was deposited by Toddy and Hardy Merchants) in March, Deposits of Kshs. **1,200,000/=** (of which 1,000,000/= was deposited by Antony Ng'ang'a of Toddy Merchants). In April the transactions amounted to Kshs. 18,800,000/= (of which, Kshs. 600,000/= was deposited by Jennifer Evelyn Mwaka T/A Evemil Enterprises). In May total deposits of kshs. 25,000,000/=, June, 2008, Kshs. 31,280,000/= of which Antony of Toddy's enterprises deposited Kshs. 4,000,000/=.

32. PW2 stated that the fact that some of the national Water and Pipeline Corporation's merchants were depositing money into the Defendant's accounts meant that he was receiving kickbacks. The corporation's offices were also burnt down thus hindering further investigations. Investigations revealed that Toddy's merchants, Hardy Enterprises, Evemil Enterprises and Elburgon Enterprises, were one company that traded under different names. They found an LPO book with claims against the company running for two years which were prepared by the procurement officer one Mr. Masakhala, who had since died.

33. PW2 further testified that an analysis of the transactions in Barclays bank of Kenya A/C no.

[Particulars withheld] showed that in April, 2008, there was a deposit of Kshs. 20,000,000/=, and another deposit of Kshs. 24,000,000/= in June, 2008 as a fixed deposit but it was impossible to tell from the bank statement where the funds had come from. He also testified that a sum of Kshs. 20,000,000/= was withdrawn from this account but another deposit was made into this account on 12th June, 2008 worth Kshs. 20,400,000/=. The same amount was withdrawn on 19th June, 2008 leaving the account with **Nil Balance**.

34. An analysis of National Westminister Bank PLC- London Branch account no. [Particulars withheld] shows that the defendant made deposits in July, 2007 of Kshs.43, 300/=, November 2007, an equivalent of Kshs. 86,600/= in sterling Pounds, and a sum of Kshs. 1,503,694/50. Within the period under investigations, the defendant made a total deposit of:

Kshs. 4, 003, 331/= in his Standard Chartered Bank account No. [Particulars withheld], **Kshs. 5, 943,759/50** in his standard chartered bank account No. [Particulars withheld],

Kshs. 1, 440,000/= in his standard Chartered Bank account No. [Particulars withheld],

Kshs. 87, 580,000/= in Barclays Bank of Kenya, account

No. [Particulars withheld],

Kshs. 40,400,000/- in Barclays Bank of Kenya account No. [Particulars withheld] and

Kshs. 1,633,594/55/= in National Westminister Bank PLC- London Branch account no. [Particulars withheld] making a total of **Kshs. 141, 000,685/50**.

35. PW2 further testified that within the said period of investigations, the \defendant made withdrawals totaling **Kshs. 85,879,522/11** and was left with a sum of Kshs. 55,096,498/=. The analysis used the Defendant's records obtained from his house during the searches and traced how the money was being applied viz a vis the Defendant's known sources of income. According to PW2 the defendant's expenditure amounted to Kshs. 2,660,445/60/= during the period under investigations while his income in that period amounted to Kshs. 1,205,790/= being salary.

36. From the investigations, PW2 concluded that the Defendant's total documented expenditure within the period under investigations amounted to **Kshs. 41,238,280/65/=** against his salary for the same period of **Kshs. 1,888,145/50/=** which was his income.

37. PW2 stated that his 2nd analysis was based purely on the Defendant's documented expenditure as reflected in the documents recovered since it was not possible for him to recover all the transaction documents, the first analysis was based on the Defendant's bank statements. He said that the bank documents indicated that the Defendant had a bank balance of Kshs. 55,000,000/= which was unexplained wealth. The claim for the **Kshs. 55,096,498/44** was based on **Section 55 of ACECA** and therefore it was not necessary for the Defendant to have been charged in a criminal case.

38. PW2 did not recover any deposit or withdrawal slips from the defendants. He obtained a court order to access the Defendant's bank accounts. He confirmed that there was no single deposit slip for Kshs. 140,000,000/= or a withdrawal slip for Kshs. 85,000,000/= nor did the Defendant's accounts hold a cumulative balance of Kshs. 55,000,000/= after withdrawals. He noted that in Barclays bank account No.[Particulars withheld] there was credited a sum of Kshs. 20,000,000 on 30.04.2008 and a debit of the same amount on 26th May, 2008. On 12th June, 2008, there was a deposit of Kshs. 20,400,000/= which

was withdrawn on 19th June, 2008.

39. PW2 did not obtain any bank statements from the Defendant's various bankers, having already recovered copies of the statements from the Defendant's house. He said that the entries in the schedule of the Defendant's various bank accounts was based on a direct extract from the Defendant's bank statements.

40. PW2 is a Quantity Surveyor by profession and is also trained in asset recovery. He asserted that the sale agreements between the Defendant and various parties were not genuine and that the purchasers were merchant's dealing with the Defendant's employer although the Defendant did not sign any LPO at the National Water and Pipeline Corporation. He admitted that there was no law that barred the Defendant from doing business with the said merchants; that he did not interview the said Merchants and that it was not illegal for the Defendant to keep money in his house or the office or to own property.

41. The Defendant in his testimony stated that he was a Certified Public (CPAK) Accountant who had held a practicing certificate since 1990 and his work entailed conducting independent audits and preparing financial statements. That he owned an audit firm which offered consultancy services and that he had worked in the public service for over 25 years, in about 10 parastatals and government offices. He left the public service, at a monthly salary of sum of **Kshs. 306,000/=.**

42. The defendant explained that in 2008, the Plaintiff raided both his home and office and confiscated his private documents, and informed him that he had committed a corruption related offence. He has not been prosecuted since. He denied that he had deposited a total of **Kshs. 140,000,000/=** in his various bank accounts or that he had withdrawn **Kshs. 85,000,000/=** leaving a balance of **Kshs. 55,000,000/=.**

43. He questioned the schedules prepared by PW2 who was not an accountant and the documents produced which were not bank statements. He asserted that only the bank could correctly state the amounts of money deposited and withdrawn from his bank accounts yet no bank official had testified in this suit. The Defendant argued that PW2 had unlawfully converted the debit and credit advises amounting to **Kshs. 120,000,000/-** and renamed them in his schedule as major bank deposits.

44. The Defendant contended that what were termed major deposits were transfers from one bank account into an investment account and back. He described it as temporary deposits into investment accounts which came back with interest, and the only time he did not earn an interest was on 12/6/2008 when he gave a debit advise for **Kshs. 20,400,000/=** to be moved to his investment account and it was returned before the expiry of the investment period. He maintained that his money grew as a result investment in fixed deposit accounts and that also explained why there were no deposit slips in support of the alleged deposits.

45. He defined a credit advice as instructions given to a bank on how to manage money already in an account and that such requests would be rejected if there was no money in the account. A report by Mwathe and Associates Auditors whom he instructed to audit his accounts for the period between 27th August, 2007 and 27th June, 2008 concluded that within the said period, the defendant deposited a total of **Kshs. 39,882,278/=** and withdrew a total of Kshs. 24,749,823/70. The Auditor's report and affidavit were filed in court.

46. The Defendant explained that he came to know Ms. Evelyn Mwaka and Mr. Tony Ng'ang'a Mwaura when he was selling his property and denied that he knew them in any other way. He made offers to sale property which they accepted. He sold property no 121/128 Komarock by the agreement dated 5th January, 2008 to Evelyn Mwaka, who paid him **Kshs. 5,000,000/=.** That he had a signed sale

agreement to that effect. He denied having had knowledge that Ms. Mwaka was a supplier at the National Water and Pipeline Corporation, and maintained that the transaction did not amount to any conflict of interest. He blamed the failure of some of his transactions to go thorough on interference from the Plaintiff.

47. The Defendant stated that when he received a letter from the Plaintiff requiring him to explain the source of his wealth he explained that house no. 121/186 was bought in 1991 through a mortgage from HFCK, and that is the property that was sold to Jennifer Evelyn Mwaka. He said that the **Kshs. 55,000,000/-** in unexplained assets was as a result of "cooked" figures by PW2. He asserted that the schedules referred to were not prepared by the Plaintiff as they did not have the Plaintiff's letterhead. Further that he had worked for over 20 years and invested his salary earned over that period of time but the Plaintiff chose to concentrate on 9 months. He also said his audit firm had been in existence for over 26 years and also earned him income.

48. The Defendant testified that he had taken loans and invested them and that his family members also contributed to his income which factors were not considered. Further that none of his employers ever raised an issue of integrity or loss of money against him.

49. Regarding the Barclays bank Account No. [Particulars withheld], the defendant testified that the money was invested in a fixed deposit account as follows:

i. 3rd March, 2008, **Kshs. 11, 000,000/=** debit advise and not a deposit as indicated by PW2.

ii. 22nd April, 2008, the **Kshs. 11,000,000/=** above returned to the account having earned interest.

iii. 30th April, 2008, **Kshs. 20,000,000/=** credit advise to the bank for the same reasons.

iv. 26th May, 2008 **Kshs. 20,000,000**/= was a debit advice

v. 12th June, 2008 was a debit advice and a further credit advice on 19th June, 2008 in the same account.

The Defendant argued that PW2 treated all these figures as deposits although they were not. That PW2 failed to distinguish between cash transfers within the same account and between different bank accounts, and treated such transfers as deposits although they concerned the same funds.

50. He pointed out that he had issued a banker's cheque worth **Kshs. 5,000,000/-** which was not cashed since the transaction it was intended for did not go through. He clarified that the total of credit and debit advises to the banks amounted to **Kshs. 121,400,000/=** which the Plaintiff mistakenly treated as deposits

51. He argued that due to lack of accounting knowledge, PW2 altered his bank statements resulting in the alleged deposit of **Kshs. 140,000,000/-** and the withdrawal of **Kshs. 85,000,000/-** which did not actually occur. He rejected the wealth declaration forms tendered by the Plaintiff in evidence saying they were incomplete. His view is that this trial was based on altered and manipulated records and that any attempt to forfeit his private property is illegal. He asserted that he had been denied the opportunity to use his property to generate income over a period of 8 years and the investigations were intended to remove him from office.

52. In cross examination, the Defendant confirmed that this investigations started with raids in both his home and office from where the Plaintiff took cash amounting to **Kshs. 3,998,000/-** together with

cheques worth **Kshs. 17,000,000/-.** Regarding the 16 ATM deposits of Kshs. 100,000/- each, he said that he had received the cash from a client being payment for audit fees. The cash deposit of **Kshs. 1,000,000/=** made to his account no. [Particulars withheld] was a collection from his community for an electricity project. The documents that could have explained this money were taken by the Plaintiff during the search in his home and office, he said.

53. Other deposits he testified, were rental income and savings which amounted to **Kshs. 1,000,000/=** and was deposited into his account on 29th November, 2007. All his deposits were therefore proceeds of legitimate income, rental income, professional accountant and audit fees, salary and sale of property of **Kshs.6,500,000/=**. The Defendant could not remember the source or purpose of the local cheques for **Kshs. 3,000,000/=** deposited in his account on 1st February, 2008 nor the one for **Kshs.4,300,600/=**. His testimony was that plot no. 18 Umoja was sold to Antony Ng'ang'a at a cost of **Kshs. 35,000,000/=**, while plot 121/186 was sold to Jennifer Evelyn Mwaka, and he was not aware that the two persons traded with the corporation for which he worked.

54. According to the Defendant his analysis of cash flow between the period under investigation came to **Kshs. 55,445,000/=** and he was relying on his memory since the Defendant confiscated his records. He asserted that he was unable to properly explain his bank account transactions since his accounts were already frozen and he could not obtain any statements.

55. The Defendant could only remember that within the period of 10 months under investigations, he spent a total of **Kshs. 43,208,000/=.** He confirmed that he paid a total of **Kshs. 7.600, 000/=** to Toyota Kenya for his two motor vehicles. He estimated his entire earnings for the 25 years professional period to be about **Kshs. 86,000,000/=** and could not tell how much the Plaintiff was claiming from him.

56. The Defendant denied having cumulative Kshs. **55,096,498/44** in bank balances or unexplained wealth and said this amount had not been explained by any bank official. He said that the statement relied on by the Plaintiff was interim and explained the sources of his wealth as follows:

i. Balance brought forward of **Kshs. 6,500,000/=**

ii. Cash brought by a Sudanese national of **Kshs. 15,500,000/=** paid as professional fees and that the invoice and receipt for this transaction were confiscated by the Plaintiff.

iii. Salary, rental income and sale of property.

The Defendant complained that the Plaintiff failed to prepare folios for the documents confiscated and only referred to some of the documents as "etc." and was unable to account for all the confiscated documents.

57. The Defendant disclosed that he paid tax on the Kshs. 15,500,000/= received as professional fees from the Sudanese national and that this was the money deposited in segments of Kshs. 100,000/= via ATM deposits. He urged that the Plaintiff confiscated his documents because they wanted to weaken his defence. He said that when he received the notice from the Plaintiff, he asked his employer for his wealth declaration forms for the years 2005, 2006 and 2007 and these were stamped by his employer and forwarded to the Plaintiff yet the wealth declaration forms filed in court were not stamped and were not the ones forwarded by the Defendant's employer.

58. The Defendant said that the Plaintiff's Notice did not ask him to explain the **Kshs. 55,096, 468/-** and pointed at the big difference between the figures of Kshs. **55,096,498/44** referred to by PW1, while PW2

referred to an amount of 43,898,722/65. His request for his accounts to be audited by a professional auditor was not heeded. In his view these proceedings are criminal in nature yet he was not charged with any offence relating to this matter in any court. Further that some of the documents recovered from his house were not recorded in the inventories and as such, the plaintiff's investigations were incomplete.

59. Having carefully analyzed the Originating summons herein, the response thereto, the evidence as well as the submissions by both parties, the issue that arise for determination is whether the 1st defendant is in possession of unexplained assets being:

1. House number A.18, Umoja Innercore

2. House number b.35- Umoja Innercore

3. Plot number C.37 Sector 1- Umoja Innercore

4. Ngong/Ngong/26632

5. Ngong/Ngong/38889

6. Ngong/Ngong/38890

7. Motor vehicles registration numbers; KBB059T, KBB537T, KAR 843M and KAH 223F.

8. Funds in the following bank accounts;

a. Accounts Number [Particulars withheld] and [Particulars withheld] Barclays Bank Of Kenya, Enterprise Road between September 2007 and June 2008.

b. Account Number [Particulars withheld]; Standard Chartered Bank, Harambee Avenue between September 2007 and 30th June, 2008

c. Account number [Particulars withheld] national west minister bank PLC-London branch 60-15-49 between September, 2007 and 20th June, 2008.

d. Cash of Kshs. 4,308,000/= (Four Million, Three Hundred and Eight Thousand Shillings) seized by the Plaintiff's agent on 2.7.2008 during execution of search warrants.

60. The Plaintiff further prayed that the defendant be ordered to forfeit landed properties as well as the value of the developments thereon amounting to **Kshs. 32,500,000/-.**

61. Learned State Counsel Mr. Kagucia prosecuted the case while learned counsel Mr. Omino appeared for the Defendant.

The definition of unexplained assets is to be found in Section 2 of ACECA which states as follows:

"***Unexplained assets means assets of a person—***

a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

The starting point is therefore to determine when the Defendant's assets aforementioned were acquired, to establish whether or not they can be classified as unexplained.

62. The burden of proof and the manner in which the court may be approached was addressed by the Kenya Court of Appeal in **Ethics** and **Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti COA NO. 213 OF 2011 [2015] eKLR** held thus:

*"Further, under Section 55 (3), (4), (5) and (6) of the Act, EACC is provided with procedure to follow once they have carried out investigations and they are satisfied that the person has unexplained assets and the person has been given an opportunity to explain the source. **If EACC is not satisfied with the explanation, they can institute proceedings by way of an originating summons and the burden remains with EACC to discharge, on a balance of probability, that the alleged assets were acquired through abuse of public office.** (Emphasis provided)*

63. In the Ugandan case of **Col. Dr. Besigye Kiiza V. Museveni Yoweri Kaguta, Election Petition No. 1 of 2001.** Which was relied on in the case of **Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR,** it was held that:

"I do share the view that the expression "proved to the satisfaction of the court" connotes absence of reasonable doubt. Admittedly, the word "satisfied" is adoptable to the two different standards. It is not uncommon for a court to hold that it is "satisfied on a balance of probabilities", or that "it is satisfied beyond reasonable doubt". However, where the court holds that it is satisfied per se, that a matter has been proved, or that a matter has been proved to its satisfaction, without more, then to my mind there can be no room to suppose that the court harbors any reasonable doubt about the occurrence or existence of that matter. By requiring that the ground for annulment of an election be proved to the satisfaction of the court, the legislature laid down the minimum amount or standard of proof required. The amount of proof that produces the court's satisfaction must be that which leaves the court without reasonable doubt."

Section 55 of the Anti-Corruption and Economic Crime Act, No. 3 of 2003 provides for forfeiture of unexplained assets. At sub-sections (2), (3), (4), (5) and (6) it provides as follows:

(2) The Commission may commence proceedings under this Section against a person if

a. After an investigation, the Commission is satisfied that the person has unexplained assets; and

b. The person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

(3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

(4) In proceedings under this section

a. The Commission shall adduce evidence that the person has unexplained assets; and

b. The person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a Defendant in civil proceedings.

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

The burden therefore lies with the plaintiff herein to prove the allegations that the defendant has unexplained assets and proof is above a balance of probability.

64. The period within which the Defendant herein is alleged to have been involved in corruption and acquisition of unexplained assets is between **September 2007 to June 2008**. Using the definition in Section 2 ACECA this court therefore considered only the property acquired within the period in question to ascertain whether it consists of the Defendant's unexplained assets. From the Plaintiff's supporting affidavits and annexures thereto, the plaintiff purchased properties as follows:

a. House number A. 18 Umoja acquired on 8/10/1999

b. House No. B. 35 Umoja acquired on 14/4/1999

c. Plot No. C.37 Acquired on 29/11/2007

d. Ngong/ Ngong 38889 and 38890 acquired on 17/6/2007 via cheque dated same day.

e. Ngong/Ngong/23281 acquired in 2002

65. **On the landed properties** it appears that the Plaintiff was satisfied with the Defendant's explanation regarding some of the properties in relation to their notice. The notice concerned Residential houses on L.R. No. Nairobi/ Block121/86, Residential house No. 231 on L.R. No. 77/256 Buruburu phase V extension, properties known as Uholo/ Magoya 540, Uholo/Magoya 1068, Uholo/Ugunja 1327, Uholo/Ugunja 1500 and Jua Kali plots No. 650,651,652 and 692 Kakamega town. These properties are not subject of the proceedings in the Originating summons dated 19th September, 2008.

66. Landed properties comprising House number A. 18 Umoja acquired on 8/10/1999, House No. B. 35 Umoja acquired on 14th April, 1999 and acquired on 26th August, 2002 shall also not be considered to form part of the Defendant's unexplained assets. The said properties were acquired way before the period under investigations. Properties known as Plot No. C.37, and Ngong/ Ngong 38889 and 38890, were acquired on 29th November, 2007 and 17th June, 2008 respectively, within the period under investigation. These Properties therefore fall in the category for consideration as unexplained assets as alleged by the Plaintiff.

67. The Defendant stated that the source of the funds used to acquire properties, known as

Ngong/Ngong/38889 and Ngong/Ngong/38890, was his salary, savings, sale of property, professional fees, bank loans and advances from friends and family income. I have considered the documents produced in evidence and particularly the sale agreements. Indeed it is not in dispute that the Defendant had been in employment for 25 years he had a private accounting firm and that he also had firm and rental houses at the time of this investigations. The value of the two properties above was not disclosed nor was it demonstrated that the defendant could not have bought them from his source of income.

68. **The motor vehicles** in the defendant's possession also came under investigation. The defendant was required to explain how he acquired motor vehicles registration numbers; KBB 059T, KBB 537T, KAR 843M and KAH 223F. A perusal of the documents annexed to the Plaintiff's Supporting affidavit dated 19th September, 2008 shows that motor vehicle registration number KAH 223F was acquired in the year 1999 and therefore does not fall within the period under investigation. As for the remaining cars, although the Defendant did admit that he paid Kshs.7,550,000/= to Toyota Kenya for two motor vehicles in the period under investigation, the receipts issued to him from Toyota Kenya for the stated amount do not indicate what the payments were for. The court cannot therefore state with any degree of certainty that the vehicles listed above fall within the unexplained assets.

69. **On the issue of cumulative bank deposits** the Plaintiff stated that the Defendant had made cumulative deposits into his various bank accounts referred to in the Originating Summons amounting to **Kshs. 140,976,620.55** withdrawn a cumulative sum of **Kshs. 86,876,522/11** and had a balance of **Kshs. 55,000,000**/= within the period under investigation between September 2007 and 30th June 2008. The Plaintiff prayed that this be forfeited to the state as it constituted the Defendant's unexplained assets. PW2 a quantity surveyor trained in asset recovery testified that he arrived at the figure by analyzing the Defendant's bank account deposits for the period under investigations. His analysis was also relied upon by PW1 a fellow investigator. The Defendant on his part questioned his ability to analyze bank records and statements, since he was not an accountant and therefore lacked the technical accounting knowledge.

70. The bank accounts pertinent to the above prayer are:

i) Standard Chartered Bank, Harambee Avenue Branch **A/C No.** [Particulars withheld];

ii) Standard Chartered Bank, Yaya Center branch **A/C No.** [Particulars withheld];

iii) Standard Chartered Bank, Harambee Avenue Branch **A/C No.** [Particulars withheld];

iv) HFCK Chiromo Branch, **A/C No.** [Particulars withheld], CFC A/C No. [Particulars withheld],

v) Cooperative Bank of Kenya, Haile-Selassie Branch **A/C No.** [Particulars withheld];

vi) National Westminister Bank PLC- London Branch **60-15-49 A/C** [Particulars withheld];

vii) Barclays bank of Kenya account Nos. [Particulars withheld] enterprise road branch.

The Plaintiff did not however, obtain comprehensive bank statements from the Defendant's respective bankers, even after obtaining an order to freeze and investigate the said accounts.

71. The affidavit deposed by Mwathe and Associate Auditors, who audited the Defendant's accounts at his instructions for the relevant period indicates that cumulatively, the Defendant had deposited a sum of **Kshs. 39,882,278/-**, and withdrawn a total of **Kshs. 24,749,823/-**, leaving a balance of **Kshs.**

15,132,455/= . The Defendant explained that the difference between his figures and the Plaintiff's figures was brought about by the fact that the Plaintiff treated debit and credit advices made by the Defendant to his bankers, requesting the bank to transfer funds from his bank accounts to Fixed deposit accounts and back, as deposits.

72. From a basic addition of deposits and withdrawals, in the bank statements tendered in evidence, I found that the Defendant made cumulative deposits of **Kshs. 37,508,561/5**, cumulative withdrawals of **Kshs. 7,388,717/25** and was left with a cumulative balance if **Kshs. 30,119,844/25**. I note that indeed the Defendant issued credit and debit advices as aforementioned for the bank to move his funds to Fixed Deposit accounts. These funds were already in the Defendant's account. They were simply being moved from the Defendant's regular account to fixed deposit accounts and back into the regular accounts. It would therefore be erroneous, to consider the credit and debit advice amounts in the computation of the cumulative deposits and withdrawals as deposits.

73. The Plaintiffs obtained search warrants to search the Defendant's residence and office on 1st of July, 2008. They also sought and obtained on 18th July 2008 warrants to investigate the Defendant's bank accounts. The order also froze the Defendant's accounts referred therein. Both the plaintiff and defendant confirm that the search warrant was duly executed and the Defendant's office and residence were searched, whereupon the documents relied upon herein were impounded.

74. As stated earlier the Plaintiff bore the burden of proving the allegations made herein, including those regarding the Defendant's financial transactions. PW2 was a Quantity Surveyor (QS) who is a construction industry professional, with expert knowledge on construction costs and contracts. This court was not told that PW2 had the additional professional and technical accounting knowledge to analyze the Defendant's accounts. The status of the Defendant's accounts required the services of a Forensic Auditor or a bank official, to re-solve the mystery of the different figures arrived at by the Plaintiff, the defendant and the court upon examination of the bank statements.

75. The upshot of my analysis is that the court cannot, even on a balance of probability, establish that the Defendant made a cumulative deposit of **Kshs. 140,976,020/=,** withdrew a cumulative sum of **Kshs. 85,879,522/11** and had a cumulative balance of **Kshs. 55,094,498/-** in his bank accounts within the period under investigations; September 2007 and June 2008.

76. Other impugned monetary receipts that came into the possession of the defendant fall into four broad categories. The Defendant alleged that these funds came from advances from friends and family, professional fees, community funds and funds from sale of property.

77. On the advances from friends and family the Defendant testified that he received advances from friends and particularly Kshs. **9,500,000/=** from one Samuel Gitonga, Vide an agreement dated 18th January, 2008. This is an averment which however, was not supported by any evidence. The said Samuel Gitonga did not testify, nor did the Defendant provide any documentary evidence to support his allegation. The court was not told of any difficulty in securing Mr. Gitonga's attendance in court to testify on behalf of the Defendant if the defendant so wished.

78. I also note that the Defendant did not produced any document in support of the grants of Letters of Administration made to him regarding the alleged estate of his let father and brother. None of his family members were called to testify to this end, nor was it demonstrated to the court when and how much of the proceeds of the sale of this said estate had been injected into his funds.

79. With regard to professional fees, the Defendant testified that some of the deposits into his bank

accounts came from payments made to him for professional accounting services he had rendered. In particular he stated that he earned **Kshs. 15.5 million** from a Sudanese National. There was however not a shred of evidence to back such an averment. In my view, for the defendant to attract professional fees of the magnitude of Kshs.15.5 million, he would have to have served a very large corporate body for a considerable amount of time or work to earn such an amount.

80. The Defendant did not provide the name or company of the so called "Sudanese national" that he served, the period for which services were provided, the nature of the actual services provided and the fee notes raised. It is not clear why he chose to bank the said fees in tranches of Kshs.100,000/= via ATM over a period of days. It is doubtful that the "Sudanese National" would have paid such a large amount of fees in cash and in such small bits over a number of days, instead of making one bank transfer or a few large transfers.

81. **On the deposits from Community funds** the defendant told the court that he collected **Kshs.1,000,000.00** through fund raising, for purposes of electricity installation on behalf of his community back in his village. One would expect that there would be some sort of committee to oversee such a noble idea or that even the area chief or sub-chief would lend credence to such assertion. I note however, that not a single witness testified in support of the said project. The Defendant said that the relevant invoice was among the documents impounded by the Plaintiff from his house and office. He however did not supply any copies of documentation from Kenya Power and Lighting Corporation for such a project.

82. **On the funds from sale of property,** of interest are the deposits made by one Jennifer Evelyn Mwaka t/a Evemil Enterprises and Anthony Mwaura Ng'ang'a T/a Toddy Merchants and Hardy Enterprises into the Defendant's Barclay's Bank Account No. 8240656. The deposits made in the period under investigation by these two persons amounted to Kshs.10.9 million.

83. The defendant admitted that he received money from Jenifer Evelyn Mwaka and Antony Ng'ang'a Mwaura amounting to Kshs. **10,900,000/=**. This he explained, was because he was in the process of selling a plot of land to Mr. Ng'ang'a at a cost of Kshs. 35,000,000/=. The Defendant supplied the Plaintiff with a sale agreement between himself and Antony Ng'ang'a as evidence of that sale. The said agreement indicates that it was signed on 28th November, 2007, and that on its strength the Defendant had received the 1st and 2nd instalments of the purchase price. The Defendant also supplied a sale agreement for Plot number 121/186 Komarock concerning Jennifer Evelyn Mwaka. This document was also not among the documents in the inventory of items recovered from his house or office during the search.

84. Several issues arise for consideration concerning these deposits. First, the Appellant did not deny that these two were merchants who had supplied goods and services to the corporation for which the Defendant worked as the Finance Manager. The Defendant told the court that he was unaware of these facts, but that even if it were true it would not preclude him from doing his own private business with them. Such a relationship is obviously one that would give rise to conflict of interest where persons with whom the Defendant was carrying on private business, were also the ones being awarded the corporation tenders and he had not disclosed such interest.

85. Second, it is difficult to believe that as Finance Manager, the Defendant was not aware of the names of persons he was authorizing to receive such hefty payments from the Corporation on a regular basis even if he did not know them in person. Evidence showed that the two persons had received several Local Purchase Orders (LPO) from the company during that time. It is hardly likely that at the time of signing the supposed private contracts the two persons did not disclose this fact to him. In so trading

with them he offended Section **66(1) of Public Procurement and Asset Disposal Act 2005.**

86. Third, if these were people with whom the Defendant was conducting bonafide trade or business they would have easily come forward to testify on his behalf and to produce their copies of the transaction documents. No such evidence was tendered.

87. Fourth, it is my view that these documents which were presented as sale agreements were suspect and were the Defendant's attempt to show that his money was from genuine transactions. It is telling that there is no evidence that the various monies have since been refunded to the alleged purchasers, or Mr. Samuel Gitonga or even the community back in the village, since the Defendant complained that the intended transactions were frustrated by the actions of the Plaintiff of confiscating his documents.

88. Fifth, the authenticity of the sale agreement which indicated that the defendant received money from Mr. Ng'ang'a in February and March 2008 and that the plot alleged to have been sold was Plot No. A18 Umoja Innercore is doubtful. The amounts of the alleged instalments received were not disclosed. The sale agreement was not part of the documents found and retrieved from the Defendant's house by the Plaintiff during the search. The alleged sale agreement between Janifer Evely Mwaka and the Defendant was dated 5th January, 2008 but was not signed nor was it witnessed.

89. Sixth, there was in evidence another offer dated 14th May, 2008 from the Defendant to one Fredrick Oburu for the sale of the same property, which from the Defendant's testimony had already been sold to Jennifer Evelyn Mwaka at a sale price of Kshs. 3,500,000/=. Together with the offer there was a sale agreement drawn by Siganga & Co. Advocate between the Plaintiff and the said Fredrick Oburu.

90. From the foregoing I make a finding that there was no sale of property between the Defendant and M/s. Jenifer Evelyn Mwaka or Mr. Anthony Ng'ang'a Mwaura.

91. Then there was also the matter of Kshs. **4,308,000/-** cash seized from the Defendant's house. The Defendant told the court that this is the money intended for the building material which was well and good. He did not however tell the court the source of this money.

92. 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."

93. The Defendant was a public official with known sources of income, as stated in his declaration under the Public Officer Ethics Act, 2003. He suddenly and inexplicably amassed wealth within the relatively short period between September 2007 to June 2008. Only he could explain his wealth and he was afforded this opportunity when he was issued with a statutory notice.

94. 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. See **- Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR.**

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 the 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 *ratios decidendii* 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:

1. Kshs. **9,500,000/=** said to have been advanced by one Samuel Gitonga,

2. Kshs. **15.5 million** said to be professional fees from a Sudanese National

3. Kshs. **10,900,000/=.** Said to be instalments paid by Evelyn Mwaka and Antony Ng'ang'a Mwaura for sale of property.

4. Kshs. **1,000,000.00** said to be funds for a community project.

5. Kshs. **4,308,000**/- cash seized from the Defendant's house.

I therefore declare the foregoing sums of monies to be unexplained assets and order that the Defendant do pay the Kenya Government Kshs.**41,208,000**/- being the sum total of the monies listed above.

There are no orders as to costs.

SIGNED, DATED this 23rd **day** of **November, 2017.**

.....

L. A. ACHODE

JUDGE

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CIVIL SUIT NO. 15 OF 2019

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

PATRICK OCHIENO ABACHI .....1ST DEFENDANT

ROSALINE WANJIRA ABACHI.....2ND DEFENDANT

BENJAMIN MAKOKHA ABACHI.....3RD DEFENDANT

MOSES ODUORI.....4TH DEFENDANT

LORIAN JUMA .....5TH DEFENDANT

ODEAR NASEWA HOLDINGS LIMITED.....6TH DEFENDANT

RICKAIR TRAVEL AGENCIES LIMITED.....7TH DEFENDANT

JUDGMENT

Introduction

1. This matter has had a rather long sojourn in our courts. It was initiated by way of an Originating Summons dated 18th September 2008. In the application brought under the provisions of the Anti-corruption and Economic Crimes Act (ACECA), the plaintiff, then the Kenya Anti-Corruption Commission (KACC), the predecessor of the Ethics and Anti-Corruption Commission (EACC), sought various orders against the defendants. A series of suits, petitions and applications have derailed the hearing of the substantive issues raised in the application. Ultimately, however, the pending suits and applications were disposed of, and the matter is now ripe for determination.

The application

2. In the Originating Summons lodged under the provisions of section 55 of ACECA and Order XXXVI of the Civil Procedure Rules, the plaintiff seeks determination of the following issues as against the defendants:

1. Whether the Defendants are in possession of unexplained assets itemised hereunder at paragraph 4;

2. Whether the properties listed at paragraph 4 hereunder ought to be preserved pending the determination of the suit;

3. Whether the assets listed at paragraph 4 constitute 'unexplained assets' under Sections 2 and 55 of the Anti-Corruption & Economic Crimes Act;

4. Whether Declarations should issue that the following properties namely:-

a. Ngong/Ngong/14888, situated within Kajiado District registered in the name of the 1st Defendant;

b. L.R. No. 337/1543, Mavoko Municipality Council (sic) registered in the name of 1st Defendant;

c. L.R. No. 337/1544, Mavoko Municipality Council registered in the name of 1st Defendant;

d. Kajiado/Kitengela/6491, Kajiado District, registered in the name of 1st Defendant;

e. Apartment No. 4 - Block A5, L.R No. 209/11646, Parkview, South C, situated within Nairobi and registered in the name of 1st Defendant;

f. Apartment No.7 — Block B4, L.R No. 209/11646, Parkview, South C, situated within Nairobi and in the name of 1st Defendant;

g. House No. HG. 60, L.R No. 146/69, Mugoya Estate, situated within Nairobi and registered in the name of 1st Defendant;

h. Kajiado/Kitengela/20644, situated within Kajiado District and registered in the name of 3rd Defendant;

i. Kajiado/Kitengela/20580,situated within Kajiado District and registered in the name of 3rd Defendant;

j. Kajiado/Kitengela/20641, situated within Kajiado District and registered in the name of 5th Defendant;

k. Kajiado/Kitengela/20609, situated within Kajiado District and in the name of 4th Defendant;

l. L. R. No. MN/1/5134, C. R. No. 35667 situated within the Municipality of Mombasa and registered in the name of the 6th Defendant;

m. Motor Vehicle Registration No. KAS 108X, Toyota Pick Up, registered in the name of 1st Defendant;

n. Motor Vehicle Registration No. KAV 170C, Toyota Lexus, registered in the name of 7th Defendant;

o. Motor Vehicle Registration No. KAU 105T, Mitsubishi Saloon, registered in the name of 1st Defendant;

p. Motor Vehicle Registration No. KAS 336X, Toyota Saloon, registered in the name of 2nd Defendant;

q. Motor Vehicle Registration No. KAU 372M, Toyota Station Wagon, registered in the name of 3rd Defendant;

r. Funds held in the following bank accounts:-

i. Barclays Bank of Kenya, Queensway Branch, Account No. [...] in the name of Rick Seaside Villas;

ii. Co-operative Bank Limited, Co-operative House Branch, A/C No. [...];

iii. Housing Finance Company of Kenya Limited, A/C No. [...];

iv. Cash in the sum of Kshs. 1,990,000/- recovered from the 1st Defendant's premises and held by the Plaintiff constitute unexplained assets;

5. Whether the Defendants ought not be condemned to pay to the Government the sum of Kshs. 75,690,000.00 being the value of some of the above listed properties constituting unexplained assets and in default the said properties be sold through public auction and the sale proceeds paid to the Government of Kenya or;

6. Whether the funds mentioned in (r) & iv should be forfeited to the Government;

7. Whether the sum of Kshs. 1,990,000/- held by the Plaintiff should not be forfeited to the Government of Kenya;

8. Whether the afore-listed properties being unexplained assets should be forfeited to the Government of Kenya;

9. Costs

3. The application is supported by an affidavit sworn on behalf of the plaintiff by Enoch Nguthu and is based on the grounds set out on the face of the application. Briefly summarized, these are, first, that the plaintiff is mandated under section 7 of ACECA to undertake investigations into allegations of corruption or economic crimes. It is further empowered, in appropriate cases, to institute civil proceedings against any person for the recovery or restitution of property acquired through corrupt conduct. Secondly, under section 55 of ACECA, the plaintiff is mandated to commence proceedings for forfeiture of unexplained assets against a person who has assets that are disproportionate with his known legitimate sources of income.

4. The plaintiff contends that the 1st defendant was at the time of the application employed as a Chief Accountant, Ministry of Agriculture, with a gross monthly salary of Kshs. 53,900. The plaintiff had, however, received credible information that the 1st defendant had acquired the assets the subject of the application (hereafter 'the assets') through corrupt conduct. It had commenced investigations and issued a statutory notice under section 26 of ACECA requiring the 1st defendant to explain how he acquired the assets. It had also established that between 2002 and 2007, the 1st defendant had acquired the assets which, at the time of filing the suit, were valued at over Kshs. 80,840,000.00. It had also established that the assets which are registered in the names of the 2nd to 7th defendants are held in trust for the 1st defendant.

5. The plaintiff further states that it had seized cash in the sum of Kshs. 1,990,000.00 pursuant to a search conducted at the 1st defendant's house whose source he had not been able to satisfactorily explain. It is its case that the assets were acquired at a time when the 1st defendant is suspected to have been engaged in corrupt conduct, and was also suspected to have received large sums of money. The plaintiff had given the 1st defendant an opportunity to explain the disproportion between the assets and his known legitimate sources of income at the time of acquisition of the assets. It was not, however, satisfied that he had given an adequate explanation.

6. The plaintiff had obtained orders preserving the assets for a period of six months pending investigations pursuant to section 56 of ACECA in High Court Miscellaneous Civil Application No. 100 of 2007- KACC V Patrick 0. Abachi & 5 Others. It was also granted interim orders on 22nd September 2008 restraining the defendants from transferring, disposing of or otherwise dealing with the subject properties pending the hearing and determination of the suit.

7. The defendants opposed the suit by way of a Replying Affidavit and a Supplementary Affidavit, both sworn by the 1st defendant on 23rd September 2020. They deny that the 1st defendant is in possession of unexplained assets and ask the court to dismiss the suit against them.

8. In order to make a proper determination of the issues raised in this suit, it is necessary to set out the respective pleadings and submissions of the parties, as well as the evidence on cross-examination of the plaintiff's witnesses pursuant to an application in that regard by Counsel for the defendants.

The Plaintiff's Case

9. The plaintiff's case is set out in the Originating Summons dated 18th September 2008 and the affidavit in support sworn by Enoch Nguthu on the same day. A Supplementary Affidavit sworn by Pius Maithya on 5th August 2020 was also filed in support of the application, as well as two sets of submission.

10. In his affidavit in support of the Originating Summons, Enoch Nguthu, an Investigator with the plaintiff at the time this matter was filed, states that he was a member of the team that investigated the matter of the unexplained assets of the 1st defendant. He avers that the plaintiff had received credible information that the 1st defendant, a public officer, had amassed a lot of property that was disproportionate to the emoluments he was expected to have earned as a public officer. The 1st defendant was employed in the public service and was at the time of the institution of the suit the Chief Accountant in the Ministry of Agriculture. He had a gross monthly salary of Kshs. 53,900 as was evidenced by copies of his pay slips for the period October, 2006 to November, 2007 (Annexures "EN1 (1) to iv)").

11. The 2nd defendant is the 1st defendant's wife, while the 5th defendant is his brother. The 3rd and 4th defendants are close kin and associates of the 1st defendant. The 6th and 7th defendants are limited liability companies in which the 1st defendant is a majority shareholder.

12. Upon preliminary investigation, the plaintiff found out that the 1st defendant did indeed own a lot of properties in many parts of the country. It conducted a search of his residential premises, House No. HG. 60 L.R No. 146/69, Mugoya Estate, Nairobi and found cash in the sum of Kshs. 1,990,000/-. The 1st defendant could not adequately explain the source of the said cash. The plaintiff placed before the court a copy of the inventory of the items that it had collected from the 1st defendant's residential premises (Annexure "EN2"). The plaintiff's team also recovered in the 1st defendant's premises documents relating to the assets the subject of this suit.

13. According to the plaintiff, most of the properties set out above are registered in the name of the 1st defendant. The rest of the properties are either registered in the names of the 2nd defendant, who is the 1st defendant's spouse, his close relations or companies in which he is the majority shareholder as title documents and logbooks in respect thereof (annexures EN4 (i) to (xvi)) demonstrate.

14. According to the plaintiff, as demonstrated by bank statements in respect thereof (annexure "EN3 (i) to (iii)") the 1st defendant was also a signatory to accounts held in his name or in the names of the corporate defendants as follows:

i) Barclays Bank of Kenya Queensway Branch, A/C No. [...] in the name of Rick Seaside Villas;

ii) Co-operative Bank, Co-op House Branch A/C No. [...] in the 1st defendant's name

iii) Housing Finance Company Limited A/C No. [...] in the 1st defendant's name.

15. It is the plaintiff's case further that, as copies of the certificates of incorporation and Memorandum and Articles of Association of the companies (annexures "EN5 (i) to (vi)) demonstrate, the 1st defendant is a major shareholder in Odear Nasuna Holdings Limited, Rick Air Travel Agencies Limited and Rick Seaside Villas Limited. It asserts that these companies are "cloak companies" used by the 1st defendant in the acquisition of properties. Further, that the 1st defendant also conducts his transactions in the name and style of Cyber General Agencies, Urban Retail Agencies, Rick Seaside Villas and Mackan Enterprises as the copies of the certificates of registration of these entities and a letter from the Companies Registry (annexures "EN6 (i) to (iv)") demonstrate.

16. The plaintiff states that its investigations revealed that the 1st defendant owns assets which are not proportionate to his known legitimate sources of income, which is his salary and allowances as a public officer. It contends that in purported compliance with the Public Officers Ethics Act, 2003, the 1st defendant filed wealth declarations as evidenced in the Wealth Declaration Forms for the years 2003 and 2007 (annexures "EN7 (i) and (ii)) but failed to disclose all his properties.

17. Between October 2003 and 2007 when the 1st defendant was working at the Ministry of Finance, investigations revealed that he was directly involved in the transactions and authorised payment relating to what is commonly referred to as the Anglo Leasing security type and related contracts as demonstrated by annexures "EN8 (i) to (iv)" which are copies of the documents authorising payment handled by the 1st defendant. The Anglo Leasing security type contracts comprise eighteen contracts entered into between the government of Kenya and various foreign companies, alleged to be nonexistent, through which the government was to pay out billions of monies. The said contracts were under investigation by the plaintiff and it was reasonably suspected that the contracts were tainted with corruption.

18. Following its investigations, the plaintiff had issued a notice (annexure "EN9") under section 26 of ACECA to the 1st defendant asking him to explain how he acquired the assets. In his response, the 1st defendant, through the letters dated 14th January, 2008 and 26th February, 2008 (annexures "EN10 (i) and (ii)"), attempted to explain the manner of acquisition of his properties. It is the plaintiff's case that the 1st defendant acquired the properties at issue between 2004 and 2007 during which time he was suspected of corruption and economic crime. He had also, during the same period, deposited large amounts of money in his various bank accounts. The funds, whose source he could not explain, were as follows:

Bank	Date	Amount deposited
Co-operative Bank	10/04/2007	Kshs. 600,000.00
	31/05/2007	Kshs. 400,000.00
	05/06/2007	Kshs. 100,000.00
	07/06/2007	Kshs. 160,000.00
	29/06/2007	Kshs. 374,808.00
	03/07/2007	Kshs. 140,000.00
Barclays Bank	31/08/2006	Kshs. 700,000.00
	11/10/2006	Kshs. 174,000.00
	14/11/2006	Kshs. 500,000.00
	27, 28 & 29/12/2006	Kshs. 293,000.00
	04/01/2007	Kshs. 162,000.00
	02/04/2007	Kshs. 300,000.00
	10/04/2007	Kshs. 289,651.00
	23/04/2007	Kshs. 234,000.00
	14/05/2007	Kshs. 350,000.00
	20/06/2007	Kshs. 300,000.00
	04/09/2007	Kshs. 800,000.00

HFCK	17/11/2003	Kshs. 600,000.00
	03/02/2004	Kshs. 100,000.00
	12/08/2004	Kshs. 180,000.00
	13/07/2005	Kshs. 1,500,000.00

19. It is the plaintiff's case that it is not satisfied with the explanation given by the defendants with regard to the manner in which the assets had been acquired. The 2nd defendant had disclosed in her statement (annexure EN 11) that motor vehicle registration number KAS 336X and property L. R. No. MN/ 5134 Rick Seaside Villas which are registered in her name or jointly in her name and the name of the 1st defendant, were solely bought by the 1st defendant without any contribution from her. In his statement (annexure "EN12"), one Gabriel Mallo, an employee of the 1st defendant and a director of the 7th defendant, had stated that the 7th defendant does not own any land or motor vehicle since it is a relatively new company. Motor vehicle registration number KAV 170C was registered in the 7th defendant's name but is owned by the 1st defendant.

20. Through its licensed valuer, Pius Maithya, the plaintiff had carried out a valuation of some of the properties reasonably suspected to be the unexplained assets of the 1st defendant and had arrived at the following valuations of the properties at the time of filing this suit:

Property Acquired	**Year (Kshs)**	**Market value**
MN/1/5134	2006	54,000,000.00
House No. HG 60	2005	5,000,000.00
L.R. 337/1543 &1544	2003	5,000,000.00
Apt 4 Parkview	2005	4,500,000.00
Apt 7 Parkview	2005	4,500,000.00
Kajiado/ Kitengela/20644	2005	600,000.00
Kajiado/ Kitengela/20641	2005	600,000.00
Kajiado/ Kitengela/20580	2005	600,000.00
Kajiado/ Kitengela/20609	2005	600,000.00
KAU 372M	2005	350,000.00
KAV 170C	2004	1,500,000.00
KAS 108X	2004	600,000.00

21. The plaintiff had not been able to value the other assets registered in the name of the defendants. However, a transfer of L. R. No. Kajiado/ Kitengela/6491 (annexure "EN 13") indicated that the 1st defendant had purchased it at a consideration of Kshs. 1 million on or about 13th July 2005. The plaintiff placed in evidence the valuations of some of the properties (annexure "EN14 (i) to (vi) and estimated the total value of the properties at over Kshs. 80,840,000.00. Its case is that the properties in the names of the 2nd to 7th defendants are held in trust for the 1st defendant as the explanation given by the 1st defendant for being in possession of the title documents is not satisfactory.

22. The plaintiff contends that it is reasonably suspected that the unexplained assets owned by the defendants have been obtained through corrupt conduct and that the defendants ought to be ordered to pay to the government a sum equivalent to the value of the properties in question having failed to give a satisfactory explanation on their acquisition. The 1st defendant has been afforded a reasonable opportunity to explain the disproportion between the assets and his known legitimate sources of income but the explanation he has given is not satisfactory as he has failed to demonstrate that the properties were obtained otherwise than as a result of corrupt conduct.

23. The plaintiff notes that although the 1st defendant, in his reply to the notice under section 26 of ACECA, stated that the house he resides in at Mugoya Estate is under tenant purchase scheme, there is evidence in the form of copies of a letter from the Ministry of Lands and Housing, letter of acceptance by the 1st defendant, bankers cheques and payment receipt (annexures EN15(i) to (iv)) that he paid the purchase price of Kshs. 2,560, 000.00 in two installments at the time of purchasing the house.

24. Enoch Nguthu confirmed in cross-examination by Counsel for the defendants that he had sworn the affidavit on behalf of the plaintiff filed in support of the Originating Summons. He further confirmed that both the names Enoch Kimanzi Nguthu and Enoch Nguthu referred to the same person. He was an investigator with the KACC at the time this suit was filed. He had annexed copies of titles to the properties registered in the names of the defendants which came from government sources. He had not attached searches of the properties. He had not been able to get trading reports or financial statements from the defendants.

25. Nguthu further confirmed that he had written to the 1st defendant under section 26 of ACECA requesting him to give the plaintiff the sources of his funds, though he did not write specifically asking for financial statements. He had sat with the 1st defendant but the 2nd defendant could not produce any financial statements. While the investigations had focused on all the defendants, he did not write to all of them under section 26 of ACECA as they were not public servants. While the 1st defendant had written to the plaintiff indicating that he conducted other businesses, he did not disclose any businesses but only said in general terms that he ran businesses. Nguthu denied that he had asserted that the 1st defendant benefitted from Anglo Leasing contracts, noting that what he said was that the 1st defendant had signed some vouchers related to Anglo Leasing. He also denied saying that the 1st defendant had been given money by the contractors in Anglo Leasing.

26. In re-examination, Nguthu stated that notices under section 26 of ACECA are issued when allegations are made in a certain matter, the intention of the notices being to confirm whether the allegations are true. A notice under the section had been issued to the 1st defendant as the section is specific to public servants. Nguthu had conducted a search at the 1st defendant's house, for which he had a search warrant. He and his colleagues who conducted the search had shown the 1st defendant and his wife their cards, as well as the search warrant, a copy of which they gave to the 1st defendant.

27. At the end of the search, the 1st defendant had signed an inventory of the items collected and had confirmed that the search was legal as there was a warrant. The search had also been witnessed by his wife, Roselyne Wanjira Abachi the 2nd defendant. The EACC team that carried out the search comprised Nguthu, who was the team leader, Pius Maithya, Francis Mwaniki and Patrick Mbijiwe. The team was not able to investigate the 1st defendant's claim that he carried on businesses and consultancies as he only gave general information that he run such businesses and consultancies.

28. The KACC team had also met some of the other defendants and had recorded their statements. The 2nd defendant had stated that the properties in her name had been bought for her by the 1st defendant.

29. Pius Nyange Maithya, an investigator and valuer with the plaintiff, had been part of the team that investigated the matter concerning the defendants. He swore a Supplementary Affidavit in support of the suit and was cross-examined thereon by Counsel for the defendants.

30. In the Supplementary Affidavit, Maithya, like Nguthu, states that he is an investigator with the EACC appointed under section

23 of ACECA. He was also part of the team that investigated the matters leading to the filing of this suit. Maithya reiterates and supplements materially the depositions set out in the affidavit of Nguthu regarding the allegations that the 1st defendant has assets that are unexplained and are not commensurate with his known sources of income.

31. According to Maithya, their preliminary investigations revealed that the 1st defendant owns a lot of properties in many parts of the country which are disproportionate to his known sources of income. The team had established this when it conducted a search of the 1st defendant's residential premises. The information is captured in an inventory of the items collected from the 1st defendant's residential premises, House No. HG. 60 on L.R No. 146/69, Mugoya Estate, Nairobi as evidenced by annexure EN2 in the affidavit of Enoch Nguthu.

32. The investigators had also obtained documents relating to the properties the subject of this suit. Most of the properties are registered in the name of the 1st defendant while the rest are either registered in the names of the 1st defendant's spouse, close relations or companies in which he is the majority shareholder as evidenced by annexures EN4, EN5 and EN6 annexed to the affidavit of Enoch Nguthu sworn in support of the Originating Summons. The 1st defendant's assets are not proportionate to his known legitimate sources of income which comprise his salary and allowances as a public officer. The plaintiff had issued a statutory notice to the 1st defendant dated 14th January, 2008 (annexure EN9) under section 26 of ACECA asking him to explain how he acquired the properties. He had responded by his letter dated 26th February, 2008 (annexure EN 10).

33. The plaintiff's investigations revealed that the 1st defendant had acquired most of his properties between 2004 and 2007 during which time he is suspected of engaging in corruption and economic crime. During this same period, the 1st defendant deposited large amounts of money in his various bank accounts. He could not explain the sources of these funds.

34. Maithya sets out the amount of funds and the dates on which the funds were deposited in the 1st defendant's account or in accounts held by entities in which he was a shareholder and director. Account number 94-8780127 Barclays Bank of Kenya, Queensway Branch-Nairobi, held in the name of Rick Seaside Villas Limited received a total of Kshs 720, 000 in two days, with Kshs 20,000 deposited on 9th August 2006 and 700,000 on 31st August 2006. A total of Kshs 202,500 was deposited in the same account in September 2006, with near daily, twice in one day, deposits of Kshs 39,000, 6,000, 15,000, 45,000, 58,500, 12,000, and 27,000 on 6th, 11th, 20th, 21st, 27th and 28th August 2006 respectively.

35. In October, the account received deposits amounting to Kshs 447,500. The amounts were deposited in tranches of Kshs 8000 on 2nd October 2006 and three deposits of Kshs 110,000, 80,000 and 64,000 on 11th October 2006. On 12th, 13th and 17th October 2006, deposits of Kshs 4000, Kshs 60,000 and Kshs 24,000 respectively were made. Two deposits of Kshs 12,000 and Kshs 7,200 were made on 23rd October 2006 while on 25th October 2006, two deposits of Kshs 26,000 and 52,300 were made into the account.

36. It is the plaintiff's case further that a total of Kshs 385,500 was deposited into the account in November 2006 on diverse dates tabulated in Maithya's affidavit: Kshs 595,000 in December 2006; Kshs 669,300 in January 2007; Kshs 283,780 in February 2007; Kshs 417,700 in March 2007 and Kshs 980, 801 in April 2007. Daily, sometimes twice daily deposits were made into the same account in May to September 2007. The total amounts deposited in these months were Kshs 311, 300, Kshs 814,913, Kshs 442,000, Kshs 705,160 and Kshs 1,557,410 respectively.

37. Deposits were also made into the same account, again on an almost daily, sometimes twice daily basis as tabulated in Maithya's affidavit, in October, November and December 2007. The total amounts deposited in these three months was Kshs 627,828, Kshs 681,035 and Kshs 10,000 respectively. In the period of one year and 6th months between 9th August 2006 to 10th December 2007, account number 94-8780127 held in the name of Rick Seaside Villas Limited held at Barclays Bank of Kenya, Queensway Branch-Nairobi received a total of Kshs 9,851,727.

38. In the same period, deposits were being made into the 1st defendant's personal account. This account, number 0110200614200 held in the name of Patrick Ochieno Abachi in Co-operative Bank Limited, Co-operative House Branch Nairobi, received, on diverse dates and at times on the same date in the month of October 2005 Kshs 10,000; in November 2005, Kshs 328,000 and in December 2005, Kshs 26,006. Deposits were also made in the 1st defendant's personal account in the following year. In January 2006, Kshs 1,660,000; February 2006, Kshs 158,000; March 2006, Kshs 19,000; April 2006, Kshs 50,000; May 2006-Kshs 60,240; June 2006- Kshs 87,009; July 2006-Kshs 265,000; August 2006-Kshs 75,000; September 2006- Kshs 129, 299, October 2006- Kshs 696,519; November 2006-Kshs 606,833 and in December 2006- Kshs 177,707.

39. The 1st defendant's account received further deposits the following year. In January 2007, it received Kshs 44,841; February 2007- Kshs 69,923. March 2007-Kshs- 52,076; April- Kshs 661,100; May, 2007-Kshs-448,469; June 2007-Kshs 404,122; July 2007-Kshs 536,082; August-Kshs 48,927; September- Kshs- 484,837; October-Kshs 173,433; November 2007-Kshs 71,455; December 2007-Kshs 27,500. The 1st defendant's account therefore received, in the two years and two months' period from 19th October 2005 to 14th December 2007, a total of Kshs 7,371,378.

40. Copies of the bank statements in respect of the two accounts, showing the deposits summarised above, are annexed to Enoch Nguthu's supporting affidavit sworn on 18th September, 2008 (annexure EN3 (i) and EN3 (ii) respectively). Maithya deposes that the plaintiff is not satisfied with the explanation given by the 1st defendant with respect to the acquisition of the subject properties. As a licensed valuer, Maithya had undertaken valuation of some of the properties reasonably suspected to be the unexplained assets of the 1st defendant. The properties were valued as set out earlier in this judgment in the summary of Nguthu's affidavit.

41. Maithya had not been able to value some of the properties. However, a copy of the transfer of L. R. No. Kajiado/ Kitengela/6491 (annexure EN 13) shows that the 1st defendant purchased it for a consideration of Kshs. 1 million on or about 13th July 2005. He estimates the value of the properties that he was able to value as evidenced in the valuation reports (EN14), together with the cash recovered from the 1st defendant's premises during the search and the value of L. R. No. Kajiado/ Kitengela/6491 at Kshs 80,840,000.00. It is the plaintiff's case that while the 1st defendant has been given a reasonable opportunity to explain the disproportion between the assets and his known legitimate sources of income, the plaintiff is not satisfied with the explanations given. In its view, the 1st defendant has failed to demonstrate that the properties were obtained otherwise than as a result of corrupt conduct.

42. Maithya was cross-examined on his affidavit sworn on 5th August 2020. He confirmed that he was a registered valuer and had prepared the valuation reports annexed to the Originating Summons. He had not attached a certificate to prove his registration as a valuer but there was no such requirement in law. Further, that registered valuers are gazetted each year and Kenya Gazette notices are public documents that can be accessed from the Government Printers or from the Valuers Registration Board. He was also an investigator with the EACC. He had conducted searches of the defendants' properties but had not attached the searches to his affidavit. He could also not say that there was a particular transaction that was connected to corruption. He did not find that the defendant had received any money from anyone as part of a corrupt scheme. However, the investigation of the defendants was not of a crime *per se* but about suspicion of a disproportion of ownership of assets in comparison with the 1st defendant's know source of income.

43. According to Maithya, the plaintiff had presented to the 1st defendant what it had established to be his known source of income. It had noted that some of the properties are registered in the names of companies, and had established the ownership and directorship of the companies. He confirmed that there was no mention of the 1st defendant in the directorship of Rockair Travel Agencies. The documents in the plaintiff's possession dated 2007 indicated that the first subscriber of Rockair Travel Agencies was the 1st defendant with 900 shares. The others were Loran Juma and Gabriel Malo.

44. In re-examination, Mr. Maithya confirmed that he had met the 1st defendant in Mombasa during the valuation of his properties. The 1st defendant had not asked for proof that Maithya was a valuer, nor did he deny him access to his properties. The defendants had also not challenged the assertion that Maithya was a valuer. Had they done so, he would have furnished such proof. He was part of the team that carried out investigations against the defendants, and was part of the team that conducted the search and had identified himself as an investigator. The investigations against the defendants were about the disproportionate assets relative to the 1st defendant's known legitimate source of income and the 1st defendant had not provided proof of any source of income other than his salary.

The Defendants' Case

45. In opposition to the suit, the defendants filed two affidavits, both sworn by the 1st defendant, on 23rd September 2020. In his Replying Affidavit which he states is sworn on behalf of all the defendants, the 1st defendant avers that the Originating Summons is devoid of merit, baseless, unsupported, anchored on wish-wash and is a blatant abuse of court process. He asserts that the institution of the suit is just a 'discomfited' (sic) attempt by the plaintiff to justify its existence as a commission by alleging all manner of abstractions against him as a civil servant and people related to him. It is his contention that it is not a crime for a citizen of Kenya, whether employed as a civil servant or not, to acquire property. Further, that every person has a constitutional right to own property of whatever description or value either individually, jointly with others or in any other manner.

46. According to the 1st defendant, the search of his residential premises was illegal and an outright violation of his rights and those of his family. It is his deposition that he does not owe the plaintiff or any other person an obligation to explain why he had the sum of Kshs. 1,990,000/= in his residence.

47. The 1st defendant denies generally the contents of the Originating Summons. He deposes that any sane person can be a signatory to a bank account and every bank maintains statements for each account holder. Further, that any person can form and be part of a company notwithstanding their place of employment and the position they hold, and his companies are not "cloak companies". He further denies that he failed to disclose all his properties and asserts that he filled the Wealth Declaration forms accurately.

48. The 1st defendant asserts that he cannot be condemned for performing his obligations as an employee, averring that he had authorised payment of money after the contracts had gone through the approval process. He denies that he has ever been involved in any corrupt dealings or economic crimes, asserting that all the money that he has is as a result of lawful gain.

49. The 1st defendant further denies that the properties held by the 2nd to 7th defendant are held in trust for him, his averment being that every person has a right to own property and a company can own property in its own name. He further contends that the plaintiff has wrongly contended that the defendants have been corrupt simply because they own various properties, and that the plaintiff's suit has proceeded on the presumption that the defendants are guilty of corrupt conduct and should therefore absolve themselves. It is his averment that the plaintiff is abdicating its role to investigate and has instead placed the burden of proving corrupt conduct on the defendants yet none of them is guilty of corrupt conduct.

50. The 1st defendant asserts that there is nothing wrong in the fact that he paid the entire purchase price for House No. HG 60 in Mugoya Estate in two instalments. That he had the option of paying for the house through monthly deductions or payment of the purchase price in full within 90 days, and he had elected to pay the entire purchase price in full before the expiry of 90 days.

51. In his supplementary affidavit sworn in response to the affidavit of Pius Maithya, the 1st defendant avers that there is no evidence to demonstrate that the deponent is or was an investigator for the plaintiff at the time of filing the Originating Summons or that he was part of the investigation team. It is his deposition that he does not own assets that are disproportionate to his sources of wealth, and he has not been furnished with an investigation report that contains such a conclusion, nor was he involved in the investigations.

52. The 1st defendant avers that he acquired the properties at issue using income from his salary and allowances as well as proceeds from other businesses that he operates. Regarding the funds deposited in his account, he avers that the funds are from his businesses and he did not get funds from any corrupt practices or economic crime. It is his contention that the plaintiff does not state why it is not satisfied with the explanation that he gave relating to the manner of acquisition of wealth. Further, that Maithya, who alleges that he is an investigator, did not investigate the viability and profitability of the 1st defendant's businesses. He contends that there is no evidence that Maithya is a licensed valuer and that the properties have deliberately been overvalued for purposes of the plaintiff's case.

The Submissions

53. The parties filed written submissions in support of their respective cases.

The Plaintiff's submissions

54. The plaintiff filed submissions dated 25th June 3030 and Supplementary Submissions in response to the defendants' submissions. The gist of the plaintiff's case is that the defendants are in possession of unexplained assets valued at Kshs. 80,840,000.00 which ought to be forfeited to the government of Kenya. The plaintiff contends that the sum of Kshs. 80,840,000.00 comprises the difference between the value of the 1st defendant's assets and the value of his known lawful and legitimate source of income acquired within a period of 5 years from 2002 to 2007.

55. The plaintiff submits that in April, 2006, a special audit report of the Controller and Auditor General was issued on financing procurement and implementation of security related projects that came to be known as the Anglo Leasing contracts. The report indicated that by these contracts, the government suffered loss due to single sourcing mode of procurement. Further, that there was

absence of complete information on the work, goods or services delivered in respect of each contract. The procurement of supplies contracts, which were for the installation of a nationwide dedicated digital multi-channel security systems telecommunication network for the Kenya Administration Police and the Provincial Administration, had been entered into on 29th May, 2003 between the government of Kenya and various companies. The supply contract price was forty-nine million six hundred fifty thousand euros (€49,650,000).

56. According to the plaintiff, it had received reports of the existence of possible procurement irregularities in the procurement of eighteen (18) of the Anglo Leasing contracts. Among the allegations made in relation to the said procurement was that there were payments being made for goods and services not rendered to the government of Kenya. The plaintiff had therefore initiated investigations pursuant to its mandate to investigate corruption and economic crimes to verify whether there may have been pricing, financing, and other irregularities in the procurement of the said government security sector contracts. Its preliminary investigations confirmed that the Ministry of Finance was responsible for making payments which were found to be flawed and grossly inflated, warranting further investigations.

57. In the course of its investigations in or about 2007, it had received information that the 1st defendant had assets well beyond his known legitimate sources of income. That such unexplained assets were acquired as a result of corrupt conduct related to the Anglo Leasing contracts; and that the assets had been acquired through abuse of office in which the 1st defendant had used his position to improperly confer benefits to himself or others contrary to section 46 of ACECA.

58. The plaintiff submits that the 1st defendant served in the accounting unit of the Ministry of Finance between 2003 and 2007. He was also the Chief Accountant in the Ministry of Agriculture from 2006. It submits therefore that at all times material to this suit, the 1st defendant was a public officer within the meaning of section 2 of The Public Officers Ethics Act, No. 4 of 2003, and that he was charged with the responsibility of managing public resources in a position of public trust.

59. Following receipt of the information with regard to the 1st defendant's unexplained assets, the plaintiff had commenced investigations and had conducted an authorized search of the 1st defendant's premises on the 28th of November, 2007. It had recovered the items set out in the inventory (annexure "EN2") which included the sum of Kshs. 1,990,000/- and documents relating to the properties the subject of the suit. The said assets had been acquired in the period between 2002 and 2007 and were valued at approximately Kshs. 80,840,000. During the period that the 1st defendant acquired these assets, he had a gross monthly salary of Kshs. 56,189.00. Its investigations had established that the 1st defendant was actively involved in the Anglo Leasing procurement in the government security sector entered into between 2002 and 2004.

60. It is the plaintiff's case that it had complied with the statutory requirements relating to applications for forfeiture of unexplained assets. It had obtained preservation orders against the assets at issue in order to prevent their sale, transfer, wastage or other disposal. The orders had been obtained on 20th December 2007 pursuant to section 56 of ACECA in Miscellaneous Application No. ELC 100 of 2007 filed on 18th December 2007. The defendants had never sought to have the preservation orders discharged.

61. The plaintiff further submits that it had issued the 1st defendant with a notice to explain the disproportion between his known legitimate sources of income and his vast wealth by way of a letter dated 7th January, 2008 (annexure "EN 9"). The 1st defendant had responded by his letters dated 14th January 2008 and 26th February 2008 (annexure "EN10"). The explanations given by the 1st defendant were generally not credible, and it had therefore sought clarification and recorded statements of the 2nd defendant and a director of the 7th defendant. Its conclusion was that the defendants, specifically the 1st defendant, had no intention of explaining the sources of their wealth. It had accordingly filed the present matter, initially filed as ELC Suit No. 423 of 2008, to recover the unexplained assets from the defendants.

62. The plaintiff submits that it seeks determination of the six questions set out in its Originating Summons. It reiterates the averment that upon receipt of credible information that the 1st defendant, a public officer, had amassed a lot of property which is disproportionate to the emoluments he is expected to have earned as a public officer during the period in question, it had executed a search at his premises, House No. HG. 60 L.R No. 146/69, Mugoya Estate, Nairobi on 28th November 2007 where several documents relating to the subject properties were seized, as well as Kshs. 1,990,000/- whose source the 1st defendant could not adequately explain. An inventory was made immediately after the search and was signed by the 1st defendant and witnessed by the 2nd defendant. It was also signed by the plaintiff's investigating officers. The plaintiff submits therefore that the contention by the 1st defendant that the search was illegal and a violation of his constitutional rights are false and misleading.

63. It is its submission further that it was upon identification of the plaintiff's investigators and receipt of a search warrant that the 1st and 2nd defendants allowed the search to be conducted. The plaintiff submits therefore that it is absurd for the defendants to claim that Enoch Nguthu and Pius Maithya are not investigators in the employ of the plaintiff. It notes that the defendants have not challenged the search of their premises nor placed any evidence before the court to support their claim that Enoch Nguthu and Pius Maithya were not investigators with the plaintiff at all times material to this suit.

64. The plaintiff submits that it had moved the court pursuant to the provisions of section 180(1) of the Evidence Act and section 23 of ACECA in seeking warrants to search the 1st defendant's premises. It had satisfied the court that the orders sought were necessary and the warrants were issued. The defendants had never challenged the search warrants or the search, and they cannot do so in the replying affidavit by making allegations of violation of constitutional rights.

65. It is the plaintiff's submission further that the subject money was seized on the strength of the search warrant which authorized its officers to seize and take possession of all documents relating to the investigation and any other documents or information that can facilitate conclusion of the ongoing investigation. The plaintiff cites in support the case of **Abubakar Shariff Abubakar v Attorney General & Another Constitutional [2014] eKLR** in which it was found that a search warrant authorizes an investigating officer to seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes, on reasonable grounds, to contain material evidence on any other charge against the person in possession of the items.

66. According to the plaintiff, an analysis of the documents relating to the properties showed that they are registered in the name of the 1st defendant, in the name of the 2nd defendant who is the 1st defendant's spouse, or in the names of close relations of the 1st defendant or companies in which the 1st defendant is the majority shareholder. It notes that the shareholders in the 6th defendant, Odear Nasuna Holdings Limited, are Rickair Travel Agencies Limited, the 7th defendant, and Rick Seaside Villas Limited. The shareholders in Rickair Travel Agencies Limited are the 1st defendant, Lorian Juma, the 5th defendant, and Gabriel Mallo. The shareholders in Rick Seaside Villas Limited are the 1st and 2nd defendants. From the statements of the 2nd defendant and Gabriel Mallo, a Director of the 7th defendant, the plaintiff had established that the above companies were used by the 1st defendant for the acquisition of the subject properties.

67. The plaintiff submits that in its notice under section 26 of ACECA dated 7th January 2008, the plaintiff had requested the 1st defendant to explain the source of his assets, including the source of the money seized from his premises during the search. The information that the plaintiff requested for included the cost and date of acquisition of each of the properties, as well as the development costs of the buildings or structures erected on the properties. The explanation offered by the 1st defendant by the letters dated 14th January, 2008 and 26th February 2008, however, was not satisfactory. He had stated that he purchased Ngong/Ngong/14888 Kajiado in 1989 yet the title document indicates that it was acquired in 1992. He had further stated that he sold Ngong/Ngong/14888 Kajiado District in 2001 but at the time of the investigations, the title document was still in his name. He had not provided proof of sale or transfer of the property to the alleged buyer, nor did he name the alleged buyer. The plaintiff observes that the 1st defendant had also not provided this information to the court despite filing his response 12 years after the institution of the suit.

68. With regard to plot numbers 337/1543 and 1544 Mavoko Municipality, the plaintiff notes that the 1st defendant stated that he purchased them between 1999 to 2001, and that he developed them between 2000 to 2005 during part of the period in question, from his salary and allowance. The plaintiff submits that it is evident that there was substantial construction on the plots which the 1st defendant could not explain how he managed to do with his salary and allowances while still meeting his personal expenses and liabilities and still acquiring other subject properties. The 1st defendant had not provided evidence of the loans he stated he had obtained, nor had he provided evidence of the businesses he alleged he was running.

69. The plaintiff further submits that the 1st defendant had stated that he is holding apartments number 4 block A5 and number 7 block B4 on L.R number 209/11646 Parkview South C on behalf of a Maxwell Mbecah resident in the USA. He further claimed that he was holding a power of attorney to the said property. The plaintiff submits that this is a blatant lie as the 1st defendant acquired the said properties on 2nd September 2005 and 16th August, 2005 during the period in question. It notes that the agreement for lease of the said properties refer to the 1st defendant as the owner of the said properties. It further notes that the 1st defendant has not provided anything to prove that the alleged Maxwell Mbecah exists, nor has the 1st defendant provided the alleged registered power of attorney regarding the said properties. It is its case that the 1st defendant is the absolute proprietor of the said properties, no power of attorney exists, and the 1st defendant is not able to explain how he acquired the said properties.

70. The plaintiff submits that the explanation given by the 1st defendant with respect to House No. HG 60 LR No.146/69 Mugoya Estate was that it was previously a government house which he has lived in since 1993, and that it is under the government house purchasing scheme. He was not, however, able to explain how he was able to pay the full purchase price of Kshs. 2,560,000/= for the house in two cash instalments between 29th December 2004 and 28th January, 2005 during the period in question.

71. The plaintiff submits that the 1st defendant's explanation with respect to Kajiado/Kitengela/6491 Kajiado District was that he purchased the property from proceeds gained while undertaking one of his business ventures in Mavoko in May, 2005. The plaintiff submits that the property was purchased at Kshs. 1,000,000/= on 13th July, 2005, during the period in question. The 1st defendant was not able to explain how he acquired the said property.

72. Regarding Kajiado/Kitengela/20644, 20580, 20641 and 20609, the 1st defendant's explanation was that the two properties do not belong to him. The plaintiff, however, submits that during the search of his premises, the 1st defendant was in actual possession of the title deeds for the said parcels of land. Its case is that Kajiado/Kitengela/20644 and Kajiado/Kitengela/20580 are registered in the name of the 3rd Defendant who is a close kin of the 1st defendant while Kajiado/Kitengela/20641 is registered in the name of the 5th defendant who is a brother of the 1st defendant. Kajiado/Kitengela/20609 is registered in the name of the 4th defendant who is a close kin of the 1st defendant. The plaintiff submits that it is its belief that the 1st defendant is the beneficial owner of the said properties since the other defendants did not care to explain the acquisition of their said properties, either during its investigations or in the present proceedings. The plaintiff asks the court to make this inference in determining whether the said properties are unexplained wealth.

73. The plaintiff notes that the 1st defendant states that plot number MN/1/5134 Nyali, Mombasa is property that he is holding on behalf of a Maxwell Mbecah, a resident of the USA, and that he holds a power of attorney with respect to the said property. The plaintiff submits that this is a blatant lie intended to conceal the source of his wealth and the inability to explain the acquisition of his assets. It submits that an analysis of its evidence shows that the 1st defendant is the beneficial owner of the said property. He purchased it on 7th June, 2005 during the period in question, but subsequent to such purchase, he transferred it to Odear Nasuna Holdings Limited on 27th September, 2007.

74. It is the plaintiff's submission therefore that the property is owned by the 1st defendant, a fact that is confirmed by the statement of the 2nd defendant. It submits that at paragraph c, e and d of the said statement, the 2nd defendant confirms that the 1st defendant is the beneficial owner of the said property. Further, that she elaborates the shareholding in the cloak companies used by her husband to conceal the assets. The plaintiff refers in this regard to annexure EN 5 in the Supporting Affidavit of Enoch Nguthu which shows the shareholding in the said company. The plaintiff urges the court to see the elaborate scheme of concealment that the 1st defendant engaged in in responding to its notice as proof of its averments that the 1st defendant is in possession of unexplained assets which are disproportionate to his legitimate sources of income.

75. The plaintiff further refers the court to annexure EN 14 in the Supporting Affidavit of Enoch Nguthu, the valuation report of the said property. It is its submission that a study of the said valuation report reveals the substantial and cost intensive developments undertaken on the property. It submits that the 1st defendant is not able to explain how, against his known sources of income, personal expense and liabilities, he has financed the said developments within a period of two years and six months from the date of acquisition of the property, 7th June 2005 to 20th December, 2007.

76. Regarding motor vehicles registration numbers KAS 108X Toyota Pick-up purchased in 2004 valued at Kshs. 600,000/= and KAU 105T Mitsubishi Salon purchased in 2005, the plaintiff notes that the 1st defendant stated that he had purchased them using salary and allowances from his employment and business income. He had not, however, proved this before the court, nor had he done so in response to the notice issued by the plaintiff. The plaintiff urges the court to infer that these vehicles are also unexplained assets as the 1st defendant has failed to provide any proof of business income or sources of income that would enable him to acquire the said motor vehicles.

77. The plaintiff notes that the 1st defendant had stated that motor vehicles KAS 336X Toyota Saloon, KAU 372M Toyota station wagon and KAV 170C Toyota Lexus purchased in 2004, 2005 and 2006 respectively do not belong to him. Its submission, however, is that all the vehicles belong to the 1st defendant. In relation to motor vehicle KAS 336X Toyota Saloon registered in the name of the 2nd defendant, the plaintiff submits that she had stated in her statement to the plaintiff (annexure EN 11) that it was the 1st defendant who had purchased the vehicle.

78. It is also the plaintiff's case that motor vehicle KAU 372M Toyota station wagon registered in the name of the 3rd defendant was also purchased by the 1st defendant. This is why he was in possession of the original ownership document, the logbook, and he is the beneficial owner of the said motor vehicle. As for motor vehicle registration number KAV 170C Toyota Lexus registered in the name of the 7th defendant and valued at Kshs. 1,500,000/= purchased in 2004, the plaintiff submits that it was purchased by the 1st defendant for his use. This submission is based on the statement of one Gabriel Mallo, a director in the 7th defendant (annexure EN 12 in the Supporting Affidavit of Enoch Nguthu) and the valuation report (annexure EN 14 in the said Supporting Affidavit).

79. The plaintiff submits that the 1st defendant has not provided any explanation for the cash deposits in the various bank accounts, nor has he provided an explanation for the Kshs. 1,990,000 in cash found on his premises. In particular, no evidence of employment allowance or business income has been provided.

80. The plaintiff contrasts the assets acquired by the 1st defendant in the period in question against the declarations made by the 1st defendant in compliance with the requirements of the Public Officers Ethics Act. It submits that by virtue of his position, he was under an obligation to make biennial declarations of his income, assets and liabilities in the prescribed Public Service Commission form (Form PSC.2B). He had lodged form PSC 2B between the years 2002-2007 (annexure "EN 7"). In these forms, the 1st defendant had declared income in the form of gross monthly salary of Kshs 36,590.00 and assets as follows:

i. Toyota Corolla KAJ 154Y 12 years old Kshs. 180,000.00;

ii. LR No. 6616/6555 Busia Kshs. 60,000.00;

iii. Hazina Co-operative Shares Kshs. 94,400.00;

iv. LR. No. 14888 Kajiado Kshs. 200,000.00;

v. Bank A/c HFCK [...] Kshs. 6,700; and

vi. Personal effects (household) Kshs. 50,000.00.

81. The plaintiff submits therefore that the total legitimate known sources of income as at the statement date of 23rd September 2003 was a gross amount of Kshs. 1,030,180.00.

82. For the period 29th November 2006 to 29th November 2007, the 1st defendant declared gross monthly salary in the sum of Kshs. 56,189.58, while the assets declared were as follows:

i. Toyota Corolla KAQ 623X 10 years old Kshs. 385,000.00;

ii. L.R No. 6616/6555 Busia Kshs. 70,000.00;

iii. Hazina Co-operative Shares Kshs. 190,245.00;

iv. Co-op Bank Account Kshs. 50,000; and

v. Personal effects (household) Kshs. 350,000.00.

83. The plaintiff submits therefore that the 1st defendant's known legitimate sources of income as at the statement date of 29th November 2007 was a gross amount of Kshs. 1,719,520.20. It had obtained the declaration forms from the Public Service Commission of Kenya on 12th February, 2008.

84. According to the plaintiff, the 1st defendant blatantly lied and filled the wealth declaration forms knowing very well that he had

failed to disclose his true income, assets and liabilities status at the time of filing the forms. Its submission was that the reason why a public official holding an office in public trust would fail to disclose his income, assets and liabilities was the intention to conceal such income, assets and liabilities from the Public Service Commission. It is its case that several properties acquired by the 1st defendant between 2002 - 2005 were never declared as assets in his wealth declaration forms. In its view, the only inference that could be drawn for such failure was because he knew he would be tasked with explaining the sources of the said wealth. Such failure to disclose the said assets in the wealth declaration forms was part of his efforts to conceal the unlawfully acquired assets.

85. The plaintiff submits that it had carried out valuations of some of the properties that were purposely omitted from the wealth declaration forms lodged by the 1st defendant. It sets out in its submissions the title of the property, the year of its acquisition and the capital value that it placed on the properties. By way of illustration, L. R. No. MN/1/5134, C. R. No. 35667 situated within the Municipality of Mombasa and registered in the name of the 6th defendant was acquired in 2005. It was developed between 2005 and 2007, and was valued by the plaintiff at Kshs. 49,000,000.00. House No. HG. 60, L.R No. 146/69, Mugoya Estate, situated within Nairobi and registered in the name of 1st defendant was purchased in 2005. It was valued at Kshs. 2,560,000.00.

86. L.R. No. 337/1543 and L.R. No. 337/1544, in Mavoko Municipal Council registered in the name of the 1st defendant were developed in 2002-2005 and were valued at Kshs. 2,000,000.00. Apartment number 4 on Block A5, and number 7 Block B4, both on L.R No. 209/11646, Parkview, South C registered in the name of the 1st defendant had a capital value of Kshs 3,650,000 and Kshs. 3,750,000.00 respectively.

87. It is the plaintiff's case that from its valuation, the 1st defendant, in his efforts to conceal the assets, had deliberately failed to disclose assets valued at Kshs. 65, 500, 000. 00. In its view, this represents an exceedingly steep increment in the 1st defendant's revenue over a relatively short period considering his only known source of income as indicated in his wealth declaration forms in 2002-2006 and the plaintiff's investigations in 2007-2008 was his salary and emoluments.

88. The plaintiff submits that the 1st defendant claimed to have a liability which he describes as "Govt house on tenant purchase loan", a declaration made on 29th November 2006. It submits that the 1st defendant purports to declare an existing loan on the government house number HG 60 LR. No 146/60 Mugoya, yet he had fully paid for the house, in cash, in 2005 as evidenced by annexure "EN15" which comprises copies of the ownership and transaction documents relating to the said house. In its view, this demonstrates the deception employed by the 1st defendant to conceal ill-gotten gains. The 1st defendant had acquired or developed the high-value assets worth over Kshs. 65 million within a very short period of time between 2002-2007. The plaintiff asks the court to be guided by the decision in **Kenya Anti-Corruption Commission v James Mwathethe Mulewa & Another [2017] eKLR** with respect to what to consider when determining whether the assets at issue are unexplained assets.

89. The plaintiff sets out in detail the numerous cash deposits made into the 1st defendant's accounts which are set out earlier in this judgment. It is its submission that most of the assets the subject of the suit were acquired by the 1st defendant between 2002 to 2007, the same period that he made deposits of large amounts of money in his various bank accounts. This is the same period, according to the plaintiff, during which the 1st defendant was engaged in corrupt conduct.

90. The plaintiff observes that within a period of 2 years and two months, from 19th October 2005 to 14th December 2007, deposits totaling Kshs. 17,223,105 were made into the accounts held in the name of Rick Seaside Villas, an entity whose directors are the 1st and 2nd defendant, and in which the 1st defendant holds 900 shares and the 2nd defendant 100 shares. And the other account in the name of the 1st defendant. It is its submission that the said deposits were not salaries or emoluments due to any of the defendants.

91. According to the plaintiff, the deposits of Kshs. 17,223,105 made within a period of 2 years and two months translates to an income of Kshs. 662,427.115 per month during the 26 months. This, it submits, represents an exceedingly steep increment in the 1st defendant's revenue over a relatively short period. The 1st defendant had not mentioned the deposits when lodging his wealth declaration forms.

92. The plaintiff submits that the defendants have failed to explain the disproportion between their legitimate source of income and the properties, including the cash deposits, acquired. It cites the decision of the Court of Appeal in **Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR** and the case from the United Kingdom of **National Crime Agency -v- Mrs A [2018] EWHC 2534** with respect to what the court should take into consideration in determining whether to issue an unexplained assets order.

93. The plaintiff submits that for the court to issue an unexplained wealth order, there must be reasonable grounds for suspecting that the known sources of an individual's lawfully obtained income would have been insufficient to enable him to obtain the property at issue. That one of the critical factors to be considered is the "income requirement". This obligates an individual required to explain the source of wealth to lead sufficient evidence to defeat any "reasonable grounds for suspicion" presented by the opposing side under the income requirement.

94. According to the plaintiff, section 362A of the United Kingdom's Proceeds of Crime Act (POCA) is in *pari materia* with section 55 (2) of ACECA. This section lays emphasis on assets being disproportionate to an individual's known legitimate sources of income, while section 55 (2) embodies the concept of "income requirement" under which an individual's assets should be proportionate to his or her legitimate known source of income.

95. The plaintiff submits that under section 55 (4) (a) of ACECA, it is under an obligation to adduce evidence to show that a person has unexplained assets. It is its submission that it has tendered documentary evidence to discharge this obligation, and the defendants have not offered any satisfactory explanation on the source of the subject properties or cash deposits to controvert what the plaintiff has placed before the court.

96. In addressing itself to the defendants' case, the plaintiff notes that though all the defendants were duly served, the 1st defendant filed a Replying Affidavit and Further Affidavit both dated 23rd September 2020 on behalf of all the defendants. All the defendants thus had an opportunity to respond to the plaintiff's claim. It is its submission that a consideration of the averments at paragraph 1 and 2 of the affidavits sworn by the 1st defendant confirms that the other defendants were cronies or agents of the 1st defendant and it invites the court to make this inference.

97. The plaintiff submits that a person who holds lawfully acquired property would consider it just to lay a claim to such property. In its view, it is no coincidence that none of the other defendants cared enough for the properties registered in their names to give an explanation regarding its acquisition. In its view, this is due to the fact that the ultimate beneficiary of the property is the 1st defendant.

98. The plaintiff observes that the 1st defendant had a minimum monthly bank deposit of Kshs. 300,000.00 against an estimated net employment income of Kshs. 35,000.00 per month, which raised the question why he would, with such an income, choose to remain in a public service job where his net highest salary as of November, 2007 was a modest Kshs. 43,995.40 per month (annexure EN 1 iv). It is its submission that the 1st defendant's averments in his two affidavits are untrue, are mere denials and are not the explanations envisaged under section 55 (5) of the ACECA.

99. The plaintiff submits that section 55(5) of ACECA shifts the evidentiary burden to the person said to have unexplained assets to provide an explanation to satisfy the court that the assets were acquired otherwise than as a result of corrupt conduct. It relies in support of this submission on the decision of the Court of Appeal in the case of **Stanley Mombo Amuti v Kenya Anti-Corruption Commission** (supra). It is the plaintiff's submission that the defendants have not placed any material before the court to substantiate their claims in relation to the properties at issue as any explanation offered would be mere fabrications and would expose facts unfavorable to them. It notes that an explanation that is now being advanced, coming more than 12 years after it sought such explanation for the 1st defendant's vast wealth, is non-existent. In its view, there is really no explanation for the disproportionate wealth the 1st defendant has acquired as against his known legitimate source of income.

100. The plaintiff notes that the defendants have not placed before the court any proof of the allowances or honoraria issued to the 1st defendant or any proof or corroboration of the loans the 1st defendant avers he was advanced. There is also no evidence of any business or trade that the 1st defendant was engaged in to prove business income. The 1st defendant has also not placed before the court the power of attorney between him and one Maxwell Mbecah to corroborate the claims related to L. R. No. MN/1/5134, C. R. No. 35667, Apartment No. 4 — Block A5, L.R No. 209/11646 and Apartment No.7 — Block B4, L.R No. 209/11646. In the plaintiff's view, this is because the 1st defendant is the sole beneficiary of the said properties.

101. Finally, the plaintiff submits that there is no evidence of any trust deed or agreement between the 1st defendant and the 3rd, 4th and 5th defendants to corroborate his claims regarding ownership of Kajiado /Kitengela 20644, Kajiado /Kitengela 20580 and Kajiado /Kitengela 20641. This, in its view, is because these defendants are close kin and associates of the 1st defendant.

102. The plaintiff submits that the 1st defendant's explanation that L. R. No. MN/1/5134, C. R. No. 35667 does not belong to him is

untrue. It submits that evidence on record (annexure EN 4 xi) confirms that the property was registered in the name of the 1st defendant on 7th June 2005 and transferred to the 6th defendant on 27th September, 2007, and the 1st defendant is the ultimate beneficiary in the 6th defendant company.

103. The plaintiff dismisses the explanation given by the defendants in relation to ownership of the motor vehicles. It submits that while the 1st defendant has stated that they do not belong to him, the 2nd defendant had confirmed that he had purchased motor vehicle KAS 336X and that KAU 372M belongs to Benjamin Abachi, a close kin of the 1st defendant. It is its submission further that while the 1st defendant denies ownership of KAV 170, Gabriel Mallo, a Director of the 7th defendant, confirms that the vehicle is owned by the 1st defendant despite being registered in the name of the 7th defendant.

104. Regarding the sum of Kshs. 1,990,000.00 recovered from the 1st defendant's house, the plaintiff notes that the 1st defendant has offered no explanation other than a mere and vague statements that it was from a client. In its view, the 1st defendant should have been able, if he was engaging in lawful business, to explain the source of his income, including the not insubstantial amount of Kshs. 1,990,000.00 which no-one, let alone a public officer holding an office in public trust, would be carrying around with no plausible explanation.

Submissions by the defendants

105. In their submissions dated 23rd October 2020, the defendants set out and address each of the questions for determination raised in the plaintiff's Originating Summons. To the question whether they are in possession of unexplained assets, their submission is that the present suit is just a 'discomfited' (sic) attempt by the plaintiff to justify its existence as a commission by alleging all manner of abstractions against them. They cite Article 40 (1) and (2) of the Constitution which they submit guarantees them the right to own property. It is their submission that the fact that they own property does not constitute a crime or a violation of any civil law. Further, that the right to own property is guaranteed to all irrespective of their employment. Support for this submission is sought in Article 27 () of the Constitution.

106. According to the defendants, the plaintiff bases its case on the fact that it found documents relating to different properties in the 1st defendant's residence, and due to his employment as a civil servant, the plaintiff unfairly and illegally treated him as a corrupt person. The defendants submit that the plaintiff alleges that the defendants have in their possession unexplained assets but has admitted that the 1st defendant wrote to it letters dated 14th January 2008 and 26th February 2008 explaining the source of his properties. They submit that the plaintiff has not adduced evidence before the court to contradict what the 1st defendant wrote in his two letters.

107. The defendants submit that both of the plaintiff's witnesses whom their Counsel cross-examined were not the actual deponents of the affidavit in support of the Originating Summons and the Supplementary Affidavit respectively. They argue that the first witness identified himself as Enoch Kimanzi Nguthu while the affidavit in support of the Originating Summons was sworn by Enoch Nguthu. The second witness identified himself as Pius Nyange Maithya while the supplementary affidavit was sworn by Pius Maithya. In light of this, it is their submission that there is no way of ascertaining whether the person who appeared before the court was the same person who swore the affidavit. The two witnesses did not also adduce documents to prove that they were or are in the plaintiff's employment. According to the defendants, both witnesses were impersonating other people, their evidence has no probative value and the plaintiff's case is therefore unsupported by evidence.

108. The defendants cite the provisions of section 26 of ACECA to submit that the power to issue a statutory notice under the section to a public officer is only vested in the Secretary to the Commission. It is their submission therefore that in this case, the letter dated 7th January 2008 addressed to the 1st defendant was written and issued by the Director of the plaintiff, and the notice was therefore illegal.

109. They submit, however, that the 1st defendant had responded to the statutory notice by his letters dated 14th January 2008 and 26th February 2008 and had addressed each of the queries raised by the plaintiff in respect of each of the properties. The explanation he had given was that he had bought title number Ngong/Ngong/14888 using savings from his salary and allowances earned as a civil servant at a cost of Kshs. 150,000/=. He had later sold it for Kshs. 1,500,000/=. The 1st defendant is not obligated to keep copies of purchase or sale agreements that he enters into, and the fact that he did not produce these agreements does not mean that the property is an 'unexplained asset'.

110. The defendants submit, with respect to title number Bukhayo/Mundika 6555 and 6616 that the 1st defendant bought these properties between 1996 and 1997 through instalment payments from his salary and allowances at a cost of Kshs. 60,000/=. He was not under an obligation to keep documents relating to the purchase of the said properties, and a failure to produce such documents does not render them 'unexplained assets'.

111. Similar submissions are made in relation to plot numbers 337/1543 and 1544 – Mavoko Municipal Council. The 1st defendant had bought the properties between 1999 and 2000 from his salary and allowance at a cost of Kshs. 300,000/=. He had thereafter build a four 4 bedroomed house on the properties.

112. Regarding apartment numbers 4 and 7 in Parkview, South C, the defendants reiterate the 1st defendant's averment that he is only holding possession of the properties on behalf of one Maxwell N. Mbecah, a resident of a foreign country, who has given him a power of attorney to transact with the property.

113. With regard to House No. HG 60 – L.R No. 146/69, Mugoya Estate, the defendants submit that the 1st defendant acquired it under the Civil Servants Housing Scheme Fund using his salary and allowances. He had bought Plot No. Kajiado/Kitengela/6491 from proceeds he earned from a business venture in Mavoko in May 2005. As for plot numbers Kajiado/Kitengela/20644, 20580, 20641 and 20609, they belong to the 3rd, 5th and 4th defendants respectively. The defendants submit that there is no evidence to show that these defendants were civil servants or that they were involved in any corrupt scheme.

114. The defendants reiterate the 1st defendant's averment that he is holding possession of plot number MN/1/5134, Nyali, Mombasa on behalf of Maxwell N. Mbecah, who is resident outside the country, and who has given him a power of attorney with respect to the property.

115. As for motor vehicles registration numbers KAS 108 X and KAU 105T, the defendants submit that the 1st defendant purchased them from savings from his salary, allowances and proceeds from businesses that he was running. They reiterate the 1st defendant's averment that motor vehicle registration numbers KAS 336X, KAU 372M and KAV 170 C are owned by the 2nd, 3rd and 7th defendants. They submit that there is not an iota of evidence before the court to demonstrate that the three defendants were involved in any corrupt scheme when they acquired theses motor vehicles.

116. With respect to the funds deposited in the various bank accounts in the name of the 1st defendant and the limited liability company defendants, it is the position of the defendants that the accounts relate to businesses the 1st defendant has been running and are not therefore unexplained assets.

117. The defendants set out in their submissions what they term as a breakdown of the amount of Kshs 1,990,000 found in the 1st defendant's house. They submit that they have given ample explanation regarding the source of the wealth alleged to be 'unexplained assets' by the plaintiff. That the burden of proving that a public officer has unexplained assets lies squarely with the plaintiff who is obligated to satisfy the court that such assets exist. Since the allegations levelled against them are serious, the standard of proof required on the part of the plaintiff must be high and in this case it must be beyond reasonable doubt.

118. They submit that the plaintiff has not discharged the burden of proof placed upon it, and rely on the decision in **Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another** (supra) in which the court cited the case of **Col Dr. Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission Election Petition No. 1 of 2001** in which it was stated that ***"proved to the satisfaction of the court' connotes absence of reasonable doubt."***

119. The defendants submit that the plaintiff's witnesses had admitted during cross examination that they did not conduct searches in the respective registries to ascertain the ownership of the properties which they allege are owned by the 1st defendant as 'unexplained assets'. They had also not conducted searches at the Companies Registry to ascertain the directorship, shareholding and ownership of the companies which the plaintiff alleges are 'shell enterprises' owned by the 1st defendant. Further, that Pius Maithya who had carried out the valuation of the properties had not produced his practicing certificate as a licensed valuer either at the time he allegedly valued the properties or at the time he testified in court. The defendants cite the case of **Maina Thiongo v Republic [2017] eKLR** in which the High Court relied on the decision in **Mutonyi v Republic (1982) KLR 203** with regard to the admission of expert evidence. They submit, on the strength of these decisions, that the valuation reports prepared by Pius Maithya and annexed to the affidavit in support of the Originating Summons have no probative value.

120. It is their case further that the plaintiff did not conduct proper investigations and has no evidence to prove the allegations against them. They submit that there is no law that bars a person holding a position in the civil service from incorporating companies, registering businesses or forming business entities with other individuals with the aim of making profit. They assert that the insinuation by the plaintiff that the 2nd – 7th defendants acquired their properties through corrupt means simply because they are related to the 1st defendant is malicious, baseless and illegal.

121. The defendants submit that none of the properties at issue in this matter constitute 'unexplained assets' within the meaning of sections 2 and 55 of ACECA. They submit that the plaintiff's suspicions regarding the 1st defendant's source of wealth are unfounded. That the plaintiff suspected that the 1st defendant was corrupt because the "highest salary" he ever earned was the sum of Kshs. 53,900/=. The defendants submit that this is not the true position as, according to the 1st defendant's November 2007 pay slip, he would earn a salary as high as Kshs. 86,355/= per month. The plaintiff had also not computed the income received by the 1st defendant from the time he joined the civil service in 1987.

122. It is their contention further that the plaintiff's second witness, Maithya, had admitted that the 1st defendant did not engage in any corrupt practice and that the plaintiff does not have evidence to demonstrate that he was engaged in corruption at all. Further, that there was no evidence that the 1st defendant received any form of benefit arising from the Anglo Leasing contracts. They further submit that the plaintiff's agents had desperately sought for information from the 1st defendant regarding the Anglo Leasing contracts with a promise that they would drop the investigations against him but did not get any information from him, and the defendants attribute the present proceedings to such failure to get information. The defendants further submit that the statements made by Rosaline Wanjira and Gabriel Mallo were made as a result of intimidation and threats made by the investigators.

123. The defendants submit that the court should not issue the orders sought by the plaintiff in the originating Summons. They submit that the plaintiff has not proved that they have or own 'unexplained assets'. Further, that the valuation reports in respect of the properties have no probative value as the witness did not produce evidence to show his skill or expertise as a valuer.

124. Regarding the funds held in the accounts the subject of the suit, the defendants submit that the plaintiff has not adduced any shred of evidence to show that either of the defendants had money that constitutes 'unexplained assets'. It is also their submission that while the plaintiff captured the transactions involving deposit of funds in the accounts, it had conveniently omitted to capture the payments made out of those accounts in order to generate revenue from the businesses. The defendants set out in their submissions explanations with respect to each of the accounts: that the account held at Barclays Bank was a business account that was used to bank all the collections as well as pay out all expenses related to business transactions; that the Co-operative Bank account was the 1st defendant's personal bank account through which he received his salary and also banked all proceeds collected from the Bar and Restaurant business; that he also had a loan from Co-operative Bank and the proceeds of the loan were deposited in this account.

125. The defendants submit that the sum of Kshs 1,990,000/= found in the 1st defendant's house should not be forfeited to the government of Kenya. It is their submission that the plaintiff has not adduced any evidence to demonstrate that the money constitutes 'unexplained assets'. The plaintiff has also not controverted the 1st defendant's explanation that he had been given the money by clients to purchase motor vehicles from Japan for them.

126. The defendants therefore urge the court to dismiss the plaintiff's suit and order the plaintiff to release to them all the documents and money that the plaintiff holds illegally. They also ask the court to award them the costs of the suit.

The Plaintiff's Submissions in Reply

127. The plaintiff filed supplementary submissions in response to the defendants' submissions. It notes that in their submissions, the defendants have introduced factual and evidential matters which had not been included in their Replying Affidavits. The defendants have, in an attempt to explain the huge regular cash deposits made into the 1st defendant's bank accounts, cited business income arising out of purported bar and restaurant business as the source of the said cash deposits. That they have also alleged that the source of the impugned cash deposits was a co-operative bank loan taken out by the 1st defendant. The plaintiff submits that these are facts which had not been part of the defendants' depositions and they cannot be ascertained.

128. Regarding the claim that its witnesses are imposters, the plaintiff asks the court to critically peruse its search inventory filed with the Originating Summons. It submits that the two witnesses had presented themselves at the 1st defendant's residence on 28th

November, 2007 and duly identified themselves. It was upon serving the 1st defendant with a search warrant that the said witnesses had obtained on behalf of the plaintiff that the 1st defendant had submitted to the search of his residence. In light of the declarations made by the 1st defendant in the search inventory, the plaintiff asks the court to infer dishonesty on the part of the defendants in alleging that the plaintiff's witnesses are imposters.

129. The plaintiff submits that while the defendants have claimed that it did not carry out investigations on the directorship and ownership of the corporate defendants in this matter, they had not disputed the evidence presented by the plaintiff regarding the directorship of the companies or ownership of the assets.

130. It is the plaintiff's submission that the factual and evidential issues raised in the defendants' submissions have no probative value. Submissions by Counsel from the Bar, it contends, are not evidence, and have never been a means for parties to tender their evidence in court Submissions are only meant to clarify issues and not for giving evidence, and Counsel's role in proceedings has never been that of a witness giving evidence on behalf of their clients. The plaintiff relies in support of this submission on the decisions in **Republic v Chairman Public Procurement Administrative Review Board & another ex parte Zapkass Consulting And Training Limited & another [2014] eKLR**; **Clips Limited v Brands Imports (Africa) Limited formerly named Brand Imports Limited [2015] eKLR**; and **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**. The plaintiff asks the court to disregard the evidence introduced by the defendants in their submissions.

131. While conceding that every person is entitled to protection of the right to property under Article 40, the plaintiff submits that while the defendants have alleged violation of their rights in their submissions, they have not demonstrated how the right has been violated. The plaintiff relies on the decision in **Oscar Kipchumba Sudi v Ethics & Anti-Corruption Commission & 3 others [2017] eKLR** in which it was held that it is not enough to allege that one's fundamental rights or freedoms have been violated. One was required to go further and demonstrate the violation, a requirement that accords with section 107 (1) of the Evidence Act.

132. It is the plaintiff's position, however that in any event, while Article 40 protects the right to own property, under Article 40(6), the protection is not absolute and does not extend to property found to have been unlawfully acquired.

133. The plaintiff submits that it is in the public interest to require public officials to explain how they acquired their wealth. That section 55 of ACECA is essentially rooted in the contractual and fiduciary responsibilities that a public official assumes on taking up his post, and that this explains why the public official is the primary subject under this provision. Upon acceptance of office or employment as a public official, one implicitly accepts the regime unilaterally established by the legislature, and he also accepts the duty related to his public functions to file his wealth declaration forms.

134. The plaintiff submits further that the 1st defendant has had an opportunity to be heard with respect to the assets that are alleged to be unexplained. First, upon receipt of the notice under section 26 of ACECA, and secondly, during the hearing of a matter such as this filed pursuant to section 55(2) of ACECA.

135. It is the plaintiff's case that the defendants have had an opportunity to explain the assets at issue but have failed to do so. Its role is to prove to the court, on a balance of probabilities, that the assets acquired constitute unexplained property and the burden then shifts to the defendants to justify possession. No proof of any element of criminal conduct is required in matters such as this, and the absence of criminal proceedings or allegation is immaterial. The plaintiff cites in support the case of **Stanley Mombo Amuti v KACC (supra)** and **Director of Assets Recovery Agency and others v Green and others [2005] EWHC 3168**.

136. The plaintiff submits that it has demonstrated the disproportion in the assets of the 1st defendant when compared with his known sources of legitimate income during the period in question. The 1st defendant cannot account for the disproportion in wealth nor is he able to present documentation of legitimate sources of income before this court. In the absence of any evidence to support the defendants claim, the plaintiff submits that it is only logical to conclude that they are unable to convince the court that the assets and wealth were acquired from a legitimate source of income. Reliance for this submission is again sought from the decision of the Court of Appeal in **Stanley Mombo Amuti v KACC** (supra).

137. In addressing the defendants' challenge of its valuation reports, the plaintiff submits that the defendants' averments are factually and legally unfounded. It refers the court to section 59 of ACECA and asks the court to presume, in the absence of evidence to the contrary, that the certificate of a valuation officer is such a certificate. The plaintiff further asks the court to consider the definition of a valuation officer in line with section 59 (3) of ACECA. It is its submission that the defendants have not tendered

any evidence that is contrary to what it has presented to the court with respect to the valuation of the properties.

138. The plaintiff further asks the court, in finding that it has proved its case and the defendants have failed to explain the source of the assets at issue, to be guided by the decision in **Stanley Mombo Amuti v KACC** (supra) in which the court held that under section 55 (5) and (6) of ACECA, the court has discretion to decide if the Commission has tendered evidence on a balance of probability establishing that a party had unexplained assets. Further, that it had the discretion to let the defendant satisfactorily explain the source of his assets.

Analysis and Determination

139. I have considered the pleadings of the parties in this matter, as well as their respective submissions. The overarching issue for determination is whether the 1st defendant has unexplained assets. The corollary to that issue is whether the said assets, should they be found to be unexplained, are liable to forfeiture to the State as prayed by the plaintiff.

140. Before embarking on a consideration of this issue, it is useful to begin by considering the law relating to forfeiture of unexplained assets. The legislative framework for recovery of unexplained assets is to be found in ACECA, section 55 of which provides as follows:

55. Forfeiture of unexplained assets

(1) In this section, "corrupt conduct" means—

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which—

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

(2) The Commission may commence proceedings under this section against a person if—

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

141. Section 55(4) of ACECA ensures that there is due process in the hearing of a matter relating to a claim that a party has in his possession unexplained assets by providing that:

(4) In proceedings under this section—

(a) the Commission shall adduce evidence that the person has unexplained assets; and

(b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

142. Section 55(5) contains the reverse burden provision imposed on a defendant in a matter alleging possession of unexplained

assets. It states as follows:

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

143. While section 55(6) sets out the powers of the court if satisfied that the defendant in a matter has unexplained assets, section 55(7) elucidates the extent of the properties that may be subject to an order relating to unexplained assets. These sections provide as follows:

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

(7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds—

(a) are held in trust for the person whose assets are in question or otherwise on his behalf; or

(b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.

144. There is no dispute that the 'Commission' vested with the mandate to pursue recovery of unexplained assets under section 55(2) of ACECA is the plaintiff. Section 11(1)(j) of the EACC Act provides that:

"In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall... institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures."

145. The plaintiff is also empowered under Article 252 of the Constitution ***to "conduct investigations on its own initiative or on a complaint made by a member of the public."*** It is also mandated, in accordance with the provisions of the Convention against Corruption (UNCAC) which is applicable to Kenya in accordance with Article 2(6) of the Constitution, to institute these proceedings as consistent with the United Nations Convention against Corruption which Kenya signed and ratified on 9th December 2003.

146. The Convention allows for the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with the Convention. "Confiscation", which includes forfeiture where applicable, is taken to mean permanent deprivation of property by order of a court or other competent authority under Article 2(g).

147. The provisions of ACECA relating to unexplained assets have been considered by both the High Court and the Court of Appeal. In its decision in **Stanley Mombo Amuti v KACC (supra)** the Court of Appeal stated as follows:

"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.".

148. The Court of Appeal also observed in that case that:

"The concept of "unexplained assets" and its forfeiture under Section 26 and 55(2) of ACECA is neither founded on criminal

proceedings nor convictions or criminal offence or economic crime."

See also **KACC v James Mwathethe Mulewa** (supra).

149. Thus, the jurisprudence from our courts is that the plaintiff, in seeking to recover unexplained assets, is not required to prove corrupt acts on the part of the public servant concerned. All that is required is for the plaintiff to show, on a balance of probabilities, that the defendant in a matter has acquired assets which are not commensurate with his known legitimate source of income. Once that is done to the satisfaction of the court, the burden shifts to the defendant to explain the source of the assets at issue.

150. It is thus permissible, under our legislative framework and as determined by our courts, for the plaintiff to institute proceedings alleging that a public servant has acquired assets that are not commensurate with his known legitimate sources of income. The plaintiff must place before the court evidence that indeed shows that the defendant is a public servant, that he has assets that are not commensurate with his known legitimate source of income, and that he has not been able to explain the source of the said assets. The question is whether the plaintiff has been able to do this in the case before me.

151. The facts that emerge from the pleadings of the parties, which are largely undisputed, are these. The 1st defendant was, at the time material to this suit, between 2002- 2007, a public officer. He was a Chief Accountant, first at the Ministry of Finance, and then at the Ministry of Agriculture. At the material time, he had a gross salary of Kshs 53,900. The 2nd defendant is the 1st defendant's wife, while the 3rd, 4th and 5th defendants are his close relatives. The 6th and 7th defendants are limited liability companies in which the 1st defendant is the majority shareholder.

152. It is also not disputed that in the period between 2002-2007 during which the 1st defendant is alleged to have been involved in the corrupt dealings that later came to be known as the Anglo Leasing security contracts, he and his co-defendants, including the limited liability companies in which he and his relatives are shareholders, acquired substantial properties. These are the properties that the plaintiff alleges are unexplained assets as defined in ACECA.

153. It is not disputed that in 2005, the 1st defendant acquired L. R. No. MN/1/5134 which is registered in the name of the 6th defendant. It is alleged by the plaintiff and not disputed by the defendants that the property was developed at substantial cost between 2005 and 2007. The 1st defendant purchased House No. HG. 60, L.R No. 146/69, Mugoya Estate in 2005 at a cost of Kshs. 2,560,000.00. The evidence before the court shows that the 1st defendant paid for the house, in cash, in January of 2005. It is also not disputed that L.R. No. 337/1543 and L.R. No. 337/1544, in Mavoko Municipality which are registered in the name of the 1st defendant were developed between 2002-2005. Apartment No. 4 — Block A5, L.R No. 209/11646, Parkview, South C and Apartment No.7 — Block B4, on L.R No. 209/11646, Parkview, South C were acquired in 2005.

154. The evidence further shows that the motor vehicles the subject of the suit, which are registered in the name of the 1st or 2nd defendant and the 7th defendant, were also purchased during the period in question, between 2002 and 2007.

155. As a public officer, the 1st defendant was required to make declarations of wealth every two years, and it appears that he complied with this requirement. In his wealth declaration forms for the years 2002-2007 (annexure "EN 7"), the 1st defendant had declared income in the form of a gross monthly salary of Kshs 36,590.00. His assets were declared as being a Toyota Corolla KAJ 154Y 12 years old valued at Kshs. 180,000.00; property LR No. 6616/6555 Busia valued at Kshs. 60,000.00; Hazina Co-operative shares valued at Kshs. 94,400.00; property number LR. No. 14888 Kajiado valued at Kshs. 200,000.00; cash of Kshs. 6,700 in HFCK bank account number 105001110921; and personal and household effects worth Kshs. 50,000.00. The plaintiff submits, on the basis of the wealth declaration by the 1st defendant, that as at the statement date of 23rd September 2003, the 1st defendant's wealth was a gross amount of Kshs. 1,030,180.00.

156. The 1st defendant had also filed a wealth declaration for the period 29th November 2006 to 29th November 2007. He had declared for this period a gross monthly salary of Kshs. 56,189.58. His assets were indicated as being Toyota Corolla KAQ 623X, 10 years old, valued at Kshs. 385,000.00; L.R No. 6616/6555 Busia valued at Kshs. 70,000.00; and Hazina Co-operative shares valued at Kshs. 190,245.00. He had also declared cash in Co-op Bank account of Kshs. 50,000 and personal and household effects of Kshs. 350,000.00. His known legitimate sources of income as at the statement date of 29th November 2007 was a gross amount of Kshs. 1,719,520.20.

157. When compared to his known legitimate sources of income and the self-declarations of wealth, the properties the subject of this suit, as well as the deposits in the 1st defendant's accounts and the accounts of the limited liability companies in which he is a majority shareholder, raise questions with respect to their sources. I am satisfied, on the evidence placed before me by the plaintiff, that the 1st defendant has unexplained assets within the meaning of section 2 of ACECA which states that:

"unexplained assets" means assets of a person—

(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

158. I have already alluded to the provisions of section 55(5) of ACECA. Under this section, should the court be satisfied, on ***a balance of probabilities*** on the basis of the evidence placed before it by the Commission that the person has unexplained assets, it may direct that the person explains the source of the assets. The burden of proof in matters relating to unexplained assets under ACECA, contrary to the submission by the defendants, is not beyond reasonable doubt. The procedure for recovery of unexplained assets is civil in nature and the burden of proof set by statute is on a balance of probabilities.

159. I should observe at this juncture that aside from the 1st defendant, none of the other defendants deigned to place any information before the court regarding the properties the subject of this suit. The only explanation that is before the court is in the form of the two affidavits filed on the same day by the 1st defendant. His explanation is that some of the properties do not belong to him but to the other defendants. Further, that in the case of three properties, namely apartments number 4 Block A5 and number 7 Block B4 on L.R number 209/11646 Parkview South C and plot number MN/1/5134 Nyali, Mombasa, he is holding the properties on behalf of a Maxwell Mbecah, a resident of the United States.

160. All the evidence before the court, however, shows that the properties in question are registered in the name of the 1st defendant or, as the statements of the 2nd defendant and one Gabriel Malo confirm, that he is the beneficial owner thereof. Nothing would have been easier than for the other defendants to place before the court, by way of affidavit evidence, their purported ownership of the subject properties. It must be observed that this matter has been in court since 2008. The defendants have had ample time to place such evidence relating to their ownership of the assets, and the legitimate sources of funds to acquire the said assets, before the court. Further, nothing would have prevented the 1st defendant from placing before the court the alleged power of attorney in respect of the properties that allegedly belong to Maxwell Mbecah. In any event, it seems to the court that if indeed the properties were owned by the said Mbecah, they would have been registered in his name, and he would then execute a power of attorney authorising the 1st defendant to deal with his properties.

161. The 1st defendant has sought to explain the sources of funds deposited in his personal account and in the accounts held in the names of the corporate defendants in this matter. I note, however, that the explanations have been set out in the written submissions, where reference to a bar and restaurant business, among other things, are made. As submitted by the plaintiff however, such factual matters in submissions are of no value. I am guided in reaching this conclusion by the decision of the court in **Republic v Chairman Public Procurement Administrative Review Board & another ex parte Zapkass Consulting and Training Limited & another [2014] eKLR** in which the court held that:

"The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored." (Emphasis added)

162. In **Clips Limited v Brands Imports (Africa) Limited formerly named Brand Imports Limited [2015] eKLR** the court observed that:

"In paragraph (iii) of its supplementary submissions, the Defendant submits that it highly regrets it did not produce any evidence of usage of the disputed marks and submits the court cannot ignore this fact. However, it is trite law that new issues cannot be raised in submissions." (Emphasis added)

163. In **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** the court held that:

"Submissions cannot take the place of evidence…What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

164. In the present case, the only credible evidence before me with regard to the assets the subject of the suit is that presented by the plaintiff. The submissions by the defendants in which they seek to introduce information about businesses operated by the 1st defendant are of no assistance to them. Nor are the submissions that the 2nd defendant and Mr. Malo did not make statements regarding ownership of the properties registered in the names of the 2nd and 7th defendant of their own accord. The 1st defendant was, at the material time, a public officer working in the Ministry of Finance in which the infamous Anglo Leasing corruption scheme was perpetrated. The evidence shows that he acquired numerous assets, registered in his name and in the names of his relations or companies in which he is the major shareholder. He also made large deposits in his personal account and in the accounts of the corporate entities in the same period. Despite being given the opportunity to do so, he has not been able to explain the source of funds for the acquisition of the assets. The assets are not commensurate with his known legitimate source of income, which was his salary. In the circumstances, I am constrained to find that the assets the subject of this suit are unexplained assets.

165. The defendants submitted that the plaintiff's witnesses are imposters, and that the valuations by the 2nd plaintiff's witness, Mr. Maithya, could not be relied on as he had not established that he was an 'expert' as required under the Evidence Act.

166. I have considered these arguments and the responses thereto by the plaintiff. I note that this assertion by the defendants arose during cross-examination and appears to be grounded on the fact that the witnesses included their middle names in introducing themselves to the court. I note, however, that in the Schedule of Items Collected from the 1st defendant's house during the search on 28th November 2008 in the presence of, among others, the two witnesses who testified before the court, P. Maithya and E. Nguthu, the schedule is signed by 'Patrick O. Abachi' and 'Enoch K. Nguthu.' The omission of the middle name in the affidavits in support of the Originating Summons does not, in my view, amount to a material omission that would render the suit unsupported by evidence.

167. The defendants have also questioned the valuation reports prepared by P. Maithya and annexed to the Originating Summons on the basis that the valuer has not included a certificate to confirm that he is indeed a valuer. The response from the plaintiff is that there is no such requirement as valuers are registered and gazetted and such gazette notice is a public document. The plaintiff also refers the court to the provisions of section 59 of ACECA which provides that:

Certificates to show value of property, etc.

(1) In a prosecution for corruption or economic crime or a proceeding under this Act, a certificate of a valuation officer as to the value of a benefit or property is admissible and is proof of that value, unless the contrary is proved.

(2) A court shall presume, in the absence of evidence to the contrary, that a certificate purporting to be the certificate of a valuation officer is such a certificate.

(3) In this section, "valuation officer" means a person appointed, employed or authorised by the Commission or the Government to value property and whose appointment, employment or authorisation is published by notice in the Gazette.

168. I note that the valuation reports in respect of each of the properties in issue in this matter is accompanied by a certificate titled **'Valuation Certificate'** and signed by Pius N. Maithya, Registered Valuer. In accordance with section 59(2) set out above, and there being no evidence to the contrary, I believe I am entitled to presume that the certificate and the valuation by Maithya, an employee of the plaintiff, is properly before the court with regard to each of the respective properties in this matter.

169. The defendants have submitted that everyone has a right to property guaranteed under Article 40 of the Constitution. They have further argued that they have a right to non-discrimination guaranteed under Article 27. The plaintiff does not dispute this. While it concedes that these rights are indeed guaranteed to all, it submit, first, that the defendants have not demonstrated a violation of these

rights. Secondly, that under Article 40(6), assets found to have been unlawfully acquired do not enjoy constitutional protection.

170. I agree with the petitioners on these two points. The 1st defendant whom, from the evidence before the court is the owner or beneficial owner of all the assets the subject of the suit, was suspected to have been involved in corruption that revolved around the Anglo Leasing contracts. Investigations showed that he had, in the five-year period that he was reasonably suspected of involvement in corruption, acquired assets whose value, as at 2008, was estimated to be in excess of Kshs 65,000,000. He has not been able to show a legitimate source for the funds to acquire the said assets.

171. In the circumstances, it is my finding and I so hold that the Originating Summons dated 18th September 2008 has merit, and is hereby allowed.

172. The orders which commend themselves to me, and which I hereby grant, are as follows:

1. I declare that the defendants are in possession of the following unexplained assets:

a. Ngong/Ngong/14888, situated within Kajiado District registered in the name of the 1st defendant;

b. L.R. No. 337/1543, Mavoko Municipality Council registered in the name of the 1st defendant;

c. L.R. No. 337/1544, Mavoko Municipality Council registered in the name of 1st defendant;

d. Kajiado/Kitengela/6491, Kajiado District, registered in the name of the 1st defendant;

e. Apartment No. 4 - Block A5, L.R No. 209/11646, Parkview, South C, situated within Nairobi and registered in the name of the 1st defendant;

f. Apartment No.7 - Block B4, L.R No. 209/11646, Parkview, South C, situated within Nairobi and in the name of the 1st defendant;

g. House No. HG. 60, L.R No. 146/69, Mugoya Estate, situated within Nairobi and registered in the name of the 1st defendant;

h. Kajiado/Kitengela/20644, situated within Kajiado District and registered in the name of the 3rd defendant;

i. Kajiado/Kitengela/20580, situated within Kajiado District and registered in the name of the 3rd defendant;

j. Kajiado/Kitengela/20641, situated within Kajiado District and registered in the name of the 5th defendant;

k. Kajiado/Kitengela/20609, situated within Kajiado District and registered in the name of the 4th defendant;

l. L. R. No. MN/1/51 34, C. R. No. 35667 situated within the Municipality of Mombasa and registered in the name of the 6th defendant;

m. Motor vehicle registration No. KAS 108X, Toyota Pick Up, registered in the name of the 1st defendant;

n. Motor vehicle registration No. KAV 170C, Toyota Lexus, registered in the name of the 7th defendant;

o. Motor vehicle registration No. KAU 105T, Mitsubishi Saloon, registered in the name of the 1st defendant;

p. Motor vehicle registration No. KAS 336X, Toyota Saloon, registered in the name of the 2nd defendant;

q. Motor vehicle registration No. KAU 372M, Toyota Station Wagon, registered in the name of the 3rd defendant;

r. Funds held in the following bank accounts:-

i. Barclays Bank of Kenya, Queensway Branch, Account No. [...] in the name of Rick Seaside Villas;

ii. Co-operative Bank Limited, Co-operative House Branch, A/C No. [...];

iii. Housing Finance Company of Kenya Limited, A/C No. [...];

iv. Cash in the sum of Kshs. 1,990,000/- recovered from the 1st defendant's premises and held by the plaintiff;

2. I declare that the assets set out in order 1 above constitute 'unexplained assets' within the meaning of sections 2 and 55 of the Anti-Corruption and Economic Crimes Act and shall be forfeited to the government;

3. I direct that the funds held in the accounts set out in order 1(r) above and the sum of Kshs 1,990,000/- recovered from the 1st defendant's premises shall be forfeited to the government.

173. As costs follow the event in civil proceedings, I direct that the defendants shall bear the costs of this suit.

174. Orders accordingly.

Dated Signed and Delivered electronically this 10th day of March 2021.

MUMBI NGUGI

JUDGE

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KENYA LAW
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MISCELLANEOUS APPLICATION NO. 5 OF 2020

IN THE MATTER OF: AN APPLICATION BY THE ASSETS RECOVERY AGENCY UNDER SECTIONS 81 AND 82 OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT READ TOGETHER WITH ORDER 51 OF THE CIVIL PROCEDURE RULES.

AND

IN THE MATTER OF: KSHS.4,249,785.90 HELD IN ACCOUNT NUMBER 0020264389109 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.

- KSHS.1,465,576.80 HELD IN ACCOUNT NUMBER 1380262333608 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.
- KSHS.2,906,213.90 HELD IN ACCOUNT NUMBER 1580261402765 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.
- KSHS.2,692,704.50 HELD IN ACCOUNT NUMBER 0350299195757 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.
- KSHS.1,296,033.07 HELD IN ACCOUNT NUMBER 1620262559567 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.
- USD 20,906.90 HELD IN ACCOUNT NUMBER 1380262333653 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT EQUITY BANK LIMITED.
- KSHS.2,235,015.27 HELD IN ACCOUNT NUMBER 0816490001 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT DIAMOND TRUST BANK LIMITED.
- KSHS.1,161,889.29 HELD IN ACCOUNT NUMBER 01143199727300 IN THE NAME OF HON. MBUVI GIDION KIOKO HELD AT CO-OPERATIVE BANK LIMITED.
- USD 7,573.03 HELD IN ACCOUNT NUMBER 0816490012 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT DIAMOND TRUST BANK LIMITED, CAPITAL CENTRE BRANCH NAIROBI.
- USD 39,426.50 HELD IN ACCOUNT NUMBER 5048843001 IN THE NAME OF MIKE SONKO MBUVI GIDION KIOKO HELD AT DIAMOND TRUST BANK LIMITED, NYALI BRANCH.

LESIIT, J

BETWEEN

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

MIKE SONKO MBUVI GIDEON KIOKO.....RESPONDENT

RULING

1. The application before the court is the one dated May 18th, 2020 filed by the Respondent in the case, **MIKE SONKO MBUVI GIDION KIOKO,** herein after referred to as Respondent/Applicant. It seeks the following orders:

(1) Moot

(2) Moot

(3) The order herein made on 6th February 2020 by the Hon. Mr. Justice Luka Kimaru be forthwith set aside, vacated, and wholly discharged.

(4) The proceedings herein lodge on 6th February 2020 be struck out and dismissed as against the Respondent MIKE SONKO MBUVI GIDION KIOKO as the same amount to an abuse of the court process.

(5) The costs of this motion be awarded to MIKE SONKO MBUVI GIDION KIOKO and borne by Asset Recovery Agency in any event.

2. The application is premised on 26 grounds cited on the face of the motion. In brief the Respondent/Applicant urges that the summary nature of the proceedings in which orders of a permanent nature were issued against him is in violation of **Article 25(c)** and **Article 50(1)** of the **Constitution** and unknown both under the **Proceeds of Crime** and **Anti-Money Laundering Act** (hereinafter **POCAMLA**) and the **Civil Procedure Act** and **Rules** (hereinafter **CPA & R**); that the matter was *res judicata*; that the Applicant/Respondent did not lodge a substantive process to support their Originating Notice of Motion and was therefore void *abinitio*; that the ex-parte order obtained by the Applicant/Respondent should have been served upon the Respondent within 3 days and in any event should have lapsed within 14 days; and, that even under **POCAMLA** an order has a life of 90 days after which it lapses meaning the current order extinguished as at May 20, 2020.

3. The application is supported by the affidavit sworn by the Respondent/Applicant of even dated and by a Supplementary Affidavit by same deponent dated 25 June, 2020. Mr. Kinyanjui for the Respondent/Applicant also filed written submissions and supplementary submissions with a list of authorities also filed.

4. The Respondent/Applicant have filed a Replying Affidavit sworn by Corporal Sautet Jeremiah dated June 23, 2020. They also filed written submissions with a list of authorities which were also supplied.

5. The Applicant/Respondent's position is that the orders issued by this court on February 6, 2020 were made after the court was satisfied that there were reasonable grounds to believe the assets in the accounts named were proceeds of crime; that POCAMLA provides for applications of this nature to be made ex parte; that forfeiture proceedings were filed before 90 days lapsed and after gazettment of the preservation orders; that this matter is not *res judicata* since the application before the Chief Magistrate was to enable the Applicant/Respondent to conduct investigations pursuant to **section 118** and **section 121** of the **Criminal Procedure Code** and that the preservation orders issued by this court were to prohibit the Respondent/Applicant from dealing with the funds pending forfeiture Application; that the orders issued in this case have not lapsed; that the Respondent/Applicant's right to be heard have not been violated as they are guaranteed under **sections 83** and **section 89** of **POCAMLA**.

6. I have considered this application and the various affidavits filed for and against this application together with the submissions by both parties, both written and oral and cases cited.

7. Before I go any further, let me clarify that for the purposes of this application I will refer to the Respondent/Applicant as the Applicant while the Applicant/Respondent will be referred to as ARA for convenience.

BACKGROUND

8. ARA approached this court with an Originating Motion dated February 5, 2020 in which it invoked **sections 81** and **82** of **Proceeds of Crime** and **Anti-Money Laundering Act**, hereinafter **POCAMLA**, and **order 51** of the **Civil Procedure Rules**, hereinafter **Criminal Procedure Rules**. It sought preservation orders over various named Bank Accounts in the name of Mike Sonko Mbuvi Gidion Kioko. It is not disputed that the preservation orders were issued ex parte by Hon. Kimaru, J on February 6, 2020.

9. It is not disputed that the ARA caused the Preservation Orders to be Gazetted which was done pursuant to **section 83(1)** of **POCAMLA** vide **Gazette Notice No. 1392 of February 21, 2020**. The ARA served the orders upon the Applicant on February 18, 2020.

10. The ARA then filed Forfeiture Application on May 21, 2020 within 90 days from one day after the date of Gazette of the Preservation Orders, and given the case file No. 16 of 2020.

ISSUES FOR DETERMINATION

11. Having considered the submissions by the counsels in this matter, Mr. Kinyanjui for the Applicant and learned State Counsel Ms Muchiri for the ARA, and the pleadings filed herein, I find that the issues for determination are as follows:

(i) Whether the Preservatory Orders issued in this case followed a process known either in the civil law or criminal process.

(ii) Whether these proceedings are res judicata and whether ARA were guilty of material non-disclosure.

(iii) Whether the Preservation Order has extinguished by effluxion of time.

(iv) Whether the Applicant's application meets the threshold of section 89 of POCAMLA.

ANALYSIS

12. Whether the Preservation Order issued in this case followed a process known either in Civil law or criminal process. It is the Applicant's contention that since ARA did not file any suit before or contemporaneously with their Notice of Motion dated February 5, 2020 to found the impugned there is no valid cause of action. That Applicant contends that since impugned orders were obtained exparte, and no further action was taken, the Applicant's constitutional right to fair trial provided under **Article 25(c)** and **Article 50(1)** of the **Constitution**.

13. For this proposition Mr. Kinyanjui cited the case of **Anastacia Wagiciengo vs. Ezekiel Wafula [2018] eKLR** where Kamau J stated:

"It is important to point out that interlocutory orders envisaged under section 3 € of the CPA cannot be granted in a vacuum. The limbs they stand on must be supported by provisions expressly provided under the CPR..."

14. Mr. Kinyanjui urged that there must be a foundational suit as a basis for interlocutory exparte orders. For that proposition Mr. Kinyanjui cited **CFC Financial Services vs. Juja Road Store Limited [2017] e KLR** where the court held:

"The primary purpose of granting interim relief is the preservation of property mitigation of losses, or preservation of peace and public order during the pendency of the suit. A mandatory injunction may be granted on an interlocutory application to preserve or restore status quo ... pending the hearing and determination of the dispute, where the court can give final appropriate relief."

15. In Kinyanjui submitted that mandatory prohibitory orders in civil process as those issued in this case, were in the class of Mareva injunctions. He relied on **International Air Transport Association & Another vs. Akarim Agenices Co. Ltd & 2 others [2014] e KLR** and **Third Chandris Shippig Corporation and others vs. Unimarine SA The Pythia, the Angelic Wings, The Genrie [1979] 2 ALL ER 972** where the meaning and effect of Mareva injunction is defined.

16. Mr. Kinyanjui cited the law in other jurisdictions, including New Zealand, United Kingdom and Seychelles where the court provided that a Civil Suit was instituted by way of filing a plaint.

17. Ms. Muchiri for the State opposed the Applicant's Notice of Motion. Counsel urged that the ARA filed suit under **sections 81** and **82** of **POCAMLA** following investigations which established the Applicant's bank accounts had received suspected stolen funds. Counsel urged that before the court issued the said orders, it was satisfied that there were reasonable grounds to believe that the funds held in the Applicant's bank accounts had received suspicious funds as prescribed under the said sections of **POCAMLA**. For that proposition Counsel relied on **Ethics and Anti-Corruption Commission vs. National Bank of Kenya and Another [2017] e KLR** where the court held;

"Provided that there are some evidential facts at the exparte stage to enable the court in the exercise of its discretion to find that reasonable grounds have been established there are no other valid preconditions to the grant of the exparte order. At the exparte stage the evidential facts need not answer the description of any specific corrupt conduct provided they point to that probability."

18. Ms Muchiri urged that the ARA obtained preservation orders to prohibit the Applicant from transacting, transferring and or dealing in any manner with the funds held in his bank accounts and to safeguard the funds pending the determination of the Forfeiture Application filed in **Civil Application No. 16 of 2020**. Counsel urged that ARA met the threshold for the grant of the said orders under **section 82 (2)** of **POCAMLA.**

19. Ms. Muchiri urged that the Preservation Order issued in this case was not akin to a Mareva Injunction, was not a summary process or mandatory injunction and the threshold in **Giella vs. Casman Brown** does not apply. For that proposition counsel relied on **Asset Recovery Agency vs. Charity Wangai Geitu [2017] e KLR. Asset Recovery Agency vs. Jane Wambui Wanjiru & 2 others 2019 e KLR and Asset Recovery Agency vs. Lilian Wanja Muthoni & Others [2019] e KLR** all which held that **section 82** of **POCAMLA** provided that an application for an order of Preservation of Property should be made exparte.

20. Ms Muchiri Learned State Counsel submitted that the ARA opted to use the Civil Process mode of Recovery provided for under **Part VIII** of **POCAMLA.** She relied on **Assets Recovery Agency vs. Pamela Aboo [2018] e KLR** and **Kenya Anti-Corruption Committee vs. Stanley Mombo Amuti [2017].**

21. The ARA invoked **sections 81** and **82** of the **POCAMLA** when it filed this matter before this court. **Section 82** provides for the procedure of seeking an order of preservation of property thus:

82(1) "The Agency may, by an exparte application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property."

22. The **Act** is clear that a Preservation Order, once a decision is made to seek it by ARA, may do so by way of an exparte application. **Section 82(2)** continues to provide thus:

82(2) "The court shall make an order under subsection (1) if there are reasonable grounds to believe 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."

23. Mr. Kinyanjui's argument was that if civil process was applied then, it had to adhere to the requirements of the **CPA & R**, in particular counsel urged that the power to set aside mandatory orders is provided under the CPR, and that the said Act emphasizes the primacy of a suit.

24. The ARA invoked the powers donated under **POCAMLA**, and in particular **sections 81** and **82** of the **Act**. That law is very clear that the Agency may apply for Preservation Order, and that such an application shall be exparte. The same law provides under **section 84(a)** that **"Preservation Order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette, unless –**

(a) There is an application for a forfeiture order pending before the court in respect of the property subject of the Preservation Order."

25. The process applied by ARA is the Civil process as provided under **POCAMLA, Part VIII** thereof. The Act breaks down the Civil process into four stages. The application before the court is stage two of the process and is premised under **sections 81** and **82** of the **Act**. The **CPR & A**, cannot be read into **POCAMLA** to limit the application of the preservation order to an injunction as envisaged under the **Civil Procedure Rules**. The two are world's apart, as they serve different purposes, and both the process of applying and of processing them are different. I see no merit in the challenge of the application on basis it has not premised on any known process of law.

26. As to whether the proceedings are *res judicata* and whether there was material non-disclosure by ARA. Mr. Kinyanjui, learned Counsel for the Applicant relied on the definition of the term res judicata under **section 7** of the **Civil Procedure Act** which provides:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. **—(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**

Explanation. **—(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

Explanation. **—(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

Explanation. **—(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

Explanation. **—(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

Explanation. **—(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."**

27. It was Mr. Kinyanjui's submissions that the prayers sought before this court were the same sought but dismissed before the

chief magistrate's court in the case of **Asset Recovery Agency vs. KCB Bank** and **9 others Chief Magistrate's Court Criminal Application No. 4477 of 2019** Counsel relies on paragraphs 21 and 22 of his clients' supporting affidavit in which he reiterates as much. Counsel cited **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others [1996] e KLR** where the court held:

"there must be an end to applications of similar nature; that is to say further, under principles of res judicata apply to applications within the suit ... There must be an end to interlocutory applications as much as there ought to be an end to litigation ..."

28. Mr. Kinyanjui urged that the **Chief Magistrate's Criminal Application No. 4477 of 2019** has been proved in Applicant's affidavit in support of this application, to be a previous suit in respect of which the matter at hand was in issue; the parties were the same or litigating under the same title; a competent court heard the matter in issue; and the issue had been raised once again in these fresh proceedings.

29. Ms Muchiri for the State urged that this matter was not res judicata. Counsel urged that the ARA obtained orders in the **Chief Magistrate's Criminal Appeal No. 4477 of 2019** subject to police powers under **sections 118** and **121 (1)** of the **Criminal Procedure Code** and **section 180** of the **Evidence Act** for authority to investigate and restrict debits in respect of funds held in the Applicant's and other persons' bank accounts.

30. Ms Muchiri urged that from the Chief Magistrate's Court, ARA obtained Applicant's bank statements and account opening forms and other bank documents. That after their investigations, they came to this court, applied for and obtained preservation orders.

31. **Section 7** of the **Civil Procedure Act** makes it clear what will be regarded as res judicata. It is res judicata where "the matter directly and substantially in issue has been directly or substantially an issue in a former suit ...."

32. Paragraph 6 of Sautet Jeremiah's Replying Affidavit states the purpose for which the **Misc. Criminal Application 4477 of 2019** was filed, which was **"to obtain court orders authorizing the ARA to investigate and restrict debits in respect of the funds held in the Appellant's and other persons' various bank accounts"**. The deponent annexed the copy of the court order as **"SJM1"**.

33. The order reads in part

"ORDER OF THE COURT

Whereas it has been proved to me on oath that for the purpose of an investigation into the commission of offence of money laundering and proceeds crime contrary to section 3(a) of POCAMLA, it is necessary and desireable to issue warrants to RESTRICT DEBITS for a period of days and investigate books of the following accounts ....."

34. The Originating Motion dated February 5, 2020 which instituted the instant suit has been brought under **sections 81** and **82** of the **POCAMLA** and **Order 51** of the **Civil Procedure Rules**. It seeks among other orders.

"This Honourable court be pleased to issue preservation orders prohibiting the Respondent and/or his agents or representatives from transacting, withdrawing, transferring using and any other dealings in respect of funds held in the following accounts ..."

35. It is clear that the jurisdiction invoked by ARA in bringing the two applications were different. Counsel urged that one seeking to prohibit debits into the accounts for purposes of investigations and the other for preservation of the proceeds in the accounts named prohibiting the Applicant from dealing in any way with the funds in the named accounts. An order was issued to that effect by Hon. Kimaru, J.

36. **POCAMLA** gives ARA powers to institute forfeiture proceedings in four levels or stages. These are investigations, carried out

under the **Evidence Act** and **Criminal Procedure Code**. This is the first level towards forfeiture. The second level is preservation orders provided under **sections 81** and **82** of the **Act**. That is the stage at which these proceedings are premised.

37. The third level is Gazettment under **section 83** of the **Act**. That level has also been invoked and the Gazette Notice is annexed to Mr. Sautet Jeremiah's affidavit as "SJM2". The fourth level is Application for Forfeiture proceedings under **section 90** and **section 92** of the **POCAMLA**. The proceedings are annexture SJM3 in the Replying affidavit of Mr. Sautet Jeremiah.

38. I do find that these proceedings are not res judicata and that the jurisdictions of this court to entertain it has not been ousted by any law. I find that ARA followed the process as prescribed under the **POCAMLA** which is the law governing investigations, Preservation and Forfeiture of proceeds of crime and money laundering.

39. As to whether the Preservation Order is extinguished by effluxion of time. I have already dealt with the issue of lapsing of the Preservation Order as provided under **section 84(a)** of **POCAMLA**. The order in this case was issued by this court on February 6, 2020. The Gazette Notice was issued on February 21, 2020. The Forfeiture Application was filed on May 21, 2020, which was within the 90 days window provided under the **Act**.

40. The Applicant's have urged that the ARA was time barred as they were not served with the Application and were unaware of it. The ARA in response not only provided the Gazette Notices and the Forfeiture Application to show the dates, but has urged that they used the email addresses given to them by EACC to serve the application.

41. These are different times where everything has to be done electronically. That presents its own unique challenges especially technical ones. Such difficulties, like emails bouncing or not going through, cannot defeat efforts made to meet legal timelines. The ARA cannot be penalized for technical failure beyond their control. I find that the ARA met the legal requirements and that the preservation order was properly obtained and has not been extinguished by effluxion of time as urged.

42. The last issue was paused by the State, ARA whether the Applicant's application meets the threshold of **section 89** of the **POCAMLA**. That **section** provides:

"Variation and rescission of orders

(1) A court which makes a preservation order –

(a) May, on application by a person affected by that order, vary or rescind the preservation order or an order authorizing the seizure of the property concerned or other ancillary order if it is satisfied –

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

(b) Shall rescind the preservation order when the proceedings against the defendant concerned are concluded.

(2) When a court orders the rescission of an order authorizing the seizure of property under paragraph (a) of subsection (1), the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation order concerned.

(3) A person affected by an order for the appointment of a manager may at any time, apply for the –

(a) Variation or rescission of the order;

(b) Variation of the terms of the appointment of the manager concerned;

Or

(c) Discharge of the manager.

4. The court that made an order for the appointment of a manager –

(a) May, if it deems it necessary in the interests of justice, at any time –

(i) Vary or rescind the order;

(ii) Vary the terms of the appointment of the manager concerned; or

(iii) Discharge that manager;

(b) Shall rescind the order and discharge the manager concerned if the relevant preservation order is rescinded.

(5) A person affected by an order in respect of immovable property may, at any time, apply for the rescission of the order.

(6) The court that made an order in respect of immovable property –

(i) May, if it deems it necessary in the interests of justice, at any time rescind the order; or

(ii) Shall rescind the order if the relevant preservation order is rescinded.

(7) If an order in respect of immovable property is rescinded, the court shall direct the Registrar of Lands concerned to lift any caveat entered by virtue of that order on the land registry in respect of that immovable property, and the Registrar shall give effect to such direction."

After the Preservation Order is issued, the party against whom it is issued has a right to challenge it by invoking **section 89** of **POCAMLA** and seek variation or rescinding of the order on the basis of the threshold set under the said section. Court has challenged the Preservation Order but has not brought his application within the provisions of **section 89** of **POCAMLA**. I rest that matter there.

43. I have carefully considered the Applicant's Notice of Motion dated May 18, 2020. I find that the order sought to be set aside and the proceedings sought to be struck out and dismissed were properly filed and orders issued regularly and ought not to be struck out or set aside. Conversely, I find that the Applicant has not met the threshold under **section 89** of the **POCAMLA** to have the impugned preservation orders varied or rescinded or for any other order provided thereunder.

44. In the result I find no merit in this application and consequently dismiss it with costs to ARA.

DELIVERED AT NAIROBI THROUGH TEAMS THIS 30TH DAY OF JULY, 2020.

LESIIT, J.

JUDGE

In presence of

Mr. Kinyanjui for Respondent/Applicant

Ms Muchiri for Applicant/Respondent

Gitonga – Court Assistant

LESIIT, J.

JUDGE

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KENYA LAW
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI -CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC CIVIL SUIT NO 1 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

PHYLIS NJERI NGIRITA.....1ST RESPONDENT

LUCY WAMBUI NGIRITA.....2ND RESPONDENT

JEREMIAH GICHINA NGIRITA.....3RD RESPONDENT

AND

PLATNUM CREDIT LIMITED.....1ST INTERESTED PARTY

OPPORTUNITY INTERNATIONAL WEDCO LTD.....2ND INTERESTED PARTY

JUDGMENT

1. This judgment addresses an application for forfeiture to the State of certain vehicles and real properties registered in the name of the respondents or in which they have a beneficial interest. It also addresses two applications brought by the Interested Parties claiming an interest in the motor vehicles the subject of the forfeiture application.

2. The forfeiture application is brought by way of an Originating Motion dated 12th March 2019. In the application, the Assets Recovery Agency (hereafter **'the Agency'**) seeks to recover motor vehicles and real property from the respondents believed to be proceeds of crime.

3. At prayer 1 of the application brought under the provisions of sections 81, 82, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Order 51 rule 1 of the Civil Procedure Rules, the Agency seeks the following order:

1. THAT this Honourable Court issue orders declaring that the following motor vehicles and properties held by the respondents are proceeds of crime and therefore liable for forfeiture to the Government

i. KCH 753U Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and Opportunity

International WEDCO Limited;

ii. KCH 600H Toyota Station Wagon, 2016 blue in colour registered in the name of the 2nd respondent and Platinum Credit Limited;

iii. KCH 889M, Toyota Pickup, 2016 silver in colour registered in the name of the 3rd respondent and Platinum Credit Limited.

iv. Title No. Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated 2nd June 2016 situated within Trans Nzoia County.

v. Title No. Naivasha/Municipality Block 2/884 measuring o.2305HA, being leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014, sold by the vendor New Hope for all Nations Church to the 2nd respondent vide sale agreement dated 8th July 2016.

vi. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated 25th April 2017.

vii. Title No. Njoro/Ngata Block 1/7436, approximate area 0.0840ha. Subdivision of P/NO. 3283 registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated 28th October, 2016 situated in Kiamunyi, Nakuru County.

viii. Title No Naivasha/Mwichiringiri Block 4/22367 approximate area 0.0450, subdivision of P/NO. 17217 registered in the name of the 3rd respondent registered on 1st July 2016.

4. At prayer 2, the Agency asks the court to issue orders of forfeiture to the State in respect of the properties set out in prayer 1 of its application. Prayer 3 asks that the court issues an order that the assets be forfeited to the government and transferred to the Agency. The Agency also asks the court to make any other ancillary orders that it may deem fit for the proper, fair, effective execution of its orders, and to provide for the costs of the application.

5. Arising out of the main application are the applications by the Interested Parties. The Interested Parties respectively ask the court to make orders in respect of their interests in the motor vehicles the subject of the forfeiture application prior to making orders for forfeiture of the vehicles to the State. In its application dated 12th July 2019, the 1st Interested Party, Platinum Credit Limited seeks the following orders:

1. THAT a declaration be and is hereby made that Platinum Credit Ltd has an interest in motor vehicle registration number KCH 600H as a secured creditor to the extent and value of Kshs 3,756,943.97/=.

2. THAT a declaration be and is hereby made that Platinum Credit Ltd, has an interest in motor vehicle registration number KCH 889M as a secured creditor to the extent and value of Kshs 386,823.78/=.

3. THAT the Honourable Court be and is hereby pleased to direct that a sum of Kshs 3,756,943.97/= being the value of the interest of Platinum Credit Ltd in motor vehicle registration number KCH 600H, be paid to Platinum Credit Ltd before the said vehicle is forfeited to the Government.

4. THAT the Honourable Court be and is hereby pleased to direct that a sum of Kshs 386,823.78/= being the value of the interest of Platinum Credit Ltd in motor vehicle registration number KCH 889M, be paid to Platinum Credit Ltd before the said vehicle is forfeited to the Government.

5. THAT the 1st Interested Party be and is hereby awarded costs of this application.

6. The 2nd Interested Party's claim also arises in relation to the orders sought against the respondents by the Agency. In the application dated 28th June 2019 brought under the provisions of sections 81 and 83 (3)(4)(5), of POCAMLA and Order 51 Rule 1 of the Civil Procedure Rules, the Interested Party seeks the following orders:

1. (Spent)

2. THAT this Honourable Court be pleased to admit this notice out of time having been brought to Court after the expiration of the 14 days upon the Notice by the Asset Recovery Agency being Published in the Kenya Gazette under Section 83 (1) of the Proceeds of Crime and Anti-Money Laundering Act.

3. THAT this Honourable Court do issue an Exclusion Order against the Applicant/ Respondent (Asset Recovery Agency) or its employees, agents, servants or any other persons acting on their behalf prohibiting the transfer or disposal of or other dealings with the motor vehicle KCH 753U Toyota Station Wagon, 2009 green in colour pending hearing and final determination of this Application.

4. THAT a Declaration that the Motor Vehicle Registration Number KCH 753U is validly held by the 2nd Interested Party/Applicant as security for a loan advanced to the 1st Respondent and in this regard, should not be forfeited to the state.

5. THAT in the alternative to prayer 2 an order do issue prohibiting the 1st Respondent and or her employees, agents, servants or any other persons acting on their behalf from accessing the proceeds in Kenya Commercial Bank, Account Number [...] pending hearing and determination of this Application.

6. THAT in the alternative to prayer 2 an order do issue prohibiting the 1st Respondent and or her employees, agents, servants or any other persons acting on their behalf from accessing the proceeds in Kenya Commercial Bank, Account Number [...].

7. THAT in the alternative to Prayer 3, an Order do issue directing Kenya Commercial Bank to release the proceeds in Kenya Commercial Bank, Account Number [...] to the 2nd Interested Party/Applicant to the extent of the amount owed by the 1st Respondent to 2nd Interested Party/Applicant.

8. THAT the Honourable Court makes any other ancillary orders that it may deem fit for the proper, fair effective execution of its orders.

9. THAT costs be provided for.

7. A determination of the issues raised in the applications by the Interested Parties will be dependent on the court's determination of the main issues raised in the Agency's application for forfeiture: whether the properties the subject of the application are proceeds of crime and whether they are liable to forfeiture to the State. Upon determination of these issues, the issue relating to the interests of the 1st Interested Party in the motor vehicles registered in its name and that of the 2nd and 3rd respondents, and whether the interest of the 2nd Interested Party in the funds deposited in the 1st respondent's account or in the vehicle used as security therefor, should be protected, will be considered. I will accordingly commence by a consideration of the respective cases of the parties on the main application and the issues that arise before entering into a consideration of the issues raised by the Interested Parties.

The Application for Forfeiture

8. The Agency's application for forfeiture is supported by an affidavit sworn on 12th March 2019 by S/Sgt Fredrick Musyoki, an investigating officer with the applicant, and on grounds set out on the face of the application. The Agency also filed a further affidavit sworn on 8th June 2019 by S/Sgt Musyoki, and a supplementary affidavit sworn on 15th October 2019 by S/Sgt. Musyoki. It also filed a further three affidavits by the same deponent, all sworn on 20th May 2020, in response to the affidavits sworn by Phyllis Njeri Ngirita on 11th April 2019; another affidavit sworn by Phyllis Njeri Ngirita on 19th July 2019; an affidavit sworn on 29th July 2019 by Lucy Wambui Ngirita; and three affidavits sworn on 4th November 2019 and filed in court on 18th November 2019 by each of the respondents respectively.

9. The basis of the Agency's application is set out in its affidavits and the grounds in support. The applicant states that it is established under section 53 of POCAMLA as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. Pursuant to Part VIII of POCAMLA, it is authorized to institute civil forfeiture proceedings and to seek orders prohibiting any person, subject to such conditions as the court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime. It also has policing powers, under section 53A (5) of POCAMLA, to enable it identify, trace, seize and recover proceeds of crime.

10. According to the Agency, on or about 26th April, 2018, it had received information on ongoing criminal investigations involving fraud and economic crimes at the National Youth Service (NYS) which were being conducted by the Directorate of Criminal Investigations (DCI). On 29th May, 2018, several suspects and entities, including the 1st, 2nd and 3rd respondents, were charged with criminal offences in Criminal Case No. ACC 13, 15 and 17 of 2018 with offences including conspiracy to commit an offence of economic crime contrary to sections 47(a)(3) and 48(1) of the Anti-Corruption and Economic Crimes Act (ACECA) and fraudulent acquisition of public property contrary to sections 45(1)(a) and 48(1) of ACECA.

11. Its preliminary investigations established that the three respondents, who are members of one family known as the Ngiritas, received huge amounts of money through their respective business entities and personal accounts held at KCB Limited. Upon investigating the bank statements and documents concerning the said accounts, the Agency established that the respondents and their business entities and associates received funds fraudulently from NYS split in several transactions. The money received from NYS through their business entities and personal accounts was further intra-transferred within the same bank into accounts owned by their family members and associates held at the same bank.

12. It is the Agency's case that in the course of its investigations, it established that the respondents acquired the properties the subject of the application using proceeds of crime fraudulently obtained from the NYS. The Agency asserts that it is in the interests of justice that the court should issue the orders of forfeiture that it seeks. If the orders are not granted, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of the general public interest.

13. The factual basis for the application is set out in the affidavits sworn by S/Sgt. Musyoki referred to earlier in this judgment. The narrative that emerges from these affidavits is as follows.

14. S.Sgt Musyoki, a Police officer attached to the Agency as an investigator, was part of the team responsible for the investigation of the matters leading to the present application. Investigations had been carried out by the DCI into the loss of funds from the NYS and charges had been preferred against the respondents and their co-accused. S/Sgt Musyoki had traced accounts belonging to the respondents, their business entities or their associates held at Kenya Commercial Bank. The accounts are suspected to have been used for money laundering purposes. The Agency sets out these accounts as being the following:

i. KCB Account No. **[…]** in the name of **Phylis Njeri Ngirita;**

ii. KCB Account No. **[…]** held in the name of **Ngiwaco Enterprises;**

iii. KCB Account No. **[…]** in the name of **Waluco Investments;**

iv. KCB Account Nos. **[…].[…]** and No. **[…]** held in the name of **Ngirita Wambui Lucy;**

v. KCB Account No. **[…]** held in the name of **Jerrycathy Enterprises.**

15. The Agency had also established that Lucy Wambui Ngirita, the 2nd respondent, is the proprietor of Ngiwaco Enterprises, which has the business registration number BN/2010/78014. She was also the proprietor of Waluco Investments, business registration number BN/2010/78029. Jeremiah Gichini Ngirita, the 3rd respondent, is the proprietor of the third business entity, Jerrycathy Enterprises, BN: 4420282.

16. The respondents had received huge amounts of money fraudulently from NYS, split in several transactions, through their respective business entities and personal accounts held at KCB Limited. In order to ensure clarity in the amounts and periods within which the funds were transferred to the respondents and their associates, I set out hereunder the respective accounts and the transactions therein as set out in the affidavit sworn on behalf of the Agency.

17. The 1st respondent, Phyllis Njeri Ngirita, received in her personal KCB account number **[…]** funds from NYS as follows:

PHYLIS NJERI NGIRITA KCB A/C No. […]	**DATE**	**MONEY RECEIVED FROM**	**AMOUNT (KSH)**

	24/11/2015	NYS	3,000,000.00
	2/12/2015	NYS	1,539,150.00
	29/6/2016	Waluco Investment	220,000.00
	20/9/2016	NYS	364,050.00
	17/10/2016	NYS	197,400.00
	17/10/2016	NYS	100,150.00
	18/10/2016	NYS	385,550.00
	18/10/2016	NYS	391,590.00
	18/10/2016	NYS	7,500,862.05
	18/10/2016	NYS	8,577,866.40
	18/10/2016	NYS	7,154,030.15
	3/1/2017	NYS	189,000.00
	9/1/2017	NYS	189,000.00
	16/2/2017	NYS	301,330.00
	21/4/2017	NYS	4,580,172.40
	21/4/2017	NYS	5,708,620.70
	21/4/2017	NYS	5,177,586.20
	21/4/2017	NYS	4,895,474.15
	21/4/2017	NYS	4,739,482.75
	10/5/2017	NYS	1,800,000.00
	12/6/2017	NYS	208,800.00
		TOTAL	**57,220,114.80**

18. The 1st respondent had been paid by NYS directly into her personal account, which is contrary to procedure. The Agency asserts that this is a clear case of fraud as there is no evidence of goods or services procured by NYS directly from the 1st respondent.

19. It also emerged from the Agency's investigations that Ngiwaco Enterprises, owned by the 2nd respondent, had received funds from NYS in its KCB account number 1125544910 as follows:

NGIWACO ENTERPRISES KCB A/C No. [...]	DATE	MONEY RECEIVED FROM	AMOUNT (KSH)
	10/4/2015	NYS	3,785,600.00
	22/5/2015	NYS	53,200.00
	2/12/2015	NYS	1,638,000.00
	12/2/2016	NYS	9,656,890.00
	15/2/2016	NYS	3,705,420.00
	20/6/2016	NYS	1,500,000.00
	29/6/2016	NYS	2,000,000.00
	5/7/2016	NYS	5,468,955.00
	17/10/2016	NYS	5,744,690.25
	18/10/2016	NYS	6,410,596.10
	18/10/2016	NYS	8,582,844.85
	18/10/2016	NYS	6,128,522.00
	18/10/2016	NYS	8,155,172.40
	18/10/2016	NYS	8,562,931.05
	18/10/2016	NYS	9,482,699.85

	18/10/2016	NYS	8,174,137.95
	14/11/2016	NYS	2,888,400.00
	14/11/2016	NYS	2,000,000.00
	31/1/2017	NYS	4,485,344.85
	22/3/2017	NYS	2,880,000.00
	26/4/2017	Phyllis Njeri Ngirita	3,700,000.00
	15/9/2017	NYS	2,597,900.00
	6/2/2018	NYS	1,422,414.00
	TOTAL		**109,023,718.30**

20. The 2nd respondent's other business entity, Waluco Investments, received funds from NYS in its KCB account number [...] as follows:

WALUCO INVESTMENTS **KCB A/C No.** **[...]**	**DATE**	**MONEY RECEIVED FROM**	**AMOUNT** **(KSH)**
	24/2/2016	NYS	750,000.00
	26/5/2016	NYS	14,816,810.35
	3/6/2016	NYS	5,690,982.75
	6/6/2016	NYS	7,017,241.40
	9/6/2016	NYS	7,168,965.50
	29/6/2016	NYS	4,117,500.00
	29/6/2016	NYS	7,455,724.15
	29/6/2016	NYS	3,345,517.25
	29/6/2016	NYS	16,476,293.10
	29/6/2016	NYS	4,000,140.00
	29/6/2016	NYS	7,586,358.60
	29/6/2016	NYS	1,500,000.00
	29/6/2016	NYS	4,500,000.00
	8/7/2016	NYS	6,648,836.20
	8/7/2016	NYS	5,964,655.15
	18/10/2016	Lucy Wambui Ngirita	41,000,000.00
	29/10/2016	Lucy Wambui Ngirita	8,000,000.00
	31/10/2016	Lucy Wambui Ngirita	1,400,000
	31/1/2018	NYS	2,527,590.00
	6/2/2018	Ngiwaco Enterprises	1,050,000.00
	TOTAL		**154,362,131.7**

21. The 2nd respondent had also received in her personal account number **[...]** held in KCB Bank funds from Ngiwaco Enterprises and Waluco Investment-essentially a transfer from her business entities to her personal account. She had also received funds from Kunjiwa Enterprises, a business entity associated with the theft of NYS funds, as follows:

NGIRITA WAMBUI LUCY KCB Account Number **[...]**	**DATE**	**MONEY RECEIVED FROM NYS**	**AMOUNT (KSH)**
	12/2/2016	Ngiwaco Enterprises	5,000,000.00
	15/2/2016	Ngiwaco Enterprises	3,000,000.00
	24/2/2016	Waluco Investment	750,000.00

	26/5/2016	Waluco Investment	14,300,000.00
	3/6/2016	Waluco Investment	5,477,000.00
	6/6/2016	Waluco Investment	6,000,000.00
	24/10/2016	Ngiwaco Enterprises	10,000,000.00
	24/10/2016	Waluco Investment	10,000.00
	24/10/2016	Waluco Investment	10,000,000.00
	27/10/2016	Kunjiwa Enterprises	4,000,000.00
		TOTAL	

22. The 3rd respondent's business, Jerrycathy Enterprises, had received in its KCB account number [...] funds from NYS as follows:

JERRYCATHY ENTERPRISES & [...]	DATE	MONEY RECEIVED FROM	AMOUNT (KSH)
	10/12/2015	NYS	1,830,000.00
	14/12/2015	NYS	124,860.00
	12/2/2016	NYS	1,966,930.00
	18/2/2016	NYS	128,780.00
	26/4/2016	NYS	1,752,850.00
	22/6/2016	NYS	631,490.00
	29/6/2016	NYS	1,000,000.00
	30/6/2016	NYS	9,120,517.25
	5/7/2016	NYS	495,000.00
	11/7/2016	NYS	864,827.60
	17/10/2016	NYS	9,281,420.70
	18/10/2016	NYS	7,580,782.75
	18/10/2016	NYS	13,844,865.50
	18/10/2016	NYS	7,434,482.75
	18/10/2016	NYS	5,585,344.85
	18/10/2016	NYS	4,646,551.70
	9/12/2016	NYS	6,505,172.40
	22/3/2017	NYS	3,060,000.00
	18/1/2018	NYS	4,693,965.50
	4/4/2018	NYS	4,480,603.45
	4/4/2018	NYS	4,480,603.45
	TOTAL		**87,931,482.65**

23. An analysis of the accounts held by the 1st respondent, Phyllis Njeri Ngirita, Ngiwaco Enterprises owned by the 2nd respondent and JerryCathy Enterprises owned by the 3rd respondent showed that the three accounts received a total of Kshs 133,922,491.30 in a two day period, between 17th and 18th October, 2016. The money received from NYS was further intra-transferred within the same bank into accounts owned by the respondents, their family members and associates held at the same bank. These intra-account transactions can be discerned from the copies of statements of account of Phyllis Njeri Ngirita, Ngiwaco Enterprises, JerryCathy Enterprises, Waluco Investment and Lucy Wambui Ngirita (annexures 'FM5' – 'FM9') annexed to the affidavit of S/Sgt Musyoki.

24. It is the Agency's contention that the funds from NYS to the respondents' personal or business name accounts were moved or withdrawn in cash and utilised in an intricate series of transactions illustrated by the Agency in S/Sgt Musyoki's affidavit.

25. What can be garnered from this illustration is that from the amount received by JerryCathy enterprises from NYS, approximately

Kshs 28 million had been withdrawn in cash; Kshs 7 million had been transferred to Kunjiwa Enterprises, an entity in the name of Catherine Wanjiku Mwai, A/C No. 1142293416 KCB. Property number Njoro/Ngata Block 1/7436 and Naivasha/Mwichiringiri Block 4/2267 at the price of Kshs 2,500,000 and Waitaluk/Mabonde Block12/ Sirende/140 at the price of Kshs 20,000,000 had been purchased by the respondents. Some of the funds for the purchase of the latter property had been transferred from account number 1154300986 held in the name of Waluco Enterprises, a business name owned by Lucy Wambui Ngirita, the 2nd respondent.

26. The Agency's narrative also shows that account number [...] held at the KCB Bank in the name of Annway Investment, whose registered proprietor was one Ann Wambere Ngirita, received Kshs 72,051,077 from NYS. Out of this amount, approximately Kshs 23 million was withdrawn in cash. Further, funds transferred from the Annway Investment account to the accounts of Lucy Wambui Ngirita at A/C numbers 1178695024, 1103229869 and 1104227606 held at the KCB Bank were part of the funds used to purchase land parcel numbers Naivasha/Municipality Block 2/884 at Kshs 46,000,000 and LR No. 8208/4 Nakuru East at Kshs 7,000,000.

27. With regard to the motor vehicles the subject of this application, the Agency's case is that investigators had also detained the three motor vehicles at the Naivasha Police Station as they were suspected to be proceeds of crime. A search conducted on 13th September 2018 at the offices of the National Transport and Safety Authority (NTSA) established that motor vehicle registration number KCH 600H Toyota station wagon blue in colour manufactured in 2016 was registered in the name of Lucy Wambui Ngirita and Platinum Credit Limited, the 1st Interested Party. KCH 753U, a Toyota station wagon green in colour manufactured in 2009 was registered in the name of Phylis Njeri Ngirita and Opportunity International WEDCO Limited, the 2nd Interested Party.

28. The third vehicle, registration number KCH 889M Toyota pick-up silver in colour manufactured in 2016 was registered in the name of Jeremiah Gichini Ngirita and Platinum Credit Limited. The Agency's investigations had established that on 19th July 2017, the 2nd respondent, Lucy Wambui Ngirita, had taken a chattel's mortgage for Kshs. 2,000,000/= from Platinum Credit Limited with an interest of 6% per month. The mortgage agreement between the 2nd respondent and the 1st Interested Party did not state the purpose of the loan. A valuation report by Regent Automobile Valuers and Assessors dated 18th July 2017 provided to the Agency by the 1st Interested Party showed that the motor vehicle Toyota Land Cruiser V8 registration number KCH 600H had a market value of Kshs. 14,400,000.

29. On 6th June 2017, the 3rd respondent, Jeremiah Gichini Ngirita had taken a chattel's mortgage for Kshs.1,295,000/= from the 1st Interested Party at an interest rate of 6% per month on the security of motor vehicle registration number KCH 889M Toyota Hilux. As with the 2nd respondent, the agreement with the 3rd respondent did not state the purpose of the money. However, a valuation report dated 5th June 2017 by the same valuation company provided to the investigators by the 1st Interested Party indicated the value of the motor vehicle at Kshs. 2,720,000.

30. Like the 2nd and 3rd respondents, the 1st respondent had, on 20th July 2017, taken out a chattel's mortgage for Kshs.900,000/= from the 1st Interested Party at the same interest rate as the other respondents. Similar circumstances as with respect to the other respondents obtained, with no indication of what the money was for. The motor vehicle Toyota Land Cruiser V8 registration number KCH 753U was however valued at Kshs. 1,950,000 in a valuation report dated 18th July 2020 by Regent Automobile Valuers and Assessors. The Agency's case was that after it served the 1st Interested Party with the orders to investigate the three respondents' accounts, the 1st Interested Party denied financing the asset and stated that it had only advanced a credit facility against the motor vehicle registration number KCH 600H, and that the security is jointly registered under its name and that of the 2nd respondent.

31. According to the Agency, motor vehicles registration No KCH 600H , KCH 753 U and KCH 889M were not financed by the 1st Interested Party as it only advanced a credit facility to the respondents. It had, on 20th July 2017, advanced Kshs 900,000 to Phyllis Njeri Ngirita, Kshs. 2,000,000 to Lucy Wambui Ngirita on 19th July 2017 and Kshs 1,295,000 to Jeremiah Gichini Ngirita on 6th June 2017. The chattels mortgage agreements between the respondents and the 1st Interested Party did not also state the purpose of the money and the difference between the values of the motor vehicles and what was advanced. In the view of the Agency, this clearly shows that the transaction between the respondents and the 1st Interested Party was a money laundering scheme and the motor vehicles are therefore proceeds of crime.

32. The respondents had acquired several properties which the Agency contends there is reasonable cause to believe were procured using proceeds of crime fraudulently obtained from the NYS. The first is title number Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA. The Agency avers that this property, which is situated in Trans Nzoia County, is registered in the name of Sylvia Ajiambo Ongoro but was sold to the 2nd respondent pursuant to a sale agreement dated 2nd June 2016.

33. The second property is title No. Naivasha/Municipality Block 2/884 measuring 0.2305HA. It is a leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014. It was sold by New Hope for all Nations Church to the 2nd respondent pursuant to a sale agreement dated 8th July 2016. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre, which is still registered in the name of John Wachira Wahome, was sold to the 2nd respondent pursuant to a sale agreement dated 25th April 2017. The fourth property is Title No. Njoro/Ngata Block 1/7436 measuring approximately 0.0840 Ha. It is situated in Kiamunyi, Nakuru County and is a subdivision of P/NO. 3283 registered in the name of Robin M. Aondo. It was sold to the 3rd respondent pursuant to a sale agreement dated 28th October, 2016. Title No Naivasha/Mwichiringiri Block 4/22367 with an approximate area of 0.0450, being a subdivision of P/NO. 17217 was registered in the name of the 3rd respondent on 1st July 2016. Copies of the sale agreements are annexed as 'FM 21', 'FM 22', 'FM 23', 'FM 24' and 'FM 25').

34. Accordingly, the Agency had, on 3rd December 2018, obtained preservation orders against the respondents' pursuant to sections 81 and 82 of POCAMLA in Nairobi High Court Civil Application No 55 of 2018, Assets Recovery Agency –vs- Phyllis Njeri Ngirita & Others. The orders were gazetted on 14th December 2018 in Kenya Gazette Notice No. 12833 Vol CXX – No. 152.

35. It is the Agency's case that it is empowered under section 90 of POCAMLA to apply for an order of forfeiture to the government of all or any of the property that is subject to the preservation order. Its case is that it is in the interests of justice that the court issues the orders that the assets belonging to the respondents, which are reasonably believed to be proceeds of crime, should be forfeited to the government and transferred to the Agency. Should the court not grant the said orders, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of the general public interest.

36. The Agency has addressed the respondents' explanation with respect to the acquisition of the subject properties in six affidavits filed in response to the respondents' affidavits. In his further affidavit, **S/Sgt Musyoki** responds to the averments set out in the affidavit sworn on 12th April, 2019 by the 1st respondent. He addresses first an allegation that the court had released the motor vehicles the subject of this application.

37. He deposes that by its order dated 19th December 2018, the court had ordered that the motor vehicles shall be detained by the OCS Naivasha Police Station or any other police officer or station only if there is a court order directing their detention or preservation. The Agency's case is that it had obtained preservation orders in Nairobi High Court Anti-Corruption & Economic Crimes Division Misc. Application No 55 of 2018 on 3rd December, 2018, before the ruling of 19th December, 2018, which were gazetted, pursuant to section 83(1) of the POCAMLA, on 14th December, 2018.

38. The Agency notes that the respondents had produced as annexure **PNN-3** thirteen (13) payment vouchers dated between 14th October, 2016 and 1st February, 2017 for the total sum of Kshs 98,076,970 as follows:

No.	Vch No.	Date	Description	Amount (Kshs)	Replying Affidavit at Page No.
i.	078	14/10/2016	Supply of workshop and drilling equipment and accessories	8,620,000.	011
ii.	062	14/10/2016	Supply of workshop and drilling equipment and accessories	9,030,000.	029
iii.	073	14/10/2016	Supply of workshop and drilling equipment and accessories	9,051,000.	047
iv.	079	14/10/2016	Supply of workshop and drilling equipment and accessories	8,600,000	086
v.	128	14/10/2016	Supply of foodstuff (Tin Beans)	6,058,037.	098
vi.	083	14/10/2016	Supply of workshop and drilling equipment and accessories	5,890,000.	134
vii.	081	14/10/2016	Supply of workshop and drilling equipment and accessories	7,840,000.	172
viii.	085	14/10/2016	Supply of workshop and drilling equipment and accessories	4,900,000.	192
ix.	118	14/10/2016	Supply of workshop and drilling equipment and	9,787,680.	215

			accessories		
x.	098	14/10/2016	Supply of foodstuff (Tinned Beans)	9,999,938.	108
xi.	205	17/10/2016	Supply of foodstuff (Tinned Beans)	6,760,265.	131
xii.	383	9/12/2016	Supply of workshop and drilling equipment and accessories	6,860,000.	150
xiii.	604	1/2/2017	Supply of workshop and drilling equipment and accessories	4,730,000.	063

39. The Agency notes that 10 payment vouchers worth Kshs 79,726,705 for supply of workshop and drilling equipment and accessories were prepared on the same day, 14th October, 2016, in favour of the respondents and their entities. In the Agency's view, this raises the question why different vouchers were prepared rather than the payment being done by a single voucher. In its view, this was a clear indication of a money laundering schemes. It further raised the question how the respondents managed to obtain the 10 contracts for supply of workshop and drilling equipment accessories and foodstuff and all payment vouchers were prepared in one day.

40. The Agency further notes that the respondents have not shown any source of funding for the financing of the supplies to the NYS. They have also not annexed any evidence showing how the contracts were awarded, or any trading licences and payment of any taxes on income earned from businesses and trade to the Kenya Revenue Authority to prove that they were undertaking legitimate business.

41. The Agency disputes the respondents' allegation that they had supplied various government agencies for over 20 years. It notes that all the documents produced in support of this averment are between 14th October 2016 and 1st February 2017, a period of 4 months. It further observes that the respondents received funds in their bank accounts, as evidenced in their bank statements, only during the period that fraud and economic crimes were committed at the NYS.

42. According to the Agency, the properties the subject of this application were all purchased between 2016 and 2017, the period during which the fraud and economic crimes were committed at the NYS. It reiterates its case that there are reasonable grounds to believe that the properties held in the name of the respondents are therefore proceeds of crime. They were obtained directly or indirectly as a result of money laundering and other predicate offences.

43. The Agency disputes the contention by the respondents that they were targeted by the investigative agencies. It argues that they were charged based on the evidence before the criminal court. It asserts that the allegations made against one Chief Inspector Mike Muya cannot be used to immunize the respondents against recovery proceedings. It notes that the present application and the criminal proceedings against the respondents are separate and distinct, with the Agency pursuing the assets reasonably believed to be proceeds of crime in accordance with its mandate under POCAMLA.

44. In responding to the respondents' affidavits sworn on 30th July 2019, S/Sgt Musyoki avers that he had obtained orders pursuant to section 118 and 121 of the Criminal Procedure Code in Miscellaneous Criminal Application Nos 1837, 1998, 2107, 2251 and 3450 of 2018 before the Chief Magistrate's Court, Milimani, Nairobi. He had also obtained orders in Nairobi High Court Anti-Corruption & Economic Crimes Division Misc Application No 39 of 2018 for warrants to investigate and freeze, and for the inspection and production of documents related to accounts held by the respondents and their associates.

45. With regard to the averments by the 1st respondent that they have been discriminated against, S/Sgt Musyoki avers that the respondents have been charged with other suspects, including officers in the employment of the NYS with criminal offences in Criminal Cases No ACC 13, 15 and 17 of 2018. He had demonstrated in his affidavit in support of the application the complex money laundering schemes that the respondents and their associates actively engaged in.

46. The Agency notes that the 1st respondent has failed to produce any tangible evidence of the purported legitimate agricultural activities or business of supplies of tangible goods and livestock and dairy production or loans from various banks to explain her broad sources of income and wealth. She had also not produced any proof of the existence of farm business such as trade permits, tax returns, tax compliance certificates, schedule of payments of labourers, schedule of cash deposits or any relevant document to support existence of the said business.

47. According to S/Sgt Musyki, he had analysed the documents relied on by the respondents and noted that the four LPOs produced

by the 1st respondent trading as Njewanga Enterprises namely 2554124, 2141333, 2474625, and 2172521 dated 19th June 2015, 30th January 2014, 13th May 2015 and 25th March 2014 respectively that the total amount supported by the 1st respondent's documents in annexure PNN 1 is Kshs 5,824,210. It is not the Kshs 38,698,970 that the 1st respondent alleged she had undertaken.

48. The LPOs are in respect of the supply of watermelon and cabbages worth Kshs 1,539,150; English potatoes, watermelon and cabbages worth Kshs 1,210,000; watermelon worth Kshs 3,000,000; and cabbages, onions and greengrams worth Kshs 785,060, making a total of Kshs 5,824,210. It was the Agency's averment that the 1st respondent had not explained or supported with documents the difference of Kshs 32,874,760 received. Further, contrary to procedure, the 1st respondent had been paid by NYS directly to her personal account.

49. Regarding the 1st respondent's contention that she had worked in Germany and saved 120,000 Euros from her employment, the Agency noted that she had not produced evidence of a visa, work permit, copy of passport and bank account statements in support.

50. In response to the affidavit sworn by the 2nd respondent which is in material respects the same as that of the 1st respondent, S/Sgt Musyoki deposes in essentially the same terms as with respect to the contentions by the 1st respondent. He reiterates his averments that the respondents have engaged in a complex money laundering schemes detailed in his affidavit in support of the forfeiture application; the failure by the respondents to produce evidence showing how the contracts they rely on were awarded, trading licences and payment of any taxes on income earned in support of their alleged legitimate businesses. He also reiterates that the respondents had not produced evidence of goods or services delivered, or evidence of any legitimate agricultural or other business activities to explain the alleged broad sources of income and wealth.

51. In explaining her broad source of income, the 2nd respondent had alleged that she obtained a loan on the security of L.R. No. 1144/263, which she alleged was transferred to her in 2013. S/Sgt Musyoki observes that contrary to this allegation, the property was actually transferred on 18th August 2010, and there is no entry in the title to the property or any evidence to show that the 2nd respondent obtained a mortgage of Kshs 28 million in 2014. According to the Agency, the 2nd respondent was advanced a mortgage of Kshs 9,750,000, not Kshs 28,000,000, on 29th May, 2013, a period which is outside the period of investigation in this matter. The loan was for the purpose of completing construction on LR. No 1144/263.

52. Further, contrary to the allegation by the 2nd respondent in reliance on an affidavit purported to have been sworn on 26th July, 2019 by one Jane Wangari Theile, there is no evidence that the 2nd respondent received a sum of Kshs 10,708,400 in 2006 from the said Jane Wangari Theile. From his analysis of the payments set out in the 2nd respondent's affidavit, being monies sent by way of Western Union to the 2nd respondent intermittently between 8th April, 2006 and 10th March 2011 by the said Jane Wangari Theile, the total amount sent was 9,050 Euro, the equivalent of Kshs 1,037,452.18 using the Central Bank of Kenya Foreign Exchange Rate of Kshs 114.6356 as at 14th October, 2019.

53. S/Sgt Musyoki observes that the 2nd respondent has not explained the difference of Kshs 9,670,947.82 between the alleged soft loan extended to her and the amount of Kshs 1,037,452.18 which the Agency's tabulation indicates the 2nd respondent received. In any event, according to the Agency, the affidavit of Jane Wangari Theile is an afterthought, having been sworn four (4) months after the application for forfeiture was filed on 12th March, 2019 and three (3) months after the respondents filed their joint replying affidavit on 12th April, 2019. The Agency also questions the validity and authenticity of the inventory of payments, which it notes is handwritten and cannot be verified.

54. According to the Agency, the documents annexed to the 2nd respondent's affidavit in opposition to the application do not explain the funds that she received through Waluco Investments and Ngiwaco Enterprises during the period under investigations, 2015 to 2018. The Agency further notes that the loan from Equity Bank referred to by the 2nd respondent was for Kshs 150,000, which was advanced on 29th December 2005 and is therefore not relevant to the instant forfeiture proceedings.

55. It is the Agency's deposition that the 2nd respondent has not adduced any evidence to support the award, supply and delivery of goods for the stated amount of Kshs 67,548,650 that was paid by the NYS. It notes that the documents that she seeks to rely on comprise unsigned delivery notes that do not bear any receiving stamp or date of receipt of the goods purportedly delivered to the NYS.

56. In response to the affidavit sworn by the 3rd respondent which is again essentially the same as that of the other respondents, the Agency reiterates in large part the averments by S/Sgt. Musyoki in response to the affidavits by the other respondents with respect to the lack of any documentation to support the award of contracts to him, the delivery of any goods to the NYS. or the existence of

his alleged legitimate businesses. It is also its averment that the 3rd respondent has not produced any evidence to support the payment of Kshs 87,931,482.65 to him by the NYS between 2015 and 2018.

57. In a further affidavit in response to the respondents' affidavits sworn on 18th November 2019, the Agency makes averments mostly on question of law relating to the provisions of POCAMLA on civil forfeiture and the burden of proof on the Agency in such matters.

58. It is the Agency's averment that the assets sought to be forfeited were bought within the period under investigations. It avers in this regard that motor vehicle registration number KCH 600H Toyota station wagon manufactured in 2016 was registered on 15th July 2016 in favour of the 3rd respondent and the 1st Interested Party. Motor vehicle registration number KCH 753U Toyota wagon was registered on 22nd July 2016 in favour of the 1st respondent and Opportunity International WEDCO. The third motor vehicle, KCH 889M Toyota pick-up silver was registered on 12th July 2016 in favour of the 3rd respondent. It also reiterates its previous averments with respect to the purchase of the real property.

59. Regarding the 2nd respondent's supplementary affidavit sworn on 18th November 2019, the Agency reiterates in large part its averments in response to the 1st respondent's affidavit, including the averments relating to the properties the subject of this application and their acquisition by the respondents within the period of investigation. It notes that the 2nd respondent had also failed to demonstrate with particularity and documentary evidence that the payments made to her were pursuant to tenders that had been awarded to her. There was no evidence of goods or services procured by NYS directly from the 2nd respondent and this was therefore a clear case of fraud. It had also been established that the award of tenders to the respondents was irregular and did not conform to the procurement procedures provided for under the Public Procurement and Asset Disposal Act.

60. The Agency terms the documents annexed to the 2nd respondent's affidavit, including the purported invoices and delivery notes, as an afterthought. It notes that they do not bear the name of the officer receiving, date, time and acknowledgement stamps from the NYS and are of no evidential value.

61. With respect to the tax clearance certificates relied on by the respondents. it is the Agency's case that they can be withdrawn once new information comes to the knowledge of KRA. As for the purported LSO documents attached to the 3rd respondent's affidavit, they relate to the period between 2007 and 2013, which is outside the period of investigation by the Agency. Like the other respondents, the 3rd respondent had failed to demonstrate with particularity and documentary evidence that the payments made to him were pursuant to tenders that had been awarded to him.

62. S/Sgt Musyoki avers that he conducted comprehensive investigations together with investigators attached to the Financial Investigation Unit of the DCI, including one No. 67343 PC Bernard Gikandi. Gikandi had prepared a covering report that was forwarded to the DPP to support the criminal charges against the respondents. The investigators had set out in detail in the report the criminal enterprise and the money laundering schemes executed by the respondents.

63. Regarding the chattel mortgages obtained by the respondents from the Interested Parties, the Agency argues that they were an attempt to conceal and disguise the source of funds with the aim of laundering proceeds of crime. S/Sgt Musyoki avers that the subject vehicles were bought during the period under investigation, and whether or not the respondents are indebted to the 1st Interested Party is solely between the two parties.

The Response

64. The respondents filed 9 affidavits in opposition to the application for forfeiture. Aside from the first affidavit filed, sworn on 11th April 2019 by the 1st respondent on behalf of all the respondents and with their authority, the other affidavits, though sworn individually by the three respondents, are essentially in the same terms, with the averments by the 2nd and 3rd respondents, who are a daughter and son of the 1st respondent, substantially mirror those of the 1st respondent. The only differences are a few averments of fact that are peculiar to the respective respondents. The 2nd and 3rd respondents' affidavits were filed in court on 12th April 2019, 27th July 2019, and 18th November 2019. I will accordingly summarise the averments by the respondents without attribution to the individual respondent except where the averments are specific to a respondent.

65. The respondents term the application for forfeiture an abuse of the court process, which aims to circumvent the orders of the court issued on 19th December 2019 for the release of their motor vehicles. They deny that the properties the subject of the

application are proceeds of crime and assert that they are hardworking Kenyans who have supplied various government agencies with goods and services for over 20 years. The supplies have been made faithfully and diligently after successful application for government tenders. They therefore have a legitimate source of income, and they rely on bundles of documents annexed to their affidavits. They further assert that they supplied goods to the NYS in the period they were paid the money the subject of this application.

66. The respondents aver that on 23rd May and 4th June 2018, police officers raided their homes and carried with them vital documents that the respondents had used to buy the goods they supplied to the NYS, actions they term to be in violation of their constitutional rights. These documents included payment vouchers, delivery receipts and purchase documents. They contend that the seizure of the goods was done in an effort to defeat their defence in subsequent proceedings. The only documents that they were able to get were the LPO's evidencing the supply of goods which were with their accountant, a Mr. Lukas Kamau, for purposes of filing returns at the KRA on the supply of the goods and tax due from such supplies.

67. The respondents assert that the investigations were conducted in bad faith and are malicious as they were premised on a family dispute between the respondents' family and the chief investigating officer, one Mr. Mike Julius Kingoo Muia, who was the lead investigator before being replaced at the respondents' behest by a Mr. Waweru from the DCI. The respondents rely in support of this averment on an affidavit sworn by the said Muia in opposition to their application in the Magistrate's Court to be released on bail.

68. It is their case that the said Muia was a business partner of the 3rd respondent who owed him Kshs 3,000,000. They rely in support on an affidavit sworn by the said Muia in which they aver that he admits to knowing and doing business with the respondents. Reliance is also placed on a photograph said to be of the said Muia and the 3rd respondent. The respondents contend that it is as a result of the debt owed to the said Muia by the 3rd respondent that Muia vowed to teach the respondents' family a lesson by maliciously instituting the investigations that led to their arrest and preferment of charges against them in Criminal Case No ACC 13, 15 and 17 of 2018.

69. According to the respondents, the said Muia was a family friend of the family with whom they had shared many issues, including partnering in supplying various goods and services, in which the said Muia had acted though proxies. Their partnership had, however, soured following a disagreement on distribution of payments and the said Muia had vowed to make the respondents pay. They allege that the proceedings against them are a result of the bad blood between them and the said Muia. Though the officer had been removed from being the lead investigator in the case, he had continued to harass the respondents to clear the debt that is owed to him by the 3rd respondent.

70. The respondents allege that the said Muia had unduly influenced the 3rd respondent to sign an affidavit, whose content the 3rd respondent did not understand, falsely stating that he was depositing funds into an account towards repayment of a loan between the 3rd respondent and Muia's late father.

71. With regard to the substance of the application, the respondents aver that it is maliciously instituted with the aim of defeating their right to property, is premature, prejudicial and an affront to justice. This is because they have not been convicted of any criminal offence yet. It is their case that their right to being presumed innocent until proven guilty is threatened by the application which seeks to arbitrary deprive them of their property. They further aver that no nexus has been established between the funds used to purchase the properties the subject of the application and the funds that the Agency claims was obtained from NYS through corrupt means.

72. With respect to the properties in issue, the respondents aver that they bear the name of parties who have not been joined to the proceedings, despite orders adverse to them being sought. The respondents contend that this is in violation of these parties rights to fair hearing, right to property and equal benefit of the law contrary to Article 40, 47 and 50 of the Constitution.

73. The respondents challenge the application further on the basis that they have not been convicted of any offence. They argue that the motor vehicles at issue were acquired legitimately as they had procured chattel mortgages for their purchase. The purchase of the vehicles was therefore not part of a money laundering scheme. It is their averment that the purpose of the money advanced to them by the Interested Parties was for an identifiable purpose that was actualized upon registration of the motor vehicles in both the name of the respondents and the Interested Party. They aver that the vehicles did not have a previous registration in the name of any of the respondents exclusive of the Interested Party

74. The respondents further assert that the contention by the Agency that the balance of the purchase price (for the vehicles) was paid through proceeds of crime is unfounded. It is their case that it was to be paid from proceeds emanating from a legitimate business venture that the respondents are engaged in. The Agency has failed to show the nexus between the property alleged to be the proceeds of crime and the respondent's property acquired through legitimate business enterprise and financing by the Interested Parties.

75. In their affidavits sworn on 27th July 2019, the respondents assert that contrary to the averments by the Agency, they have never participated in any criminal activity or money laundering, nor have they engaged in fraud, economic crimes or any illegal activity. Rather, they have always engaged in legitimate business in supplies, farming, livestock and horticulture. With specific reference to the funds set out in the Agency's affidavit as having been deposited in the respondents' respective business entities' and personal accounts held at KCB Limited, the respondents aver that the funds were acquired and accumulated legitimately, and had also been positively and accurately posted by the NYS.

76. The respondents also aver that they have engaged in legitimate business with several 'stakeholders', including NYS, and there is nothing illegal in receiving payments for business already done. They contend that public payments are subjected to due diligence, checks and balances, and the payments to them were subjected to audit, examination and verification. Further, all the monies paid into their accounts were paid in exchange for valid supplies to the NYS, and that rigorous scrutiny and prudence were applied when making such public payments.

77. The respondents allege bad faith and double standards, questioning why the Agency has focused on them, to the exclusion of other suspects. They contend that no other case has been pursued with the viciousness that has been demonstrated against them They also allege discrimination against them and a vendetta on the part of the Agency's deponent, S/Sgt Musyoki, whom they allege is acting under the direct control of Muia Mike Kingoo.

78. The respondents deny ever having engaged in corruption. They also assert that the rights and property of the 1st and 2nd respondents, as widows, are protected under Articles 23, 24, 25 and 26 of the Women's Protocol to the African Charter on Human and People's Rights as read with Article 2(5) (6) of the Constitution.

79. In explaining the sources of their funds, all the respondents aver that they started their small supply businesses in various years- in 2002, 1966 and 2003 in the case of the 1st, 2nd and 3rd respondents respectively. They aver that they have grown their respective businesses into huge enterprises with several divisions and compartments. They therefore respectively have broad sources of income that cumulatively explain the sources of their wealth. They have engaged in legitimate agricultural activities that earn reasonable amounts of money. Such agricultural activity includes cultivation of maize, cabbages, onions and tomatoes, water melons, oranges, passion, guavas and bananas. They have also engaged in legitimate business of supplies of tangible goods to the NYS, including uniforms, firewood, vegetables, bread, mandazi and mahamri, meat, potatoes and tomatoes. They all assert that without their efforts and supplies to the NYS, sometimes done in difficult circumstances, the over 10,000 NYS youths would have starved.

80. The respondents further aver that they engage in legitimate livestock and dairy production that has smart returns. Each names the number of animals kept, 30, and 60 respectively, for meat and meat products as well as dairy cows and 200, 100 and 300 goats and sheep respectively that bring good economic returns. In order to sustain their businesses, the respondents aver that they have borrowed funds from Cooperative, KCB and Equity Banks.

81. In their last affidavits sworn in opposition to the application pursuant to leave granted on 16th October 2019, the respondents question the basis on which the Agency received information from the DCI in respect to the present matter. They note that the DCI is a different law enforcement body whose legal mandate is different from that of the Agency. They also assert that it is not clear whether the Agency opened an inquiry file upon receipt of the information from the DCI.

82. The respondents contend that the Agency is legally obligated to ensure that any information or evidence that it may obtain from other law enforcement bodies meets the standards required for a prosecution that is intended to achieve the objects of POCAMLA. Further, that the Agency has a specific legal mandate under POCAMLA that is separate and distinct from the legal mandate of the DCI. Such policing powers as have been vested in the Agency under POCAMLA have to be exercised in accordance with the Constitution and the law. They further make various averments with respect to the powers of the Agency under POCAMLA and assert that an application for asset forfeiture pre-supposes the existence of victims and payment of restitution to victims of crime, but there are no known victims in this case.

83. The respondents further argue that the monetary value of the claim against them in this application exceeds the value of the sums which they are respectively alleged to have fraudulently acquired as charged in Nairobi Anti-Corruption Court Criminal Case No.10 of 2018. It is unconscionable, in their view, for the value of the asset forfeiture claim against them to exceed the value of the alleged proceeds of crime that they are alleged to have acquired through their purported crimes as alleged in the criminal case. They allege that where a court of law orders a confiscation of proceeds of crime after a conviction as provided for under section 61 (1) of POCAMLA, it is provided that the amount that the court may order a defendant to pay to the government shall not exceed the value of the defendant's proceeds of the offences or related criminal activities as determined by the court. They accordingly aver that the present application against them is intended to oppress or punish them and not to recover any purported proceeds of crime.

84. The respondents further contend that the Agency is using what it is attempting to pass off as a civil claim to achieve the objects of criminal law. Further, that the asset forfeiture claim is so grossly disproportionate to the offence that it is designed to punish that it amounts to cruel punishment within the meaning of Article 29 (f) of the Constitution of Kenya. It is also their contention that the evidence that the State intends to rely on in the criminal charges against them has not been placed before this court to enable it to make its own determination, on a balance of probabilities, whether the sums which are alleged to have been unlawfully paid to them by the NYS constitute proceeds of crime.

85. The respondents further contend, on the basis of advice from their Counsel, that there is reason to believe that the Agency did not carry out any investigations in respect of the matters which fall within its legal mandate under POCAMLA/ They were never informed by the Agency about the accusations which had been levelled against them by the DCI in the information that was purportedly given by the said DCI to the Agency. They were also completely unaware of the purported offence or offences that they were alleged to have committed in the said complaints which supposedly form the basis of the present claim to recover the alleged proceeds of crime.

86. The respondents further aver that they have never been questioned by the Agency about the allegations made against them nor provided with an opportunity to correct, contradict or comment on the allegations contained in the purported complaint before this forfeiture application was filed.

87. The respondents further aver that they are entitled under the provisions of Article 47 of the Constitution as read with section 4 (1) and (3) (b) of the Fair Administrative Action Act, 2015 to be given a fair and reasonable opportunity to defend themselves before the Agency made the decision to file the present application. They were not summoned by the Agency to respond to the allegations of their involvement in corrupt activities at the NYS before the adverse decisions to seek orders to investigate and freeze and or preserve the funds in their bank account were sought from the Chief Magistrate's Court at Milimani through Miscellaneous Criminal Application Nos.1837 of 2018, 1998 of 2018, 2107 of 2018, 2251 of 2018 and High Court at Nairobi's Anti-Corruption and Economic Crimes Division Miscellaneous Application No.39 of 2018 as contemplated under Article 47 (1) of the Constitution.

88. They were also not summoned and given an opportunity by the Chief Magistrate's Court or the High Court in the matters aforesaid to respond to the allegations of their involvement in corrupt activities at the NYS before the said orders were made. This, they allege, is a violation of their constitutional rights under Article 50 (1) of the Constitution to a fair and public hearing.

89. It is the respondents' deposition further that no investigation into the purported fraud committed at the NYS, which is a public body, can be carried out by any competent investigator without questioning relevant persons at the said body and obtaining relevant documents and information on the suspected payments and the tenders pursuant to which the payments were made.

90. While citing the provisions of section 121 and 122 of POCAMLA, the respondents contend that the fact that the Agency failed to exercise the powers under these sections and chose to file a forfeiture claim which is not supported by any witness statements, documents or information from NYS gives rise to reasonable doubt as to whether the Assets Recovery Agency conducted any investigations into a legitimate complaint or whether it ever had any intentions of doing so. They further aver that the Agency has failed to produce sufficient circumstantial evidence from which an inference can be drawn to the required criminal standard that the property in the said bank accounts has a criminal origin.

91. The respondents further argue that the Agency has not demonstrated that it made any effort to obtain information from the NYS on how the respondents were awarded the relevant tenders and contracts. It has also not demonstrated that it made any effort to obtain information from KRA with respect to the respondents' tax payments. It is their contention that they were barred by the trial court from accessing the NYS offices during the pendency of the trial and they cannot therefore reasonably be expected to obtain information from there. The further charge the Agency with a failure to produce any records from the NYS stores to demonstrate

that the respondents had not delivered any goods to the NYS.

92. With regard to the motor vehicles the subject of this application, the respondents aver that the Agency has not given any reason why it believes that the motor vehicles are proceeds of crime. It is their case that the mortgage agreements did not require that they should state the purpose for which they needed the loan. Further, that they had not claimed that they had obtained the vehicle from financing from the 1st Interested Party. In any event, there is nothing illegal in obtaining a loan of a lesser amount than the value of the security offered.

93. The respondents also make various averments specific to their individual circumstances. The 1st respondent avers that she has engaged in livestock farming in Gulgil and traded in cereals such as beans, maize and green grams from Busia to Naivasha. She also used to trade in cabbages and green vegetables in whole sale using a lorry registration number KCA 548T and made large amounts of money from the business. She has engaged in legitimate business in Kenya between 2003-2016 as shown in a bundle of documents (annexure "PNN 1") worth Kshs. 38,698,970/=. On or about 12th July 2004, she had supplied the Prisons Service with potatoes worth Kshs. 59,800/=.

94. On 16th February 2005, she supplied the Naivasha G. K. Prison with oranges worth Kshs. 60,000/=. On 30th May 2005, she supplied English potatoes worth Kshs. 88,460/=, though she does not indicate to what institution. The 1st respondent avers that she made supplies of various items in the years 2005, 2007, the amounts thereof being Kshs. 219,497/=; Kshs. 171,558/=; Kshs.14,608/=; Kshs. 33,120/=; Kshs. 27,045/= and Kshs. 42,992/= (annexure "PNN 2".) She further avers that she worked in Germany in 2006 and 2007 and saved 120,000 Euros which she invested in the family business, but the documents in respect of the savings were confiscated by CID detectives.

95. The 1st respondent further alleges that she had started a business known as Njewanga Enterprises on or about 20th June 2013. She relies on a bundle (exhibit 4) which she states demonstrates that she was actively engaged in legitimate business for more than fifteen years. Within the said period, she supplied goods and services to various public bodies, and she had also obtained a loan from Equity Bank Ltd of Kshs 150,000.

96. On her part, the 2nd respondent states that she is a business woman in Naivasha. She denies having ever engaged in criminal activity or in money laundering. She has always engaged in legitimate business in supplies, farming, livestock and horticulture. She echoes the averments by the 1st respondent that the funds in their business entities and personal accounts held at KCB Limited have been acquired and accumulated legitimately, and have been positively and accurately posted by the NYS in these accounts. She also alleges double standards and discrimination against the respondents.

97. Like the 1st respondent, she avers that she started her small business of supply, but in 1966. She has grown it into a huge enterprise with several divisions and compartments. She also engages in farming of maize, and vegetables, cabbages, onions and tomatoes, and water melons. She too engaged in supply of goods to the NYS, without which the youth in the institution would have starved.

98. The 2nd respondent avers that in 2013, using savings earned from agriculture and from a posho mill, she purchased L.R. No. 1144/263 (FR. 16237) Naivasha in her name. She had taken a mortgage of Kshs. 28,000,000/= to improve the property. In 2006, her daughter, Jane Wangari Theile and her husband gave her a loan of Kshs. 10,708,400 to assist in expanding and improving her business. She supplied, on diverse dates between 2002 and 2015, firewood, meat, powder milk, biscuits, and fruits to the Prison Department, Naivasha District Hospital, Naivasha TTI and NYS for a global sum of about Kshs. 41,876,527, which was legitimate business and has nothing to do with proceeds of crime and or unexplained wealth.

99. On 19th May 2002, she bought L.R. No. 27 High Density Lake View at Naivasha for Kshs. 1,400,000/=. On 29th December 2005 she obtained a loan of Kshs. 150,000/= from Equity Bank. She avers that on 31st December 2013 Mahaver Stores Ltd would allow her to take goods worth more than Kshs 2, 671,220, relying on a letter from the said store to this effect (exhibit "LWN 7"). On 14th January 2017 she was able to purchase a Toyota Hilux for Kenya Shillings One Million Nine Hundred and Twenty Three Thousand (Kshs. 1,923,000/=.

100. The 2nd respondent avers that she enjoyed overdraft facilities of Kenya Shillings Three Million (Kshs. 3,000,000/=) at KCB Bank Gilgil Branch to service her contracts with the NYS, relying in support on exhibit "LWN 11". She had bought, on or about 14th May 2010, L.R. No. 1144/263 at Naivasha town measuring 0.1148 acre for Kshs. 1,950,000/=. She had also bought, on or about 27th September 2010, a shop known as Ikumbi General Stores for Kshs. 150,000/=. She was also the owner of Ngiwaco Company

Enterprises; she also traded as Ngirispa Enterprises, Annway Investment and Waluco Investments for a total amount of ksh.67,548,650/= , though she does not indicate with what or with whom she traded in these entities..

101. According to the 2nd respondent, she received assistance in the sum of Ksh.10,800,000/= from her daughter, Ann Wambere Wanjiru Ngirita who was working in Germany, reliance for this averment being placed on exhibit "LWN 15". The 2nd respondent also produces a bundle of documents containing copies of the certificates of registration of Ngiwaco Enterprises, Waluco Investments, several single business permits and Tax Compliance Certificates which she avers demonstrate that she has been engaged in legitimate business.

102. It is the 2nd respondent further averment that on or about 24th October 2018, she requested the Ministry of Public Service, Youth and Gender Affairs to provide her with copies of documents pertaining to LPOs, invoices paid and unpaid at the NYS. She was provided with the documents which she exhibits as annexure LWN 5 in the affidavit filed on 18th November 2019. She also annexes documents which she avers demonstrate that she has been engaged in legitimate business for more than fifteen years during which period she supplied various public bodies. She states that on or about June 2018, the respondents engaged a professional accountant/auditor to analyze the books of accounts, invoices and financial statements of the companies for the financial year 2015/2016 and he prepared a report which she exhibits as annexure LWN 7. She had also secured a credit mortgage from KCB of Kshs. 9,750,000/= payable in ten years in respect of L.R. 1114/263, an overdraft facility with KCB and substantial savings with the Kenya Women Finance Trust.

103. For his part, while echoing the averments of the 1st and 2nd respondents, the 3rd respondent describes himself as a business man in Naivasha who never participated in any criminal activity or money laundering. He has always engaged in legitimate business in supplies, farming, livestock and horticulture. Like the other respondents, he asserts that he engaged in legitimate business with several stakeholders, including NYS, and there is nothing illegal in receiving payments for business already done. The funds deposited in their accounts were for valid supplies procured by the NYS and rigorous scrutiny and exercise of prudence was applied when the payments were made.

104. The 3rd respondent avers that he started his small business of supplies in 2003. He too, has grown it into a huge enterprise with several divisions and compartments, has a broad source of income that cumulatively explains the sources of his wealth, and engages in legitimate agricultural involving the cultivation and supply of the same vegetables as the other respondents. He has also engaged in legitimate business with various government agencies between 2004 to 2015 to the tune of Kshs 20,273,858.

105. He registered JerryCathy Enterprises on 27th May 2006 and carried out various businesses between 2006 and 2016 which was legitimate as shown by the bundle of exhibits ("JGN2") which showed that he transacted business worth more than Kshs.14,207,910. The 3rd respondent also deposes that he has a shop where he sells water melons on retail and wholesale basis. His shop was doing very well until the investigations by the Agency which had a malicious intention to revenge on his family. He had, on 4th July 2014, purchased motor vehicle registration number KCA 548T at Kshs. 3,600,000/= (exhibit "JGN 4").

106. In support of his averment that he has engaged in legitimate business, the 3rd respondent relies on the certificate of registration of JerryCathy Enterprises and copies of tax compliance certificates (exhibit JGN 4). He avers that all his documents relating to the transactions which gave rise to the criminal case were confiscated by DCI officers in searches done at his home and business premises at the time of his arrest in May 2018. He however relies on a bundle (exhibit JGN5) which he avers demonstrates that he has been actively engaged in legitimate business for more than fifteen years, and that he has supplied goods and services to various public bodies.

107. The 3rd respondent asserts that he had requested the Ministry of Youth and Gender Affairs, State Department of Public Service and Youth for all the relevant LPOs and invoices paid or unpaid in respect of Jerrycathy Enterprises. On 30th October 2018, he had been provided by the Principal Secretary of the Ministry with the documents (exhibit JGN 6), which demonstrate that he has been engaging in legitimate business with the NYS.

The Submissions

108. The Agency filed written submissions dated 26th June 2019 and Further Written Submissions which are undated but were filed in court on 18th May 2020. The Agency identifies four issues as arising for determination. These are, first, whether the properties sought to be forfeited are proceeds of crime and second, whether they are liable to forfeiture to the government. The third issue is whether the present application is in violation of the respondents' right to property, fair administrative action and fair hearing. The

final issue identified is whether the forfeiture proceedings are dependent on the outcome of the criminal proceedings against the respondents.

109. In addressing itself to the first issue, the Agency submits that the application is brought under POCAMLA which provides for the offence of money laundering and introduces measures for combating the offence. It further provides for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime. The Agency relies on the decision in **Abdulrahman Mahmoud 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."

110. The Agency further relies on the decision in **Mohunram and Another v National Director of Public Prosecutions and Another (CCT19/06) [2007] ZACC 4** in which the court commented on the objects and rationale for the measures adopted in the Prevention of Organized Crime Act as considered in **National Director of Public Prosecutions v Mohamed N.O. [2002] ZACC 9**. Further reliance is placed on the case of **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** in which it was held that the primary object of a confiscation order is not to enrich the State but, among other secondary purposes, to deprive the convicted person of ill-gotten gains.

111. The Agency cites the definition of '*proceeds of crime*' in POCAMLA to submit that the funds from which the properties the subject of this application were purchased are proceeds of crime. It had received information from the DCI regarding on-going investigations involving fraud and economic crimes at the NYS, and the respondents have been charged with various criminal offences in Criminal Case Nos. ACC 13, 15 and 17 of 2018.

112. The Agency reiterates the factual foundation for the present application, including its investigations and findings on the respondent's bank accounts which it suspects have been used for money laundering purposes. The 1st respondent had been paid in her personal account number 1109800584, which is contrary to procedure, Kshs 57,000,114.80. The 2nd respondent had, through Ngiwaco Enterprises and Waluco Enterprises, received a total of Kshs 263,385,849 on diverse dates between 2015 and 2018 from the NYS and associates.

113. Through his business Jerrycathy Enterprises, the 3rd respondent had received Kshs 87,931,482 on diverse dates between 2015 and 2018 from the NYS. The respondents had then intra-transferred the funds within the same bank into accounts that they own or that are owned by their family members or associates. According to the Agency, the respondents had received in their accounts a total of Kshs 133,922,491.30 in two consecutive days, the 17th and 18th October, 2016.

114. The Agency submits that these funds were thereafter used to purchase the properties the subject of this application. It notes that all the properties were acquired during the period the fraud and economic crimes were committed at the NYS, and that the funds were notably all from the NYS.

115. The Agency again cites the decision in **Schabir Shaik & Others –vs- State** (supra) in which the court observed as follows with respect to the definition of proceeds of crime:

"...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."

116. While relying on section 112 of the Evidence Act, the Agency submits that the respondents have failed to demonstrate with particularity how they obtained the properties. Instead, they have indicated that the assets were obtained through legitimate sources of income and that they have supplied various government agencies with goods and services for over 20 years. These assertions, according to the Agency, are not supported by any documentary evidence.

117. The Agency relies on the case of **Assets Recovery Agency –vs- Fisher, Rohan and Miller, Delores, Supreme Court of**

Jamaica, Claim No 2007 HCV003259 with regard to the evidential burden placed on the respondent to demonstrate how they lawfully came into possession of the assets at issue. The Agency submits, in relation to the motor vehicles, that their value compared to what was advanced to the respondents by the Interested Parties clearly demonstrates that the respondents were engaged in a money laundering scheme. Its submission is that the allegation by the respondents that the motor vehicles were purchased through a chattels mortgage scheme is false, its contention being that the vehicles were used as security for a credit facility in an effort to conceal and disguise the source of funds for the purchase of the motor vehicles.

118. According to the Agency, the motor vehicles were purchased at different times between 2016 and 2017, the period of the investigations. Motor vehicle registration number KCH 600H Toyota station wagon was manufactured in 2016 and registered to the 1st respondent on 15th July 2016. The second vehicle, registration number KCH 753U Toyota station wagon was manufactured in 2009 and registered on 22nd July 2016. The final vehicle, registration number KCH 889M Toyota pick-up was manufactured in 2009 and registered on 12th July 2016.

119. The Agency further submits that the real properties the subject of this application were all purchased in the period under investigation, pursuant to sale agreements dated 2nd June 2016, 8th July 2016, 25th April 2017, 28th October, 2016 and 1st July 2016. None of the real properties, however, has yet been registered in the name of the respondents but remain in the previous owner's names, which the Agency submits is a ploy to disguise ownership of the properties. It is its submission further that though the respondents are not the registered owners, they are the beneficial owners having signed sale agreements and provided the funds for the purchase of the properties.

120. With regard to the argument by the respondents that the registered owners of the properties are not parties to this matter and that therefore their right to a hearing has been violated, the Agency cites section 92(3) of POCAMLA which provides that the court may make a forfeiture order even in the absence of a party whose interest may be affected by such an order.

121. The Agency discounts the evidential value of the copies of documents annexed to the respondents' affidavits as evidence of their legitimate businesses. It observes that most of them are not clear, do not have stamps signifying receipt of goods by the NYS, and their authenticity cannot be verified. The other documents relied on by the respondents largely do not link to the period under investigation or have been rebutted by its evidence. It is its case that the respondents have not been able to respond to the specific transactions that it has pinpointed with particulars on how they received the funds from the NYS. The Agency relies on the case of **Assets Recovery Agency vs Lillian Wanja Muthoni Mbogo & others, ACEC MISC APPL No 58 of 2018** for the proposition that there should be a clear source of funds and a document trail in the form of, *inter alia*, books of accounts, stock registers or LPOS to account for funds.

122. The Agency submits further that the actions of the respondents of intra- transferring among themselves the amounts they received from NYS was a money laundering scheme to camouflage the proceeds of crime and disguise the economic benefit derived as legitimate. It is its submission therefore that the respondents are beneficiaries of proceeds of crime, and the properties the subject of this application are proceeds of crime as they were obtained directly as a result of money laundering and other predicate offences.

123. The Agency asks the court to determine the second issue- whether the properties at issue are liable to forfeiture to the government-in the affirmative. It submits that it has demonstrated that the properties are proceeds of crime as defined in POCAMLA, and the court is empowered under section 92(1) thereof to make an order for forfeiture if it finds, on a balance of probabilities, that the properties have been used or are intended for use in the commission of an offence or is proceeds of crime.

124. The Agency relies on the case of **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372** with respect to the burden of proof in civil cases, which is on a balance of probabilities. It is its submission that the present proceedings are civil in nature and the standard of proof is on a balance of probabilities. Reliance is also placed on **Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168** in which it was held that the commission of a specific criminal offence need not be alleged in civil forfeiture proceedings. It also cites the case of **Muneka v Commissioner of Customs and Excise [2005] EWHC 495** for a similar holding.

125. The Agency further seeks support in the case of **National Director of Public Prosecutions (NDPP) –v- R O Cook Properties (Pty) Ltd 2004 ZASCA 36**. It submits that in this case, the Supreme Court of Appeal in South Africa found that Chapter 6 of the South African Prevention of Organised Crime Act No 121 of 1998, provides expressly at section 36 that all proceedings under that chapter are civil in nature. It also provides for forfeiture where it is established, on a balance of probabilities, that property has been used to commit an offence or is the proceeds of unlawful activities, even when no criminal proceedings are pending. The Agency

notes that Chapter 6 of POCA contains similar provisions on civil recovery as are found in Part VIII of POCAMLA.

126. It is the Agency's case that the respondents in this matter benefitted from the crimes committed at the NYS. That it has demonstrated on a balance of probabilities that the properties sought to be forfeited are proceeds of crime as they were purchased directly as a result of the offences committed at the NYS.

127. The Agency further relies on **Republic v Director of Public Prosecutions & another *ex parte* Patrick Ogola Onyango & 8 others [2016] eKLR** and **Serious Organized Crime Agency vs Gale** quoted in **Assets recovery Agency & Others –vs- Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120** in which it was held that civil recovery proceedings are directed at the seizure of property found, on a balance of probabilities, to be proceeds of crime, and not the conviction of any individual. The Agency's submission is that the property in this matter are proceeds of crime and liable to forfeiture to the State under section 92(1) of POCAMLA.

128. The Agency's submission on the third issue is that the court should find the present application is not a violation of the respondents' right to property, fair administrative action and fair hearing. It observes that Article 40 of the Constitution guarantees to everyone the right to acquire and own property of any description in any part of Kenya. As provided under Article 40(6), however, this right does not extend to property which has been unlawfully acquired. The Agency relies for this submission on **Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eKLR** and the Namibian case of **Teckla Nandjila Lameck-Vs- President of Namibia 2012(1) NR 255(HC)** as well as **Martin Shalli -vs-Attorney General of Namibia & Others High Court of Namibia Case No:POCA9/2011**.

129. Regarding the respondents' contention that their right to fair administrative action and fair hearing under Article 40 and 50 respectively have been violated, the Agency relies on the words of the Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** and the High Court's decision in **Dry Associates Limited v Capital Markets Authority & Another [2012] eKLR** with regard to the distinction between the two constitutional rights. It is its submission that the respondents have been accorded the right to a fair hearing by participating in the instant proceedings. Further, that Article 47 does not apply in this case as it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies.

130. The final issue addressed by the Agency is whether the present proceedings should have awaited the outcome of the criminal proceedings against the respondents. It observes that the respondents have been charged in Criminal Case Nos. ACC 13, 15 and 17 of 2018 with, amongst others, conspiracy to commit an offence of economic crime contrary to sections 47(a)(3) and 48(1) of ACECA and fraudulent acquisition of public property contrary to sections 45(1)(a) and 48(1) of ACECA. It submits, however, that civil forfeiture entails an *in rem* action, that is, an action against the asset itself and not against the individual.

131. It relies on the decision in **Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR** in which the court stated that civil forfeiture proceedings are proceedings *in rem* (against the property) and involve a civil suit being brought against the property which is reasonably believed to be a proceed of crime. It further relies on section 92 (4) of POCAMLA which provides that the validity of a forfeiture order is not affected by the outcome of criminal proceedings or investigations in respect of an offence with which the property concerned is in some way associated.

132. The Agency further seeks reliance for this submission on **Phillips v The United Kingdom [2001] ECHR 437** quoted in **Martin Shalli -v-Attorney General of Namibia & Others** (supra); **Teckla Nandjila Lameck-vs- President of Namibia** (supra); **Assets Recovery Agency vs James Thuita Nderitu & others** (supra) **National Director of Public Prosecutions v Mohamed N.O.**(supra); **National Director of Public Prosecutions v Prophet (5926/01) [2003] ZAWCHC 16**; **National Director of Public Prosecutions v Van der Merwe and Another (A338/2010) [2011] ZAWCHC 8**; and **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR**. The Agency also relies on the **Stolen Asset Recovery initiative** publication: **Few and FAR: The Hard Facts on Stolen Asset Recovery, (2014)** on the damage wrought to a society, its economy and the rule of law, and the important role played by the seizure and recovery of the proceeds of economic crimes. It urges the court to find that the application for forfeiture is merited, and to grant the orders as prayed.

Submissions in Reply

133. The respondents filed two sets of submissions. The first set was filed on 23rd August 2019 by the firm of Ondieki & Co Advocates. Thereafter, the firm of Waudo & Co. Advocates filed submissions dated 21st May 2020 and filed in court on 26th May 2020 in which they indicated that the respondents wished to abandon the earlier submissions and rely entirely on the new

submissions.

134. In these latter submissions, the respondents' first argument relates to the burden of proof in matters such as this which are lodged under the provisions of the POCAMLA. They submit that the Agency has proceeded on the assumption that the burden of proof lies on them, and that all it needs to do in an application for civil forfeiture is level accusations against them and then the burden shifts to them to justify how they acquired the purported proceeds of crime. Should they fail to do so, their preserved assets are liable for forfeiture.

135. In the respondents' view, however, the legal burden of proof lies and remains with the Agency. Reliance is placed on section 107 of the Evidence Act for the proposition that he who alleges must prove. The respondents further rely on section 108 and 109 of the Evidence Act with regard to the burden of proof, It is their submission that the onus is on the Agency to prove that the subject properties are proceeds of crime as defined under section 2 of POCAMLA.

136. The respondents rely on the decision in **Eastern Produce (K) Ltd-Chemomi Tea Estate v. Bonfas Shoya (2018) eKLR** in which the court held that the burden was always on a plaintiff to prove his case on a balance of probabilities, a burden that was not lessened even when the case proceeded on formal proof. It is their contention that the reliance by the Agency on section 112 of the Evidence Act to shift the burden of proof onto the respondents is misguided and is based on a misreading of the law.

137. It is their submission further that the facts of this case are not such as are contemplated under section 112 as being facts especially within the knowledge of a particular party. They contend that they are alleged to have traded with a public entity, the NYS, and it is their submission therefore that relevant information with regard to the present matter is not therefore exclusively within their knowledge but is shared with the procuring entity, the NYS.

138. The respondents submit that the Accounting Officer of a public procurement entity has a statutory duty under section 68 of the Public Procurement and Asset Disposal Act, 2015 to keep the records for each procurement for at least six years after the resulting contract has been completed. If no contract resulted, for at least six years after the procurement proceedings were terminated. They further submit that the Agency has very wide investigating powers under sections 121 and 122 of POCAMLA, but that it has simply refused to exercise these powers in this case.

139. According to the respondents, under section 121 of POCAMLA, the Attorney General is empowered to request any person employed in or associated with a government department or statutory body to furnish him with all information that may reasonably be required for any investigation under the Act. Further, that section 122 of POCAMLA empowers the Attorney General to direct, under written authority, a specific investigation where he has reason to believe that any person may be in possession of information relevant to commission or intended commission of an alleged offence under the Act, or that any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offence.

140. It is only where records cannot be found by the Agency at the NYS, its parent Ministry, and the government financial system, that the Agency would be justified in invoking the provisions of section 112 of the Evidence Act. The respondents submit that the Agency has not produced any evidence before this court to prove that the said records are untraceable. In their view, indolence on the part of the Agency does not justify the application of section 112 of the Evidence Act.

141. The respondents further submit, in reliance on the case of **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR**, that the legal burden of proof in this case rests on the Agency. It is only the evidential burden of proof which may shift to the respondents depending on the nature and effect of the evidence adduced by the Agency. The respondents further submit, in reliance on **Ethics and Anti-Corruption Commission vs. Stanley Mombo Amuti v. Kenya Anti-Corruption Commission** (supra), that the burden of proof lies with the Agency and it is for the court to determine that it was discharged on a balance of probabilities, at which stage it would shift to the respondents. They further cite the case of **Peter Wafula Juma & 2 Others vs. Republic (2014) eKLR** for a similar proposition.

142. The second argument advanced by the respondents relates to the standard of proof in matters such as this. They rely on the definition of *'standard of proof'* in **Black's Law Dictionary, (9th Edition, 2009)** at page 1535. They submit that there are three main categories of the standard of proof -the criminal standard of proof of beyond reasonable doubt; the application of civil case standard of 'balance of probabilities'; and the application of an intermediate standard of proof.

143. While noting the reliance by the applicant on the case of **Miller vs. Minister of Pensions (1947) 2ALL ER 372** with respect to the burden of proof in civil cases, it is their submission that the cases of **Enfil Ltd vs. Registrar of Titles Mombasa and 2 Others (2014) eKLR; Mpungu & Sons Transporters Ltd –v- Attorney General & another, Civil Appeal No.17 of 2001; Evans Kidero v Speaker of the Nairobi City County Assembly & Another (2018) eKLR**; and **Kibiro Wagoro Makumi vs. Francis Nduati Macharia & Another (2018) eKLR** are more applicable as they bring out what courts have held to be the burden of proof in civil cases where there is an allegation of fraud. Their submission is that the holding in these cases is that allegations of fraud are required to be proved on a higher standard than the ordinary balance of probabilities. In their view, this is the standard that is applicable in the present case, a standard that is higher than a balance of probabilities but less than the criminal standard of beyond reasonable doubt.

144. To the question whether the subject property is liable to forfeiture, the respondents take the position that the Agency has not presented sufficient evidence to justify the forfeiture. It is their submission that the Agency has selectively relied on the decision in **Director of Assets Recovery and Others, Republic vs. Green & Others (2005) EWHC 3168** and **Assets Recovery Agency vs. Fisher, Rohan and Millier, Delores, Supreme Court of Jamaica, Claim Nio. 2007 HCV003259** to support its position.

145. The respondents further rely on Order 2 Rule 1 of the Civil Procedure Rules which they submit requires that information on the circumstances in which it is alleged that liability has arisen be set out in every pleading. Further reliance is placed on Order 2 Rule 4 of the Civil Procedure Rules which sets out the matters which must be specifically pleaded in every pleading, which includes fraud. It is the respondents case that the facts presented to this court by the Agency do not meet these requirements.

146. The respondents further argue that while the Agency can collaborate with other law enforcement organs in the discharge of its statutory mandate, it has lost sight of the fact that it is a separate and distinct legal entity from the DCI. It has its own legal mandate under POCAMLA to ensure that any information and or evidence that it may obtain from other law enforcement bodies meets the standards required for a prosecution that is intended to achieve the objects of POCAMLA

147. The respondents submit that the Agency had belatedly filed a further affidavit of S/Sgt Fredrick Musyoki sworn on 14th May 2020 in response to their averments in their affidavits sworn on 18th November 2019 that the purported report and evidence allegedly obtained by the Agency from the DCI had not been placed before this court. They submit that he had annexed to the said affidavi a statement purportedly written by an officer from the DCI, one Bernard Gikandi. While observing that the Agency did not have a right of reply, the respondents submit that the said Gikandi is not a witness in this case, and the evidence in his statement cannot therefore be tested in the usual manner through cross-examination.

148. Further, that the documents that the said officer claimed to have collected, inspected and analyzed have not been placed before this court, and it cannot be assumed that such evidence as is contained in the said documents would be admissible. It is their submission further that no evidence that is being relied on by the prosecution in the criminal cases has been placed before this court for it to make its determination thereon on the civil standard of proof.

149. The respondents further submit that the fact that they have been charged with a criminal offence cannot be adequate to establish a *prima facie* case against them in forfeiture proceedings. They submit that relevant evidence being relied on by the prosecution in support of the criminal charges must be placed before this court for it to make its own determination on whether a *prima facie* case has been established against them on a balance of probabilities.

150. The respondents further submit that the Agency did not examine the bank records of the NYS, the payment vouchers and supporting documents at NYS, nor did he record any evidence from any official of the NYS, or examine any of the counter receipt voucher, requisition and issue voucher, inspection and acceptance report and signed and stamped delivery note. It is also their submission that there is no evidence that the Agency sought information from the Ministry of Youth and Public Service, or from the Director of IFMIS at the Treasury.

151. With respect to the source of funds for the purchase of the subject property, the respondents argue that the Agency has not produced evidence to support its allegation that the funds were solely from the NYS. They submit that no attempt was made to establish whether they have legitimate sources of income. In their view, what the Agency has done is to dismiss their evidence that they have other sources of income on the basis that it cannot be verified, even where it included business dealings with public bodies.

152. It is their submission that the Agency's case is based on suspicion, which is inadequate to found a claim of this nature. Further,

that such suspicion is not reasonable. The respondents cite the definition of reasonable suspicion in **Black's Law Dictionary 9th Edition at page 1585** as ***"A particularized or objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity"*** and the case of Emmanuel **Suipanu Siyanga v Republic (2013) eKLR** to support their position that the suspicion in this matter is not reasonable.

153. The respondents reiterate that the Agency has not established a *prima facie* case (through evidence placed before this Court to justify the shifting of the evidential burden of proof to them. They rely in support on **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR; Ethics and Anti-Corruption Commission vs. Stanley Mombo Amuti v. Kenya Anti-Corruption Commission (2015) eKLR, Peter Wafula Juma & 2 Others vs. Republic (2014) eKLR** and **Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) eKLR** with regard to the burden of proof.

154. The respondents submit that they Agency has violated their right to fair administrative action guaranteed under Article 47 and sections 3 and 4 of the Fair Administrative Action Act, 2015. It is their contention that they have both a constitutional and statutory right to have this right protected. In support of their arguments that this right has been violated, the respondents submit that search warrants in respect of their premises were obtained *ex- parte* by the DCI, and the Agency is relying on information gathered by the DCI.

155. It is also their contention that preservation orders were obtained *ex parte* by the Agency, and it did not give them an opportunity to respond to the allegations made against them before it made the decision to obtain the preservation orders. They were also not given an opportunity to respond to the allegations against them before the Agency made the decision to seek and obtain warrants to investigate their bank accounts as the warrants were obtained *ex parte*. The respondents submit that the decision to obtain the search warrants is an administrative action within the meaning of section 2 of the Fair Administrative Action Act. The same submission is advanced in respect to the issuance by the court of the warrants to investigate their accounts. They rely on the decision in **Sanjay Shah Arunjain vs. Republic (2002) eKLR** to submit that the law at the time the warrants were issued did not provide for the issuance of warrants to investigate accounts *ex parte*. Also cited in support of the same argument is the case of **Aurelian Ajiambo Akwaro v Republic (2009) eKLR**.

156. The respondents further submit that Hon. Ong;udi had ordered that they should be served with the aforesaid application, but the order had been violated. They were also not given a chance to respond to the allegations made against them before the decision to file the present application was made. They rely on the case of **Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others (2006) eKLR** with respect to the right to be heard and the duty of a decision maker to hear all parties. It is their submission that the right not to be condemned unheard is based on the rules of natural justice which are not donated by statute or by a court of law and such rules cannot therefore be curtailed on the basis of the stay granted by the Supreme Court of the decision in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae).**

157. It is their argument that the evidence in the bank statements was not in their control, and there was no risk that it would disappear. However, even in cases where there is a risk of evidence being moved or destroyed, the Court of Appeal had, in **Samuel Watatua and Another vs Republic Court of Appeal Nai. Criminal Appeal No.2 of 2013** (Unreported) held that *ex parte* orders may be granted only for a short period, and no final orders should be granted until all parties likely to be affected by the orders have been given a chance to be heard.

158. The respondents allege violation of their right to fair hearing guaranteed under Article 50 (1). They submit that the present proceedings are purported civil proceeding where information and evidence are not obtained and exchanged through discovery as provided for under the Civil Procedure Rules. Instead, one of the parties has employed criminal law practices and procedures, such as the use of search warrants and warrants to investigate accounts and gather evidence while the affected parties are denied the constitutional and statutory protections that are available to them under criminal law.

159. The respondents submit that there cannot be a fair hearing within the meaning of Article 50 where they are expected to produce in their defence evidence in the form of documentation touching on the relevant tenders and contracts with the NYS when all the documents in their possession relating to their dealings with the NYS were seized by the DCI pursuant to search warrants issued by a court of law in the course of the criminal investigations. They ask the court to take judicial notice of the fact that it is a normal practice in our criminal justice system for accused persons to be barred from visiting the scene of crime or contacting possible witnesses. They submit that it is therefore illogical to imagine that they would be in a position to visit the NYS to gather evidence to use in their defence in this matter or in the criminal cases.

160. To the question whether the property the subject of this matter should be forfeited to the State, the respondents argue that the decision of **Schabir Shaik & Others vs. State Case CCT 86/06 (2008) ZACC** relied on by the Agency in support of its application for forfeiture is only persuasive in nature and is inapplicable to the facts of this case. They point out that the case concerned an application for criminal forfeiture after a conviction. In this case, the application is for civil forfeiture proceedings provided for under Part VIII of POCAMLA while criminal forfeiture is provided for under Part VII. The respondents cite the case of **Republic v. Kenya Revenue Authority *ex parte* Stanley Mombo Amuti (2018) eKLR** for the proposition that a case is only an authority for what it actually decides.+

161. With regard to the reliance by the Agency on the case of **Assets Recovery Agency vs Lilian Wanja Muthoni t/a Sahara Consultants & 5 Others (2019) eKLR**, the respondents argue that, unlike in the above case, they have, through their affidavits, produced evidence to prove that they have been engaged in business activities and can therefore justify their lifestyle. They further argue that the decision in the above matter was *per incurium*, their submission being that judgments are not entered in either civil or criminal cases because a defendant or accused person has failed to adduce evidence but because the plaintiff has proved its case to the required standard.

162. Reliance for this submission is placed on the decision in **Peter Wafula Juma & 2 Others vs. Republic (2014) eKLR , Central Kenya Ltd v Trust Bank Limited & 4 Others (1996) eKLR** and **Silvia Wanjiku Kimani & Another v Kimani Muiruri Machugu & 2 Others (2020) eKLR** in which the court addressed itself to the standard of proof where fraud is alleged which is, as in cases cited earlier by the respondents, beyond a balance of probabilities and slightly below the standard required in criminal cases.

163. It is their submission therefore that the forfeiture orders cannot be granted against them as the evidence adduced in support of the Agency's case falls below the required standard. They ask the court to find that the Agency has failed to establish a *prima facie* case against them to justify the shifting of the evidential burden of proof to them, and that it has also failed to discharge its legal and evidential burden of proof as contemplated under section 92 of POCAMLA.

164. I now turn to consider the respective arguments advanced by the Interested Parties in support of their respective cases for protection of their interests in the motor vehicles the subject of this application for forfeiture.

The Case of the 1st Interested Party

165. The 1st Interested Party's case is that in or around July, 2017, it had advanced a loan of Kshs 2 million to the 2nd respondent on the security of motor vehicle registration number KCH 600H under its logbook financing scheme. It had also, in or around June, 2017, advanced a loan of Kshs 1,295,000/= to the 3rd respondent on the security of motor vehicle registration number KCH 889M under the same scheme. It had made these advances after satisfying itself that the 2nd and 3rd respondents respectively were the legitimate and registered owners of the respective vehicles and upon confirming suitability of the vehicles as securities for the loans. All the documents necessary for securing the loans had been executed to ensure that the parties were bound by the terms thereof. The 1st Interested Party had, in accordance with the terms of the loan agreements, procured transfer of the motor vehicles into the joint names of itself and the 2nd and 3rd respondents.

166. It had further complied with all statutory and contractual requirements including having its security rights in the two vehicles registered under the Movable Property Security Rights Act, 2017. The 2nd and 3rd respondents had, however, defaulted in the repayment of the loans leading to accrual of penalties and other contemplated charges. Their financial obligations to the 1st Interested Party stood at Kshs 3,756,943.97/= and Kshs 386,823.78/= respectively at the time of the application.

167. It is the 1st Interested Party's case that it has not been involved in any manner whatsoever in the commission of any of the offences alleged to have been committed by the 2nd and 3rd respondents. It contends that it acquired interests in the two motor vehicles for sufficient consideration as they were used as security for loans of Kshs 2 Million and Kshs 1,295,000/=, respectively. Further, that it was not aware at the time it acquired the interest that the two motor vehicles were tainted property nor did it have any suspicion that they were proceeds of crime as alleged.

168. It is its case that the discovery of loss of funds at the NYS had not been made, nor had it been made public, at the time it entered into the transactions with the 2nd and 3rd respondents. It also had no suspicion that the 2nd and 3rd respondents were suspected of economic crimes or that either or both vehicles were potentially proceeds of crime. It had therefore treated the two transactions in the same manner as any other in the course of its money-lending business.

169. It urges the court to uphold its constitutional right to property by declaring and protecting its interest in the two vehicles. Should a forfeiture order be made in respect of the two vehicles without a corresponding order declaring its interests in the two vehicle and an order for the realization of its interest, the 1st Interested Party will suffer the injustice of having its legally-secured interest extinguished arbitrarily in addition to suffering a loss of over Kshs 4,143,767.75/=, the aggregate loan repayment amount due from the 2nd and 3rd respondents.

170. In its submissions, the 1st Interested Party argues that the question whether the two motor vehicles are proceeds of crime can only be answered by a consideration of the evidence presented before the court by the Agency and the 2nd and 3rd respondents. As to whether the vehicles should be forfeited to the State will be determined by a consideration of the provisions of section 92 of POCAMLA. It is its contention, however, that a forfeiture order will render its suit against the 2nd respondent, Naivasha CMCC No. 28 of 2018, moot.

171. The 1st Interested Party argues, however, that it has proved on a balance of probabilities that it acquired an interest in the two vehicles for sufficient consideration and without knowing and/or reasonably suspecting that they were tainted property. It relies on section *93 of the POCAMLA,* under which it has lodged its application.

172. It submits that it has made its application as contemplated under the section during the pendency of an application for forfeiture and before a forfeiture order is made. There is no imputation that it was in any way involved in the commission of the alleged offences, by the 2nd and 3rd respondents, and it has proved that it was not and could not have been involved in commission of the offences in any manner whatsoever.

173. It is its case that it has sufficiently established that it acquired an interest in the two vehicles for sufficient consideration as collateral for loans. It had no suspicion that the two vehicles were tainted property. It submits in this regard that the loan agreements for the two vehicles were entered into in June and July, 2017, while the discovery of the loss of funds from the NYS was made in May, 2018. The results of the investigations were made public thereafter. It submits therefore that no-one could have known or reasonably suspected, a year earlier in 2017, that the two vehicles were likely to be proceeds of crime as at that time investigations had not commenced and the public was not aware of the loss of funds or of the perpetrators.

174. *The* 1st Interested Party submits that it has ably shown the existence, extent and value of its interest in the two vehicles. It is its case that its interest is capable of protection by the court. It cites the decision in **Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR** in which the Court relied on the holding in **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** to the effect that:

"….the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains."

175. The 1st Interested Party further reiterates that it acquired interests in the two vehicles innocently and after placing reliance on the documents provided by the 2nd and 3rd respondents, as well as information obtained from its exercise of due diligence. It should therefore not be punished for offences allegedly committed by the respondents.

176. The 1st Interested Party notes that neither the Agency nor the 2nd and 3rd respondents filed responses to its application and so it is uncontroverted. It urges the court to be guided by the case of **Nandwa-vs-Kenya Kazi Limited (1988) KLR 488** on the effect of failure to controvert facts and evidence tendered by the opposing party, and its submission is that its facts and evidence stand unchallenged.

177. It is also its case that having registered its interest through registration of the two vehicles in its name and that of the 2nd and 3rd respondent respectively, it also registered notice of its security right therein. It is its case therefore that under section 15 of the Movable Property Security Rights Act, 2017, its interest in the two vehicles is effective as against third parties, including the government.

Application by the 2nd Interested Party

178. The 2nd Interested Party filed an application supported by an affidavit sworn by Wycliffe Kiprono, its Collection Manager and is based on the grounds set out on the face of the application. Its case is that it had advanced to the 1st respondent a loan of Kshs.

800,000.00 on the security of motor vehicle registration number KCH 753U Toyota Station Wagon. It is still holding the original log book of the motor vehicle. It had deposited the approved loan amount in the 1st respondent's account number [...] at KCB Bank.

179. The 2nd Interested Party argues that it was reasonably believed and misconstrued by the Agency that the proceeds in the 1st respondent's account were fraudulently acquired from the NYS. The 2nd Interested Party had only recently come to be aware of the Gazette Notice by the Agency under section 83(1) of POCAMLA. It alleged that at the time of its application, there was no order preserving the funds in the said account as an order to that effect issued on 6th June 2018 in Milimani Chief Magistrates Court Misc. Criminal Application Number 1998 of 2018 had lapsed.

180. The Agency had also, according to the 2nd Interested Party, intimated to the Chief Magistrate's Court that it did not wish to pursue the reinstatement of the preservation order in respect of the amount as it had confirmed that the money in the 1st respondent's bank account was not proceeds of crime but a loan advanced by the 2nd Interested Party. The Agency had also intimated that its only interest is in the forfeiture of motor vehicle registration number KCH 753U that had been used as security for the loan. The 2nd Interested Party contended that there was imminent danger that the Agency shall dispose, transfer and dissipate the said motor vehicle or the 1st respondent shall proceed to withdraw and utilize the funds in the said account unless preservation orders were issued.

181. The 2nd Interested Party submits that it has an interest in the said motor vehicle and, in the alternative, in the monies preserved by the Agency pursuant to an order issued in Milimani Chief Magistrates Court Misc. Criminal Application Number 1998 of 2018 in which the court preserved the funds held in the 1st respondent's account Number [...]. It is its case that the 1st respondent had acquired from it a loan facility of Kshs. 800,000.00 by offering a security in the form of the said motor vehicle. It had approved the loan amount and deposited it in the 1st respondent's KCB bank.

182. The 2nd Interested Party submits that it was unaware of the allegation that the 1st respondent had acquired the motor vehicle illegally when it approved the motor vehicle as security for the loan. It contends that the Agency had, in the application before the Chief Magistrate's Court, intimated that it did not wish to pursue preservation of the monies in the account as it had duly confirmed that the monies in the 1st respondent's bank account are not proceeds of crime but a loan advanced by the 2nd Interested Party. It had also stated that it is only interested in the forfeiture of the motor vehicle.

183. The 2nd Interested Party submits that it should be allowed to serve a notice on the Agency under section 83 of POCAMLA out of time. It did not do so as required since it only recently came to be aware of the Gazette Notice by the Agency under section 83(1) of the Act. It had not been served by the Agency with the court documents even though it had been included in the Agency's application for preservation orders in respect of the motor vehicle and the bank account. It had made the present application in line with section 91 (1) of POCAMLA seeking leave to serve the Agency with the notice provided in section 83 (3) out of time. It is its case that as no party is opposed to such leave being granted, the court should grant it in the interests of equity and justice.

184. The 2nd Interested Party further submits that section 94 (1) (b) of POCAMLA gives the court powers to make an order excluding certain interest in property, such as the motor vehicle in this matter, from operation of the order of forfeiture. It submits that this means that an exclusion order is made only after the court has determined the merit of an application for forfeiture, and indeed granted such forfeiture order. It contends, however, that under section 93 (1) any person who claims an interest in property the subject matter of forfeiture proceedings may make an application, before the forfeiture order is made, for exclusion of the property. It is its case therefore that its present application, contrary to the assertions by the Agency, has been made at the appropriate time.

185. The 2nd Interested Party further submits that it has properly sought an order for the preservation of the funds held in Kenya Commercial Bank, Account Number [...] within this suit. It submits that while the Agency has argued in its grounds of opposition that the bank account is not subject to the forfeiture application and can only be canvassed between the 2nd Interested Party and the 1st respondent, the funds in the bank account are squarely connected to the motor vehicle in this matter as the vehicle was used as security by the 1st respondent to obtain the loan. It is its case therefore that there is a direct nexus between the vehicle and the monies in the bank account, and the monies therefore fall within the jurisdiction of this Court.

186. The 2nd Interested Party submits that the purpose of forfeiture proceedings is to ensure that offenders do not benefit from the proceeds of crime and to deter would be offenders. It also asks the court to be guided by the decision of Ong'udi J in **Assets Recovery Agency v Quorandum Limited & 2 others** (supra) with respect to the purpose of forfeiture orders.

187. It is its submission that if this court were to allow forfeiture of the motor vehicle and allow the 1st respondent to access and enjoy funds in the bank account which were directly obtained by the 1st respondent using the tainted motor vehicle as security, then the purpose of the enactment of POCAMLA and the central function of the Agency will not have been achieved. It would also suffer irreparable harm if the court were to decline to preserve the funds as it would not be able to recover the funds from the 1st respondent. Its submission is therefore that this is the proper forum for seeking to preserve the funds in the bank account.

188. The 2nd Interested Party asks the court, should it make a forfeiture order, to issue an exclusion order on the motor vehicle the subject matter of its application. In the alternative, it asks the court to issue an order directing that the funds in the 1st respondent's bank account be returned to the 2nd Interested Party.

189. The Agency filed grounds of opposition to the 2nd Interested Party's application. These grounds, already alluded to above, were first, that the application for exclusion of interest in property can only be made after the court has made an order for forfeiture pursuant to section 94 of POCAMLA. Its second ground is that the funds in the KCB account are not the subject of the forfeiture proceedings and can only be canvassed between the 2nd Interested Party and the 1st respondent.

190. No submissions were filed by the Agency or the respondents in response to the Interested Party's applications, nor did the respondents file any response to the applications.

Analysis and Determination

191. I have read and considered the pleadings of the Agency and the respondents in this matter. I have also considered the pleadings and submissions of the Interested Parties in support of their respective applications, as well as the responses thereto. In my view, the following issues arise for determination:

i. Whether the present proceedings are premature and should await the outcome of criminal prosecution of the respondents;

ii. Whether the present application is in violation of the respondents' constitutional rights to property, fair administrative action and fair hearing under Articles 40, 47 and 50 respectively;

iii. Whether the properties the subject of the application are proceeds of crime and liable to forfeiture to the State;

iv. If the answer to issue iii) above is in the affirmative, whether the motor vehicles in which the Interested Parties claim an interest should be excluded from the forfeiture orders.

Preliminary Issues

192. Before entering into an analysis of the substantive issues set out above however, I wish to dispense with a couple of collateral issues raised by the respondents.

193. The first is an argument by the respondents that the application for forfeiture is an abuse of the court process aimed at circumventing an order issued on 19th December 2018 for the release of the motor vehicles the subject of this application. The Agency responds that the order of the court was that the motor vehicles shall be detained by the OCS, Naivasha Police Station or any other police officer or station only if there is a court order directing such detention or preservation. It is its case that it had obtained preservation orders in **Nairobi High Court Anti-Corruption & Economic Crimes Division Misc. Application No 55 of 2018** on 3rd December, 2018, before the ruling of 19th December, 2018. The said orders were gazetted, pursuant to section 83(1) of the POCAMLA, on 14th December, 2018.

194. I have considered the ruling of Ong'udi J on this point made on 19th December 2018. Indeed, her order with respect to the detention of the motor vehicles was conditional on there being an order authorizing such detention. At paragraph 24 of the ruling in **Phylis Njeri Ngirita & 2 others v Director of Public Prosecutions & 2 others; Asset Recovery Agency (Interested Party) [2018] eKLR** the court observed and directed as follows:

24. For the above reasons stated, it is my finding that the 2nd and 3rd respondent have no good reason to continue detaining the

applicants' motor vehicles unless otherwise served with a lawful order preserving them. Accordingly, the application herein is hereby allowed with orders that:

i. The OCS Naivasha Police station be and is hereby directed to release motor vehicles KCH 753U, KCH 600H and KCA 889M to the applicants or if in custody to the close relatives as they may authorize with immediate effect.

ii. That the said motor vehicles shall be detained by the OCS Naivasha Police Station or any other police officer or station only if there is a court order directing detention or preservation of the same. (Emphasis added)

195. The argument by the Agency that by the time the court issued the ruling of 19th December 2018 an order had been issued and gazetted for the preservation of the motor vehicles in question is not controverted. Accordingly, the application for forfeiture cannot be challenged on the basis that it was brought in disobedience of an order of the court.

196. A second minor issue relates to the allegation that the affidavit sworn on behalf of the Agency and filed in court on 20th May was filed without leave. In the ruling dated 27th February 2020, I dismissed an application by the Agency seeking to strike out the three affidavits filed by the respondents on 18th November 2019. The basis of the application was that the respondents had gone beyond the scope of the leave granted to them to file a further affidavit. In allowing the three affidavits to be deemed as being properly on record, I also granted the Agency leave to file a further affidavit in response to any new issues raised by the respondents in the affidavits of 18th November 2019. I believe, therefore, that all the pleadings on record are there with the leave of the court.

197. A third issue relates to the allegation that the Agency should have carried out its own investigations and that it failed to use its powers under sections 121 and 122 of POCAMLA. These sections relate to the powers of the Attorney General to request any person employed in or associated with a government department or statutory body to furnish him with all information that may reasonably be required for any investigation, and to order specific investigations.

198. I am not persuaded that there was a failure on the part of the Agency to carry out investigations in this matter. I observe that it has been deposed expressly for the Agency that it had carried out investigations into the acquisition of properties by the respondents. It has placed before the court its findings in that regard in the affidavit of S/Sgt Musyoki, who deposes that he was one of the officers in the team from the Agency investigating the matter.

199. The preliminary issues raised by the respondents in this matter therefore have no merit, in my view, and I accordingly turn to consider the main issues identified above on the basis of the affidavits and submissions on record.

Whether the Present Proceedings are Premature

200. The first issue to consider is whether the present proceedings should await the outcome of the criminal proceedings against the respondents. The respondents have argued that this application is premature, prejudicial and an affront to justice as they have not been convicted of any criminal offence yet. It is further their case that it is a violation of their right to be presumed innocent until proven guilty, and no nexus has been established between the funds used to purchase the properties the subject of the application and the funds allegedly obtained from the NYS through corrupt means.

201. The application before me is brought under Part VIII of the POCAMLA. Section 92 thereof provides as follows:

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.

(3) 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.

(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. (Emphasis added)

202. At section 2 of POCAMLA, "proceeds of crime is defined 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;"

203. My reading of these two sections is that a conviction is not necessary, for the purposes of Part VIII of POCAMLA, in order for the Court to make an order of forfeiture with respect to property shown to be proceeds of crime. Once it is established, on a balance of probabilities, that the property in question has been obtained from proceeds of crime, then an order for forfeiture may be made. It does not matter, to my understanding, in whose hands the property in question is found. Nor does it matter that no one is ever convicted in respect of any crime in connection with the property.

204. I am guided in reaching this conclusion by the sentiments expressed by courts dealing with matters similar to the one before me in this and other jurisdictions whose jurisprudence is persuasive in nature.

205. In the Namibian case of **Teckla Nandjila Lameck-vs- President of Namibia** (supra), the court stated that:

"…Asset forfeiture is, as is stated in section 50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution….even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above."

206. In **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7**, the Court held that:

"…. 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…"

207. The respondents have submitted, correctly, that the case of **Schabir Shaik & Others** related to criminal forfeiture under the South African Prevention of Organized Crime Act (POCA). Part VII of the POCAMLA in Kenya have similar provisions. The definition of proceeds of crime in POCAMLA and POCA in Kenya and South Africa respectively, however, as well as the intent behind the proceedings, whether the process before the court is under the civil and criminal forfeiture procedure, is the same: it is to deny a perpetrator or beneficiary of criminal conduct from enjoying such proceeds of crime. While a forfeiture order will be made in cases of criminal forfeiture after a conviction, as was the case in **Schabir Shaik**, in cases of civil forfeiture, a prior conviction is not necessary.

208. The sentiments expressed in the above cases are in any event echoed in jurisprudence from our courts. In the case of **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others [2016] eKLR** it was held 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."

209. In its decision in **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR** the court stated that:

"This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168, the court stated that: "In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained." I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR." (Emphasis added).

210. In **Assets Recovery Agency vs Pamela Aboo [2018] eKLR**, the court considered the issue in relation to the civil proceedings for forfeiture before it and observed as follows:

"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..."

211. Finally, in his decision in **Republic v Director of Public Prosecutions & another** ex *parte* **Patrick Ogola Onyango & 8 others [2016] eKLR** which related to a challenge to the prosecution of the applicants for the offence of money laundering under POCAMLA, Onguto J observed as follows:

"150. 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.

There is in my view no need to await any prior convictions of other offences before launching the prosecution of alleged money launderers. It is thus of little wonder that 'proceeds of crime' as defined under POCAMLA 2009 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 successfully 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)

152. I have added the emphasis to illustrate that even the legislators appreciated instances when there may be no one to

prosecute hence there may be no conviction for a predicate offence or crime. The need to prove a predicate offence before laying a charge of money laundering was effectively dispensed with.

153. 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." (Emphasis added)

212. I agree fully with the views expressed by the courts in the above matters. The purpose and legislative intent behind POCAMLA is to ensure that those who profit from proceeds of crime do not enjoy such benefits. It is recognized, as observed by Onguto J, that the perpetrator of an offence may never be identified, or convicted. This, however, does not prevent the court from making an order of forfeiture to the State of such property as may have been found, on a balance of probabilities, to be a proceed of crime.

213. It is my finding therefore, and I so hold, that the present application is not premature, and it need not wait for completion of the criminal cases against the respondents.

Violation of Constitutional rights

214. The respondents have argued that the present application is in violation of their right to property, fair administrative action and fair hearing under Articles 40, 47 and 50 respectively.

215. Article 40 of the Constitution protects the right of every person to own property in any part of Kenya. However, as provided under Article 40(6), the protection of this right does not extend to property found to have been unlawfully acquired. Should the court find that the properties the subject of this application are proceeds of crime, then it will not be a violation of the right to property for the Agency to apply for, and for the court to issue, an order of forfeiture.

216. The respondents further allege violation of the right to fair administrative action by the Agency in the actions it took in relation to the subject properties. Article 47 provides that every person has the right to ***"administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

217. The respondents argue that they are entitled, under Article 47 of the Constitution as read with section 4 (1) and (3) (b) of the Fair Administrative Action Act, 2015 to a fair and reasonable opportunity to defend themselves before the Agency made the decision to file the present application. They were also entitled to an opportunity to respond to the allegations of their involvement in corrupt activities at the NYS before orders to investigate and freeze or preserve the funds in their bank account were sought from the Chief Magistrate's Court at Milimani through the miscellaneous criminal applications on the basis of which the orders were issued. Similar arguments are made with regard to the issuance of the orders by the Chief Magistrate's Court, as well as the orders issued by the High Court for the preservation of the properties the subject of this application.

218. I will deal first with the argument that the respondents' right to fair administrative action was violated. In its decision in **Judicial Service Comission v Mbalu Mutava & another [2015] eKLR** the Court of Appeal observed as follows with respect to the right to fair administrative action vis a vis the right to fair hearing:

"Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. "Fair hearing" in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise."

219. It seems to me that the complaint with regard to the violation of the right to fair administrative action and fair hearing are

unmerited, for two reasons. First, as is apparent from the respondent's affidavits dated 18th November 2019, they appear as something of an afterthought, the respondents seeming to have determined, at a late stage in the proceedings, to approach their response to the forfeiture application by an assault on the preliminary applications made by the Agency in obtaining orders to investigate their accounts. This, in my view, cannot properly be done in this matter. But even if it could, it is my view that it is an assault that is not sustainable. Section 118 and 121 of the Criminal Procedure Code under whose provisions the authority to search the respondents' accounts was obtained do not provide for notice to be issued to the parties concerned.

220. The respondents have made passing reference to the ruling of the Supreme Court delivered on 7th February 2020 in **Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae).** The effect of this ruling was to restore the position obtaining before the Court of Appeal decision in **Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR**. The effect of this latter decision had been to require investigative agencies to give notice under section 26 of the Anti-corruption and Economic Crimes Act to any person whose bank accounts were intended to be the subject of investigation. In my view, this decision is of no assistance to the respondents in the present matter.

221. The respondents also allege violation of the right to a fair hearing guaranteed under Article 50(1) which states that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

222. The present proceedings, in my view, present the opportunity for the respondents to be heard with respect to the properties the subject of the application. The Agency is given the power, under Part VIII of POCAMLA, to lodge a civil claim for forfeiture of properties believed to be proceeds of crime. The respondents are given the right to respond to the claim before a court of law and present their position with regard to the lawfulness of their acquisition of the properties in question. It is my view, therefore, that there has been no violation of the respondents' rights under the cited provisions of the Constitution.

Whether the properties the subject of the application are proceeds of crime and liable to forfeiture to the State

223. The Agency asserts that the properties the subject of this application are proceeds of crime and liable to forfeiture to the State. It demonstrates this by showing that in a two-year period, the respondents received in their personal accounts vast sums of money fraudulently transferred from the NYS, which they then used to buy the properties the subject of the application.

224. The respondents have taken two, somewhat divergent, approaches in their response to the forfeiture application. In the affidavits filed earlier in response to the application, their position was that the funds deposited in their accounts were rightfully deposited by the NYS as they have been dealing in supplies with various government entities, including the NYS, for a period in excess of twenty years. They have also had access to funds from other sources with which they could meet their obligations to supply the NYS, such as loans from commercial banks.

225. In the affidavits filed on 18th November 2020 and their later submissions, they take the position that the Agency has not met its obligation under POCAMLA, and the burden of proof cannot therefore shift to them to show that the properties the subject of this application are not proceeds of crime.

226. I will address myself to these two positions separately. I deal, first, with the evidence presented by the Agency in support of the application for forfeiture and its contention that the properties the subject of this application are proceeds of crime.

227. The evidence from the Agency in respect of the funds received from the NYS can be summarised from the copies of the respondents' bank statements exhibited in the affidavit of S/Sgt Musyoki in support of the forfeiture application as annexures 'FM5' – 'FM9' and the analysis of these statements by the Agency which I have set out earlier in this judgment. What emerges from these statements is that between November 2015 and June 2017, Phyllis Njeri Ngirita, the 1st respondent, received from NYS in her personal KCB account number 1109800584 Kshs 57,220,114.80. In a 24- hour period, between 17th and 18th October 2016, she received in that bank account Kshs 197,400.00; Kshs 100,150.00; Kshs 385,550.00; Kshs 391,590.00; Kshs 7,500,862.05; Kshs 8,577,866.40, and Kshs 7,154,030.15

228. Ngiwaco Enterprises, a business entity owned by the 2nd respondent, had received Kshs 109,023,718.30 from NYS in its KCB

account number 1125544910- between April 2015 and February 2018. In the same single day period as in the case of the 1st respondent, between 17th October 2016 and 18th October 2016, the 2nd respondent received Kshs 6,410,596.10; Kshs 8,582,844.85; Kshs 6,128,522.00; Kshs 8,155,172.40; Kshs 8,562,931.05; Kshs 9,482,699.85; and Kshs 8,174,137.95. Waluco Investments, also a business entity owned by the 2nd respondent, received from NYS in its KCB account number 1154300986 between February 2016 –February 2018 Kshs 154,362,131.70.

229. On a single day, the 29th of June 2016, this account received from the NYS Kshs 4,117,500.00; Kshs 7,455,724.15; Kshs 3,345,517.25; Kshs 16,476,293.10; Kshs 4,000,140.00; Kshs 7,586,358.60; Kshs 1,500,000.00 and Kshs 4,500,000.00.

230. JerryCathy Enterprises, the 3rd respondent's business, had received in its KCB account number 1104186225 Kshs 87,931,482.65 from NYS. On the same single day period as in the case of the 1st and 2nd respondents- 17th and 18th October 2016- it had received Kshs 9,281,420.70; Kshs7,580,782.75; Kshs 13,844,865.50; Kshs 7,434,482.75 Kshs 5,585,344.85 and Kshs4,646,551.70. The evidence before the court therefore is that in that two-day period, the accounts held by the respondents had received a total of Kshs 133,922,491.30. An account number 1181363756 held at the KCB Bank in the name of Annway Investment, whose registered proprietor is one Ann Wambere Wanjiku Ngirita, had received Kshs 72,051,077 from NYS. There had also been intra-account transfers between the 2nd respondent's accounts and one other account belonging to Kunjiwa Enterprises, a business entity in the name of Catherine Wanjiku Mwai, which had also received funds from the NYS.

231. The Agency contends that these funds were then moved or withdrawn in cash and utilised in an intricate, and I must observe somewhat dizzying, web of transactions illustrated by the Agency in S/Sgt Musyoki's affidavit. What can be garnered from this illustration is that from the amount received by JerryCathy enterprises from NYS, approximately Kshs 28 million had been withdrawn in cash; Kshs 7 million had been transferred to Kunjiwa Enterprises, an entity in the name of Catherine Wanjiku Mwai, A/C No. 1142293416 KCB.

232. Some of the funds were then used to buy the property the subject of this application. Property number Njoro/Ngata Block 1/7436 and Naivasha/Mwichiringiri Block 4/2267 were purchased at the price of Kshs 2,500,000 and Waitaluk/Mabonde Block12/ Sirende/140 at the price of Kshs 20,000,000. Part of the purchase price for Waitaluk/Mabonde Block12/ Sirende/140 had been transferred from account number 1154300986 held in the name of Waluco Enterprises, the 2nd respondent's business name.

233. Out of the Kshs 72,051,077 transferred from NYS to account number 1181363756 held at the KCB Bank in the name of Annway Investment, approximately Kshs 23 million was withdrawn in cash. Other funds were transferred from the Annway Investment account to the accounts of Lucy Wambui Ngirita at A/C numbers [...],[...] and [...] held at the KCB Bank, and were part of the funds used to purchase land parcel numbers Naivasha/Municipality Block 2/884 at Kshs 46,000,000 and L.R No. 8208/4 Nakuru East at Kshs 7,000,000.

234. The contention of the Agency and the evidence placed before the court with regard to the motor vehicles is that they were also purchased from the NYS funds and were suspected to be proceeds of crime. The chattels mortgages for these vehicles were taken long after their purchase.

235. A search conducted on 13th September 2018 at the NTSA offices established that motor vehicle registration number KCH 600H Toyota station wagon blue in colour manufactured in 2016 was registered in the name of Lucy Wambui Ngirita and Platinum Credit Limited, the 1st Interested Party. On 19th July 2017, the 2nd respondent had taken a chattel's mortgage for Kshs. 2,000,000/= from the 1st Interested Party. A valuation of the vehicle by Regent Automobile Valuers and Assessors dated 18th July 2017 provided to the Agency by the 1st Interested Party showed that the motor vehicle, a Toyota Land Cruiser V8, had a market value of Kshs. 14,400,000.

236. KCH 753U, a Toyota station wagon green in colour was registered in the name of the 1st respondent and the 2nd Interested Party. KCH 889M Toyota pick-up was registered in the name of the 3rd respondent and the 1st Interested Party. The 3rd respondent had, on 6th June 2017, taken a chattel's mortgage for Kshs.1,295,000/= from the 1st Interested Party at an interest rate of 6% per month on the security of motor vehicle registration number KCH 889M Toyota Hilux. A valuation report dated 5th June 2017 by Regent Automobile Valuers and Assessors indicated the value of the motor vehicle at Kshs. 2,720,000.

237. The 1st respondent had also taken a chattels mortgage on 20th July 2017 for Kshs.900,000/= from the 1st Interested Party at the same interest rate as the other respondents. The motor vehicle, Toyota Land Cruiser V8 registration number KCH 753U was valued at Kshs. 1,950,000. It is the Agency's contention that these vehicles were not financed by the 1st Interested Party. It only advanced

a credit facility of Kshs 900,000, Kshs. 2,000,000 and Kshs 1,295,000 to the 1st, 2nd and 3rd respondents respectively. The chattels mortgages between the respondents and the 1st Interested Party did not state the purpose of the money, and the difference between the values of the motor vehicles and what was advanced, in the view of the Agency, clearly shows that the transactions between the respondents and the 1st Interested Party was a money laundering scheme and the motor vehicles are therefore proceeds of crime.

238. I observe here that the Agency's case with respect to the loan to the 1st respondent is not quite accurate. The case presented by the 1st Interested Party is that it only had chattels mortgages with the 2nd and 3rd respondents. The 2nd Interested Party had advanced a loan of Kshs 800,000 to the 1st respondent on the security of motor vehicle registration number KCH 753U. The funds advanced are still in the 1st respondent's account and are the subject of the application for exclusion by the 2nd Interested Party.

239. I have considered the evidence presented by the Agency and its submissions on the issue. Under POCAMLA, the Agency is required to show, on a balance of probabilities, that the assets at issue are proceeds of crime. What we have in this case is a family of three, mother, daughter and son. The 1st respondent received from NYS Kshs 57,000,000 in her personal account; the 2nd respondent, as Ngiwaco and Waluco Enterprises, Kshs 263, 385, 849; the 3rd respondent, Kshs 87, 931,482. Between them, they received approximately Kshs 400 million on from the NYS, a public entity, in a period of two years or so. If the Kshs 72 million deposited in the account of Ann Wambere Wanjiku Ngirita is added, the total comes close to 500 million. In one day, the 17th -18th of October 2016, they received over Kshs 133 million, deposited in their respective accounts in different tranches.

240. The evidence further indicates that in the period during which the respondents received the funds from the NYS, they went on something of a spending spree. They not only purchased the three motor vehicles, but they also purchased the real properties which are also the subject of this application. These properties- title number Waitaluk/Mabonde Block 12/Sirende/410; title No. Naivasha/Municipality Block 2/884, title No. L.R 8208/4 Nakuru East, title No. Njoro/Ngata Block 1/7436 and title number Naivasha/Mwichiringiri Block 4/22367 were purchased by the 2nd and 3rd respondent pursuant to sale agreements dated 2nd June 2016, 8th July 2016, 25th April 2017; and 28th October, 2016 respectively. The last property, Naivasha/Mwichiringiri Block 4/22367, was registered in the name of the 3rd respondent on 1st July 2016. The Agency has placed copies of the sale agreements in evidence.

241. The respondents have not denied the averments that they purchased these properties at the time alleged by the Agency by way of the sale agreements placed before the court. Their response to these contentions is that the Agency is violating the rights of the registered owners by applying for the forfeiture of the properties without the registered owners being heard. I observe here that the registered owners had a right to approach the court for exclusion orders under section 93 of POCAMLA.

242. What we have then, is a family, operating in their business names, into which a State entity deposits public funds in excess of Kshs 400 million.

243. Perhaps there are gifted families in Kenya who are entrepreneurs extraordinaire, who can, in their individual capacities, with their business names creatively named Waluco, Njewanga Ngiwaco, and JerryCathy, transact business with State entities in a brief two years' period worth Kshs 400 million, out of which Kshs133 million is paid in a single day. But that is a big perhaps. From the material placed before me by the Agency, one is constrained to draw the inference that the transactions which resulted in these deposits were of a criminal nature. It beggars belief that it is possible for public funds to be legitimately transmitted to individual accounts in such a manner.

244. The Agency has therefore, in my view, placed before the court material on the basis of which it can validly be questioned whether the properties that were purchased in the period during which the funds were deposited in the respondents' accounts were proceeds of crime. Which then shifts the burden of proof to the respondents to show that the properties were acquired from legitimate sources and were not proceeds of crime.

245. The respondents have argued at length about the burden of proof placed on the Agency in this case. They contend that the burden is below the standard in criminal cases, beyond reasonable doubt, but above a balance of probabilities, because there is an allegation of fraud made. I observe, first, that given the legislative intent of POCAMLA, this is a misreading of the law. The Act provides for civil forfeiture, and there is no requirement that anyone should be proved to have committed any offence, including fraud.

246. More importantly, the legislation in question is specific on the burden placed on the Agency in matters such as this. Section 92 (1) empowers the court to make a forfeiture order if it is satisfied, on a balance of probabilities, that the properties in question are proceeds of crime.

247. In **Miller v. Minister of Pensions [1947] 2 All ER 372**, Denning, MR, in discussing the burden of proof in civil cases, stated as follows:

"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."

248. From the evidence presented above, I am satisfied that the Agency has placed sufficient material before the court to require the respondents to explain the basis of the massive deposits that they received from the NYS, and the source of the funds from which they purchased the properties the subject of this application. I say this bearing in mind the observations of courts with respect to the failure or inability of a party to explain the sources of its funds. In **Assets Recovery Agency –vs- Fisher, Rohan and Miller (supra)** the court observed that:

".....Even though these proceedings are quasi Criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousand of United States dollars without more."

There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence. is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.

This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 14th August, 2007.

This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The money was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets..."

249. See also my decisions in **Assets Recovery Agency v James Thuita Nderitu & 6 Others [2020] eKLR** and **Assets Recovery Agency vs Lillian Wanja Muthoni Mbogo & others, ACEC MISC APPL No 58 of 2018**.

250. It was thus incumbent on the respondents to demonstrate that the properties in this case were not purchased from proceeds of crime; that the millions deposited in their accounts from the NYS were properly proceeds from legitimate business conducted with the NYS.

251. This is what I have gathered as the respondents' explanation for the millions of funds deposited in their accounts from the NYS. The respondents had started their small supply businesses in 2002, 1966 and 2003 respectively. They have grown these businesses into huge enterprises with several divisions and compartments. They have broad sources of income that together explain the sources of their wealth. They have cultivated and supplied vegetables and fruits, including maize, cabbages, onions and tomatoes, water melons, oranges, passion, guavas and bananas to the NYS and other entities. They have also supplied uniforms, firewood, bread, mandazi and mahamri to the NYS, and without their efforts and supplies to the NYS, sometimes done in difficult circumstances, the over 10,000 NYS youths would have starved.

252. The respondents have placed before the court copies of documents which they allege are evidence of the tenders and supplies of goods to the NYS and other government agencies. What is notable about these documents is that for the most part, they date back to 2004-2005. In the case of those which are within the period within which they allegedly supplied goods to the NYS and the funds at issue were deposited into their accounts, there is none that approaches the value of the monies paid into their accounts. In the case of the 1st respondent, for instance, she alleges that she had supplied goods worth Kshs Kshs 38,698,970 to the NYS.

253. An analysis of the four LPOs that the 1st respondent trading as Njewanga Enterprises relies on namely 2554124, 2141333, 2474625, and 2172521 dated 19th June 2015, 30th January 2014, 13th May 2015 and 25th March 2014 (annexure PNN) respectively shows that the total amount that is supported by evidence is Kshs 5,824,210. It is not the Kshs 38,698,970 that the 1st respondent alleged she had undertaken. The LPOs are for the supply of watermelon and cabbages worth Kshs 1,539,150; English potatoes, watermelon and cabbages worth Kshs 1,210,000; watermelon worth Kshs 3,000,000; and cabbages, onions and greengrams worth Kshs 785,060, making a total of Kshs 5,824,210.

254. The 1st respondent alleged that she had worked in Germany in 2006 and 2007 and saved 120,000 Euros which she had invested in the family business. She had started a business known as Njewanga Enterprises on or about 20th June 2013.

255. The 2nd respondent had also engaged in vegetable business and a posho mill from which she earned enough to buy a property. She had borrowed Kshs 28,000,000/= to improve her property, and she had, in 2006, received a loan from her daughter, Jane Wangari Theile and her husband of Kshs. 10,708,400 to assist in expanding and improving her business. She had supplied, on diverse dates between 2002 and 2015, firewood, meat, powder milk, biscuits, and fruits to the Prison Department, Naivasha District Hospital, Naivasha TTI and NYS for a global sum of about Kshs. 41,876,527.

256. The 2nd respondent also alleged that she enjoyed overdraft facilities of Kenya Shillings three Million (Kshs. 3,000,000/=) at KCB Bank Gilgil Branch to service her contracts with the NYS She was also the owner of Ngiwaco Company Enterprises, traded as Ngirispa Enterprises, Annway Investment and Waluco Investments for a total amount of ksh.67,548,650/=. She also had been allowed, on 31st December 2013, to take goods on credit from Mahaver Stores Ltd worth more than Kshs 2, 671,220. The 3rd respondent's explanation is that he ran a shop in which he sold water melons.

257. The response from the Agency is that the allegations by the respondents are not borne out by the documents they have placed before the court. In the case of the 1st respondent, there is no evidence of a bank account into which the earnings from Germany were directed, or a visa or work permit to support her contention.

258. The contentions of the 2nd respondent are also not borne out by the documents she has supplied. Contrary to her assertions, she had not obtained a loan of Kshs. 28,000,000/= to improve her property, but Kshs 9, 750,000. As for the money allegedly advanced to her by her daughter in 2006, while there were no bank records to indicate receipt of the money, the affidavit sworn by her daughter annexed to her affidavit only shows that she intermittently sent, through Western Union, between 8th April, 2006 and 10th March 2011, a total of 9,050 Euro, the equivalent of Kshs 1,037,452.18.

259. With respect to the business enterprises of the respondents, the copies of documents placed before the court indicate that the 1st respondent registered her business name, Njewanga Enterprises, on 20th June 2013. The 2nd respondent registered Ngiwaco Enterprises on 18th June 2010. Jerrycathy Enterprises was registered as a business name on 27th May 2006, and was also registered under the 'Youth Access to Government Procurement Opportunities (YAGPO) on 14th October 2014.

260. I have considered the averments of the respondents with respect to their sources of funds and the documents that they have placed before the court. The bulk of the documents annexed to the respondents' affidavits go back some fifteen years or so, to 2005-2006, prior to the period within which they received the funds and purchased the assets the subject of this application. They comprise copies of mostly unsigned delivery notes for items such as firewood, cabbages, sukuma wiki, baked beans and oranges to the Naivasha District Hospital, 'the Commandant,' of the NYS, and the Ministry of Interior and Co-ordination of National Government.

261. There are also copies of *'letters of acceptance'* of tenders going back several years prior to 2013. Also included in their bundles are copies of letters purportedly from the *'Commandant'* of the NYS. The letters, such as two dated 11th February 2010 and 9th July 2013, require the respondents to *'supply cabbages on credit'* and to *"Treat this letter as an order since currently I do not have sufficient funds in my Vote Book to commit an L.P.O equivalent to this letter."*

262. Though the respondents have placed all these copies of documents before the court, some of which raise serious concerns about the way State entities deal with public funds and public procurement, none of them explains the vast sums of money deposited in their accounts in the 2015-2018 period. The respondents averred that they have grown their entities into *'huge enterprises with several divisions and compartments.'* I have not seen any evidence of these enterprises or the supplies business that they engage in, to support the large payments into the respondents' accounts. 'Huge enterprises' with divisions and compartments have books of accounts, stock registers, audited accounts and tax returns. To be able to supply goods worth in excess of Kshs 400 million, one

would expect to have warehouses where the stock is kept.

263. The respondents allege that the documents that could have explained the basis for the payments were with the NYS or were taken by the DCI. I note, however, that they all aver that they communicated with the NYS and were supplied with various documents. In any event, I have not heard them to say that their business documents such as stock registers, tax returns and audited accounts were also taken with the documents connected with the NYS transactions.

264. Taking all the facts of this case and the evidence placed before me by the Agency and the respondents, I am not satisfied that the evidence placed before me by the respondents demonstrates that they had the capacity to supply goods of the value of the money deposited in their accounts in the 2015-2018 period. In my view, the funds deposited in their account were therefore deposited there fraudulently, and the properties that they purchased in the period that they obtained the funds from NYS are therefore proceeds of crime.

265. The respondents have complained that they have been pursued aggressively and that there are double standards in pursuing them to the exclusion of others. They also allege that they were pursued because they fell out with a previous investigating officer from the DCI, whom they suggest that they were involved in the business of supplies with.

266. I make two observations on these contentions. First, it is probable, as they allege, indeed one could say that it is certain, that there are others involved in the siphoning of funds from the NYS who have not been pursued, or who have not been pursued with as much vigour as they have been. It is difficult not to draw this inference given the large amount of funds deposited by the NYS into the respondents' accounts. For that large amount of money to be deposited in their accounts in a short space of time, in some cases in a matter of days, would require a person within the NYS or the parent Ministry, with sufficient authority, to place his or her imprimatur on the transactions. The respondents are, in my view, mere minnows in the entire scheme to rob the public.

267. That, however, does not mean that the respondents should not be pursued, through proceedings for the forfeiture of the properties purchased from the said funds, for recovery of the public funds that went into their accounts. What is expected of the Agency and the other State agencies charged with investigation and prosecution of corruption offences, as well as with recovery of ill-gotten wealth, is that they will pursue the other beneficiaries with the same vigour and subject them to similar proceedings to recover the public funds lost in nefarious schemes such as were perpetrated at the NYS.

268. It is my finding, therefore, and I so hold, that the motor vehicles and real properties the subject of this application are proceeds of crime, and should be forfeited to the state.

269. Which brings me to a consideration of the last issue in this matter which arises out of the two applications by the Interested Parties.

Whether the Motor Vehicles in which the Interested Parties claim an interest should be excluded from the forfeiture orders

270. The 1st Interested Party's interest is in the two motor vehicles registered in the name of the 2nd and 3rd respondents. The 2nd Interested Party claims an interest in motor vehicle registration number KCH 735u or the funds deposited in the 1st respondent's account.

271. The Interested Parties' contentions that they advanced funds to the respondents on the security of the vehicles the subject of the forfeiture application have not been challenged. The Agency argues only that the interest of the 2nd Interested Party can only be considered after an order for forfeiture is made, and in respect of the funds in the 1st respondent's account, that it is not within the jurisdiction of this court to make an order with respect thereto. The Agency does not appear to have filed any documents in response to the claim by the 1st Interested Party.

272. Reliance has been placed by the Interested Parties on section 93 of POCAMLA, while the Agency relies on section 94 thereof. The 2nd Interested Party has also cited section 83 of POCAMLA, but at this stage in the proceedings, I believe the more apposite provision is section 93, which provides as follows:

1. Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—

(a) that the person was not in any way involved in

the commission of the offence; and

(b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property, the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

(Emphasis added)

273. Section 94 relied on by the Agency provides that:

(1) The High Court may, on application—

(a) under section 90(3);

(b) by a person referred to in section 91(1), and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

274. The Interested Parties have demonstrated that they acquired interests in the motor vehicles the subject of the application for forfeiture. In the case of the 1st Interested Party, it had advanced loans to the 2nd and 3rd respondents on the security of motor vehicles KCH 600H Toyota Station Wagon and KCH 889M, Toyota Pickup. In the case of the 2nd Interested Party, it advanced a loan to the 1st respondent on the security of motor vehicle registration number KCH 753U Toyota Station Wagon. The funds advanced are, however, still in the 1st respondent's account at KCB.

275. Section 93 of POCAMLA is intended to protect third parties in the circumstances set out under its provisions. The Agency did not place any material before the court on the basis of which the court could conclude that the Interested Parties were involved in the offences out of which the property the subject of forfeiture was acquired, or that they knew that the motor vehicles were tainted properties at the time they acquired such interests. There is a danger that a party who acquires property in circumstances similar to what is presently before me may obtain financing on the security of such properties with a view to concealing the source of the properties or defeating forfeiture proceedings, and those who acquire such interests may be complicit. However, no such evidence in this case has been placed before me by the Agency. That being the case, the interests of the Interested Parties merit the protection of the court under section 93 of POCAMLA.

276. In the case of the motor vehicles registered in the name of the 2nd and 3rd respondents and the 1st Interested Party, being motor vehicles KCH 600H Toyota Station Wagon and KCH 889M, Toyota Pickup, it is my finding and I so direct that though, from the Agency's evidence, they are proceeds of crime, they shall be excluded from the properties the subject of forfeiture to protect the interests of the 2nd Interested Party, Platinum Credit Limited.

277. With regard to motor vehicle registration number KCH 753U Toyota Station Wagon, I note that though it was used as security for a loan of Kshs 800,000 to the 1st respondent, the said amount is still held in the 1st respondent's account. The said amount is not subject to forfeiture and is properly due for refund to the 2nd Interested Party, Opportunity International WEDCO Limited. The said motor vehicle is accordingly liable to forfeiture to the State. The funds in the 1st respondent's account shall be released to the 2nd Interested Party.

278. I accordingly issue the following declarations and orders:

1. It is hereby declared that the following properties are proceeds of crime:

i. Motor vehicle registration number KCH 753U Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and Opportunity International WEDCO Limited;

ii. Motor vehicle registration number KCH 600H Toyota Station Wagon, 2016 blue in colour registered in the name of the 2nd respondent and Platinum Credit Limited;

iii. Motor vehicle registration number KCH 889M, Toyota Pickup, 2016 silver in colour registered in the name of the 3rd respondent and Platinum Credit Limited;

iv. Title No. Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA situated within Trans Nzoia county registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated 2nd June 2016;

v. Title No. Naivasha/Municipality Block 2/884 measuring o.2305HA, being leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014, sold by New Hope for all Nations Church to the 2nd respondent vide sale agreement dated 8th July 2016;

vi. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated 25th April 2017;

vii. Title No. Njoro/Ngata Block 1/7436, approximate area 0.0840ha. Subdivision of P/NO. 3283 sitated in Kiamunyi, Nakuru County registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated 28th October, 2016;

viii. Title No Naivasha/Mwichiringiri Block 4/22367 approximate area 0.0450, subdivision of P/NO. 17217 registered in the name of the 3rd respondent on 1st July 2016.

2. It is hereby declared that the following properties shall be forfeited to the State and transferred to the Agency:

i. Motor vehicle registration number KCH 753U Toyota Station Wagon, 2009 green in colour registered in the name of the 1st respondent and Opportunity International WEDCO Limited;

ii. Title No. Waitaluk/Mabonde Block 12/Sirende/410 measuring 0.70HA situated within Trans Nzoia County registered in the name of Sylvia Ajiambo Ongoro but sold to the 2nd respondent vide sale agreement dated 2nd June 2016;

iii. Title No. Naivasha/Municipality Block 2/884 measuring o.2305HA, being leasehold from the County Government of Nakuru for the term of 99 years from 1st September 2014, sold by New Hope for all Nations Church to the 2nd respondent vide sale agreement dated 8th July 2016;

v. Title No. L.R 8208/4 Nakuru East measuring quarter of an acre registered in the name of John Wachira Wahome but sold to the 2nd respondent vide sale agreement dated 25th April 2017;

v. Title No. Njoro/Ngata Block 1/7436, approximate area 0.0840ha. subdivision of P/NO. 3283 situate in Kiamunyi, Nakuru County registered in the name of Robin M. Aondo but sold to the 3rd respondent vide sale agreement dated 28th October, 2016;

vi. Title No Naivasha/Mwichiringiri Block 4/22367 approximate area 0.0450, subdivision of P/NO. 17217 registered in the name of the 3rd respondent on 1st July 2016.

3.It is hereby ordered that the amount of Kshs 800,000 held in the 1st respondent's account in Kenya Commercial Bank, Account Number [...] shall be released to the 2nd Interested Party.

280. The law is that costs follow the event. The respondents shall meet the costs of the Agency and the Interested Parties.

Dated Delivered and Signed at Nairobi this 26th day of August 2020.

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this Judgment has been delivered to the parties online with their consent, the parties having waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS APPLICATION NO 78 OF 2017

THE ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

CHARITY WANGUI GETHI.....1ST RESPONDENT

SAMUEL MDANYI WACHENJE Alias SAM MWADIME.....2ND RESPONDENT

JUDGMENT

1. This application is brought pursuant to the provisions of section 81, 82, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act (hereafter 'POCAMLA') as read with Order 51 of the Civil Procedure Rules). In the application dated 13th November 2017, the applicant, the Assets Recovery Agency (hereafter 'The Agency') seeks the following orders:

1. THAT this Honourable Court be pleased to issue an order declaring that funds amounting to Kshs 97,682,424 held in the names of the 1st and 2nd Respondents in the following bank accounts are the proceeds of crime and liable for forfeiture to the Government;

a. Kshs 79,676,505 in Account number [**********] at Faulu Kenya Limited Nairobi in the name of Charity Wangui Gethi.

b. Kshs 10,000,000 in Account number [**********] at Family Bank Limited, Ruaka Branch in the name of Sam M. Mwadime.

c. Kshs 7,801,919 in Account number [**********] at Standard Chartered Bank Ruaraka Branch, in the name of Charity Wangui Gethi.

d. Kshs 204,000 in Account Number [**********] at Old Mutual Money market Fund Nairobi in the name of Charity Wangui Gethi.

2. THAT this Honourable Court be pleased to issue an order that the above funds be forfeited to the Government and transferred to the Applicant.

3. THAT this Honourable Court do make any other ancillary orders it consider appropriate to facilitate the transfer of the forfeited funds to the Government of Kenya.

4. THAT costs of the application be provided for.

2. The application is supported by two affidavits. One is sworn by Ms. Muthoni Kimani, the Director of the Agency, and the other by Cpl. Sautet Jeremiah Matipei on the 13th of November 2017. The application is premised on fourteen grounds set out on the face of the application.

3. The Agency states that it is established under section 53 of the POCAMLA as a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. Under section 90 in Part VIII of POCAMLA, it is authorized to institute civil forfeiture proceedings and seek orders forfeiting to the government all or any of the property that is subject to the preservation orders.

4. The 1st respondent, Charity Wangui Gethi, is a resident of Nairobi. She is described as the beneficiary of Kshs 87,682,424 held in various bank accounts which were part of Kshs 791,385,000 stolen from the National Youth Service (NYS) as follows:

i. Kshs 79,676,505 in Account number [**********] at Faulu Kenya Limited.

ii. Kshs 7,801,919 in Account number [**********] at Standard Chartered Bank, Ruaraka Branch.

iii. Kshs 204,000 in Account Number [**********] at Old Mutual Money Market Fund.

5. The 2nd respondent, Samwel Mdanyi Wachenje *alias* Sam Mwadime is described as the named beneficiary of Kshs 10,000,000 held at Family Bank Kagwe Branch. The said funds are also alleged to be part of Kshs 791,385,000 stolen from the NYS.

6. According to the Agency, the Directorate of Criminal Investigations (DCI) conducted investigations of the theft and fraud of the said sum of Kshs 791,385,000 from the National Youth Service (NYS), State Department of Planning in the Ministry of Devolution. It established that payments amounting to Kshs. 791,385,000 were unlawfully paid to three business entities, Form Home Builders, Roof and All Trading and Reinforced Concrete Technology all owned by one Josephine Kabura Irungu. The said funds were subsequently transferred to the above stated bank accounts belonging to the respondents. On 6th October 2015, 8th December 2015 and 15th December 2015, the court had issued orders to investigate, search and seize accounts suspected to have received money stolen from the NYS. The said orders had been served on the banks freezing the respondents' accounts holding Kshs 97,682,424 which investigations established was part of the Kshs 791,385,000 stolen from the NYS.

7. The Agency asserts that the said amount was transferred to the said bank account through complex money laundering schemes contrary to POCAMLA. The investigations have also resulted in the criminal prosecution of the respondents and others in Nairobi Chief Magistrate's Court (Milimani) Criminal Case No 1905 of 2015 and Nairobi Chief Magistrate's Court (Milimani) Criminal Case No. 301 of 2016.

8. On 31st July 2017 and 7th August 2017, the court issued preservation orders in Misc. Application No. 61 of 2017 prohibiting the respondents and or their agents or representative from transferring or dealing with the said Kshs 97,682,424. The preservation order was gazetted by the Agency on 18th August 2017 vide Gazette Notice No. 1046 pursuant to section 83 of POCAMLA.

9. It is the Agency's case that there are reasonable grounds to believe that the funds held in the respondents' bank accounts are directly from the NYS and were transferred to the respondents' accounts in order to conceal, disguise, and hide the source of the funds. The Agency therefore pleads that it is in the interests of justice that the orders that it seeks against the respondents be granted.

The Pleadings

10. The affidavit of the Director of the Agency, Muthoni Kimani, reiterates the grounds forming the basis of the application. She places in evidence copies of the court orders issued on 6th October 2015, 8th December 2015 and 15th December 2015 authorising the DCI to investigate, search and seize funds held in the respondent's bank accounts (Annexure MK1). The orders were served on the respective banks. A copy of the charge sheet (annexure MK2) against the respondents and others in Nairobi Chief Magistrate's Court (Milimani) Criminal Case No 1905 of 2015 and Nairobi Chief Magistrate's Court (Milimani) Criminal Case No. 301 of 2016 is also exhibited. Ms. Kimani avers that on 31st July 2017 and 7th August 2017, the court issued preservation orders (annexure MK3) in Misc. Application No. 61 of 2017 prohibiting the respondents and or their agents or representative from transferring or dealing

with the said sum of Kshs 97,682,424. A copy of the Gazette Notice No. 1046 in respect of the preservation orders pursuant to section 83 of POCAMLA (annexure "MK4") is also exhibited in evidence.

11. The substance of the Agency's case is set out in the affidavits sworn by No. 75821 Cpl. Sautet Jeremiah Matipei, a police officer attached to the Agency. He deposes in detail regarding the investigations that culminated in the present matter. It is his deposition that he was a member of the team assigned to undertake investigations into allegations of attempted theft of approximately Kshs. 695,000,000, part of the funds allocated to the NYS development budget, for civil works and other infrastructure projects. The investigations had established that in the 2014/2015 financial year, between December 2014 and March 2015, huge payments amounting to Kshs. 791,385,000 had been paid by the NYS. The payments had been made to various entities in their bank accounts as follows:

a) Kshs. 218,925,000 to a/c no [**********] held at Family Bank, KTDA Plaza, Nairobi, in the name of Form Home Builders on diverse dates between 22nd December, 2014 and 21st January, 2015.

b) Kshs. 252,300,000 to a/c no [**********] held at Family Bank KTDA Plaza, Nairobi, in the name of Roof and All Trading on diverse dates between 5th February, 2015 and 27th March, 2015.

c) Kshs. 320,160,000 to a/c no [**********] held at Family Bank, KTDA, Plaza Nairobi, in the name Reinforced Concrete Technologies on diverse dates between 5th February, 2015 and 31st March, 2015.

12. Cpl. Matipei had obtained court orders (annexure 'SJM-1) authorizing the investigations and search of the said bank accounts. He had served the court order on Family Bank Head Office. A search at the Companies Registry at Sheria House, Nairobi on the ownership of the business entities established that they were all registered by one Josephine Kabura Irungu as the sole proprietor on 12th and 13th November 2014. Their business was indicated as trading in general merchandize and general supplies. Copies of the certificates of business registration (annexure 'SJM-2') were exhibited in evidence.

13. Investigations had also established that the bank accounts were opened by Josephine Kabura Irungu within a two-day period. The account by Form Home Builders was opened on 14th November 2014 while the accounts for Roof and All Trading and Reinforced Concrete Technologies were opened on the same day, the 13th of November 2014. The account opening forms and bank statements (annexure SJM-3') indicated that at the time of receipt of payments from the NYS, all the accounts had nil balances. Upon payment of the funds into the accounts, the funds were immediately transferred to other bank accounts. Kshs 97,682,424 which, according to the Agency, was part of the Kshs. 791,385,000 stolen from the NYS through Josephine Kabura Irungu's businesses entities, was transferred into the respondents' bank accounts set out above.

14. Cpl. Matipei avers that their investigations established that out of the payments received by Josephine Kabura Irungu from the NYS, a sum of Kshs. 381,000,000 was internally transferred by Josephine Kabura Irungu to the accounts of one John Kago Ndungu (Kago) at Family Bank, Cargen Branch on diverse dates between 20th January and 9th June 2015. Within this period, Kshs 273,000,000 was transferred to account number [**********] held in the name of John Kago Ndungu.

15. Between 10th April and 9th June 2015, Kshs. 108,000,000 was transferred to account number [**********] held in the name of Good Luck Twenty Eleven Enterprises, a business entity owned by Kago. This is demonstrated by annexure 'SJM-4, comprising copies of John Kago Ndungu and Goodluck Twenty Eleven Enterprises Family Bank account statements and a bundle of teller's transaction detail showing the deposits and transfers from the said account, The account opening forms indicate that the accounts had been opened by Kago. Account number [**********] in the name of Good Luck Twenty Eleven Enterprises had been opened on 7th March 2015.

16. Out of the sum of Kshs.273, 000,000 that he received in his bank account number [**********] from Josephine Kabura Irungu, Kago transferred through RTGS (annexure SJM - 5) a sum of Kshs.103, 000,000 to K-Rep Bank account number [**********] in the name of Ogola and Company Advocates between March 2015 and June 2015. In addition, out of the Kshs 108,000,000 that Kago received through Good Luck Twenty Eleven Enterprises account number [**********], he transferred through RTGS ("SJM-6") on 25th May 2015 a sum of Kshs.10, 000,000 to K-Rep Bank account number [**********] held in the name of Ogola and Company Advocates. The firm of Ogola and Company Advocates had therefore received Kshs.113, 000,000 in its bank account number [**********] held at K-Rep Bank, Kilimani Branch. From these funds, Ogola and Company Advocates transferred Kshs 79,676,505 to the 1st respondent's account number [**********] at the Faulu Kenya Limited.

17. From the statement made to the Agency by Patrick Ogola ("SJM-7") it emerges that on 28th May 2015 the said Advocates, out of the Kshs.113, 000,000 received from Kago, transferred Kshs. 20,000,000/= from the firm's bank account No. [**********] held at K-Rep Bank to Faulu Kenya Limited account number [**********] held at Bank of Africa as an investment for the 1st respondent in her account number [**********] held at the said Faulu Kenya Limited.

18. It is the Agency's case further that on 8th April 2015, Kago transferred through RTGS (SJM-8) Kshs.78, 000,000 out of the 273,000,000 held in Family bank account number [**********] to M.M Gitonga and Associates Bank account number [**********]held at Prime Bank. Thereafter, on 5th June 2015, Martin Muthomi of M.M. Gitonga and Company Advocates transferred Kshs. 30,000,000/= out of the Kshs. 78,000,000 received from Kago through RTGS (SJM-9) from account number [**********] held at Prime Bank to Faulu Kenya Limited bank account number [**********] held at Bank of Africa as an investment for the 1st respondent in her account number [**********] held at the said Faulu Kenya Limited.

19. On the same day, 5th June 2015, Martin Muthomi of M.M. Gitonga and Company Advocates transferred through RTGS a further Kshs. 30,000,000/= from the same account number [**********] held at Prime Bank to Faulu Kenya Limited bank account number [**********] held at Co-operative Bank of Kenya through RTGS (SJM-10) as an investment for the 1st respondent in her account number [**********] held at the said Faulu Kenya Limited.

20. Cpl. Matipei avers that on 8th December 2015, he obtained orders vide Milimani Chief Magistrate's Court Miscellaneous Criminal Application Number 2549 of 2015 (SJM-11) to investigate, search and seize the funds held in the 1st respondent's bank account number [**********] held at Faulu Kenya Limited, where a total of Kshs 80,000,000 had been transferred by Martin Muthomi of M.M. Gitonga and Company Advocates. He had served the court order on the same date upon Faulu Kenya Limited and found that account number [**********] had a balance of Kshs 79,676,505 as evidenced by annexure "SJM-12", a copy of the Faulu Microfinance Bank Limited account statement for account number [**********]. He had frozen the said funds as part of the funds stolen from NYS.

21. With regard to the sum of Kshs 7,801,919 held in the 1st respondent's Standard Chartered Bank account number [**********], Ruaraka Branch, the following narrative emerges from the Agency's averments. On 28th May 2015, Patrick Ogola transferred, through RTGS, Kshs 18,000,000 out of the Kshs.113, 000,000 he had received from Kago from his bank account No. [**********]at K-Rep Bank to the 1st respondent's Old Mutual Money Market Fund Account No. [**********]. This can be discerned from annexure SJM-13, a copy of the 1st respondent's Old Mutual consolidated account statement and a written statement by Harrison Gongo, the Retail Operations Manager at Old Mutual Kenya.

22. The 1st respondent's statement of account (SJM-14) shows that on 26th August 2015, the 1st respondent had redeemed Kshs.15, 000,000 from Old Mutual Money Market Fund Account No.80356 and transferred the funds to her Standard Chartered Bank Ruaraka Branch account number [**********]. On 23rd September 2015, she had further redeemed another Kshs.20, 000,000 from her Old Mutual Money Market Fund Account No. and transferred the said amount to her Standard Chartered Bank Ruaraka Branch, account number [**********] . This is evidenced by a letter (SJM 12) dated 18th September 2015 from the 1st respondent to the Manager of Old Mutual.

23. Cpl. Matipei had obtained orders (annexure SJM-15) on 15th December 2015 in Miscellaneous Criminal Application No. 2597 of 2015 to investigate the 1st respondent's Standard Chartered Bank Ruaraka Branch account number[**********]. He had served the said orders upon Standard Chartered Bank Head Office and had found a balance of Kshs.7, 803,119 in the 1st respondent's Standard Chartered Bank account number [**********] as emerges from her bank statement (annexure SJM14).

24. The Agency further seeks forfeiture of a sum of Kshs 204,000 held in the 1st respondent's Old Mutual Money Market Fund Account Number [**********]. It is averred on its behalf that from the sum of Kshs. 113,000,000 received by Ogola and Company Advocates from Kago on 28th May 2015, Patrick Ogola transferred a sum of Kshs. 18,000,000/= from his bank account No. [**********] at K-Rep Bank to the 1st respondent's Old Mutual Money Market Fund Account No. [**********]. The Agency relies in support on annexure SJM 13, a copy of the 1st respondent's Old Mutual consolidated account statement.

25. Similarly, the firm of M.M. Gitonga and Associates had, on 11th June 2015, transferred through RTGS (annexure SJM-16) a sum of Kshs. 17,600,000/= to the 1st respondent's account. This amount was the balance, less a sum of Kshs. 400,000 deducted as legal fees, of the Kshs. 78,000,000 received from Kago from account No. [**********] held at Prime Bank to the 1st respondent's Old Mutual Money Market Fund Account No. [**********].

26. The Agency had, on 8th December 2015, applied for and obtained orders (annexure 11) vide Miscellaneous Criminal Application No. 2549 of 2015 to investigate the 1st respondent's Old Mutual Money Market Fund Account No. [**********]. The orders had been served on Old Mutual Money Market and the Agency had found that the 1st respondent's Old Mutual Money Market Fund Account No. [**********] had a balance of Kshs. 204,000 which the Agency preserved as it was part of the funds stolen from NYS. A copy of the 1st respondent's Old Mutual Money Market Fund consolidated account number [**********] (annexure 13) is exhibited in evidence.

27. As pertains to the Kshs 10 million in the 2nd respondent's Family Bank account number [**********], Kagwe Branch, the Agency's case is as follows. On 31st March 2015, Josephine Kabura Irungu transferred internally a total of Kshs.20,000,000 from Reinforced Concrete Technologies bank account number [**********] to one Sam M. Mwadime's Family Bank Kagwe Branch account number [**********]. In support of this averment, the Agency relies on annexure 'SJM-17", a bundle of documents comprising copies of the Family Bank account statements of Sam Mwadime and tellers' transaction details of 31st March 2015 from Family Bank KTDA Branch of Lillian Wangui, a teller in the said Branch. It also relies on a copy of Reinforced Concrete Technologies Family Bank account statement (annexure 3). According to the Agency, the bank accounts opening forms showed that account number [**********] was opened by the 2nd respondent on 22nd December 2014. At the time the amount of Kshs. 20,000,000 was transferred to it, the account had a nil balance and there were no other transactions.

28. The Agency's investigations established that the identification card number [**********] used to open the account was forged and belonged to Fatuma Osman Abdi. The ID serial number [**********] belonged to Samuel Kikongo Kihara. The Agency places before the court copies of the print outs from the National Registration Bureau of the forged identity card of the 2nd respondent in the name Sam Mwadime and the copies of the genuine identity card of the 2nd respondent in the name Samuel Mdanyi Wachenje (annexure 'SJM-18").

29. The Agency had further traced Kshs. 20,000,000 received from Josephine Kabura Irungu through the 2nd respondent's account at Kagwe Branch in the name Samuel Mdanyi Wachenje. The 2nd respondent had used the amount to purchase L. R No. 20857/190 situate in Kasarani from Esther Nthenya Nzioki and registered the property in the name of Susan Mkiwa Mdanyi. Copies of the land title, sale agreements and statements of Tirus Kamau Mutoru and Esther Nthenya Nzioka (annexure 'SJM-19") as well as a copy of the Family Bank account statement (annexure "SJM17") for Sam M Mwadime, were exhibited in evidence. It is the Agency's case that Sam M. Mwadime was Samuel Mdanyi Wachenje. Further, that the said Samuel Mdanyi Wachenje was the husband of Susan Mkiwa Mdanyi, the former Finance Director and alternate AIE Holder at the NYS. He had used funds from the said account at the Family Bank Kagwe branch to purchase two other properties known as Kasarani LR. No. [*******] and Plot LR. No. Ruiru Juja East Block [*******] in his wife's name.

30. The Agency had, on 6th October 2015, applied and obtained court orders (annexure "SJM20") to investigate, search and seize Sam M. Mwadime Family Bank account number [**********] at Kagwe Branch vide Nairobi Milimani Chief Magistrate's Court Miscellaneous Criminal Application No. 2034/15. He had served the said orders on the same date upon Family Bank Head Office and found a balance of Kshs.10 million in account number [**********] which he had frozen for further investigations.

31. It is averred on behalf of the Agency that its financial investigations have established that the total amount of Kshs 97,682,424 traced and deposited in the respondents' various bank accounts as detailed above is from the funds stolen from the NYS and is therefore liable for recovery by the Agency under POCAMLA. It asserts that from its investigations, there is sufficient evidence that the sum of Kshs 97,682,424 held in the respondents' respective accounts is proceeds of crime liable for recovery under POCAMLA.

32. In his further affidavit sworn on 23rd June 2020, Cpl. Matipei avers that the Agency had obtained preservation orders on 31st July 2017 preserving the funds held in the respondents' bank accounts the subject of this suit which are suspected to be part of the funds stolen from the NYS. The 1st respondent's account had received a total of Kshs 87,682,424 which was suspicious and suspected to be part of the funds stolen from NYS.

33. The Agency investigations further established that the 1st respondent is the Senior Administrative Assistant at the Ministry of Agriculture, Livestock and Fisheries. Her net salary between July 2015 and April 2016 was a total of Kshs 462,790.05. She had a net salary of Kshs 29,844.45 in July 2015; Kshs 124,622.30 in August 2015; Kshs 36,883.10 in September 2015; Kshs 35,466.20 in October 2015; and Kshs 35,931.50 in November 2015. In December 2015, she had a net salary of Kshs 41,123.50. In the period January to April 2016, the 1st respondent had a net salary of Kshs 37,023.50; Kshs 46,714.50; Kshs 37,590.50 and Kshs 37,590.50 respectively.

34. Cpl. Matipei avers that since the net salary of the 1st respondent between July 2015 and April 2016 was Kshs 462,790.05, the amount of Kshs 87,682,424 that she received in various accounts is suspicious in view of her net salary. The Agency places before the court copies of the 1st respondent's letter of appointment and her pay slips (annexure SJM1) to demonstrate the discrepancy between the amount she received and her net salary over the same period. In the Agency's view, the amount depicts a complex case of money laundering with the clear intention of concealing, disguising and hiding the source of funds and thereby accruing proceeds of crime to the 1st respondent.

35. Cpl. Matipei avers that contrary to the averments in his affidavit in support of the application sworn on 13th November 2017, between 20th January and 9th June 2015, there were suspicious cash deposits of approximately Kshs 273,000,000 deposited into Kago's bank account number [**********] held at Family Bank Ltd by Josephine Kabura Irungu, Ben Gethi and Kago himself. These three have been charged in Nairobi Chief Magistrate Criminal Case No. 1905 of 2015 and Nairobi Chief Magistrate Criminal Case No. 301 of 2016. The said amount is suspected to be part of the funds stolen from the NYS.

36. It is his averment further that on diverse dates between 10th April and 9th June 2015, Kago's business entity known as Good Luck Twenty Eleven Enterprises received suspicious cash deposits of Kshs 108,000,000 which is suspected to be part of funds stolen from NYS. The amount was transferred by an RTGS transaction dated 2nd April 2015. Its investigations established that the respondents' accounts received suspicious huge cash deposits and transactions depicting a clear case of money laundering with the intention of concealing, disguising and hiding the source of funds and thereby accruing proceeds of crime to the respondents. It is its averment that there are reasonable grounds to believe that the funds held in the respondents' bank accounts are proceeds of crime liable for recovery by the Agency under POCAMLA.

The Response

37. Although the 2nd respondent had entered appearance and was represented by Counsel, he did not file any response to the suit. The Agency's averments with respect to him are therefore uncontroverted. The court notes, though, that while the prayer in the Originating Motion with respect to the 2nd respondent refers to an account held in Family Bank, Ruaka Branch, the averments by Cpl. Matipei and the evidence before the court in the form of bank statements shows that the amount in question was deposited in the Kagwe Branch of Family Bank.

38. The 1st respondent opposed the Originating Motion and filed an affidavit in response sworn on 11th August 2020. She denies the averments and allegations in the application and affidavits in support. She avers that the present application is founded on orders granted in Misc. App No. 61 of 2017 which she was not made aware of and the Agency has all along acted in secrecy in obtaining the said orders. She dismisses the averments in the affidavit of Muthoni Kimani as based on hearsay and asks the court to disregard its contents.

39. With regard to the averments by Cpl. Matipei, it is her deposition that she has never been a beneficiary of any funds from the NYS either directly or through a third party. She has also not engaged in any business dealings with the NYS. She further denies having any personal or business relationship with Josephine Kabura Irungu or her three companies- Form Home Builders, Roof and All Traders or Reinforced Concrete.

40. According to the 1st respondent, all the funds in her accounts are her own funds sourced and received from a separate and different entity which does legitimate business. It is also her position that whether the sum of Kshs 791,385,000 paid to Josephine Kabura Irungu is stolen funds or legitimate payments is a matter yet to be determined by the court. She had not been called upon by the Agency to explain her source of funds nor was she given an opportunity to explain her bank transactions.

41. The 1st respondent further argues that the Agency has not provided any statement from Josephine Kabura Irungu linking her to the said funds or to her transactions with Kago from the said funds as averred by the Agency. She avers, however, that Kago was her agent whom she had engaged for the sole purpose of scouting, identifying and purchasing some property for her. She was not privy to any dealings he may have had with other persons outside the scope of her engagement with him. She relies in support of this averment on an affidavit sworn by Kago annexed to her affidavit as annexure "CWG1".

42. According to the 1st respondent, she and Kago had agreed that he would identify properties for her. If she visited them and decided that she wanted them, she would entrust to him funds for the purchase of the properties. When her health deteriorated, she would request her son, Ben Gethi, to work with Kago to safeguard her interests. She had given Kago a total of Kshs. 302,100,000 on various dates from November 2014. These funds had been sourced from Horizon Limited (Horizon) for the purpose of

investment. Kago had acknowledged receipt of the funds by way of acknowledgment receipts (annexure CWG 2).

43. The 1st respondent avers that the source of the Kshs 302,100,000 that she gave to Kago was Horizon. This was a company owned by her son, Benson Gethi. Horizon had given her the funds on the basis of an agreement she had with it as she had supported it when it was starting up. She deposes that the company is a duly incorporated company doing genuine business in Kenya. It has been engaged in business with the Government of Kenya, including the Ministry of Devolution and Planning, where it won competitive tenders to supply goods and was subsequently paid for the supplies in terms of the contracts entered into.

44. In support of this deposition, the 1st respondent relies on an affidavit annexed to her affidavit as annexure CWG 3 sworn by one Peter Anthony Mathenge (Mathenge) on behalf of Horizon. In further explaining the movement of funds in her account, the 1st respondent deposes that she was interested in two properties which she had visited and agreed to purchase. One of the properties was Rossyln plot No. LR [.....] at a cost of Kshs 63,513,000. Kago and Ben Gethi had identified Ogola & Company Advocates to represent her in the transaction. She had instructed Kago to send the purchase price for the property to the Advocates, which had been done.

45. The 1st respondent further avers that she had also instructed Kago to send, from the money she had previously given him, money to Ogola & Company Advocates for the purchase of yet another property. As this transaction did not succeed, she had instructed Kago to have the funds refunded to her. Reliance for this deposition is placed on a statement by the Advocate, Patrick Ogola (annexure CWG 4).

46. The 1st respondent avers that she had instructed Kago on various dates to send to Patrick Ogola Kshs 113 million for investment. He had sent the funds to Ogola & Company Advocates' account at K-REP Bank, account number [**********]. The money had been sent on diverse dates, with Kshs 40 million sent on 16th March 2015, Kshs 23,513,000 on 17th March 2015, Kshs 40 million on 25th May 2015 and Kshs 10 million on 25th March 2015. The firm of Advocates had then transferred from its bank account number [**********] to her Faulu bank account number [**********] Kshs. 12,000,000. This amount, according to the 1st respondent, was the amount remaining from the purchase price of the Rosslyn property.

47. She deposes that the balance of Kshs. 50,000,000 was part of the purchase price for a second property. The transaction was unsuccessful and she therefore instructed Ben Gethi to inform Patrick Ogola to refund the amount. This, according to the 1st respondent, is the amount that the firm of Ogola transferred in two tranches. First, Kshs. 20,000,000 was transferred to her Faulu Bank account on 28th May 2015 while Kshs 18,000,000,000 was transferred to her Old Mutual account.

48. With regard to the transfer of funds to the firm of M.M. Gitonga & Co. Advocates, the 1st respondent states that she had identified a lucrative opportunity to buy a stake in Community Development Systems Limited (CDSL). The transaction involved the purchase of a 10% stake in the company at Kshs. 157,500,000/= but the total stake was later reduced to 5% at Kshs 78,750,000/-. The agreement required the 1st respondent to deposit the amount with M.M Gitonga & Co. Advocates. CDSL was required to furnish the law firm with its details for purposes of due diligence checks. The 1st respondent therefore instructed Kago to transfer Kshs. 78,000,000/- to M.M Gitonga Advocates' bank account number [**********] at Prime Bank on 10th April 2015. She refers the court to the bank statement and swift transfers annexed to the affidavit of Cpl. Matipei as annexures 'SJM 4' and 'SJM 8' respectively. She also relies on annexure "SJM 10", the written statement of Martin Muthomi Gitonga, and a copy of the investment agreement with CDSL.

49. Like the property transactions, the business deal fell through and the 1st respondent requested Kago to instruct M.M Gitonga & Co. Advocates to refund the amounts sent to them, less legal fee of Kshs 400,000. On 5th June 2015, the firm sent Kshs. 60,000,000 to her Faulu Bank account and Kshs. 17,600,000 on 11th June 2015 to her Old Mutual account. It is her case therefore that all the funds in her account were sourced from Horizon and are legitimate funds sourced from a legitimate company doing legitimate business.

50. The 1st respondent denies being privy to information relating to the theft of funds from the NYS and in as far as they concern one Josephine Kabura Irungu and others. She had learnt of the matters through the media and after being served with the present application. She notes that an analysis of the documents annexed to the affidavit of Matipei relating to the bank statement of Form Home Builders, Reinforced Concrete Technologies and Roof and all Trading reveals that none of the RTGS transactions in the statements are to her or Kago. There are no bank receipts attached to show who withdrew the monies or where the monies were deposited; and that none of the funds from Form Home Builders had been transferred to her account.

51. The 1st respondent disputes the total amount received in the three companies' accounts, which she avers is Kshs. 404,800,000 and not Kshs. 791,853,000 as averred by the applicant. She specifically denies that any of Josephine Kabura Irungu's business entities transferred any part of the Kshs. 791,385,000 into her bank accounts. She further denies that the said Josephine Kabura Irungu transferred a sum of Kshs. 273,000,000 and/or Kshs. 108,000,000 into Kago's account or to the account of Good Luck Twenty Eleven Enterprises at Family Bank on diverse dates between 20th January and 9th June, 2015.

52. The 1st respondent alleges that the documents relied on in support of the application are manufactured, forged or falsified to show the occurrence of false transaction between Kago, Josephine Kabura Irungu and the three companies. She asserts that she is aware that Ogola and Company Advocates received Kshs. 113 Million into their K-Rep Bank account from Kago. This amount, however, was part of her money which she had given to Kago after sourcing it from Horizon.

53. The 1st respondent asserts that she has a constitutional right to own property; that there is no proof that she perpetrated the alleged fraudulent schemes and money laundering activities; that all the funds in her accounts came from Horizon and is not linked to the alleged funds from the NYS and the allegation that the funds are proceeds of crime are unfounded. She urges the court to find that the present application does not meet the threshold set by POCAMLA and to dismiss it with costs.

The Agency's Averments in Response

54. The Agency filed a Supplementary Affidavit sworn by Cpl. Matipei on 15th September 2020 in reply to the 1st respondent's affidavit sworn on 11th August 2020. Cpl. Matipei avers that he was part of the team of investigators investigating the theft of Kshs 791,385,000 from the NYS that occurred in 2014 and 2015. The investigations had established that a total of Kshs 791,385,000 was fraudulently paid to three business entities whose sole proprietor was Josephine Kabura Irungu. Kshs 218,925,000 was deposited in account number [**********] held at Family Bank KTDA Plaza in the name of Form Home Builders on diverse dates between 22nd December 2014 and 21st January 2015. Between 5th February 2015 and 27th March 2015, Kshs 252,300,000 was deposited in account number [**********] held at Family Bank KTDA Plaza, Nairobi in the name of Roof and All Trading.

55. Finally, that on diverse dates between 5th February 2015 and 31st March 2015, Kshs 320,160,000 was fraudulently paid to account number [**********] held in the name of Reinforced Concrete Technologies at Family Bank KTDA Plaza, Nairobi. The said Josephine Kabura Irungu did not file any tax returns for the above business entities with the Kenya Revenue Authority (KRA), nor did she declare any income despite receiving funds. Reliance for this averment is placed on a copy of a letter from KRA (annexure SJM1) to this effect. According to Cpl. Matipei, their investigations had traced Kshs 97,682,44 of the amount unlawfully paid out from the NYS in the 1st and 2nd respondents' bank accounts.

56. The Agency disputes the contention by the 1st respondent that the funds transferred to her account were from Horizon. He notes that no evidence has been placed before the court to show the alleged support that she gave to Horizon, nor has she produced any evidence to show that the amount of Kshs 302,100,000 was sourced from Horizon. Further, that the 1st respondent has not produced any evidence to show that the Bank Manager had made inquiries with regard to the source of funds transferred to Kago's bank accounts.

57. The Agency contends that the allegation in the affidavit of Peter Anthony Mathenge annexed to the 1st respondent's affidavit (annexure CWG3) that Horizon has been doing genuine business and filed their tax returns is false. Cpl. Matipei avers that investigations established that in 2015, Horizon filed nil return despite receiving income of more than Kshs 242,790,015. A letter from the KRA (annexure 'SJM3') to this effect is relied on in support. As for the reliance by the 1st respondent on the letter dated 27th March 2018 from the Office of the Director of Public Prosecution (ODPP) (annexure PW3 in the affidavit of Peter Anthony Mathenge), the Agency avers that the letter is from an independent institution whose constitutional and statutory mandate is distinct from that of the Agency. Accordingly, the Agency, whose mandate is to identify, trace, freeze, seize and recover proceeds of crime, is not bound by the said letter nor is it prevented from executing its mandate in recovery of proceeds of crime.

58. The Agency dismisses the purported report by a Dr. Njoroge O. Kimani (annexure PM2 in the affidavit of Peter Anthony Mathenge) as of no value. It is its averment that the investigation of theft of funds from the NYS was conducted by independent institutions established and mandated by the law to conduct investigations. The investigations traced funds in the 1st and 2nd respondent's bank accounts which are proceeds crime. It is its case further that investigations in Kenya are conducted by the Kenya Police as provided under the National Police Service Act and not an individual.

59. The Agency further avers that Family Bank Ltd, where Josephine Kabura Irungu's business entities as well as Kago and

Horizon held their accounts was fined by the Central Bank of Kenya in its administrative enforcement of Prudential Guidelines for breach of banking regulations and failure to report suspicious transactions.

Additional Pleadings

60. In accordance with the rules of civil procedure which govern civil forfeiture under POCAMLA, the pleadings summarized above should have marked the end of the pleadings by the parties. However, the 1st respondent filed a Further Replying Affidavit, without the leave of the court, which she swore on 20th September 2020. Upon hearing the submissions of the parties on whether or not to expunge the affidavit as prayed by the Agency, I granted the 1st respondent's plea that the affidavit be admitted into the record and deemed as duly filed. However, I allowed the Agency to file a further affidavit in response.

61. The Agency filed an affidavit in response sworn on 4th November 2020 by Cpl. Matipei. The Agency also requested for a mention of the matter in court on the basis that investigations had established that one of the affidavits annexed to the 1st respondent's Further Replying Affidavit, purportedly sworn by one Meldon Awino Anyango, was a forgery. The matter was placed for mention before me on 5th November 2020.

62. I heard the submissions of the parties and considered the contents of the 1st respondent's Further Replying Affidavit and the Replying Affidavit by the Agency. This latter affidavit included a statement by the said Meldon Awino Anyango that she had not sworn any affidavit and the affidavit attributed to her was a forgery. Upon considering the matter, I directed that any references in the affidavit of the 1st respondent and reliance on the affidavit allegedly sworn by one Meldon Awino Anyango which the alleged deponent disowned would be expunged from the record.

63. In the Further Replying Affidavit, the 1st respondent for the most part reiterates the averments set out in her affidavit sworn on 11th August 2020 in reply to the application as well as the affidavit of Peter Anthony Mathenge annexed to her affidavit in reply. She further avers that the tax matters relating to Horizon were investigated and cleared by both the DCI and DPP. She relies in support on a Further Affidavit (annexure (CWG-7) sworn by Mathenge on behalf of Horizon. It is her deposition on the basis of this affidavit that KRA reviewed Horizon's supply documents in relation to its dealings with the NYS which included the year 2015. Its income for the year 2015, according to the 1st respondent, was Kshs. 142,800,015.60 and not Kshs 242,790.015 as alleged by Cpl. Matipei. It is also her averment, again on the basis of Mathenge's affidavit, that Horizon's return for the year 2015 have been amended and filed.

64. The 1st respondent avers that part of the funds targeted by the Agency is a sum of Kshs 67,500,000 which she had received from Horizon before 2015. In support of this deposition, the 1st respondent refers to Mathenge's affidavit (annexure CWG-3) annexed to her Replying Affidavit. She reiterates that Horizon was cleared of any wrong doing after an investigation by the DCI as directed by the Inspector General of Police. Support for this averment is sought in the letter from the DCI dated 8th May, 2017 (annexure PM-5 in Mathenge's affidavit) purportedly clearing Horizon of any wrongdoing.

65. The investigations, of which she was a target, involved determining the beneficiaries of the money paid to Horizon. It is her averment that the investigation concluded that she and her son, Benson Gethi as well as one George Kamia Kuvika were the beneficiaries of the monies from Horizon in respect of which no irregularity or illegality was found. The investigations, in her view, therefore confirm her assertion that she sourced her funds from Horizon and not from the Kshs. 791 million stolen from the NYS.

66. The 1st respondent further states that the narration in Kago's bank transaction document does not bear the name Josephine Kabura Irungu but the name Josephine Kabura. She contends that the Bank Manager, who was present during the said transactions and authorized the said deposits, had stated that the person mentioned in the statement is one Kabura Mumbi and not Josephine Kabura Irungu. In any event, the Agency has not provided any statement from Josephine Kabura Irungu linking the Kshs. 10,000,000 deposit into Kago's account on 20th January 2015 to monies withdrawn from Form Home Builders and therefore his conclusions are baseless and false. The 1st respondent avers that she has never at any point declared her salary as the source of her funds and reiterates that she has sourced her funds from Horizon.

67. Peter Anthony Mathenge, the Managing Director of Horizon Ltd, has sworn two affidavits which are annexed as exhibits to the affidavits of the 1st respondent. In his first affidavit (annexure CW3 in the replying affidavit), Mathenge avers that he is also the Managing Director of Ratego Technologies which is part of Horizon. He states that the 1st respondent had assisted them financially when they were starting up and after incorporation of Horizon as their capacity then was meagre. The company has been doing genuine business within Kenya and has been engaged in business with the government of Kenya, including the Ministry of

Devolution and Planning where it won competitive tenders to supply goods and was subsequently paid for the supplies as per the contracts entered into. Attached to his affidavit are what he refers to as copies of bank statement, contract documents and KRA documents as proof of the company's activities.

68. Mathenge deposes that on various dates from 12th November 2014 to 9th June (sic) 'they' advanced the 1st respondent various amounts totaling Kshs 302,100,000 (Kenya shillings three hundred and two million one hundred thousand) from Horizon. Mathenge avers that the funds given to the 1st respondent were from their bank accounts which they had withdrawn and given to her. He attaches copies of bank statements which he avers shows the various cash withdrawals made and given to the 1st respondent.

69. Mathenge further deposes that a Dr. Njoroge O. Kimani, a certified public accountant, forensic auditor and advocate of the High Court, produced an accurate, independently verified report after thorough perusal of the related accounting documents which highly contradicted the Agency's averments. The report had been copied to, among others, the Governor, Central Bank, the Inspector General of Police, Kenya Police Services, the Director of Public Prosecutions and the Chairman Ethics and Anti-Corruption Commission.

70. Mathenge deposes that he was summoned on various dates by the DCI and that he assisted the investigators with all documents relating to Horizon, including all transactions that it had done. He had been informed that the investigations were completed and the file forwarded to the DPP who agreed with the finding of the DCI and advised that the file on the matter be closed with no further police action. He deposes that Horizon was therefore investigated by the DCI and it was determined that its funds were from genuine and legitimate business. He had given the funds amounting to Kshs 302, 100,000 to the 1st respondent from various cash withdrawals from their bank accounts. He was aware that the 1st respondent had given the amount to Kago.

71. According to Mathenge, he would receive calls from Family Bank through their Bank Manager, Meldon Awino Onyango, requesting him to confirm that the deposits being done in Kago's account number [**********] and account number [**********] in the name of Goodluck Twenty Eleven Enterprises were sourced from Horizon. He would confirm and even give exact details of the source as Horizon's bank account number [**********] and Rategо Bank account number [**********], all domiciled at Family Bank.

72. In a Further Affidavit annexed to the 1st respondent's Further Replying Affidavit, Mathenge deposes that in 2015, Horizon received an income of Ksh.142,800,015 from the State Department of Planning. The payments, which he sets out in a table, were in respect of diesel and engine oil supplies to the State Department of Planning. He annexes in support what he refers to as certified bank statement of Horizon. He further avers that as at 22nd February 2015, KRA was fully aware of all the supplies, earnings and pending payments at the NYS, reliance for this deposition being placed on a letter (PM4) from the Deputy Commissioner Of Investigation and Enforcement Department. It is his deposition that most of the transactions in 2015 comprised of diesel, which was zero-rated. The DCI had, following a directive from the Inspector General of Police by way of a letter dated 29th April 2016, investigated remittances of taxes on amounts received by Horizon to KRA. The DCI had recommended that the file be closed. It is his deposition further that the DPP, having carefully perused the file and considered the evidence, directed by letter dated 27th March 2018 that the file be closed for lack of any evidence of criminality.

73. Mathenge further deposes that the company's tax return for 2015 has been amended (annexure PM6) and filed pursuant to section 31 (g) (4) of the Tax Procedure Act of 2015. He further deposes that bank statements of Horizon's account number [**********] and Rategо Technologies account number [**********] marked PMI in his earlier affidavit had not been properly photo copied. He therefore attaches what he refers to as similar and certified copies of the same bank statements (annexure PM7) for proper reference of income and cash withdrawals.

74. The 1st respondent also annexes to her affidavit an affidavit sworn by Kago (annexure CWG1). In the affidavit, Kago denies receipt of cash deposits amounting to Kshs 273,000,000 in account No [**********] in his name or 108,000,000 in account number [**********] in the name of Goodluck Twenty Eleven Enterprises deposited by Josephine Kabura, Ben Gethi or himself. He clarifies that he received Kshs 302,100,000 in cash which he credited to account number [**********] in his name and [**********] in the name of Goodluck Twenty Eleven Enterprises.

75. Kago avers that he acted as an agent for the 1st respondent in identifying properties to invest in, and that she introduced him to Horizon, which provided the money for the transactions. He had received Kshs 302,100,000 from the 1st respondent from 12th November 2014 to 9th June 2015 for the purchase of the properties. He deposes that he would *'later credit the said funds to my accounts as and when I required'*. When he credited the said amounts, the Bank Manager, one Meldon Onyango, would inquire

about the source of the funds before she authorized the deposits. *'They'* (sic) would inform her that the source of the funds was Horizon Ltd.

76. *'For accountability purposes'*, he would issue the 1st respondent with acknowledgment receipts for the payments received. He sets out in a table the amounts he received from the 1st respondent. According to his tabulation, between 12th November 2014 and 9th June 2015, he had received a total of Kshs 302,100,000 in amounts ranging between Kshs 2,000,000 and Kshs 20,000,000. He had credited the funds to his personal account and to the account held in the name of Good Luck Twenty Eleven Enterprises.

77. Kago deposes that he had bought four (4) properties for the 1st respondent. One was L.R. No. 21/1/97 at Kshs 63,515,000 Rosslyn; Muthaiga North L.R. No. 14902/38 at a cost of Kshs 45,000,000; Thika L.R. No 8361/12 at Kshs 35,000,000 and Edentimes Restaurant at a cost of Kshs 20,000,000. He had refunded the balance of the money received from the 1st respondent into her Old Mutual and Faulu Bank accounts. Kago avers that he sent to Ogola & Co Advocates Kshs 113,000,000 for purchase of two properties in Nairobi. Since they only finalized purchase of two properties, he instructed Ogola to forward the unutilized funds to the 1st respondent's Old Mutual and Faulu Bank accounts. The payments were credited to these accounts on 28th May 2015. Kshs 32,000,000 was credited to Faulu Bank while Kshs 18,000,000 was sent to the 1st respondent's Old Mutual account.

78. It is Kago's deposition further that out of the Kshs 302,100,000 received from the 1st respondent and later deposited in his accounts, he transferred Kshs 78,000,000 to account number [**********] belonging to M.M. Gitonga Advocates. The transfer was made from his bank account number [**********]on 8th April 2015. The purpose of the funds was for purchase of shares in a communication company the 1st respondent intended to invest in. When the transaction failed, the 1st respondent advised him to ask the advocates to refund the amount less Kshs 400,000 legal fees.

79. Kago denies receiving Kshs 273,000,000 from Josephine Kabura Irungu in his account No [**********]or in the account of Goodluck Twenty Eleven Enterprises account number [**********]. He annexes to his affidavit copies of documents headed *'Cash Acknowledgement' Goodluck Twenty Eleven Enterprises'* each respectively indicating the dates and amounts received from the 1st respondent from 12th November 2014 to 9th June 2015.

80. The Agency responded to the 1st respondent's Further Replying Affidavit sworn on 22nd October 2020 through a Further Supplementary Affidavit sworn by Cpl. Matipei on 4th November 2020. Regarding the 1st respondent's complaint that she had not been served, Matipei averred that the firm of Were and Oonge Advocates currently on record for the 1st respondent did not return the application for preservation orders in Misc. App No. 61 of 2017 to the Agency. They did not also notify the Agency that they were not representing the 1st respondent. The Agency avers therefore that the 1st respondent was all along aware of the preservation application.

81. Cpl. Matipei asserts that the 1st respondent and others were charged with the offence of money laundering contrary to section 3 as read with section 16(1) of POCAMLA. It is his averment further that Investigations by the Agency have shown that the affidavit dated 21st October 2020 (annexure "CWG6") annexed to the Further Replying Affidavit of the 1st respondent and purported to have been sworn by Meldon Awino Onyango, the Relationship Manager at Family Bank, KTDA Branch is a forgery.

82. He notes that while the 1st respondent purported that the said Meldon Awino Onyango was present and approved transactions and cash made into Kago's account No [**********]and Good Luck Twenty Eleven Enterprises account No. [**********] and that she confirmed the funds deposited in the said accounts were sourced from Horizon, a statement recorded from the said Meldon Awino Onyango by Cpl. Frederick Musyoki indicated that she did not swear the affidavit, it did not bear her identification number, the signature on the affidavit is not hers nor is the address indicated on the affidavit hers. She does not know the law firm of K.K Njenga & Associates who purportedly drew the affidavit nor has she ever appeared before Kibiru Njenga Advocate who is purported to have commissioned the affidavit.

83. According to Cpl. Matipei, Ms. Onyango further states that she did not give the averments and contents of the affidavit and to the best of her knowledge, the contents are not true. Cpl. Matipei annexes to his affidavit a copy of the statement from Meldon Awino Onyango (annexure SJM1). It is his averment therefore that the allegation that the Bank Manager, one Meldon Awino Onyango, was present and authorized the cash deposits in Kago's account is false in view of the fact that the purported affidavit of Meldon Awino Onyango is a forgery.

84. Cpl. Matipei avers further that the said Meldon Awino Onyango was shown another affidavit dated 12th September 2018 (annexure SJM2). The affidavit was purported to have been sworn by her and was an annexure tendered by the 1st respondent as

evidence in Misc. Application No 16 of 2016 (formerly Misc. Appl. No. 221 of 2015) Assets Recovery Agency –vs- Charity Wangui Gethi. Ms. Onyango had stated that the said affidavit is also a forgery; she had not sworn the affidavit, and the averments in the said affidavit are not true and were not given by her. She had provided specimens of her signature (annexure SJM3) as proof that the purported signatures in the two affidavits were not hers. It is the Agency's averment that the 1st respondent has therefore fabricated and used forged documents in court and is still using forged documents to give a false account of facts to mislead the Court.

85. The Agency terms the averments by the 1st respondent with regard to Horizon as false. It notes that the company had filed nil returns in 2015 despite receiving income of more than Kshs 242,790,015. It had also not paid the taxes assessed by KRA amounting to Kshs 5,102,409 for corporate tax from 2011 to 2014 and Kshs 6,840,000 in VAT for the year 2014 and 2015 todate as confirmed by the letter from KRA dated 2nd November 2020 (annexure SJM4). The company had filed self-assessment return on 21st October 2020 declaring taxable income of Kshs 1,499,221 which, according to the Agency, is an afterthought as the return was filed after the Agency had averred in its Supplementary Affidavit sworn on 23rd June 2020 that the company had filed a nil return despite receiving income of more than Kshs 242,790,015.

86. The Agency further avers that Horizon had no intention of declaring the correct income gained in 2015 and is evading paying taxes. The company's income for 2015 was Kshs 142,800,015, which contradicts the amount of Kshs 66,840,015 declared by the said company as income earned in the same year as illustrated in the tax return attached to annexure SJM4.

87. Cpl. Matipei avers that contrary to the 1st respondent's contention in her Further Replying Affidavit, the Agency has not targeted any of her funds. Rather, the 1st respondent has not tendered any concrete evidence by way of bank receipts to prove that she received the alleged Kshs 67,500,000 from Horizon.

88. Cpl. Matipei deposes that the investigation of the theft of funds from NYS had been carried out by a team of investigators from various independent institutions under the Multi Agency Team, each with its own specific mandate. The DCI exercised its mandate by investigating the predicate offences in the theft of the funds from NYS while the Agency exercised its mandate under POCAMLA to trace the proceeds of crime. The investigations had been conducted in accordance with the law, leading to the charging of the 1st respondent and others with various offences.

89. As for the contention by the 1st respondent in relation to the cash deposits in Kago's account, Cpl. Matipei avers that they are false, for several reasons. First, because the investigations revealed that on 20th January 2015, there was a suspicious cash withdrawal of Kshs 10,000,000 from Josephine Kabura Irungu's company, Form Home Builders and a corresponding suspicious cash deposit of the same amount into Kago's bank account No. 014000020948 held at Family Bank on the same date. These transactions are evidenced in annexure SJM3, Form Home Builders bank statement and annexure SJM4, Kago's bank statement annexed to the affidavit of Cpl. Matipei sworn on 13th November 2017.

90. He notes, secondly, that no evidence by way of cash withdrawal slips and corresponding cash deposits slips were tendered by the 1st respondent to prove that the source of the cash deposited into Kago's accounts was from Horizon. Further, the investigations were comprehensive and evidence gathered revealed that the Kshs 10 million deposited into Kago's account on 20th January 2015 was sourced from Form Home Builders. No confirmation was required from Josephine Kabura Irungu who has been charged with various offences.

91. Cpl. Matipei further avers that contrary to the 1st respondent's contentions in her Further Replying Affidavit, investigations had shown that on 26th March 2015, there were two suspicious cash withdrawals of Kshs 20 million each from Josephine Kabura Irungu's company, Reinforced Concrete Technologies and the amount was deposited into Kago's bank account No. [**********] held at Family Bank by Josephine Kabura Irungu. That this can be gleaned from annexure SJM3, Reinforced Concrete Technologies bank statement, and annexure SJM4, Kago's bank statement annexed to the affidavit in support of the application sworn on 13th November 2017. The investigations had established that the Kshs 20 million deposited into Kago's account on 26th March 2015 was sourced from Reinforced Concrete Technologies. Again, no confirmation of this fact was required from Josephine Kabura Irungu.

92. It is further deposed on behalf of the Agency that contrary to the 1st respondent's averments, investigations had revealed that on 9th April 2015, there was a suspicious cash withdrawal of Kshs 20 million from Josephine Kabura Irungu's company, Roof and All Trading, which was deposited into Kago's bank account number [**********] held at Family Bank by Josephine Kabura Irungu. Again, this can be discerned from annexure SJM3, Roof and All Trading bank statement, and annexure SJM4, Kago's bank

statement annexed to the supporting affidavit sworn on 13th November 2017. The 1st respondent's contention that the deposits into Kago's account preceded the Roof and All Trading withdrawal was therefore false.

93. Cpl. Matipei avers that the Agency had demonstrated that the funds deposited in Kago's account were connected to the funds stolen from NYS. No confirmation from Josephine Kabura Irungu was therefore necessary.

94. Regarding the receipts relied on by the 1st respondent (annexure CW6) as showing receipt of funds from the 1st respondent by Kago, it is the Agency's case that they do not meet the provisions of section 65(8) of the Evidence Act which requires a certificate to be tendered by the 1st respondent. Their authenticity cannot therefore be verified.

95. The Agency notes that the 1st respondent has admitted that the total amount in Kago's and Goodluck Twenty Eleven Enterprises account is Kshs 381 million, the same amount that Cpl. Matipei had stated in his affidavit in support of the application.

The Submissions

96. The Agency and the 1st respondent filed submissions setting out their respective positions on the matter and requested the court to rely thereon in rendering its decision. In these submissions, the parties have identified the issues that they deem as arising for determination and structured their submissions on the basis of those issues.

Submissions by the Agency

97. The first issue addressed by the Agency is whether the funds held in the 1st and 2nd respondents' bank accounts are proceeds of crime. It reiterates the factual basis of its application-the investigation conducted by a team of investigators into the theft of Kshs 791,385,000 from NYS, which was under the State Department of Planning in the Ministry of Devolution. The theft was perpetrated by public officials and other private persons, all of whom have been charged in Nairobi Chief Magistrate Court Criminal Case No. 1905 of 2015 and Criminal Case No 301 of 2016. The funds had been paid into the bank accounts of three business accounts whose sole proprietor was Josephine Kabura Irungu.

98. From these accounts, in a classical scheme of money laundering, Kago had received a total of Kshs 381,000,000 million in his personal account number [**********] and his business entity known as Good Luck Twenty Eleven Enterprises account number[**********], both held at Family Bank. Kago's account number [**********] had received Kshs 273,000,000 million, while his business entity, Good Luck Twenty Eleven Enterprises, received in its bank account number [**********] Kshs 108,000,000 million.

99. It is the Agency's submission that Kago's account received, out of the Kshs. 273,000,000 million, on 26th March 2015, Kshs. 40,000,000 from Josephine Kabura. These funds were withdrawn from Reinforced Concrete Technologies, a business entity that had received Kshs. 320,160,000 from NYS. He had further received, on 9th April 2015 in his personal account, Kshs 20,000,000 from Josephine Kabura. The funds were withdrawn from Roof and All Trading, a business entity that had received Kshs. 252,300,000 from NYS. The Agency submits that Kago then transferred Kshs 103,000,000 from his personal account to the firm of Ogola and Company Advocates Account No. [**********] held at K-Rep Bank. He further transferred Kshs 10,000,000 from his business entity, Good Luck Twenty Eleven Enterprises, to the same firm of Ogola and Company Advocates Account No. [**********]held at K-Rep Bank. The firm of Ogola and Company advocates thus received a total of Kshs 113,000,000 from Kago.

100. On 2nd April 2015, Kago transferred Kshs78,000,000 to the firm of M.M Gitonga & Associates account number [**********] held at Prime Bank. Thereafter, on 28th May 2015, Ogola and Company Advocates transferred Kshs 20,000,000 to the 1st respondent's account held at Faulu Kenya Limited. The firm of M.M Gitonga & Associates transferred, on 5th June 2015, a total of Kshs 60,000,000 to the 1st respondents account held at Faulu Micro Finance in two transactions of 30,000,000 each on the same day. The 1st respondent thus received a total of Kshs 80,000,000 in her Faulu Micro Finance Bank account number [**********]from the two firms of Advocates.

101. On 28th May 2015, the firm of Ogola and Company Advocates transferred Kshs 18,000,000 to the 1st respondent's Old Mutual Money Market Fund Account No. [**********]. On 11th June 2015, the firm of M.M Gitonga & Associates also transferred Ksh.17.6 million to the 1st respondent's Old Mutual Money Market Fund Account number [**********]. She thus received a

total of Kshs. 35,600,000 in her Old Mutual Money Market Fund Account number [**********]from the two firms of Advocates.

102. According to the Agency, the 1st respondent redeemed the funds in her Old Mutual Money Market Fund Account number [**********] in two tranches. She first redeemed Kshs 15,000,000 million on 26th August 2015 which she transferred to her Standard Chartered Bank account number No. [**********]. On 23rd September 2015, she redeemed a further Kshs. 20,000,000 from her Old Mutual Money Market Fund Account No. [**********] which she again transferred to her Standard Chartered Bank account number No. [**********]. The Agency had been able to preserve Kshs 204,000/= in Old Mutual Money Market Fund Account number [**********] and Kshs. 7,801,919/= in Standard Chartered Bank account number No. [**********] which were the amounts remaining in the two accounts at the time the application for preservation was made.

103. The 2nd respondent, Samuel Mdanyi Wachenje alias Sam Mwadime held a bank account number [**********] at the Family Bank, Kagwe Branch. On 31st March 2015, Josephine Kabura Irungu transferred Kshs 20,000,000 from Reinforced Concrete Technologies bank account number [**********] to the said account. According to the Agency, the bank account was opened on 22nd December 2014. At the time of the transfer of Kshs 20,000,000, the said account had a nil balance and there were no other transactions. The Agency was able to preserve Kshs 10,000,000, the amount that was left in the account at the time it obtained the preservation orders. The Agency notes that the 2nd respondent has not rebutted its assertion that he received funds stolen from NYS. It cites the case of **Nguku v Republic (1985) KLR 412** in which it was held that where a party fails to produce certain evidence, a presumption arises that the evidence would be unfavourable to that party.

104. The Agency submits that Family Bank Ltd, where Josephine Kabura Irungu's business entities, Kago, Horizon and the 2nd respondent's account were held was fined by the Central Bank of Kenya as an administrative enforcement of the Prudential Guidelines on Anti-Money Laundering and Combating Financing of Terrorism for failure to report suspicious transactions. It notes that in **Family Bank Ltd & 2 Others –v Director of Public Prosecution & 2 Others (2018) eKLR**, the Court observed that the Central Bank of Kenya, in enforcement of its Prudential Guidelines on Anti-Money Laundering (AML) and Combating Financing of Terrorism (CBK/PG/08) fined Family Bank Limited Kshs 1,000,000 for breach of their obligation under the AML for failure to report suspicious transactions. The administrative action did not bar the criminal prosecution of the Bank for the offences under POCAMLA. The Court dismissed the application filed by Family Bank Limited and others which sought orders to prohibit their prosecution for the offences under POCAMLA.

105. The Agency submits that from the evidence it has placed before the court, there is no doubt that the 1st and 2nd respondents' accounts were used as conduits for money laundering contrary to section 3, 4 and 7 as read with section 16 of POCAMLA. Accordingly, the funds held in their accounts are proceeds of crime liable to forfeiture to the Government.

106. The second issue identified and submitted on by the Agency is linked to the first: if the funds in the respondents' bank accounts are found to be proceeds of crime, should they be forfeited to the State" The Agency's case is that it has demonstrated that the funds in question are proceeds of crime as defined under section 2 of POCAMLA. The Agency relies on the case of **Schabir Shaik & Others v State CCT 86/06(2008) ZACC** 7 in which the court, in defining proceeds of crime, stated as follows:

"...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."

107. According to the Agency, the 1st respondent has the evidentiary burden to demonstrate the legitimate source of the funds held in her accounts, which she has failed to do. Her position was that the funds were sourced from Horizon, a company she alleged that she supported during its start up. She had not, however, placed any evidence before the court to prove the alleged support to the company.

108. The Agency notes that the 1st respondent has annexed affidavits sworn by Kago and Mathenge in which they allege that the 1st respondent received Kshs 302,100,000 from Horizon. That the 1st respondent claimed that she gave the said funds to Kago in cash for purposes of investments and procuring properties. No evidence by way of bank receipts has, however, been tendered by the 1st respondent to show that the funds withdrawn from Horizon were given to her, or to show the linkage between the funds withdrawn from Horizon and the funds held in her accounts.

109. In the Agency's view, the fact that the funds were transacted physically and not automated was intended to disguise the suspicious transactions and avoid the financial trail as the said funds were part of the funds stolen from NYS. It is its submission, further, that no evidence has been tendered to prove that the assets at issue, namely Rossyln plot No [*******], Muthaiga North Plot No.LR [********], Thika plot No [*******]and Eden Times restaurant were procured using the funds from Horizon.

110. The Agency disputes the allegation by the 1st respondent that she received funds from Horizon, which she then gave to Kago, who then deposited the funds in his account then transferred the funds to the firms of Ogola and Company advocates and M.M Gitonga & Associates and the funds finally ended up in her bank account. It terms the said allegation an excuse to disguise the source of the funds. The Agency cites section 112 of the Evidence Act and the decision of the court in **Assets Recovery Agency v Lillian Wanja Muthoni Mbogo & Others, (2020) eKLR** to support its contention that the 1st respondent has not been able to show the source of the funds deposited in her accounts.

111. As for the 1st respondent's contention that she was issued with acknowledgement receipts (annexure "CWG2") by Kago in respect of the funds she gave to him, the Agency submits that such receipts have no evidentiary value. They are between two parties and their authenticity cannot be verified, nor is there anything in the receipts to show that the funds were derived from Horizon. In its view, the 1st respondent has used the acknowledgment receipts to cover up the financial trail and hide the source of the funds held in her bank accounts, whose source it maintains is the funds stolen from NYS.

112. The Agency relies on the case of **Assets Recovery Agency v Rose Monyani Musanda & Others Civil Application No.2 of 2020** to support its contention that the acknowledgement receipts have no probative value as they cannot be authenticated. Reliance is also placed on **Assets Recovery Agency v Pamela Aboo Misc. No 73 of 2017** for the proposition that the 1st respondent had the burden of proving that the funds were from a legitimate source. The Agency also refers the court to the decisions in **Assets Recovery Agency v Phyllis Njeri Ngiritas & Others (2020) eKLR; Assets Recovery Agency v Pamela Aboo Civil App No 58 of 2017** and **Assets Recovery Agency v James Thuita Nderitu & 6 others [2020] eKLR**.

113. The Agency submits that Horizon, which the 1st respondent alleges is the source of the funds in her accounts, filed nil returns with KRA in 2015 despite receiving income of more than Kshs 242,790,015. It further notes that an analysis of the company's bank statement (annexure "PM1") shows that the company had received income in 2015. In its view, the fact that the company filed nil returns despite receiving income shows that the funds that it received are not from legitimate source.

114. The Agency further observes that an analysis of Horizon's bank statements shows that the company transferred funds electronically to other individuals and business entities, and it is strange that the 1st respondent received in cash Kshs. 302.100,000/= from Horizon. In its view, the only reasonable conclusion is that the 1st respondent is using Horizon to disguise the suspicious funds in her accounts.

115. The Agency submits further that its investigations established that the 1st respondent is an employee at the Ministry of Agriculture, Livestock and Fisheries. Her net salary between July 2015 and April 2016 is Kshs 462,790.05. In its view, her known source of income being her salary, the amount of Kshs 302,100,000 she purportedly received from Horizon is suspicious. It is its submission therefore that there are reasonable grounds to believe that the funds held in her accounts are part of the funds stolen from NYS in view of her net salary.

116. The Agency submits that it has demonstrated that the funds held in the respondents' accounts are part of the funds stolen from NYS; that the respondents have not demonstrated that the funds have a legitimate source; and that accordingly, the said funds are subject to recovery under POCAMLA. The Agency cites section 92(1) of POCAMLA which empowers the High Court to make an order for forfeiture if it finds, on a balance of probabilities, that the property concerned has been used or is intended for use in the commission of an offence, or is proceeds of crime. Support for its submissions in this regard is sought in **Assets Recovery Agency v Fisher, Rohan and Miller, Delores, Supreme Court of Jamaica, Claim No 2007 HCV003259; Assets Recovery Agency v Lilian Wanja Muthoni t/a Sahara Consultants & 5 Others (2020) eKLR; Assets Recovery Agency v Rose Monyani Musanda & Others Civil Application No.2 of 2020.**

117. The Agency also refers the 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 Proceed 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"

118. Reference is also made to **Prosecutor General v New Africa Dimensions & Others, High Court of Namibia Case No. POCA 10/2012** in which the court issued forfeiture orders having found, on a balance of probabilities, that the assets at issue were proceeds of crime. The Agency urges the court to issue forfeiture orders in respect of the assets the subject of the application. It asks the court to be guided by the rationale for issuance of forfeiture orders enunciated in **NDPP v Rebuzzi** quoted in the case of **Schabir Shaik & Others v State Case CCT 86/06(2008) ZACC 7 (supra)** and **National Director of Public Prosecutions v Van der Merwe and Another (A338/2010) [2011] ZAWCHC 8**.

119. Regarding the 1st respondent's claim that the present application is in violation of her right to property and fair hearing provided under Article 40 and 50 of the Constitution of Kenya, the Agency submits that while it is true that Article 40 protects the right to property, such protection, as Article 40(6) provides, does not extend to property which has been unlawfully acquired. Since the funds held in her account were proceeds of crime and unlawfully acquired, they are not protected by Article 40 of the Constitution. The Agency relies on the case of **Teckla Nandjila Lameck v President of Namibia 2012(1) NR 255(HC)** in which the court stated that:

"...The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity which is defined to "constitute an offence or which contravenes any law...."

120. Reliance is also placed on the case of **Martin Shalli -v-Attorney General of Namibia High Court of Namibia case No: POCA 9/2011** and **Assets Recovery Agency v James Thuita Nderitu & others, ACEC Civil Suit No 2 of 2019**.

121. As for the 1st respondent's contention that the funds were sourced from Horizon and given to Kago, the Agency submits that the 1st respondent has not tendered any concrete evidence by way of bank documents such as cash withdrawal slips and corresponding cash deposits slips to show the financial trail or connect the funds held in her accounts with the purported funds from Horizon. It terms the documents relied on by the 1st respondent to show that Horizon and others were cleared by the relevant Government agencies vide letter dated 8th May 2017 from DCI and the letter dated 27th March 2018 from the ODPP as well as the Minutes of the Ministerial Tender Committee held on 30th October 2015 from the Ministry of Devolution and Planning as illegally obtained evidence and of no probative value.

122. It is its submission that the 1st respondent did not follow the procedure for introducing public documents in court as evidence as provided under section 80 of the Evidence Act. According to the Agency, section 80 of the Evidence Act guarantees the authenticity and integrity of public documents relied upon by the Court, and it would be detrimental to the administration of justice to rely on irregularly obtained documents such as the 1st respondent has obtained in this case. The Agency cites the case of **Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others [2020] eKLR** where the Court stated as follows;

".....We reiterate that the appellants claimed to have been supplied with the contentious documents by "conscientious citizens" and "whistleblowers". Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution. It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.

We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned "conscientious citizens" or "whistleblowers" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question...."

123. In any event, according to the Agency, the 1st respondent, Ben Gethi and others were still charged in Nairobi Chief Magistrate Court Criminal Case No. 1905 of 2015 and Criminal Case No. 301 of 2016 despite the 1st respondent's claim that they were cleared vide the letter dated 8th May 2017 from the DCI.

124. The Agency submits that the 1st respondent's claim that the funds withdrawn from Horizon match with the funds given to Kago is not true, nor has it been supported by any evidence. It notes that the 1st respondent attempted to connect the funds in her accounts with the purported funds from Horizon through the affidavit of Meldon Awino Onyango dated 21st October 2020, an attempt that failed as further investigations revealed that the purported affidavit is a forgery.

125. The Agency notes that the affidavits purportedly sworn by Kago and Mathenge tendered by the 1st respondent showing the tabulation of transactions have not been supported by any evidence by way of cash withdrawal slips and corresponding cash deposits slips to connect the funds to Horizon Ltd. It is its submission that in any event, such affidavits have no evidential value as an affidavit cannot be an annexure to another affidavit. They rely in support of this submission on the decision in **Republic v Ministry of Health & 3 Others *ex parte* Kennedy Amdany & 27 Others (2018) eKLR**.

126. The Agency further notes that the 1st respondent has relied on section 65 of POCAMLA in her submission that she is required to establish a legitimate source of the funds. It submits that section 65 of POCAMLA applies to a benefit obtained in an inquiry under section 61(1) of the Act, which provides for confiscation orders obtained in criminal forfeiture. The provision is therefore not applicable in the present matter which is a civil forfeiture application.

127. Regarding the 1st respondent's contentions with respect to the tax status of Horizon, the Agency submits that the self-assessment tax return filed on 21st October 2020 declaring taxable income of Kshs 1,499,221, is an afterthought. This is because the return had been filed after the Agency had highlighted in the supplementary affidavit of Cpl. Matipei that Horizon had filed nil return despite receiving income of more than Kshs 242,790,015. It further submits that the 1st respondent's claim that Horizon's income for the year 2015 was Kshs 142,800,015 contradicts the income declared by the said company in the same year amounting to Kshs 66,840,015. Its submission is that this is a clear indication that Horizon had no intention of declaring the correct income gained and is evading paying taxes.

128. The Agency submits that it has demonstrated the intricate scheme of money laundering involving the 1st respondent and others in its pleadings and depositions in this matter. It has also demonstrated that there is a connection between the funds held in the 1st respondent's accounts and the funds stolen from NYS. It therefore submits that the funds in the 1st respondent's account are proceeds of crime as defined in section 2 of POCAMLA. It further submits that the allegations by the 1st respondent that the mixing of funds belonging to her with other funds is not evidence that the funds are proceeds of crime is misleading given the definition of proceeds of crime under section 2 of POCAMLA.

129. The Agency notes that the 1st respondent's allegations that the withdrawals from Horizon began on 12th November 2014 is unsupported by any evidence. She has not tendered any evidence by way of cash withdrawal slips and corresponding cash deposits slips to link the preserved funds held in her accounts with the purported funds from Horizon. As for her reliance on **ACEC No. 16 of 2016 - Asset Recovery Agency v Charity Wangui Gethi** the Agency submits that the judgement is the subject of an appeal pending in the Court of Appeal in **Civil Appeal No 40 of 2019 Assets Recovery Agency v Charity Wangui Gethi** and it is therefore not a final decision.

130. The Agency terms the report by one Dr. Njoroge as biased and prepared without full information. It is its submission that in any event, investigations in Kenya are conducted by the Kenya police as provided under section 24 of the National Police Service Act and not individuals.

131. The Agency reiterates that it has demonstrated that the funds held in the 1st respondent accounts are proceeds of crime liable for recovery under POCAMLA. That in exercising its powers under section 92 of POCAMLA and allowing the forfeiture application, the court will be depriving the 1st respondent of the ill-gotten gains. The Agency cites the case of **Assets Recovery Agency v Lilian Wanja Muthoni t/a Sahara Consultants & 5 Others (2020) eKLR** in which the court observed that:

"…..What I discern from the Respondents' submissions is that since the Applicant has not shown a direct link between the funds in the said accounts and the funds alleged to have been stolen from the NYS, the said funds are not proceeds of crime, and should therefore not be forfeited to the State. I take the view, however, that POCAMLA and the entire legal regime related to recovery of proceeds of crime and unexplained assets has the underlying premise that crime and corruption are undertaken in a labyrinthine, secretive manner; that funds and assets may not be directly traced to crime; that while investigations may be carried out, some alleged perpetrators charged and subjected to trial, a conviction may not result. Yet, the Respondent may have in his or her possession substantial funds and assets, but is not able to show a legitimate source of the funds and assets.

The question is what, in such circumstances, should be the option" Is it to say, as the Respondents ask the court to do, that there is no trail leading the funds to the suspected source, in this case the NYS funds" That the funds do not belong to the State just because the Respondents cannot show a legitimate source" What would such a conclusion mean in relation to the tracing and recovery of, say, funds and assets derived from the narcotics trade, cyber-crime or piracy, or from trafficking in wildlife, or in persons"

I believe I would not be remiss if I asserted as an incontrovertible truth that money and assets are not plucked from the air or, like fruits, from trees. They can be traced to specific sources- salaries, businesses in which one sells specific items or goods, or provides professional services. There must be books of accounts, stock registers, local purchases orders and delivery notes showing to whom goods are sold, deliveries made and payment receipts showing from whom payment has been received".

132. The Agency submits that it has established that the funds in the 1st respondent's account are proceeds of crime. It notes that the 1st respondent argues that it has to establish that an offence was committed and that the property subject of the forfeiture proceedings was acquired through the offence. It is its case, however, that it has demonstrated the intricate scheme of money laundering involving the 1st respondent and others in which investigations traced Kshs 87,682,424 in the 1st respondent's accounts which funds are part of the funds stolen from NYS and are proceeds of crime. The 1st respondent and others have been charged with the offence of money laundering contrary to section 3 as read with section 16(1) of POCAMLA in Nairobi Chief Magistrate's Court Criminal Case No. 301 of 2016. In the circumstances, there were reasonable grounds to warrant the institution of the present forfeiture proceedings.

133. As for the 1st respondent's claim that the Agency has not demonstrated breach of banking procedures and protocols, the Agency asks the Court to take judicial notice that Family Bank Limited where Josephine Kabura Irungu's business entities, Kago, Horizon and the 2nd respondent's accounts were held was fined for breach of their obligation under the Anti-Money Laundering regulation for failure to report suspicious transactions. It refers the court to the decision in **Family Bank Ltd & 2 Others v Directors of Public Prosecution & 2 Others** (supra) in this regard.

134. On the contention that the 1st respondent was not given an opportunity to explain about the funds held in her accounts, the Agency submits that she has participated in the present proceedings and has been accorded the opportunity to present her case, which she has done through her affidavits. Support for this submission is sought in the case of **Assets Recovery Agency v James Thuita Nderitu & others (supra).**

135. The Agency submits, finally, that these proceedings have been brought under the civil forfeiture mode of recovery of proceeds of crime under POCAMLA. The proceedings are *in rem* (against the property). The process requires proceedings against the property which is reasonably believed to be proceeds of crime. Accordingly, it is its submission that a conviction is not required prior to the making of a forfeiture order. While noting the 1st respondent's argument that she and others were charged with the offence of money laundering contrary to section 3 as read with section 16(1)(a) of POCAMLA vide Nairobi Chief Magistrate's Court Criminal Case No. 1905 of 2015 and Criminal Case No 301 of 2016 and the criminal cases are yet to be determined and the issue whether Kshs 791,385,000 was stolen is yet to be determined by the court, the Agency argues that the outcome of the present proceedings is not affected by the criminal proceedings in which the respondents and others have been charged. The Agency cites in support section 92 (4) of POCAMLA and the case of **Assets Recovery Agency v Quorandum Limited & 2 others [2018] eKLR**. Also cited is the case of **Serious Organized Crime Agency v Gale** quoted in the case of **Assets Recovery Agency & Others v Audrene Samantha Rowe & Others 2012 HCV 02120** and **Assets Recovery and Others, Republic v Green & Others [2005] EWHC 3168.**

Submissions by the 1st respondent

136. The 1st respondent's arguments in response to the question whether the funds in her account are proceeds of crime is that first, she is the owner of the accounts the subject matter of the suit, as well as the funds in the said accounts. It is her argument, secondly, that her sources of funds are separate, legitimate and verifiable and are not in any way connected to the funds allegedly stolen from the NYS and paid to Josephine Kabura Irungu through her three companies. The 1st respondent and Horizon do not know and have never, either in person or by proxy, engaged in any business or personal deals or received any funds from Josephine Kabura Irungu, the alleged recipient of the alleged stolen funds. She submits that the evidence relied on by the Agency to connect her to the NYS has major discrepancies and misrepresentations. Such discrepancies, she contends, arise either out of the investigator's failure to understand and interpret the documents relied on or deliberate misrepresentations designed to arrive at a pre-determined outcome. It is her submission that investigations were conducted by the DCI, and that both the DCI and ODPP gave a clean bill of health to

Horizon's business with NYS and further transactions with the 1st respondent.

137. With regard to the question whether the funds should be forfeited to the state, the 1st respondent argues that her funds are from a legitimate source and are not proceeds of crime. She refers to section 65 of POCAMLA to submit that she is required to establish a legitimate source of funds and reiterates her contention that the funds at issue were sourced from Horizon. She had given the funds to Kago who gave her acknowledgment receipts in respect thereof. The Kago had also revealed to the bank the source of his funds.

138. The 1st respondent maintains her position that the funds at issue are not from the Kshs 791. 385,000 paid by NYS to Josephine Kabura Irungu through her three companies. It is her submission that since the Agency has linked her funds to a specific offence, the allegedly stolen funds from the NYS, it has a duty to show a connection between the said funds and the funds in her accounts, which it has failed to do. The 1st respondent contends that the withdrawals from Horizon, where she sourced her funds, began on 12th November, 2014 while, according to the Agency, payments from NYS to Josephine Irungu were made between December 2014 and March 2015, which was way after the Horizon withdrawals had begun.

139. The 1st respondent submits, on the basis of section 2 of the POCAMLA, that whereas the Agency has disclosed an offence under investigation, the alleged loss of Kshs. 791,385,000 from NYS, it has failed to connect her funds to the alleged offence as required by section 2 of POCAMLA. While several persons have been charged in connection with the alleged offence of stealing Kshs. 791,385,000 in Chief Magistrate's Court at Nairobi Criminal Case No. 1905 of 2015, she and Horizon are not accused persons in that case. It is her submission that the connection that the Agency attempts to make between her and the said offence is an indirect one.

140. The 1st respondent submits that it is undisputed that funds were sent to and from the accounts of Ogola & Ogola Company Advocates and M.M. Gitonga & Co. Advocates as deposed by the Agency. That M. M Gitonga sent Kshs. 17,600,000 to her Old Mutual Account on 12th June 2015, and Kshs 60,000,000 to her Faulu Bank account on 11th June 2015. That the firm of Ogola & Ogola Advocates transferred Kshs. 18 million on 28th May 2015 and Kshs 10 million on 3rd June 2015 to her Old Mutual account. Further, that it is undisputed that the same firm sent Kshs 20 million on 28th May 2015 and Kshs 12 million on 28th April, 2015 to her Faulu Bank account.

141. The 1st respondent further submits that it is not disputed that on 26th August 2015, she redeemed Kshs. 15,000,000/= to her Standard Chartered Bank account. It is her submission that this particular amount was the subject of proceedings before this court in ACEC No. 16 of 2016. In a judgment delivered on 20th November, 2018, the court made a finding that the amount was not part of the alleged Kshs. 791 385,000.

142. The 1st respondent submits that an analysis of the bank statements presented by the Agency in respect of Josephine Kabura Irungu's three companies shows that the companies did receive funds from the NYS. That they also show that there were a lot of cash withdrawals without narrations and RTGS transactions with narrations. Her submission is that in the circumstances, it is difficult to prove where cash withdrawals went to and only assumptions can be made, and assumptions and suspicion do not amount to evidence. She submits that from the report of a financial analyst she had engaged, one Dr. Njoroge O. Kimani, to analyze the bank documents and produce a report, which report has not been controverted, the Agency's account of events is totally flawed and full of errors, inconsistent and contradictory to the normal banking practice.

143. The 1st respondent submits that it is not in dispute that Kago's accounts received funds from different persons. That both accounts received and transacted a total of Kshs. 380,000,000, all received at different times. She submits that there was obviously mixing of the funds in the two accounts. Such mixing of her funds and those of other persons in Kago's accounts, however, is not of itself evidence that the funds were proceeds of crime. This is so if she can account for the proportion of her funds and show a legitimate source of the funds, which she submits that she has done. It is her submission, further, that Kago has also clarified the proportions of monies in his accounts that belonged to her.

144. The 1st respondent submits that the funds in her account are not proceeds of crime as defined in section 2 of POCAMLA. The Agency also has to first establish that an offence was committed and that the property the subject of the forfeiture proceedings was acquired through that offence. The Agency has not established a link between the alleged crime, the theft of funds from the NYS, and the funds in her accounts. It is her submission that the court should take judicial notice that it is not illegal to transact in cash; that there are checks and balances within banking institutions to regulate how such transactions are done; and there is no evidence to show that there was breach of banking procedures and protocols in the transactions.

145. To the question whether a conviction is a condition precedent to orders of forfeiture, the 1st respondent submits that the Agency has not discharged the burden of proof required. It relies on the case of **State of New Jersey v. 4194.00 In U.S. Currency** in which the court found that the State had failed to establish the requisite connection between the money in question and criminal activity. She further asks the court to be guided by the case of **Honeycutt v United States 581 (2017)** in which the court held that *"Forfeiture pursuant to §853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime."* and concluded that one Terry Honeycutt had no ownership interest in his brother's store and he never obtained tainted property as a result of the crime, so a forfeiture order would not issue.

146. Finally, the 1st respondent submits that the application for forfeiture is a violation of her right to property. It is her case that she is the owner of the funds in the accounts at issue and that she has a right to own property as guaranteed under Article 40 of the Constitution. She submits that as averred in the affidavits in reply to the application, the funds were sourced from Horizon and from interest earned from the banking institutions. She has never been a supplier at the NYS, nor was she paid any money that was part of the Kshs. 791,385,000 stolen from the NYS. She is neither a director nor a shareholder of any of the companies allegedly involved in NYS dealings nor has she been involved in any transactions with Josephine Kabura Irungu. Her funds were sourced from Horizon Ltd, a company that was duly incorporated, has been doing genuine business in Kenya and has been engaged in business with the government ministries. She relies in support of this submission on Mathenge's affidavit annexed as "CWG 3" in her affidavit. She submits that the company had placed before the court tenders showing its business and income and that it had been given a clean bill of health by various government agencies. Her submission, therefore, is that the legitimacy of its sources of income is not in question. Investigation of Horizon carried out by the DCI had shown that the payments made to it were regular and lawful, and that she, her son Ben Gethi and George Kamia Kuvika were the beneficiaries of the funds. This, she submits, is confirmation that she had received the money the subject of this application from Horizon Ltd.

147. The 1st respondent submits that there are records clearly showing withdrawals by Horizon; that the funds withdrawn were given to her agent, Kago, who had signed acknowledgement receipts attached to his affidavit (annexure "CGW-1"); and that the amounts withdrawn from Horizon on various dates match the amounts given to Kago. It is also her submission that she was specifically referenced as Suspect E1 in the letter dated 8th May, 2017 from the DCI. She submits that the findings of the investigations confirm her assertion that she sourced her money from Horizon Ltd, and not from the Kshs. 791 million allegedly stolen from the NYS.

148. The 1st respondent urges the court to find that the Agency has failed to establish a connection between the funds in her accounts and the alleged offence; that the funds in her account are therefore not proceeds of crime within the meaning of POCAMLA; that the Agency has failed to discharge the burden of proof, dismiss the forfeiture application with costs and issue an order lifting all the freezing, preservation and or any other orders over her bank accounts.

Analysis and Determination

149. I have considered the pleadings of the parties and their respective written submissions and authorities. In its submissions, the Agency notes that its case arose following investigations conducted by a team of investigators into the theft of Kshs 791,385,000 from the NYS which had occurred in 2014 and 2015. The investigations had established that the said amount was fraudulently paid to Josephine Kabura Irungu's three business entities- Form Home Builders, Roof and All Trading and Reinforced Concrete Technologies bank accounts. Investigations further established a complex scheme of money laundering where there were several suspicious large cash withdrawals made from the entities by Josephine Kabura Irungu. The funds were then deposited in accounts held by Kago, who subsequently transferred part of the funds to the firms of Ogola and Company Advocates and M.M Gitonga and Associates. These firms then transferred the funds received from Kago to the 1st respondent's accounts.

150. Josephine Kabura Irungu had also transferred Kshs 20 million from Reinforced Concrete Technologies to the 2nd respondent's bank account. These funds were also part of the Kshs 791,385,000 stolen from NYS. The investigations had traced a total of Kshs 97,682,424 in the accounts of the 1st and 2nd respondents. Kshs 87,682,424 was held in the 1st respondent's bank accounts while Kshs 10 million was traced to the 2nd respondent's bank account. It is its case that there are reasonable grounds to believe that these funds are part of the funds stolen from NYS.

151. The Agency submits that the 1st and 2nd respondents and others were charged with the offence of money laundering contrary to section 3 as read with section 16(1)(a) of POCAMLA in Nairobi Chief Magistrate's Court Criminal Case No. 1905 of 2015 and Criminal Case No 301 of 2016. It had applied for and obtained preservation orders on 31st July 2017 and 7th August 2017 in Misc. Application No 61 of 2017 prohibiting the respondents from transferring or dealing with the Kshs 97,682,424. It had also complied with the requirements under POCAMLA when, on 18th August 2017, it gazetted the preservation orders pursuant to section 83(1) of

POCAMLA vide Gazette Notice No. 7854.

152. As noted earlier in this judgment, the 2nd respondent did not file a response to the forfeiture application or participate meaningfully in the proceedings. His Counsel, one Mr. Wagara, appeared in court a couple of times but thereafter dropped out of the scene.

153. On her part, the 1st respondent denies that the funds the subject of these proceedings are part of the funds stolen from the NYS. She avers that she received the funds from Horizon Ltd in which her son, one Benson Gethi, was a Director. The company had given her, in cash, Kshs 302,100, 000. She had given this amount, again in cash, to her agent, Kago, whom she had instructed to purchase properties for her. He had, on her instructions, transferred various amounts into accounts held by two law firms for the purchase of the properties. He had purchased some of the properties, but some of the transactions had failed. She had therefore instructed him to have the Advocates transfer the funds to her accounts at the Old Mutual and Faulu Micro Finance Bank.

154. From the pleadings and submissions of the parties which I have summarized above, the following issues arise for determination:

i. Whether the funds held in the 1st and 2nd respondents' bank accounts are proceeds of crime;

ii. If issue No. (i) is in the affirmative, whether the funds held in the 1st and 2nd respondents' bank accounts should be forfeited to the State;

iii. Whether the instant application for civil forfeiture is in violation of the respondents' right to property and right to fair hearing provided under Article 40 and 50 of the Constitution of Kenya;

iv. Whether the instant forfeiture proceedings are dependent on the outcome of the criminal proceedings against the respondents.

Preliminary Issues

155. Before addressing my mind to these issues, however, it is imperative to address myself to two preliminary issues. The first relates to the nature of the evidence presented before the court by the 1st respondent. The Agency submits that Kago and Mathenge's affidavits annexed to the 1st respondent's affidavits have no evidential value. It contends that an affidavit cannot be an annexure to another affidavit. It relies in support on the decision in **Republic v Ministry of Health & 3 Others ex *parte* Kennedy Amdany & 27 Others (2018) eKLR**. The 1st respondent did not address the court on this point.

156. I have taken note of the several affidavits attached to the 1st respondent's affidavit as annexures. In her Replying Affidavit sworn on 11th August 2020, the 1st respondent annexes two affidavits, one sworn by Kago and the other by Mathenge. In her Further Replying Affidavit sworn on 22nd October 2020, the 1st respondent again annexes an affidavit sworn by Mathenge, as well as the affidavit of Meldon Awino Onyango. The bulk of the 1st respondent's case is anchored on these affidavits, and the question is what the probative value of such affidavits is.

157. Order 19 rule 3 of the Civil Procedure Rules provides that affidavits shall be confined to statements of fact. In interlocutory proceedings, however, or with leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

158. In its decision in **Republic v Ministry of Health & 3 Others ex *parte* Kennedy Amdany & 27 Others (supra)** cited by the Agency, the Court stated as follows:

"99….On the other hand, I must mention that the affidavit of Dr Kioko Mang'eli is indeed irregularly attached to the affidavit of Taher as it ought to have been filed by the maker thereof and not attached as an annexure…

100. From the foregoing it therefore follows that an affidavit is where all the facts in the case should be, not in an annexture in the form of another affidavit, especially where the annexed affidavit has not been used as an affidavit in any other proceeding."

159. A similar conclusion was reached by the court in **Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2017] eKLR** in which the Court stated as follows:

"3. I accept that these witness affidavits, because they were not filed, were not independent of the 1st petitioner's supporting affidavit and cannot, therefore, be the basis upon which the witnesses can be called to testify, or be cross-examined. This issue was dealt with by the Supreme Court in Raila Odinga & 2 Others –v- IEBC & 3 Others [2013]eKLR…

In short, the witness affidavits annexed to the 1st petitioner's supporting affidavit filed on 5th September 2017 were not filed, have no probative value and are, therefore, expunged from the record."

160. The issue of affidavits annexed to another affidavit was also considered by the High Court in **Sammy Ndungu Waity & Another v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR**. In its decision, the Court observed as follows:

"21. It follows from the above discussion that there is no basis to deny the 2nd petitioner's prayer to withdraw from this petition. That being so the 2nd petitioner's affidavit in support of the petition must be expunged. Since the 2nd petitioner by his application clearly shows that he wants nothing to do with the petition it follows that his evidence filed in support of the petition ought to be expunged. The main opposition of the 1st petitioner to that affidavit of 2nd petitioner being expunged was because it had annexed to it further affidavits of three other persons…. It is important to state that the affidavits of those three persons are filed as annextures to the 2nd petitioner's affidavit in support of the petition. They are not stand alone affidavits. In my view if the main affidavit of the 2nd petitioner is expunged, as it will be here, the annextures to it must also be expunged. In any case the style of annexing affidavits to the petitioner's affidavit is unusual and was criticized by the Supreme Court in … RAILA ODINGA & 5 OTHERS –V- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS (2013) eKLR…

22. It follows that since the affidavits annexed to the 2nd Petitioner's affidavit would not have probative value in this matter there will be no impediment nor prejudice to the expunging them together with the 2nd petitioner's affidavit."(Emphasis added)

161. In its decision in **Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others** (supra) cited by the High Court in the above matters, the Supreme Court had occasion to consider affidavits filed as annexures to an affidavit in circumstances similar to what is currently before the court. The petitioners in the case had filed an "Affidavit in Reply" in response to the respondent's response to the Petition. Through the Affidavit in Reply, the Petitioners had placed on record 6 further affidavits, which were not formally filed, but marked as annexures 1 to 6. The court struck out the Affidavit in Reply for having been filed out of time and without leave. The court went on to observe that such a manner of introducing evidence was an anomaly and the affidavits annexed to the Replying Affidavit would not have probative value. It stated as follows:

"This is an unusual way of availing affidavits as "annextures" or "evidence", they are not independent affidavits filed to stand on their own, as evidenced in the particular proceedings. We would understand if an affidavit is sworn in other proceedings in the past, is annexed as evidence of that affidavit. However, to have several affidavits sworn for the purpose of current proceedings and annexed as evidence is most unusual, if not strange, in our view. Firstly, such affidavit evades payment of the filing fee and, secondly, their probative value come into question."

162. In the present case, I have before me the 1st respondent's affidavits in which she seeks to rely on the affidavits of other parties annexed thereto. Bearing in mind the decisions of the courts set out above and the provisions of Order 19, the said affidavits are of no probative value. Such evidence as the 1st respondent seeks to adduce on the basis of the said affidavits, including the alleged tax status of Horizon Ltd, the bank statements of Horizon Ltd, the letters of various government agencies purportedly clearing the said Horizon, is all hearsay. I will accordingly, in considering and determining the issues raised in this matter, confine myself solely to such averments of the 1st respondent as meet the provisions of Order 19.

163. The second preliminary issue relates to the provisions of POCAMLA applicable to this matter. The 1st respondent submits that she is required to show a legitimate source of funds as provided under section 65 of POCAMLA. The Agency responds that this is not the case as its application is brought under the civil forfeiture provisions of POCAMLA. This is indeed the position. Section 65 is contained in Part VII of POCAMLA which provides for forfeiture pursuant to criminal proceeding. It is not applicable to the present matter.

164. I now turn to consider the 4 issues that arise for determination in this matter.

Whether the funds held in the 1st and 2nd respondents' bank accounts are

proceeds of crime

165. I will consider this issue alongside the second issue identified as arising for determination: whether the funds held in the 1st and 2nd respondents' bank accounts should be forfeited to the State.

166. This application for forfeiture has been brought under the provisions of POCAMLA. The Act provides for the offence of money laundering and introduces measures for combating the offence. It also contains provisions for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime. In the case of **Abdulrahman Mahmoud Sheikh & 6 others v Republic & others** (supra) the court identified the legislative intent behind POCAMLA in the following terms:

"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."

167. In **Schabir Shaik & Others –vs- State Case CCT 86/06(2008) ZACC 7** it was held that:

"…. 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…"

168. 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 added)

169. Should the facts of the case as presented by the agency show, on a balance of probabilities, that the funds at issue are proceeds of crime, the 1st respondent would be required to show, by way of evidence, that the funds have a legitimate source. In the event that she fails to do so, the court would have jurisdiction to issue the forfeiture orders sought.

170. The facts presented to the court by the Agency show as follows. In the 2014/2015 financial year, between December 2014 and March 2015 some Kshs. 791,385,000 had been paid by the NYS to three business entities registered by one Josephine Kabura Irungu. Between 22nd December, 2014 and 21st January, 2015, Kshs. 218,925,000 had been paid to account number [**********] held at Family Bank, KTDA Plaza, Nairobi, in the name of Form Home Builders. Between 5th February, 2015 and 27th March, 2015, Kshs. 252,300,000 had been paid to account number [**********]held at Family Bank KTDA Plaza, Nairobi, in the name of Roof and All Trading. Finally, between 5th February, 2015 and 31st March, 2015, Kshs. 320,160,000 had been paid to account number [**********] held at Family Bank, KTDA, Plaza Nairobi, in the name of Reinforced Concrete Technologies. The accounts of these entities had nil balances at the time the funds were deposited. Upon payment of the funds into the accounts, the funds were immediately transferred to other bank accounts.

171. From the amounts paid to the accounts above, a total of Kshs. 381,000,000 was internally transferred by Josephine Kabura Irungu to the accounts of one John Kago Ndungu and Goodluck Treaty Eleven Enterprises at Family Bank, Cargen Branch on diverse dates between 20th January and 9th June 2015. Kshs 273,000,000 was transferred to account number [**********] held in the name of John Kago Ndungu. Between 10th April and 9th June 2015, Kshs. 108,000,000 was transferred to account number [**********] held in the name of Good Luck Twenty Eleven Enterprises, a business entity owned by Kago. Copies of Kago's and Goodluck Twenty Eleven Enterprises Family Bank account statements and a bundle of teller's transaction detail showing the

deposits and transfers from the said account have been placed before the court. The two accounts had been opened by Kago on 7th March 2015.

172. The evidence presented by the Agency shows that out of the Kshs.273, 000,000 that he received in his bank account number [**********], Kago transferred through RTGS (annexure SJM - 5) a sum of Kshs.103, 000,000 to K-Rep Bank account number [**********] in the name of Ogola and Company Advocates between March 2015 and June 2015. Further, that out of the Kshs 108,000,000 that Kago received through Good Luck Twenty Eleven Enterprises account number [**********], he transferred through RTGS ("SJM-6") on 25th May 2015 a sum of Kshs.10, 000,000 to K-Rep Bank account number [**********] in the name of Ogola and Company Advocates. The firm of Ogola and Company Advocates had thus received Kshs.113, 000,000 in its bank account number [**********] held at K-Rep Bank, Kilimani Branch. On its part, the firm of Ogola and Company Advocates transferred Kshs 79,676,505 to the 1st respondent's account number [**********] at the Faulu Kenya Limited.

173. Further, as emerged from the statement made by Patrick Ogola ("SJM-7"), on 28th May 2015 the said firm, out of the sum of Kshs.113, 000,000 received from Kago, transferred Kshs. 20,000,000/= from its bank account number [**********] held at K-Rep Bank to Faulu Kenya Limited bank account number [**********] held at Bank of Africa as an investment for the 1st respondent in her account number [**********] held at the said Faulu Kenya Limited.

174. The Agency's evidence is further that on 8th April 2015, out of the Kshs 273,000,000 held in Family bank account number [**********], Kago transferred through RTGS (SJM-8) Kshs.78, 000,000 to M.M Gitonga and Associates Bank account number [**********] held at Prime Bank. On 5th June 2015, Martin Muthomi of M.M. Gitonga and Company Advocates transferred Kshs. 30,000,000/= out of the Kshs. 78,000,000 received from Kago through RTGS (SJM-9) to Faulu Kenya Limited Bank account number [**********] held at Bank of Africa as an investment for the 1st respondent in her account number [**********] held at the said Faulu Kenya Limited. On the same day, 5th June 2015, Martin Muthomi of M.M. Gitonga and Company Advocates transferred through RTGS a further Kshs. 30,000,000/= from the same account number [**********] held at Prime Bank to Faulu Kenya Limited bank account number [**********] held at Co-operative Bank of Kenya through RTGS (SJM-10) as an investment for the 1st respondent in her account number [**********]held at the said Faulu Kenya Limited.

175. Following investigations into the transactions involving funds from the NYS, Central Bank, in administrative enforcement of Prudential Guidelines, had imposed a fine on Family Bank for breach of banking regulations and failure to report suspicious transactions.

176. The 1st respondent concedes the movement of funds from Kago's and Goodluck Twenty Eleven Enterprises accounts to her Advocates' accounts. She also concedes the movement of funds from the Advocates accounts to her personal accounts. Indeed, in her affidavits, she narrates the movement of funds in more or less the same terms as does the Agency. She also cites in support of her averments in respect of the movement of funds some of the annexures in the affidavits sworn on behalf of the Agency, such as annexures SJM 4 and SJM 8 which are her Advocates' statements of account, as well as the statements made to the agency by the Advocates, such as annexure SJM10- Muthomi's statement to the investigators.

177. The 1st respondent's case is that the funds in Kago's account, as well as the funds in Goodluck Twenty Eleven Enterprises which were transferred to her Advocates and later to her personal accounts, were her funds. The funds were not from her salary. They were funds which she had been given by Horizon Ltd. Horizon, whose directors were her son, Ben Gethi and Mathenge, had withdrawn the funds from their account in Family Bank and given the money to her in cash. In turn, she had given the money, in cash, to Kago. He had given her acknowledgement receipts, and he is the one who had deposited the funds in his account and in the Goodluck Twenty Eleven Enterprises account in Family Bank. The funds had not been deposited by Josephine Kabura Irungu. The reference in the narration in a statement showing a transfer to Kago was by another Josephine Kabura, not Josephine Kabura Irungu.

178. I have considered the 'evidence' that the 1st respondent has placed before the court in support of her contentions. All the averments relating to the source of funds as being Horizon Ltd are based on an affidavit annexed to the 1st respondent's affidavit, ostensibly sworn by Peter Anthony Mathenge. The averments relating to the receipt of the funds by Kago is also based on an affidavit annexed to her affidavit. There is nothing from the 1st respondent that can be considered to be proof that she received funds from Horizon. There is also nothing from the 1st respondent that would prove the support she allegedly gave to Horizon at its inception that would justify its very generous gift to her of funds in excess of Kshs 302,000,000. It is also interesting that Horizon, which, according to the 1st respondent, had an income in 2015 of Kshs 142,800,015.60 was able to give her cash of Kshs 302,100,000.

179. It would also be quite a strange coincidence that on the same dates and in the same branch of the same bank, Family Bank, that funds were moving from Josephine Kabura Irungu's business entities, the exact same quantity of funds were being deposited into Kago's account in the same bank, and thereafter finding their way to her Advocates, and then into her accounts. The 1st respondent really does seek to stretch the credulity of the court.

180. I note that the respondents have been charged, with others, with criminal offences relating to the funds from NYS, though the 1st respondent acknowledges at times that she is among the accused persons, and denies in others. Under section 92(1) of POCAMLA, it is provided that:

(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.

181. Section 2 of POCAMLA defines proceeds of crime as any benefit derived '***directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender.***' From the evidence placed before me by the Agency which the 1st respondent has not displaced, I am satisfied, on a balance of probabilities, that the funds in the respondents' accounts are proceeds of crime. The respondents had the evidential burden to demonstrate the sources of the funds deposited in their respective accounts from the accounts of the business entities owned by Josephine Kabura Irungu. The 2nd respondent did not file anything to challenge the Agency's case.

182. As for the 1st respondent, in light of the court's findings on the probative value of the affidavits annexed to her affidavit, there is no evidence before the court that can support her contention that the funds at issue are her funds. Accordingly, it is my finding and I so hold that the funds the subject of this application are proceeds of crime.

183. Having so found, the answer to the next issue must, of necessity, be in the affirmative. The Agency has established, on a balance of probabilities, that the funds in the respondents' accounts are proceeds of crime, having been part of the funds fraudulently transferred from the NYS to the accounts held by the three business entities registered in the name of Josephine Kabura Irungu. Having so found, then the only recourse open to the court is to find that as proceeds of crime, they are liable to forfeiture to the State.

184. But the 1st respondent makes two further arguments in opposition to the orders of forfeiture. The first is that no-one has been convicted in relation to the funds allegedly fraudulently transferred from the NYS. As the criminal prosecution is not over and no one has yet to be convicted, the forfeiture orders cannot issue.

185. This argument, I believe, is answered by past jurisprudence from this court and by the provisions of statute. In **Assets Recovery Agency vs Pamela Aboo [2018] eKLR**, the court considered the issue in relation to the civil proceedings for forfeiture before it and observed as follows:

"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..."

186. Section 92(4) of POCAMLA provides that:

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

187. It is my finding therefore and I so hold that the issuance of a forfeiture order in this matter is not dependent on whether or not anyone is ever convicted in relation to the fraudulent transfer of funds from the NYS. The 1st respondent has not been able to discharge the burden placed on her to demonstrate the source of the funds deposited in her account, and to displace the Agency's evidence that shows it was part of the NYS funds. In the face of such failure, there is no refuge that the 1st respondent can find in alleging that there has been no conviction in relation to the NYS funds.

188. The last argument made by the 1st respondent is that the funds at issue belong to her, and she has a right to property under Article 40 of the Constitution. The right to property is, indeed, guaranteed in the Constitution, and no-one can argue with its being available to all citizens. However, under Article 40(6), property that is found to be unlawfully acquired is not protected. The Article provides that:

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

189. I have already considered the 1st respondent's explanation of the sources of the funds in her accounts, and found that such explanation is not tenable. In the circumstances, I find that the issuance of a forfeiture order in this case is not a violation of her rights under Article 40.

190. An argument has also been made that there has been a violation of the 1st respondent's right to fair hearing. Given the fact that the 1st respondent has fully participated in the hearing of the present matter, such contention has no basis- see **Assets Recovery Agency v James Thuita Nderitu & 6 others** (supra).

191. Finally, the 1st respondent has sought succour in the decision of the High Court in ACEC No. 16 of 2016. She has argued that it is not disputed that on 26th August 2015, she redeemed Kshs. 15,000,000/= to her Standard Chartered Bank account. She contends that this amount was the subject of proceedings before this court in ACEC No. 16 of 2016, and that in a judgment delivered on 20th November, 2018, the court made a finding that the amount was not part of the alleged Kshs. 791,385,000 fraudulently transferred from the NYS. The response of the Agency is that the judgment of the court in that matter is the subject of an appeal and it is therefore not a final decision.

192. I have read the decision of the court (Ong'udi J) in **Assets Recovery Agency v Charity Wangui Gethi [2018] eKLR**. The issue before the court was whether the applicant, the Assets Recovery Agency, had proved on a balance of probabilities that the money used by the 1st respondent to purchase motor vehicle registration number KCD 241Q Jeep Cherokee was part of the money stolen or fraudulently acquired from the NYS. Upon considering the evidence placed before it, the court found that the applicant had failed to prove, to the required standard, that the motor vehicle had been purchased from the said funds, and it accordingly declined to issue a forfeiture order. In reaching its decision, the court observed as follows:

64. Of interest to this court is the issue of the deposit of Kshs 17.6 M by M.M. Gitonga advocates with Old Mutual which money is suspected to have originated from Josephine Kabura and part of it used to purchase of the motor vehicle in issue using funds from the Respondent's account. Old Mutual's quality assurance will always require that the source of such funds be verified. For this purpose a sale agreement dated 5th June 2015 between Kilele Investment Group and the Respondent drawn by M.M. Gitonga and Associates for Kshs 17,6M for residential property known as utawala block 11/38 on LR. 1132 NRB was provided by her agent Martin Wanjohi.

65. There were many other deposits and annexed sale agreements which I will not get into as they are not part of the Kshs 17.6M. According to Cpl Sautet this particular agreement was found to have been a forgery as there was no such sale agreement presented to Old Mutual by her.

66. When called upon to explain the issue of the purchase of this vehicle, the respondent explained that she was given money Kshs 10M by Horizon Ltd a company owned by her son. This was cash money and so did not go through any bank transactions. She further stated that the Kshs 10M was already in her account as at the time these other deposits were being made.

67 Again going by Mr. Harrison Gongo's statement the Respondent opened the Old Mutual account on 6th January 2015, through her intermediary one Martin Wanjohi. There was a cash deposit of Kshs10M on 2nd January 2015 confirmed by a slip of the same date. A further deposit of Kshs 10M was made on 13th February 2015.

68. The Kshs 17.6M was received by old Mutual on 11th June 2015 while Kshs 18 M from Ogola & Co Advocates was received on 28th May 2015. By this time there was already over Kshs 100 M in the Respondent's Old Mutual account.

69. According to Harriosn Gongo of Old Mutual the first redemption of Kshs 3 M was made by the Respondent on 23rd February 2015 while the 2nd one of Kshs 14 M was made on 26th March 2015. It is therefore clear that as at the time the Kshs 17.6M and 18M were hitting the Respondent's account at Old mutual the money from which the motor vehicle was bought was not in that account.

70. Secondly the money from Josephine Kabura which the Applicant is relying on to pin down the Respondent hit John Kago's accounts on 26th and 31st March 2015. The same was also not transferred to the Respondent's Old Mutual account immediately. It was transferred after 26th March 2015

71. Its therefore clear that whatever the Respondent may have received indirectly through John Kago did not form part of what the Respondent transferred/redeemed from her Old mutual account to her Standard Chartered Bank account. It is not disputed that the money that was used to purchase the Jeep Cherokee vehicle was from the Respondent's Standard Chartered bank account.

193. The Agency informed the court that there is an appeal pending at the Court of Appeal against the decision of Ong'udi J in the above matter, so I will confine myself to a few observations pertinent to the matter before me. I note that the subject of that case is materially different from the issues now before me. The court in that matter was concerned with the question whether or not the motor vehicle at issue was a proceed of crime. On the material before it, the court found that the Agency had not established, on a balance of probabilities, that the funds used to purchase the vehicle were part of the funds fraudulently paid out from the NYS.

194. The court further noted that the 1st respondent had redeemed Kshs 3 million on 23rd February 2015 and Kshs 14 million on 26th March 2015. The view of the court was that by the time the 17.6 million and 18 million transferred to the 1st respondent's accounts by M. M. Gitonga Advocates and Ogola & Co. Advocates reached her Old Mutual account in June 2015, she had already redeemed funds to her Standard Chartered Bank account, which she used to purchase the Jeep Cherokee the subject of the application before the court.

195. In the present case, I have found that the Agency has established, on a balance of probabilities, that the Kshs 87,000,000 in the 1st respondent's account and Kshs 10,000,000 in the 2nd respondent's account was part of the funds fraudulently transferred from the NYS and into Josephine Kabura Irungu's entities' accounts. The 2nd respondent has not bothered to proffer an explanation for the source of the funds. The 1st respondent has proffered an explanation that does not satisfy the court that the Agency's contentions are wrong. Her contention that the Kshs 15 million that she redeemed from Old Mutual to her Standard Chartered Bank account on 26th August 2015 was the subject of ACEC 16 of 2018 is not borne out by the evidence or the judgment in the matter. In the circumstances, I find that the decision of the court in ACEC Misc. 16 of 2018 does not assist the 1st respondent.

196. Accordingly, I find and hold that the application in this matter is merited, and I hereby grant the following orders:

1. THAT a declaration be and is hereby issued that funds amounting to Kshs 97,682,424 held in the names of the 1st and 2nd respondents in the following bank accounts are proceeds of crime and liable for forfeiture to the Government;

a. Kshs 79,676,505 in Account number [**********] at Faulu Kenya Limited Nairobi in the name of Charity Wangui Gethi.

b. Kshs 10,000,000 in Account number [**********] at Family Bank Limited, Kagwe Branch in the name Sam M.

Mwadime.

c. Kshs 7,801,919 in Account number [**********] at Standard Chartered Bank Ruaraka Branch, in the name Charity Wangui Gethi.

d. Kshs 204,000 in Account Number [**********] at Old Mutual Money market Fund Nairobi in the name of Charity Wangui Gethi.

2. THAT an order be and is hereby issued that the said funds be forfeited to the Government and transferred to the Applicant.

3. THAT the respondents shall bear the costs of this application.

DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF FEBRUARY 2021

MUMBI NGUGI

JUDGE

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23rd March, 2022

The Clerk of the Senate

Parliament Buildings

NAIROBI

RE: COMMITTEE STAGE AMENDMENTS TO THE LIFESTYLE AUDIT BILL (SENATE BILLS NO. 36 OF 2021)

NOTICE is given that Sen. Erick Okong'o Mogeni, the Chairperson to the Standing Committee on Justice, Legal Affairs and Human Rights, intends to move the following amendments to the Lifestyle Audit Bill, Senate Bills No. 36 of 2021, at the Committee Stage—

CLAUSE 4

THAT clause 4 of the Bill be amended by inserting the following new subclause immediately after subclause (3)—

(3A) An accounting officer who fails to comply with the requirement under subsection (3) commits an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both.

CLAUSE 5

THAT clause 5 of the Bill be amended in subclause (1) by deleting paragraphs (a) and (b) and substituting therefor the following new paragraph (a)—

(a) there are reasons to believe that a public officer is living beyond the officer's lawfully obtained and reported income and is unable to account for the source of their additional income;

CLAUSE 6

THAT clause 6 of the Bill be amended by deleting the words "apply for a search warrant to be issued against" appearing immediately after the words "by such officer" in the introductory clause and substituting therefor the words "issue a notice to explain for".

CLAUSE 7

THAT clause 7 of the Bill be amended —

(a) in subclause (1) by —

(i) inserting the words "*ex parte*" immediately after the words "it may apply"; and

(ii) deleting the word "High" appearing immediately after the words "officer from the" and substituting therefor the word "Magistrates'";

(b) by deleting subclause (2) and substituting therefor the following new subclause—

(2) When making an application under subsection (1), the Commission shall—

(a) specify the grounds on which the application is made and if material relevant to the lifestyle audit is likely to be found on the premises specified in the application;

(b) specify the information and material being sought in the intended search; and

(c) substantiate to the Court that the material sought could not be reasonably obtained anywhere else other than in the premises specified in the application.

(c) by inserting the following new subclauses immediately after subclause (4)—

(5) The Commission shall deposit the material obtained in the execution of a search warrant with the respective Court within three days of the execution.

(6) A person aggrieved by the issuance of a search warrant under this section may apply to the High Court for a review of the decision—

(d) at any time before the execution of the search warrant; and

(e) within thirty days after the execution of the search warrant.

CLAUSE 10

THAT the Bill be amended by deleting clause 10.

CLAUSE 11

THAT clause 11 of the Bill be amended—

(a) in subclause (1) by inserting the words "*ex parte*" immediately after the words "make an application"; and

(b) in subclause (3) deleting the word "three" appearing immediately after the words "shall not exceed" and substituting therefor the word "six".

CLAUSE 14

THAT clause 14 of the Bill be amended—

(a) in subclause (1) by inserting the words "*ex parte*" immediately after the words "Commission may apply"; and

(b) in subclause (4) deleting the word "three" appearing immediately after the words "shall not exceed" and substituting therefor the word "six".

CLAUSE 21

THAT the Bill be amended by deleting clause 21.

CLAUSE 23

THAT clause 23 of the Bill be amended in subclause (3) by deleting the words "Director of Public Prosecutions may, in consultation with the Commission" appearing immediately after the word "The" and substituting therefor the words "Commission may".

CLAUSE 25

THAT the Bill be amended by deleting clause 25.

NEW CLAUSE

THAT the Bill be amended by inserting the following new clause immediately after clause 2 —

Application of the Act.

2A. This Act shall apply —

(a) to public officers; and

(b) in the case of a person who has ceased being a public officer, the period of ten years immediately after the person has ceased to be a public officer.

CLAUSE 2

THAT clause 2 be amended in the definition of the word "Commission" by inserting the word "Commission" immediately after the words "Ethics and Anti-Corruption".

Dated this **24th** day of **March, 2022**

Sen. Erick Okong'o Mogeni,
Chairperson,
Standing Committee on Justice, Legal Affairs and Human Rights.