



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 Rosslyn 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 Ratego 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 Ratego 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 to date 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 RossyIn 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 Okiiti & 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. Matpei 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 Quorum 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 annexure 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 annexures 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 annexures 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 “annexures” 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