



Assets Recovery Agency v Wanjiku; Pak Mumtaz Motor Limited (Interested Party) (Anti-Corruption and Economic Crimes Civil Suit E007 of 2021) [2023] KEHC 358 (KLR) (Anti-Corruption and Economic Crimes) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 358 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E007 OF 2021
EN MAINA, J
JANUARY 26, 2023

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

HILLARY WACHIRA WANJIKU RESPONDENT

AND

PAK MUMTAZ MOTOR LIMITED INTERESTED PARTY

JUDGMENT

1. The Applicant herein is the Assets Recovery Agency established under section 53(1) of the *Proceeds of Crime and Anti-Money Laundering Act* (herein after referred to as POCAMLA). The principal mandate of the Agency is to recover assets that are acquired through proceeds of crime and also assets which are instrumentalities of crime.
2. Civil forfeiture is provided for under part VIII of the *Proceeds of Crime and Anti-Money Laundering Act*. Sections 81 and 82 specifically empower the Agency to institute preservation proceedings for assets where there are reasonable grounds to believe that the property is a proceed of crime or has been used or is intended to be used in the commission of an offence.
3. On the 15th of December 2020 this Honourable Court granted the Applicant an order of preservation against motor vehicle registration number KCU 42IJ Toyota Vitz. That order was published in the Kenya Gazette on December 31, 2020 vide Gazette Notice No 11331 in Kenya Gazette Vol CXXII No 240, a copy whereof was attached to the affidavit of CPL Isaac Nakitare dated March 29, 2021.
4. The above Motor Vehicle is owned by the Respondent and the Interested Party herein.



5. On the March 30, 2021, the Applicant filed an Originating Motion application for forfeiture.
6. On the 21st of March 2022 following the filing of an affidavit of service dated March 18, 2022 detailing the efforts made by the Applicants to serve the parties this Court granted the Applicant's application to serve the parties by way of substituted service. The Applicant duly published the notice in the Daily Nation of March 28, 2022.
7. Subsequent to the publication of the notice the Interested Party appointed the firm of Messrs. Okanga and Company Advocates to enter appearance on their behalf. The Respondent has never appeared.
8. Despite being granted time by this Honourable Court, Learned Counsel for the Interested Party did not file their pleadings and has not appeared in court since the first appearance on June 20, 2022.
9. The Applicant has consistently served both the Respondent and the Interested Party's Counsel with the dates and documents as evidenced by the various affidavits of service filed herein.
10. I have considered the pleadings and written submission of the ARA/Applicant and as correctly stated by Counsel for the ARA/Applicant the issues for determinations are:-
 - i. Whether the motor vehicle Registration No KCU 421 J is a proceed of crime.
 - ii. Whether the motor vehicle Registration No KCU 421 J is liable to be forfeited to the state.
11. An application for a forfeiture order is made under Section 90 (1) of the [Proceeds of Crime and Anti-Money Laundering Act](#) (POCAMLA) which states: -

“90(1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.”
12. The circumstances under which such a forfeiture order can be made are set out in Section 92(1) of the [Act](#). Section 92(1) provides that such an order shall be made if the court finds on a balance of probabilities that the properly concerned is either: -
 - a. An instrumentality of crime or
 - b. Is a proceeds of crime.
13. In this case it is contended that the motor vehicle Registration No. KCU 421J is a proceeds of crime the same having been purchased through the sale of narcotic drugs. It is alleged that the Respondent in whose name the motor vehicle is registered, albeit jointly with the Interested Party, was arrested trafficking in Narcotics and that he is facing charges related to the trade in the Jomo Kenyatta International Airport (JKIA) Chief Magistrate's Court.
14. Whereas the Respondent was duly served with the requisite Notice under Section 90(2) of the [POCAMLA](#) he did not enter appearance in these proceedings or even attend during the proceedings. In the premises the averments of the ARA/Applicant have not been rebutted. This court has carefully considered the material placed before it by the Applicant and it is satisfied on a balance of probabilities that the vehicle was purchased and or acquired with income from the sale of narcotics and/or psychotropic substance. In Kenya such trade is prohibited under the [Narcotic Drugs And Psychotropic Substances \(Control\) Act](#) No 4 of 1994. It is therefore an offence hence a crime to traffick such substances. This therefore renders the motor vehicle proceeds of crime.



15. Although this court is alive to the fact that the respondent's trial in the lower court is still underway the law is that forfeiture proceedings are not tied down to the outcome of criminal proceedings (See Section 92(4)) of the [Proceeds of Crime and Anti-Money Laundering Act](#) which states: -
- “ 92(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.”
16. It is also instructive that the absence of a person whose interest in the property may be affected by a forfeiture order does not prevent the court from making the order – Section 92(3).
17. The interested party entered appearance but did not take part in the proceedings. Accordingly, there being no notice or application under section 94 of the [Proceeds of Crime and Anti-Money Laundering Act](#), and this court having been persuaded on a balance of probabilities that The motor vehicle KCU 421J is a proceeds of crime, this court finds that the same is liable for forfeiture to the State and I do so order.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY 2023

E N MAINA

JUDGE

