

**AN EXAMINATION OF ASSET SEIZURE, PRESERVATION, FORFEITURE AND
MANAGEMENT IN KENYA**

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the requirements for the Master of Laws (LL.M) Degree Program.

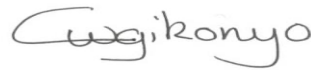
October 14th , 2021

Declaration

I, **OONGE EDWARD MAGOMA**, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university.

Signature..........Date.....14.10.2021...
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This research project has been submitted for examination with my approval as the University Supervisor



Signature

14/10 /21

DR. CONSTANCE GIKONYO

Acknowledgement

I am very grateful to my supervisor Dr Constance W. Gikonyo for her invaluable advice and support and to her committed guidance towards the completion of this research project. All errors and omissions in this study are wholly attributable to me.

Dedication.

To Maureen and the Kids. Thank you.

Abstract

Asset seizure and forfeiture as part of asset recovery is the process through which law enforcement identify and trace assets linking them to crime and criminal activity and allow for seizure and confiscation of the proceeds and prosecution of the perpetrators. It is mainly concerned with the fight against crime and aimed at correcting the harm caused by crime based on the principle of ensuring and encouraging corrective justice and the principle that crime does not pay. The study considers asset seizure and forfeiture processes as well as asset management under POCAMLA , the utility of the process of criminal and civil asset forfeiture as tools in the fight against corruption, and organised crime, the justification and the aim of asset seizure and forfeiture of taking the benefits out of crime and in the process ensuring that crime does not pay at the same time ensuring that the society is compensated for the negative effects of crime. The study also considers the conflict between protection of private property and the public interest in effective crime fighting and prevention. And the standard of proof to be mustered in the process of both criminal and civil asset forfeiture regimes. The study also considers the effect of forfeiture on the rights of innocent third parties for example co-owners, lenders, mortgagees and creditors.

The findings of the research show that Asset management compliments the asset recovery policy by taking care of the assets and maintaining their value. Thus, proper asset management lies at the heart of the asset recovery policy supporting the aim of combating crime and correcting the harm caused by crime. Without proper asset management skills, the authorities may end up seizing and preserving liabilities rather than assets whose management costs may exceed the anticipated realizable value hence burdening the authorities and the public unnecessarily.

The study looks at the management of seized and forfeited assets and the processes involved with respect to international best practices, identifies shortcomings and proposes ways of addressing them. The findings of this study adds to the body of law and expands the knowledge in the areas specifically of asset management as well as improve the management of seized assets in Kenya. The study has identified gaps in the body of the law and offered recommendations on likely amendments to fill the identified gaps and enrich the process which makes the enforcement of the law beneficial to the law enforcement agencies and the citizenry.

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List of Abbreviation

ACECA	Anti-Corruption and Economic Crimes Act
AG	Attorney General
ARA	Asset Recovery Authority
CAF	Civil Asset Forfeiture
CPCA	Criminal Property Confiscation Act
DPP	Director of Public Prosecution
EACC	Ethics and Anti-Corruption Commission
ECHR	European Court of Human Rights
NCB	Non-Conviction Based forfeiture
NDPP	National Director of Public Prosecutions
NTSA	National Transport and Safety Authority
NYS	National Youth Service
POCA	Prevention of Organized Crime Act
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
SA	South Africa
UK	United Kingdom
UN	United Nations
USA	United States of America
UWO	Unexplained Wealth Orders

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Proceeds of Crime and Money Laundering Act No 9 of 2009.

The Constitution of Kenya 2010

The Penal Code Cap 63

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United Nations Convention against Corruption (Adopted 31st October, 2003 Entered into Force, 14th December, 2005,)’ I-42146 UNTS

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Adopted in Vienna on 19 December 1988 and came into force 11 November 1990) I-27627 UNTS

CHAPTER 1: INTRODUCTION

1.0. Background

Towards the end of 2018, a leading newspaper¹ reported that the Assets Recovery Agency had recovered assets worth KShs. 1.8 billion related to what is now notoriously known as National Youth Service (NYS) Season 2. NYS, a noble idea mooted by the government to train youth to offer services to the country and make them responsible members of the community was being used as a gateway to siphon funds meant to improve and equip the department. Individuals using business names and limited liability companies freshly incorporated, acting in concert with government officials in the NYS procurement department hatched a scheme to siphon hundreds of millions of Shillings to company accounts belonging to people who did not supply anything to NYS.

The money was reportedly carted away in sacks from a local bank according to press reports and proceedings in a parliamentary committee. In some instances, senior government department employees, in this instance NYS have accumulated vast properties that are unexplained and beyond their known source of income which is their salary. A case in point is reported in the newspapers² where a clerk in NYS stole over KShs. 500Million, the money ended purchasing farms and property in upmarket locations.

The stolen money provides comforts and luxuries which makes the perpetrators have a sense of entitlement and ownership of the assets the stolen money buys and what it does for them, in some instances it includes payment of school fees in high end private schools for their children. In a demonstration of a sense of entitlement and ownership of money and assets suspected to be stolen but frozen by the authorities, a suspect in one of the NYS cases pending in court was seen complaining in the media³ that a freeze of her assets and money is affecting her son's education which is a further demonstration that the illicit wealth not only purchases assets but are used to pay tuition fees for children in expensive schools that teach foreign languages.

¹ Rushdie Oudia and Donna Atola, 'Agency Recovers NYS Assets Worth Sh1.8bn' (*Nation*, 28 March 2019) <<https://nation.africa/kenya/news/agency-recovers-nys-assets-worth-sh1-8bn-152860>> accessed 13 March 2020.

² Paul Ogemba, "This Clerk Stole Sh500m in Four Years" (*The Standard*) <<https://www.standardmedia.co.ke/article/2001353186/this-clerk-stole-sh500m-in-four-years>> accessed 28 March 2020.

³ Vincent Kejitan, 'My Son Is Now a Chokoraa, Cannot Speak German, Only Kikuyu, Swahili and English' (*Ureport-Citizen Journalism*) <<https://www.standardmedia.co.ke/ureport/article/2001361758/my-son-is-now-a-chokoraa-cannot-speak-german-only-kikuyu-swahili-and-english>> accessed 20 March 2020.

In other cases, in order to explain the sources of large deposits of money in the personal accounts, attempts are made by the suspects to explain the deposits as proceeds of farming enterprises and activities in the villages which allegations have been refuted by the investigators as deceit and a ploy to disguise and conceal the sources of funds which are proceeds of corruptly⁴ stolen money from government. Recently, the UK government did indeed prosecute a case locally known as “chicken gate” in record time and recovered a sum of Ksh 52Million⁵ which money was repatriated and put into good use of purchase of ambulances for hospitals. The money had initially gone into peoples’ pockets.

Across all government departments, resources that are budgeted for provision of services to the citizens are embezzled through shadowy networks of dubious service providers. The resources end up purchasing property and assets illegally and in other instances end up in private bank accounts. In a speech delivered on 25 January 2019⁶, the President, while addressing the Multi-Sectoral National Anti-Corruption Conference said that we celebrate people who have made wealth through illicit means in places of worship rather than shunning them. Those that have manipulated the system to acquire ill-gotten wealth are admired to the extent that there is no stigma attached to corruption and there are no social consequences.

There is therefore, a need to have a structured manner of recovery of the illicit assets bought from illegally acquired funds and redirect the funds to the functions they were intended to achieve in the first place. This can only be done through various processes of asset seizure and forfeiture. The process of asset seizure and forfeiture involves law enforcement and the prosecution whose main duty is tracing and to identify assets associated with suspected criminals and their illegal activities with an aim of seizing the assets and prosecution of the suspects. The persons and entities that have an interest in the specified assets at the time of confiscation lose all the rights to the confiscated items or funds⁷. Previously the issue of asset

⁴ Susan Muhindi, ‘Farm Trip a Delay Ploy, Agency Tells Court in Omollo NYS Case’ (*The Star*, 16 July 2019) <<https://www.the-star.co.ke/news/2019-07-16-farm-trip-a-delay-ploy-agency-tells-court-in-omollo-nys-case/>> accessed 22 March 2020.

⁵ Maureen Murimi, ‘Kenya Recovers Ksh 52 Million from “Chickengate” Scandal’ (*Citizen tv.co.ke*, 30 March 2016) <<https://citizentv.co.ke/news/kenya-recovers-ksh-52-million-from-chickengate-scandal-120362/>> accessed 1 April 2020.

⁶ Paul Mwangi, ‘Success of Kenya’s Anti-Graft War Is in Asset Recovery’ (*Nation*, 20 April 2019) <<https://nation.africa/kenya/news/success-of-kenya-s-anti-graft-war-is-in-asset-recovery-160428>> accessed 1 April 2020.

⁷ Mat Tromme, ‘Waging War against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with the Rule of Law’ (2018) 29 *Duke Journal of Comparative and International Law* 165.

seizure and forfeiture were regulated by the Penal Code⁸ and The Prevention of Corruption Act⁹(repealed). In order to empower the government to effectively deal with the issue of corruptly acquired wealth, to facilitate the government to confiscate property used in commission of crime or is a product of crime, the Proceeds of Crime and Money Laundering Act 2009 (POCAML A)¹⁰ was enacted. The objective of the Act is contained in the preamble.

The Act creates Asset Recovery Agency that is headed by the Director whose duties are spelt out. This study seeks to interrogate the process of tracing, preservation, seizure, forfeiture, of funds and assets under POCAML A. The Management of seized assets by ensuring their value is preserved as it was before. The study will also look at the role of the courts as a component of the process of asset seizure and forfeiture. This will involve a consideration of the provisions of the constitution¹¹ relating to the right to property and due process of the law in seizure and forfeiture of property.

1.1. Problem Statement

Even though our parliament has enacted legislation that deals with and regulates asset seizure and forfeiture¹², and also aims to effectively and timeously trace , freeze, preserve , and eventually forfeit to the state assets and proceeds resulting from crime and corrupt activities perpetrated by civil servants , individuals and private institutions, nevertheless, the implementation of the asset seizure and forfeiture of proceeds of crime and property suspected to have been acquired corruptly still remains a challenge. The reasons for this may be, among others, the lack of political will, lapses or weak implementation regime of the provisions of the laws or short comings in the body of the law. This study will seek to interrogate the effectiveness of the laws regulating the seizure, management and forfeiture of proceeds of crime and property acquired corruptly by the institutions set up under the laws in achieving its objectives, the lapses and lacunas contained in the laws and possible recommendations , and ways to effectively achieve their intended purpose. or as to whether there is a conflict or overlap either real or perceived of the functions of the agencies established by POCAML A.

⁸ Penal Code Cap. 63.

⁹ The Prevention of Corruption Act Cap 65(repealed).

¹⁰ Proceeds Of Crime And Anti Money Laundering ActNo. 9 of 2009.

¹¹ Constitution of Kenya 2010.

¹² Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009.

1.2. Justification of The Study

Pilferage and theft of public resources by persons who are entrusted with the custody of the resources and their associates only means that the resources are not utilized for the intended purpose, instead the resources end up in private bank accounts and purchase of assets that finance luxurious lifestyle of the officials and their associates to the detriment of the intended beneficiaries. Various crimes committed also leave victims in their wake, and one of the main principles of criminal law is the states' desire to ensure that no one benefits from criminal conduct or criminality.

The findings of this study will contribute to existing knowledge about asset seizure and forfeiture in the country, the role of different stake holder offices and the extent in which they can further be involved to achieve the objectives of the relevant laws. The study will also inform the government on the extent of the enforcement of the laws the weaknesses and strengths of the two laws that deal with asset seizure forfeiture, and possible suggestions on improvement on implementation of the process.

1.3. The Objective of the Study

- (a) To examine the scope and applicability of the application of the POCAMLA towards criminal asset seizure, asset forfeiture and asset management in Kenya.
- (b) To examine the scope and applicability of the application of non-conviction-based asset seizure, asset forfeiture and asset management in Kenya.

1.4. Research Questions

The study asks and seeks to provide answers to the following questions:

- (i) What is the scope and applicability of POCAMLA in criminal asset seizure asset forfeiture and asset management in Kenya?
- (ii) What is the scope and applicability of POCAMLA towards the civil asset forfeiture and management in Kenya.

1.5. Theoretical Framework

It is proposed to base the study on The Theory of Crime and Punishment and the Entitlement Theory of Justice :

1.5.1. The Theory of Crime and Punishment

The study will look at mainly the deterrent theory of punishment which has it that the general justification of punishment is to deter crime or make it less frequent thus justifying punishment on account of the good consequences that it makes possible which is deterrence of criminality¹³. Deterrent theory , proponents say is a forward looking theory mainly concerned with deterring future criminality.

According to Hobbes, punishment of crimes by sovereign is recommended as an element of good governance, punishment is directed towards the guilty. It flows from a legal conviction and not linked to actual guilt but to public judgment. Enactment of punishment is presented as dependent on the will of the punishing authority. It is not a form of debt but a way of expressing public censure to a criminal and must be administered by an authority and should involve a loss of either money liberty or the proceeds obtained from the crime¹⁴.Hobbes insists that punishment must consist in the infliction of suffering upon the punished person and further that punishment should be aimed at removing the unfair advantage of a crime according the retributive theory of punishment¹⁵. And according to him punishment takes deprivation, a good example of deprivation could be , deprivation of liberty, money or lands but he suggests that not all deprivations of liberty or goods are to be understood as punishment which must require some active suffering if it is to be considered as punishment. Hobbes suggests Pecuniary punishments that consists of fines or deprivation of other goods such as lands, but makes a distinction of loss of liberty from one caused by need of safety or disciplinary loss of goods from that which is carried out by the state for other purposes example is taxation. Taxation is not punishment¹⁶.

¹³ Shadd Maruna and Russ Immarigeon, *After Crime and Punishment* (Routledge 2013).

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ St Gutnick Allen, 'Thomas Hobbes's Theory of Crime and Punishment' (Thesis, 2016) <<https://qmro.qmul.ac.uk/xmlui/handle/123456789/23267>> accessed 3 August 2020.

R Dworkins view is that someone in a place to influence policy on an issue is richer than someone who does not hence this power should not be abused and in the event it is, the punishment that includes the taking away of the fruits of this abuse is considered¹⁷. The very act of confiscation of illegally obtained assets through either a criminal asset forfeiture or civil asset forfeiture serves a purpose of deterring future crime and serves as retribution to the past crime. This thus complements the study's finding that one of the aims of asset seizure and forfeiture is removing the benefit out of crime and taking care that criminals do not obtain any gain from the crime as it does not offer any benefit.

Research Methodology

This study will employ doctrinal research, which analyses scholarly articles, statutes, court decisions and administrative decisions in different jurisdictions that deal with asset seizure and forfeiture in order to understand the development and the reasoning behind the laws and importantly the applicability of these concepts in Kenya. This methodology is the most appropriate as it builds knowledge on the subject through analysis of authoritative material on the subject by various scholars.

1.6.Literature Review

The literature review in this study will encompass a study of asset seizure and forfeiture in jurisdictions such as Australia, UK, USA, South Africa, Botswana, and other jurisdictions. The review will also study the works of scholars who have interrogated the subject of asset seizure and forfeiture across different legal jurisdictions. The review will also look at the statutory regime in Kenya on the subject of asset seizure and forfeiture, the jurisprudence emanating from the High court and the provisions of the Constitution¹⁸ regarding the right to property and the provisions in the Constitution that deal with the right to what is referred to in other jurisdictions as due process. The review will also study both the criminal asset seizure and forfeiture and civil asset seizure and forfeiture and asset management together with their application in Kenya. Asset forfeiture and recovery being the process of identification and tracing of assets linked to criminals and criminal activity and their seizure and confiscation as

¹⁷ Thom Brooks, *Punishment* (Routledge 2012).

¹⁸ The Constitution of Kenya 2010.

well as prosecution of those involved. The persons with an interest in the assets at that time lose all the rights connected to the assets and the money¹⁹.

The law²⁰ provides that the proceedings for the orders are civil. Even in cases where the proceedings are criminal in nature, the rules of evidence that are applied in civil proceedings apply to proceedings on an application for confiscation or restraint order. The High Court of Kenya²¹ has held that civil forfeiture proceedings are proceedings in rem. This means that they are proceedings against the property that is reasonably believed to be a proceed of crime. This definition may be used to determine the criminal origins of the property in issue and are distinct from a criminal prosecution against the applicant where the presumption of innocence is applicable.

The Court of Appeal²² has also held that the sections of the law activated action against the property which is an in rem action, and the law²³ made provisions for evidentiary burden which is placed on the person being investigated to explain properly or to clearly establish the legitimate origin of their assets. The Court has referred to this reversal as “dynamic burden of proof” this means that the person in a better position to prove a fact ought to be the one to prove it in some instances it is referred to as the reverse onus of proof. Despite the fact that one of the fundamental principles of criminal justice is that a suspect or a criminal must not benefit or derive any gain his crime²⁴, criminal forfeiture process has been criticized in various jurisdictions on grounds of shifting the burden of proof to the suspect.

Forfeiture laws complement existing criminal remedies by destroying the economic base of a crime and related activity by taking away illicit outcomes of crime being assets and profits²⁵. If it is started at the time of the alleged illegal event, this has the effect of tainting the property making the owner unable to pass a good title to third parties²⁶. Forfeiture laws in some instances

¹⁹ Tromme (n 7).

²⁰ Proceeds Of Crime And Anti Money Laundering Act No. 9 of 2009.

²¹ *Asset Recovery Agency V Quorandum Limited & Another*, Miscellaneous Application 4 of 2017 - [2018] Eklr (23rd November 2018).

²² *Stanley Mombo Amuti V Kenya Anti-Corruption Commission*, Civil Appeal 184 of 2018 [2019]eKLR (10th May 2019).

²³ Section 55(2) Anti-Corruption and Economic Crimes Act (ACECA).

²⁴ Johan Boucht, ‘Civil Asset Forfeiture And The Presumption Of Innocence Under Article 6(2) ECHR’ (2014) 5 New Journal of European Criminal Law 36.

²⁵ Michael Goldsmith and Mark Jay Linderman, ‘Asset Forfeiture and Third Party Rights: The Need for Further Law Reform’ (1989) 1989 Duke Law Journal 1254.

²⁶ *ibid*.

may operate to the detriment of innocent third parties like lien holders, unsecured creditors mortgage firms or financiers or bonafide purchasers by subjecting their property to forfeiture because it was used or derived from an illegal transaction. This may mean that banks may forfeit their security interest in the property²⁷. Whatever the name they may be called, forfeiture proceedings are criminal proceedings in nature. As they are brought by the state and the proceedings sought to be confiscated to the state which has the nature of criminal proceedings involving punishing or deterring crime as opposed to providing a remedy for a private wrong.

Criminal confiscation orders are made in cases of conviction of the defendant where in the opinion of the court, the accused or suspect has obtained a benefit or income from any criminal conduct that is related to an offence²⁸. In other jurisdictions for example South Africa, a forfeiture order may be made where it is found on a balance of probability that the property that is involved may be proceeds or instrumentality of unlawful criminal activity or offence. In this case the burden of proof is on the state to prove the charge to the civil standard. The affected persons have a right of appeal.

1.6.1. Civil Forfeiture

Civil Forfeiture, it appears originates from the bible, it is also found in English Law in early ages perhaps the 10th Century eventually finding its way in Statutes. It appears that the Deodand may be the oldest form of forfeiture from the study of the common law.²⁹ The term refers to a thing that causes the death of a person in such a case it was to be forfeited to the state. The reason being it was suggested that the state had lost a citizen hence people needed to exercise care. At this stage the issue of damages did not exist. The Crown took away the the deodand as part of retribution to the wrong done to the community and to a substitute for compensation to the victim of the death that may have been caused by accident³⁰. In 1846³¹ the issue of Deodands was done away with according to the English law. The second form of forfeiture was developed in admiralty jurisdictions which allowed forfeiture in rem, the statutes are navigational acts which permitted proceedings to be commenced against a vessel not

²⁷ *ibid.*

²⁸ Ben Clarke, 'Confiscation of Unexplained Wealth: Western Australia's Response to Organised Crime Gangs' (2002) 15 South African Journal of Criminal Justice 61.

²⁹ 'Anthony Davidson Gray Forfeiture Provisions And The Criminal/Civil Divide (2012) 15 New Crim L Rev 32' 37.

³⁰ *ibid.*

³¹ Anthony Davidson Gray, 'Forfeiture Provisions and the Criminal/Civil Divide' (2012) 15 New Criminal Law Review 32.

owners as it is the vessel that was involved in the offence not the owner. Conviction of the owner in this case was not a requirement. This principle may be traced to a US supreme court The *Palmyra* where the court found that in in rem forfeiture proceedings, it is the thing that is argued to be the offender not the person³². And lastly, there is attainder forfeiture which is known to common law to apply in personam on conviction of the offender. This form of forfeiture was abolished in 1870.

In the U.S, civil forfeiture can be traced to early statutes, in 1789 to enforce the collection of import duties and other charges on ships. The law contained forfeiture provisions and was used as a tool against criminal elements during periods like prohibition. In Australia, it is the ancient English common law attainder and corruption of blood. Attainder is believed to have emerged in 1308 to become part of the English Common law during the reign of King Richard II, the purpose and effect was extinction of civil rights on sentencing for treason and /or felony. Upon abolition of the attainder in England by passing the forfeiture Act 1870, the enactment of similar Acts followed in Australia.³³

Civil forfeiture is forfeiture in absence of a criminal conviction. It provides for the forfeiture of property suspected to be a result of illegal act or crime³⁴. The assumption here being that the property was unlawfully obtained. The proceedings are criminal in nature despite the terminology used³⁵. It is also called Non-Conviction Based forfeiture or NCB which is confiscation of assets in absence of a conviction³⁶. NCB is a typical action in rem, that is an action against the property, the first stage will be seizure of the property and forfeiture action then proceeds in rem meaning against the property. The property owner is in the circumstances reduced to an observer or an interested party and thereby put away from enjoying many constitutional safeguards provided in a criminal action³⁷ the purpose of civil forfeiture's is not regulatory, which is concerned with seeking temporary control over the property but it is

³² *ibid.*

³³ Natalie Skead and Sarah Murray, 'Natalie Skead and Sarah Murray, The Politics Of Proceeds Of Crime Legislation(2015)38 UNSWL 455' (2015) 38 38.

³⁴ Gray (n 31).

³⁵ *ibid.*

³⁶ Tromme (n 7).

³⁷ 'How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement' (2017) 131 Harvard Law Review 2387.

acquisitive which character seeks to vest into the state ownership of the property for the benefit of the public³⁸.

Civil forfeiture is preferred over criminal forfeiture as criminal processes seems long and cumbersome and the police may lack evidence to prove beyond reasonable doubt as required³⁹. A decision of the High Court of Australia ⁴⁰ suggests that civil asset forfeiture has been accepted in diverse jurisdictions around the world as a means of preventing criminal activity and organised crime by authorising the governments to seize property that is suspected to be connected with crime and illegal activities⁴¹. It is enforced against the person holding the property whether or not he is involved in the crime or has knowledge of the crime. The owner thus loses the property rights through forfeiture.

The main argument advanced against a number of the civil forfeiture statutes is that many of them purport to use civil process to achieve criminal law objectives by allowing governments to cite its citizens for violation of the law but in absence of constitutional safeguards that are required for criminal prosecutions. Legislatures seem to be avoiding the constitutional safeguards for criminal prosecutions which is achieved by allowing the government to impose punishments and penalties through a semblance of 'civil' proceedings⁴². It has been argued that both the legislators and the courts have justified civil forfeiture on the grounds that that conventional remedies aimed at to fighting crime do not seem to be working despite the fact that its utility and application are heavily contested⁴³. One of the main criticisms against NCB is that it literally does away with the due process rights of the accused and confers overbearing power to the state without corresponding system to keep it in check. This brings about concerns of abuse of state power as this may be used to target political opponents in certain situations. Challenges to this form of asset forfeiture have been overruled in some jurisdictions which have given prosecutors and investigators a quick and workable way to recover illicit property. The applicability and acceptability of NCB means that in some instances it may be utilized in situations where the defendants have fled jurisdiction, are dead or immune from prosecution.

³⁸ AJ van der Walt, 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause' (2000) 16 South African Journal on Human Rights 1.

³⁹ Gray (n 31).

⁴⁰ *ibid.*

⁴¹ 'How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement' (n 37).

⁴² Caleb Nelson, 'The Constitutionality of Civil Forfeiture' (2016) 125 Yale 2487

⁴³ Tromme (n 7).

NCB may also be used as a tool against assets that may be either proceeds of or derived from corruption related activities or in illegal activities. It is also not limited in its nature to a specific property or related to a particular transaction, it may be used to target and forfeit property belonging to a third party who has no plausible defence and may be filed in the course of a criminal case or when there is no criminal charge⁴⁴. The process involves the adoption of the civil standard of proof which is on a balance of probability. The onus of proof is shifted to the respondent to prove that the property was acquired lawfully⁴⁵. Civil forfeiture in Kenya is found in the ACECA⁴⁶, and POCAMLA although under ACECA the process is exclusively civil. Under POCAMLA, the forfeiture proceedings are civil proceedings that use the rules of evidence applicable in civil proceedings⁴⁷.

The Law provides for the Agency Director⁴⁸ to make an ex-parte application to the court for restraint order any person from dealing with any property subject to the application. This is the first stage that seeks to preserve the property. The court may, if it is established through reasonable grounds that the property was used or may be used in the commission of an offence or is proceeds of crime may make an order preserving the property and at the same time order the seizure of the property targeted by a police officer⁴⁹. Under the prevailing law, the court is placed at the centre of the civil forfeiture process allowing it to issue directions in the manner in which the property seized by an order made on an application of a party shall be dealt with. It thus may seem that the law drags the court into the process both as a party and as an arbiter on contested issues thus taking part in the custody, management and handling of the seized property. Under ACECA⁵⁰, the law provides for forfeiture of unexplained assets if it is found after an investigation, that the person has unexplained assets. The commission proceeds to court by way of an originating summons. The respondent has and may exercise the rights usually afforded to a defendant in civil proceedings. Civil forfeiture statutes in the USA authorize the government to seize and hold suspected property without undertaking any

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Anti Corruption And Economic Act No. 3 of 2003.

⁴⁷ Proceeds Of Crime And Anti Money Laundering Act No. 9 of 2009.

⁴⁸ *Ibid* s 2.

⁴⁹ *Asset Recovery Agency V Charity Wambui Gethi*, Miscellaneous Application 16 of 2016 [2018]eKLR (20th November 2018).

⁵⁰ Anti Corruption And Economic Act No. 3 of 2003.

prosecution for an underlying offence if any⁵¹. Forfeiture proceedings are thus actions against property and not its owner.

Asset forfeiture also removes the instrumentalities of crime from the control of wrong doers, the instrumentalities may even be cryptocurrency which offers criminals the ability to fund their enterprises with ease and anonymity⁵². It thus takes the profit out of crime by removing the fruits of illegal crimes which may include cryptocurrencies. Forfeiture is also a form of punishment that deprives a wrong doer of the assets that provide him the means with which to commit the criminal activity and the fruits of the criminal enterprise⁵³. NCB according to opinion, violates people's basic property rights as well as the presumption of innocence by shifting the burden of proof to the owner of property while also making it easy for the law enforcement by lowering enforcement standards⁵⁴. In *Boyd v United States*⁵⁵ the supreme court of US has reached a decision that the proceedings commenced aimed at either seizure or forfeiture of property despite being branded as civil, they are criminal by their nature. The High court of Kenya leans towards the position that Civil assets recovery proceedings are aimed at determining the criminal origin of the property in issue and not the prosecution against the respondent in other words, directed at the seizure of property and not conviction of any individual⁵⁶.

The study has identified similarities in the unexplained wealth orders contained in ACECA as being a replica of the provisions of the UK's POCA and Australia Criminal Property Confiscation Act 2000 which has been described as a gross violation of civil liberties for its far reaching provisions that include, retrospective effect of the law, reversal of burden of proof, criminal sanctions without the requirement of conviction, application of confiscation process for any offence that carries a penalty of 2 years or more. And the POCA in UK. This is a potential forfeiture of almost all of the person's assets including business assets, removal of judicial discretion by mandatory forfeiture in certain circumstances, and admissibility of

⁵¹ Michigan Law Review [Vol114 pg 457].

⁵² Shirley U Emehelu, 'A Shot in the Dark: Using Asset Forfeiture Tools to Identify and Restrain Criminals' Cryptocurrency' (2018) 66 United States Attorneys' Bulletin 81.

⁵³ *ibid.*

⁵⁴ Alex Haller, 'Legislative Reform Or Legalized Theft: Why Civil Asset Forfeiture Must Be Outlawed in Ohio' (2019) 67 Cleveland State Law Review 295.

⁵⁵ *Boyd v United States* 116 U.S 616,633-34(1886).

⁵⁶ *Asset Recovery Agency vs Joseph Wanjohi & 3 others Anti-Corruption and Economic Case Application 7 of 2019*, [2020] eKLR. (21 Feb 2020)

hearsay evidence in support of decisions to order confiscation of property⁵⁷. In Kenya the provisions have been given a stamp of approval whilst being compared to the comparative UK jurisprudence which both hold that a person's assets should be commensurate to his or her usual known sources of income and the requirement to give an explanation for unexplained assets protects legitimate assets and not property acquired through larceny, money laundering or illegal enterprise⁵⁸.

In Australia, the DPP has sweeping powers to apply for an unexplained wealth declaration against an individual. Should the person's cumulative wealth be more than his lawfully acquired assets, the court declares the person to be holding unexplained wealth. The presumption is that any person's wealth and assets are unlawfully acquired unless the respondent provides evidence to disprove the fact to the contrary. It thus seems possible that a person may lose legitimately acquired assets if he or she cannot account for them and show that they were acquired genuinely within the law. The burden of proving that the assets are genuinely acquired rests on the respondent. What is required of the DPP is for him to make an application to the court or make an allegation and the respondent bears the onus of proving the assets. The law in this instance allows the DPP to go for an information fishing expedition in pursuit of unexplained wealth⁵⁹. It is thus argued that there is an obvious possibility of misuse of the provisions of the law relating to unexplained wealth, the fear is reinforced by the fact that there is no legislative right of appeal provided. Once the order is made the respondent is liable to make the payment. The presumption is that a person has to prove that his wealth is lawfully acquired. The fundamental common law checks and balances and constitutional guarantees that protect property against unlawful forfeiture, the presumption of innocence is also reversed and the respondent bears the onus of giving a satisfactory account for the wealth. The law provides no legislative provision for appeal against an order made against unexplained wealth declaration, the respondent being required to pay immediately the order is made.

The perceived excessive powers wielded by the DPP on unexplained wealth provisions, are made possible because Australia has no comprehensive bill of rights, which gives the law makers freedom to determine the scope and nature of legislation which may be viewed as

⁵⁷ Clarke (n 28).

⁵⁸ *Amuti V Kenya Anti-Corruption Commission, Civil Appeal 184 of 2018 Stanley Mombo* [2019]eKLR (10th May 2019) (n 22).

⁵⁹ Clarke (n 28).

draconian.⁶⁰ The Australian Criminal Property confiscation Act 2000, does not provide for appeal and it contains retrospective application clauses. Despite the fact that the laws contain an attack on what can be termed as constitutional rights elsewhere, there is overwhelming support by Australians to this law and protests against the law are mainly by civil liberty proponents, defence lawyers and criminal gangs⁶¹

The Unexplained Wealth Orders were introduced in UK in Sep 2017 through Criminal Finance Act. This was aimed at bridging the gap to curb influence of United Kingdom as a centre of worldwide corruption. The proceedings are brought against a person, not the asset. The requirement is that the prosecutor only needs to show by leading evidence that the owner is in possession of wealth whose sources are unexplained. The onus of proof is shifted to the owner who is required to justify the origins of the wealth and assets in question . Failure to respond or an inadequate response can lead to the asset being recovered through civil recovery mechanism. In UK what is required is a mere suspicion of illicit wealth there is no need of previous proceedings .

The common feature in NCB forfeitures according to scholars is that, it is to be carried out independently of criminal process. The goods so called proceeds of crime do not have to be obtained from an offence for which the accused is convicted but from a general unlawful conduct similar to that crime⁶². It is argued that dissipation of assets thought to be illicit are a real concern that in some instances countries' presidents have gone as far as using Executive Orders to direct the manner of preservation of the assets although the legality or otherwise of the said Executive orders are subject to challenge or interpretations ⁶³

If the prosecutor provides sufficient evidence that the material gain was or has been acquired through criminal offences it may be confiscated based on unexplained wealth theory which acts as an efficient tool in the fight against gangs , criminals and organized crime and other

⁶⁰ 'Ben Clarke, Confiscation of Unexplained Wealth: Western Australia's Response to Organized Crime Gangs (2002)15 S Afr J Crim Just 61'.

⁶¹ *ibid.*

⁶² Adrian Stan, 'The Challenges of Extended Confiscation. Directive 2014/42/Eu and Transposing Difficulties in Romania' (2019) 3 EU and comparative law issues and challenges series (ECLIC) 637.

⁶³ Oyelowo Oyewo, 'The Legality of Executive Order No. 6, 2018 on Asset Recovery in Nigeria' (2019) 81 Journal of Law, Policy and Globalization 1.

major crimes . The advantage this has is a faster reaction time by the state, shorter judicial process that is independent of criminal process and efficient preservation process⁶⁴.

Preventive confiscation,⁶⁵ which is a form of NCB, has been used to deal with Mafia, persons suspected to belong to a criminal association, those involved in corruption or embezzlement of public funds and extortion the assets can be confiscated following a Judicial Order with no requirement of a prior criminal conviction. This provision has been used as a primary tool to combat organized crime in Italy which is aimed at attacking the economic foundation of the organized crime using fast and effective non-criminal prevention instruments. NCB thus can be a measure directed at neutralizing illegal profits. As the push for NCB gathers momentum as a tool for illicit assets recovery, it is necessary that at all times constitutional property rights safeguards may be put in place aimed at preventing abuse in NCB. This will ensure that the system is not diverted from its original objective, this will strengthen the trust in the use of NCB and contribute to long time utility and effectiveness.

There has to be consistency in the application of NCB and transparency in re allocation of the proceeds this will increase the confidence in the process. It is also necessary that the system balances the public and private interests by considering the public aim of confiscating ill-gotten gains at the same time offer appropriate law safeguards for the protection of third-party rights.

1.6.1.1.Mitigation of The Impact of Forfeiture:

Some jurisdictions such as Namibia and Botswana have considered compensation to mitigate the impact of forfeiture. Compensation thus will accompany interference with property where it affects third parties property rights, or where it interferes with peaceful enjoyment of rights. This can be for instance in cases where the asset frozen for investigatory purposes is found not to be either proceeds or instrumentalities of crime. The Courts under the law⁶⁶ may vary the orders or reverse the preservation orders and the affected parties may seek living and legal

⁶⁴ Anton Girginov, ‘Confiscation and Criminal Assets Recovery - Review of Bosnian Law’ (2017) 8 Beijing Law Review 252.

⁶⁵ Miriam Allena, ‘Anti-Mafia Confiscation against Corruption: The New Frontier of Human Rights’ (2019) 11 Italian Journal of Public Law 196.

⁶⁶ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009.

expenses. Proper constitutional safeguards thus can be implemented to prevent instances where forfeiture orders may harm the defendants unnecessarily as illustrated in the Namibian case.⁶⁷

Reversal of the burden of proof .

The common feature of NCB in most jurisdictions is the reversal of the burden of proof, NCB places the burden on the defendant explain the origin or source of his assets to avoid confiscation⁶⁸ This reversal has been challenged severally in the courts mainly by reason that it eroded and undermines the presumption of innocence. Despite this, states that have adopted the reverse onus see it as an advantage from their point of view. This assists the state prosecution and makes the asset forfeiture process faster from the state's perspective . The utility of the forfeiture laws depends on the ability to shift the onus of proof to the defendant and require him to prove that he acquired the assets lawfully on a balance of probabilities and failure by the accused to rebut the presumption, the presumption is then converted into a fact thus effectively freezing the asset . The shift of the onus of proof is what makes NCB attractive for the law enforcement despite the fact that the reversal of the burden of proof undermines the rights to a fair trial.

In some jurisdictions like South Africa, the inherent risks with the reverse onus provisions are mitigated by varying the standard and burden of proof through the forfeiture process. During preservation stage for instance, the DPP has to establish reasonable grounds, during the forfeiture stage, the onus still rests with the DPP but the standard is higher which is on a balance of probabilities. This double procedure brings with it more safety provisions which restricts the states' ability to initiate such proceedings without a degree of proof.

In Kenya, the high court⁶⁹ has held that although the civil asset forfeiture proceedings are quasi criminal in nature, there is an evidential onus of proof placed on the defendant to demonstrate how they lawfully came into possession of the seized assets. Further, the court of appeal has ruled that the evidentiary onus of proof is cast on the person to prove on a balance of probability that he has assets that are proportional to his income and the demand to explain

⁶⁷ *Shalli v Attorney – General and Another*, (POCA 9/2011) [2013] NAHCMD 5 (16 January 2013); | Namibia Legal Information Institute.

⁶⁸ OECD, 'Confiscation of Instrumentalities and Proceeds of Corruption Crimes in Eastern Europe and Central Asia' (2018) <<https://www.oecd.org/corruption/acn/OECD-Confiscation-of-Proceeds-of-Corruption-Crimes-ENG.pdf>> accessed 30 April 2021.

⁶⁹ *Asset Recovery Agency vs Joseph Wanjohi & 3 others Anti-Corruption and Economic Case Application 7 of 2019* ,[2020]eklr.(21 Feb 2020) (n 56).

assets is not the same as a requirement for one to explain his innocence or otherwise⁷⁰. which mirrors what happens in Botswana where, the courts allow shifting of the burden of proof to the owner of the assets reverse despite the fact that they extensively contravene a citizen's right to due process of the presumption of innocence. The Botswana Court of Appeal⁷¹ has ruled in favour of the constitutionality of the reverse onus and further ruled that it is in the public interest that it was justified at the same time protecting the the rights of others.

1.6.2. Asset Management.

The purpose of and effective management of seized assets is to protect the alleged instruments and proceeds of crime and ensure availability when the final orders is made. Asset management is the process of ensuring the safety and the value of assets pending confiscation, this may take a period of time sometimes perhaps years. Asset management involves control, management, maintenance of assets that range from exotic livestock to real estate and businesses. This therefore means that it is necessary that there exists suitable legislation which establishes a management system that is functional to be able to facilitate preservation of the proper value of assets in an efficient, and economical manner. To achieve this, it is also necessary that sufficient resources are also committed towards asset management which may perform functions such as hiring of professionals with the right skills to run the program as the existing systems sometimes are ill equipped and ill staffed to deal with a wide range of seized assets and businesses. This might ultimately compromise the whole essence and purpose of confiscation which is to protect the value of seized assets⁷².

To facilitate a successful asset recovery and confiscation regime, there must be coordination efforts of both individuals and agencies with both skills and synergy from all the agencies starting from the investigators, prosecutors and magistrates to the asset manager who have an intimate knowledge of the progress of the case from the beginning to the end. This necessitates that the asset manager has the required technical skills ,manpower and resources and legal authority to preserve the economic value of assets pending further steps that may include authority to dispose of rapidly depreciating assets should the circumstances require, or in

⁷⁰ *Stanley Mombo Amuti V Kenya Anti-Corruption Commission*, Civil Appeal 184 of 2018 [2019]eKLR (10th May 2019). (n 22).

⁷¹ *Olthomile v The state* 2002 (2)B.L.R 295 [H.C]

⁷² Jean-Pierre Brun, *Asset Recovery Handbook: A Guide for Practitioners* (World Bank : UNODC 2011) 90.

instances where the assets in question require specialized skill, the manager may hire a contractor to undertake the assignment.

Thus, one has to look at the cost of administering the asset after seizure, and conduct adequate planning and sound financial decisions prior to seizing the assets so that informed decisions are made on the assets to be seized, the process involved and what is to be seized or not in the first place. Improving the effectiveness of forfeiture requires a program that effectively manages and administers seized and forfeited assets⁷³

The process may be made easier by the alternative of either creating a separate trained and facilitated wing to manage the assets or creation of an asset management division within the existing agency or outsource the function of asset management. The main aim in all these suggestions is availability of qualified asset managers that are able to conduct the asset management duties of pre restraint planning, analysis, realization and eventual realization within the existing law or in terms of the court orders⁷⁴. This may include the power to carry out functions granted through the relevant confiscation laws which may include authority to pay costs and expenses that relate to the property as well as have the property under the care of a manager insured. If the asset is a business, the manager has a duty and obligation to run the business and make all necessary decisions for the prudent running of the business with requisite reporting terms to the court. The manager also has the power to deal with assets that depreciate quickly or those that are predisposed to being perishable assets even at the interlocutory stage including power to move the court to facilitate disposal of the perishable assets. The draw back will be that the process is costly and time consuming.

1.6.2.1. Information Gathering.

Considerable time and resources have to be spent to improve information gathering processes and ensuring the information is reliable. The important consideration is to reduce the danger of losses or damage or in some instances hiding the property beyond jurisdiction or law enforcement that might work contra to the objectives of the confiscation order once made⁷⁵

⁷³ Organización de los Estados Americanos, 'Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets' (2011).

⁷⁴ Brun (n 72).

⁷⁵ United Nations Office on Drugs and Crime, 'Effective Management and Disposal of Seized and Confiscated Assets' 86.

1.6.2.2. Record Keeping.

Proper, information on the asset's whereabouts and its value should be undertaken at the initial stage this also should include accurate record keeping and adoption of clear processes and procedures and also obeying of court orders and laws that govern the asset management process are necessary for the sake of transparency and accountability⁷⁶.

Asset management should balance the competing lawful interests of the owner of the property against law enforcement considerations. It should at the same time be alive to the fact that the courts may refuse to grant a confiscation order thus necessitating that the property is returned to the owner in the shape and form it was when it was taken from him by the interim orders. As the issue of the lawful origin of the property subject to the dispute moves on, it is necessary that the interests of the owner and the third parties be considered especially when issues of the management and maintenance arise. This must be done within reasonable limits while ensuring that the property rights of persons with an interest in the property are protected and the property taken care of.

It is necessary that planning is conducted before seizure to determine which assets should or should not be seized and adequate care taken to ensure that the economic value of the assets is preserved at a minimum cost so that they yield maximum returns upon realization. Thus, as the manager takes over the seized assets, they are required to take and maintain accurate records and description of the assets and their state at taking over as well as aim to provide subsequent updates on the state of the assets both at the time of seizure and always keep and maintain a record of defects if any noted on the assets and their physical condition. The frequent reporting on the status of the assets increases transparency on the activities of the process of asset management.

Part of minimising the costs of asset management is embracing measures such as letting the assets to remain under the custody of the owner subject to conditions and positive obligations to maintain the value of the property or placing the property in the hands of a third party for instance the state or state institutions or have the property sold as pre confiscation sale. Studies have shown a relationship between an increase in the value of confiscated assets in countries that have set up specialized asset management offices. It is necessary to have updated information on the number, value and location and the state of seized assets and the expected

⁷⁶ *ibid.*

value. This is because the asset recovery process attracts a number of players from investigators to prosecutors which stretches the asset recovery capacity when undertaken by different institutions hence poses a challenge. This thus requires that strict protocols are adopted on the capturing and handling the data as well as processes that verify the data⁷⁷.

The private sector players in some instances are called upon to offer its specialized skill in managing certain type of assets. This may be done either by appointment by the court or on case-by-case basis or by use of the subcontracting mechanism by the entity responsible for the management of the assets. The use of private sector professionals in asset management is thus a common procedure ⁷⁸ The assets should therefore be managed in a way that eases the burden and cost of maintaining the assets pending the determination of the proceedings at the same time ensuring that the law enforcement objectives and respect for the owners' rights are achieved.

In instances where cash is seized, it is usually preserved in the account in which it was found or in an interest earning account. The challenge may arise from the other financial instruments such as stocks or bonds and what process may be undertaken to preserve or redeem their value especially taking into consideration that the stocks don't have a fixed value their value is determined by the markets so much so that the state may at the end of the process be left holding worthless stock. There is a need to appoint a professional to value the assets and determine the best way to preserve their value should he require authority to liquidate or hold the bonds or the stock to preserve its value⁷⁹. In instances involving seizure of immovable property the person charged with the responsibility of registration of lands is required to place a caveat on the land register in respect of the land or immovable property. However, care has to be taken to ensure that the rates and taxes in respect of the property are paid. The manager may agree with the occupant for continued occupation of the property on condition that the property is maintained, the taxes are paid with a right of immediate occupation by the manager in default as the payment of rates and taxes take priority over confiscation orders.

Some properties pose a challenge in their maintenance for instance farms or golf courses as the value must be maintained. The manager may consider selling them or leasing them so as to mitigate the losses and obtain value. Motor vehicles pose a challenge as they are difficult and

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ Brun (n 72).

expensive to store and depreciate fast , in instances they are left in open fields where the value deteriorates even further.

Proper storage and maintenance of the motor vehicles demand that they are kept in appropriate storage facilities which comes with huge expenses. With this kind of expenses and the depreciating nature of the motor vehicles, a consideration should thus be given for sale of such assets while they are almost new and in a good condition which may be in the best interests of the parties for a depreciating asset be turned into value. The other alternative may be that the owner is permitted a continued use of the asset during the course of the proceedings on condition that he posts a bond guaranteeing payment of value at the end of the proceedings⁸⁰. In cases where the asset sought to be seized is a business, a decision must be made whether to continue operating the business or close down its activities. If it is cost effective to continue operations of a seized business, a manager will be sourced to continue the operation of the business⁸¹.

If a decision is made to run the business, it has to be put under the control of an asset manager. This comes with a risk because the running business has an inventory, premises, customers and goodwill. It will be necessary that equity valuation is taken before seizure, this is a form of due diligence to know the debt load as compared to equity. The process must ensure that the existing business goodwill is not damaged in the process of seizure and this may be mitigated by allowing the business to run uninterrupted with the business manager reporting to the asset manager appointed by the court. In order to effectively take over the seized businesses, the Asset manager takes over the running of the entire business process and also ensures that the daily business records are available to him with a corresponding duty to send regular reports to the court. Perishable goods pose a challenge as the nature of the goods require that they be disposed of within the shortest time possible to protect against loss of value this will be the same case with farm animals or crops in the field which also need to be harvested within an appropriate time these assets should be sold by the asset manager and the proceedings placed in an interest earning account.

Asset management in a number of countries faces funding challenges as it has to compete for public funds with other priorities which means that there has to be innovation to be able to fund

⁸⁰ *ibid.*

⁸¹ G Patrick Gallagher, *The Management and Disposition of Seized Assets* (US Department of Justice, Office of Justice Programs, Bureau of Justice Assistance 1988).

the operations of asset management. This requires therefore that there has to be a deliberate effort made to ensure that right from the beginning during the start of the seizure process and decision making the seized assets should be maintained in value while in the hands of the state by ensuring that the expenses involved in managing the assets do not exceed the value of seized assets⁸² This may include consultations by all parties affected by a management proposal that may affect the ultimate value of an asset under restraint, consultation may militate against future claims and costs. The fees payable to the asset managers are provided for in the relevant statutes or in some cases they are left to the courts' discretion. This is subject to mandatory audits. Ideally this cost or fees should be an expense recovered from the proceeds for service rendered.

In summary, the study has analysed literature by various scholars on the subject of criminal forfeiture, civil forfeiture, and management of assets and has looked at the existing scenario in Kenya in relation to what takes place in other jurisdictions. The study has identified and defined criminal and civil asset forfeiture. The study has also looked at the civil forfeiture process, its history and origin, and the reasons for its preference by law enforcement agencies, over criminal asset forfeiture, the arguments set against the civil forfeiture, the positive side of the civil forfeiture, the burden of proof, who should discharge it and at what stage in civil forfeiture. Related to this, is the issue of the rights of the persons and institutions that hold interests in specific assets at the time of confiscation and the treatment of these rights and interests, by a comparison between other jurisdictions and Kenya. Finally, the study has analysed the management of seized assets and the processes that are involved to ensure safety and value pending confiscation.

1.7.Hypothesis

The successful application of the criminal asset seizure and forfeiture and non-conviction-based assets seizure forfeiture under the Proceeds of Crime and Anti-Money Laundering Act No 9 of 2009 depends on the effectiveness of the process of asset management.

⁸² United Nations Office on Drugs and Crime (n 75).

1.8. Chapter Breakdown

1.8.1. Chapter 1- Introduction and outline of The Study.

This chapter is a road map to the study. It introduces the subject of asset seizure and forfeiture and the general process of asset seizure and asset forfeiture in Kenya, it identifies the statement of the research problem; the objective of the study; research questions that the study seeks to answer; the theoretical framework within which the study will be based; the research methodology to be adopted in the study; the literature review; the justification of the study; and the research hypothesis.

1.8.2. Chapter 2 – Criminal Asset Seizure and Forfeiture

This chapter introduces the subject of criminal asset seizure and forfeiture under POCAMLA, it explains the origin and the process of criminal asset seizure and forfeiture, it describes the process thereon and the elements of the process such as the application and issue of restraint orders, confiscation orders appointment of a manager for property subject to confiscation orders and the realization of the property . This chapter also discusses the asset recovery fund and its function with respect to the property forfeited. At the end will be concluding remarks.

1.8.3. Chapter 3 – Civil Asset Seizure and Forfeiture

This chapter discusses civil asset seizure and forfeiture under POCAMLA, it describes what civil asset forfeiture is and the kind of proceedings involved. The chapter further discusses the assets recovery and preservation , the issue of preservation orders and the effect of preservation orders, the appointment of a manager in respect of a property subject of a preservation order, forfeiture orders and preservation of third-party interests in the property, the fulfilment of forfeiture order, the role of the police in the process and finally the conclusion.

1.8.4. Chapter 4 – Management of The Seized and Forfeited Assets.

This chapter discusses management of seized and forfeited assets under POCAMLA. It discusses the management of seized or restrained assets in criminal and civil forfeiture process. The study also looks at the role of the Director Asset Recovery Agency in management of the seized assets as well as the management of assets that have been seized by the police. The study also looks at the role of the court in the management of seized assets, the appointment, role and duties of a manager in asset management. The study also discusses the management of

immovable property and assets that are subject to restraint and preservation orders. Finally the study looks at the effect of an appeal on asset preservation and management. And the conclusion.

1.8.5. Chapter 5. Findings, conclusions and recommendations

This chapter discusses the summary of findings of the study, conclusions and recommendations derived from the study.

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CHAPTER TWO: CRIMINAL ASSET SEIZURE AND FORFEITURE UNDER POCAMLA

2.0. Introduction

This chapter introduces the subject of criminal asset seizure and forfeiture under POCAMLA, the chapter will trace the origin and the process of criminal asset seizure and forfeiture, and describe the process involved thereon, the components of the process such as application and issue of restraint orders, confiscation orders appointment of a manager for property subject to confiscation orders and the realization of the property. This chapter will also discuss the asset recovery fund and its function with respect to the property forfeited. It is proposed to end the chapter with concluding remarks.

Kenya being part of the international community, it has entered into international treaties which have been ratified and form part of our laws¹. The treaties include, The UN Convention against Corruption² UN Convention against Transnational Organized Crime³ and African Union Convention on Preventing and Combating Corruption, 2003⁴ and also on international conventions and the recommendations of the Financial Task Force. The running theme in all these treaties is prevention and combating corruption and curbing organized crime and money laundering. Thus, the enactment of POCAMLA was aimed at domesticating the Treaty⁵ as provided under article 5 of the Treaty which was ratified on January, 5th 2005.

The preamble of the law⁶ states, an Act of parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes. The Act provides for both Criminal and Civil Forfeiture.

¹ Constitution of Kenya,2010.

² ‘United Nations Convention against Corruption (Adopted 31st October, 2003 Entered into Force,14th December, 2005,)’.

³ ‘United Nations Convention Against Transnational Organized Crime (Adopted on 15th November,2000, Entered into Force on 25th December,2005)’.

⁴ ‘African Union Convention on Preventing and Combating Corruption, 2003. (Adopted on 11th July, 2003, Entered into Force on 5th August 2006,)’.

⁵ ‘United Nations Convention Against Transnational Organized Crime (Adopted on 15th November,2000, Entered into Force on 25th December,2005)’ (n 3).

⁶ Proceeds Of Crime And Anti Money Laundering ActNo. 9 of 2009.

2.1. Criminal Forfeiture

POCAMLTA has not defined criminal forfeiture, but it is the legal process of identification and tracing of assets which may be linked to either criminals or crime and at the same time provide for their seizure while undertaking prosecution of the alleged criminals or people involved. For a successful criminal forfeiture, there must be a trial and the perpetrator must be convicted. It involves an action against the defendant.⁷ Criminal Asset forfeiture is thus an action *in personam*. It is a sanction applied directly against the perpetrator. Criminal forfeiture is dependent on the conviction of the defendant who is the accused in a criminal process. It is thus by implication that the burden of proof lies with the prosecutor in the criminal trial. For criminal forfeiture process to ensue there must be a conviction. This requires that the investigators establish causality between the asset and a criminal activity. Criminal forfeiture is complementary in a criminal trial being part of the sentence⁸, it is made in addition to any punishment which the court may impose in respect of the offence, it is strictly speaking not a punishment. It comes after conviction and sentence.⁹

Criminal forfeiture takes part in three-stages. The first stage is the restraining stage which is the identification and preservation stage aimed at the preservation of the assets awaiting the hearing of the case and conviction of an accused defendant and the subsequent grant of an order to confiscate the assets. The proceedings involve the grant of a restraint order over realizable property held by the defendant or his agents or any person who may have received the affected gifts by the defendant.¹⁰

The next stage is the confiscation stage which involves an inquiry by the trial court on the nature of the benefit derived from the sentence arising from the conviction and a related offence if there is any. This leads to the a confiscation order, finally, the realization of the property stage, which is initiated in the event that the defendant has failed to satisfy the order of confiscation of the property .

⁷ Mat Tromme, 'Waging War against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with the Rule of Law' (2018) 29 Duke Journal of Comparative and International Law 165.

⁸ Kyle T Bateman, 'Asset Forfeiture in Elder Fraud Schemes' (2018) 66 United States Attorneys' Bulletin 61.

⁹ *National Director of Public Prosecutions v Rautenbach and Another* (146/2003) [2004] ZASCA 102; [2005] 1 All SA 412 (SCA) (22 November 2004).

¹⁰ Simon NM Young, *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing 2009).

Asset forfeiture has a number of advantages some of them being, removal of proceeds of crime from the control and reach of wrong doers which cripples the criminals by reducing their ability to fund their criminal schemes and enterprises and asset forfeiture allows for preservation of assets during the pendency of a criminal trial. Asset forfeiture removes the fruits of crime from the hands of wrong doers by sending a deterrent message to those engaging in economic crime and it is a punishment which works by depriving the criminal of further means with which to commit further criminal activity¹¹.

Forfeiture laws are also supplementary to usual traditional criminal solutions which work by dismantling the economic bases of criminal enterprise by confiscating illicit profits and assets¹². POCAMLA provides that the proceedings on an application for confiscation orders or restraint orders are civil proceedings and provides that the rules of evidence that are applicable in civil proceedings shall apply to proceedings on application for a confiscation order. The process of criminal forfeiture under POCAMLA is initiated by the Attorney General, the Agency Director or the court suo moto. This is at the end of the trial and upon conviction where an inquiry is commenced into any benefit which may have accrued from the offence that resulted in the conviction or a related offence or any unlawful activity that the court may sufficiently link to the offence.

It is not clear why the Director of Public Prosecutions is left out as under the Constitution of Kenya¹³, the Director of Public Prosecutions under article 157 is empowered to inter alia commence and undertake and terminate criminal proceedings against any person before any court in respect of any offence, article 156 spells out the powers of the A-G and under art ,156(4)(b) it is clear that the AG cannot appear in court in criminal proceedings. This creates a grey area as to who may initiate the proceedings. It also must be borne in mind that the DPP is the prosecutor in the criminal court, even if the court were to proceed in its own motion, there must be a prosecutor available to lead evidence or who has conduct of the trial that culminated into the conviction. This will not be the Agency Director or the AG both of which have no power to prosecute criminal cases which demonstrates lack of clarity on when the A-G and the Agency Director may step in or when the DPP's duty starts or ends.

¹¹ Tromme (n 7).

¹² Michael Goldsmith and Mark Jay Linderman, 'Asset Forfeiture and Third Party Rights: The Need for Further Law Reform' (1989) 1989 Duke Law Journal 1254.

¹³ Constitution of Kenya, 2010.

The provisions contained in POCAMLA, being, provision for living expenses, legal expenses, and the provision for carrying out of any trade, business, profession or occupation, and affording the affected persons a chance to make presentations on oath to demonstrate his or her interest in the property, reflects the desire to incorporate constitutional safeguards whilst ensuring that the process still serves its purpose in the fight against crime. The law also makes provisions of varying the orders if the orders will cause depravity on the applicant of means to reasonably survive and will cause undue difficulty or instances where the hardship the applicant will suffer outweighs the risk of loss and damage property or concealment.

Further, at the confiscation stage the court is required to hold an inquiry into the benefit the defendant has derived from the offence, and also has to hear presentations from persons having any interest in the property concerned. In the realization stage, the court is empowered to afford all persons who might have an interest in the property concerned an opportunity to be heard on the property in connection with the realization. And in cases that involve money, the government does not have a preferential claim over others in this instance it waits in the line like all others.

There is also demonstration of following the rule of law and provides safeguards for property rights and the defendant's rights from fair trial rights to defence, and fair hearing, and the right to adduce evidence as well as a right to appeal, thus preventing instances of abuse of the law by the government departments and individuals by ensuring law enforcement objectives behind forfeiture are achieved as well as respect for rights of owners of the assets¹⁴. The provisions also require establishment of guilt or a trial to establish that the assets subject of the trial are proceeds or instrumentalities of crime¹⁵. This is demonstrated by mainly placing the court at the centre of the criminal forfeiture process under POCAMLA which allows for what will be referred to as observance of natural justice process in all the stages starting with the restraint stage, where before final restraint orders are made, any party affected is allowed to make representations to the court, secondly at the confiscation stage the law also provides for any party likely to be affected to make presentations but importantly the court must make an inquiry into any benefit or advantage that accrues from the offence or related criminal activities. Thereafter an order is made by the court of payment to the state of any

¹⁴ United Nations Office on Drugs and Crime, 'Effective Management and Disposal of Seized and Confiscated Assets' 86.

¹⁵ Theodore S Greenberg, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (World Bank Publications 2009).

amounts it deems appropriate or make further orders it deems fit. The court thus has a final say on the entire process as opposed to either individuals or a government department. This minimises the prospects of abuse by striking a balance between the fight against crime and the main objectives of forfeiture which is ensuring that criminals do not benefit from criminal activities and removal of profit out of crime thereby making forfeiture a viable tool for recovery of assets related to crime.

Part VI of POCAMLA provides for the retrospective application of the law by considering previous criminal activities and accruing benefits if they were received both before and after commencement of the Act¹⁶. Whereas the general rule is against retrospective application of the law, the courts have allowed retroactive application of the law against criminal proceeds acquired before enactment of the seizure and forfeiture laws for reasons among others that this works on the broad policy objectives that nobody should benefit from crime and that crime should not pay, the laws curtail enjoyment by criminals of property that arises from acts that were illegal when the crime took place. This provision guards against unjust enrichment by officials who stay in power for long and are involved in criminal activities. These persons should not retain the proceeds that they should not have had in the first place, it allows for the recovery of that property. Forfeiture thus in this instance will not only be treated as criminal or penal in nature but also as a civil law outcome of the fact that the perpetrator has obtained assets unlawfully. Seizure thus is not treated as a penalty¹⁷. This situation is reflected also in the Commonwealth Jurisdiction of Australia where the Australian Criminal Property Confiscation Act 2000¹⁸ contains no provision for appeal and it contains retrospective application clauses.

This is contrary to the case with the practice and proceedings in other jurisdictions which also provide that the right to property is subject to restrictions, and interference to the right to property is only allowed if it is prescribed by the law and is in the interest of the public and necessary in a democratic society. Under POCAMLA, any property illegally obtained realizable. The property to be forfeited is the market value of the property free from any encumbrance or from a claim or interest from a third party.

¹⁶ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 52.

¹⁷ *Dassa Foundation and Others v Liechtenstein*, Application no 696/05 (ECHR).

¹⁸ Criminal Property Confiscation Act No: 068 of 2000.

Regarding the value, the law¹⁹ determines the value of the property to be forfeited, to be based at the time of receipt of the payment, or the value at a particular time or if it is the property in his hands the property received. The value of the property is its worth at a particular time. It is argued that in making forfeiture orders, the courts will not consider an increase in capital worth of the property in favour of the defendant for the reason that, the capital gain could not have been achieved were it not for the criminal enterprise and the defendant cannot therefore benefit from the capital value as it will be illegal enrichment.²⁰ And in some instances, the shares and the dividends have been held to be proceeds that flow from the crime and subject to confiscation.²¹

2.1.1. Restraint orders

Restraint orders are made in anticipation of granting of confiscation orders, and are aimed to preserve property in cases where it might be realized in satisfaction of a future order of confiscation. In this case, the order preserves the property so that it is available to be realized in satisfaction of a confiscation order.²² The law provides for issue of restraint orders, which may be issued on an ex-parte application by the Agency Director. The orders prohibit dealing with the property in any manner. It is not necessary to establish a threat disappearance or wastage of the assets for the purpose of obtaining a restraint order, at that stage, the purpose of a restraint order is to preserve any benefit or advantage obtained from the offence as the purpose of the restraint order is to preserve the property in preparation for it to be realized through a confiscation order.

The property is a security for the expected order of confiscation.²³ By including the term all property, it includes even property legitimately acquired by a defendant, and legitimate property held by another person as a gift who received an affected gift from a defendant, in some instances restraint orders may be made against future transfers of assets.²⁴ The Agency Director has to satisfy the court of commencement of, a criminal investigation relating to the

¹⁹ Proceeds Of Crime And Anti Money Laundering Act No. 9 of 2009 s 58(2).

²⁰ *National Director of Public Prosecutions v Geyser and Another* (160/07) [2008] ZASCA 15; [2008] 2 All SA 616 (SCA); 2008 (2) SACR 103 (SCA) (25 March 2008).

²¹ *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (2) SACR 165 (CC); 2008 (8) BCLR 834 (CC) (29 May 2008).

²² *National Director of Public Prosecutions v Rautenbach and Another* (146/2003) [2004] ZASCA 102; [2005] 1 All SA 412 (SCA) (22 November 2004) (n 9).

²³ Young (n 10).

²⁴ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 68(2)(b).

offence or criminal conduct against a defendant. Whereas it might be straight forward to marshal the ingredients of satisfying the court of existence of a criminal investigation, the law does not seem to define what is meant by a criminal lifestyle or a benefit from criminal conduct, it is thus possible that under this law, a person's property may be restrained by an order of the court for a very long period of time on either suspicion, indefinite investigations or just by appearance or an opinion of another person or law enforcement. It thus seems, that the court takes on the duties of the investigator in making a discovery order.²⁵

Besides making restraint orders on facts presented ex-parte by an Agency Director, the court is also authorised to make orders of discovery or disclosure of facts that relate to other properties and their location that are not subject to the application presented in the court at the time . It is argued that, this has an effect of using the court to compel a defendant to make self-incriminating disclosures in respect to matters under investigations and also to offences or issues not known to the state as at the time. This goes against the provisions of the Constitution against self-incrimination. The counter argument to this position is that the person who has the property or an asset suspected is in a better position to prove that he acquired it legitimately. The offender thus is only needs to prove genuine origin of the property subject to confiscation.²⁶ It is argued that criminals are always planning ahead and taking steps aimed at concealing crime and its proceeds making tough and effective confiscation process mandatory. The European Court of Human Rights has observed that an accused ought to be able to give explanations on the evidence against him or else it is likely that the confiscation is likely upheld by the ECHR in cases where the rebuttal does not require self-incrimination.²⁷ The house of Lords has held that the burden that is placed on the defendant is a persuasive onus which the defendant has an obligation to discharge.²⁸ The Judges also have discretionary powers to administer an assumption should they believe that to do otherwise may cause injustice²⁹. And that confiscation measures do not violate the conventions right to fair trial if

²⁵ *ibid* 68.

²⁶ OECD, 'Confiscation of Instrumentalities and Proceeds of Corruption Crimes in Eastern Europe and Central Asia' (2018) <<https://www.oecd.org/corruption/acn/OECD-Confiscation-of-Proceeds-of-Corruption-Crimes-ENG.pdf>> accessed 30 April 2021.

²⁷ Michael Levi, 'Reversal of the Burden of Proof in Confiscation of the Proceeds of Crime: A Council of Europe Best Practice Survey' [2000] Strasbourg: Council of Europe, European Committee of Crime Problems.

²⁸ *Regina v Rezvi*: HL 24 Jan 2002.

²⁹ OECD (n 26).

the owner of the property the court is seized of is provided a reasonable opportunity to adduce their arguments and evidence in the proceedings³⁰.

The other argument to this fact could be that these orders are not made to assist or ease the work of the applicant, but are issued to ensure that the respondent avails information that may ensure other property within the reach of the respondent are not sold off or hidden away in expectation of adverse findings against him or her as under criminal forfeiture, the property ought to be presumed innocent,³¹ section 65POCAMLTA, also places the onus of proof on the defendant to demonstrate that he had known sources of income to justify ownership of the property at a fixed date. This is despite the fact that the law is not clear on who determines what the fixed date is. This disadvantages the defendant as the law does not provide specificity of the time from which he must provide information to justify the property he holds.

The order for discovery and disclosure ought not to be granted just for the sake but according to the discretion which the court must exercise on proper grounds,³² and the court making a restraint order is obligated to make a seizure order at the same time of all movable assets and make other orders that the court deems fit in the circumstances. Should there be grounds to conclude that the property may be hidden or sold, seizure of the realizable assets is ordered to protect such a property, a police officer is also authorized to seize realizable movable assets and keep them from being sold or removed from jurisdiction contrary to a restraint order.

The law provides remedies to people affected by the restraint orders by granting a “soft landing” to such people. This is done by making provisions of living expenses and legal expenses that arise out of the orders or any criminal proceedings related to these. The current jurisprudence in the country is that the court may allow a provision or reasonable living expenses during the pendency of the preservation orders³³ in this case the high court in Mombasa allowed the prayer for subsistence of Ksh 300,000 monthly for three applicants whilst maintaining the preservation orders.

And finally provision on the continued trade, business, personal profession or occupation this is subject to disclosure under oath by the person seeking the orders and disclosing all his what

³⁰ *ibid.*

³¹ *Levi* (n 27).

³² *National Director of Public Prosecutions v Rebutzi* (94/2000) [2001] ZASCA 127 (23 November 2001).

³³ *Abdrahman Mahmood Sheikh & Others V Samwel Mbote Muninda & Others*, Miscellaneous Criminal Application 62 of 2015 & 37 of 2016, [2016] eKLR. (30 Sep 2016).

interest he or she has in the property that is sought to be restrained . The court making a seizure order against moveable property may also on a request made by the person affected by the order or modify the order if the order has an effect of causing difficulty to the applicant. Or where the inconvenience to be suffered by the applicant outweighs the risk against the property. The order may also be rescinded at the conclusion of the proceedings against the defendant.

The court is empowered by the law to make a restraint order in cases where a case for the prosecution for a crime has been instituted against the defendant or there exists a confiscation order against a defendant or if there exists reasonable grounds to anticipate that a confiscation order may be made against the defendant or proceedings against the defendant are still pending. or it is satisfied that a person is to be charged with an offence. The restraint order may be rescinded if the defendant is not charged within such a period as may be considered by the court to be reasonable. In instances where an appeal is considered by either party, the order remains in force pending the outcome of the appeal .

The purpose of the restraint order is to preserve property pending a confiscation order and also provides for the recovery process of the proceeds of crime³⁴ to that end , in making the orders, the court ought to consider proportionality, which limits the value of the assets seized .³⁵ for the reason that once the restraint order is made, or confirmed prior to conviction, the order might not be amended or altered , this in essence puts the assets out of reach of the defendants for extended periods of time pending the hearing and determination of the cases which may take years to conclude thereby exposing the property to damage and wastage if the property is not properly maintained. The Courts in Kenya have weighed the two scenarios one being recovery at the end of the trial which requires the assets to be protected against damage and wastage or in other words be maintained for value and the paramount consideration that nobody should get any reward from the proceeds of criminal conduct and ruled that unrestricted access of either the preserved money or assets will negate the purpose of the statute³⁶.

³⁴ Vinesh Basdeo, 'The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma' (2014) 17 Potchefstroom Electronic Law Journal 1047.

³⁵ *National Director of Public Prosecutions v Mtwazi and Others* (441/2016) [2017] ZAECBHC 4 (5 June 2017).

³⁶ *Abdrahman Mahmood Sheikh & Others V Samwel Mbote Muninda & Others*, Miscellaneous Criminal Application 62 of 2015 & 37 of 2016, [2016] eKLR. (30 Sep 2016). (n 33).

2.1.2. Appointment of a manager /receiver

The law makes provision for appointment of a manager for a property subject to a restraint order to manage and , administer the asset or in case the asset is perishable and liable to wastage, he may sell it and if the property is a business , run the business within the existing legal parameters . The law provides for provisions for liberty to apply in terms of variation of the order. The order appointing the manager may be rescinded and in some instances the terms of the manager may be varied or he may be discharged, or orders made relating to fees and expenditure and the fees of the manager which are paid out of the confiscated proceeds or by the government. The registrar of lands by an order of the court is obligated to place a restriction on the land register in respect of the immovable assets such as land and buildings . An appeal filed against a decision to vary or rescind any order s becomes an automatic stay of such an order awaiting the determination of the appeal. The law grants an automatic stay of variation or rescission pending the determination of the appeal.

2.1.3. Confiscation Orders

The main utility of confiscation of proceeds of crime is not only punishment but restoration of previous state of ownership by protecting the rights of the real owners or primary owners³⁷. Confiscation orders also ensure that profit and benefit are taken out of crime .³⁸ The confiscation order is aimed at preventing criminal conduct and aims to taking away ill gotten gains from the hands of the criminals , it cripples the financial muscles of the criminals hence maiming their ability financially of committing any more crime.³⁹ A court must consider the connection of the property and the criminal conduct and activities.⁴⁰ To the extent that an understanding should be reached against any suggestion that the state does benefit from the orders of confiscation but merely removing from the convicted persons assets obtained illegally.⁴¹ The order is not interested in the property or specific assets but the value or money

³⁷ ‘Suncana Rokсандic Vidica and Martha Dragicevic, Does Crime Pay off ,(UN)Efficiency of Confiscation in Croatia(2019)3 ECLIC 549’.

³⁸ *National Director for Public Prosecutions v Ramlutchman* (677/15) [2016] ZASCA 202; 2017 (1) SACR 343 (SCA) (9 December 2016).

³⁹ Basdeo (n 34).

⁴⁰ *National Director for Public Prosecutions v Ramlutchman* (677/15) [2016] ZASCA 202; 2017 (1) SACR 343 (SCA) (9 December 2016) (n 38).

⁴¹ *National Director of Public Prosecutions v Rebuzzi* (94/2000) [2001] ZASCA 127 (23 November 2001) (n 32)..

to the state .⁴² Under POCAMLA, the confiscation orders are made after conviction on an application or by the court suo moto . This means that the court has the opportunity to interrogate the reward or benefit obtained by the defendant from the criminal conduct on a balance of probabilities this enquiry is aimed at determining the quantum of what should be paid to the state as confiscation as the order is a civil judgment for payment of money to the state and the court determines what should be paid which is in addition to the sentence of the court .⁴³ An order of confiscation of benefits thus accrues to the offender whether or not the offender is still in possession of the assets the moment it is established that he benefited the order of payment to the state is due and as a civil judgment it may be paid even from clean assets .⁴⁴.⁴⁵The subject of confiscation is a benefit connected to the offence, or any other offence of which the defendant has been convicted at the same trial and any related criminal activity which the court finds to be connected to that offence. The law makes a general statement regarding any criminal activity which the court finds to be sufficiently related to that offence, despite the fact that it is not clear whether a fresh inquiry or hearing or fresh evidence taken in respect to that other criminal activity.

Upon conviction, in addition to any punishment, the defendant may be ordered to pay to the government any such sum as the court may determine to be appropriate. The law confers on the court wide discretionary power in confiscation proceedings but does not state or limit the extent of the exercise of the discretion. This is informed perhaps by the fact that discretion on confiscation orders and conviction are solely the discretion of the trial court . Therefore within legal limits, the court should thus enjoy a free hand even during the confiscation stage, this is aimed to achieve the purpose of ensuring effectiveness or fairness of the confiscation order but at the same time the court must be mindful of making an order which may be interpreted as punitive and may amount to state taking of individuals property.

In determining the amounts subject to the confiscation order, the law puts a ceiling that the amount shall not be more than the value the defendants obtained from the proceeds of crime. The court thus has been given wide powers to determine what will be paid to the government

⁴² *S v Shaik and Others*, (CCT 86/07) [2008] ZACC 7; 2008 (5) SA 354 (CC) ; 2008 (2) SACR 165 (CC) ; 2008 (8) BCLR 834 (CC) (29 May 2008) (n 21).

⁴³ *National Director for Public Prosecutions v Ramlutchman* (677/15) [2016] ZASCA 202; 2017 (1) SACR 343 (SCA) (9 December 2016) (n 38).

⁴⁴ *National Director of Public Prosecutions v Mtwazi and Others* (441/2016) [2017] ZAECBHC 4 (5 June 2017) (n 35).

⁴⁵ *ibid.*

by the defendant in making confiscation orders. This is achieved by calling for evidence as may be necessary to enable the court to make an inquiry as to the exact amount to be confiscated. It has however not determined the lowest or the lower value of the asset sought to be forfeited. In not setting this limit, the law allows the court to make determination on case by case basis. Upon making the o confiscation order the court may determine when the payments may be made. This is a departure from other laws for example, the Penal Code which prescribe a fine or imprisonment and provide that the fine has to be paid immediately or else the defendant is sent to prison.

This could be a demonstration of either fairness or an inadvertent oversight on the part of the drafters or of the law, it contemplates the court giving the defendant time to make payments within a specified period of time. A very unusual clause in our jurisdiction. However, this is within the law and in exercise of the court's discretion. As the payment is treated as a civil judgment recoverable from the defendant through execution. The determination of the appropriate amount to be confiscated, is arrived at considering the connection of the asset to be confiscated and the defendants criminal conduct. The value of the proceeds of crime is what is deemed to be what the defendant derives from the defendants crime. Which in this instance is what is actually received by him or any other person in connection with a criminal activity, where either the defendant or any other person is involved. In other instances what is in possession of the defendant, either received in connection to the criminal activity or what has been previously determined by a court having made a previous confiscation order. What then may be realized according to POCAMLA is realizable property held and gifts made by the defendant less what the court may determine as obligations and to what priority. Adjustments are made to take into account inflation and financial fluctuations as shall be determined by the court.

In determining the amounts that are realizable, parties are afforded an opportunity to address the court on any information relating to the assets . The defendant or a third party thus has to demonstrate that as at the time, he had legitimately obtained the interest on the asset that he claims, failure to make this demonstration will be evidence that the property is a benefit from a crime Notwithstanding the fact that criminal forfeiture proceedings are criminal proceedings, the confiscation order made, is a civil judgment⁴⁶. The courts in Kenya have refused to make final forfeiture orders on grounds that Assets Recovery Agency has not demonstrated that it

⁴⁶ Proceeds Of Crime And Anti Money Laundering ActNo. 9 of 2009 s 66.

has made administrative arrangements with respect of funds subject to forfeiture in terms of where they are being deposited and has refused an application for forfeiture not to take effect pending appeal by reason of such arrangements.⁴⁷ The law makes provisions on instances of death or where the defendant absconds by looking at the possibility of existence of reasonable grounds of issue of confiscation orders being made in the absence or death of such a defendant or by an inquiry to the extent of the benefit obtained by such a defendant from the offence before the confiscation order issues. The confiscation order will issue subject to the court hearing presentations from persons who may have any connection to the asset sought to be confiscated.

2.1.4. Realization of property

Realization of the property comes after a confiscation order has been made and after all the avenues for appeal and review have been exhausted or at the termination of the proceedings against the defendant. The process is driven by the Agency Director, on his application, a receiver or manager will be appointed if none was appointed before, the receiver proceeds to realize the property as will be determined by the court, this includes property held by individuals which must be surrendered to the receiver.

Any persons who might have an interest are allowed to move the court before the final order is made. These may be individuals who hold third party rights in the property, who could be lien holders, unsecured creditors, bonafide purchasers, business partners, joint tenants or commercial third-party interests⁴⁸. The law empowers the court to suspend realization until it has addressed all the claims, interests and concerns of the third parties. In Kenya, the courts have allowed the financiers and third parties to file an application in the court to exclude the property that are subject to asset financing where the financier of the subject motor vehicle Sidian Bank was enjoined as an interested party and obtained orders in its favour⁴⁹. This is a departure from other jurisdictions, where the third parties automatically lose their interest in the properties sought to be forfeited despite their lack of involvement in the crime in question⁵⁰.

⁴⁷ *Asset Recovery Agency v Lilian Wanja Muthoni & 5 others*, Civil Application 58 of 2018 [2019] eKLR. (09 Oct 2019)

⁴⁸ Goldsmith and Linderman (n 12).

⁴⁹ *Assets Recovery Agency v Rose Monyani Musanda; Sidian Bank Limited (Interested Party)*, Miscellaneous Application 2 of 2020 [2021] eKLR. (14 Apr 2021)

⁵⁰ Goldsmith and Linderman (n 12).

This is a form of protection to third parties who might or have an interest that is legitimate in the property before an order realizing the property is made. After the issues, concerns and claims have been resolved to the court's satisfaction; the court makes an order for the process of realization to proceed. The law makes provision for sums of money seized and are in the control of the receiver, to be first applied to pay off the value of confiscation order, and the balance remaining after the confiscation order is fully paid out, on the direction of the court, to be paid out to affected persons and third parties under Section 64 after hearing representations in connection to the distribution. The government has no preferential claim on the money, if it has any claim it has to make presentations in connection with the distribution just like all parties.

It is the receivers' duty in exercise of his powers to make available the realizable property to pay off all confiscation orders made present or future against the defendant, realize not more than the current value from a person who has received a gift from the defendant, care must be taken to leave out a gift that shall conflict with the execution of a confiscation order. The law is alive to the provisions that involve sequestration of part of an Estate subject to the confiscation order, or winding up of a company where both instances the properties are subject to distribution to creditors, the court in these instances, on an application by the defendant may issue a certificate to the effect that the balance is inadequate for payment of the amount due under a confiscation order and the certificate may be used by the defendant to seek a reduction of the amount payable against the order. The court may thus exercise its discretion as it might deem just under the circumstances.

The law makes provision for the eventualities such as bankruptcy on the property and assets sought to be realized, to the effect that a bankruptcy order made against a person holding realizable property after a restraint order, or after realizable property has been vested under the control of the receiver appointed under this act, such property remains under the provisions of this law. POCAMLA in this instance prevails over the Insolvency Act, 2015⁵¹.

2.1.5. Criminal Asset Recovery Fund⁵²

The underlying hypothesis of the asset forfeiture legislation is reduction of the incentive to commit specific crimes. The ideal situation is that when assets are finally confiscated, they are

⁵¹ Insolvency Act No. 18 of 2015.

⁵² Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. ss 109–112.

handed over to be dealt with within the confines of the order of the court that gave the order. In the circumstances, an agency designated for this specific purpose that is to hold property and monies deposited during judicial forfeiture or a confiscation order. The law establishes the Criminal Asset Recovery Fund which is administered by the Agency. Its functions are to ensure that all the money derived from the execution of both confiscation and forfeiture orders are paid into the consolidated fund and property that vests in the government is disposed in accordance with the existing public property disposal laws. The cabinet secretary responsible for the Treasury is given a mandate to make regulations on the operationalization of the fund. However, the law has not given any timelines within which this should be done nor has it operationalized this part of the law. In attempts to commence operationalization of the fund, the draft proceeds of crime and anti-money laundering regulations (Criminal Assets Recovery Fund) (Administration) 2020 were prepared and a notice issued, the regulations were published on 18th August, 2020 but were subsequently recalled by the Cabinet Secretary National Treasury and Planning to allow for further consultations with stake holders through a public notice that was published in the local newspapers.

The slow start on the establishment and operationalization of this fund in Kenya seems to be nothing new as a study on the jurisdiction of South Africa shows that the setting up of the legislative mechanism to facilitate commencement and smooth running of the fund took years as did the build-up of capital to the organization. The importance that is attached to the establishment of this body is demonstrated by the persons who sit in the committee that is composed of cabinet ministers whose duty is to make policy recommendations to cabinet on critical aspects of the running of the fund which may include a defined process of managing the deposits, allocation, oversight transparency and reporting and generally ensuring that the integrity of the fund is maintained⁵³. In Kenya this is yet to be actualized and has led to the courts having to wonder whether there are any administrative arrangements as contemplated by the law with respect to funds that are subject to forfeiture⁵⁴.

2.2. Conclusion

The law provides for a meticulous and well laid down procedure in criminal forfeiture under POCAMLA. It places the court at the centre of the criminal forfeiture process in a number of

⁵³ United Nations Office on Drugs and Crime (n 14).

⁵⁴ *Asset Recovery Agency v Lilian Wanja Muthoni & 5 others*, Civil Application 58 of 2018, [2019] eKLR. (09 Oct 2019) (n 48).

respects. This starts right from conviction by holding an enquiry of what is the possible benefit that has accrued to the defendant, requiring that persons interested in the property to move the court for reprieve in all stages of the forfeiture process up to the very end the realization process. The discretion of the court in making orders in the process is unfettered and it is aimed at ensuring that the defendant and parties that are interested in the property are heard before orders are made. And finally the law makes provisions at ⁵⁵ provides that the defendant may even ask the court for time of even request to make the payments in instalments and within what period. The next chapter will discuss the civil forfeiture regime under POCAMLA , the law the steps involved in forfeiture and the process followed in civil forfeiture.

⁵⁵ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 61(6).

CHAPTER 3 : CIVIL ASSET SEIZURE AND FORFEITURE

3.0.Introduction.

In the previous chapter, the study looked at the criminal asset seizure and forfeiture under the Proceeds of Crime and Anti-Money Laundering Act “POCAML A”. This chapter of the study will look at civil asset seizure and forfeiture under POCAML A, it will describe what civil asset forfeiture is, the nature of the proceedings involved, and the standard of proof required, the chapter further discusses , preservation orders , the effect of preservation orders, the appointment of a manager in respect of a property subject of a preservation orders, forfeiture orders and preservation of third party interests in the property , the fulfilment of forfeiture order ,the role of the police in the process and finally the conclusion .

3.1. Historical Origin of Civil Asset forfeiture.

Forfeiture of tainted property is traced to the bible period when it was a practice to hand over whatever that was associated to one’s sin to God. It was believed that the thing that caused the sin itself should be held responsible for the wrongdoing.¹ The notions of punishment in the old testament where if an ox gores and kills a person, the ox must be stoned and killed irrespective of the owners negligence and its flesh not eaten.² This rendered the property guilty of wrong doing and not the person or the owner. Modern asset forfeiture laws date back to the eleventh century English common law era where the law of deodands applied through England and the enforcement of English statutes and common law by colonies before the adoption of the US Constitution, it can also be found in the admiralty jurisdictions where in rem forfeiture was permitted by the laws , the Navigational laws which allowed proceedings to be brought against sea vessels not the owners as conviction or proceedings against the owners was not a requirement³ The old practice is the origin of the present fiction of civil forfeiture or forfeiture in rem which is far removed from the reality of right and wrong, grossly harsh, unjust and an unequitable procedure.⁴

¹ Luis Suarez, ‘Guilty until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense’ (2019) 5 Texas A&M Journal of Property Law 1001.

² M Fourie and GJ Pienaar, ‘Tracing the Roots of Forfeiture and the Loss of Property in English and American Law’ (2017) 23 Fundamina 20.

³ Anthony Davidson Gray, ‘Forfeiture Provisions and the Criminal/Civil Divide’ (2012) 15 New Criminal Law Review 32.

⁴ *ibid.*

Early US Supreme Court decisions, have held that it is “the thing” that was primarily considered to be the wrong doer therefore meaning that the offence was connected to the thing or item that caused it or resulted into it. Proceedings against the thing thus do not connect at all to proceedings against the person.⁵ Later, the US Supreme court has held in *US vs Ussery*⁶ and in *Austin v US*⁷ that *in rem* forfeiture means that it is the property which is proceeded against hence a legal fiction that the property is held guilty and condemned. Courts have lately abandoned the legal fiction and moved also to the idea of including the owners of the property in proceedings should it be found that he might have allowed his or her property to be used in an offence which makes him negligent to an extent. The proceedings against the property will also attach punishment for allowing the property to be used by criminals.⁸ The Constitutional Court of South Africa has weighed in on what it thinks civil forfeiture is, that is, largely based on the English fiction that concentrates on the guilt of the property making the property obtained be a subject to forfeiture.⁹

Increased concerns about organized criminal activity and the perception that constitutional safeguards have made criminal law weak in the face of tackling criminal activities effectively coupled with perceived weaknesses in the criminal justice system has given rise to the clamour to develop an alternative or another approach which makes use of civil means to get hold of criminally acquired assets.¹⁰ Further, public interest in fighting organised crime justifies the enforcement of harsh and sometimes unusual measures which are beyond normal protection of individual property rights provided for in the constitution.

This is origin of civil asset forfeiture which allows for a concept of following the money belonging to criminals and seizing it without the benefit of a criminal conviction but using civil process and civil onus of proof. In the process ousting the rules of criminal evidence from application and admitting evidence that would in any event not be admissible or considered at a criminal trial court.¹¹

⁵ ‘Palmyra Escurra 25 US (12 WHEAT)1 [1827].Pdf’.

⁶ *US v Ussery* (1995) 59 F 3d 568 (Court of Appeals, 6th Circuit).

⁷ ‘Austin v United States [1993] 509 US 602.Pdf’.

⁸ ‘How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement’ (2017) 131 Harvard Law Review 2387.

⁹ *Prophet v NDPP* [2013] BCLR 906 44.

¹⁰ Jennifer Hendry and Colin King, ‘How Far Is Too Far - Theorising Non-Conviction-Based Asset Forfeiture’ (2015) 11 International Journal of Law in Context 398.

¹¹ *ibid.*

It erodes constitutional and Procedural safeguards afforded to a suspect thus favouring states blind power and the pursuit of illicit assets in the name of tackling organized crime and corruption which makes civil forfeiture process avoid procedural protections afforded to a criminal process through mislabelling it as civil in character whereas it is clearly a criminal process.¹² Civil Asset Forfeiture (CAF) or non-conviction based confiscation is only aimed at promoting the efficiency and speed of asset recovery . The measures are aimed at illicit property and the suspected criminal proceeds . The proceedings are civil but targeted at suspected criminal proceeds where the convictions have not been obtained . Thus a person cannot claim to hold illegally acquired property as his or claim to hold rightfully property obtained through dubious conduct.¹³ Thus it is preventive in nature not punitive or deterrent.¹⁴

Courts in jurisdictions such as Botswana and South Africa recognize the utility of civil forfeiture in prevention people deriving profit from unlawful conduct and at the same time have property owners to look after their property to prevent illegal use .¹⁵ In instances where civil forfeiture authorises forfeiture of assets that are unconnected to criminal activity , this may cause acute disabilities to the parties.¹⁶ CAF can be commenced without any prior criminal conviction, and because CAF is concerned with the property and not the individual. Its attention is directed to the property not the conduct of the person of the holder. Civil forfeiture is forfeiture without a criminal conviction it provides for forfeiture of property suspected but not conclusively proven to be the product of criminal activities or illegal conduct. It does seem that one can therefore conclude that civil forfeiture provisions are criminal in form .¹⁷ Confiscation is therefore a different kind of approach not necessarily a penalty aimed at property making certain safeguards liable to be toned down but not done away with completely .¹⁸

¹² *ibid.*

¹³ Johan Boucht, 'Civil Asset Forfeiture And The Presumption Of Innocence Under Article 6(2) ECHR' (2014) 5 *New Journal of European Criminal Law* 36.

¹⁴ *ibid.*

¹⁵ 'How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement' (n 8).

¹⁶ *ibid.*

¹⁷ Gray (n 3).

¹⁸ Michele Simonato, 'Confiscation and Fundamental Rights across Criminal and Non-Criminal Domains' (2017) 18 *ERA Forum* 365.

3.2. Civil Asset Forfeiture.

It is forfeiture without a criminal conviction.¹⁹ It is a process by which property suspected to be an outcome of a crime or used to commit a crime is confiscated by the authorities.²⁰ Civil forfeiture action proceeds in rem, which is to say against the property, resting on the idea that the property has violated the law and not the owner of the property.²¹ Because forfeiture allows police to take assets from individuals who have not faced any legal proceedings, critics have termed it to be legalized theft driven by profit incentives.²² Forfeiture laws support the other law enforcement remedies by weakening the base of criminal enterprise, this is done through confiscation of illicit property, by forfeiture being triggered at the commencement of illegal activity, it ruins the title of the property that the owner may not be able to validly or legally sell or transfer the property to any other person which makes anything related to crime unviable even if it is transferred to third parties.

In some instances, forfeiture laws operate to the detriment of other innocent people whose property may be forfeited because it is connected to a criminal activity. Civil forfeiture requires a lower burden of proof hence providing the prosecution with an opportunity for discovery to gather more information on the suspect transaction.²³ Despite being referred to as unconstitutional deprivation of property without due process, civil forfeiture has become regular and common practice partly because unlike criminal prosecution which requires proof beyond reasonable doubt, it is easy to seize property through civil action and almost anything is liable to seizure.²⁴ One of the advantages of civil forfeiture according to A.J Van De Walt²⁵ is that it allows the state to restrict the financial mobility of crime syndicates by freezing money and property derived from and used in criminal activities.

Civil Forfeiture provides that officers from the law enforcement may take away property that has links to criminal activity.²⁶ This is done by identification and tracing the assets,

¹⁹ Gray (n 3).

²⁰ Meghan Berkery, 'Rethinking the Future of Civil Asset Forfeiture in Michigan: The Impact of an Evidentiary Standard' (2018) 96 University of Detroit Mercy Law Review 329.

²¹ *ibid.*

²² *ibid.*

²³ Michael Goldsmith and Mark Jay Linderman, 'Asset Forfeiture and Third Party Rights: The Need for Further Law Reform' (1989) 1989 Duke Law Journal 1254.

²⁴ Christine A Budasoff, 'Modern Civil Forfeiture Is Unconstitutional (2019)23 Tex Rev L&POL 467' 23 23.

²⁵ AJ van der Walt, 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause' (2000) 16 South African Journal on Human Rights 1.

²⁶ Suarez (n 1).

connecting them to criminal enterprise or illegal activity and following the criminal process of prosecution of the offenders and confiscating of the proceeds of the crime . The effect is loss of the property interest and rights of those who claim the property that is due for confiscation..²⁷ Thus the interests of persons or companies with proprietary interest lose all the rights to the assets and funds that are subject to confiscation.²⁸

3.3.Burden of Proof

The proceedings are in rem, being an action against the property rather than the person or suspect . This comes with benefits, some being the difference in rules of procedure, and a lowered onus of proof. In, these proceedings as compared to the criminal proceedings this makes civil forfeiture cases less bothersome for the government but hard for the persons claiming and lastly guilt of the party is not an issue .²⁹ Compared to the other forfeiture regime, this contains less requirements as mainly it does not require conviction or even specificity of the property tied to an individual .³⁰

In jurisdictions such as South Africa , Botswana and Kenya , officials use criminal law prosecution methods in getting forfeiture orders by use of methods that are reserved for criminal law enforcement without observing due process protections . This has led to a reference to the relationship between criminal enforcement and civil forfeiture as toxic.³¹ The onus of proof during the proceedings is on the government to establish by preponderance of evidence that the property is liable to be forfeited. Should there be allegations by the government that the property was used to enable or assist in commission of a crime, it is for the state to show the link between the crime and the assets ought to be seized.³² In Kenya, the proceedings are aimed at determining the criminal origin of the property in issue and not a criminal prosecution against the respondent and a forfeiture or seizure order does not depend on the outcome of criminal proceedings. The applicant will only be required to establish on a balance of probability that the assets in question are suspected to be proceeds of crime which

²⁷ Mat Tromme, 'Waging War against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with the Rule of Law' (2018) 29 Duke Journal of Comparative and International Law 165.

²⁸ *ibid.*

²⁹ Suarez (n 1).

³⁰ 'How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement' (n 8).

³¹ *ibid.*

³² Suarez (n 1).

then moves the onus of proof to the respondent to establish the contrary³³ This position finds support in the high court³⁴ where the court makes a finding that despite the fact that the law has set a low bar of proof of evidence for a party, it is still the law and the courts have a duty to enforce the law.

Civil forfeiture doesn't rely on the verdict of guilty, the benchmark is a civil standard or a balance of probability the High Court³⁵ however has placed reliance on the Evidence Act³⁶ in making a finding that it is the applicant who must establish that the asset was purchased by use of funds fraudulently acquired. This shifts the onus to the Applicant to prove the origin of the property.³⁷ The burden of proof in civil forfeiture cases varies according to the stage the process is in. This is seen in the case of the first stage, the preservation stage where the standard of proof required to obtain the order is that of reasonable belief, a very low threshold.

During the forfeiture stage, the onus of proof still stays with the Agency still continues to lie with the Agency but on a higher standard than that of the preservation stage which is on a balance of probabilities, which is a higher standard than what has to be mustered in the preservation stage. The High court has held that the only requirement that the Agency has to demonstrate is that the funds or assets are the proceeds of crime based on the balance of probabilities., once the applicant has established this, the burden will shift to the respondent to show that the funds or assets have a legitimate source.³⁸In instances where, parties appear in obedience to the summons having entered appearance during the preservation stage, the burden shifts to the parties as they have to apply for the exclusion of their interest in the property from the order to forfeit by proving on a balance of probabilities or on reasonable grounds that they have a genuine interest in the property.

The owner has to prove on a balance of probabilities that the property was legally acquired for fair exchange and money and that the applicant did not know had reasonable grounds to

³³ *Assets Recovery Agency v Joseph Wanjohi & 3 others*, Anti-Corruption and Economic Case Application 7 of 2019 [2020] eKLR. (21 Feb 2020)

³⁴ *Recovery Agency v Jane Wambui Wanjiru & 2 others*, Miscellaneous Application 53 of 2018 [2019] eKLR (25 Apr 2019)

³⁵ *Asset Recovery Agency V Charity Wambui Gethi*, Miscellaneous Application 16 of 2016 [2018]eKLR (20th November 2018).

³⁶ Evidence Act CAP. 80 s 107(i).

³⁷ Tromme (n 27).

³⁸ *Asset Recovery Agency v Lilian Wanja Muthoni & 5 others*, Civil Application 58 of 2018 [2019] eKLR. (09 Oct 2019)

suspect that the asset originated from crime.³⁹ The High Court declined to grant orders to forfeit a motor vehicle on the grounds that despite the Asset Recovery Agency's best endeavours, the Respondent clearly demonstrated that the money that was used to purchase the Motor Vehicle was not linked with funds suspected to be proceeds of crime⁴⁰ an order was made for the release of the motor vehicle.

By allowing recovery of assets from people who are absent or dead or by targeting tainted assets this demonstrates that civil forfeiture cases are not limited to property related to a particular transaction. The reach of civil forfeiture goes as far as property belonging to a third party who has no bonafide defence, it can also be filed before, or after or during a criminal case or where there is no criminal charge.⁴¹

3.4.The Process and Stages of Civil Forfeiture.

Civil forfeiture process provides a process of freezing tainted assets and assets which derive from criminal conduct eventually forfeiting them to the state on the orders of the court. This involves the following stages;

3.4.1. Investigative or Investigations Stage.

This is the initial or preliminary stage that seeks to establish that the asset is either proceeds of criminal conduct or an enabler of an offence this will be done by the Agency or the police and in some instances under the direction of the DPP and involvement of EACC.⁴² It is at this stage where evidence is collected relating to the properties, bank accounts by use of warrants to investigate accounts of people of interest. This information that is gathered and the evidence forms the contents of the averments in the affidavit that will accompany the Ex-parte application for the preservation order.

3.4.2. Preservation Stage /Order

This is made on application by the Agency Director to the high court seeking an order that prohibits a named person or entity from dealing with the property in any way, the court issuing

³⁹ Tromme (n 27).

⁴⁰ *Asset Recovery Agency V Charity Wambui Gethi, Miscellaneous Application 16 of 2016* [2018]eKLR (20th November 2018) (n 35).

⁴¹ Tromme (n 27).

⁴² *ibid.*

the order may issue the order subject to exceptions and conditions. The preservation order is aimed at preserving the property that may be made a subject of an order of forfeiture . In this stage, upon the investigators being satisfied with the evidence collected or that there is sufficient cause to believe that the property is proceeds or instrumentality of crime . The court is moved ex parte by an application by the Agency Director and the application placed before the duty judge who , upon being satisfied of sufficiency of grounds presented impugning the property in crime is obligated in mandatory terms under section 82(2)to issue a preservation order once the two grounds have been established.

The standard will be a mere existence of reasonable grounds. The grounds , should be both reasonable rational and objective .⁴³ At the application stage the state is not required to satisfy the court that a forfeiture order may finally ensue . Upon making the preservation orders the court may, if it considers it appropriate or proper may make an order authorizing seizure of the subject asset by a police officer. The language of section 85(1) of POCAMLA seems to suggest that any police officer may seize any of the property. The requirement is only reasonable grounds on his part that the property will be sold off of or taken away from the court's jurisdiction.

This differs from other Jurisdictions like South Africa where, by the time the court is being moved for preservation orders, the property sought to be preserved is usually in the custody of the police⁴⁴. Upon the application and the making of the preservation order, the court takes the centre stage regarding the custody and handling of the property subject of the order as upon making the preservation orders the law gives the court powers to direct in what manner the property so seized may be dealt with. The Agency Director is obligated to serve the Preservation orders to the affected parties by a publication in the Gazette and effect service as provided under the Civil procedure Act (Cap.21). The parties will have 14 days either from service or within 14 days after the publication of the notice in the Gazette to make relevant replies. The notice period gives interested parties to the property that is subject to a preservatory order an opportunity to file notices of their intention to oppose the making of the forfeiture order or apply for an order excluding their interest in the property concerned from the operation of the forfeiture order. The notice served by the persons interested in any of the assets to the Agency director contains particulars of the address of service, and an affidavit that contains the

⁴³ Vinesh Basdeo, 'The Legal Challenges of Criminal and Civil Asset Forfeiture in South Africa: A Comparative Analysis' (2013) 21 African Journal of International and Comparative Law 303.

⁴⁴ *ibid.*

applicants identity, the extent of the persons' interest in the assets concerned and the grounds for opposition to a forfeiture order or supporting the application to exclude his interest in the property.

The person affected by the order may challenge the preservation order either through an appeal or an application for variation or rescission on grounds that are provided in section 89 POCAMLA, which provides that the court, which made the preservation order has discretion to vary or modify the preservation order, or an order authorising the seizure on an application made by a person affected if the applicant satisfies the court that , the order will cause him depravity and cause hardship which hardship outweighs the risk of loss and damage or transfer to the property or when the proceedings against the defendant are concluded. The High court in Kenya⁴⁵ has held that the applicant will bear the burden of proof that he deserves the orders of variation or rescission of the preservation orders this it is argued , will balance the individual interests against the public interest unless it is demonstrated that the application was malicious and a frivolous application made to the court. Further the applicant ought to satisfy the threshold of Section 89⁴⁶. The position obtaining in Kenya expounded by the courts is that to order withdrawal of any of the preserved assets will amount to perpetuating an illegality that the state seeks to address in the first place as the preservation is not aimed at benefiting the state but protection of public funds⁴⁷. And have compared the risk of lifting the order to be higher than the hardship likely to be suffered by the applicant which in any event will be only for a short period of time as the money remains safe and the fact that the onus of proof in forfeiture proceedings is higher , that of a balance of probability. In other cases , the high court has considered the plea to exclude an asset in this case a motor vehicle brought by a bank that has financed the asset from the bracket of the order preserving the asset and assets belonging to a person who has not been enjoined in the proceedings or served with the orders on grounds that it will be unconstitutional to include such a property in the preservation order⁴⁸. But in all these the burden of proof lies on the applicant.⁴⁹

⁴⁵ *Asset Recovery Agency v Ali Abdi Ibrahim*, Application 12 of 2020 [2020] eKLR (15 Jun 2020)

⁴⁶ *Assets Recovery Agency v Samuel Wachenje & 7 others*, *Miscellaneous Application 3 of 2016 [2017] eKLR* (27 Jun 2017).

⁴⁷ *Asset Recovery Agency v Ali Abdi Ibrahim*, *Application 12 of 2020 [2020] eKLR* (15 Jun 2020) (n 45).

⁴⁸ *Assets Recovery Agency v Rose Monyani Musanda & 2 others; Wilma & Sons Company Limited (Interested Party)*, *Miscellaneous Application 2 of 2020 [2021] eKLR*. (14 Apr 2021)

⁴⁹ *Assets Recovery Agency v Jane Wambui Wanjiru & 2 others*, *Miscellaneous Application 53 of 2018 [2019] eKLR* (25 Apr 2019)

The preservation orders are valid for 90 days after the notice is published in the government gazette, unless there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order or an unsatisfied forfeiture order in force relating to the property subject to the preservation order or the order is rescinded before the expiry of that period. In *Levi v NDPP* the court set aside an application for a forfeiture order on a technical ground of not filing an application on time within 90 days.. In some instances, the Agency director files a forfeiture application on the 11th hour to automatically take advantage of section 84(a) by getting an automatic extension of the preservation orders. In order to render the preservation order still pending as contemplated under section 84 POCAMLA it is necessary to serve the forfeiture application on interested parties.

The court that issues a preservation order may on its own motion or on application by the Agency Director appoint a manager to undertake some functions on behalf of the owner of the assets or any person affected by the preservation order. These functions will include assuming control over the property, maintenance of the property, administration of the asset, if the asset is a trade or business or undertaking carry on with the business or in the case of property that is perishable or liable to deterioration, decay or injury by being detained in custody to sell or dispose of the property, this function seems the same as that required of a manager under section 75 of POCAMLA. The person against whom the orders are made may also be ordered to surrender the property either immediately or within such period as may be determined by the court to the manager. The fees and expenditure incurred by the manager in the course of his duties shall be paid out of the forfeited asset or by the Government.

Section 89 POCAMLA makes a provision for rescission or variation of an order of appointment of a manager by an application made by a person who is affected by such order. He may also seek to vary the terms and conditions of work and the the appointment of the manager or the discharge of the manager. The court enjoys a wide discretion in terms of applications that are brought before it seeking modification of the order appointing the manager. The order appointing the manager will also stand rescinded if the preservation order is rescinded by the court. The preservation order made against immovable property is given effect by the Registrar of lands of the specific registry where the property is located. This is done by entering a restriction on the land register in respect of the property preventing any form of dealings on the property without the consent of the court.

POCAMLTA also does make provision for protection of the preserved property by providing that the property shall not be dealt with either by the Official receiver or the High Court Registrar in case the company or corporate body that owns the property is being wound up without the consent of the court that made the preservation order. This will be effected by the Registrar of Lands of the concerned registry by making entries in the relevant registers and endorsement of the relevant Title with the order of the court both in a copy of the Title and the original Title when it is presented to his office. Upon the making the preservation order and the preservation order being endorsed on the register and the Title by the Registrar, the custody of the property remains as provided by section 87 POCAMLTA , either under the custody of the Registrar of the High Court or the Official Receiver . Any person who is affected by the Orders has liberty to apply to the court that made the order for rescission of the order.

3.4.2.1. Exceptions on grant of the Preservation Order.

Despite the fact that forfeiture provisions are crime fighting tools, they are aimed at ensuring that criminals or persons do not derive any benefit out of crime. The application of the provisions of the Act especially at the preservation stage, does in some cases go against the fundamental rights of the victims as they are granted merely on a belief, sometimes mere suspicion and not proof that the property in question consists of proceeds associated with or instrumentalities of crime. The exceptions provided, thus mitigates the militant effects of the obvious violation of the fundamental rights of the persons affected by the orders as provided in the constitution. These are the exceptions that POCAMLTA has provided for in the application for preservation orders.

An affected person may challenge the orders made under section 87 may apply for rescission or variation of the order, the relevant preservation order may be rescinded in this case the court directs that the caveats registered against the property be raised .POCAMLTA at section 88 makes provision for reasonable subsistence expenses of a person with an interest in the property sought to be preserved together with his home .This is made subject to disclosure under oath, the applicants full interest in the property submitted by way of an affidavit and that the person is not able to meet his expenses out of his other holdings that is not subject to the preservation order and the courts have given effect top this provision The High Court⁵⁰ordered provision of living and personal expenses out of the frozen assets. Care has to be

⁵⁰ *Asset Recovery Agency v Lilian Wanja Muthoni & 5 others*, Civil Application 58 of 2018 [2019] eKLR. (09 Oct 2019)

taken to ensure that in ordering the provision of living expenses the court does not order the maintenance of extravagant living by the applicant which will end up defeating the purpose of the orders in the first place as for instance the funds sought to be preserved may be depleted to the detriment of the preservation orders.⁵¹ It is also expected that in making an application for provision of subsistence needs, the applicant ought to show by evidence the family requirements in terms of upkeep and demonstrate absence of any other sources of income to support the family which may be done on humanitarian grounds. The court may also in its own motion at the making of the preservation order carry out an inquiry and make orders without the necessity of an application from the persons affected by the preservation order for the exclusion of their interests .

Whereas the law at 134 (1) (c) seems to suggest that the legal fees both for making an application or defending an application for preservation orders or defending proceedings relating to the property subject to the order of preservation should be provided for. The same law also provides that the minister in consultation with the Chief Justice may make regulations that prescribe the maximum allowable costs for legal services, this has not been done, thus leading to the conclusion that despite the provision no practical steps have been made to this effect thus creating a confusion on the application of the law in this instance as there are no regulations to operationalise this provision.

3.5. Forfeiture Stage

The forfeiture order application is made while the preservation order is in force on an application to the High Court. The application is for an order forfeiting to the government all the property subject to the preservation order. The parties that have filed notices are served with the application in accordance with the provision of the Civil Procedure Act (Cap21) for them to appear either to either oppose the application or make an apply to have their interests in the Assets or modify the operation of the order in respect of the asset . The law provides that the forfeiture proceedings shall be civil proceedings and that the court needs to find on a balance of probabilities that the property has either been used or is intended to be used in the course of criminal activity or is proceeds of criminal conduct.

⁵¹ *ibid.*

The Agency has to demonstrate unlawful acts and conduct and the property is an outcome of criminal activity undertaken by the respondent.⁵² The High court has also held that the only requirement to be met by the applicant is to prove on a balance of probability that the respondent has funds or assets which are proceeds of crime.⁵³ The Agency which is the applicant, need not prove that a specific offence was connected on a particular date by the individual and there need not be a conviction of the respondent, the only requirement being demonstration of some unlawful conduct which resulted in acquisition of the property, the Agency thus must demonstrate on a balance of probability that the property results from unlawful conduct.⁵⁴ The court may in some instances refuse an application for forfeiture if it is established that the asset in contention has not been procured using proceeds of crime or that the applicant has not proven that the asset in question to be proceeds of crime. The High Court⁵⁵ declined to issue forfeiture orders sought against a motor vehicle on grounds that the applicant had not established that it was purchased using proceeds from NYS and that the respondent had proven that the motor vehicle was procured using funds from a legitimate source. Once it is proved on a balance of probability that the property arises from criminal activity, a forfeiture order will ensue. The involvement of the property owner will not be an issue of contention.⁵⁶

3.5.1. Exclusion of Interests in Property Subject to Forfeiture Orders.

The law provides for protections similar to those availed to parties during the preservation stage of the proceedings where certain interests are excluded in terms of section 72(2)⁵⁷. The same protections are granted in the forfeiture stage which are aimed at protecting the interests of third parties who have a proprietary interest in the asset in question by preventing the arbitrary deprivation of property by the state or its agencies. This is done through the law by enabling persons who have an interest in the targeted assets to have a say and make

⁵² Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64 *Journal of African Law* 27.

⁵³ *Asset Recovery Agency v Lilian Wanja Muthoni & 5 others*, Civil Application 58 of 2018 [2019] eKLR. (09 Oct 2019) (n 38).

⁵⁴ Gikonyo (n 52).

⁵⁵ *Asset Recovery Agency V Charity Wambui Gethi, Miscellaneous Application 16 of 2016 [2018]eKLR (20th November 2018)* (n 35).

⁵⁶ Gikonyo (n 52).

⁵⁷ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009.

presentations on the property before the court makes a determination on forfeiture orders. This offers great protection to possible third parties⁵⁸.

A person (s) with a claim or interest in the assets may make an application to the High court at any time before the final orders forfeiting the property is made and the court using the standard of a balance of probability, satisfies itself that the person was not part of the criminals in any way, or the interest he has whether acquired during or after the commission of the offence, was acquired legally in absence of knowledge, and in circumstances that do not raise any issues of complicity or suspicion, that the property was at the time it was acquired was , tainted property. Section 93⁵⁹ contains a provision that may be called a recognition of interest part ,where the court is thus expected to make a finding on the nature of the applicant's interest on the basis of evidence provided by the applicant, the value of the interest and the extent of the interest in the property.

The court is required to make an inquiry and a finding on the facts presented by the applicant towards his interest in the property . The applicant thus bears the burden of proof to present facts and evidence that he was not involved in the commission of the offence, he obtained the property by payment of sufficient market rate consideration and that he did not know or could not have reasonably suspected the property at the time of acquisition was tainted property.

The second exclusion provided by the law under exclusion of interests in the property is contained in section 94⁶⁰ that provides that the interested party needs to demonstrate that they acquired the interests legally, for a consideration or a price that is not significantly below the value of the interest or that they neither knew or had any reasonable grounds to suspect that the property constituted criminal proceeds. The high court on application by a bank as an interested party ordered release of a seized motor vehicle financed by a bank on grounds that the fact of the motor vehicle being financed by an institution removed it from the bracket of proceeds of crime⁶¹

⁵⁸ United Nations Office on Drugs and Crime, 'Effective Management and Disposal of Seized and Confiscated Assets' 86.

⁵⁹ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009.

⁶⁰ *ibid* 94.

⁶¹ *Assets Recovery Agency v Rose Monyani Musanda & 2 others; Wilma & Sons Company Limited (Interested Party)*, *Miscellaneous Application 2 of 2020 [2021] eKLR. (14 Apr 2021)* (n 48).

The applicants may also be required to demonstrate that they took steps to halt continued misuse of the property. The law in this instance shifts the burden of proof to the applicant to discharge on a balance of probability should he not be successful, the court will not exclude the interests. From the foregoing, section 93 contains what is seen to be recognition and separation of interests for section 94 to give effect to by excluding them from the operation of the forfeiture order, in the process, this promotes the right to property thereby avoiding arbitrary deprivation of property.⁶²

3.5.2. Effect and Execution of Forfeiture Orders .

As provided under section 92(1), subject to the exclusions made under section 94 the court is obligated in mandatory terms to order forfeiture upon the applicant establishing that the asset is either proceeds of crime or instrumentalities of crime. The courts discretion is taken away by the provisions the Act. This leaves it with only the issue of exclusion of interests in the property to determine. The absence of an affected person, a person who owns a pecuniary interest in the property may be affected by the forfeiture order does not prevent the court from making the order. It is also to be noted that either an investigation aimed at commencing a criminal process or the outcome of criminal proceedings are not a bar to the commencement of forfeiture orders as the High Court⁶³ has made such a determination. This therefore suggests that the finding of the court trying a criminal case related to the same property will not affect the forfeiture order once it has been made. An acquittal therefore will not clear an already declared tainted property.

The forfeiture order once made must be published in the Gazette as soon as practicable, in any event not more than 30 days after the order is made. Upon gazettelement of the order , the law provides for a chance to persons who were entitled to receive a notice of application of the order but did not do so to apply within forty five days after the notice is published to the High Court for an order to exclude their interest which hearing must be held within 30days of filing of the application. The court will make a determination on the interest on a balance of probabilities that the application fits within the provisions of the law on late notice and the

⁶² Gikonyo (n 52).

⁶³ ,*Asset Recovery Agency v James Thuita Nderitu & Others, ACEC Civil Suit NO 2 OF 2019* [2020] eKLR (22nd April ,2020).

provisions of the exclusion of interests where once again the applicant has the burden of proof to exclude their interest from the operation of the order.

3.5.3. Provision for Appeal.

The preservation order or seizure order or forfeiture order once made subsists awaiting the outcome of any proceedings of appeal filed challenging the order or expiry of the period provided to file an appeal against the order, the effect of the provision under section 97 is that, it grants an automatic stay of any order granted pending the outcome of an appeal.

3.5.4. Appointment of A manager

Upon making the forfeiture order, the Court may appoint a manager to undertake the duties spelt out in the law regarding the forfeited property, this will include, taking possession of the subject property after some interests have been excluded under section 94, to ensure that forfeiture of the property takes effect. This however must wait until the appeal filed against the forfeiture orders has been disposed of, once the appeal process is concluded, then the next stage sets in which stage is the vesting of the property to the manager. Once appointed, the manager completes the forfeiture process by depositing any forfeited proceeds to the fund, or deliver forfeited assets to the fund or offer to buyers by way of sale property forfeited by sale or other means and deposit the proceeds of the sale to the fund. This is subject to, firstly ensuring compliance of an order excluding any interest in the property is complied with.

Regarding the deceased's estates, the law⁶⁴ contains elaborate provisions on the issue of assets held by a deceased person in any property that is subject to a preservation order. The interest will be limited to the property held by the deceased prior to his death. An order therefore may be sought in respect of part of the deceased's and evidence adduced concerning the activities of the deceased person.

Notwithstanding the position of the Succession Act in property held jointly, after a person's death, and in instances where there was a preservation order in place against his interest in property, his interest in the property will not vest in the surviving owners but the preservation order remains in place as if the owner did not die, and a subsequent forfeiture order made in

⁶⁴ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 101.

respect of the interest applies as if the order took effect in relation to the interest immediately before the person died.

3.6. The Role of Police in Civil asset forfeiture.

Police play a big part in the process of civil forfeiture in the following respects, The Agency does not have investigatory powers they rely on the police who are charged with investigations and collection of evidence prior to the application of preservation orders. It is the information that they collect in the course of their investigations that is used by the Agency to swear an affidavit that will accompany the ex-parte application for the preservation orders. In ACEC 58 of 2018⁶⁵, the affidavits sworn on behalf of the applicant the Asset Recovery Agency are all sworn by the police investigators. The Police will seize any preserved assets on the orders of the court if he has reasonable grounds to believe that that the property will be disposed or removed⁶⁶. The function and role of police under the law has been affirmed by the high court⁶⁷ that over and above the provisions of the law the orders of the court are to be implemented by the police.

3.7. Conclusion

This chapter of the study has examined civil forfeiture in terms of the origin, the meaning and definition, preservation orders and forfeiture orders. The chapter has also examined the standard of proof required to be mustered both in the preservation stage and the forfeiture stage as well as exclusion of the interests of people who have an interest in the property subject to forfeiture orders. The study has also looked at provisions that provide for rescission of the orders granted and the grounds that support the rescission, appointment of a manager and his functions in the execution of the forfeiture orders and the execution of the final forfeiture orders. In the next chapter proposes to look at the management of the seized and forfeited assets in the following instances, during the pendency of the preservation order, and during the pendency of an appeal.

⁶⁵ *Asset Recovery Agency v Lilian Wanja Muthoni & 5 others, Civil Application 58 of 2018* [2019] eKLR. (09 Oct 2019) (n 38).

⁶⁶ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 71.

⁶⁷ *Asset Recovery Agency V Charity Wambui Gethi, Miscellaneous Application 16 of 2016* [2018]eKLR (20th November 2018) (n 35).

CHAPTER 4: MANAGEMENT OF SEIZED, RESTRAINED AND PRESERVED ASSETS.

4.0. Introduction

In the previous two chapters the study discussed criminal forfeiture and civil forfeiture and looked at the processes involved in the treatment of the assets seized in the restraint stage in criminal forfeiture and during the preservation and forfeiture stage of the civil forfeiture processes. In this chapter, the study will look at the management of these assets during the pendency of the restraint orders and the preservation orders and during the pendency of an appeal if one is preferred.

The issue of proper management of seized assets goes to the root of success or failure of both the civil and criminal asset forfeiture regimes. It ensures the safety and value of the assets as they await the process of confiscation which in some instances takes years to complete. The system thus should be able to manage the assets at the same time have the capacity to realize the assets and pay into the state.¹ Thus proper asset management acts as an important link between the initial recovery process and the end process that is realization. This requires special skills that will preserve the value of the assets pending the final process which skills are most likely not available within the law enforcement. Asset management looks into the future of the seizure process by ensuring that there is proper pre seizure planning which looks at the condition of the assets, the cost of the seizure process which will include the cost of storage of seized items as contrasted with the cost of the assets. This will guide the relevant authorities to make informed decisions on whether to seize the assets or leave them with the owners, the type of care needed on the assets or importantly whether to consider starting the process of seizure or not and finally whether there will be value recovered at the end of the process or not. Asset management process serves as a vetting mechanism of process

4.1. Management of seized or restrained assets in Criminal and Civil forfeiture process.

The law² makes it mandatory that, as the court is making a restraint order, it also must make an order allowing the seizure of movable property and the seized property is subject to the further orders of the court. This means that the court therefore assumes custody, control and

¹ Jean-Pierre Brun, *Asset Recovery Handbook: A Guide for Practitioners* (World Bank : UNODC 2011).

² Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 68(7).

management of the property that is subject to a restraint order. There is limited jurisprudence available on the subject of management of restrained assets in Kenya under Proceeds of Crime and Money Laundering Act (POCAMLA) with the large part of the material available only concentrating on the applications that eventually give rise to grant of the preservation orders or restraint orders.

The case law in Kenya on the subject is still at its infancy, thus, there is a lot of reliance to case law from South Africa to shed light on the subject. The reason for this reliance may be the fact that most of the provisions of South Africa's Prevention of Organized Crime Act (POCA) contain almost identical provisions as POCAMLA in the areas of management of seized assets. This is coupled with the fact that South Africa has advanced its jurisprudence and capacity in the areas of matters that relate to asset restraint, preservation and related issues. This is evident from the many judicial decisions available that relate to treatment and management of seized property under POCA.

In the course of investigation and eventual decision-making process it is thus important to prevent wastage of the property that is likely to be forfeited to the state.³ This calls for proper handling of the property to avoid dissipation that may lead to the eventual orders becoming nugatory. The Proceeds of crime and anti -Money Laundering Act (POCAMLA) makes provisions for the management of the property seized⁴, where the court is placed at the centre stage to determine and issue directions on how the property shall be dealt with. The majority, if not all of the applications for preservation orders presented in court involve preservation of motor vehicles, immovable property and cash deposits in banks. Once the court has heard the application by the Agency Director Ex parte and granted the orders, it remains up to the Agency to follow up and execute the orders or give effect to the orders of the court.

In cases that involve immovable property, all the Director needs to do under the law⁵, is to have a restriction placed on the register in respect of the immovable property by the Registrar of the relevant Land Registry where the property is located. This will also be the case in an application which involves cash deposits, where the preservation order will be served upon the bank or the institution having custody of the money and the money in the accounts is preserved on account

³ Constance Gikonyo, 'The Kenyan Civil Forfeiture Regime: Nature, Challenges and Possible Solutions' (2020) 64 Journal of African Law 27.

⁴ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 68(7) and (8).

⁵ *ibid* 73.

of the preservation order. The other movable assets like motor vehicles that are subject of restraint orders, present a challenge as it is required that the owners of the motor vehicles be served with the orders and the motor vehicles seized.

Whereas it is a requirement that, just as it is the case of immovable property, a restriction be placed in the register of the motor vehicle held at NTSA⁶ and the subject vehicle seized, there are cases where the Respondents either hide the motor vehicles, or sell them to innocent third parties to frustrate the process. This may occur when the Agency is not vigilant enough to have the restriction registered against the register of the subject motor vehicle soon enough thereby leaving the asset exposed to transfer to third parties. The court⁷ has held that despite the fact that there is no caveat registered on the register of motor vehicles, the fact that preservation orders exist, they serve the purpose of preserving the subject motor vehicle pending disposal of the forfeiture application. And further that preservation orders properly obtained cannot be extinguished by effluxion of time.⁸As the orders that authorize seizure remain in force pending the outcome of any appeal against the decision concerned.⁹

4.2. The Agency Director's Role

One may argue that the Agency Director's role regarding the property that is subject to the restraint orders ends when he presents an ex-parte application before the court. This is for the reason that the court that makes the restraint order it is also empowered to make an order authorizing the seizure of moveable property. The property seized is to be dealt with within the courts orders being the court which makes the restraint order. The restraint order once granted, deprives the persons affected of property rights pertaining the property affected by the order pending the making of the forfeiture order. Which makes it necessary that care should be taken in the handling of the property in the intervening period.

The procedure and the current practice is, that upon the applicant presenting the ex parte application to the court in terms of POCAMLA¹⁰, and the court granting the orders, the Agency takes over to ensure the compliance of the orders. But what the next stage of the process that

⁶ National Transport and Safety Authority

⁷ *Assets Recovery Agency v Samuel Wachenje & 7 others*, Miscellaneous Application 3 of 2016 [2017] eKLR (27 Jun 2017)

⁸ *Asset Recovery Agency v Mike Sonko Mbuvi Gideon Kioko*, Miscellaneous Application 5 of 2020 [2020] Eklr (30 Jul 2020)

⁹ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 70.

¹⁰ *ibid* 66.

POCAMLTA contemplates, is the control by the court in terms of further orders on how the property may be dealt with or managed upon the order being made. Far from this, it is clear that asset seizure is one thing and safe custody and management of the seized property is the other thing. Seized property has on occasions been exposed to harsh weather and wastage. The High Court ¹¹ has acknowledged this state of affairs and issued orders that mitigate the situation by releasing the asset, in this case the motor vehicle to the owner and the Agency retaining the Log book. This will ensure that the wastage of the seized asset due to the vagaries of harsh weather conditions which result from exposure to sunshine are minimised.

But the situation obtaining above is different from a High court decision,¹² where the court despite acknowledging the wastage of motor vehicles by the harsh coastal weather conditions in the coastal city of Mombasa declined to release the vehicles for reasons that to make the order will be an act beyond the courts duty to apply the law. This is despite the fact that powers granted to the court by the law¹³ do authorise it to make orders that seize the property and to make such orders as may be appropriate. It also has to be borne in mind that the government is permitted by the law to seize the personal property and retain it pending the outcome of a proceeding.¹⁴ The main aim of the restraint order is to keep the property on the reasoning that that the asset may possibly be realized in compliance of a confiscation order as the restrained is held as a security against the anticipated order of confiscation .¹⁵ As the court considers an application for a restraint order , it also needs to consider what might occur in the future, or immediately regarding the property subject to the order.

This seems to be the reasoning behind the provision in Prevention of Organized Crime Act 1998¹⁶ (POCA) which requires that as the court is making a restraint order, it also includes an order that directs the defendant or other affected person to surrender the property to the curator bonis .¹⁷ The curator bonis Is the equivalent of a manager under POCAMLTA. The

¹¹ *Assets Recovery Agency V Jared Kiasa Otieno*, Anti-Corruption & Economic Crimes Case 36 of 2019 . [2020] Eklr (15 Jul 2020)

¹² *Abdrahman Mahmood Sheikh & Others V Samwel Mbote Muninda & Others*, Miscellaneous Criminal Application 62 of 2015 & 37 of 2016, [2016] eKLR. (30 Sep 2016)

¹³ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 68(9).

¹⁴ David O'Connell, 'Civil Asset Forfeiture: Lining Pockets and Ruining Lives' (2017) 74 National Lawyers Guild Review 237.

¹⁵ Vinesh Basdeo, 'The Legal Challenges of Criminal and Civil Asset Forfeiture in South Africa: A Comparative Analysis' (2013) 21 African Journal of International and Comparative Law 303.

¹⁶ Prevention of Organised Crime Act | South African Government.

¹⁷ Basdeo (n 15).

foregoing is also the case in Botswana's POCA¹⁸ which also requires that the court making a preservation order, does also make an order which authorises the seizure of the property concerned by the police and makes it a condition that the property seized must be dealt with in accordance with the directions of the court¹⁹.

4.3. Seizure by the Police.

Under the law²⁰, the Director is empowered to obtain staff on secondment on terms that are stipulated in the law, these staff include members of the Police service which are based at the Agency and are involved in investigation duties. The law further provides that the Director may appoint professional and technical staff which in this instance may include forensic and financial investigators who have powers and privileges of a police officer. In section 53A²¹ the investigators have the powers and the privileges and immunities of a police officer. Thus the Agency may employ Police officers for the proper execution of the work of the Agency. It is the function of the police and the investigators to trace the assets that are subject of the preservation orders, seize them and keep custody of the assets.²² In instances where there is fear that the realizable property may be disposed of or removed against a restraint order, it may be seized by the police.²³ The court is placed at the centre of these proceedings as it is required to issue directions on how the property so seized by the police may be dealt with. The court may also make orders that the police seize the property that is subject to the restraint or preservation orders.²⁴

4.4. The Role of the Court in Management of Seized Assets

During the Ex parte stage of the preservation proceedings, the Director, who is the applicant, presents to the court an application that leaves the court with little room to apply itself on the application at hand and on the law. This is because the law requires the court to issue interim orders on the application as a matter of course. The court thus in some instances will grant orders based on the prayers sought by the Agency. The court in *Asset recovery Agency v*

¹⁸ Prevention of Organised Crime Act 29 of 2004 as Amended GN 77 of 2009.

¹⁹ *ibid.*

²⁰ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 53.

²¹ *ibid* 53A.

²² *Assets Recovery Agency v Samuel Wachenje & 7 others*, Miscellaneous Application 3 of 2016 [2017] eKLR (27 Jun 2017) (n 7).

²³ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 71.

²⁴ *National Director of Public Prosecutions v Rebutzi* (94/2000) [2001] ZASCA 127 (23 November 2001).

Josephine Kabura and others ²⁵ ordered a motor vehicle be seized and surrendered to an investigating officer to be detained until further orders of the court, this is despite the fact that the law provides for clear timelines on preservation orders. The law is however silent on what the police does or will do with the seized assets that are subject of a preservation order pending the making of the forfeiture order.

From the recent decisions of the court,²⁶It is clear that the seized assets especially motor vehicles once seized are stored or kept in surroundings that expose them to wastage due to harsh weather conditions. Hence the need to balance between the need to preserve the assets and the damage that the assets are exposed to during seizure and preservation in the hands of the Police officers. With respect to funds deposited in bank accounts, the position does not change much as also once the court, on an application by the Agency Director grants preservation orders and the orders gazetted as required by the law , nothing else takes place until the application for forfeiture is filed and heard.²⁷When it comes to the next step of appeal the law²⁸provides that the order in force at the time of the decision of the court remains in force pending the outcome of any appeal against the impugned decision.

4.5. Appointment of a Manager .

4.5.1. Who appoints a manager

Upon making a restraint order under section 72 or a preservation order in terms of Sections 86, the court is empowered to appoint a manager who will undertake functions that relate to preserving the property .The appointment of the manager and his attendant powers conferred on him by the court ought to be exercised with a view to converting into value realizable property available eventually for the satisfaction of confiscation orders.²⁹ The curator bonis once appointed has to take charge of the property or have the property surrendered to him.³⁰

²⁵ *Asset Recovery Agency v Josephine Kabura & others*, Miscellaneous Application 2 of 2015 (formerly Miscellaneous Application 524 of 15) [2018] Eklr (20 Nov 2018)

²⁶ *Assets Recovery Agency V Jared Kiasa Otieno*, Anti-Corruption & Economic Crimes Case 36 of 2019 . [2020] Eklr (15 Jul 2020) (n 11).

²⁷ *Asset Recovery Agency v James Thuita Nderitu & Others*, ACEC Civil Suit NO 2 OF 2019, [2020] eKLR (22nd April ,2020).

²⁸ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 70.

²⁹ Vinesh Basdeo, 'The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma' (2014) 17 Potchefstroom Electronic Law Journal 1047.

³⁰ *National Director of Public Prosecutions v Rebuszi* (94/2000) [2001] ZASCA 127 (23 November 2001) (n 24).

The managers duty as provided mainly centres on control and care of the property, if it is a business, the law contemplates the manager taking over the business and carrying on with the business that is subject of the preservation order

4.5.2. Duties of a Manager .

The functions of the manager under the law ³¹ that deals with appointment of a manager in respect of property that is subject to a restraint order and the appointment of a manager in respect of property subject to preservation orders are almost identical. The manager is to undertake his duties on behalf of the person against whom the restraint order has been made.³²The duties include taking care of the said property, administering the property, or carry on the business or undertaking if the restrained property is a business .In instances where the restraint or preservation order involves perishable property or property that is liable to decay or may waste away by being detained in custody, the manager is empowered to sell or dispose of the said property. The manager also has a duty to collect any property from third persons against whom a restraint order has been made. The manager's duty as provided mainly centres on control and care of the property, if it is a business, the law contemplates the manager taking over the business and carrying on with the business that is subject of the preservation order. The question of the function and duties of the Manager has not been interrogated by the courts in Kenya. This is for the reason that the jurisprudence on the subject is in its infancy stages and thus leaves us to look to other jurisdictions that have developed their laws and jurisprudence on the subject .

The closest case law on the appointment of a manager under POCAMLA perhaps the earliest is *Asset Recovery Agency v Josephine Kabura Others* ³³ where during the ex-parte application stage, although the Applicant sought an order of appointment of a Manager by the court to assume control and carry on the business of a restaurant, the prayer was not granted in the first instance and it is not clear why the applicant did not follow up on the appointment of the manager and what happened to the business subject to the application. South Africa also provides a good source of material on the subject for the reason that we share the same legal background and that it has a rich history and jurisprudence on the subject. In this jurisdiction³⁴,

³¹ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. ss 72, 86.

³² *ibid* 72.

³³ *Asset Recovery Agency v Josephine Kabura & others*, Miscellaneous Application 2 of 2015 (formerly Miscellaneous Application 524 of 15) [2018] Eklr (20 Nov 2018)

³⁴ *Basis Point(Pty)ltd and others v DPP* (HC) [2019]

once the restraint order is made, all the Assets that include motor vehicles, machinery, buildings and other property are placed under the control of a receiver pending finalization of forfeiture proceedings. The court appoints a curator bonis to take charge of such a property or have the property surrendered to the curator bonis.³⁵ Residential property may also be attached by a curator who is appointed pursuant to the provisions of the restraint order.³⁶

4.6. Immovable properties that are subject to restraint and preservation orders.

With respect to immovable property, Sections 73 and 87³⁷ contain almost identical provisions. The court makes an order that the Registrar of Lands places a restriction on the land register in respect of the immovable property which caution prevents any dealing with the land without the consent or order of the court. In *Rebuzzi*³⁸ the court ordered a restriction to be placed against an immovable property to prevent transfer pending confiscation proceedings. The law contemplates the original owner to still maintain custody of the property even during the period of the restriction being registered against the Title. In *Vanderburg*³⁹, the property remained in the control of the owners who despite a preservation order pending against the property, they continued their illegal activities in the property. The interest of the owner of the property subject to preservation orders are not also divested on account of insolvency as the owner retains the right to deal with matters of his estate as he still holds a reversionary interest.⁴⁰

4.7. Appeals against the preservation and restriction orders.

The law⁴¹ has made provisions for the treatment of the seized assets both during preservation and restraint stage pending appeal or once an appeal has been preferred. This is done by providing that the initial decision, be it a preservation order or a restraint order in force at the time of a decision, shall remain in force pending the outcome of an appeal against the decision subject of an appeal. Sections 70 and 92(6) thus provides safeguards for the property pending

³⁵ *National Director of Public Prosecutions v Rebuzzi* (94/2000) [2001] ZASCA 127 (23 November 2001) (n 24).

³⁶ *National Director of Public Prosecutions v Mtwazi and Others* (441/2016) [2017] ZAECBHC 4 (5 June 2017).

³⁷ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 73 and 87.

³⁸ *National Director of Public Prosecutions v Rebuzzi* (94/2000) [2001] ZASCA 127 (23 November 2001) (n 24).

³⁹ *Van der Burg and Another v National Director of Public Prosecutions* (CCT 75/11) [2012] ZACC 12; 2012 (2) SACR 331 (CC); 2012 (8) BCLR 881 (CC) (12 June 2012).

⁴⁰ *National Director for Public Prosecutions v Ramlutchman* (677/15) [2016] ZASCA 202; 2017 (1) SACR 343 (SCA) (9 December 2016).

⁴¹ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 70,74,92(6) and 97.

the outcome of the appeal process. This therefore means that the assets remain at the place and state in which they were until the finalization of the appeal or any orders cannot take effect pending the determination of the appeal⁴². The court, in the case relating to an appeal relating to cash deposits, ordered that the preservation orders granted to remain in force pending the hearing of the appeal.⁴³

4.8. Conclusion

This chapter of the study sought to examine the management and treatment of the seized assets during the pendency of the restraint and preservation orders and during the course of the process of appeal. The study has looked at the management of the seized or restrained assets during the criminal and civil forfeiture process, the role of the Director, Asset Recovery Authority, the role of the courts and the police in the process, The study has also looked at the appointment and duties of the manager in the process as well as the treatment of the immovable properties that are subject of the restraint and preservation orders.

And finally the study has looked at the treatment and management of the properties in case of an appeal against the preservation and restraint orders. The next chapter, the study give a summary of the findings in the course of the study, the conclusion and recommendations.

⁴² *Asset Recovery Agency v Lilian Wanja Muthoni & 5 others*, Civil Application 58 of 2018 [2019] eKLR. (09 Oct 2019) .

⁴³ *ibid.*

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.

5.0. Introduction

The study sought to examine the scope and applicability of POCAMLA towards Criminal asset seizure, management and forfeiture in Kenya. The study also sought to investigate successes, challenges and impediments of the law in asset seizure, forfeiture and management. The motivation to the study was the rise in high profile corruption cases and the resultant visible activity by the Asset Recovery Authority in applications for seizure of assets suspected to be obtained corruptly from suspects that have been arraigned in the anti-corruption courts. By tracing, freezing seizing and eventually forfeiting the assets that are deemed to have been obtained corruptly, it is likely to reduce high levels corruption. This chapter seeks to highlight the main findings of the research, the sections that follow will discuss the various outcomes and problems identified through the research questions. The sections will further consider the importance of the findings and recommendations that may be implemented.

5.1. Findings of the study.

In the course of the study, research questions were identified and an attempt has been made to provide answers to the questions. In answering the first question on the extent of the success of the law, the study has discussed criminal asset seizure and forfeiture under POCAMLA, the efficacy of the criminal forfeiture regime and its function in removal of the proceeds of crime from the control or reach of wrong doers and ensuring that crime does not pay by crippling the operations and enterprise of the criminals .Chapter three of the study has established that the civil asset forfeiture complements the law enforcement function of getting the benefit out of crime through the processes. Civil forfeiture proceeds against the property not the person on the legal fiction that the property and not the owner has violated the law. To this effect the study has shown that civil forfeiture supplements the traditional remedies by attacking the economic foundations of criminal activity by confiscation of the property and assets as at the time of the illegal event, the property is tainted and its title held by the owner invalidated.

The lower burden of proof and the reverse burden of proof in the civil forfeiture process lessens the burden for the prosecutor and provides them with an opportunity to get more information on suspect transactions as it offers them fewer procedural requirements hence expediting the process to obtain quicker outcomes.

The study in chapter 4 has dealt with the second research question of the effectiveness of the law in management of seized and preserved assets. The study has established that there is limited jurisprudence on asset management under the existing law, the reason being that the law is at infancy stages in Kenya. More reliance is put on South African Jurisprudence and case law. The study has established that a majority of preservation orders presented in court involve motor vehicles, Immovable assets and cash deposits in banks. Once the court has granted interim orders on the application by the Agency, it is thereafter left to the Agency to undertake the function of management of these assets. It must also be noted that the same court has been given wide powers in the handling of seized assets despite the fact that there is still much more to be done to ensure effective management of the seized assets. The study shows that more needs to be done to ensure that assets seized do not end up becoming a burden to the society.

5.2. The Importance of the findings.

Asset seizure and forfeiture laws are aimed at taking away the benefit out of crime thus ensuring that crime does not pay. This study aims to contribute to already existing literature on the subject relating to the application of asset seizure, management and forfeiture. The study has identified the strengths in the application of the law in asset seizure and forfeiture and at the same time identified its shortcomings and made some recommendation in areas of improvement in order to increase its reach in application. This knowledge might be of help to various people who interact with the law including policy makers and lawmakers, prosecutors and investigators. The findings of the study may assist in the understanding of the subject of asset seizure and forfeiture and management as provided for in POCAMLA. The country may also benefit from improving on the areas that have been pointed out in this research as weaknesses and the solution that the study has offered. Finally, the study has shown weaknesses of the law in the management of seized assets despite the vibrant approach of the law in asset seizure and forfeiture. This does call for further research and improvement on the shortcomings to make the law clearer and more effective towards the management of the seized assets.

5.3. Recommendations.

This study has identified recommendations which are aimed either at providing solutions or alternatives to the issues which have been identified in the course of the study. The issues identified and recommendations are enumerated as follows.

5.3.1. Recommendations on rights of individuals.

The study has established that the asset forfeiture regime proceeds under the principle that crime should not pay and nobody should benefit from crime. An analysis of the principle creates an assumption that asset recovery is concerned with the benefit accrued from crime and not the damage that the victims of the crime have suffered.

Recommendation 1

The study recommends that the law be amended to accord with the consideration of the victims of crime together with consideration of the harm suffered by the victims, by enabling the court to make a determination on what is a fair compensation to the victims without the necessity of filing a civil suit and just as forfeiture is treated as a civil judgment, the award by the court too should be treated as such.

Recommendation 2

The study recommends that the law should focus on corrective justice, being punishment to the accused at the same time offering the harm caused by the crime.

The study has established that, whereas the law makes far reaching provisions that are seen to fly in the face of the fundamental rights and provisions, it also makes provisions that are aimed to soften the effect of the preservation orders on fundamental rights of defendants. This is for the reason that firstly, the defendant should be presumed innocent and the proceeds should be treated as legally owned by the defendant until the determination is made as to whether they are proceeds of crime. This thus entitles the defendants to the provision of living expenses from the preserved assets pending the final determination of the court. This has been done by enacting provisions that make allowance for payment of living expenses from the seized assets during the period of the preservation order. This should include spouses and dependants of the defendants. However, the study found that it is necessary that the state takes strict control of the payments of legal and living expenses. This is for the reason that the payments are a charge against the value of the restrained assets and such payments will affect the value of the preserved assets.

Recommendation 1

The law thus should be amended to require that the use of publicly funded counsel. This will as of necessity uphold the right of legal representation while at the same time preserving the assets. It is also recommended that the legal fees payment be limited to taxed costs as opposed to leaving it to be determined by a measure of what is deemed reasonable, where the reasonable is a vague measure. This might pose a challenge as it may be seen to limit the right of the defendant to be represented by counsel of one's choice. The right to counsel will thus come down to the ability to pay in other words the choice of counsel must be looked at from the defendant's ability to facilitate the right.

Recommendation 2

Whereas this is a welcome gesture, it is suggested that the law should be amended to enable the courts to make such orders to provide for living expenses from the preserved property as a measure of last resort. With strict checks and balances being applied in the applications. The amendments should also be made aimed at having a provision that limits such payments to prevent the defendants from abusing the process. It is recommended that the law provides for a ceiling of what amount is payable and not leave it to the boundaries of reasonableness by the courts.

5.3.2. Safeguards against self-incrimination.

The study has established that the existing law has provisions that compel the Respondent to provide information, the study shows that it flies in the face of the law against self-incrimination which require the respondent to provide further information or discovery or disclosure of facts.

Recommendation

The study recommends that the law be amended to provide for safeguards to the respondent against self-incrimination in line with the constitutional requirements.

5.3.3. Asset forfeiture and children's rights

The study has established that the law in the process has not considered other important issues that are provided for in other existing statutes, for instance when dealing with forfeiture of immovable properties which are homes inhabited by families with children. The law has a potential of rendering persons homeless which may include children. The law enforcement

needs to be child sensitive by requiring even the courts to show regard to the children's rights and the extent to which the children may be affected by the forfeiture order.¹ This requires that a court considers their interests and their social and economic circumstances. The protection of such children is not taken into consideration and the best interest of the children's right to shelter is not considered under the existing law.

The law fails to consider who has a duty to raise the children's interests during the proceedings, or where the children's rights feature in the process and what should be done about the children. The clarity offered is that the court has a duty to consider the specific interests of the children and the officers of the court are also under an obligation to assist the court with relevant information in their possession². The law in this respect has not taken into consideration the impact that forfeiture might have on the respondents' children as a possible homelessness or hardship of the children cannot be overlooked.

Recommendation

The study thus does recommend that the law be amended to provide for the best interests of the children and the right of the children to shelter as provided for in the Children Act NO.8 OF 2001³ by making provision on who should raise the issue and the manner that it should be dealt with so that the innocent children are not rendered homeless.

5.3.4. Asset forfeiture and rights of financial institutions.

The study has established that the law is silent on the position and protection of third parties especially banks which have the properties sought to be forfeited in their books as security,

Recommendation.

The law thus should be amended to specifically provide for these scenarios. For instance, the owner will be required to maintain the property in the same state of repair it was at the time of seizure and maintain insurance mortgage payment utilities and tax obligations that have been in place prior to the freezing order. The study suggests that the law be amended to permit

¹ *Van der Burg and Another v National Director of Public Prosecutions* (CCT 75/11) [2012] ZACC 12; 2012 (2) SACR 331 (CC); 2012 (8) BCLR 881 (CC) (12 June 2012).

² *Van der Burg and Another v National Director of Public Prosecutions* (CCT 75/11) [2012] ZACC 12; 2012 (2) SACR 331 (CC); 2012 (8) BCLR 881 (CC) (12 June 2012) (n 1).

³ Children Act NO. 8 OF 2001 s 23(2).

legitimate third-party lenders to exercise their ownership rights in cases when the interested party falls behind payments or breaches the mortgage contract. It is thus suggested that provisions be put in place that allow the property to be sold in a fair market value and the proceeds of sale left after the payment of the mortgage to be held pending outcome of the confiscation proceeds.

5.3.5. Recommendations on asset Management.

A proper asset management regime is essential for a successful asset seizure policy and the law enforcement objective of ensuring that no one benefits from crime or simply put crime does not pay. The study has established that there is a general lack of regulations that provide for managing preserved and recovered assets. There is also limited jurisprudence in Kenya on the application of the law specifically on seized asset management in Kenya. The study has established that the law concentrates on issues of preservation orders upon application and the court does not go further in the process other than the appointment of a manager of the property in question or grant of orders authorising seizure by the police pending further directions of the court.

Recommendation 1

The study recommends that the law be amended to provide for setting up of a body that will be responsible for locating, retrieving, storing and managing property and instrumentalities of crime. This body also has to among other duties ensure that the asset recovery system is economically viable and operates in a transparent, responsible, and accountable manner that ensures public confidence and public support for asset recovery. In addition, the body should be charged with the responsibility of streamlining the management process and put the properties under a single umbrella.

5.3.5.1. Management of Complex Assets, stocks and bonds

The study has established that the law does not provide for instances where the nature of the seized assets presents technical challenges in preservation. In some instances, the state and law enforcement lack capacity to manage the asset or is incapable of handling a particular asset that is seized this may lead to wastage or destruction of the asset. The same case will apply in cases that involve stocks and bonds which as simple as they seem they are complex assets as care

must be taken to study the movement of the stock as the value is determined by the market so that at the end of the process the state is not left holding worthless stock.

Recommendation 1

The study suggests that the law be amended to provide for sourcing of a private contractor with knowledge of handling such assets and with the required capacity and provide for the remuneration of such a contractor.

Recommendation 2

The study recommends that the law should be amended to provide for financial assets such as stocks and bonds and the manner in which they should be dealt with while taking into consideration the volatility of the stock market . This will ensure that the state retains value at the end of the process and not worthless stock.

5.3.5.2. Management of businesses subject to seizure

The study has established that the law makes provision at the restraint stage for the carrying on of any trade or business, profession or occupation. And on appointment of a manager of property subject to a restraint order, the law also provides for instances where the property is a business or undertaking, carry on with due regard to any law which may be applicable, the business or undertaking, carry on the business or undertaking.

Recommendation 1

The law has already provided for the running of the business through a manager, this is not enough as the manager may lack expertise to run the business. Some businesses may be complex, and managers appointed may be ill equipped to run the businesses. It is recommended that the business be kept running under the current arrangement but the Managing director to be accountable on a regular basis on the business at the same time the law be mended to prohibit disposal of assets or the business itself and also require that the Managing director seeks and obtains consent before entering into transactions that are deemed to be outside the ordinary course of business. It may also be a requirement that the law should provide for repayment of the business loans and business expenses. in simple terms the law ought to provide for the smooth running of the business without interruption.

Recommendation 2

The law should also be amended to provide for outsourcing of the function of managing the seized businesses.

5.3.5.3. Pre seizure planning.

Pre seizure planning process ensures that the process of preservation is efficient and cost effective. It encourages a cost benefit analysis before seizure is commenced. This will help address the options available for securing the assets in a manner that preserves its value and mitigates the risks that are associated with seizure which may include dissipation of the assets, burdensome maintenance costs and in some cases legal liabilities. The process includes pre seizure valuation, record keeping and pre seizure sale.

Recommendation.

The study recommends that the law should be amended to provide for pre seizure process which may include evaluation of the assets and confiscation scenarios and valuation of the assets before freezing or seizure. This will ensure that the process of preservation is efficient and cost effective.

5.3.5.4. Pre seizure valuation

The valuation is to be done by a competent authority preferably and independent body the values will be taken and recorded. The valuation will include the cost at seizure and the status of the asset at seizure. It is advisable that the assessment, primarily for assets that are intended for preservation ought to be valued before an application may be presented for preservation orders. This ensures that what is preserved is a valuable asset as opposed to preserving worthless assets. It is necessary to provide for planning and assessment of the value of assets and the costs of maintaining the assets during the freezing and preservation period.

Recommendation

The study recommends that the law be amended to provide for the process of pre seizure valuation before an application is presented for preservation order. This will ensure that the assets seized are preserved for value not worthless junk. And in instances where the value of the assets is less than the cost of preserving the asset it is necessary that the asset be sold.

5.3.5.5 Proper record keeping

A proper record of the assets kept and provision be made within the law for reporting and audit of the process and provide for asset tracking across the country. The records will include essential details and information of the assets which include, the date of preservation, value at preservation, the costs of management value at confiscation and the realized value.

Recommendation 1

The study has established that the law as exists does not provide for this and it is recommended that the law be amended to provide for a database of all assets recovered or in the process of recovery and important details and all the assets under management this will increase accountability in the process.

Recommendation 2.

The law should also provide for reporting function and make it an obligation done at very regular intervals and make publication of the reports mandatory which will increase accountability. The law also should provide for legislation on provision of storage facilities, and managing the disposal part of the process which includes professionals like auctioneers where it is suggested that the law should provide for a centralized approach so that there is a benefit from bulk procurement of services.

5.3.5.5. Prejudgment Sale

The law provides for the functions of the manager which include sale of property which is perishable, liable to deterioration, decay or injury by being detained in custody. The reasoning behind this provision is borne out of the understanding of the long trial court process which takes a significant time to conclude and at the end of the court process the assets might have been devalued or wasted .

The second category of assets that have not been provided for in the law include assets that present a burden to maintain, that require specialised expertise to maintain which comes at prohibitive costs , rapidly wasting assets for example vessels , aircraft and electronics or assets that are easy to replace . There is also another category of goods whose value is easy to determine or goods whose seizure might cause depreciation, hardship, damage and disproportionate costs.

Recommendation1

Against the background that what is sought to be achieved at the end of the process is value, the study recommends that the law be amended to provide for pre judgment sale of these kind of assets . This will preserve the value of assets in instances where preservation will cause deterioration of the value of the assets. The study further recommends that the law further ought to provide for how the funds obtained through the sale should be handled. The study recommends that the law be amended to allow for disposal of assets where the value of the assets is less than the cost of preservation of the assets and at the same time provide for how such funds should be handled.

Recommendation 2.

In instances of cases that take too long to be finalized, the costs of managing the assets are likely to go up or pose challenges the study proposes an amendment to the law to set timelines for conclusion of cases that involve seized assets. The study suggests that the law should be amended to provide for a maximum period upon which assets should remain frozen and set time limit for hearing and conclusion of cases relating to the subject. Include therefore pre seizure planning in the law to provide for assessment of the value of assets and the costs of maintaining the assets during the freezing period thereafter undertake pre judgment sale .

5.3.5.6. Hazardous Assets

The study suggests that the law does provide for the handling and dealing with these kind of assets and assets that pose a danger to public safety.

5.3.6. Appointment of a Manager

Whereas the law provides for the appointment of a manager to a property which is subject to restraining order, and enumerates the duties and functions of the manager, the law has not provided clarity on the issue of accountability by the manager, what are the parameters and deliverables of his assignment and importantly the remuneration of the manager the qualifications of appointment as a manager. The study recommends that the law to be amended to provide for such clarity on the role of the Manager and the extent of responsibility in execution of his functions and the extent of accountability of what was confiscated.

Recommendation

The study recommends that the law be amended to provide for mechanisms of holding the manager liable for the conduct of his work the terms and extent of his accountability which may be measured by looking at the state of the asset at preservation stage and the state of the same asset at confiscation.

5.3.6.1. The manager's remuneration.

The study established that the court has a final say on the issue of payment of fees payable to the manager and has wide discretion on the fees payable to the manager. The provision gives the court latitude to make an order to pay as it deems fit. The study has established that there is no corresponding requirement for responsibility and accountability, there is no provision to have a minimum or maximum fee payable and no provision for verification of fees or providing for fees payable to the managers.

Recommendation

The study also suggests that the managers remuneration be based on performance and in some instances the law do provide that the manager provides security for assets that are placed under his control so that in the event of default the security may be enforced. The cost of security should be paid from the income derived from the preserved assets.

5.3.7. Preserved assets left with the owners.

From the study, it has been established that whereas every effort has been made to take care of seized assets within the confines of the available processes, the study has found that there is a need to preserve the economic value of the asset in a cost-effective manner to eventually yield maximum returns, at the same time maintaining the economic value of the asset for realization and safeguards against damage loss and diminishing value. This includes assets that are in possession of the owners which if seized may require additional costs and resources to keep and maintain.

Recommendation

The study recommends that the law be amended to provide for retention of the assets with the owners subject to restrictions and conditions on the use together with other obligations which may include positive use of the assets. The law should thus concentrate on the value of the

asset as opposed to the asset as one may end up as a worthless junk. This should be in line with recent court decisions.⁴

5.3.8. Property seized by the Police.

The law⁵ authorises a police officer to seize either realizable property or property subject to preservation orders if he has reasonable grounds to suspect removal or disposal of the property. The seized property is dealt with in accordance to the directions of the court that made the relevant order. Thus, the police in seizing the property holds such property subject to the directions of the court. The questions that therefore arise then are how is the seized property handled by the police, are there any standards that should be maintained in the handling of the property by the police? what are the obligations of the police towards the property, do the police owe the owner of the property any duty of care and lastly what are the mechanisms of accountability by the police to the court that made the order.

Recommendation.

The study recommends that the law be amended to provide for clear procedure, standards of handling the property seized by the police on orders of the court and also provide for clear periodical accounting mechanisms on the state of the seized property to the court.

5.3.9. The establishment of the Criminal Asset recovery Fund.

Whereas the law provides for the establishment of Criminal Assets Recovery fund, the study has established that the fund has not been set up this leaves the issues surrounding forfeited funds hanging as the courts are unable to make proper determinations on the funds. it is necessary that the government does move and set up the mechanism which will activate the process of starting the functioning of the fund.

As the process of setting up of the fund is commenced the law should be amended to provide for audit of the use of the funds and at the same time provide for coordination between the Agency Director and the Criminal Assets recovery fund and designate their respective responsibilities which will increase the levels of accountability.

⁴ *Asset Recovery Agency v Charity Wangui Gethi, Miscellaneous Application 16 of 2016 ,[2020] eKLR (24 Jun 2020).*

⁵ Proceeds Of Crime And Anti-Money Laundering Act No 9 Of 2009. s 71and 87.

5.4. Conclusion.

The study has shown that asset seizure and forfeiture laws have inbuilt robust provisions that are aimed at implementing the legislative objective of removing benefit out of crime and correcting the harm caused by crime. This is achieved by the principle of ensuring corrective justice and that crime does not pay

Despite few shortcomings identified in the study, the law provides for an effective regime that seeks to achieve the legislative objective that of the fight against corruption. The provisions thus make it easier for the law enforcement to specifically go for the property suspected and not the individuals involved thus crippling the criminal and corruption enterprise as well as target the benefits that accrue from corruption.

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