REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E044 of 2024

(Consolidated with Petition No. E046 of 2024)

–BETWEEN–

ETHICS AND ANTI-CORRUPTION COMMISSION..... 1ST APPELLANT

ASSETS RECOVERY AGENCY.....2ND APPELLANT

–AND–

PAMELA ABOO .....RESPONDENT

(*Being an Appeal from the Judgment and Orders of the Court of Appeal at Nairobi* ***(Warsame & Okwengu JJ.A. with Mativo, JA dissenting)*** *delivered in Civil Appeal No. 452 of 2018 on 15th December, 2023*)

Representation:

Ms. Regina Jemutai, appearing with Mr. Kisaka for the 1st Appellant
(EACC)

Mr. Mohamed Adoo for the 2nd Appellant
(*Assets Recovery Agency)*

Mr. Victor Oguli Namenya, appearing with Mr. Akude Jura for the Respondent
(*Oringe Waswa & Co. Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court are two appeals, Nos. E044 of 2024 and E046 of 2024, both dated 18th December 2024 and filed on 20th and 24th December 2024 respectively. The appeals by Ethics and Anti-Corruption Commission ***(EACC)*** and Asset Recovery Agency ***(ARA)***, 1st and 2nd appellants respectively are brought pursuant to their admittance by this Court as involving a matter of general public importance under Articles 163(4)(b) and 163(5) of the Constitution. Both appeals are challenging the Judgment of the Court of Appeal at Nairobi *(Warsame & Okwengu JJ.A. with Mativo JA. dissenting)* in *Civil Appeal No. 452 of 2018* delivered on 15th December 2023. The appeals were consolidated by an order of this Court dated 4th February 2025.

[2] In affirming the Certification by the Court of Appeal, in ***Aboo Vs Assets Recovery Agency & another*** (Application E034 of 2024) [2025] KESC 38 (KLR), this Court *(Koome CJ & P, Mwilu, DCJ & VP, Wanjala, Njoki & Ouko, SCJJ*) delineated the following issues for determination;

a) Whether it is incumbent upon EACC or ARA to prove/establish a connection between the crime and money/property sought to be forfeited under civil forfeiture proceedings.

b) Whether the evidentiary burden shifts to a person in possession of property suspected to be proceeds of crime or unlawfully acquired to explain the source/origin of the property; and if so, at what point in time?

c) Under what circumstances is a person considered to have provided reasonable explanation for the origin/source of his/her property?

d) What reliefs should issue?

B. FACTUAL BACKGROUND

[3] The respondent operates three different accounts at Equity Bank, Donholm Branch, Nairobi ***(the accounts)***. The said accounts had a total of Kshs 19,688,152.35. On 7th March 2017, the 2nd appellant received information that the funds in the accounts were suspected to be proceeds of crime and that the accounts were a channel for depositing and transferring proceeds of crime or funds acquired illegally. Upon receipt of this information, the 2nd appellant obtained orders authorising it to investigate the aforementioned accounts from the Nairobi Chief Magistrate's Court, vide ***Miscellaneous Criminal Application No. 868 of 2017***. Particularly, to search, investigate, and freeze funds held in the respondent's accounts, for a period of sixty (60) days pending the completion of investigations.

[4] In the course of the investigations, the respondent was invited to explain the sources of her income or the funds in the said accounts. She replied that the sources of the funds in the accounts were cash deposits from her businesses and trade in: transportation, bananas, sugarcane, perfumes and cereals in Mombasa and Busia. Similarly, her husband, one Alex Mukhwana Khisa ***(Mr. Khisa)***, was interviewed and confirmed he was an employee of the Kenya Revenue Authority; he was aware of the bank accounts and that the amounts in the said accounts belonged to his wife, the respondent herein; but denied knowing the source of the funds. The 2nd appellant, dissatisfied with the respondent's explanation, obtained preservation orders against the monies held in the three bank accounts in ***Miscellaneous Application No. 58 of 2017***.

[5] Coincidentally, the 1st appellant was also conducting parallel investigations into allegations of corruption and abuse of office against Mr. Khisa, following reports that he had solicited and received bribes from clearing and forwarding agents, and as a result, undervalued the tax payable on imports. The 1st appellant's investigations also led to the respondent's accounts, where it was alleged that the

said accounts were being used by her husband as a conduit to deposit and transfer money acquired from bribes. Consequently, the 1st appellant obtained preservation orders in ***ACEC Misc. Application No. 40 of 2017***. These orders were vacated, and the file was later marked as closed by a court order issued on 24th January 2018.

C. LITIGATION HISTORY

i. Proceedings before the High Court

[6] The 2nd appellant moved the High Court in ***ACEC Miscellaneous No. 73 of 2017***, under Sections 81, 82, 90 and 92 of the Proceeds of Crime and Anti-Money Laundering Act ***(POCAMLA)*** as read with Section 51 of the Civil Procedure Rules. It was the 2nd appellant's case that the respondent had failed to produce any evidence, such as business licenses, permits or compliance documents, as proof that she operated the alleged businesses or trade. It was further urged that the funds in the accounts were deposited by or for Mr. Khisa from criminal and unlawful origins.

[7] The 2nd appellant contended that the evidence adduced had established that the funds in the accounts were proceeds of crime within the meaning of Section 2 of POCAMLA; it had proved the case for forfeiture as proceeds of crime can be direct or indirect; the funds having been obtained illegally were not protected by Article 40 of the Constitution; and a civil suit under Section 94 and Part VIII of POCAMLA is an action *in rem* (against property) and the threshold for grant of forfeiture had been met.

[8] Consequently, the 2nd appellant sought the following orders:

i. *An order declaring that Kshs 19,688,152.35 held in the three Bank accounts at Equity Bank Donholm Branch Nairobi in the name of the respondent are proceeds of crime and therefore liable for forfeiture to the Government.*

ii. Orders of forfeiture of the following funds:

a) Kshs. 10,214,762.35 in the first account in the name of Pamela Aboo, held at Equity Bank Limited, Donholm Branch;

b) Kshs. 7,473,390.00 in the second account in the name of Pamela Aboo, held at Equity Bank Limited, Donholm Branch;

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

iii. An order that the above funds be forfeited to the Government and transferred to the 2nd applicant;

iv. Any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government; and

v. Costs.

[9] The 1st appellant ***("the Commission")*** was joined as an interested party, wherein it joined issues with the 2nd appellant. The Commission mainly urged that the respondent had failed to explain any legitimate sources of income, and the funds in the accounts amounted to unexplained assets derived from improper benefits, subject to recovery under Section 55(2) of the Anti-Corruption and Economic Crimes Act ***(ACECA)*** as read with Section 11(1)(j) of the Ethics and Anti-Corruption Commission ***(EACC)*** Act. It urged that the respondent's husband had unlawfully obtained the funds deposited into the accounts. Further, under Section 55(2) to (6) of ACECA, it is not a requirement for the 1st appellant to prove that the respondent actually committed an act of corruption to invoke Section 55 of ACECA.

[10] In reply, the respondent refuted all claims that the funds in the accounts were proceeds of crime. She contended that she had provided evidence of her sources of income and that the 2nd appellant had failed to rebut her evidence, and to discharge its duty under Section 92(1) of POCAMLA, mainly, to satisfy the court that the funds had either been used or were intended for use in the commission of an offence, or were proceeds of crime. The respondent asserted that the appellants

had not connected the funds to any illegitimate source or proved that the deposits made into the accounts were made on behalf of Mr. Khisa. She contended that in any event, the 2nd appellant had failed to join Mr. Khisa to the proceedings before the trial court.

[11] It was also her case that, having been issued with a tax assessment dated 26th February 2018, it was evident that the funds in the accounts were genuine; and the mere fact that Mr. Khisa was her husband did not prove that the deposits into the accounts were made on his behalf. It was her case that the appellants had not proven any wrongdoing on her part to warrant the freeze and preservation orders against the accounts.

[12] In a Judgment dated 13th November 2018, the High Court framed one issue for determination, *whether the appellants had proved a case for forfeiture of the funds in the accounts under POCAMLA and/or ACECA*. The trial court (*Hedwig Ong'udi, J as she then was)* held that forfeiture proceedings under POCAMLA are civil in nature, and the standard of proof is on a balance of probabilities. Further, once the 2nd appellant had established through the bank statement that there were huge unexplained deposits into the accounts, the burden shifted to the respondent to explain the source (s) of the funds. Consequently, the respondent, having failed to explain the source of the funds or adduce evidence in support of her alleged businesses or trade; that she had failed to discharge the burden of proof. In the end, the court entered Judgment in favour of the 2nd appellant in the following terms:

i. Kshs 19,688,152.35 held in the Accounts at Equity Branch Donholm Branch Nairobi in the name of the respondent are proceeds of crime;

ii. Forfeiture orders in terms of all the funds held in said Accounts;

iii. Forfeiture of the said funds to the Government; and

iv. Costs to the 2nd appellant.

ii. Proceedings before the Court of Appeal

[13] Aggrieved by the decision of the High Court, the respondent moved the Court of Appeal vide ***Civil Appeal No. 452 of 2018***, premised on the grounds that the learned Judge erred in:

i. *Holding that the funds (Kshs. 19,688,152.35) held in the respondent's accounts were proceeds of crime in the absence of evidence;*
ii. *Finding that the 2nd appellant had proved that the funds in the accounts were proceeds of crime within the meaning of Section 2 as read with Section 92 of the POCAMLA;*
iii. *Finding that the respondent had failed to discharge the burden of proof under Sections 107 and 108 of the Evidence Act, and as a result, occasioned a miscarriage of justice;*
iv. *Shifting the burden of proof to the respondent, and in the end arriving at an erroneous conclusion; and*
v. *Relying on inapplicable foreign authorities cited by the appellants, thus occasioning injustice.*

[14] The respondent's main contention was that under Section 2 of the POCAMLA, the burden of proof rests with the 2nd appellant to prove two elements: that the funds in the accounts were proximately and substantially connected to criminal activity, and that the value of the assets exceeded her legitimate source (s) at the material time. She maintained that the 2nd appellant had failed to discharge this burden. In any event, she argued that the appellants had failed to join her husband to the proceedings before the High Court despite their allegations that he had deposited funds obtained illegally into her accounts. In the foregoing, she contested that she had explained the sources of her income and funds in the

accounts, and the 2nd appellant had not refuted her evidence or adduced competing evidence that her businesses and trade were non-existent.

[15] In response, the 2nd appellant opposed the appeal, maintaining that once it had established that the respondent could not show a legitimate source of the funds in her accounts, the burden of proof had shifted to the respondent. Further, it was incumbent on the respondent to demonstrate how she had lawfully acquired the funds in question. It was the 2nd appellant's position that it had proved the funds were suspected to be from an illegitimate source, and it was immaterial whether the respondent knew of or participated in the acquisition of the illicit funds, so long as she could not explain her sources. The 2nd appellant insisted that its duty under POCAMLA was to make a *prima facie* case that there was evidence which establishes its belief that the funds in question were proceeds of crime or unlawful engagements or activities. The 1st appellant also opposed the appeal and mirrored the arguments by the 2nd appellant entirely.

[16] In a Judgment delivered on 15th December 2023, the Court of Appeal (*Warsame, & Okwengu, JJ.A with Mativo, J.A dissenting)* set aside the trial court Judgment, with costs to the respondent. In its determination, the Court of Appeal noted that the crux of the appeal revolved around one main issue, to wit, *where the burden of proof lies when determining whether the origins of funds are proceeds of crime when seeking forfeiture orders under POCAMLA*.

[17] To answer this question, the majority determined that proceedings under Part VII of the POCAMLA entailed civil forfeiture and, therefore, the civil proceedings rules of evidence were applicable. Further, under Section 92 of POCAMLA, the standard of proof is on a balance of probabilities; under Section 107 of the Evidence Act, the burden lies on the person who alleges; and under Section 108 of the Evidence Act, the burden does shift to the other party throughout the trial. The court reasoned that civil forfeiture is not dependent on the identification, charging, prosecution, conviction, or punishment of an offender, but signifies an action *in rem*, as opposed to *in personam* actions. From the foregoing, the Court of Appeal

held that the 2nd appellant had the legal burden to prove a *prima facie* case on a balance of probabilities, under Section 92 of the POCAMLA, to wit, either that the respondent had assets that had been used or intended for use in the commission of an offence, or the assets were proceeds of crime. Further, a link must establish that certain benefits flowed either indirectly or directly from the offence.

[18] As to whether the appellants had discharged this burden, the majority found that three links in the chain of causation must be established. The court found that the first link in the chain of causation was established by the fact that the genesis of the alleged offence and proceeds was the respondent's husband, who had been investigated by the appellants for corruption after receiving reports that he had solicited and received bribes from clearing and forwarding agents to undervalue tax payable on imports. Similarly, the second link was established by the investigation on the respondent's husband, which led to the respondent and her impugned accounts. While the third link was the business partners the respondent alleged to be in business with, and the sources of the funds in the accounts. The appellate court found that the 2nd appellant had established the first two links of causation and therefore the evidentiary burden shifted to the respondent to explain the source of the funds in the accounts. On whether the respondent had discharged the evidentiary burden, the appellate court found that she had given a satisfactory explanation disclosing not only who was making the deposits, but also for what purpose the deposits were being made. Consequently, the evidentiary burden shifted back to the 2nd appellant to prove otherwise.

[19] In determining whether the 2nd appellant had discharged this burden, the court found that the 2nd appellant had failed to prove that the respondent's businesses or the business partners were illegitimate, as a result, failed to discharge the evidentiary burden and broke the link in the chain of causation. The court reasoned that Section 112 of the Evidence Act is not a panacea for poor and disjointed investigations, and it was the duty of the 2nd appellant to demonstrate that the money in the accounts was disproportionate to the respondent's income,

which it failed to do. The majority also found that the 2nd appellant had failed to establish a connection between Mr. Khisa and the deposits made in Mombasa or to prove that the monies in the respondent's accounts were deposited at the behest of her husband, Mr. Khisa.

[20] In the end, the majority distinguished the decision in ***Stanley Mombo Amuti Vs Kenya Anti-Corruption Commission*** Civil Appeal No. 184 of 2018 [2019] eKLR from the instant case. The learned Judges found that the former dealt with the question of the concept of unexplained assets and notice to explain under Section 2 as read with Section 55 (2) of ACECA, while the latter dealt with proceedings under POCAMLA. It was determined that, though forfeiture of unexplained assets under ACECA is civil in nature and comparable to civil forfeiture under POCAMLA, proceedings brought pursuant to POCAMLA do not deal with the concept of unexplained assets. More so, the evidentiary standard in the instant circumstances does not apply to proceedings under ACECA.

[21] In his dissenting opinion, *Mativo, JA*. was of the view that once the burden of proof shifted, the respondent had a duty to show the legitimate source of funds in the accounts to discharge the reverse onus burden of proof. The learned Judge opined that the respondent had a duty to adduce credible evidence to support her assertion that she lawfully earned the money. The learned Judge reasoned that, as the disputing party, the respondent necessarily possessed the knowledge of the source of funds, and was obligated to provide satisfactory evidence and explanation, showing on a balance of probabilities that the funds were lawfully earned. Consequently, the Judge noted that she had failed to discharge this burden, and the failure to call her alleged business associates to support her claim left gaps in her evidence. In the end, *Mativo, JA*. determined that he would have dismissed the appeal with costs to the appellants.

iii. Proceedings before the Supreme Court

[22] Dissatisfied, the appellants sought certification of the appeal as one involving a matter of general public importance. The Court of Appeal granted certification, prompting the respondent to seek a review before this Court. In disallowing the application for review, this Court delineated the issue set out in paragraph [2] above.

[23] The 1st appellant's appeal is premised on the grounds that the learned Judges of Appeal erred in law by:

i. *Finding that the 2nd appellant failed to establish a nexus between the offence and the resultant proceeds of crime;*

ii. *Holding that it is the duty of state agencies to demonstrate that the trophy is a benefit unduly, unjustly, and/or unlawfully obtained by the respondent;*

iii. *Setting aside the judgment and decree of the trial judge with costs to the 2nd appellant;*

iv. *Finding that the evidentiary burden shifted to the 2nd appellant when the appellants demonstrated that the respondent had assets which were disproportionate to her legitimate income;*

v. *Finding that the evidentiary burden was discharged by the respondent merely by giving the names and cell phone numbers of the depositors in the course of the investigation;*

vi. *Conflating investigation with the trial process;*

vii. *Failing to find that the evidentiary burden had to be discharged at the trial;*

viii. *Failing to find that the evidentiary burden rested on the respondent to offer a satisfactory explanation for the legitimate acquisition of her funds and satisfactorily explain the disproportionate assets which she failed to discharge.*

ix. *Failing to apply the standard in* ***Stanley Mombo Amuti Vs Kenya Anti-Corruption Commission*** *[2019] eKLR;*

x. *Failing to apply Sections 26 and 55 of ACECA;*

xi. *Holding that the 1st appellant was joined in the 2nd appellant's motion as an interested party and did not bring in the forfeiture provisions provided under ACECA;*

xii. *Failing to find that the 1st appellant was joined to the proceedings to prove the case under Section 55 of the ACECA; and*

xiii. *Condemning the appellants to bear costs notwithstanding that the forfeiture proceedings were instituted in the public interest.*

[24] The 1st appellant consequently seeks the following reliefs:

i. *The petition be allowed with costs;*

ii. *The Judgment of the Court of Appeal in Civil Appeal No. 452 of 2018:* ***Pamela Aboo Vs Asset Recovery Agency and the Ethics and Anti-Corruption Commission*** *delivered on 15th December 2023, be set aside, varied, and substituted with an order dismissing the respondent's appeal;*

iii. *The costs of this appeal, costs in the Court of Appeal and High Court be borne by the respondent;*

iv. *In the event that the said sum of Kshs. 19,688,152.35 held in the three Accounts at Equity Bank Donholm Branch Nairobi, held in the name*

of the respondent, has been withdrawn, an order for payment of the same with interest from the date of withdrawal until payment in full.

[25] The 2nd appellant's appeal is premised on the grounds that the learned Judges of Appeal erred in law by:

i. *Failing to appreciate policy and statutory reasons for civil forfeiture;*

ii. *Having no regard for how the funds in issue were laundered through schemes of money laundering contrary to the provisions of the POCAMLA;*

iii. *Introducing an unknown principle in civil forfeiture under the POCAMLA, i.e., a causal link connection between the proceeds of crime in possession of the respondent and an offence as a test of evidentiary burden of proof contrary to the nature, import, and purpose of the provisions of the POCAMLA;*

iv. *Relying on the causal link connection between the funds in issue and the respondent with no regard to the chain of identification, tracing and acquisition of the proceeds of crime as demonstrated by the 2nd appellant in accordance with the provisions of the POCAMLA, and in the absence of a real, genuine and logical explanation by the respondent on how she acquired the same contrary to the provisions of POCAMLA;*

v. *Adopting a narrow interpretation of the provisions of the POCAMLA and shifting the evidential burden of proof unreasonably to the 2nd appellant, thus limiting the purpose and intent of the POCAMLA and the mandate of the 2nd appellant;*

vi. *Setting an unrealistic high burden of proof by the 2nd appellant, which is not founded in law and which ignores the labyrinthine and clandestine nature of corruption and economic crimes;*

vii. *Failing to appreciate that the Civil forfeiture under the POCAMLA is an action against the proceeds of crime/assets and not the person; and*

viii. *Creating a concept of differential treatment of unexplained assets in civil forfeiture under the POCAMLA and ACECA.*

[26] The 2nd appellant seeks the following reliefs:

i. *The appeal be allowed;*

ii. *The decision of the majority Court of Appeal dated 15th December 2023 be set aside in its entirety;*

iii. *The Honourable Court be pleased to substitute the majority decision of the Court of Appeal (Warsame & Okwengu, JJ.A) and affirm the minority decision (Mativo JA), upholding the judgment of the High Court dated 13th November 2018;*

iv. *Costs of this appeal, costs of the appeal in the Court of Appeal, and costs of the High Court case; and*

v. *Any other relief that the court deems fit to grant.*

[27] In response, the respondent filed responses to the petition , both dated 9th January 2025. The respondent's case is that the appellants had a legal duty to prove their case to the required standard under Section 107 of the Evidence Act, but failed to do so. It is further urged that Section 112 of the Evidence Act is an exception to the general rule under Section 107 of the same Act and cannot be used to relieve a party from the obligations of discharging the burden of proof. Moreover, the respondent objects to the reliance on the provisions of ACECA, particularly Section 55, for reasons that the appellants could not sustain an appeal under ACECA, which was not cited in the motion filed before the trial court under the POCAMLA.

D. THE PARTIES' SUBMISSIONS

i. 1st Appellant's Submissions

[28] The 1st appellant's submissions are dated 29th July 2025 and filed on 30th July 2025, limited to the four issues delineated by this Court. On *whether it is incumbent upon the appellants to prove/establish a connection between the crime and money/property sought to be forfeited under civil forfeiture,* the 1st appellant submits that civil forfeiture proceedings are *suits in rem,* against the property. Accordingly, the 2nd appellant is required only to demonstrate, on a balance of probabilities, that the property constitutes proceeds of corruption, not that there is a connection between the crime and the proceeds subject to forfeiture.

[29] It is submitted that the 2nd appellant does not have to establish the precise form of unlawful conduct as a result of which the property in question was acquired. In this regard, it relies on Section 92 (1) of POCAMLA and the decisions by the England and Wales High Court in ***Director of Assets Recovery Agency & Ors, Republic Vs Green & Ors*** [2005] EWHC 3168; and the Court of Appeal in ***Mangira & another Vs Assets Recovery Agency: Ali Cars Limited (Interested Party)*** (Civil Appeal E132 of 2023) [2024] KECA 1488 (KLR). Moreover, the 1st appellant contends that investigations of corruption extend to associates of the suspect as defined under Section 27 (2) of the ACECA.

[30] To this end, the 1st appellant contends that the 2nd appellant has established that the respondent was engaged in money laundering of the bribes received by her husband, Mr. Khisa, who was a declaration officer with the Kenya Revenue Authority. To support this assertion, it is argued that the 2nd appellant proved: the deposits were mainly made in Mombasa and Embakasi, where importation clearance takes place; the huge amounts were made without withdrawals, whereas, in the ordinary course, a business account has debits and credit entries; the respondent could not tell the running balances of the accounts; and the respondent had failed to adduce documentary and material proof of the various alleged

businesses or trade. It relies on the decision of the Supreme Court of Zambia in ***People Vs Liato*** (Appeal 291 of 2014) [2015] ZMSC to the effect that the prosecution does not have to show the link between the source of money or the accused, to possible criminal conduct, but it is sufficient that possession and reasonable suspicion are proved.

[31] On *whether the evidentiary burden shifts to a person in possession of property suspected to be proceeds of crime or unlawfully acquired to explain the source/origin of the property, and if so, at what point in time,* the 1st appellant submits that once the 2nd appellant had discharged its evidentiary burden and demonstrated that the funds in the account were suspected proceeds of crime, the evidential burden shifted to the respondent to prove the impugned property was not proceeds of crime or arose from illegitimate sources. In this regard, it relies on this Court's decision in ***Odinga & another Vs Independent Electoral and Boundaries Commission & 2 Others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)*** [2017] KESC 42 (KLR); and ***Odinga & 5 others Vs Independent Electoral and BoundariesCommission & 3 others*** [2013] KESC 6 (KLR).

[32] On the *circumstances which a person is considered to have provided a reasonable explanation for the origin/source of his property,* the 1st appellant submits that by failing to provide documentary proof of her business, the respondent failed to discharge the evidentiary burden cast upon her. It relies on the decision of the Court of Appeal in ***Mangira & another Vs Asset Recovery Recovery*** [supra] and the Supreme Court of Ireland in ***Gillian Vs Ireland, Attorney General, Criminal Assets Bureau and Others*** [2001] IESC 92 wherein the courts held that a respondent is free to challenge or discredit any evidence adduced by the state through cross-examination, introducing third party evidence or affidavit evidence. The 1st appellant also argues that if the legitimate acquisition of such property is not satisfactorily explained, such tainted property risks categorization as property that has been unlawfully acquired. In this regard,

it cites the Court of Appeal in ***Stanley Mombo Amuti Vs Kenya Anti-Corruption Commission*** [2019] KECA 783 (KLR) and argues that the majority Judges of Appeal failed to appreciate that the standard of proof required under Section 55 of ACECA on unexplained assets is the same standard required under Sections 82, 91, and 93 of POCAMLA.

[33] As relates to *Section 112 of the Evidence Act,* the 1st appellant submits that the legality or otherwise of the funds in the accounts would be within the special knowledge of the respondent, and the evidential burden rests on the respondent to demonstrate how she lawfully came into possession of the assets seized. Moreover, it urges that the information concerning the respondent's business associates, the contracts underlying her various businesses, such as receipts, invoices, and delivery notes, was a matter especially within the knowledge of the respondent, which she failed to prove. In support of this assertion, it relies on the decision of the Supreme Court of Jamaica in the case of ***Assets Recovery Agency Vs Rohan Anthony Fisher, and others*** [supra]. On the *reliefs* available, the 1st appellant restates its prayers in the appeal.

ii. 2nd Appellant's Submissions

[34] The 2nd appellant relies on its submissions dated 20th January 2025 and 22nd July 2025, filed on 23rd January 2025 and 24th July 2025, respectively. On *whether it is incumbent upon the appellants to prove/establish a connection between the crime and property sought to be forfeited under civil forfeiture*, the 2nd appellant submits that it is not required to establish a nexus or connection between a specific crime and the assets in issue, but rather a reasonable criminal conduct or activities of the owner of the assets, reasonable illegitimate origin/source of the assets, or lack of believable explanation of legitimate source of acquisition of the assets in issue. In support, it relies on England and Wales High Court cases of ***Director of Assets Recovery & others, Republic Vs Green & others*** [2005] EWHC

3168; and the Constitutional Court of South Africa case of ***Schabir Shaik & Others Vs State*** Case CCT 86/06 (2008) ZACC 7

[35] The 2nd appellant also argues that the majority Judgment failed to appreciate the underpinning policy and statutory reasons for forfeiture, which are: (i) gains from unlawful activity ought not to accrue and accumulate in the hands of those who obtained them through unlawful means/activity; and (ii) the duty of the state as a matter of policy and international obligation is to suppress the conditions that lead to unlawful acquisition of assets which are proceeds of crime or assets used or intended for the commission of crime. It further submits that the majority Judges created and used an inelastic principle identified as 'causal link connection' as a test of evidentiary burden of proof with no regard to the chain of identification, tracing and acquisition of the proceeds of crime; assets used or intended for the commission of crime; and in the absence of genuine and logical explanation by the respondent on how she acquired the funds in issue. This, it contends, went beyond and contrary to the nature, import and purpose of the provisions of the POCAMLA. The 2nd appellant suggests that the decision of the majority will impact its unique mandate in combating complex money laundering, organized and transnational crimes through recovery of assets which are proceeds of crime or used for or intended for the commission of crime.

[36] It relies on the decisions in ***Republic Vs Director of Public Prosecution & Others, J.R.*** Civil Appeal No. 102 of 2016; ***Martin Shalli Vs Attorney General of Namibia & Others,*** High Court of Namibia case No. POCA 9 of 2011; and ***Asset Recovery Agency & Others Vs Audrene Samantha Rowe & Others*** Civil Division Claim No. 2012 HCV 02120 to submit that money laundering is a stand-alone offence and one does not need to prove any charges before instituting charges of money laundering, and the presumption of innocence would therefore not arise. The 2nd appellant also cites the case of ***Prosecutor General Vs New Africa Dimensions & Others,*** High Court of Namibia Case

No. POCA 10 of 2012 to emphasize that in money laundering schemes, ownership of the proceeds may be direct or indirect.

[37] As to *who bears the burden of proof under POCAMLA,* the 2nd appellant argues that once it was established on a balance of probabilities that the respondent has assets acquired illegitimately, the burden of proof shifted to the respondent, and the onus was on her to satisfy the court that the funds held in her accounts were not proceeds of crime. It reiterates that the respondent did not rebut the evidence presented by it before the High Court. Further, the majority decision adopted a beyond a reasonable doubt test as a burden of proof in arriving at their decision, and that the said decision applied issues which were not before the High Court.

[38] As to *whether the concept of unexplained assets is applicable under POCAMLA*. The 2nd appellant submits that the majority decision wrongly created a concept of differential treatment of unexplained assets in civil forfeiture under the POCAMLA and the ACECA, contrary to the definition set out in Section 2 of the POCAMLA and the general object and purpose of the Act.

[39] As regards, *what circumstances pursuant to which a person may be considered to have provided a reasonable explanation for the origin/source of his/her property,* the 2nd appellant submits that a person is generally considered to have provided a reasonable explanation for the origin or source of the assets in issue if he or she has provided credible, plausible, and legally acceptable evidence or documentation that links the assets to lawful activities or sources.

[40] It preferred the following circumstances or criteria under which a person may be considered to have provided a reasonable explanation; documentation of transactions or acquisitions of assets, such as receipts, contracts or invoices that demonstrate the individuals' earnings from legitimate business; or proof that the assets in issue are not derived from illicit activities such as fraud, bribery, money laundering, narcotic drugs, human trafficking and other illegal or unexplained

sources. It relies on the Supreme Court of Jamaica decision in ***Assets Recovery Agency Vs Rohan Antony Fisher & Others,*** Claim No. 2007 HCV 003259, where the court, in issuing an order for recovery of money found to be proceeds of crime, held that the evidential burden is placed on a respondent to show the lawful source of the funds in issue.

iii. Respondent's Submissions

[41] The respondent's submissions are dated 7th August 2025 and filed on 8th August 2025, wherein she urges that the statute under consideration by the High Court was the POCAMLA and not ACECA, and therefore the 1st appellant, having been admitted as an interested party, should have played an incidental role in the proceedings before the Court of Appeal and this Court. The respondent points out that there is a clear distinction between proceedings under POCAMLA and ACECA, because ACECA governs proceeds from corruption or unexplained wealth.

[42] Turning to the substantive issues framed by this Court, on *whether it is incumbent upon the appellants to prove/establish a connection between the crime and money/property sought to be forfeited under civil forfeiture proceedings,* the respondent cites Section 81 of POCAMLA and submits that under Part VIII of the POCAMLA, forfeiture is civil in nature and the rules of evidence are applicable. Similarly, civil forfeiture is a non-conviction-based mechanism that targets property suspected to be proceeds of crime, even in the absence of a criminal conviction. Therefore, the appellants bear the burden of establishing, on a balance of probabilities, that the property in question is proceeds of crime as defined under section 2 of the POCAMLA. Further, the appellants must demonstrate that the property was derived or obtained, directly or indirectly, from the commission of an offence.

[43] For these reasons, the respondent submits that a connection or nexus must be established between the suspected criminal activity and the property sought to be forfeited, though not necessarily by proving the crime itself, but by evidentially

linking the property to unlawful conduct. The respondent contends that the plausibility of demonstrating the said connection is further buttressed by Section 107 of the Evidence Act, which provides that he who alleges must prove the existence of facts on the strength of evidence. She further urges the court to be guided by the United Kingdom Supreme Court decision in ***Serious Organised Crime Agency Vs Gale*** [2011] UKSC 49; [2011] 1 WLR 2760; ***Chatterjee Vs Ontario (Attorney General)***, 2009 SCC 19, [2009] 1 S.C.R. 624; and the South African Constitutional Court in ***National Director of Public Prosecution Vs Mahmed*** No. [2002] ZACC 9.

[44] On *whether the evidentiary burden shifts to a person in possession of property suspected to be proceeds of crime or unlawfully acquired to explain the source/origin of the property, and if so, at what point in time,* the respondent relies on the decision in ***Raila Amolo Odinga & Another Vs IEBC & 2Others*** [2017] eKLR to urge that, depending on the effectiveness with which a party discharges the evidential burden, the same shifts. She contends that to determine who bears the burden, the court ought to ask the question, who would lose if further evidence were not introduced. The respondent reiterates that she rebutted the evidence relied on by the 2nd appellant by providing the contacts of all her agents and partners. Further, by doing so, she had discharged the evidentiary burden, and the appellants' failure to investigate or invalidate the respondent's explanation renders forfeiture proceedings against her illegal, unsustainable and unconstitutional.

[45] The respondent contends that under Section 54, as read with Section 55 of the POCAMLA, the 2nd appellant has sufficient funding and mandate to cooperate with other government agencies, including competent investigative bodies and authorities, such as the Governor of the Central Bank, the National Intelligence Service, and the Director of Criminal Investigations, who sit on its advisory board. With this background, the respondent submits that the 2nd appellants cannot be excused for failing to conduct extensive investigations.

[46] Regarding the *circumstances under which a person is considered to have provided a reasonable explanation for the origin/source of his/her property*, the respondent argues that the test for a reasonable explanation under POCAMLA must be objective, evidence-based, and fair. Further, the appellants are required to investigate diligently, and, where possible, objectively verify or rebut an explanation or narrative on the source of income. She adds that the investigative duty is not a formality, but a substantive safeguard against arbitrary state deprivation of property. Consequently, she posits that her explanation was specific and capable of proof or disproof; the appellants had a duty to take active steps, including contacting business associates, corroborating commercial activity, and presenting their findings to the trial court. The respondent therefore urges the Court to find that she met the legal standard on reasonable explanation and that the appellants failed to rebut that explanation and evidence.

[47] As to *what reliefs should issue,* the respondent urges the Court to dismiss the appeal in its entirety; the Judgement and orders of the majority in the Court of Appeal be upheld; an order to issue unfreezing the respondent's accounts and/or the said funds be refunded forthwith; and the respondent be awarded the costs of this appeal, costs of the appeal in the Court of Appeal and the costs in the High Court.

E. ISSUES FOR DETERMINATION

[48] Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, and the pronouncement of this Court when admitting this appeal as one involving a matter of general public importance, we hereby restate the four issues for determination as being:

a) Whether it is incumbent upon EACC or ARA to prove/establish a connection between the crime and money/property sought to be forfeited under civil forfeiture proceedings;

b) Whether the evidentiary burden shifts to a person in possession of property suspected to be proceeds of crime or unlawfully acquired to explain the source/origin of the property; and if so, at what point in time;

c) Under what circumstances is a person considered to have provided a reasonable explanation for the origin/source of his/her property; and

d) What reliefs should issue.

F. ANALYSIS AND DETERMINATION

i. Crime and the Subject of Forfeiture Proceedings; a Necessary Link?

[49] The question as to whether either the EACC or the ARA must establish a link between a crime and the property which it seeks to forfeit is central to this appeal. The issue was a subject of contestation at both the trial and appellate courts. On the one hand, the appellants herein are categorical that it is not necessary to establish such a link. All that is required in their view, is proof on a balance of probabilities, that the respondent was involved in suspicious criminal conduct leading to the acquisition of the suit property. On the other hand, the respondent maintains that under POCAMLA, the second appellant must prove, again on a balance of probabilities, that the property sought to be forfeited is a proceed of a specific crime. In other words, there must be a clear link between the property and a crime. The majority judgment by the Court of Appeal (*Warsame* and *Okwengu, JJ.A*) was in agreement with this reasoning by the respondent and so held. The dissenting judgment (*Mativo, JA)* in upholding the trial court's Judgment was premised on the reasoning that it was the duty of the respondent, to discharge the evidentiary burden that had shifted, by providing credible evidence as to the legitimacy of the funds in question.

[50] The operative statutory provisions for purposes of determining the issue in question are Sections 2, 90, and 92 of POCAMLA. Section 2 *defines proceeds of crime* as:

> ***"...any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence, irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed."***

[51] Section 92 (1) (a) and (b) provides as follows:

> ***"92 (1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—***
>
> ***a) has been used or is intended for use in the commission of an offence; or***
> ***b) is proceeds of crime.***
>
> ***(2) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated."***

[52] A reading of the foregoing provisions leaves no doubt that an order for forfeiture under POCAMLA, can only be made against property which, in one way or another, is associated with the commission of a crime, or is a proceed of crime. The incidence of crime remains central to such forfeiture proceedings. The title of the statute, Proceeds of Crime and Money Laundering Act, confirms this statement. The property in question, in terms of Section 2 aforesaid must be connected to some criminal offence or constitute proceeds of crime. In this regard, the property in question must have been used or intended for use in the commission of a crime. By the same token, the property is to be regarded as a proceed of crime if it has been realized or derived directly or indirectly as a result of or in connection with an offence. It is therefore a requirement that the ARA has to establish a nexus between the subject matter of forfeiture and a crime or its intended commission when seeking an order of forfeiture. However, should the person in possession of the property in question be charged with a specific offence in a court of law, the fact that the accused is eventually acquitted of the same, does not necessarily insulate the property from forfeiture. By the same token, even where the investigation does not yield evidence sufficient enough to sustain a criminal charge, the property in question would still be subject to forfeiture proceedings under Section 90 of POCAMLA.

[53] Does this mean that all that the ARA needs to do is to allege that the property in question may be linked to a crime or its intended commission thereof, however tenuously? Not in the least. As we have already opined in the foregoing paragraph, the incidence of crime remains central to a successful forfeiture application. The Agency must place before the court credible evidence that satisfies the crucial ingredients of Section 92 (1) of POCAMLA.

[54] As we restate the principle regarding the burden and standard of proof in subsequent paragraphs, the ARA must prove the nexus of crime and the subject matter of forfeiture on a balance of probabilities. This standard is dictated by the fact that forfeiture proceedings are civil in nature. The fact that the standard is one

of a balance of probabilities, does not necessarily relieve the Agency of the exacting nature of its duty to place before the Court evidence that can stand unless controverted.

[55] The Anti-Corruption and Economic Crimes Act, which is the operational legal regime pursuant to which the Ethics and Anti-Corruption Commission executes its enforcement mandate, provides for forfeiture of *unexplained assets*. The assets in question are those in possession of a person but which, are way and above his known legitimate sources of income. The Act provides for the circumstances pursuant to which, forfeiture proeedings may be instituted by the Commission. Section 55 thereof provides as follows:

> ***(1) In this section, "corrupt conduct" means—***
>
> ***a) conduct that constitutes corruption or economic crime; or***
>
> ***b) conduct that took place before this Act came into operation and which—***
>
> ***i. at the time, constituted an offence; and***
>
> ***ii. if it had taken place after this Act came into operation, would have constituted corruption or economic crime.***
>
> ***(2) The Commission may commence proceedings under this section against a person if—***
>
> ***a) after an investigation, the Commission is satisfied that the person has unexplained assets; and***
>
> ***b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income***

and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

[56] The main requirement in forfeiture proceedings under ACECA is that the person must have in his possession, assets which are *disproportionate* to his *known legitimate sources of income*. The Commission is therefore under an obligation to place before the court evidence of the disproportion. It goes without saying that by the same token, the Commission must specify the suspect's legitimate sources of income. These two conditions have to be met for the Commission to discharge its initial burden. The language of ACECA in forfeiture proceedings appears to be more elastic than that of POCAMLA. In the former, all that is required to raise a rebuttable assumption of corrupt conduct is the disproportionality, while in the latter, the nexus between the property which is the subject of forfeiture proceedings and the incidence of crime cannot be dispensed with. In civil forfeiture proceedings under ACECA, the Commission need not prove a specific crime of corruption. Of course, where the Commission decides to prefer criminal charges against a suspect, proof of the crime beyond a reasonable doubt is a must. Otherwise, in civil proceedings, the standard of proof under both regimes remains "a balance of probabilities".

[57] The appellants argue that a nexus between the crime and the money/property in forfeiture proceedings is not required under the POCAMLA or ACECA. They rely on the following cited authorities. In ***Kenya Anti-Corruption Commission Vs Stanley Mombo Amuti [supra],*** the forfeiture of unexplained assets was instituted under Section 55 of the ACECA. In determining whether the EACC is required to establish the commission of an offence, the High Court stated:

> ***"This is a claim for civil recovery. <u>A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct</u>. The plaintiff herein is therefore not***

required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA."

[58] While this decision cannot be faulted to the extent to which it concerns forfeiture of unexplained assets under Section 55 of ACECA, we are not persuaded that it can apply with equal force to forfeiture proceedings under Section 92 (1) of POCAMLA. We have, in this regard, highlighted the difference in the elements that must be established under the two legislations.

[59] In support of their argument, the appellants further placed reliance on the Court of Appeal's decision in ***Mangira & another Vs Assets Recovery Agency: Ali Cars Limited (Interested Party)*** *(Civil Appeal E132 of 2023) [2024] KECA 1488 (KLR*) where one of the issues for determination in that case was whether the appellants' acquittal in the criminal case was consequential to the preservation orders and the application for forfeiture under POCAMLA. The Court of Appeal cited with approval the High Court's decision in ***Kenya Anti-Corruption Commission Vs Stanley Mombo Amuti*** [*Supra*] and held that:

"...the provision of section 92 of POCAMLA clearly delinks the outcome of criminal proceedings (if any) from civil proceedings for forfeiture."

[60] Likewise, while we agree with the Court of Appeal's holding in ***Mangira*** [supra], we do not find it squarely relevant to the issue under consideration. In the appeal before us, there were no criminal proceedings against either the respondent, or any other person. The issue as to whether the outcome of such proceedings ought to have been delinked from the civil forfeiture proceedings does not therefore arise.

[61] Comparatively, reference was made to the decision of the High Court of England and Wales in ***Director of Assets Recovery Agency & Ors,***

Republic Vs Green & Ors [2005] EWHC 3168, which determined the issue as to whether a claim for civil recovery can be determined based on conduct in relation to property without the identification of any particular unlawful bearing, and whether a claimant can sustain a case for civil recovery in circumstances where a respondent has no identifiable lawful income to warrant his lifestyle. The court held:

> ***"(i) In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence*** *but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained***.** [Emphasis added].
>
> ***(ii) A claim for civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle."***

[62] The appellants did not particularize in both their written and oral submissions whether the decision in ***Green*** (***Part 5 of the Act***) (Supra) was based on a regime similar to Section 92 (1) of POCAMLA or Section 55 of ACECA. But, even if, for purposes of argument, we were to assume that "Part 5 of the Act" is the equivalent of Section 92 of POCAMLA, we do not understand the High Court to be granting the Director a blanket leeway not to link the subject property to an incidence or incidences of crime. In the words of the court, what the director is not bound to do is to allege the commission of a specific crime, but he still *must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.* If the court meant otherwise, then we cannot be persuaded that such is the position envisaged under Section 92 of POCAMLA.

[63] The respondent, on the other hand, contends that a connection must be established to sustain forfeiture proceedings under POCAMLA. She urges the Court to be persuaded by the following comparative case law. In ***Serious Organised Crime Agency Vs Gale*** [2011] UKSC 49; [2011] 1 WLR 2760, the appellants' case was that an essential stepping stone towards proving that the relevant property was the product of crime was proof that the appellants were guilty of criminal conduct. In dismissing the appeal, the Supreme Court of the United Kingdom held that the starting point is possession of property by a person, and that he/she is unable to provide a legitimate explanation of its origin. The court held:

> ***"44. ....If confiscation proceedings do not involve a criminal charge, but are subject to the civil standard of proof, I see no reason in principle why confiscation should not be based on evidence that satisfies the civil standard, notwithstanding that it has proved insufficiently compelling to found a conviction on application of the criminal standard. At all events, insofar as other Strasbourg jurisprudence supports the first proposition, it is only in circumstances where there is a procedural link between the criminal prosecution and the subsequent confiscation proceedings."***

[64] Again, the proposition remains as we understand it, that is, unless one is charged with a criminal offence in forfeiture proceedings, the relevant agency need not prove that such an offence was committed. However, the burden to lay before the court, by way of evidence, that such an offence or offences may have been committed, on a balance of probabilities, remains on the agency.

[65] The decision in the South African Constitutional Court in ***National Director of Public Prosecution Vs Mahmed*** NO [2002] ZACC 9, is more

relevant to the appeal before us. It concerned the constitutionality of Section 38 of the South African Prevention of Crime Act, on preservation of property orders. Although the challenge of constitutionality was referred back to the High Court, the Constitutional Court reasoned:

> ***"[17] Section 38 forms part of a complex, two-stage procedure whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited. That procedure is set out in great detail in sections 37 to 62 of the Act, which form chapter 6 of the Act. Chapter 6 provides for forfeiture*** *in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities*, ***even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, chapter 6 needs to be understood in contradistinction to chapter 5 of the Act.*** *Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime*. ***The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings."*** [Emphasis added]

[66] Section 38 of the South African Prevention of Crime Act stands on all fours with Section 92 (1) of POCAMLA. We have already stated that under our statute, the ARA cannot effectively mount forfeiture proceedings under POCAMLA without establishing a link to an incidence or incidences of crime in the manner provided, by demonstrating that the said property has been used to commit a crime, is intended for use in the commission of a crime, or that it is a proceed of crime.We are therefore in agreement with the reasoning by the South African Constitutional Court in ***National Director of Public Prosecutions Vs Mahmed*** [Supra].

ii. Shifting of the Evidentiary Burden; At What Point?

[67] The question of whether and at what point, the evidentiary burden shifts in forfeiture proceedings, is not a novel legal issue whose parameters lie beyond existing statutory provisions and established case law. The general principle in civil proceedings is that whoever asserts, must prove. Thus, the burden of proof lies on the person alleging the existence of a set of facts. If the person adduces evidence to the satisfaction of a court on a balance of probabilities, that such a set of facts exists, the burden of proving otherwise shifts to the person against whom the allegation is made. Section 107 of the Evidence Act provides as follows regarding the burden of proof:

> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

[68] More specifically, Section 112 of the Evidence Act, provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[69] In ***Odinga & 5 Others Vs Independent Electoral and Boundaries Commission & 3 Others*** [2013] KESC 6 (KLR), the Supreme Court had an occasion to render itself on the issue of burden of proof in electoral disputes. It stated thus:

> ***"There is, apparently, a common thread in the foregoing comparative jurisprudence on the burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the***

effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.

.....

.....it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting."

[70] On the same issue, the Supreme Court ***in Odinga & another Vs Independent Electoral and Boundaries Commission & 2 Others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)*** [2017] KESC 42 (KLR) determined that:

"It follows, therefore, that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election..."

[71] With regard to the shifting of the evidentiary burden in the context of forfeiture proceedings, we are persuaded by the position articulated by the Supreme Court of Jamaica in ***Assets Recovery Agency Vs Rohan Anthony Fisher, and & Others***, [2012] JMSC Civ. No. 16, which held that:

"***Even though these proceedings are quasi [c]riminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate***

evidentially how they lawfully came into possession of the assets seized."

[72] The law regarding the shifting of the evidentiary burden is therefore largely settled on the basis of the foregoing legislative and judicial authorities. Suffice it to say that, although the two authorities cited above concern election petitions, the principle applies equally to forfeiture proceedings under POCAMLA.

iii. When can a person be said to have provided a reasonable explanation regarding the source of his/her property?

[73] The short and straight answer to this question, is that there is no uniform or set standard, as to when a person can be said, to have provided a reasonable explanation, regarding the source of his/her property. It all depends on the case and evidence presented to the court by the relevant agency seeking the forfeiture of the person's property. The guiding standard is that proof is one of a balance of probabilities. For the burden to shift, the court must be satisfied that the agency has adduced credible evidence to warrant an explanation from the respondent. If the respondent likewise, provides an explanation credible enough to create a doubt in the mind of the court regarding the petitioner's case, then the burden shifts back to the petitioner. At the end of the day, the issue of a reasonable explanation is for the court to decide.

[74] We are persuaded by the reasoning of Moore-Bick, LJ in the Court of Appeal of England and Wales in ***The Director of the Assets Recovery Agency Vs Szepietowski & Others*** (2007) EWCA Civ. 766, where in laying down the approach under the United Kingdom's Proceeds of Crime Act 2002, he opined at paragraphs 106 and 107 as follows:

"When deciding what the Director must prove, it important to bear in mind that the right to recover property does not depend on the commission of unlawful conduct by the

current holder. All that is required is that the property itself be tainted because it, or other property which it represents, was obtained by unlawful conduct… It is important, therefore, that the Director should be required to establish clearly that the property which she seeks to recover, or other property which it represents, was indeed obtained by unlawful conduct.

In order to do that it is sufficient, in my view, for the Director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or by whom or in what circumstances, and that the property was obtained by or in return for it. In my view Sullivan J. was right, therefore, to hold that in order to succeed, the Director need not prove the commission of any specific criminal offence, in the sense of proving that a particular person committed a particular offence on a particular occasion."

[75] Similarly, Lord Hughes at the Judicial Committee of the Privy Council in ***Assets Recovery Agency (Ex-Parte) (Jamaica)*** [2015] UKPC 1, interpreting similar legislation, the Jamaican Proceeds of Crime Act 2007, which provides the test to be applied by the courts is whether there are "reasonable grounds for believing" that the person concerned benefited from his criminal conduct, opined at paragraph 19 thus:

"Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing…. The test is concerned not with proof but the existence

of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. … It only asks for the applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief."

G. DETERMINATION

[76] Applying the foregoing principles and enunciations to the appeal before us, does the record reveal a credible case of forfeiture of the respondents' property? The Court of Appeal concluded that the appellant had not made out a case for such forfeiture by failing to link the monies in question to a crime. For our part, we are guided by the unambiguous language of Section 92 (1) of POCAMLA. Consequently, we have to determine whether, any or all of the three requirements for forfeiture were proved by the 2nd appellant. Were the monies in question used in the commission of a crime? There is nothing on record to show that the funds were used in the commission of a crime. Were the monies intended for use in the commission of a crime? Likewise, there is nothing on record to indicate such criminal intent. This leaves us with the question as to whether the funds were proceeds of crime.

[77] The record reveals that the forfeiture proceedings were triggered by the fact that, the respondent had a sum of 19 million Kenya shillings in her bank account. Both the appellants suspected that the monies were proceeds of crime. This suspicion was based on the fact that the monies had been variously deposited without being withdrawn. The respondent's husband, an employee of the Kenya Revenue Authority, had earlier been investigated for various acts of corruption. No charges were preferred against him, with the 1st appellant abandoning further participation in the investigations. Asked to explain the source of the funds, the respondent stated that the same were earnings from her small-scale agricultural produce and other businesses with persons whose identities she provided. Instead of discounting the respondent's explanation by investigating these sources, all the

2nd appellant stated in rebuttal was that the respondent had not produced any receipts to back up her claim.

[78] Do these facts indicate, on a balance of probabilities, that the Kenya Shillings 19 million in the respondent's bank accounts, were proceeds of crime? What is there on record to show that the monies in question were obtained by the respondent as a result of an offence or criminal activity? The 1st appellant submits that the respondent was engaged in money laundering of the bribes received by her husband, in his capacity as a declarations officer at the Kenya Revenue Authority. Where is the evidence on record to support such an allegation by the very institution that closed further investigations into the accusations of bribery against the respondent's husband? Where is the incidence of crime in the entire chain of events that triggered the forfeiture proceedings?

[79] It is not for this Court to re-evaluate the evidence adduced at the trial court. That task remains with the Court of Appeal. All we can do as the Supreme Court, is to determine whether the evidence on record, meets specified legal criteria to bring the subject property of forfeiture proceedings within the ambit of Chapter IV of POCAMLA. Towards this end, we have come to the conclusion that, the record discloses no evidence to link the monies in question to the commission of a crime, or that they were proceeds of crime. Without such a nexus, the forfeiture proceedings ought not to have stood before the trial court. We do not agree with the argument by the 2nd appellant that, all it needs to do in such forfeiture proceedings, is to require the respondent to explain the source of the funds in her account. Such a posture could have found favour with the Court had the proceedings been brought under Section 55 of ACECA for forfeiture of unexplained assets.

[80] We are also constrained to address an aspect relating to the manner in which the forfeiture proceeding was conducted. While we note that Section 92(3) of POCAMLA explicitly provides that the absence of a person whose interest in

property may be affected by a forfeiture order does not prevent the Court from making the order, we are equally cognizant of the fact that the statute promotes the right to fair hearing through several interlocking procedural safeguards. Under Section 83(1) and (2) of POCAMLA, a preservation order must be notified to all known interested parties within twenty-one days, and notice must be served to such interested parties in accordance with the Civil Procedure Act. Under Section 83(3), a person who has an interest in property subject to a preservation order may give notice of his intention to oppose the making of a forfeiture order, or to apply for an order excluding his interest from its operation. Under Section 90(2), the Agency Director must give fourteen days' notice of an application for forfeiture to every person who served such notice. Furthermore, Section 90(4) permits a person who served notice under Section 83(3) to appear at the hearing to oppose the order, apply for exclusion or variation of his interest, and adduce evidence. Lastly. Section 93 provides for the protection of third parties, claiming interest in the subject properties, to make an application for exclusion of any properties from the forfeiture order. These provisions signal the statutory intent that forfeiture proceedings ought to afford interested parties an opportunity to be heard.

[81] We are of the considered view that the requirement for a nexus between the impugned property and the alleged criminal conduct under the forfeiture scheme in POCAMLA makes it critical that the person alleged to have generated the proceeds of crime, in this case, the respondent's husband, ought to be joined to the proceedings. Where the Agency's case rests on the assertion that the property constitutes proceeds of crime generated by a third party and merely held, concealed, or enjoyed through the respondent, the alleged perpetrator of the predicate offence possesses a direct and substantial interest in the proceedings. Their participation is necessary both to afford them an opportunity to contest the allegation that the assets represent proceeds of their criminal conduct and to enable the court to make a fully informed determination on the provenance of the property.

[82] Consequently, this finding leads us to make the following Orders:

H. ORDERS

i) ***The appeals dated 18th December 2024 are hereby dismissed;***

ii) ***The Judgment of the Court of Appeal dated 15th December 2023 is hereby upheld;***

iii) ***The sum of Kshs. 6,000/- deposited as security be released to the appellants.***

I. COSTS

Applying the principles enunciated in Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others, Sup Ct Petition No 4 of 2012; [2014] eKLR, on the award of costs, we order the costs of this and first appeals to be borne by the appellants.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **19th Day** of **June 2026.**

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....	**.....**
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

…… ……

I. LENAOLA **W. OUKO**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA